

12 October 2018

Dear Members

## Meeting of the Sentencing Council – 19 October 2018

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 19 October 2018 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

### The agenda items for the Council meeting are:

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| ▪ Agenda                                  | SC(18)OCT00 |
| ▪ Minutes of meeting held on 28 September | SC(18)SEP01 |
| ▪ Action Log                              | SC(18)OCT02 |
| ▪ Firearms 1                              | SC(18)OCT03 |
| ▪ Arson and Criminal Damage               | SC(18)OCT04 |
| ▪ Theft Evaluation                        | No paper    |
| ▪ Drugs                                   | SC(18)OCT05 |
| ▪ General guideline                       | SC(18)OCT06 |
| ▪ Firearms 2                              | SC(18)OCT07 |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

A table has been booked at Brasserie Blanc, on Chancery Lane for Christmas lunch on Friday 14th December at 14:30. A £10 deposit is required to book the table; please can all members bring this along to this meeting.

Best wishes



**Steve Wade**

Head of the Office of the Sentencing Council

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## COUNCIL MEETING AGENDA

**19 October 2018  
Royal Courts of Justice  
Queen's Building**

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|---------------|--|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 10:45 | Firearms 1 – presented by Sophie Klinger (paper 3)             |
| 10:45 – 11:45 | Arson & Criminal Damage – presented by Mandy Banks (paper 4)   |
| 11:45 – 12:15 | Theft Evaluation – presented by Heidi Harries                  |
| 12:15 – 13:15 | Drugs – presented by Eleanor Nicholls (paper 5)                |
| 13:15 – 13:45 | Lunch  |
| 13:45 – 14:45 | General guideline – presented by Ruth Pope (paper 6)           |
| 14:45 – 15:45 | Firearms 2 – presented by Sophie Klinger (paper 7)             |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

28 SEPTEMBER 2018

### MINUTES

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Members present:

Tim Holroyde (Chairman)  
Rob Butler  
Mark Castle  
Rosina Cottage  
Rebecca Crane  
Rosa Dean  
Julian Goose  
Heather Hallett  
Maura McGowan  
Alpa Parmar  
Alison Saunders  
Beverley Thompson

Apologies:

Sarah Munro

Representatives:

Chief Constable Olivia Pinkney for the police  
Phil Douglas for the Lord Chancellor (Director,  
Offender and Youth Justice Policy)

Members of Office in  
Attendance:

Steve Wade (Head of Office)  
Mandy Banks  
Lisa Frost  
Sophie Klinger  
Eleanor Nicholls  
Nick Mann  
Ruth Pope  
Sarah Poppleton

## **1. MINUTES OF LAST MEETING**

- 1.1. The minutes from the meeting of 27 July 2018 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman welcomed four Taiwanese judges who were observing the meeting.

## **3. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council considered findings from discussions with magistrates on a draft common assault guideline and some potential revisions to assessing harm for actual bodily harm offences.
- 3.2 The Council then considered at length suggested harm models for ABH and GBH offences and discussed options to address some of the findings from the evaluation of the existing assault guideline. It was agreed that two models for ABH and GBH offences should be tested with Crown Court judges.
- 3.3 The Council agreed sentence for ABH should be tested with Crown Court Judges and consideration given to whether adjustment to sentences is required at a future meeting.

## **4. DISCUSSION ON MCSG – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered a first draft of a revised guideline for the offence of unauthorised use of a trade mark. It was agreed that the guideline should broadly reflect current sentencing practice.
- 4.2 The Council agreed that culpability should be assessed on the basis of the role of the offender and the sophistication and planning with which the offence was carried out. The Council discussed the assessment of harm and agreed that this should be on the basis of a financial measure of the scale of the offending, and any risk to health or safety from the counterfeit goods.

## **5. DISCUSSION ON MENTAL HEALTH – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council discussed a revised version of the guideline, considering draft wording on assessing culpability, determining the sentence, requesting reports, information regarding disorders/conditions, and sentencing disposals. The Council asked for some amendments and changes to the draft wording to be made, to be brought back at a future meeting.

**6. DISCUSSION ON MEDIA COVERAGE – PRESENTED BY NICK MANN, OFFICE OF THE SENTENCING COUNCIL**

- 6.1 Nick Mann summarised the current situation as regards the nature and level of media coverage being achieved for guidelines and consultations, suggesting potential changes of approach for consideration by the Confidence and Communication Sub-group.

**7. DISCUSSION ON DRUGS – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL**

- 7.1 In its first consideration of the revision of the current Drug Offences guideline, the Council looked at the scope of revisions and some questions of approach. Council agreed that the revised guideline should cover the offences in the current guideline and the comparable offences in the Psychoactive Substances Act 2016.
- 7.2 The Council discussed and agreed some areas that would need particular consideration as part of the revision process. These areas included: offences relating to drugs in prison; how the guideline deals with drug rehabilitation requirements as part of community orders and suspended sentence orders; what guidance may be necessary in relation to offences committed by children and young people; and any potential changes to current approaches to culpability and harm, particularly in light of newer types of offending behaviour such as 'county lines' and sales of drugs online.
- 7.3 The Council also discussed an overall approach to current sentencing practice and agreed that, as a starting assumption, they would not aim to make significant changes to current sentencing severity.

**8. DISCUSSION ON FIREARMS– PRESENTED BY SOPHIE KLINGER, OFFICE OF THE SENTENCING COUNCIL**

- 8.1 The Council considered the overarching aims of the firearms guideline and agreed that the guideline should aim to maintain current sentencing levels. Sentencing levels for each offence will be considered at a later meeting. There was an initial discussion on guidelines for possession of firearms.
- 8.2 The Council considered the assessment of culpability and harm in a draft guideline on possession of a prohibited firearm or ammunition, based on the approach in the Bladed Articles and Offensive Weapons guideline. It was agreed that alternative culpability and harm models would be explored and discussed at the next meeting.

**9. DISCUSSION ON EFFECTIVENESS – PRESENTED BY SARAH POPPLETON, OFFICE OF THE SENTENCING COUNCIL**

- 9.1 The Council was updated on the latest academic and government research into the effectiveness of sentencing, with regard to reoffending, covering the period September 2017 to date.
- 9.2 The update built on a comprehensive review of this literature from the last 10 years, carried out last year. Annual updates will continue to be produced, to keep Council members apprised of this literature.



### ACTION AND ACTIVITY LOG – as at 11 October 2018

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 13 April 2018</b>					
1	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton	<b>ACTION ONGOING:</b> The report will be sent to Members in November.	
<b>SENTENCING COUNCIL MEETING 22 June 2018</b>					
2	Expanded factors in offence specific guidelines	Council members to assist with reviewing factors in digital guidelines over the summer	Ruth Pope/ Council members	<b>ACTION ONGOING:</b> This has been delayed while we await the digital version of the guidelines.	
<b>SENTENCING COUNCIL MEETING 27 July 2018</b>					
3	Mental Health	Claire agreed to check the data held in relation to probation reports, specifically, what percentage of reports (oral and written) suggested that psychiatric reports were ordered.	Claire Fielder	<b>ACTION ONGOING-</b> Conversations continue to take place with MOJ about what data is held but, given limited resources available, it is unlikely anything significant will be identified.	
<b>SENTENCING COUNCIL MEETING 28 September 2018</b>					
4	Media Coverage	It was agreed that the suggested actions arising from Nick Mann's presentation on changing trends in media coverage be remitted to the Communications and Confidence Subgroup	Phil Hodgson	<b>ACTION ONGOING -</b> to be discussed at next C&C subgroup meeting in the new year	

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**19 October 2018**  
**SC(18)OCT03 – Firearms paper 1**  
**Maura McGowan**  
**Sophie Klinger**  
**07976 300962**

## **1 ISSUE**

1.1 This is the third meeting to consider the firearms guideline. This paper (paper 1) asks the Council to consider the culpability and harm models for the possession guidelines. The aggravating and mitigating factors will be considered in a separate paper (paper 2) at the same meeting.

1.2 Currently, there are three further meetings scheduled to discuss the firearms guideline. An initial additional meeting has been added to the timetable due to the widened scope and complexity of the guideline. The tentative aim is now to sign off the consultation version at the March 2019 meeting, if possible, with consultation planned for late April to late July 2019. However, these timelines will continue to be monitored and amended as required.

1.3 Further guidelines (on possession with intent, transfer of prohibited weapons, and possible guidelines on manufacturing and possession of articles for conversion) will follow once the Council has agreed the basic culpability and harm models for the possession offences. The Council will also be asked to examine sentence levels, generic text and wording on the statutory minimum sentence at subsequent meetings.

## **2 RECOMMENDATION**

- That the Council agrees the culpability model for the possession guidelines, with type of weapon as an initial step within culpability (paragraphs 3.3-3.11);
- That the Council agrees the harm model for the possession guidelines (paragraphs 3.28-3.32);
- That the Council agrees to explore options for addressing offences subject to the statutory minimum sentence at a later stage (3.33-3.34).

## **3 CONSIDERATION**

3.1 There are four separate firearms guidelines covering possession offences:

1. Possession of a prohibited weapon (**Annex A**)

2. Possession without a certificate (**Annex B**)
3. Possession by a person prohibited because of previous conviction (**Annex C**)
4. Carrying a firearm in a public place (**Annex D**)

3.2 At the last meeting, the Council had an initial discussion about culpability and harm in the possession of a prohibited weapon guideline. The guidelines have been revised based on Council feedback. A revised draft of the possession of prohibited weapon guideline was circulated to a subset of Council members following the meeting. This revised draft had placed harm first in the guideline, ahead of culpability. The majority preferred the usual order of culpability then harm, so this order has been retained in these draft guidelines.

*Culpability model – Guideline 1: Possession of prohibited weapon*

3.3 This guideline at **Annex A** covers possession, purchase or acquisition, without authority, of a prohibited firearm or ammunition under sections 5(1) and (1A) Firearms Act 1968. Subsections under (1) and (1A) list the various types of firearms and ammunition that are prohibited. The mandatory minimum sentence applies to specified subsections. It should be noted that section 5 prohibited firearms can be possessed lawfully, either under authorisation from the Secretary of State, or under an exemption from this authority (per section 5A), although this is tightly controlled. Sections 5 and 5A are at **Annex D**.

3.4 At the last meeting, the Council considered the culpability model for this guideline. The Council agreed that three levels of culpability were appropriate. It was agreed that the type of weapon needed to be considered in a separate step. A possible model was shared with a subset of Council members, situating the type of weapon assessment as a step within harm rather than culpability. On balance, Council members preferred that the type of weapon assessment remain within culpability. These drafts are structured accordingly.

3.5 The model proposed in **Annex A** takes a two-pronged approach to culpability. There is assessment first of (A) Type of weapon, then (B) Other culpability factors. This then leads into a table that uses these two assessments to identify a final culpability category. There are three culpability categories, as in the previous draft. This two-pronged approach is similar to the model used in the Health and Safety guideline for harm, which included a table requiring consideration of both the seriousness of the harm risked and the likelihood of the harm arising. The table containing the final culpability category is arranged so that there is a lower limit of culpability B for the *most* serious type of weapon, and similarly an upper limit of culpability B for the *least* serious type of weapon.

3.6 Alternative approaches to culpability were considered, including one based more closely on the harm model in fraud guideline. Such an approach would have an initial

assessment based on the type of weapon, then a second step where the court could take into account other factors (in fraud, victim impact), to determine whether it warranted the sentence being moved to a different category, or moved within the range of the initial category. There is a concern that this approach would not give due weight to the important factors contained within culpability step B, and would anchor the overall culpability assessment too inflexibly to the type of weapon assessment. Analysis of transcripts has shown that the factors in culpability step B (such as whether the weapon was loaded and whether it was intended for use) are regarded as very significant, so should also drive the overall culpability assessment, rather than being relegated to a less influential status. For these reasons the proposed approach is preferred over the fraud guideline approach.

**3.7 Culpability A – Type of weapon:** There are three categories in this assessment, which Council were in favour of at the last meeting. The proposed drafting for the type of weapon section is as follows:

Use the table below to identify an initial culpability category based on the <b>type of weapon</b> only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.	
Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.	
<b>Type 1</b>	<ul style="list-style-type: none"> <li>Automatic weapon or other weapon (including component part) that is capable of being immediately lethal to more than one person</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>All other weapons (including component part) falling between Type 1 and Type 3</li> <li>Ammunition (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>Stun gun or other weapon (including component part) that is [usually non-lethal / not designed to be lethal]</li> <li>Very small quantity of ammunition</li> </ul>

**3.8** This section has been drafted to include a component part on an equal footing to a complete firearm in this assessment, as Council preferred; where the firearm is incomplete or incapable of being discharged, this will instead be a mitigating factor at step two, instead of featuring in culpability.

**3.9** The Council appeared to support referring to certain specific types of weapons, so automatic weapons have been added under Type 1, and stun guns under type 3. There is also additional broad language under both Type 1 and Type 3. Some broad wording is required to enable other types of weapons to be covered that may be equally as serious, including new weapons that may be developed in future. It is preferable for this wording to

focus on the potential impact the weapon may have, rather than specific firing mechanisms, as this would likely become outdated.

3.10 The wording under Type 3 contains two alternative options for the Council to consider: 'usually non-lethal' or 'not designed to be lethal'. This wording reflects the fact that stun guns and similar devices can be lethal on occasion. There is a catch-all category, 'All other weapons (including component part) falling between Type 1 and Type 3' at Type 2. Currently Type 3 as drafted is not limited to stun guns charged under section 5(1)(b) so would also capture stun guns falling under section 5(1A)(a) (disguised weapons), which is subject to the minimum sentence. If the Council would like to draw this distinction, stun guns falling under 5(1A)(a) could be excluded from Type 3.

3.11 Section 5 covers both firearms and ammunition so ammunition also needs to be classified in this section. Ammunition has been placed in the middle category except where it is only present in a very small quantity, which is in the lowest category.

3.12 **Culpability B – Other culpability factors:** This step covers the other factors that were under culpability in the previous draft. There are still three levels of culpability in this section. Factors are included relating to whether the weapon was loaded or kept with ammunition. The Council preferred these to remain alongside the other culpability factors, rather than in the type of weapon assessment. A loaded firearm has been placed at high culpability while possession with compatible ammunition has been placed at medium culpability. The Council may agree with this categorisation, or may prefer to have these two factors at the same level.

3.13 The factors relating to use or intended use have been simplified, as agreed. Use or intended use for a criminal purpose is at high culpability, and no use or intention to use is at lower culpability. The middle category contains 'Firearm/ammunition produced (where not at High culpability)' to cover the narrow set of instances where there is production for non-criminal reasons, such as to show off the item to a friend. There is also 'Firearm/ammunition intended for use (where not at High culpability)' to cover the again narrow set of instances where the item is not intended for a criminal purpose. Alternatively, these two factors could be replaced with an 'All other cases' factor, though it is preferable to have some specific factors in the middle category. Our analysis of previous guidelines has shown that a lack of detail in the middle category can lead to overuse of the top and bottom categories. The factors previously under culpability, relating to custodians holding the weapon under pressure, coercion etc, have been shifted to step two, as agreed.

**Question 1: Does the Council agree with the proposed culpability model for the possession of prohibited weapons guideline?**

*Culpability model – Guideline 2: Possession without a certificate*

3.14 This guideline at **Annex B** covers the possession, purchase or acquisition of a firearm or ammunition under section 1(1), and possession of a shotgun under 2(1), without a certificate. The offences occur when the firearm, shotgun or ammunition is possessed, purchased or acquired without holding a certificate in force at the time, or otherwise than as authorised by the certificate, or (for ammunition) in quantities in excess of what is authorised.

3.15 There is an aggravated form of the section 1(1) offence where the firearm is a converted firearm or a shortened shotgun. This aggravated form has a statutory maximum of seven years rather than five years. It is quite low volume (14 in 2017 compared with 97 for the non-aggravated form).

3.16 This guideline will require a slightly different approach to culpability, compared with the possession of prohibited weapon guideline, because it only covers firearms and ammunition for which a certificate is required, not weapons prohibited under section 5.

3.17 It is proposed to retain a two-pronged approach to culpability with (A) an initial assessment of the type of weapon, then (B) an assessment of other culpability factors, and again a table to identify the final culpability category. The wording for the type of weapon assessment needs to be tailored to the weapons covered under this offence. It is suggested that shortened shotguns and firearms which have been converted (i.e. the aggravated form) fall in the top category. The following wording is proposed:

<b>Type 1</b>	<ul style="list-style-type: none"><li>• Shotgun which has been shortened within the meaning of section 4(4)</li><li>• Firearm which has been converted within the meaning of section 4(4)</li></ul>
<b>Type 2</b>	<ul style="list-style-type: none"><li>• All other firearms or shotguns</li><li>• Ammunition (where not at Type 3)</li></ul>
<b>Type 3</b>	<ul style="list-style-type: none"><li>• Very small quantity of ammunition</li></ul>

3.18 Based on the current volumes, the majority of cases would fall into Type 2 rather than Type 1 or Type 3. This can be taken into account when developing the sentence levels.

3.19 In terms of other culpability factors under the second culpability step, it is proposed the same factors are used as for the possession of prohibited weapons guideline, with two minor amendments. First, there is the addition of wording to clarify that the discharge of the weapon falls at high culpability where the weapon is discharged ‘other than for a lawful

purpose', since there are various non-criminal purposes for the firearms and ammunition that can be held under certificate (from sporting uses to vermin control). It is also suggested the middle category factor cover use as well as intended use, other than for a criminal purpose.

**Question 2: Does the Council agree with the proposed culpability model for the possession without a certificate guideline?**

*Culpability model – Guideline 3: Possession by person prohibited*

3.20 This guideline at **Annex C** covers possession by persons prohibited from possessing a firearm or ammunition due to a previous conviction under section 21. Upon conviction, persons are prohibited from possession firearms for either five years or life depending on the length of the sentence.<sup>1</sup> This guideline covers the offence that occurs when the prohibition is contravened. The prohibition covers any firearm or ammunition at all, so it may include an item prohibited under section 5 or one for which a certificate is required. It appears in practice the offence is also charged for items for which no certificate is required, such as imitation firearms or lower-grade air weapons.

3.21 As with the other guidelines, it is proposed to take a two-pronged approach to culpability with (A) an initial assessment of the type of weapon, then (B) an assessment of other culpability factors, and again a table to identify the final culpability category. The following wording is proposed for type of weapon under this guideline:

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Firearm or ammunition prohibited under section 5 (whether or not the minimum sentence applies) (where not at Type 2)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• Weapon prohibited under section 5(1)(b)</li> <li>• Firearm for which a certificate is required</li> <li>• Ammunition for which a certificate is required (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Air weapon or imitation firearm</li> <li>• Very small quantity of ammunition</li> </ul>

3.22 A small number of offences under this guideline will involve prohibited weapons. On the weapons to be included under Type 1, the Council may agree to include all prohibited weapons under section 5, including the section 5(1)(b) category which includes stun guns and similar devices. Alternatively, the Council may prefer to draw a distinction between those

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<sup>1</sup> A person who has been sentenced to life or imprisonment for three years or more is permanently prohibited from possessing a firearm or ammunition. A person sentenced to imprisonment for three months or more but less than three years is prohibited for five years from the date of release, or from the date of sentence in the case of a suspended sentence.



to which the minimum sentence applies and those to which it does not, placing the latter at Type 2. It should be noted that the weapons where the minimum sentence does *not* apply vary greatly in their seriousness, from stun guns under section 5(1)(b) to weapons for military use under section 5(1A)(b)-(g). To ensure these categories are properly targeted, it is proposed that section 5(1)(b) only is carved out of Type 1 and moved to Type 2.

3.23 Although this offence does not expressly cover air weapons or imitation firearms, it appears from the transcripts that sometimes this offence does involve these types of weapons. They have been included as Type 3 weapons.

**Question 3: Does the Council agree with the proposed culpability model for the possession by person prohibited guideline?**

*Culpability model – Guideline 4: Carrying in a public place*

3.24 This guideline at **Annex D** covers the carrying of a firearm in a public place under section 19. It will replace the [existing guideline in the MCSG](#). The offence involves a person having with them in a public place:

- (a) a loaded shotgun;
- (b) an air weapon (whether loaded or not);
- (c) any other firearm together with ammunition for it; or
- (d) an imitation firearm.

3.25 There is a defence of lawful authority or reasonable excuse. The mandatory minimum sentence applies where the firearm is a specified prohibited weapon from section 5(1) or (1A).

