

21 February 2019

Dear Members

Meeting of the Sentencing Council – 1 March 2019

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 1 March 2019 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(19)MAR00 |
| ▪ Minutes of meeting held on 25 January | SC(19)JAN01 |
| ▪ Action Log | SC(19)MAR02 |
| ▪ Public Order | SC(19)MAR03 |
| ▪ Arson/Criminal Damage | SC(19)MAR04 |
| ▪ Firearms 1 | SC(19)MAR05 |
| ▪ 10 year anniversary | No paper |
| ▪ Public attitudes and communication strategy | No paper |
| ▪ Firearms 2 | SC(19)MAR06 |
| ▪ Bladed article/offensive weapon | SC(19)MAR07 |

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.

Best wishes



Steve Wade

Head of the Office of the Sentencing Council

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COUNCIL MEETING AGENDA

1 March 2019
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 – 11:00 | Public Order - presented by Lisa Frost (paper 3) |
| 11:00 – 12:00 | Arson - presented by Mandy Banks (paper 4) |
| 12:00– 13:00 | Firearms 1 - presented by Sophie Klinger (paper 5) |
| 13:00 – 13:30 | Lunch |
| 13:30 – 13:45 | 10 th year anniversary - presented by Emma Marshall and Phil Hodgson |
| 13:45 – 14:15 | Public Attitudes work and Communications Strategy - presented by Phil Hodgson and Emma McKay (Comres) |
| 14:15 – 15:15 | Firearms 2 - presented by Sophie Klinger (paper 6) |
| 15:15 – 15:45: | Bladed article/offensive weapon - presented by Ruth Pope (paper 7) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

25 January 2019

MINUTES

Members present:

Tim Holroyde (Chairman)
Rob Butler
Mark Castle
Rosina Cottage
Rebecca Crane
Rosa Dean
Heather Hallett
Max Hill
Maura McGowan
Sarah Munro
Alpa Parmar
Beverley Thompson

Apologies:

Julian Goose

Representatives:

Vanessa Watling for the Lord Chief Justice (Head of Lord Chief Justice's Criminal Justice Team)
Phil Douglas for the Lord Chancellor (Director, Offender and Youth Justice Policy)

Members of Office in attendance:

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

1. MINUTES OF LAST MEETING

- 1.1. The minutes from the meeting of 14 December 2018 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman informed the Council that he had recently held an introductory meeting with Rory Stewart MP, the minister with responsibility for sentencing.

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

- 3.1 The Council considered firearms guidelines on possession with intent offences, covering possession with intent to endanger life (section 16), possession with intent to cause fear of violence (section 16A), use of firearm to resist arrest (section 17(1)), possession while committing a Schedule 1 offence (section 17(2)), and carrying a firearm with intent to commit an indictable offence (section 18). It was agreed that the section 16 and 16A offences should each have a separate guideline, and the section 17 and 18 offences could all be grouped within one guideline.
- 3.2 Culpability and harm models were considered. The Council agreed to adopt broadly the same culpability and harm models as used in the possession guidelines. The culpability factors were discussed and some revisions will be made to individual factors. Factors relating to coercion and acting under direction were considered; it was agreed these should remain at step two.
- 3.3 The Council considered the factors in harm; these were similar to those in the possession guidelines with additional factors relating to physical and psychological harm. Minor revisions were agreed to the wording.
- 3.4 The Council agreed to establish a working group to consider the firearms guidelines in more detail between Council meetings.

4. DISCUSSION ON ARSON/CRIMINAL DAMAGE – PRESENTED BY STEVE WADE, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council discussed consultation responses to the draft criminal damage guidelines, including the racially or religiously aggravated version of the offence, and the threats to destroy or damage property draft guideline.
- 4.2 The Council also noted the work that was carried out to explore the guidelines with sentencers. As a result of the discussion the Council agreed a small number of amendments and changes to wording. Sentence levels across all the offences will be discussed at the next Council meeting.

5. DISCUSSION ON PUBLIC ORDER – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Council considered consultation responses and research findings for the draft guidelines for riot and violent disorder. Based on consultation responses and research findings the Council agreed a number of changes to the draft guidelines. The culpability factor referring to a 'ringleader' in both guidelines was amended to 'instigator'.
- 5.2 The Council agreed that for riot offences culpability category B should be reworded to capture all cases not including a category A factor, rather than listing factors describing a riot incident. The harm model for the riot guideline was also amended, retaining the same factors and categories but clarifying that the highest harm category required multiple or extreme examples of the factors included.
- 5.3 The Council agreed that additional wording relating to increasing or reducing the starting point for relevant aggravating and mitigating factors should be removed in both guidelines. For violent disorder, no other culpability factors were amended.
- 5.4 The Council agreed to include an additional high harm category to capture cases involving extreme or multiple harm factors, to provide for very serious cases. This reflected updated statistics which highlighted a relatively high proportion of pre-guilty plea sentences above the draft guideline's highest starting point.

