

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

**19 October 2018**  
**SC(18)OCT07 – Firearms paper 2**  
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## **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?**