3.26 The same two-pronged approach is proposed for culpability for this guideline. The following is suggested for the assessment under Culpability A - Type of weapon (with the question of whether the weapon is loaded or with ammunition to remain under Culpability B – Other culpability factors):

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Firearm or shotgun prohibited under section 5 (whether or not the mandatory minimum sentence applies) (where not at Type 2)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• Weapon prohibited under section 5(1)(b)</li> <li>• Firearm, shotgun or air weapon for which a certificate is required</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Air weapon that is not prohibited and for which no certificate is required</li> <li>• Imitation firearm</li> </ul>

3.27 The factors under Culpability B – Other culpability factors are proposed to be the same as the other guidelines, with the addition of another lower culpability factor

'Possession falls just short of reasonable excuse'. This factor is intended to address those cases where the reasons for carrying the weapon did not amount to a defence but have nonetheless lowered the offender's culpability.

**Question 4: Does the Council agree with the proposed culpability model for the carrying in a public place guideline?**

*Harm model – Guideline 1: Possession of prohibited weapon*

3.28 The harm model is set out at page 4 of **Annex A**. The Council considered an earlier draft of the harm factors at the last meeting. This section has since been revised to make it higher level and more thematic. It is still proposed to have three levels of harm. There is new introductory wording stating that harm is assessed by reference to the **risk of injury/death** or **disorder** occurring and/or **actual alarm/distress** caused. Similar thematic introductory wording is found in other guidelines such as theft, drugs, and environmental offences. There is also additional wording providing guidance on considerations that may be relevant when considering the risk of harm, including 'the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence'.

3.29 One area related to harm but not included is the risk that the weapon will fall into criminal possession. It was considered that the factor is sufficiently covered under the culpability factors relating to criminal use or intended use, and aggravating factors relating to offending in a group or having contact with criminal associates.

3.30 The harm factors are then higher level and aligned with the thematic areas set out in the introductory wording, focusing on the circumstances in which the offence was committed. The benefit of this approach compared with one spelling out more specific factors (such as the location of offending at a school, or children being present) is that it focuses the assessment on the harm itself, whether actual or risked, rather than using specific factors that may not always correspond to harm or risk of harm.

3.31 Circumstances where there is a high risk of serious injury or death, or of serious disorder, are placed at category 1, while low/minimal risk of the same is at category 3. Similarly, serious alarm/distress is at category 1 and no/minimal alarm/distress is at category 3. Category 2 contains 'limited alarm/distress caused' and a catch-all factor. This catch-all factor has been used instead of including a 'medium' factor for risk of serious injury/death and serious disorder, as feedback indicated that 'medium risk' was considered problematic. A 'medium risk' factor was included in the food safety guideline so there is a precedent to include this if the Council prefers.

**Question 5: Does the Council agree with the harm model for the possession of prohibited weapon guideline?**

*Harm model – Guidelines 2-4*

3.32 It is proposed that the harm model and factors for guidelines 2-4 be consistent with those for the possession of prohibited weapons guideline. The broader, more thematic framing of the harm model and the similarities in terms of harm between the offences of possession without a certificate, possession by person prohibited, and carrying in a public place, mean that the same harm factors should be suitable across these guidelines.

**Question 6: Does the Council agree to use the same harm model and factors for the remaining possession guidelines?**

*Approaches to addressing cases where the minimum sentence applies*

3.33 Certain offences falling under the possession of prohibited weapons guideline and the carrying in a public place guideline will be subject to the mandatory minimum sentence<sup>2</sup> (as will future guidelines to be considered on transfer and manufacture of prohibited weapons). For possession of prohibited weapons offences, by volume, the offences where the minimum sentence was engaged formed around 25 per cent of cases in 2017. In the remaining 75 per cent of cases the minimum sentence was not applicable.

3.34 There is concern about how the possession of prohibited weapon guideline will cater for offences where the statutory minimum sentence applies as well as those where it does not. Some Council members wanted consideration to be given to separate tables or sections of the guideline for dealing with minimum sentence cases. Council members were interested in understanding how the sentencing tables would accommodate the minimum five year sentence. The detail of the sentencing tables will be developed at subsequent meetings. In the proposed guideline at **Annex B**, separate sentencing tables have been included in step two, as a possible option. It is proposed that further work is done to explore how best to address this issue and to develop a coherent approach to apply across the relevant guidelines.

**Question 7: Does the Council agree to explore options for addressing offences subject to the statutory minimum sentence at a later stage?**

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<sup>2</sup> The minimum sentence provisions apply where a person is convicted under section 5(1)(a)-(af) or (c), or section 5(1A)(a). They also apply where a person commits one of a number of other offences with a firearm or ammunition specified in those same subsections, including carrying in a public place, possession with intent offences, and manufacture or transfer of a prohibited weapon.

## **4 IMPACT**

4.1 A draft resource assessment will be considered in due course. The resource assessment will be developed in line with the Council's decision at the September meeting that the guideline should aim to replicate current sentencing practice (subject to consideration of the sentencing tables for the specific offences). The impact on resources within the system is likely to be negligible if the guideline continues to be developed in line with this aim.

## **5 RISK**

5.1 There are various legislative changes in train around firearms. The Home Office is still working on regulations that will prohibit certain antique firearms. The Offensive Weapons Bill is due to have its report stage and third reading on Monday 15 October 2018. This Bill will reclassify two further types of firearm and bump stock devices as prohibited weapons. It is necessary to ensure the wording in the guideline is future-proofed to accommodate these and any future changes to the list of prohibited weapons. Other proposed amendments to the Bill are also being monitored, including an amendment that would create a specific new offence for the possession of component parts of ammunition with intent to manufacture.

5.2 As expected, some complexities and technical questions have arisen in developing the guideline. Input is being sought from CPS, the National Ballistics Intelligence Service and firearms technical specialists at the Metropolitan Police Service where needed to inform the development of the guidelines and ensure technical accuracy.

5.3 There has been some pressure on timelines for this guideline due to the main staff resource being available through to May 2019. In light of the widened scope and complexities involved in the guideline, an initial additional Council meeting has been added to the timetable. Sign-off is now planned for March 2019 rather than January. The consultation will still be launched in late April if timescales permit. Drafts may be circulated to Council members to seek additional feedback in between meetings. This plan will be kept under review as the guideline progresses.

# Firearms – Possession of prohibited weapon

## **Possession, purchase or acquisition of a prohibited weapon or ammunition**

Firearms Act 1968 (section 5(1), 5(1A))

Indictable only:

Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c)  
Section 5(1A)(a)

Triable either way:

Section 5(1)(b)  
Section 5(1A)(b), (c), (d), (e), (f), (g)

Maximum: 10 years' custody

Offence range: [To come]

This offence is subject to statutory minimum sentencing provisions.  
See STEPS TWO AND THREE for further details.

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability A – Type of weapon**

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

<b>Type 1</b>	<ul style="list-style-type: none"> <li>Automatic weapon or other weapon (including component part) that is capable of being immediately lethal to more than one person</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>All other weapons (including component part) falling between Type 1 and Type 3</li> <li>Ammunition (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>Stun gun or other weapon (including component part) that is [usually non-lethal / not designed to be lethal]</li> <li>Very small quantity of ammunition</li> </ul>

### Culpability B – Other culpability factors

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

<b>Culpability</b> demonstrated by one or more of the following:	
<b>High culpability:</b>	<ul style="list-style-type: none"> <li>• Firearm discharged</li> <li>• Firearm loaded</li> <li>• Firearm/ammunition used or intended for use for criminal purpose</li> </ul>
<b>Medium culpability:</b>	<ul style="list-style-type: none"> <li>• Firearm/ammunition produced (where not at High culpability)</li> <li>• Firearm held with compatible ammunition</li> <li>• Firearm/ammunition intended for use (where not at High culpability)</li> </ul>
<b>Lower culpability:</b>	<ul style="list-style-type: none"> <li>• Firearm/ammunition not produced</li> <li>• No use or intention to use</li> </ul>

### Final culpability category

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		<b>A – Type of weapon</b>		
		<b>1</b>	<b>2</b>	<b>3</b>
<b>B – Other culpability factors</b>	<b>High</b>	Culpability category A	Culpability category A	Culpability category B
	<b>Medium</b>	Culpability category A	Culpability category B	Culpability category C
	<b>Lower</b>	Culpability category B	Culpability category C	Culpability category C

<b>Harm</b>	
The court should consider the steps set out below to determine the level of harm that has been <b>caused or was risked</b> .	
This step is assessed by reference to the <b>risk of injury/death or disorder</b> occurring and/or <b>actual alarm/distress</b> caused.	
When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious alarm/distress caused</li> <li>• Offence committed in circumstances where others put at high risk of serious injury or death</li> <li>• Offence committed in circumstances where there is a high risk of serious disorder</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Limited alarm/distress caused</li> <li>• All other cases falling between category 1 and category 3</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• No/minimal alarm/distress caused</li> <li>• Offence committed in circumstances where others put at no/minimal risk of serious injury or death</li> <li>• Offence committed in circumstances where there is no/minimal risk of serious disorder</li> </ul>

**Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.**



<b>STEP TWO</b>			
<b>Starting point and category range</b>			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
Table 1 should be used if the offence is subject to statutory minimum sentencing provisions, unless there are exceptional circumstances. Table 2 should be used for all other cases. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
<b>TABLE 1</b>	<b>Offences subject to the statutory minimum sentence (Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a))</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

<b>TABLE 2</b>	<b>Offences not subject to the statutory minimum sentence</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

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

- A1. 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
- A2. Offence committed whilst on bail

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

- A3. Offence was committed as part of a group or offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)
- A4. Commission of offence whilst under the influence of alcohol or drugs
- A5. Firearm/ammunition kept as part of a large-scale accumulation of weapons
- A6. Firearm modified to increase lethality and/or to conceal, or firearm under section 5(1)(b) able to be converted to live firing weapon
- A7. Abuse of position of registered firearms dealer
- A8. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- A9. Offences taken into consideration
- A10. Failure to comply with current court orders
- A11. Offence committed on licence or post sentence supervision

### Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged
- M4. Came into possession involuntarily
- M5. Voluntary surrender of firearm/ammunition
- M6. No knowledge or suspicion of presence of firearm/ammunition
- M7. Unaware firearm/ammunition is prohibited
- M8. Genuine mistake about whether covered by lawful authorisation
- M9. Held on behalf of another through coercion, intimidation, or exploitation

- M10. Serious medical condition requiring urgent, intensive or long-term treatment
- M11. Age and/or lack of maturity
- M12. Mental disorder or learning disability
- M13. Sole or primary carer for dependent relatives
- M14. Co-operation with the police

**STEP THREE**  
**Minimum Terms**  
 [To come]

**STEP FOUR**  
**Consider any factors which indicate a reduction for assistance to the prosecution**  
 The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FIVE**  
**Reduction for guilty pleas**  
 The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

**STEP SIX**  
**Totality principle**  
 If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SEVEN**  
**Ancillary orders**  
 In all cases the court should consider whether to make ancillary orders.

***Forfeiture and destruction of firearms and cancellation of certificate***  
 The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

**Serious Crime Prevention Order**  
 The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

## **Firearms – Possession without certificate**

### **Possession, purchase or acquisition of a firearm without a certificate**

Firearms Act 1968 (section 1(1)(a))

### **Possession, purchase or acquisition of ammunition without a certificate**

Firearms Act 1968 (section 1(1)(b))

### **Possession, purchase or acquisition of a shotgun without a certificate**

Firearms Act 1968 (section 2(1))

Triable either way

Maximum: 5 years' custody, or 7 years for the section 1(1) offence where it is aggravated within the meaning of section 4(4) of the Act (shortened shotgun or converted firearm)

Offence range: [To come]

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability A – Type of weapon**

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Shotgun which has been shortened within the meaning of section 4(4)</li> <li>• Firearm which has been converted within the meaning of section 4(4)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• All other firearms or shotguns</li> <li>• Ammunition (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Very small quantity of ammunition</li> </ul>

**Culpability B – Other culpability factors**

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

<b>Culpability</b> demonstrated by one or more of the following:
<p><b>High culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm discharged, other than for lawful purpose</li> <li>• Firearm loaded</li> <li>• Firearm/ammunition used or intended for use for criminal purpose</li> </ul>
<p><b>Medium culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm/ammunition produced (where not at High culpability)</li> <li>• Firearm held with compatible ammunition</li> <li>• Firearm/ammunition used or intended for use (where not at High culpability)</li> </ul>
<p><b>Lower culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm/ammunition not produced</li> <li>• No use or intention to use</li> </ul>

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**Final culpability category**

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		<b>A – Type of weapon</b>		
		<b>1</b>	<b>2</b>	<b>3</b>
<b>B – Other culpability factors</b>	<b>High</b>	Culpability category A	Culpability category A	Culpability category B
	<b>Medium</b>	Culpability category A	Culpability category B	Culpability category C
	<b>Lower</b>	Culpability category B	Culpability category C	Culpability category C

<p><b>Harm</b></p> <p>The court should consider the factors set out below to determine the level of harm that has been <b>caused or was risked</b>.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p> <p>This step is assessed by reference to the <b>risk of injury/death or disorder</b> occurring and/or <b>actual alarm/distress</b> caused.</p> <p>When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.</p>	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious alarm/distress caused</li> <li>• Offence committed in circumstances where others put at high risk of serious injury or death</li> <li>• Offence committed in circumstances where there is a high risk of serious disorder</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Limited alarm/distress caused</li> <li>• All other cases falling between category 1 and category 3</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• No/minimal alarm/distress caused</li> <li>• Offence committed in circumstances where others put at no/minimal risk of serious injury or death</li> <li>• Offence committed in circumstances where there is no/minimal risk of serious disorder</li> </ul>

**Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.**



<b>STEP TWO</b>			
<b>Starting point and category range</b>			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
<b>Where the offence is aggravated under section 4(4) (i.e. the weapon is a converted firearm or shortened shotgun), the maximum penalty is seven years and it may be appropriate to go above the top of the category range.</b>			
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail

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

- A3. Offence was committed as part of a group or offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)
- A4. Commission of offence whilst under the influence of alcohol or drugs

- A5. Firearm/ammunition kept as part of a large-scale accumulation of weapons
- A6. Firearm modified to increase lethality and/or to conceal (where not taken into account in type of weapon at step one)
- A7. Abuse of position of registered firearms dealer
- A8. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- A9. Offences taken into consideration
- A10. Failure to comply with current court orders
- A11. Offence committed on licence or post sentence supervision
- A12. Possession continued after certificate refused or revoked
- A13. Poor record of firearms compliance

**Factors reducing seriousness or reflecting personal mitigation**

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged
- M4. Came into possession involuntarily
- M5. Voluntary surrender of firearm/ammunition
- M6. No knowledge or suspicion of presence of firearm/ammunition
- M7. Genuine misunderstanding about terms or validity of certificate
- M8. Steps taken to obtain certificate
- M9. Certificate not obtained/renewed due to genuine oversight
- M10. Good record of firearms licensing compliance
- M11. Held on behalf of another through coercion, intimidation, or exploitation
- M12. Serious medical condition requiring urgent, intensive or long-term treatment
- M13. Age and/or lack of maturity
- M14. Mental disorder or learning disability
- M15. Sole or primary carer for dependent relatives
- M16. Co-operation with the police

**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR****Reduction for guilty pleas**

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

**STEP FIVE****Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SIX****Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

***Forfeiture and destruction of firearms and cancellation of certificate***

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

**Serious Crime Prevention Order**

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP SEVEN****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP EIGHT****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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## **Firearms – Possession by person previously convicted**

### **Possession of a firearm or ammunition by person with previous convictions prohibited from possessing a firearm or ammunition**

Firearms Act 1968 (section 21(4))

Triable either way

Maximum: 5 years' custody

Offence range: [To come]

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability A – Type of weapon**

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Firearm or ammunition prohibited under section 5 (whether or not the minimum sentence applies) (where not at Type 2)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• Weapon prohibited under section 5(1)(b)</li> <li>• Firearm for which a certificate is required</li> <li>• Ammunition for which a certificate is required (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Air weapon or imitation firearm</li> <li>• Very small quantity of ammunition</li> </ul>

**Culpability B – Other culpability factors**

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

<b>Culpability</b> demonstrated by one or more of the following:
<p><b>High culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm discharged, other than for lawful purpose</li> <li>• Firearm loaded</li> <li>• Firearm/ammunition used or intended for use for criminal purpose</li> </ul>
<p><b>Medium culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm/ammunition produced (where not at High culpability)</li> <li>• Firearm held with compatible ammunition</li> <li>• Firearm/ammunition used or intended for use (where not at High culpability)</li> </ul>
<p><b>Lower culpability:</b></p> <ul style="list-style-type: none"> <li>• Firearm/ammunition not produced</li> <li>• No use or intention to use</li> </ul>

**Final culpability category**

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		<b>A – Type of weapon</b>		
		<b>1</b>	<b>2</b>	<b>3</b>
<b>B – Other culpability factors</b>	<b>High</b>	Culpability category A	Culpability category A	Culpability category B
	<b>Medium</b>	Culpability category A	Culpability category B	Culpability category C
	<b>Lower</b>	Culpability category B	Culpability category C	Culpability category C

<p><b>Harm</b></p> <p>The court should consider the factors set out below to determine the level of harm that has been <b>caused or was risked</b>.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p> <p>This step is assessed by reference to the <b>risk of injury/death or disorder</b> occurring and/or <b>actual alarm/distress</b> caused.</p> <p>When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.</p>	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious alarm/distress caused</li> <li>• Offence committed in circumstances where others put at high risk of serious injury or death</li> <li>• Offence committed in circumstances where there is a high risk of serious disorder</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Limited alarm/distress caused</li> <li>• All other cases falling between category 1 and category 3</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• No/minimal alarm/distress caused</li> <li>• Offence committed in circumstances where others put at no/minimal risk of serious injury or death</li> <li>• Offence committed in circumstances where there is no/minimal risk of serious disorder</li> </ul>

**Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.**



<b>STEP TWO</b>			
<b>Starting point and category range</b>			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail

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

- A3. Offence was committed as part of a group or offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)
- A4. Commission of offence whilst under the influence of alcohol or drugs
- A5. Firearm/ammunition kept as part of a large-scale accumulation of weapons
- A6. Firearm modified to increase lethality and/or to conceal
- A7. Abuse of position of registered firearms dealer

- A8. Offences taken into consideration
- A9. Failure to comply with current court orders
- A10. Offence committed on licence or post sentence supervision

#### Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged
- M4. Came into possession involuntarily
- M5. Voluntary surrender of firearm/ammunition
- M6. No knowledge or suspicion of presence of firearm/ammunition
- M7. Unaware firearm/ammunition is prohibited
- M8. Genuine misunderstanding about terms of prohibition
- M9. Held on behalf of another through coercion, intimidation, or exploitation
- M10. Serious medical condition requiring urgent, intensive or long-term treatment
- M11. Age and/or lack of maturity
- M12. Mental disorder or learning disability
- M13. Sole or primary carer for dependent relatives
- M14. Co-operation with the police

#### STEP THREE

##### Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

#### STEP FOUR

##### Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

#### STEP FIVE

##### Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SIX**

**Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

***Forfeiture and destruction of firearms and cancellation of certificate***

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

**Serious Crime Prevention Order**

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP SEVEN**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP EIGHT**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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# Firearms – Carrying in a public place

## Carrying a firearm in a public place

Firearms Act 1968 (section 19)

- (a) a loaded shot gun
- (b) an air weapon (whether loaded or not)
- (c) any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm
- (d) an imitation firearm

Triable either way:

Indictable only if the firearm is a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af) or section 5(1A)(a) of the Firearms Act 1968

Summary only if the firearm is an air weapon

Maximum: 7 years' custody (12 months' custody for imitation firearms)

Offence range: [To come]

**This offence is subject to statutory minimum sentencing provisions. See STEPS TWO and THREE for further details.**

**STEP ONE**  
**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability A – Type of weapon**

Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order.

Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in STEP TWO.

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Firearm or shotgun prohibited under section 5 (whether or not the mandatory minimum sentence applies) (where not at Type 2)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• Weapon prohibited under section 5(1)(b)</li> <li>• Firearm, shotgun or air weapon for which a certificate is required</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Air weapon that is not prohibited and for which no certificate is required</li> <li>• Imitation firearm</li> </ul>

### Culpability B – Other culpability factors

The court should weigh all the factors set out below in determining the offender's culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

<b>Culpability demonstrated by one or more of the following:</b>
<b>High culpability:</b> <ul style="list-style-type: none"> <li>• Firearm discharged, other than for lawful purpose</li> <li>• Firearm loaded</li> <li>• Firearm/ammunition used or intended for use for criminal purpose</li> </ul>
<b>Medium culpability:</b> <ul style="list-style-type: none"> <li>• Firearm/ammunition produced (where not at High culpability)</li> <li>• Firearm held with compatible ammunition</li> <li>• Firearm/ammunition used or intended for use (where not at High culpability)</li> </ul>
<b>Lower culpability:</b> <ul style="list-style-type: none"> <li>• Firearm/ammunition not produced</li> <li>• No use or intention to use</li> <li>• Possession falls just short of reasonable excuse</li> </ul>

### Final culpability category

Identify the final culpability category in the table below, considering both **A – Type of weapon** and **B – Other culpability factors**.

		<b>A – Type of weapon</b>		
		<b>1</b>	<b>2</b>	<b>3</b>
<b>B – Other culpability factors</b>	<b>High</b>	Culpability category A	Culpability category A	Culpability category B
	<b>Medium</b>	Culpability category A	Culpability category B	Culpability category C
	<b>Lower</b>	Culpability category B	Culpability category C	Culpability category C

<b>Harm</b>	
The court should consider the steps set out below to determine the level of harm that has been <b>caused or was risked</b> .	
This step is assessed by reference to the <b>risk of injury/death or disorder</b> occurring and/or <b>actual alarm/distress</b> caused.	
When considering the risk of harm, relevant considerations may include the number and vulnerability of people exposed, especially children, accessibility and visibility of the weapon, and the location of the offence.	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious alarm/distress caused</li> <li>• Offence committed in circumstances where others put at high risk of serious injury or death</li> <li>• Offence committed in circumstances where there is a high risk of serious disorder</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Limited alarm/distress caused</li> <li>• All other cases falling between category 1 and category 3</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• No/minimal alarm/distress caused</li> <li>• Offence committed in circumstances where others put at no/minimal risk of serious injury or death</li> <li>• Offence committed in circumstances where there is no/minimal risk of serious disorder</li> </ul>

**Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.**



<b>STEP TWO</b>			
<b>Starting point and category range</b>			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
Table 1 should be used if the offence is subject to statutory minimum sentencing provisions, unless there are exceptional circumstances. Table 2 should be used for all other cases. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
<b>TABLE 1</b>	<b>Offences subject to the statutory minimum sentence (Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a))</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

<b>TABLE 2</b>	<b>Offences not subject to the statutory minimum sentence</b>		
<b>Harm</b>	<b>Culpability</b>		
	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	<b>Category range</b>	<b>Category range</b>	<b>Category range</b>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Factors increasing seriousness

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

- A1. 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
- A2. Offence committed whilst on bail

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

- A3. Offence was committed as part of a group or offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)
- A4. Commission of offence whilst under the influence of alcohol or drugs
- A5. Firearm/ammunition kept as part of a large-scale accumulation of weapons
- A6. Firearm modified to increase lethality and/or to conceal, or firearm under section 5(1)(b) able to be converted to live firing weapon
- A7. Abuse of position of registered firearms dealer
- A8. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- A9. Offences taken into consideration
- A10. Failure to comply with current court orders
- A11. Offence committed on licence or post sentence supervision

### Factors reducing seriousness or reflecting personal mitigation

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Good character and/or exemplary conduct
- M3. Firearm incomplete or incapable of being discharged
- M4. Came into possession involuntarily
- M5. Voluntary surrender of firearm/ammunition
- M6. No knowledge or suspicion of presence of firearm/ammunition
- M7. Unaware firearm/ammunition is prohibited
- M8. Genuine mistake about whether covered by lawful authorisation

- M9. Held on behalf of another through coercion, intimidation, or exploitation
- M10. Serious medical condition requiring urgent, intensive or long-term treatment
- M11. Age and/or lack of maturity
- M12. Mental disorder or learning disability
- M13. Sole or primary carer for dependent relatives
- M14. Co-operation with the police

**STEP THREE**  
**Minimum Terms**  
 [To come]

**STEP FOUR**  
**Consider any factors which indicate a reduction for assistance to the prosecution**  
 The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FIVE**  
**Reduction for guilty pleas**  
 The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.  
 Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

**STEP SIX**  
**Totality principle**  
 If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SEVEN**  
**Ancillary orders**  
 In all cases the court should consider whether to make ancillary orders.  
***Forfeiture and destruction of firearms and cancellation of certificate***  
 The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

**Serious Crime Prevention Order**

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

## Firearms Act 1968

### 5.— Weapons subject to general prohibition.

(1) A person commits an offence if, [without authority] <sup>1</sup>, he has in his possession, or purchases or acquires [...] <sup>2</sup> —

[(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;

(ab) any self-loading or pump-action [rifled gun] <sup>4</sup> other than one which is chambered for .22 rim-fire cartridges;

[(aba) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, [...] <sup>6</sup> a muzzle-loading gun or a firearm designed as signalling apparatus;] <sup>5</sup>

(ac) any self-loading or pump-action smooth-bore gun which is not [an air weapon or ] <sup>7</sup> chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or [...] <sup>8</sup> is less than 40 inches in length overall;

(ad) any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges or [a muzzle-loading gun] <sup>9</sup> ;

(ae) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as signalling apparatus;] <sup>3</sup>

[(af) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system;] <sup>10</sup>

(b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing; and

[(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid.] <sup>11</sup>

[(1A) Subject to section 5A of this Act, a person commits an offence if, [without authority] <sup>1</sup>, he has in his possession, or purchases or acquires [...] <sup>13</sup> -

(a) any firearm which is disguised as another object;

(b) any rocket or ammunition not falling within paragraph (c) of subsection (1) of this section which consists in or incorporates a missile designed to explode on or immediately before impact and is for military use;

(c) any launcher or other projecting apparatus not falling within paragraph (ae) of that subsection which is designed to be used with any rocket or ammunition falling within paragraph (b) above or with ammunition which would fall within that paragraph but for its being ammunition falling within paragraph (c) of that subsection;

(d) any ammunition for military use which consists in or incorporates a missile designed so that a substance contained in the missile will ignite on or immediately before impact;

(e) any ammunition for military use which consists in or incorporates a missile designed, on account of its having a jacket and hard-core, to penetrate armour plating, armour screening or body armour;

[(f) any ammunition which is designed to be used with a pistol and incorporates a missile designed or adapted to expand on impact;] <sup>14</sup>

(g) anything which is designed to be projected as a missile from any weapon and is designed to be, or has been, incorporated in-

(i) any ammunition falling within any of the preceding paragraphs; or

(ii) any ammunition which would fall within any of those paragraphs but for its being specified in subsection (1) of this section.] <sup>12</sup>

(2) The weapons and ammunition specified in [subsections (1) and (1A) of this section (including, in the case of ammunition, any missiles falling within subsection (1A)(g) of this section)] <sup>15</sup> are referred to in this Act as "*prohibited weapons*" and "*prohibited ammunition*" respectively.

[(2A) A person commits an offence if without authority—

(a) he manufactures any weapon or ammunition specified in subsection (1) of this section,

(b) he sells or transfers any prohibited weapon or prohibited ammunition,

(c) he has in his possession for sale or transfer any prohibited weapon or prohibited ammunition, or

(d) he purchases or acquires for sale or transfer any prohibited weapon or prohibited ammunition.] <sup>16</sup>

[(3) In this section "*authority*" means an authority given in writing by—

(a) the Secretary of State (in or as regards England and Wales), or

(b) the Scottish Ministers (in or as regards Scotland).] <sup>17</sup>

(4) [An authority shall be subject to conditions specified in it, including such as the Secretary of State or the Scottish Ministers (as appropriate)] <sup>18</sup> having regard to the circumstances of each particular case, [thinks] <sup>19</sup> fit to impose for the purpose of securing that the prohibited weapon or ammunition to which the authority relates will not endanger the public safety or the peace.

(5) It is an offence for a person to whom an authority is given under this section to fail to comply with any condition of the authority.

(6) [The Secretary of State or the Scottish Ministers (as appropriate) may at any time, if they think fit,] <sup>20</sup> revoke an authority given to a person under this section

by notice in writing requiring him to deliver up the authority to such person as may be specified in the notice within twenty-one days from the date of the notice; and it is an offence for him to fail to comply with that requirement.

[(7) For the purposes of this section and section 5A of this Act-

(a) any rocket or ammunition which is designed to be capable of being used with a military weapon shall be taken to be for military use;

(b) references to a missile designed so that a substance contained in the missile will ignite on or immediately before impact include references to any missile containing a substance that ignites on exposure to air; and

(c) references to a missile's expanding on impact include references to its deforming in any predictable manner on or immediately after impact.] <sup>21</sup>

[(8) For the purposes of subsection (1)(aba) and (ac) above, any detachable, folding, retractable or other movable butt-stock shall be disregarded in measuring the length of any firearm.

(9) Any reference in this section to a muzzle-loading gun is a reference to a gun which is designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and a separate ball (or other missile).] <sup>22</sup>

## Notes

- [1](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(a) (July 14, 2014)
- [2](#) . Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(2)(a) (July 14, 2014)
- [3](#) . S. 5(1)(a)-(ae) substituted for s. 5(1)(a) by Firearms (Amendment) Act 1988 (c.45), s. 1(2)
- [4](#) . Words substituted subject to savings specified in SI 1997/1535 art.5 by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(3) (July 1, 1997: substitution has effect subject to savings specified in SI 1997/1535 art.5)
- [5](#) . Added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(2) (July 1, 1997: insertion has effect from July 1, 1997 for purposes specified in SI 1997/1535 art.4; October 1, 1997 otherwise)
- [6](#) . Words repealed by Firearms (Amendment) (No. 2) Act 1997 c. 64 Sch.1 para.1 (February 1, 1998 as SI 1997/3114)
- [7](#) . Words added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(4) (July 1, 1997)
- [8](#) . Words repealed by Firearms (Amendment) Act 1997 c. 5 Sch.3 para.1 (July 1, 1997 as SI 1997/1535)
- [9](#) . Words substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(5) (July 1, 1997)
- [10](#) . Inserted subject to transitional provisions specified in SI 2003/3300 art.5 by Anti-social Behaviour Act 2003 c. 38 Pt 5 s.39(3) (January 20, 2004: insertion has effect from January 20, 2004 for purposes specified in SI 2003/3300 art.2(c)(iii); April 30, 2004 subject to transitional provisions specified in SI 2003/3300 art.5 otherwise)
- [11](#) . S. 5(1)(c) substituted by Firearms (Amendment) Act 1988 (c.45), s. 1(3)
- [12](#) . Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(1) (January 1, 1993)
- [13](#) . Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(2)(b) (July 14, 2014)
- [14](#) . Substituted by Policing and Crime Act 2017 c. 3 Pt 6 s.129(2) (May 2, 2017)
- [15](#) . Words substituted by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(2) (January 1, 1993)
- [16](#) . Added by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(3) (July 14, 2014)
- [17](#) . Substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(4) (July 14, 2014)
- [18](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(b) (July 14, 2014)
- [19](#) . Words substituted by virtue of S.I. 1968/1200, arts. 2, 3
- [20](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(c) (July 14, 2014)
- [21](#) . Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(3) (January 1, 1993)
- [22](#) . Added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(6) (July 1, 1997)

## **[5A.— Exemptions from requirement of authority under s.5.**

(1) Subject to subsection (2) below, the authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for any person to have in his possession, or to purchase, acquire, sell or transfer, [any weapon, ammunition or missile specified in subsection (1A) of that section] <sup>4</sup> if he is authorised by a certificate under this Act to possess, purchase or acquire that weapon or ammunition subject to a condition that he does so only for the purpose of its being kept or exhibited as part of a collection.

(2) No sale or transfer may be made under subsection (1) above except to a person who-

(a) produces the authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> under section 5 of this Act for his purchase or acquisition; or

(b) shows that he is, under this section or a licence under the Schedule to the Firearms (Amendment) Act 1988 (museums etc.), entitled to make the purchase or acquisition without the authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup>.

(3) The authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for any person to have in his possession, or to purchase or acquire, [any weapon, ammunition or missile specified in subsection (1A) of that section] <sup>4</sup> if his possession, purchase or acquisition is exclusively in connection with the carrying on of activities in respect of which-

(a) that person; or

(b) the person on whose behalf he has possession, or makes the purchase or acquisition,

is recognised, for the purposes of the law of another member State relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons.

(4) The authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for any person to have in his possession, or to purchase or acquire [, or to sell or transfer] <sup>5</sup>, any expanding ammunition or the missile for any such ammunition if-

[(a) he is authorised by a firearm certificate or visitor's firearm permit to possess, or purchase or acquire, any expanding ammunition; and

(b) the certificate or permit is subject to a condition restricting the use of any expanding ammunition to use in connection with any one or more of the following, namely—

(i) the lawful shooting of deer;



(ii) the shooting of vermin or, in the course of carrying on activities in connection with the management of any estate, other wildlife;

(iii) the humane killing of animals;

(iv) the shooting of animals for the protection of other animals or humans.] <sup>6</sup>

(5) The authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for any person to have in his possession any expanding ammunition or the missile for any such ammunition if-

(a) he is entitled, under section 10 of this Act, to have a slaughtering instrument and the ammunition for it in his possession; and

(b) the ammunition or missile in question is designed to be capable of being used with a slaughtering instrument.

(6) The authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for the sale or transfer of any expanding ammunition or the missile for any such ammunition to any person who produces a certificate by virtue of which he is authorised under subsection (4) above to purchase or acquire it without the authority of the Secretary of State [or the Scottish Ministers (as appropriate)] <sup>7</sup>.

[(7) The authority of the Secretary of State [or the Scottish Ministers] <sup>2</sup> shall not be required by virtue of [section 5] <sup>3</sup> of this Act for a person carrying on the business of a firearms dealer, or any servant of his, to have in his possession, or to purchase, acquire, sell or transfer, any expanding ammunition or the missile for any such ammunition in the ordinary course of that business.] <sup>8</sup>

(8) In this section-

(a) references to expanding ammunition are references to any ammunition which [ is designed to be used with a pistol and] <sup>9</sup>[...] <sup>10</sup> incorporates a missile which is designed to expand on impact; and

(b) references to the missile for any such ammunition are references to anything which, in relation to any such ammunition, falls within section 5(1A)(g) of this Act.] <sup>1</sup>

## Notes

- <sup>1</sup>. Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(4) (January 1, 1993)
- <sup>2</sup>. Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(2)(a) (July 14, 2014)
- <sup>3</sup>. Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(5)(a) (July 14, 2014)
- <sup>4</sup>. Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(5)(b) (July 14, 2014)
- <sup>5</sup>. Words added by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(2)(a) (July 1, 1997)
- <sup>6</sup>. Substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(2)(b) (July 1, 1997)
- <sup>7</sup>. Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(2)(b) (July 14, 2014)
- <sup>8</sup>. Substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(3) (July 1, 1997)
- <sup>9</sup>. Words inserted by Policing and Crime Act 2017 c. 3 Pt 6 s.129(3) (May 2, 2017)

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**Sentencing Council meeting:** 19 October 2018  
**Paper number:** SC(18)OCT04 – Arson & Criminal  
Damage  
**Lead Council member:** Rebecca Crane and Sarah Munro  
**Lead officials:** Mandy Banks  
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## 1 ISSUE

1.1 This is the first meeting to consider the responses to the guideline following consultation earlier this year. The reaction to the draft guidelines was positive, in total 26 consultation responses were received. This is a smaller number than generally received, however this was not unexpected as the guidelines are uncontroversial and the public order consultation was also ongoing during some of the period. Responses were received from the main stakeholders that usually submit responses (The Law Society, Magistrates Association (MA), Prison Reform Trust (PRT) and so on). A list of the organisations that responded is attached at **Annex A**.

1.2 A consultation event on the guidelines was held with the Arson Prevention Forum, (which includes representatives from Police, Fire services, the Insurance Industry, Local Authorities, Charities etc), and the criminal damage (under £5000 guideline) was tested at events with magistrates. In addition the ‘aggravated’ criminal damage/arson with intent to endanger life or reckless as to whether life was endangered guideline was tested with 12 Crown Court Judges. Further details on the road testing can be found at **Annex B**.

1.3 This meeting will focus on the ‘simple’ arson and ‘aggravated’ criminal damage/arson guidelines. Subsequent meetings will consider the criminal damage both under and over £5000 offences, racially or religiously aggravated offence, threats to destroy/damage property, and sentence levels across all the offences. There are four meetings scheduled to discuss the guidelines, with sign off of the definitive guidelines at the April meeting.

## 2 RECOMMENDATION

That the Council:

- Considers the suggested amendments to the 'simple' arson offence
- Considers the suggested amendments to the 'aggravated' criminal damage/arson offence

## 3 CONSIDERATION

*Arson guideline- Annex C*

3.1 Generally, this draft guideline was received positively, with some suggestions made for amendments and clarification on the proposals. Starting with culpability, (page 2 of **Annex C**) the main comment from consultation respondents (CPS, MA, Law Society) was that the wording of factors between culpability A and B was too similar, (specifically the last 2 factors within each category), and that references to 'recklessness' should be removed from high culpability, category A and placed in category B. The Law Society stated that they believed '*...there is risk of sentence inflation and potentially, double counting and injustice, by elevating recklessness on a par with intent in assessing culpability...*' These respondents noted that the structure for culpability for the 'aggravated' arson/criminal damage offence, (**Annex D**) separated out intent into culpability A, and recklessness into culpability B, and asked whether there could be more consistency between the two guidelines.

3.2 However, as the Council may recall from the discussions in developing the draft guidelines, the reason why this structure was used for the aggravated offence, was because although one offence, cases involving intent are treated more seriously than those involving recklessness, and are sentenced accordingly. This structure allowed for those differences to be clearly reflected within one guideline. For simple arson, less distinction is drawn between recklessness and intent. The word 'recklessness' was added to the last factor in high culpability late in the development of the simple arson guideline, and on reconsideration, and given the comments by the Law Society, perhaps it should be removed from high culpability. The rest of the high culpability factors are those that make the offending more serious, so high degree of planning, acting in revenge, use of accelerant, and the risk of injury posed by an offender's actions, which generally all indicate intent by an offender. The relevant parts of legislation are attached at **Annex E** for reference.

3.3 It is recommended that some changes to culpability B are made to address the issue raised that the factors are too similar between A and B. During the development of the guideline the last two factors in category B '*intention to cause significant damage to property*' and '*recklessness or intention to create a significant risk of injury to persons*' were developed to try and provide more guidance to sentencers as to what kind of cases might fall into medium culpability (this is something sentencers often ask for- more factors within medium culpability). However, it seems that trying to provide additional guidance in this case has not been helpful, people commented that '*very serious damage to property*', and '*a high risk of injury*' in category A are too similar to '*significant damage to property*' and a '*significant risk of injury*' in category B, and that court time would be wasted in arguing the difference between the two.

3.4 As can be seen in track changes on page 2 of Annex C, these specific factors in culpability B have been struck through, and replaced with '*cases that fall between categories A and C because: factors are present in A and C which balance each other out and/or the offender's culpability falls between the factors described in A and C*'. It is suggested that this is the best way of assisting courts with assessing culpability, rather than trying to create specific factors which are not actually that helpful and could lead to debate about their meaning in the courts.

***Question 1: Does the Council agree to remove 'recklessness' from culpability A? And agree with the suggestions regarding the rewording of the factors in culpability B?***

3.5 The other culpability factor that consultation respondents expressed concern about was the wording of the lesser culpability factor of '*offender's responsibility substantially reduced by mental disorder\* or learning disability*'. The wording next to the asterisk qualified the factor, stating '*reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.*' This wording appears across all the arson/criminal damage offences in this guideline. The Criminal Bar Association (CBA), MA, PRT, London Criminal Courts Solicitor's Association (LCCSA) and the Justice Committee all objected, particularly to the qualifying wording, the LCCSA calling it 'draconian' and others saying it failed to take into account the use of drugs or alcohol to self- medicate, or to alleviate distress.

3.6 It was also queried whether, given the aggravating factor of '*commission of offence whilst under the influence of alcohol or drugs*' and the fact that a high number

of people with mental disorders have drug/alcohol problems, that would be double counting, and these offenders would be doubly penalised. The Justice Committee noted that the wording was not the same as used in the definitive manslaughter guideline, and suggested that the wording here should reflect that of the manslaughter guideline. Out of four offences in the manslaughter guideline, qualifying wording for the mental disorder factor, as shown below, is only used in the diminished responsibility guideline:

*‘where an offender exacerbates the mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to seek or follow medical advice this may increase responsibility. In considering the extent to which the offender’s behaviour was voluntary, the extent to which a mental disorder has an impact on the offender’s ability to exercise self- control or to engage with medical services will be relevant.’*

3.7 It is recommended that the qualifying wording is removed from this guideline, and from all the offences within the guideline, leaving the culpability factor unqualified. This lesser culpability factor is used routinely across most other guidelines, without any form of qualifying wording, and it is suggested that it is unnecessary here. In due course the O/P mental health guideline will be published, which will be cross referred to in all offence guidelines, and will offer more guidance to courts on assessing culpability in these circumstances.

***Question 2: Does the Council agree to remove the qualifying wording from this factor in lesser culpability, and across all the offences in the guideline?***

3.8 In all the offences apart from criminal damage there was wording under the sentence table suggesting to sentencers that they consider asking for psychiatric reports, to assist in sentencing (this can be seen on page 4, struck through). This inclusion of this wording met with general approval by respondents, except for the PRT, who questioned the positioning of the text. They argue that sentencers need to be fully informed of any mental health disorder/learning disability whilst considering culpability at step 1, yet the wording appears at step 2, and is focused on sentencing disposals, so any wording should appear at step 1, right at the very start of the guideline. They recommend a tiered approach, so that a report is requested from L&D services, followed by a medical practitioner, and finally, if required and appropriate, a psychiatric report. New wording to reflect this suggestion has been developed, and can be seen above culpability at step 1 and reads:

*‘Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in*

order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered’.

**Question 3: Does the Council agree with the revised wording and placement of the text regarding requests for reports? If so, does the Council agree that this text should be used within the simple and aggravated arson, and threats to destroy guidelines?**

3.9 Respondents were supportive of the proposed structure for harm, and the harm factors. The only suggested amendment was from Historic England, who wanted a specific reference inserted into the second bullet point in category 1 harm of ‘cultural’ as they felt this would better capture heritage assets. This bullet point would then read ‘*serious consequential economic, cultural or social impact of offence*’. They also suggest that the same amendment should be made in harm the aggravated arson offence.

**Question 4: Does the Council agree with the suggestion regarding the factor in category 1 harm for both offences?**

3.10 The CBA suggest that given the proportion of offenders with mental health issues within these offences, there should be a reference inserted above the sentence table that prompts consideration of a community order with mental health treatment requirements as an alternative to a short or moderate custodial sentence. They pointed to the sexual offences guideline which has similar wording relating to community orders with a sex offender treatment programme as an alternative to a short/moderate sentence, in a number of serious offences, sexual assault for example. New wording to reflect this suggestion has been drafted, and is shown in the box below, and can be seen on page 3 of the Annex. As drugs and alcohol are also very common features within this type of offending, and offenders with mental health problems frequently also have drug/alcohol problems, a reference to community orders with drug rehabilitation or alcohol treatment requirements has also been added to this wording.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

**Question 5: Does the Council agree to include the new wording regarding community orders with treatment requirements as alternatives to short/moderate sentences? If so, does the Council agree that this text should also be used within all the offences within this guideline?**

3.11 Very few comments were received regarding the proposed aggravating and mitigating factors. Two new aggravating factors were suggested, the Law Society and the National Fire Chief's Council suggested '*offence committed for financial gain*', (A5) to destroy commercial rivals, or for the insurance, for example, and '*offence committed to conceal other offences*', (A6) such as burglary. The Law Society and the CBA also suggested a new mitigating factor, '*Offender lit fire accidentally and/or tried to minimise its effect*' (M2). These suggestions can be seen on pages 4 and 5 of **Annex C**. As noted earlier in the paper, sentence levels across all offences will be reviewed at a later meeting.

**Question 6: Does the Council agree with the proposed aggravating and mitigating factors?**

*Criminal damage/arson with intent to endanger life or reckless as to whether life endangered - Annex D*

3.12 As noted in para 3.2, for this offence, culpability was separated into two fixed categories, culpability A for cases involving intent, and culpability B for recklessness cases, to reflect the fact that intent cases are treated more seriously by the courts and generally attract longer sentences. Other factors that might make the offence more serious, such as use of an accelerant, or less serious, such as a mental disorder, appear as aggravating or mitigating factors at step 2. Respondents were overwhelmingly supportive of this approach to culpability, so it is proposed that there are no changes to culpability.

**Question 7: Does the Council agree to retain the structure in culpability?**

3.13 As culpability is fixed for this offence, and there is quite a variation in types of harm for this offence, the proposed harm factors are quite expansive, with a number of medium harm category factors to try to assist courts assess harm effectively. As well as considering the *actual* harm caused, within harm for this offence there is also a factor to try and capture the risk posed by the offending (the second bullet point in each of the harm categories). This approach to harm was generally supported by respondents, except the CPS who questioned the use of both 'high' and 'very high'



within category 1, and 'significant' in category 2. They said these factors were too similar, would lead to uncertainty and make it difficult for courts to decide whether harm should fall into category 1 or 2. They proposed instead using the harm factors from 'simple' arson (page 3 **Annex C**) which just has category 2 as '*harm that falls between categories 1 and 3*'. The LCCSA also made similar comments.

3.14 As noted in the discussion around culpability factors in para 3.3, where possible, factors are included in medium levels of harm and culpability in response to requests by sentencers, who say that deciding what falls into the medium level can be difficult without specific factors. Sometimes however, the consequence of trying to do this can, as seen in the earlier culpability discussion, lead to confusion, with factors being too similar to one another. But for this offence, with its fixed culpability structure and variation in harm, there is a strong argument in retaining the specific medium harm factors, particularly as the majority of respondents didn't raise any objections to the proposals.

**Question 8: Does the Council agree to retain the structure and factors in harm?**

3.15 Several Judges during road testing mentioned the risk of double counting, stating that some of the aggravating factors, e.g multiple people endangered, may have already been considered when determining the harm category. They suggested putting a note in to remind sentencers not to double count. This has been done in other guidelines where considered necessary, so if the Council think it necessary in this text could be inserted to state: '*care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one*'. This can be seen on page 4 before the aggravating factors.

3.16 A suggestion was made during road testing of an additional mitigating factor: '*lack of premeditation*' (M3). It is recommended that this is included, as it was an oversight not to have included such a factor originally- as a counter balance to '*significant degree of planning or premeditation*' (A6) as an aggravating factor.

**Question 9: Does the Council feel it is necessary to warn against double counting? Does the Council wish to add the additional mitigating factor?**

3.17 For this offence, because of the particular structure of culpability, the factor '*offender's responsibility substantially reduced by mental disorder or learning disability*' appears as a mitigating factor (M2), in the arson guideline it appears as a lesser culpability factor. The LCCSA in particular noted this different placement between the 2 guidelines, and argue that this is unfair- that the same factor will carry less weight at step 2 within this guideline. This is a valid point, and so a way of

attaching more weight to it as mitigation (without moving it to culpability and altering the structure of culpability), would be to add some additional wording to so that it reads '*offender's responsibility substantially reduced by mental disorder or learning disability (if this factor provides strong mitigation it may be appropriate to go down a category)*'. The standard wording above the aggravating/mitigating factors states: '*identify whether any combination of these, or other relevant factors should result in an upward or downward adjustment from the starting point*'. So this wording doesn't preclude moving out of a category, but it also doesn't expressly say that you can.

***Question 10: Does the Council agree to the additional wording for this factor?***

#### **4 IMPACT/RISK**

4.1 A final resource impact assessment will be prepared and circulated amongst the Council for comment in due course.

***Question 11: Is the Council content that the risks have been adequately considered at this stage?***

**Arson and Criminal Damage consultation responses      Annex A**

1. CPS
2. Sophie (Member of the Public)
3. The Association of Youth Offending Team Managers
4. Criminal Bar Association
5. Merseyside Fire and Rescue Service
6. SEL Magistrates Bench
7. CLSA
8. Prison Reform Trust
9. The Magistrates Association
10. LCCSA
11. The Council of Circuit Judges
12. The National Fire Chief Council
13. Historic England
14. London Fire Brigade
15. The Heritage Alliance
16. Ben Payne
17. Ben Damazer
18. Ian Allott
19. Leics & Rutland Mags Bench
20. Julia Hurrell
21. Deborah Backhaus
22. South Derbys Mags bench
23. Council of District Judges
24. Professor Mark Walters
25. The Law Society
26. Justice Committee

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## **Annex B**

### **Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered: Road testing with Crown Court judges**

#### **Introduction**

Twelve interviews were conducted with Crown Court judges to test the *Criminal Damage/Arson with Intent to Endanger Life or Reckless as to Whether Life Endangered* draft guideline. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered two scenarios (as summarised below)<sup>1</sup>, sentencing the scenarios as if they were in court today (without the draft guideline) and then sentencing using the draft guideline. The research has provided valuable information on how the guideline might work in practice to support development of the Arson and Criminal Damage Guideline. However, there are limitations to the work<sup>2</sup>, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

<b>Scenario</b>	<b>Summary of scenario</b>
1 – arson with intent	P took off her jumper, set light to it, and pushed it through the letter box. She and the friend, who had left the scene and then returned, both then walked away. Children were in the house, P was aware of this.
1A – arson with intent	P was caught on CCTV setting alight rubbish he had piled against the fire exit of a crowded pub, using matches. This was the second time he had set fire to the same pub, he had previously done so in 2004. The fire was spotted in its early stages by a member of pub staff who put the fire out using a fire extinguisher.
2 - reckless	W, aged 30 had been drinking all day. On his way home in the afternoon he passed by a house in which a number of students lived. He took out a bag of rubbish from a wheelie bin, placed it outside the door of the property, and set it alight with matches he had in his pocket. He then left. The fire did not really take hold partly as the material in the bag was not particularly flammable, and partly as one of the students came and put the fire out.
2A – reckless	H, aged 28 shared a caravan with another man, they both lived and worked on a poultry farm. The pair had been drinking in a group earlier in the day, and had a disagreement about some beer that had gone missing. The victim was asleep in bed in the caravan in the early hours when H set fire to his empty bed, using an aerosol and a lighter. The victim awoke to thick black smoke and flames, and had to escape the caravan through a small window, dressed only in his boxer shorts, dropping to gravel below. A neighbour saw the flames and called the emergency services, but the fire had spread to two other caravans.

<sup>1</sup> The scenarios consisted of shortened versions of two reckless cases and two intent cases at varying levels of seriousness. Each scenario was sentenced by six judges.

<sup>2</sup> Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the 'pre-guideline' sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

## Key Points

- Most judges see arson with intent to endanger life/reckless as to whether life is endangered cases a few times a year, and reported that these frequently involve an offender with mental health difficulties. 'Reckless' offences are reported as more common than 'with intent'. Criminal damage with intent or reckless as to whether life is endangered is rarely seen in the Crown Court.
- The guideline road tested well and judges found it clear and easy to use. For the most part, scenarios were sentenced consistently across judges, and the hypothetical sentences judges gave under the new draft guideline were largely consistent with the sentence they gave 'as if it came before them today'. There was no indication that the guideline would raise sentencing levels.
- Three small issues were raised, which the Council may wish to consider:
  - When sentencing one of the 'reckless' scenarios, several judges observed that the starting point under culpability B felt a little low, insufficiently reflecting the dangerousness of an offence where a life has been endangered by something as unpredictable as a fire. Moreover, in another 'reckless' scenario, a few judges gave a lower sentence under the new draft guideline than their current sentence. This may suggest an appetite for slightly increasing the starting point sentences for culpability B ('reckless' offences).
  - Although judges were generally happy with the aggravating and mitigating section, several felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial. Council may wish to add a line on double counting into the aggravating and mitigating factors section of the guideline.
  - Currently there is no aggravating factor that increases the seriousness of an offence in which victims are not able to get away from the fire easily, for example because the main exits are blocked. Several judges felt that if fire exits or main exits are blocked, this is an important aggravating factor.

## Sentence Levels, Consistency, Starting Points and Ranges

- In all four scenarios, the vast majority of judges categorised the culpability consistently and as expected by policy. This shows that judges understand that the culpability section is determined by the charging of the offence. Categorisation of harm was fairly consistent across judges and concurred with the expectations of policy, with one exception: in one scenario (the most serious 'intent' case – 1A), there was some tendency to categorise risk of harm at a lower level than expected.
- The road testing suggests that the draft guideline is unlikely to increase sentencing for criminal damage/arson with intent to endanger life or reckless as to whether life endangered offence. Across multiple scenarios and multiple judges, there were only two instances where judges gave a higher sentence (by one year) using the draft guideline than the sentence they would give under current practice.
- For criminal damage/arson with intent (those offences going into culpability A) most sentences stayed the same when judges sentenced as they would 'as if it came before them today' and then using the new guideline.
- For reckless criminal damage/arson offences (those offences going into culpability B) whilst most sentences stayed the same, some sentences were lower using the draft guideline (between 1.5 to 5 years' decrease). Some of the judges who gave lower sentences using the draft guideline for scenario 2 (culpability B, category 3 – students' house) felt that these sentences were too low. The road testing identified two main reasons why these sentences were perceived as low:
  - Firstly, these judges felt that regardless of whether it had been reckless, a life had been endangered and the sentence needed to reflect this. All of these judges gave a sentence of below two years on this scenario with the draft guideline and some judges did not deem this appropriate: *"This is too low for a case that recklessly puts lives in danger, this does not feel right"*.
  - Secondly, some judges felt that due to the unpredictable nature of fire there is always a high risk of harm as the offender does not know the extent of the damage that the fire will cause. Again, they felt this needed to be reflected in the sentence: *"Fire is unpredictable. So, if you set any fire however minor in circumstances where you are guilty of recklessness as to whether life is*

*endangered, if you come into contact with it, then there's a significant risk of serious harm”.*

- At the higher harm level in culpability B (scenario 2A, caravan) the guideline took some judges to an appreciably lighter sentence than they had reached without the guideline, inferring that sentence levels at the higher harm levels may be a little light as well.

### **Views on Culpability**

- Most judges were happy with the culpability step, words such as *clear*, *simple* and *sensible* were used to describe the structure. Judges were particularly keen on the simplicity of the culpability section and some judges suggested that there would not be another way of structuring it appropriately.
- For a couple of judges at first, they felt that the culpability section did not allow for a determination of seriousness (further than just distinguishing between reckless and intent offences). They felt that the factors included in the aggravating factors section which were used to potentially increase the seriousness of the offence were too important to be just aggravating factors and should be included in the culpability section of the guideline. This was no longer an issue when they realised that the seriousness of the case would largely be decided in the harm section.

### **Views on Harm**

- There was a general recognition of difficulty when assessing risk due to the unpredictable nature of fire, and the offender not knowing the level of harm they could end up causing. That being said, the scenarios found that judges were generally comfortable with placing the offender in harm categories and were able to use the facts in the scenario to justify this placement.
- Several judges suggested that the ‘serious consequential economic or social impact of offence caused’ and ‘value of damage caused’ factors need more context to clarify their meaning and to ensure that ‘value of damage caused’ is known by judges to be relative to the individual/company.
- A few other observations were made:
  - One judge queried why the word ‘very’ is included in category 1 (very serious physical and psychological harm caused and very high value of damage caused) when it is not referred to in category 2.
  - One judge felt that ‘some’ risk was not covered in the three categories (very serious, significant, no or minimal)



- One judge felt that category 3 was an oxymoron because if there is an endangerment of life then it will not get into category 3 as low risk.

## Views on Aggravating and Mitigating Factors

Judges were generally happy with the aggravating and mitigating section. There were the following observations:

- A few judges mentioned that previous convictions for arson were more relevant than other offences, even a historical conviction. One judge suggested making it clearer in the guideline that previous convictions for arson are of particular relevance, regardless of the time passed.
- Some of the judges considered 'victim is particularly vulnerable' to be applicable for a victim sleeping. One judge suggested that referring to a sleeping victim as 'vulnerable' could cause some issues in court but as it is an important factor this could be added to the list separately.
- When judges were asked to consider important factors in each scenario without the draft guideline a few judges referred to the ability of the victim to get away from the fire if the key entry/exit to the premises was obstructed and how this would aggravate the sentence, *"Outside the door so main point of exit or entrance potentially blocked"*.
- Several judges highlighted the risk of double counting with this guideline. Judges felt that a number of aggravating factors (e.g. multiple people endangered) would be considered when determining the harm category and a flag to remind judges not to double count would be beneficial *"I just think that it needs a note of caution, some factors which would determine the risk of serious harm may be factors which are aggravating features, be careful not to use them twice"*. Council may wish to add a line on double counting into the aggravating and mitigating section of the guideline.
- Other suggestions for aggravating and mitigating factors were<sup>3</sup>: lack of premeditation (mitigating), offender calls emergency services (mitigating), committed in the context of public order (aggravating), children being present (aggravating), danger to firefighters specifically (aggravating) and financial gain (aggravating).

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<sup>3</sup> These were mentioned by one judge only.

## **Other points**

- Judges were supportive of the 'in exceptional cases within category 1A' text that sits above the starting point table.
- Judges were also supportive of the mental health disposal step, stating that it was very helpful and relevant for the offence. Some judges queried the details in this step (especially around ordering of the different disposals) and this is being looked at again by policy.
- Of the judges that expressed an opinion it was generally felt that there would not be any issues by having arson and criminal damage in the same guideline.

## **Arson (criminal damage by fire)**

### **Criminal Damage Act 1971, s.1**

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

#### **Triable either way**

Maximum when tried summarily: Level 5 fine and/or 6 months' custody

Maximum when tried on indictment: Life

Offence range: Discharge – 8 years' custody

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**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered**

## STEP ONE

### Determining the offence category

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

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

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

#### A - High culpability:

- High degree of planning or premeditation
- Revenge attack
- Use of accelerant
- Intention to cause very serious damage to property
- ~~Recklessness or~~ Intention to create a high risk of injury to persons

#### B - Medium culpability:

- ~~All other~~ Cases that fall between categories A and C because:
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors described in A and C
- ~~Intention to cause significant damage to property~~
- ~~Recklessness or intention to create a significant risk of injury to persons~~
- 

#### C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Offender's responsibility substantially reduced by mental disorder\* or learning disability
- Involved through coercion, intimidation or exploitation

~~\* Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

## Harm

**The level of harm is assessed by weighing up all the factors of the case.**

<p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>• Serious physical and/or psychological harm caused</li> <li>• Serious consequential economic, <u>cultural</u> or social impact of offence</li> <li>• High value of damage caused</li> </ul>
<p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>• Harm that falls between categories 1 and 3</li> </ul>
<p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• No or minimal physical and/or psychological harm caused</li> <li>• Low value of damage caused</li> </ul>
<p><b>STEP TWO</b>  <b>Starting point and category range</b></p> <p>Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.</p>

**In exceptional cases within category 1A, sentences of above 8 years may be appropriate.**

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Harm	Culpability		
	A	B	C
<p><b>Category 1</b></p>	<p><b>Starting point</b> 4 years' custody</p> <p><b>Category range</b> 2 to 8 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 9 months to 3 years' custody</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> 6 months – 1 year 6 months' custody</p>
<p><b>Category 2</b></p>	<p><b>Starting point</b> 2 years' custody</p> <p><b>Category range</b> 1 to 4 years'</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> 6 months- 1 year 6</p>	<p><b>Starting point</b> High level Community order</p> <p><b>Category range</b> Medium level</p>

	custody	months' custody	Community order-9 months' custody
<b>Category 3</b>	<b>Starting point</b> 1 years' custody  <b>Category range</b> 6 months - 2 years' custody	<b>Starting point</b> High level Community order  <b>Category range</b> Medium level Community order-9 months' custody	<b>Starting point</b> Low level Community order  <b>Category range</b> Discharge- High level Community order

~~Sentencers should consider whether to ask for psychiatric reports in order to assist in the appropriate sentencing (hospital orders, or mental health treatment requirements) of certain offenders to whom this may be relevant. Where a mental health disposal is indicated refer to Step 3 of the Criminal Damage/ Arson with intent to endanger life or reckless as to whether life endangered guideline.~~

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

#### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail
- A3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

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

- A4. Commission of offence whilst under the influence of alcohol or drugs
- A5. Offence committed for financial gain
- A6. Offence committed to conceal other offences
- A7. Victim is particularly vulnerable
- A8. Fire set in or near a public amenity
- A9. Damage caused to heritage assets
- A10. Significant impact on emergency services or resources

- A11. Established evidence of community/wider impact
- A12. Failure to comply with current court orders
- A13. Offence committed on licence or post sentence supervision
- A14. Offences taken into consideration

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

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Offender lit fire accidentally and/or tried to minimise its effect
- M3. Remorse
- M4. Good character and/or exemplary conduct
- M5. Serious medical condition requiring urgent, intensive or long-term treatment
- M6. Age and/or lack of maturity where it affects the responsibility of the offender
- M7. Sole or primary carer for dependent relatives
- M8. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

#### **STEP THREE**

##### **Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

#### **STEP FOUR**

##### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### **STEP FIVE**

##### **Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX****Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP SEVEN****Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

**STEP EIGHT****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



**Criminal damage/arson with intent to endanger life or reckless as to whether life endangered**

**Criminal Damage Act 1971, s.1(2)**

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

**Triable only on indictment**  
Maximum: Life imprisonment

Offence range: High level Community order- 12 years' custody

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**Where offence committed in a domestic context, also refer to the *Domestic Abuse: Overarching Principles* guideline**

**Courts should consider requesting a report from liaison and development services, or from a medical practitioner, or in appropriate cases, ordering a psychiatric report in order to both ascertain whether the offence is linked to an underlying mental disorder or learning disability (and so assist in the assessment of culpability) and whether any mental health disposal should be considered.**

#### **STEP ONE**

##### **Determining the offence category**

The court should determine the offence category with reference only to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Within this offence, culpability is fixed, culpability A is for intent, culpability B is for recklessness.**

##### **Culpability A:**

- Offender intended to endanger life

##### **Culpability B:**

- Offender was reckless as to whether life was endangered

#### **Harm**

The level of harm is assessed by weighing up all the factors of the case.

##### **Category 1**

- Very serious physical and/or psychological harm caused
- High risk of very serious physical and/or psychological harm
- Serious consequential economic, cultural or social impact of offence caused
- Very high value of damage caused

##### **Category 2**

- Significant physical and/or psychological harm caused
- Significant risk of serious physical and/ or psychological harm
- Significant value of damage caused
- All other harm that falls between categories 1 and 3

##### **Category 3**

- No or minimal physical and/or psychological harm caused
- Low risk of serious physical and/or psychological harm
- Low value of damage caused

**STEP TWO****Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

**In exceptional cases within category 1A, sentences of above 12 years may be appropriate.**

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, which is linked to the offending, and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209, or an alcohol treatment requirement under section 212 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Where the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

Harm	Culpability	
	A	B
<b>Category 1</b>	<b>Starting point</b> 8 years' custody  <b>Category range</b> 5 years to 12 years' custody	<b>Starting point</b> 6 years' custody  <b>Category range</b> 4 years to 10 years' custody
<b>Category 2</b>	<b>Starting point</b> 6 years' custody  <b>Category range</b> 4 to 8 years' custody	<b>Starting point</b> 4 years' custody  <b>Category range</b> 2 to 6 years' custody
<b>Category 3</b>	<b>Starting point</b> 2 years' custody  <b>Category range</b> 6 months custody to 3 years' custody	<b>Starting point</b> 1 years' custody  <b>Category range</b> High level Community order- 2 years 6 months' custody

**~~In appropriate cases, the court should order a psychiatric report in order to ascertain whether the offence is linked to an underlying mental disorder and, if it is, whether any mental health disposal should be considered (see Step Three.)~~**

The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Care should be taken to avoid double counting factors already taken into account in assessing the level of harm at step one

### **Factors increasing seriousness**

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

- A1. 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
- A2. Offence committed whilst on bail
- A3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity.

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

- A4. Commission of offence whilst under the influence of alcohol or drugs.
- A5. Revenge attack
- A6. Significant degree of planning or premeditation
- A7. Use of accelerant
- A8. Fire set in or near a public amenity
- A9. Victim is particularly vulnerable
- A10. Damage caused to heritage assets
- A11. Multiple people endangered
- A12. Significant impact on emergency services or resources
- A13. Established evidence of community/wider impact
- A14. Failure to comply with current court orders
- A15. Offence committed on licence or post sentence supervision
- A16. Offences taken into consideration

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

- M1. No previous convictions **or** no relevant/recent convictions
- M2. Offender's responsibility substantially reduced by mental disorder or learning disability (if this factor provides strong mitigation it may be appropriate to go down

a category)

- M3. Lack of premeditation
- M4. Involved through coercion, intimidation or exploitation
- M5. Remorse
- M6. Good character and/or exemplary conduct
- M7. Serious medical condition requiring urgent, intensive or long-term treatment
- M8. Age and/or lack of maturity where it affects the responsibility of the offender
- M9. Sole or primary carer for dependent relatives
- M10. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

~~\*Reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.~~

### **STEP THREE**

#### **Consideration of mental health disposals**

##### **Where custody is being considered:**

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) that the offending is wholly or in significant part attributable to that disorder,
- (iii) treatment is available, and
- (iv) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider these matters in the following order:

##### **Section 45A hospital and limitation direction**

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the direction will cease to have effect at the end of a determinate sentence.
- b. If the mental disorder can appropriately be dealt with by a direction under s.45A(1), then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

##### **Section 37 hospital order and s41 restriction order**

- c. If a s.45A direction is not appropriate the court must then consider, before going further, whether: (1) the mental disorder is treatable, (2) once treated there is no evidence the offender would be dangerous, and (3) the offending is due to that mental disorder. If these conditions are met a hospital order under s.37/41 is likely to be the correct disposal.

### **Section 47 transfer to hospital**

- d. The court must also have regard to the question of whether other methods of dealing with the offender are available including consideration of whether the powers under s47 MHA for transfer from custody to hospital for treatment would, taking in to consideration all of the circumstances, be appropriate.
- There must always be sound reasons for departing from the usual course of imposing a custodial sentence and where a custodial sentence is not imposed, the judge must set out these reasons.

#### **Non-custodial option:**

If a non-custodial option is considered, and where an offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be appropriate. The offender should express a willingness to comply with the requirement.

### **STEP FOUR**

#### **Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### **STEP FIVE**

#### **Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

### **STEP SIX**

#### **Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 15 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions the notional determinate sentence should be used as the basis for the setting of a minimum term.

### **STEP SEVEN**

#### **Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

**STEP EIGHT****Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

***Compensation order***

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

**STEP NINE****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP TEN****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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## Annex E

### Criminal Damage Act 1971

#### Section 1

##### **Destroying or damaging property.**

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

#### Section 2

##### **Threats to destroy or damage property.**

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,

(a) to destroy or damage any property belonging to that other or a third person; or

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person;

shall be guilty of an offence.

#### Section 3

##### **Possessing anything with intent to destroy or damage property.**

A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it —

(a) to destroy or damage any property belonging to some other person; or

(b) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person;

shall be guilty of an offence.

#### Section 4

##### **Punishment of offences.**

(1) A person guilty of arson under section 1 above or of an offence under section 1(2) above (whether arson or not) shall on conviction on indictment be liable to imprisonment for life.

(2) A person guilty of any other offence under this Act shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

## **Racially or religiously aggravated criminal damage**

Section 30 [Crime and Disorder Act 1998](#)

### **30.— [ Racially or religiously aggravated ] criminal damage.**

(1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the Criminal Damage Act 1971 (destroying or damaging property belonging to another) which is [ racially or religiously aggravated ] for the purposes of this section.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine, or to both.

(3) For the purposes of this section, section 28(1)(a) above shall have effect as if the person to whom the property belongs or is treated as belonging for the purposes of that Act were the victim of the offence

Under section 17 of the Magistrates' Courts Act 1980 the following are either way:  
Schedule 1 para 29:

Offences under the following provisions of the Criminal Damage Act 1971 —  
section 1(1) (destroying or damaging property);  
section 1(1) and (3) (arson);  
section 2 (threats to destroy or damage property);  
section 3 (possessing anything with intent to destroy or damage property).

Under sections 22, 33 and schedule 2 of the MCA 1980 offences of criminal damage where the value is £5000 or less are treated as summary only

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**19 October 2018**  
**SC(18)OCT05 – Drugs revision**  
**Sarah Munro/Rebecca Crane**  
**Eleanor Nicholls – 020 7071 5799**

## **1 ISSUE**

1.1 This is the second paper on the revision of the Drug Offences guideline following discussion of scope in September. This paper covers questions of approach to culpability and harm, and changes to aggravating and mitigating factors, for the offences of importation/exportation, supply (including possession with intent to supply (PWITS) and production of a controlled drug (including cultivation of cannabis). The current paper considers the approach to these in relation to drugs controlled by the Misuse of Drugs Act (MDA) 1971. Offences under the Psychoactive Substances Act 2016 will be considered at a later meeting.

1.2 Sections of the revised draft guidelines for these offences are set out at **Annex A**.

## **2 RECOMMENDATION**

- That the Council agrees the approach to assessment of culpability and the wording of culpability factors.
- That the Council agrees the approach to the assessment of harm and the wording of additional harm factors.
- That the Council agrees changes to aggravating and mitigating factors for these offences.

## **3 CONSIDERATION**

### *Approach to assessment of culpability – importation/supply/production offences*

3.1 Early discussion with Crown Court judges, the police and NCA, together with analysis of transcripts of importation, supply and production cases, have suggested that the model for assessing culpability in the current guideline is working reasonably well. The approach taken, basing the assessment on the offender's role, seems to capture the most important aspects. The current division of roles into "leading", "significant" and "lesser" for these offences seems to operate as expected, particularly for the more serious offences. In cases with many separate offenders, the factors seem to enable judges to differentiate between the

roles which each offender played. However, one factor in the “Significant” category is causing concern:

Motivated by financial or other advantage, whether or not operating alone
---

3.2 This factor applies in nearly all importation/supply/production cases; offenders are almost always motivated by the money they will receive from the drugs sold, or by other advantages such as free accommodation, free drugs, or paying off a drug debt. In some cases, this is the only factor in the “Significant” category; all other applicable factors are in the “lesser” category. These are often offenders who are themselves addicts, and who, even if not subjected to direct coercion from someone higher up in the chain, are nevertheless vulnerable to financial pressure. The sums of money involved are often, in relation to drug market, very small (under £100).

3.3 As we would hope, judges are often balancing this factor with those which apply in the “lesser” role category, in order to place the offender in that “lesser” category. However, in some cases where there are no “lesser” factors relating to role, but where they nevertheless feel that the offender’s role is low despite their having been motivated by money, the judge has to go outside the range for the “significant” category to find an appropriate starting point, often using step two mitigating factors. It could be argued that the way in which judges are going outside the category range, balancing factors, shows that the structure of the guideline is working well. However, I suggest that including a factor in the “significant” category which will fit nearly all cases is not the most transparent approach, and may lead to inconsistencies as different judges use different workarounds to reduce the sentence to that which seems appropriate to the seriousness of the case.

3.4 This is a particular problem in cases of very low level street dealing, which is automatically placed in category three harm. In these cases, offenders with low culpability in all other respects may be put in the “Significant” category with category three harm, with a starting point of 4 years 6 months’ custody for a supply offence. The category range only goes down to 3 years 6 months’ custody, so the sentence cannot be suspended.

3.5 To make the factor relating to motivation for financial gain more transparent and help judges apply it more consistently, I have considered two options. The most straightforward option, which I propose would be most effective, would be to remove this factor from the “Significant” category, since it applies in nearly all cases and does not therefore add much to the assessment of culpability. Where the offender was motivated by substantial financial or other advantage, that factor would remain in the “Higher” culpability category.

3.6 However, if instead Council would like to retain some reference to financial or other advantage in the lower categories, we could amend the relevant factor in the current

“Significant” category, and add a new factor in the “Lesser” category, to fit with current practice and enable judges to place cases in the “Lesser” category where there was limited financial or other advantage and address the concerns set out above. Suggested wording is as follows:

**Significant role:**

- Motivated by significant financial or other advantage, whether or not operating alone.

**Lesser role (new factor):**

- Motivated by limited, if any, financial or other advantage

***Question One: Is the Council content to remove the factor relating to financial or other advantage from the “Significant” category? If not, is Council content with the suggested alternative wording?***

3.7 Several of those we have spoken to, including Crown Court judges, the police and the NCA, have suggested that other factors, beyond role, should be included at step one. These include versions of factors which are listed as aggravating/mitigating factors at step two, particularly in response to changes in drug offending such as County Lines and online drug dealing. Adding factors at step one would dilute the focus on role, but would ensure that the most important features of offending are given additional weight. If these new factors are added, the description of the categories may need to change from “Leading”, “Significant” and “Lesser”.

3.8 Key features of offending which seem important enough for inclusion at step one relate to exploiting vulnerable people and cuckooing, using the home of a vulnerable person as a base for drug dealing. Exploiting vulnerable people is already covered at step one by the factor about involving others in the operation – this could cover vulnerable people just as much as any others. This also relates to harm caused, and could be included in additional harm factors (see 3.14 below). I do not therefore propose any additional culpability factors for the person exploiting vulnerable individuals.

3.9 Where an offender has been exploited in a county lines type case, this would be covered by the existing factors in the “Lesser” role category:

- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation

I do not propose to add any additional factors relating to exploitation in a county lines type case, but would welcome Council views on whether these factors are adequate to cover current offending, and will test this at consultation.

**Question Two: Does Council consider that the above “Lesser” role factors relating to coercion and exploitation are sufficient to deal with county lines and other types of offending?**

3.10 To ensure that cuckooing is covered, I propose an additional factor in the “Significant” role category. There is a risk of drafting the factor too broadly – it may be that those found with drugs in another person’s home (in quantities sufficient for a PWITS conviction) are not themselves the people who have taken control of it to use as a base for drug dealing, but instead are those who have been coerced into that other person’s home, bringing drugs from another place. Suggested wording is as follows:

Takes control (whether by pressure, influence, intimidation or reward) of the home of another person for drug-related activity
--

3.11 The feature of online dealing which may be worth including is that relating to use of fast post services to avoid detection. This feature cannot easily be related to role and I therefore propose to deal with it as a change to the relevant aggravating factor at step two (see 3.17 below).

**Question Three: Is the Council content to add the factor above to the “Significant” role category?**

*Approach to assessment of harm – importation/supply/production offences*

3.12 The Crown Court judges, and expert witnesses we have spoken to agree that the current approach to the assessment of harm based on quantity is, whilst not ideal, the only practical approach which a guideline can take given the wide variety in cases and, importantly, in the information available to the court on which to base harm. Transcripts reviewed so far support that view. Courts are using information on quantities where available to set the starting point, then moving from that using a variety of factors, including some not listed here. Courts appear to be using the single indicative quantity given as a starting point, as intended, and moving up and down from that depending on the actual quantity of drugs in the case. Given this, I do not propose substantial changes to the overall approach to the assessment of harm.

3.13 I had hoped to include in this paper a fuller discussion of harm, with revised quantities for these offences. These would in part be based on up to date data on drug seizures by police and Border Force, to compare with the data used when the original

guideline was produced. We have not yet received the more detailed data that we need from the Home Office, so will discuss the exact quantities and sentence levels at a later meeting, probably in January. However, there are some additional elements of the assessment of harm which may need to be changed in this revision of the guideline which I propose to deal with now.

3.14 These elements relate to how to take into account wider aspects of harm where these are known. In the Supply guideline, street dealing and supply of drugs into a prison by a prison employee are examples of such aspects, which are dealt with by increasing the category of harm from four to three, even where the quantity is small (category four). Other aspects of harm to consider are:

- a) harm caused by the way in which the drug has been produced or mixed;
- b) harm caused by supply of drugs into a prison by visitors or prisoners themselves, as well as by employees (currently covered by culpability factors in the Supply offence guideline, and to be considered alongside other aspects of drugs in prisons at a later meeting);
- c) specific targeting of vulnerable people as couriers etc (see above at 3.8).

3.15 These could be included by adding them in underneath the factors relating to street dealing or supply in prisons, though this would make the list very long and the guideline appear more complex. There is also the question of how best to take any new factors, and the existing two additional factors, into account. The current arrangement, of placing all such cases which would normally fall into category four by quantity into category three instead, does not allow much discretion. To allow judges discretion to take these additional factors into account to the extent which seems appropriate, I propose a model similar to that used in several of the Theft and Fraud guidelines, in which the initial categorisation is based on value, but with movement up into the next category, or upwards within the same category, based on a list of other factors. Revised wording could be as follows:

Harm is determined both by the weight of the product and by the additional factors listed. Purity is not taken into account at step one but is dealt with at step two.

Harm is initially assessed by the quantity of drug concerned. Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

The court should then take into account the following factors to determine whether they warrant the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

- Exposure of others to more than usual danger (for example, drugs cut with harmful substances or produced in ways likely to cause greater harm)
- *[Only in the Supply guideline]* Selling directly to users
- *[Only in the Supply guideline]* Supply of drugs in prison by a prison employee
- Specific targeting of vulnerable people to assist in drug dealing, whether as couriers or otherwise

***Question Four: Does the Council agree to adopting the two-stage approach to the assessment of harm proposed above?***

***Question Five: Does the Council agree with the drafting of the additional factors?***

***Question Six: Are there any additional factors which Council members would like to be included at this stage?***

*Aggravating and Mitigating Factors – importation/supply/production offences*

3.16 Further to the changes above, I propose making some changes to the aggravating and mitigating factors for these offences. Consideration of transcripts thus far, and consistency checking has revealed some discrepancies. I am proposing removing factor A6, below, relating to exposure of others to more than usual harm, because this has been moved to step one (see para 3.14 above). I also propose to add to factor A17 for production/cultivation the standard wording “where not charged separately”, since cultivation charges are often accompanied by charges of abstracting electricity. Finally, I have added reference to “post-sentence supervision” to the aggravating factor relating to the offence’s being committed on licence, since post-sentence supervision has been introduced since the guideline came into force.



3.17 There are also two additional factors suggested following consideration of transcripts, suggestions from the NCA, and suggestions from judges. First is an additional factor relating to online offending, where drugs are dealt over the dark web and despatched through fast post services, to reduce the likelihood of detection. Although this could come under “Attempts to conceal evidence” it may merit a separate, though still broadly drafted factor, which I have added at A15 below.

3.18 Secondly, in response to concerns about prevalence of drug offending, particularly county lines activity, being concentrated in certain local areas, I propose to add wording used in the theft guideline on prevalence.

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of drug offending should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that drug offending is prevalent in their area, and is causing particular harm in that community; and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

3.19 Proposed changes are set out in the following table:

<b>Importation/Exportation and Supply/PWITS</b>	<b>Production/Cultivation</b>
A1 Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction	A1 Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
A2 Offender used or permitted a person under 18 to deliver a controlled drug to a third person	
A3 Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.	

A4 Offence committed on bail	A4 Offence committed on bail
A5 Targeting of any premises intended to locate vulnerable individuals [and/or supply to those under 18 – Supply offence only]	
<del>A6 Exposure of others to more than usual danger, for example drugs cut with harmful substances</del>	<del>A6 Exposure of others to more than usual danger, for example drugs cut with harmful substances</del>
A7 Attempts to conceal or dispose of evidence, where not charged separately	A7 Attempts to conceal or dispose of evidence, where not charged separately
A8 Presence of others, especially children and/or non-users	A8 Presence of others, especially children and/or non-users
A9 Presence of weapons, where not charged separately	A9 Presence of weapons, where not charged separately
[A10 Charged as importation of a very small amount – Supply offence only]	
A11 High purity	A11 High purity or high potential yield
A12 Failure to comply with current court orders	A12 Failure to comply with current court orders
A13 Offence committed on licence <u>or post sentence supervision</u>	A13 Offence committed on licence or post sentence supervision
A14 Established evidence of community impact	A14 Established evidence of community impact
	A15 Nature of any likely supply
	A16 Level of any profit element
	A17 use of premises accompanied by unlawful access to electricity/other utility supply of others <u>where not charged separately</u>
	A18 Ongoing/large scale operation as evidenced by presence and nature of specialist equipment

<u>A19 Offender chose particular method of offending to avoid detection</u>	
<u>A20 Prevalence (see below [Supply/PWITS only]</u>	

**Question Seven: is the Council content with the changes to aggravating factors set out above? Are there any additional aggravating factors needed for these offences?**

3.20 I do not propose any changes to mitigating factors, which seems to be used consistently in transcripts reviewed so far. Mitigating factors are as follows:

<b>Importation/Exportation/Supply PWITS</b>	<b>Production/Cultivation</b>
M1 Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.	M1 Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
M2 Supply only of drug to which offender addicted	
M3 Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances	
M4 Isolated incident	M4 Isolated incident
M5 Low purity	M5 Low purity
M6 No previous convictions <b>or</b> no relevant or recent convictions	M6 No previous convictions <b>or</b> no relevant or recent convictions
M7 Remorse	
M8 Good character and/or exemplary conduct	
M9 Determination and/or demonstration of steps having been taken to address addiction or offending behaviour	M9 Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

M10 Serious medical conditions requiring urgent, intensive or long-term treatment	M10 Serious medical conditions requiring urgent, intensive or long-term treatment
M11 Age and/or lack of maturity where it affects the responsibility of the offender	M11 Age and/or lack of maturity where it affects the responsibility of the offender
M12 Mental disorder or learning disability	M12 Mental disorder or learning disability
M13 Sole or primary carer for dependent relatives	M13 Sole or primary carer for dependent relatives
M14 Offender's vulnerability was exploited	M14 Offender's vulnerability was exploited

***Question Eight: Is the Council content with the current mitigating factors set out above? Are there any additional mitigating factors needed for these offences?***

#### **4 IMPACT**

4.1 We are currently undertaking further analysis of transcripts, as well as seeking more data on drug seizures from the Home Office to inform development of the Harm section of these guidelines. We will also be speaking to magistrates to further understand how they use the guidelines and any problems they encounter. While it is not intended that any of the above changes have a significant impact on sentence levels, it may be that changes to the culpability factor relating to offenders being motivated by financial or other advantage, and changes to the harm model, may reduce the starting points slightly for some lower level street dealing cases. However, given that judges already work around the guideline to reach lower sentences through mitigation in some of these cases, there may be little impact. The impact of this will be considered as we develop the resource assessment prior to consultation.

#### **5 RISK**

5.1 At the Council's meeting in September, Rob Butler raised concerns about the high profile nature of this guideline, and the risk of adverse (or simply misleading) media reporting. Some of the changes outlined above may generate misleading or adverse reports from some sections of the media, and we will be alive to this risk in our media strategy when we launch the consultation.

## Revision of Drug Offences Guideline – proposed sections for new guideline October 2018

Changes from current guideline indicated by struck through/underlined text

### **Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug**

Misuse of Drugs Act 1971 (section 3)

Customs and Excise Management Act 1979 (section 170(2))

#### Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (~~quantity~~) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

~~In assessing harm, quantity~~ is determined both by the weight of the product and by the additional factors listed. Purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

##### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial gain
- Uses business as cover
- Abuses a position of trust or responsibility

##### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- ~~Motivated by financial or other advantage, whether or not operating alone~~
- Some awareness and understanding of scale of operation

**Lesser role:**

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

*Category of harm*

Harm is initially assessed by the quantity of drug concerned. Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

The court should then take into account the following factors to determine whether they warrant the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

- Exposure of others to more than usual danger (for example, drugs cut with harmful substances or produced in ways likely to cause greater harm)
- Specific targeting of vulnerable people to assist in drug dealing, whether as couriers or otherwise

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

*Other aggravating factors include:*

- Targeting of any premises intended to locate vulnerable individuals
- ~~Exposure of others to more than usual danger, for example drugs cut with harmful substances~~
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Offender chose particular method of offending to avoid detection

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Supplying or offering to supply a controlled drug  
**Misuse of Drugs Act 1971 (section 4(3))**

Possession of a controlled drug with intent to supply it to another  
**Misuse of Drugs Act 1971 (section 4(3))**

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (~~quantity~~) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

~~In assessing harm, quantity~~ is determined both by the weight of the product and by the additional factors listed. Purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

*Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

**Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial gain
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional

**Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- ~~Motivated by financial or other advantage, whether or not operating alone~~
- Some awareness and understanding of scale of operation
- Takes control (whether by pressure, influence, intimidation or reward) of the home of another person for drug-related activity

**Lesser** role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation



- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis

*Category of harm*

Harm is initially assessed by the quantity of drug concerned. Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

The court should then take into account the following factors to determine whether they warrant the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

- Exposure of others to more than usual danger (for example, drugs cut with harmful substances or produced in ways likely to cause greater harm)
- Selling directly to users
- Supply of drugs in prison by a prison employee
- Specific targeting of vulnerable people to assist in drug dealing, whether as couriers or otherwise

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class B and C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

For appropriate class B and C ranges, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person

- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

*Other aggravating factors include:*

- Targeting of any premises intended to locate vulnerable individuals or supply to such individuals and/or supply to those under 18
- ~~Exposure of others to more than usual danger, for example drugs cut with harmful substances~~
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Offender chose particular method of offending to avoid detection
- Prevalence

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of drug offending should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that drug offending is prevalent in their area, and is causing particular harm in that community; and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

## **Production of a controlled drug**

Misuse of Drugs Act 1971 (section 4(2)(a) or (b))

## **Cultivation of cannabis plant**

Misuse of Drugs Act 1971 (section 6(2))

### Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (~~output or potential output~~) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

~~In assessing harm, output or potential output are~~ is determined both by the ~~output or the potential output~~ (the weight of the product or number of plants/scale of operation) and by the additional factors listed. For production offences purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

#### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial gain
- Uses business as cover
- Abuses a position of trust or responsibility

#### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- ~~Motivated by financial or other advantage, whether or not operating alone~~
- Some awareness and understanding of scale of operation
- Takes control (whether by pressure, influence, intimidation or reward) of the home of another person for drug-related activity

#### **Lesser** role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation

- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

*Category of harm*

Harm is initially assessed by the output or potential output. Indicative ~~output or potential output~~ quantities, upon which the starting point is to be based are as follows:

[TABLE OF QUANTITIES]

The court should then take into account the following factors to determine whether they warrant the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

- Exposure of others to more than usual danger (for example, drugs cut with harmful substances or produced in ways likely to cause greater harm)
- Specific targeting of vulnerable people to assist in production/cultivation, whether as couriers or otherwise

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

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

*Other aggravating factors include:*

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others

- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- ~~Exposure of others to more than usual danger, for example drugs cut with harmful substances~~
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Offender chose particular method of offending to avoid detection

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**19 October 2018**  
**SC(18)OCT06 – General guideline**  
**Maura McGowan**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 This is the first consideration of the General guideline post-consultation. Any changes made to the explanations will also apply to those in offence specific guidelines.

1.2 The consultation on providing explanations for factors in offence specific guidelines was scheduled to start in December, but will be put back due mainly to delays in development of the digital Crown Court digital guidelines. A revised timetable for these projects will be produced once we have a clear idea of when the digital platform will be ready.

## **2 RECOMMENDATION**

2.1 That the Council considers the suggestions made in consultation responses and agrees revisions to the draft guideline at Annex A. Suggested additions are shown underlined. The question numbers in bold in the draft guideline relate to the questions in this paper.

2.2 It may not be possible to cover all of the questions in the paper at this meeting, there will be a further opportunity to consider these and any other issues arising from the road testing and consultation at a later meeting.

## **3 CONSIDERATION**

### *The consultation and research*

3.1 There were 27 responses to the consultation including from key stakeholders such as the Magistrates' Association, the Law Society and the CPS. There were a number of responses from groups with an interest in particular offence types that are not covered by offence-specific guidelines such as wildlife/rural crime, housing offences, insolvency offences and tobacco related offences.

3.2 The consultation responses were broadly supportive of the guideline but there were suggestions for changes which will be considered in detail below.

3.3 Research interviews were conducted with 22 magistrates and District Judges. Of those about half found the guideline helpful. Those who did not consider it helpful found the guideline difficult to navigate, the text dense, and wanted more direction on sentence levels.

*The format of the guideline*

3.4 Some consultation respondents were provided with the text version of the draft guideline to assist with group responses. However, all of those who responded to the consultation said that they had been able to use the digital version (which can be accessed at:

<https://www.sentencingcouncil.org.uk/offences/item/general-guideline-sentencing-offences-for-which-there-is-no-definitive-guideline-for-consultation-only/> )

3.5 Most respondents to the consultation reported that they found the mechanism for accessing the additional information straightforward, though in road testing most participants needed help in doing so. There were some specific criticisms or comments on the digital format that have been fed back to the website developers. The consultation on the offence specific explanations will provide an opportunity to test changes.

3.6 Most of the difficulties experienced by users were due to the unfamiliarity of the format, the density of the information and the fact that in any given case much of the information would be irrelevant. The problem of unfamiliarity will naturally resolve itself when the digitisation project is completed and the format is used across all guidelines. The problem of the density and irrelevance of the information is more difficult to address. Suggestions for change in this paper all involve adding rather than subtracting information. Consideration will be given to making the presentation of the information as clear as possible and this issue will be returned to at a future meeting.

3.7 An issue raised by some respondents was the accessibility of the guideline to those without internet access, particularly offenders in custody. A printable version of all guidelines will be available from the website and the office will continue to send hard copies of guidelines to those prisoners or other users who are unable to access the digital guidelines and who request them.

*The applicability of the guideline*

3.8 The text and online versions of the draft guideline consulted on had different wording on applicability. The online version says:

Following consultation, when a definitive guideline is produced it will apply to all offenders aged 18 and older, and to organisations who are sentenced on or after the effective date of this guideline, regardless of the date of the offence. [ ]



General principles to be considered in the sentencing of youths are in the Sentencing Council's definitive guideline: [Overarching Principles – Sentencing Children and Young People](#)

3.9 Whereas the version at Annex A says:

Following consultation, when a definitive guideline is produced it will apply to all individuals, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence. [ ]

When sentencing offenders aged under 18 courts should also refer to the Sentencing Council's definitive guideline, *Overarching Principles – Sentencing Children and Young People*.

3.10 It is difficult to see how the General guideline would be of much, if any, practical assistance in sentencing under 18s, especially as it would have to be read in conjunction with the Children and Young People guideline. The proposal is for the guideline to be applicable to adults and organisations only.

**Question 1: Does the Council agree that the General guideline should not be applicable to under 18s?**

*Step one*

3.11 Several respondents suggested that further guidance on identifying and applying analogous guidelines would be helpful. The underlined text at a) and b) are suggested additions.

**Question 2: Should the suggested text be added regarding analogous guidelines?**

3.12 Birmingham Law Society made the following comment:

We agree with the prohibition on taking into account draft sentencing guidelines. We disagree with the prohibition on taking into account sentencing guidelines that are not yet in force. Although this reflects recent Court of Appeal authority, it is our experience that courts were often assisted by referral to such guidelines, prior to the Court of Appeal guidance. Our preference is that courts ought to be able to have regard to published Guidelines prior to their implementation date, without them being binding.

**Question 3: Should courts be able to take into account definitive guidelines not yet in force?**

3.13 The Howard League suggested that the guideline should provide information of the effectiveness of sentencing:

While it is accepted that the Sentencing Council has no power to change the statutory purposes of sentencing, it does have a duty to provide sentencers with relevant information that will assist sentencers in applying them. We note that with

regard to “the reduction of crime (including its reduction by deterrence)” the courts should be provided with information about the effectiveness of different sentences in reducing crime, namely that there is no such evidence.

Research has shown that community sentences can be more effective than short prison sentences at reducing crime. Recent research on short sentences published by the Ministry of Justice showed that custodial sentences of under 12 months were associated with higher levels of reoffending than sentences served in the community and that reductions in reoffending associated with community orders were greater for people with larger numbers of previous offences.

#### 3.14 The CPS stated:

We suggest that explanations should also be provided for the five purposes of sentence at section 142 Criminal Justice Act 2003 to explain how they relate to Section 143(1) of the Criminal Justice Act 2003 which states that: ‘In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused’. That explanation will therefore focus on seriousness, aggravating and mitigating factors and how these considerations may result in a purpose of sentencing being preferred to another purpose.

#### **Question 4: Should the guideline seek to give guidance on the effectiveness of sentences or any further information on the purposes of sentencing?**

3.15 T2A (Transition to Adulthood) and the Howard League suggest that age/lack of maturity linked to the commission of the offence should be included at step one and a link made between reckless behaviour and immaturity. The MA note that some of the aggravating and mitigating factors that follow would more usually be considered at step one. WWF suggest that factors relating to role, planning, organisation etc should be considered in relation to culpability.

3.16 While it is clearly the case that many of the factors (and their expanded explanations) in step two in this guideline are likely to be relevant at step one, the unspecific nature of the guideline makes it impossible to choose which to ‘promote’ to step one. The suggested additional text (underlined) could clarify that courts can take into account offender characteristics in the assessment of culpability.

3.17 Wording could be added to refer sentencers to the aggravating and mitigating factors to assist in the assessment of culpability (and harm).

#### **Question 5: Should the suggested text be added? Should any further guidance be added to culpability?**

3.18 The guideline refers to Harm – Caused, risked or intended. The CPS point out that the statutory language is ‘any harm which the offence caused, was intended to cause or might foreseeably have caused’.

#### **Question 6: Would it be preferable to use the statutory wording for harm?**

3.19 The Association of Tenancy Relations Officers suggests that loss of the home or being in fear in the home should be examples of harm. Link (who represent wildlife and conservation charities) suggest adding an aggravating factor relating to cruelty to animals. if it was felt that it was not clear that suffering caused to animals was covered in the assessment of harm (the term psychological harm is not readily applicable to animals) additional wording could assist.

3.20 Several respondents suggested making reference to other impact statements at step one to ensure that harm is properly assessed for those offences where there is not an identifiable individual victim. Suggested additional text is shown underlined.

**Question 7: Should the explanation of harm include a wider range of examples of harm and/or should reference be made at step one to impact statements other than VPS?**

3.21 Birmingham Law Society note that there is no instruction to balance considerations of harm as there is with culpability. The Department of Health and Social Care suggests that examples of the range of levels harm should be provided (as has been done with culpability). This was also a strong finding from the road testing. A suggested table with additional text has been added.

**Question 8: Should the suggested text and table relating to harm be added?**

*Step two*

3.22 The Chief Magistrate and the Justices' Clerks' Society (JCS) suggested the inclusion of a statement that sometimes a fine resulting from a sentencing process may be lower than the fixed penalty. Suggested additional text is shown underlined.

**Question 9: Should the suggested text relating to fixed penalties be added?**

3.23 The Howard League and MA suggested that the additional information relating to community orders could contain more of the information in the Imposition guideline. The suggested items are:

- Community orders can fulfil all of the purposes of sentencing.
- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty.
- The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion.

- whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case

3.24 The content of the ‘drop down box’ on community orders is that used in all MCSG offences for which a community order is a possible sentence. It is an extract from the Imposition guideline (and includes a link to the Imposition guideline) and is designed to be of practical use to the sentencer. The difficulty is that the more additional information we include the less likely users are to look at anything but the table.

**Question 10: Should more information on community orders be included?**

*Aggravating factors*

3.25 The JCS suggest adding a statement that relevant previous convictions include offences committed in another member state and may include offences committed anywhere.

**Question 11: Should the additional point relating to convictions in another jurisdiction be made as suggested?**

3.26 The Assaults on Emergency Worker (Offences) Act 2018 will come into effect on 13 November 2018. This creates a statutory aggravating factor of ‘Offence was committed against an emergency worker acting in the exercise of functions of such a worker’ for the following offences:

1. Threats to kill;
2. Wounding with intent to cause grievous bodily harm;
3. Malicious wounding;
4. Administering poison etc;
5. Causing bodily injury by gunpowder etc;
6. Using explosive substances etc with intent to cause grievous bodily harm;
7. Assault occasioning actual bodily harm;
8. Sexual assault;
9. Manslaughter;
10. Kidnapping.

3.27 There are offence specific guidelines for most of these offences, so for the purposes of the General guideline this factor is only likely to apply to kidnap or offences relating to explosives or poison (4, 5, 6 and 10 in the list above). The proposal is to add the factor and explanation to the General guideline as set out at Annex A.

3.28 In addition, when the provision comes into force in November, the factor will be added to the digital version of the relevant offence specific guidelines. The explanation will be consulted on as part of the offence specific phase of this project.

**Question 12: Should the additional statutory aggravating factor and explanation be added as set out in Annex A?**

3.29 Several respondents raised an issue of the danger of double counting. There is a general caution against double counting at the top of the aggravating factors and at the top of the mitigating factors as well as specific notes for the following factors:

A6 'high level of profit',  
A11 'others put at risk of harm by the offending',  
A16 'offence committed on licence or post sentence supervision etc',  
A17 'offence committed in custody',  
A21 'Location and/or timing',  
A22 'Established evidence of community/ wider impact',  
A23 'Prevalence'.

3.30 It is also proposed to add a caution about double counting to factor A10 ('Victim was providing a public service' etc). Three suggestions to guard against double counting are:

1. The existing general warning against double counting could be formatted to make it more prominent.
2. The standard wording on double counting could be included in every expanded explanation.
3. Tailored wording on double counting could be added to individual factors as appropriate.

**Question 13: How should the issue of double counting be dealt with?**

3.31 The Chief Magistrate states:

I note that although the guideline refers to acting as part of a gang as an aggravating feature, it does not specify whether having a leading role in the gang is a factor to be taken into account, although it does list "acting under direction" in the mitigating factors.

3.32 In fact the wording does say 'the role of the offender will be a relevant consideration'. It may be helpful to give more guidance on role within the group. It has also been suggested that a reference to organised crime could be relevant. Suggested additional text is shown underlined.

**Question 14: Should any of the suggested additional text relating to offending as part of a group be added?**

3.33 Link suggest that where dogs are used in the commission of wildlife crime (such as poaching and badger persecution) they should be considered to be weapons. While the use of dogs in such situations could clearly be seen to be an aggravating factor (unless an

element of the offence) it may not be helpful to characterise this as 'use of a weapon'. It is therefore not proposed to include any other examples of weapons.

3.34 The CLSA suggest including consideration of 'whether or not a weapon has been made or adapted for use as a weapon as a factor. For example a bottle that has been smashed specifically for use as a weapon or a bottle filled with ammonia. Use of such items suggests planning and preparation for violence which would make an offence more serious'. Suggested additional text is shown underlined.

**Question 15: Should any further examples of weapons be added; should the suggested additional text be added?**

3.35 WWF suggested that factors relevant to planning in the context of wildlife crime include: 'a sophisticated and/or large-scale operation; offending in course of business/ defendant is professional dealer; evidence of prolonged activity; conspiracy to defraud buyers (by them unwittingly purchasing illegal goods); defendant shown to have knowledge of specific risks involved i.e. knows the species is endangered'. While some of the suggestions from WWF are too specific to wildlife crime to be of general relevance, it might be helpful to adopt others. Suggested additional text is shown underlined.

**Question 16: Should the suggested additional text relating to planning be added?**

3.36 There were suggestions for additional examples of offending for financial gain or the avoidance of costs. Link suggested that where offending is masked by legal trade (for example, where a pet shop trades, for the most part legally, but in part illegally by selling endangered species) or where financial gain accrues by not following lawful process (for instance, property developers who fail to follow lawful licensing procedures and whose activities impact on protected species and habitats). These suggestions from Link appear to be already covered by the concept of offending in a commercial context and failing to comply with regulations. (See also Question 32 in relation to the mitigating factor 'activity originally legitimate' below.) The Insolvency Service suggested 'failing to declare property to the Official Receiver or to a liquidator' as an example. While such a specific example would not be helpful, suggested additional text of a more general nature is shown underlined.

**Question 17: Should the suggested additional text relating to offending for financial gain be added?**

3.37 The CLSA suggested that a reminder about compensation would be helpful. The Residential Landlords Association (RLA) were concerned that 'the guideline should make in clear (in line with case law relating to confiscation) that only the economic benefit derived from unlawful activity should be added to the fine. Where the offender has breached a

regulatory requirement but the underlying activity remains lawful, care should be taken to identify what sum of money represents the benefit derived from the offence. Priority should be given to compensating the victims of an offence, whether this is achieved through a compensation order or making allowance for an anticipated Rent Repayment Order’.

3.38 To a degree the points raised by the RLA are covered by the wording ‘fair and proportionate’. Suggested additional text is shown underlined.

**Question 18: Should the suggested additional text relating to economic benefit be added?**

3.39 A magistrate suggested that reference should be made to obtaining financial information about the offender. Suggested additional text taken from the Environmental guideline is shown underlined.

**Question 19: Should the suggested additional text on obtaining information be added?**

3.40 Many of the points raised in relation to factor A5 also apply to factor A6.

**Question 20: Should the changes also be made to A6?**

3.41 The CLSA suggested adding a reference to different levels of trust as in the Theft guideline which has a high culpability factor of ‘breach of a high degree of trust or responsibility’ and a medium culpability factor of ‘breach of some degree of trust or responsibility’. Suggested additional text is shown underlined.

**Question 21: Should the suggested additional text regarding the level of trust be added?**

3.42 Link asked for clarification of what is meant by ‘victim’ in this factor and ask if it could include an animal. WWF suggested additional aggravating factors relating to victims:

1. endangered or critically endangered species;
2. specimens taken from particularly sensitive stock/areas;
3. human, animal or flora health adversely affected (e.g. animals injured or killed during shipment, flora destroyed, etc.);
4. evidence of cruelty or deliberate cruelty towards the animals involved

3.43 The assessment of harm at step one includes reference to the environment and animals and it is not clear that it would be helpful to add these factors to a general guideline.

**Question 22: Should any additional factors be added relating to vulnerability of animals or the environment?**

3.44 WWF suggested providing guidance relating to factor A13 that the more deliberate and sophisticated the conduct to conceal, the more weight should be attached to this factor. Birmingham Law Society suggested balancing this factor against the immaturity of the offender in appropriate cases. Baker J queried the reference to separate charges, noting that even if the offending was charged separately it would still be permissible to take it into account when assessing the totality of offending.

3.45 Suggested additional text to address these points is shown underlined

**Question 23: Should any of the suggested additional text relating to actions after the event be added?**

3.46 Similarly for factor A14 Birmingham Law Society suggested balancing this factor against the immaturity of the offender in appropriate cases. Suggested additional text is shown underlined

**Question 24: Should the suggested additional text relating to blame wrongly placed on others be added?**

3.47 The CPS noted that there was no reference to whether extensive compliance with a licence/order would mitigate the aggravating effect of an offence committed on licence etc. Suggested additional text is shown underlined. As with factor A14 above, the reference to being dealt with separately has been changed.

**Question 25: Should the suggested changes to the information on offence committed on licence etc be made?**

3.48 The CPS commented:

The explanation within the Overarching Principles guidance is clearer and we suggest that the first paragraph from that guidance succinctly outlines the limitations of this aggravating factor. That paragraph states

“The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type”.

3.49 Other respondents were broadly supportive of the explanation.

**Question 26: Should any change be made to the explanation of prevalence?**

*Mitigating factors*

3.50 The MA and the CLSA queried why the mitigation for a first offence / good character would not apply if the crime is particularly serious.



**Question 27: Should the qualification relating to the seriousness of the offence be removed?**

3.51 The Law Society suggested adding ‘separate from any guilty plea reduction at step four’ to the explanation on remorse as used in the next two mitigating factors. The guilty plea guideline states:

- The purpose of reducing the sentence for a guilty plea is to yield the benefits described above. The guilty plea should be considered by the court to be independent of the offender’s personal mitigation.
- Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should **not** be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.

**Question 28: Should the suggested wording in the explanation for remorse be added?**

3.52 The MA suggested that ‘limited awareness or understanding’ could relate to a lack of capacity on the part of the offender and that the court would require specialist advice to assess this. Other respondents were concerned that offenders could rely on this factor when they had chosen not to inform themselves of the law. Suggested additional wording to clarify this factor is shown underlined.

**Question 29: Should the suggested wording regarding limited awareness of the offence be added?**

3.53 There was some misunderstanding of the explanation regarding little or no financial gain, with one respondent suggesting that it might be relied on where gain was intended but did not materialise. It is therefore proposed to put the words ‘did not seek to gain financially’ in bold.

**Question 30: Should the suggested emphasis regarding financial gain be added?**

3.54 Several respondents who are involved in the prosecution of offences that typically take a long time to come to court were concerned about this factor and suggested additional wording such as ‘unless inherent in the investigation of the offence in question’. The Chief Magistrate suggested that a reduction that was unreasonable but short should not result in a reduction in sentence. Suggested additional wording is shown underlined.

**Question 31: Should the suggested wording regarding delay be added?**

3.55 Suggested wording is shown underlined to qualify the factor ‘activity originally legitimate’.

**Question 32: Should the suggested wording relating to activity that was originally legitimate be added?**

3.56 The information relating to the 'Age and/or lack of maturity' factor was welcomed by many respondents. The Howard League and T2A have produced a report 'Sentencing Young Adults'<sup>1</sup> in which they make the case for sentencing principles for young adults. A meeting with the Howard League clarified some of their comments and the suggested additional text shown underlined is in response to the points raised by them and T2A.

3.57 The suggested reference to the age range 18-25 has been added to references to this factor elsewhere in the guideline.

**Question 33: Should the suggested wording relating to age and immaturity be added?**

3.58 One respondent (who has also made the same point in response to the Arson and Criminal damage consultation) suggested that pregnancy should be a factor considered in mitigation. The suggestion is that pregnancy could have an effect on the suitability of a community order or the impact of custody and should therefore be considered at sentencing. She states that 'should a custodial sentence be considered for a pregnant defendant it should be compulsory that the defendant is provided a place at a Mother and Baby Unit'. Such a recommendation is beyond the remit of a sentencing guideline. Views are sought on whether the factor 'sole or primary carer for dependent relatives' would be applied to a pregnant offender and whether there is any need to explicitly deal with pregnant offenders in guidelines.

**Question 34: Should a separate factor or explanatory wording be added in relation to pregnant offenders?**

3.59 The MA and Magistrates' Leadership Executive raised issues relating to obtaining information about an offender where mental health issues are raised. More detailed information on this factor will be provided in due course by the separate overarching guideline. Some limited suggested additional wording is shown underlined.

**Question 35: Should the additional wording relating to obtaining reports form the Liaison and Diversion Team be added?**

**4 RISKS/IMPACT**

4.1 There was some criticism of the Council for the lack of a detailed impact assessment for this guideline. Some research has been done with sentencers during consultation to try to assess the likely impact of the guideline, but it remains impossible to quantify.

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<sup>1</sup> <https://howardleague.org/publications/sentencing-young-adults-making-the-case-for-sentencing-principles-for-young-adults/>

# General guideline

## For sentencing offences for which there is no offence specific sentencing guideline

### Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced it will apply to all individuals, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

When sentencing offenders aged under 18 courts should also refer to the Sentencing Council’s definitive guideline, *Overarching Principles – Sentencing Children and Young People*.<sup>1</sup>

#### Question 1

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<sup>1</sup> <https://www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/>

**STEP ONE – reaching a provisional sentence**

- a) Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):
- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
  - sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
  - definitive sentencing guidelines for analogous offences

The court will be assisted by the parties in identifying the above. **Question 2**

For the avoidance of doubt the court should **not** take account of any draft sentencing guidelines or definitive guidelines that are not yet in force. **Question 3**

- b) When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetic exercise. **Question 2**
- c) Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.
- The seriousness of the offence is assessed by considering:
- the **culpability** of the offender and
  - the **harm** caused by the offending.
- d) The initial assessment of harm and culpability should take no account of plea or previous convictions.

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence. **Question 4**


- the punishment of offenders
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

More information:


**Culpability** is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning. **Question 5**

- The court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence and offender characteristics.

- The relevance of factors will vary depending on the type of offending. Where a characteristic is inherent in the offence, the mere presence of that characteristic will not be determinative of the level of culpability.
- Deliberate or gratuitous violence, or damage to property, over and above what is needed to carry out the offence will normally indicate a higher level of culpability
- For offences where there is no requirement for the offender to have any level of intention, recklessness, negligence, dishonesty, knowledge, understanding or foresight for the offence to be made out, the range of culpability **may** be inferred from the circumstances of the offence as follows:

Highest level  Lowest level	Deliberate - intentional act or omission
	Reckless - acted or failed to act regardless of the foreseeable risk
	Negligent - failed to take steps to guard against the act or omission
	Low/no culpability - act or omission with none of the above features

- For offences that require some level of culpability (eg intention, recklessness or knowledge) to be made out, the range of culpability will be narrower. Relevant factors **may** typically include but are not limited to:

Highest level  Lowest level	High level of planning/ sophistication/ leading role
	Some planning/ significant role
	Little or no planning/ minor role

- These models of assessing culpability will not be applicable to all offences

**Harm – *caused, risked and/or intended***


**Question 6**

- There may be primary and secondary victims of an offence and, depending on the offence, victims may include one or more individuals, a community, the general public, the state, the environment and/or animal(s). In some cases there may not be an identifiable victim.
- An assessment of harm should generally reflect the overall impact of the offence upon the victim(s) and may include direct harm (including physical injury, psychological harm and financial loss) and consequential harm.
- When considering the value of property lost or damaged the court should also take account of any sentimental value to the victim(s) and any disruption caused to a victim’s life, activities or business.
- Where harm was intended but no harm or a lower level of harm resulted – the sentence will normally be assessed with reference to the level of harm intended.
- Where the harm caused is greater than that intended - the sentence will normally be assessed with reference to the level of harm suffered by the victim.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
- Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.
- A Victim Personal Statement (VPS) or other impact statement may assist the court in assessing harm, but the absence of a VPS should not be taken to indicate the absence of harm.

**Question 7**

- The court should balance these characteristics to reach a fair assessment of harm in the context of the circumstances of the offence

**Question 8**

Highest level  Lowest level	Very serious harm caused to individual victim(s) or to wider public/ environment etc
	Serious harm caused OR high risk of very serious harm
	Significant harm caused OR high risk of serious harm
	Low/ no harm caused OR high risk significant harm

The table should be used in conjunction with the notes above and may not be applicable to all offences.

**STEP TWO**

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

- Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.
- It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.
- When sentencing an offence for which a **fixed penalty notice [link to information below]** was available the reason why the offender did not take advantage of the fixed penalty will be a relevant consideration.
- **If considering a community or custodial sentence refer also to the *Imposition of community and custodial sentences* definitive guideline. [link to information below]**
- **If considering a fine – see information on fine bands [link to information below]**

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More information:

**Penalty notices** may be issued as an alternative to prosecution in respect of a range of offences. An admission of guilt is not a prerequisite to issuing a penalty notice. An offender who is issued with a penalty notice may nevertheless be prosecuted for the offence if he or she:

- asks to be tried for the offence; or
- fails to pay the penalty within the period stipulated in the notice and the prosecutor decides to proceed with charges.

In some cases of non-payment, the penalty is automatically registered and enforceable as a fine without need for recourse to the courts. This procedure applies to penalty notices for disorder and fixed penalty notices issued in respect of certain road traffic offences but not to fixed penalty notices issued for most other criminal offences

When sentencing in cases in which a penalty notice was available:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guideline (including the amount of any fine, which must take an offender’s financial circumstances into account), disregarding the availability of the penalty. In some cases this may result in a fine that is lower than the fixed penalty. **Question 9**
- where a penalty notice could not be offered or taken up for reasons unconnected with the offence itself, such as administrative difficulties outside the control of the offender, the starting point should be a fine equivalent to the amount of the penalty and no order of costs should be imposed. The offender should not be disadvantaged by the unavailability of the penalty notice in these circumstances.

Where an offender has had previous penalty notice(s), the fact that an offender has previously been issued with a penalty notice does not increase the seriousness of the current offence and must not be regarded as an aggravating factor. It may, however, properly influence the court’s assessment of the offender’s suitability for a particular sentence, so long as it remains within the limits established by the seriousness of the current offence.

More information - fines

	<u>Starting point</u>	<u>Range</u>
<b><u>Fine Band A</u></b>	<u>50% of relevant weekly income</u>	<u>25 – 75% of relevant weekly income</u>
<b><u>Fine Band B</u></b>	<u>100% of relevant weekly income</u>	<u>75 – 125% of relevant weekly income</u>
<b><u>Fine Band C</u></b>	<u>150% of relevant weekly income</u>	<u>125 – 175% of relevant weekly income</u>
<b><u>Fine Band D</u></b>	<u>250% of relevant weekly income</u>	<u>200 – 300% of relevant weekly income</u>
<b><u>Fine Band E</u></b>	<u>400% of relevant weekly income</u>	<u>300 – 500% of relevant weekly income</u>
<b><u>Fine Band F</u></b>	<u>600% of relevant weekly income</u>	<u>500 – 700% of relevant weekly income</u>

More information – community orders

**Question 10**

- The seriousness of the offence should be the **initial** factor in determining which requirements to include in a community order. Offence specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). See below for **non-exhaustive** examples of requirements that might be appropriate in each.
- At least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so. For further information see the [Imposition guideline](#).

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.

Low	Medium	High
<ul style="list-style-type: none"> <li>• Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender’s record means that a discharge or fine is inappropriate</li> <li>• In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary</li> </ul>	<ul style="list-style-type: none"> <li>• Offences that obviously fall within the community order band</li> </ul>	<ul style="list-style-type: none"> <li>• Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</li> <li>• More intensive sentences which combine two or more requirements may be appropriate</li> </ul>
<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 40 – 80 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for a few weeks</li> <li>• Exclusion requirement, for a few months</li> <li>• Prohibited activity requirement</li> <li>• Attendance centre requirement (where available)</li> </ul>	<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 80 – 150 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours for 2 – 3 months</li> <li>• Exclusion requirement lasting in the region of 6 months</li> <li>• Prohibited activity requirement</li> </ul>	<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 150 – 300 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for 4 – 12 months</li> <li>• Exclusion requirement lasting in the region of 12 months</li> </ul>

If order does not contain a punitive requirement, suggested fine levels are indicated below:

**BAND A FINE**

**BAND B FINE**

**BAND C FINE**



More information – custodial sentences

The approach to the imposition of a custodial sentence should be as follows:

**1) Has the custody threshold been passed?**

- A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.
- There is no general definition of where the custody threshold lies. The circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.
- The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.

**2) Is it unavoidable that a sentence of imprisonment be imposed?**

- Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.
- For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

**3) What is the shortest term commensurate with the seriousness of the offence?**

- In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender’s release.

**4) Can the sentence be suspended?**

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. **Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.** If not, a non-custodial sentence should be imposed.
- The following factors should be weighed in considering whether it is possible to suspend the sentence:

**Factors indicating that it would not be appropriate to suspend a custodial sentence**

- Offender presents a risk/danger to the public
- Appropriate punishment can only be achieved by immediate custody

**Factors indicating that it may be appropriate to suspend a custodial sentence**

- Realistic prospect of rehabilitation
- Strong personal mitigation

- History of poor compliance with court orders
- Immediate custody will result in significant harmful impact upon others

The imposition of a custodial sentence is both punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

### Pre-sentence report

Whenever the court reaches the provisional view that:

- the custody threshold has been passed; and, if so
- the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;

the court should obtain a pre-sentence report, whether verbal or written, **unless** the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.

**Magistrates:** Consult your legal adviser before deciding to sentence to custody without a pre-sentence report.

For further information and sentencing flowcharts see the guideline on [Imposition of Community and Custodial Sentences](#).

### Statutory aggravating factors

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

#### Short description:

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

#### More information:

### Guidance on the Use of Previous Convictions

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

**Question 11**

Section 143 of the Criminal Justice Act states that:

*In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, 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.*

1. Previous convictions are considered at step two in the Council's offence specific guidelines.
2. The primary significance of previous convictions is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences;
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type;
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders;
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence;
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is it should be proportionate and kept to the necessary minimum.
8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise;
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.

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Short description:

Offence committed whilst on bail

More information:

S143 (3) Criminal Justice Act 2003 states:

In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

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Short description:

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

More information:

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been aggravated by the relevant hostility.**
- **Where the element of hostility is core to the offending, the aggravation will be higher than where it plays a lesser role.**

**Increase in sentences for racial or religious aggravation**

s145(2) of the Criminal Justice Act 2003 states:

*If the offence was racially or religiously aggravated, the court—*

- (a) must treat that fact as an aggravating factor, and*
- (b) must state in open court that the offence was so aggravated.*

An offence is racially or religiously aggravated for these purposes if—

- at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**
- the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

*“membership”*, in relation to a racial or religious group, includes association with members of that group;

*“presumed”* means presumed by the offender.

It is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned above.

*“racial group”* means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

*“religious group”* means a group of persons defined by reference to religious belief or lack of religious belief.

**Increase in sentences for aggravation related to disability, sexual orientation or transgender identity**

s146 of the Criminal Justice Act 2003 states:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
- (ii) a disability (or presumed disability) of the victim, or
- (iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation,
- (ii) by hostility towards persons who have a disability or a particular disability or
- (iii) by hostility towards persons who are transgender.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section "disability" means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

Short description:

Offence was committed against an emergency worker acting in the exercise of functions of such a worker.

**Question 12**

More information:

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been so aggravated.**
- **Note this statutory factor only applies to certain violent or sexual offences as listed below which were committed on or after 13 November 2018.**
- **For other offences the factor 'Victim was providing a public service or performing a public duty at the time of the offence' can be applied where relevant.**

The Assaults on Emergency Worker (Offences) Act 2018 states:

**2 Aggravating factor**

(1) This section applies where—

(a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and

(b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

- (2) The court—
- (a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
  - (b) must state in open court that the offence is so aggravated.
- (3) The offences referred to in subsection (1)(a) are—
- (a) an offence under any of the following provisions of the Offences against the Person Act 1861—
    - (i) section 16 (threats to kill);
    - (ii) section 18 (wounding with intent to cause grievous bodily harm);
    - (iii) section 20 (malicious wounding);
    - (iv) section 23 (administering poison etc);
    - (v) section 28 (causing bodily injury by gunpowder etc);
    - (vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);
    - (vii) section 47 (assault occasioning actual bodily harm);
  - (b) an offence under section 3 of the Sexual Offences Act 2003 (sexual assault);
  - (c) manslaughter;
  - (d) kidnapping;
  - (e) an ancillary offence in relation to any of the preceding offences.

(4) For the purposes of subsection (1)(b), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.

- (5) In this section—
- “ancillary offence”, in relation to an offence, means any of the following—
    - (a) aiding, abetting, counselling or procuring the commission of the offence;
    - (b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence;
    - (c) attempting or conspiring to commit the offence;
  - “emergency worker” has the meaning given by section 3.

(6) Nothing in this section prevents a court from treating the fact mentioned in subsection (1)(b) as an aggravating factor in relation to offences not listed in subsection (3).

(7) This section applies only in relation to offences committed on or after the day it comes into force.

### **3 Meaning of “emergency worker”**

- (1) In sections 1 and 2, “emergency worker” means—
- (a) a constable;
  - (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
  - (c) a National Crime Agency officer;
  - (d) a prison officer;
  - (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer;
  - (f) a prisoner custody officer, so far as relating to the exercise of escort functions;
  - (g) a custody officer, so far as relating to the exercise of escort functions;

- (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services;
- (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both);
- (j) a person employed for the purposes of providing, or engaged to provide—
  - (i) NHS health services, or
  - (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

(2) It is immaterial for the purposes of subsection (1) whether the employment or engagement is paid or unpaid.

(3) In this section—

“custodial institution” means any of the following—

- (a) a prison;
- (b) a young offender institution, secure training centre, secure college or remand centre;
- (c) a removal centre, a short-term holding facility or pre-departure accommodation, as defined by section 147 of the Immigration and Asylum Act 1999;
- (d) services custody premises, as defined by section 300(7) of the Armed Forces Act 2006;

“custody officer” has the meaning given by section 12(3) of the Criminal Justice and Public Order Act 1994;

“escort functions”—

- (a) in the case of a prisoner custody officer, means the functions specified in section 80(1) of the Criminal Justice Act 1991;
- (b) in the case of a custody officer, means the functions specified in paragraph 1 of Schedule 1 to the Criminal Justice and Public Order Act 1994;

“NHS health services” means any kind of health services provided as part of the health service continued under section 1(1) of the National Health Service Act 2006 and under section 1(1) of the National Health Service (Wales) Act 2006;

“prisoner custody officer” has the meaning given by section 89(1) of the Criminal Justice Act 1991.

**Other aggravating factors:** (factors are not listed in any particular order and are **not** exhaustive)

**Question 13**

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

Short description:

A1. Commission of offence whilst under the influence of alcohol or drugs

More information:

- The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.

- In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction in making that assessment.
- An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

Short description:

A2. Offence was committed as part of a group or gang.

Question 14

More information:

The mere membership of a group (two or more persons) or gang should not be used to increase the sentence, but where the **offence was committed as part** of a group or gang this will normally make it more serious because:

- the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
- the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).

Culpability based on role in group offending could range from:

Higher culpability indicated by a leading role in the group and/or involvement of others through coercion, intimidation or exploitation, to

Lower culpability indicated by a lesser or subordinate role under direction and/or involvement through coercion, intimidation or exploitation.

Where the offending is part of an organised criminal network, this will make it more serious, and the role of the offender in the organisation will also be relevant.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending. **(See Question 33 below)**

Short description:

A3. Offence involved use or threat of use of a weapon

Question 15

More information:

- A 'weapon' can take many forms and may include a shod foot
- The use or production of a weapon has relevance
  - to the **culpability** of the offender where it indicates planning or intention to cause harm; and
  - to the **harm** caused (both physical or psychological) or the potential for harm.
- Relevant considerations will include:
  - the dangerousness of the weapon;
  - whether the offender brought the weapon to the scene, or just used what was available on impulse;
  - whether the offender made or adapted something for use as a weapon;
  - the context in which the weapon was threatened, used or produced.



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Short description:

A4. Planning of an offence

**Question 16**More information:

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
  - Planning may be indicated by the scale and sophistication of the offending
  - The greater the degree of planning the greater the culpability
- 

Short description:

A5. Commission of the offence for financial gain

More information:

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
  - examples would include, but are not limited to, dealing in unlawful goods, failing to disclose relevant matters to an authority or regulator, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
  - offending of this type can undermine legitimate businesses. **Question 17**
- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
  - avoided costs;
  - operating savings;
  - any gain made as a direct result of the offence.
- Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- In considering economic benefit, the court should avoid double recovery. Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty (see further step seven below)

**Question 18**
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**
- Obtaining financial information: In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary. It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial

circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

### Question 19

Short description:

A6. High level of profit from the offence

### Question 20

More information:

- A high level of profit is likely to indicate:
  - high culpability in terms of planning and
  - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- Where possible if a financial penalty is imposed it should remove any economic benefit the offender has derived through the commission of the offence including:
  - avoided costs;
  - operating savings;
  - any gain made as a direct result of the offence.
- Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**

Short description:

A7. Abuse of trust or dominant position

### Question 21

More information:

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. It would **not** generally include a familial relationship without a significant level of responsibility.
- The level of trust or responsibility that the offender has, will be a significant factor in assessing the degree to which any abuse of that trust or responsibility makes an offence more serious.

- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

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Short description:

A8. Gratuitous degradation of victim / maximising distress to victim

More information:

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to, posts of images on social media designed to cause additional distress to the victim (where not separately charged).

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Short description:

**Question 22**

A9. Vulnerable victim

More information:

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence).
- Other factors such as the victim being isolated, incapacitated through drink or being in an unfamiliar situation **may** lead to a court considering that the offence is more serious.
- The extent to which any vulnerability may impact on the sentence is a matter for the court to weigh up in each case.
- Culpability will be increased if the offender **targeted** a victim because of an actual or perceived vulnerability.
- Culpability will be increased if the victim is made vulnerable by the actions of the offender (such as a victim who has been intimidated or isolated by the offender).
- Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim).
- The level of harm (physical, psychological or financial) is likely to be increased if the victim is vulnerable.

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Short description:

A10. Victim was providing a public service or performing a public duty at the time of the offence

More information:

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
- the fact that someone is working for the public good merits the additional protection of the courts.

Care should be taken to avoid double counting where the statutory aggravating factor relating to emergency workers applies

**Question 13**

Short description:

A11. Other(s) put at risk of harm by the offending

More information:

- Where there is risk of harm to other(s) not taken in account at step one and not subject to a separate charge, this makes the offence more serious.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Short description:

A12. Offence committed in the presence of other(s) (especially children)

More information:

- This reflects the psychological harm that may be caused to those who witnessed the offence.
- The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.

Short description:

A13. Actions after the event including but not limited to attempts to cover up/ conceal evidence

**Question 23**

More information:

The more sophisticated the conduct, the more likely it is to increase the seriousness of the offence.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of such conduct.

Where any such ~~Unless this~~ conduct is the subject of separate charges, it should be taken into account when assessing totality at step six ~~to make the offence more serious.~~

Short description:

A14. Blame wrongly placed on other(s)

**Question 24**

More information:

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
- This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
- When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of such conduct.

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Short description:

A15. Failure to respond to warnings or concerns expressed by others about the offender's behaviour

More information:

Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.

This may particularly be the case when:

- such warning(s) or advice were of an official nature or from a professional source and/or
- the warning(s) were made at the time of or shortly before the commission of the offence.

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Short description:

A16. Offence committed on licence or post sentence supervision or while subject to court order(s)

Question 25

More information:

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Commission of an offence while subject to a **relevant** court order makes the offence more serious. ~~(where not dealt with separately as a breach of that order).~~
- The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration.
- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step six)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

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Short description:

A17. Offence committed in custody

More information:

- Offences committed in custody are more serious because they undermine the fundamental need for control and order which is necessary for the running of prisons and maintaining safety.
  - Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.
  - Care should be taken to avoid double counting matters taken into account when considering previous convictions.
-

Short description:

A18. Offences taken into consideration

More information:

Taken from the [Offences Taken into Consideration Definitive Guideline](#):

**General principles**

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

**Offences to be Taken into Consideration**

The court has discretion as to whether or not to take TICs into account. In exercising its discretion the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.

It is generally **undesirable** for TICs to be accepted in the following circumstances:

- where the TIC is likely to attract a greater sentence than the conviction offence;
- where it is in the public interest that the TIC should be the subject of a separate charge;
- where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
  - where the TIC attracts mandatory disqualification or endorsement and the offence(s) for which the defendant is to be sentenced do not;
- where the TIC constitutes a breach of an earlier sentence;
- where the TIC is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003, but the conviction offence is non-specified; or
- where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).

**Jurisdiction**

The magistrates' court cannot take into consideration an indictable only offence. The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

**Procedural safeguards**

A court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;

- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

## Application

The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive sentencing guidelines. No regard should be had to the presence of TICs at this stage.
2. Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.

The presence of TICs should generally be treated as an aggravating feature that justifies an adjustment from the starting point. Where there is a large number of TICs, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

3. Continue through the sentencing process including:
  - consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;
  - any reduction for a guilty plea should be applied to the overall sentence;
  - the principle of totality;
  - when considering ancillary orders these can be considered in relation to any or all of the TICs, specifically:
    - compensation orders;
    - restitution orders

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### Short description:

A19. Offence committed in a domestic context

### More information:

Refer to the [Overarching Principles: Domestic Abuse Definitive Guideline](#)

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Short description:

A20. Offence committed in a terrorist context

More information:

Where there is a terrorist element to the offence, refer also to the [Terrorism Offences Definitive Guideline](#)

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Short description:

A21. Location and/or timing of offence

More information:

- In general, an offence is not made more serious by the location and/or timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others). Care should be taken to avoid double counting.
  - Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
  - An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.
- 

Short description:

A22. Established evidence of community/ wider impact

More information:

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
  - For issues of prevalence see the separate guidance.
- 

Short description:

A23. Prevalence **Question 26**

More information:

- Sentencing levels in offence specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
- It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
- First, there must be evidence provided to the court by a responsible body or by a senior police officer.



- Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
  - Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
    - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
    - that the circumstances can properly be described as exceptional; **and**
    - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.
- 

**Factors reducing seriousness or reflecting personal mitigation** (factors are not listed in any particular order and are not exhaustive)

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm**

Short description:

M1. No previous convictions or no relevant/recent convictions

More information:

- First time offenders generally represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders attract a mitigated sentence (unless the crime is particularly serious).

**Question 27**

- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
  - When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.
  - Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.
-

Short description:

M2. Good character and/or exemplary conduct

More information:

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

**However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

**Question 27**

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Short description:

M3. Remorse

**Question 28**

More information:

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction at step four).

Lack of remorse should never be treated as an aggravating factor.

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Short description:

M4. Self-reporting

More information:

Where an offender has self-reported to the authorities, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction at step four).

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Short description:

M5. Cooperation with the investigation/ early admissions

More information:

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction at step four).

---

Short description:

M6. Little or no planning

More information:

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

**However**, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

---

Short description:

M7. The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

More information:

Whereas acting as part of a group or gang may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

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Short description:

M8. Involved through coercion, intimidation or exploitation

More information:

- Where this applies it will reduce the culpability of the offender.
  - This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
  - Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
  - This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.
- 

Short description:

M9. Limited awareness or understanding of the offence

Question 29

More information:

The factor may apply to reduce the culpability of an offender

- acting alone who has not appreciated the significance of the offence **or**
- where an offender is acting with others and does not appreciate the extent of the overall offending.

In such cases the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

This factor will not apply where an offender has wilfully avoided taking steps to understand the offence.

Where an offender lacks capacity to understand the full extent of the offending see the guidance under 'Mental disorder or learning disability' below.

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Short description:

M10. Little or no financial gain Question 30

More information:

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

Short description:

M11. Delay since apprehension

More information: Question 31

Where there has been an **unreasonable** delay in proceedings since apprehension **that is not the fault of the offender**, and which has had a detrimental effect on the offender, the court may take this into account by reducing the sentence.

Short description:

M12. Activity originally legitimate

More information: Question 32

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this **may** indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

Short description:

M13. Age and/or lack of maturity Question 33

More information:

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) may still be developing neurologically and consequently be less able to:

- evaluate the consequences of their actions
- limit impulsivity

- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood deprivation or abuse will affect development.

An immature offender may find it more difficult to cope with custody or to complete a community order.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Where the offender is a care leaver regard should be had to the effect of any sentence on the duties that the local authority has towards the offender.

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but taking into account the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

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Short description:

M14. Sole or primary carer for dependent relatives

**Question 34**

More information:

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. Where custody is unavoidable consideration of the impact on dependants may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

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Short description:

M15. Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment

More information:

Such conditions as may affect the impact of a sentence on the offender may justify a reduction in sentence.

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Short description:

M16. Mental disorder or learning disability

## Question 35

More information:

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms ‘mental disorder’ and learning disabilities’ should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger’s syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

1. the offender’s responsibility for the offence and
2. the impact of the sentence on the offender.

The court will be assisted by a PSR and, where appropriate, medical reports (including from the Liaison and Diversion Team) in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender’s responsibility for the offence. This may be because the condition had an impact on the offender’s ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
    - a relevant factor will be the degree to which a mental disorder or learning disability has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
    - in considering the extent to which the offender’s actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender’s ability to exercise self-control or to engage with medical services will be a relevant consideration.
  2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.
-

Short description:

M17. Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

More information:

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

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**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

**Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality guideline*.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders. The court will be assisted by the parties in identifying relevant ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.



**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**19 October 2018**  
**SC(18)OCT07 – Firearms paper 2**  
**Maura McGowan**  
**Sophie Klinger**  
**07976 300962**

## **1 ISSUE**

1.1 This is the third meeting to consider the firearms guideline. This paper (paper 2) asks the Council to consider the aggravating and mitigating factors for the possession offences. The culpability and harm models were covered in paper 1. References to annexes in this paper are the annexes to paper 1.

## **2 RECOMMENDATION**

- That the Council considers the aggravating and mitigating factors for the possession of prohibited weapons guideline;
- That the Council considers the aggravating and mitigating factors for the possession without a certificate guideline;
- That the Council considers the aggravating and mitigating factors for the possession by person prohibited guideline;
- That the Council considers the aggravating and mitigating factors for the carrying in a public place guideline.

## **3 CONSIDERATION**

3.1 There are four separate firearms guidelines covering possession offences:

1. Possession of a prohibited weapon (**Annex A**)
2. Possession without a certificate (**Annex B**)
3. Possession by a person prohibited because of previous conviction (**Annex C**)
4. Carrying a firearm in a public place (**Annex D**)

3.2 At the last meeting, the Council considered culpability and harm but did not discuss the aggravating and mitigating factors. Some revisions have been made to these factors following the September meeting. The factors are broadly grouped into offence-specific factors first, followed by offender-specific factors, although mitigating factors M1 and M2 relating to lack of previous convictions and good character have been retained first in the list to balance the first aggravating factor on previous convictions. There may be scope to

combine or omit certain factors to streamline the lists, but most factors have been included for this meeting to allow the Council to discuss them and give views on what it is most important to include.

*Guideline 1: Possession of a prohibited weapon – aggravating factors*

3.3 This guideline at **Annex A** covers possession, purchase or acquisition, without authority, of a prohibited firearm or ammunition under sections 5(1) and (1A). Subsections under (1) and (1A) list the various types of firearms and ammunition that are prohibited. The mandatory minimum sentence applies to specified subsections. It should be noted that section 5 prohibited firearms can be possessed lawfully, either under authorisation from the Secretary of State, or under an exemption from this authority (per section 5A), although this is tightly controlled. Sections 5 and 5A are at **Annex D**.

3.4 A3 is 'Offence was committed as part of a group or offender has contact with criminal associates, including through the purchase or supply of drugs (except where already taken into account at step one)'. This has been included as there was significant concern in the transcripts about firearms falling into criminal possession and being circulated between criminal associates, particularly in the context of drug offending. References to 'gang' have been omitted as this wording has been considered problematic. It has been limited to avoid double counting of factors considered as part of culpability and harm.

3.5 A4 'Commission of offence whilst under the influence of alcohol or drugs' has been included from the *Bladed Articles* guideline possession guideline, reflecting the increased risk of harm arising from possession of a weapon whilst under the influence.

3.6 A5 'Firearm/ammunition kept as part of a large-scale accumulation of weapons' has been included. There is significant law enforcement concern about offenders who accumulate large numbers of weapons in one location, sometimes in the hundreds, which makes them more of a target for theft. 'Large-scale accumulation' has been suggested instead of 'stockpile' to avoid disputes about whether small numbers of weapons constitute a stockpile.

3.7 A6 'Firearm modified to increase lethality and/or to conceal, or firearm under section 5(1)(b) able to be converted to live firing weapon' has been included because there is currently particular concern about converted firearms, and certain firearms that fire blanks or CS pellets so fall within section 5(1)(b) but are being converted at scale into live weapons.

3.8 A7 'Abuse of position of registered firearms dealer' has been included. The 'abuse of position' wording has been included to ensure this factor only applies where there has been abuse of the position as opposed to possession that is unconnected to the registered firearms dealing.

3.9 A8 'Offender prohibited from possessing weapon or ammunition...' has been included because many offenders are subject to a prohibition on firearms due to their previous convictions but are often not charged separately with an offence under section 21.

3.10 A9, A10 and A11 are adopted from the *Bladed Articles* guideline and most other guidelines.

3.11 Compared with the previous version seen by the Council in September, the following factors have been omitted after further consideration and/or to streamline the factors:

- 'Attempt to involve or implicate others in possession' – this factor was observed in transcripts but was not one of the most common factors considered to be aggravating, so has been removed.
- 'Significant degree of planning/premeditation' – again, this factor was not very prevalent in transcripts (reflecting the fact that although section 5 offences can involve purchase or acquisition, the majority of section 5 offences are for possession). Since it is less relevant for these offences it has been omitted.
- 'Attempts to conceal/dispose of evidence' – this was originally included from the bladed articles guideline, but on reflection it seems preferable to remove it. This is because generally efforts to reduce the accessibility and visibility of firearms, including by keeping it hidden, in fact reduce the seriousness of the offending, and depending on the circumstances, disposal can also be looked on favourably if it removes the weapon from circulation (though not if it leaves the weapon available for members of the public or other associates to come across).

*Guideline 1: Possession of a prohibited weapon – mitigating factors*

3.12 Factors M1, M2, and M10-M14 are adopted from the *Bladed Articles* guideline. They also feature in most other guidelines.

3.13 M3 'Firearm incomplete or incapable of being discharged' has been included because sometimes the firearm is not in working order and cannot be fired, for example because it is broken or rusted, or is missing a relevant part, and courts have regarded this as less serious than a fully-functioning weapon. This factor would also capture cases of stun guns that are not operational because they are de-charged. Under the previous wording of this factor, component parts were expressly excluded because they had attracted lower culpability under step one. This factor should now apply to component parts, since the new 'type of weapon' assessment does not distinguish between a complete weapon and a component part for culpability purposes. The wording has been amended accordingly.

3.14 M4 'Came into possession involuntarily' is a factor identified from transcripts, where courts have regarded as less serious those cases where the person was given the weapon (for instance as a gift) or came across it incidentally, for example found it abandoned in a public place.

3.15 M5 'Voluntary surrender of firearm/ammunition' has been included as a mitigating factor to address those occasional cases where the offender has recognised the need to take the weapon out of circulation and handed it in to the police.

3.16 M6 'No knowledge or suspicion of presence of firearm/ammunition': offences under section 1 (possession without a certificate), section 5 (possession of prohibited weapon) and section 19 (carrying in a public place) are strict liability. The offender need only know that he is in possession of something which is, in fact, a firearm; they need not know that the thing in question was a firearm.<sup>1</sup> There have been cases where the offender was in possession of a container, such as a bag or box, and they were unaware of what was in the container or thought it contained something innocent.<sup>2</sup> Transcripts have shown courts regarding this as a mitigating factor but only when the offender lacks even suspicion that the item is a firearm.

3.17 M7 'Unaware firearm/ammunition is prohibited': although ignorance that the item was prohibited will not afford a defence, transcripts have indicated it reduces culpability. It tends to occur in cases involving stun guns, disguised stun guns and pepper spray. In some cases the offender has purchased the item online or overseas and was unaware it is classified as a prohibited weapon in this country. This has been regarded as a mitigating factor in several of the transcripts sampled. There appears to be low public awareness about stun guns and pepper spray being classified as prohibited weapons.

3.18 M8 'Genuine mistake about whether covered by lawful authorisation' has been included because prohibited firearms and ammunition may occasionally be held under authority from the Secretary of State or certificate. It is expected that cases involving this factor would be rare, so it could be omitted if there is a desire to reduce the number of factors.

3.19 M9 'Held on behalf of another through coercion, intimidation, or exploitation': this was previously located in culpability and was moved to step two at Council's request. There were previously two separate factors referring to 'pressure, coercion, intimidation' and 'naivety/exploitation'. These have been combined into the one single factor. The current wording follows the Fraud guideline. Options for further simplifying this factor can be considered if the Council wishes.

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<sup>1</sup> Hussain [1981] 2 All ER 287, followed in Vann [1996] Crim LR 52. See Blackstone's at B12.43.

<sup>2</sup> Zahid [2010] EWCA Crim 2158; Price v DPP [1996] CLY 1469, following Bradish [1990] 1 QB 981.

3.20 Compared with the previous version the Council considered, the following factors have been omitted:

- 'Little or no planning': this had primarily been included to balance out the equivalent aggravating factor of significant planning/premeditation, which has now also been removed.
- 'Possession of very short duration': this factor was originally under harm, and then was moved to step two. Several members considered this factor was problematic and would not always constitute mitigation, depending on the circumstances. The Council may wish to discuss this factor further to decide whether it should be removed or retained.

**Question 1: Does the Council agree with the aggravating and mitigating factors for the possession of a prohibited weapon guideline?**

*Guideline 2: Possession without a certificate – aggravating and mitigating factors*

3.21 This guideline at **Annex B** covers the possession, purchase or acquisition of a firearm or ammunition under section 1(1), and possession of a shotgun under 2(1), without a certificate. The offences occur when the firearm, shotgun or ammunition is possessed, purchased or acquired without holding a certificate in force at the time, or otherwise than as authorised by the certificate, or (for ammunition) in quantities in excess of what is authorised. There is an aggravated form of the section 1(1) offence where the firearm is a converted firearm or a shortened shotgun, with a statutory maximum of seven rather than five years.

3.22 In general, the aggravating and mitigating factors for this guideline are the same as for the prohibited firearms guideline, but there are additional factors relating to different circumstances that may arise under the licensing regime. The key changes are as follows:

	<b>Aggravating factors</b>	<b>Mitigating factors</b>
<b>Added</b>	A12 Possession continued after certificate refused or revoked A13 Poor record of firearms compliance	M7 Genuine misunderstanding about terms or validity of certificate M8 Steps taken to obtain certificate M9 Certificate not obtained/renewed due to genuine oversight M10 Good record of firearms licensing compliance
<b>Removed/ amended</b>	Reference to 'firearm under section 5(1)(b)' omitted from A6 as not relevant	Genuine mistake about lawful authorisation (due to new factors above) Unaware firearm/ammunition is prohibited – removed as not relevant

**Question 2: Does the Council agree with the aggravating and mitigating factors for the possession without a certificate guideline?**

*Guideline 3: Possession by a person previously convicted*

3.23 This guideline at **Annex C** covers possession by persons prohibited from possessing a firearm or ammunition due to a previous conviction under section 21. Upon conviction, persons are prohibited from possession firearms for either five years or life depending on the length of the sentence. This guideline covers the offence that occurs when the prohibition is contravened.

3.24 These factors are generally the same as for the prohibited weapons guideline except for two changes. The aggravating factor relating to the prohibition on possession has been removed because it is part of the offence for this guideline. M8 is changed to 'genuine misunderstanding about terms of prohibition' (instead of 'genuine mistake about whether covered by lawful authorisation' from the prohibited weapons guideline). This factor is intended to address those cases where the offender did not understand they were prohibited from possession or the duration of the prohibition. Law enforcement stakeholders have highlighted that there are some cases, particularly where the sentence is suspended, where offenders are not made fully aware of the prohibition or its duration.

**Question 3: Does the Council agree with the aggravating and mitigating factors for the possession by person previously convicted guideline?**

*Guideline 4: Carrying a firearm in a public place*

3.25 This guideline at **Annex D** covers carrying of a firearm in a public place under section 19. It will replace the [existing guideline in the MCSG](#). Section 19 involves a person having with them in a public place: (a) a loaded shotgun; (b) an air weapon (whether loaded or not); (c) any other firearm together with ammunition for it; or (d) an imitation firearm. There is a defence of lawful authority or reasonable excuse. The mandatory minimum sentence applies where the firearm is a specified prohibited weapon from section 5(1) or (1A).

3.26 The aggravating and mitigating factors are the same as for the other guidelines. Since there may be lawful authority to carry a firearm in a public place, mitigating factor M8 'Genuine mistake about whether covered by lawful authorisation' has been retained (consistent with the possession of prohibited weapons guideline).

**Question 4: Does the Council agree with the aggravating and mitigating factors for the carrying in a public place guideline?**