6. DISCUSSION ON EXPANDED EXPLANATIONS IN OFFENCE SPECIFIC GUIDELINES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council discussed the approach to applying expanded explanations of aggravating and mitigating factors to offence specific guidelines and agreed to consult on the detailed proposals. The Council also agreed to consult on whether the General guideline should be treated as an overarching guideline to replace the existing Seriousness guideline produced by the Sentencing Guidelines Council in 2004.
- 6.2 The Council considered a policy for making future changes to guidelines and agreed that this should be published on the Council's website.

7. DISCUSSION ON DRUG OFFENCES – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL

- 7.1 The Council discussed the guideline for possession offences under the Misuse of Drugs Act 1971, which it was agreed is working broadly as intended. The Council agreed some minor changes to the guideline, including how the guideline should make reference to community orders and how to deal with low level importation offences currently included within the possession guideline.

- 7.2 The Council considered the main offences under the Psychoactive Substances Act 2016 for the first time. It agreed that the approach to the assessment of culpability, and the aggravating and mitigating factors, should be closely based on that in the comparable Misuse of Drugs Act offences, with some small changes to take into account the differences in the legislation. The consultation on the draft guideline will seek views on whether there are any other differences between the offences which a guideline needs to take into account.
- 7.3 The approach to the assessment of harm for these Psychoactive Substances Act offences will be considered at a future meeting.

8. DISCUSSION ON PUBLICATION OF THE ROBBERY ASSESSMENT – PRESENTED BY SARAH POPPLETON, OFFICE OF THE SENTENCING COUNCIL

- 8.1 The Council agreed to publish the assessment of the robbery guideline's impact and implementation in February 2019. The Council noted the importance of making it clear that this report covers adult offenders only. In the light of these findings the Council agreed to put consideration of possible revision of this guideline on the medium to long-term work plan.

ACTION AND ACTIVITY LOG – as at 21 February 2019

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 27 July 2018					
1	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.	Pamela Jooman	ACTION ONGOING- It has been determined that any information available in the reports is likely to be limited (in terms of both coverage and detail), and would require a large amount of resource to extract. SC A&R are instead investigating other sources of data and working with MoJ colleagues to determine what information may be available.	
SENTENCING COUNCIL MEETING 28 September 2018					
2	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		ACTION CLOSED: C & C sub group to meet on 26 February.
SENTENCING COUNCIL MEETING 25 January 2019					
3	Firearms	Firearms working group to be established, comprising Council members LJ Holroyde, Mrs Justice McGowan, HHJ Sarah Munro, Max Hill QC (or nominee), and relevant SC staff.	Sophie Klinger		ACTION CLOSED: Working group met on 11 February and will continue to meet as necessary.

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

1 March 2019
SC(19)MAR03 – Public Order
Sarah Munro & Rebecca Crane
Lisa Frost
0207 071 5784

1 ISSUE

1.1 This meeting requires consideration of consultation responses to the draft guidelines for Public Order offences.

2 RECOMMENDATION

2.1 The Council is asked to;

- consider points raised in consultation for the draft guideline for affray and;
- agree revisions to the definitive version of the guideline.

3 CONSIDERATION

3.1 As was the case for the guidelines discussed at the last meeting, there were a limited number of responses which were balanced and useful in suggesting changes which may be required to the draft affray guideline. Such responses were received from the Criminal Bar Association, CPS, District Judge Legal Committee, HM Circuit Judges, Law Society, Magistrates Association and London Criminal Courts Solicitors Association.

3.2 **Annex A** includes the draft guidelines which were subject to consultation. A summary of decisions made in the development of each guideline is included in this paper, and to further assist members not present during the development stage a copy of the consultation document which provided the rationale for the content of the guideline is provided at **Annex B**. Road testing of the guideline was undertaken during the consultation period. Road testing findings are included at **Annex C** and have informed or supported some of the changes proposed in this paper.

3.3 The offence of Affray falls between violent disorder and the s4 offence of threatening behaviour, and shares very similar elements with violent disorder, in that it requires the use or threat of unlawful violence towards another and conduct such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

3.4 Section 3 of the Public Order Act provides for the offence of Affray and states that;

(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places.

Culpability factors

3.5 The principle that the sentence should relate to the overall incident and not the offender's individual role in an incident does not apply to the offence of affray as it does for riot and some cases of violent disorder. As the offence requires the use or threatening of unlawful violence, the factors agreed reflect gradations of this type of conduct.

3.6 Of all the questions asked in consultation regarding the Affray guideline, the question as to whether respondents agreed with culpability factors elicited most responses. While there was broad approval of the culpability factors, some issues were raised.

3.7 The CBA thought that the guideline should be clearer that the individual's role in an offence is key to sentencing an affray, unlike in riot and some cases of violent disorder;

The guidelines should make it clear that offenders convicted of involvement in the same offence of violent disorder and affray, can be sentenced differently. In other words, individual involvement is more important when sentencing for violent disorder and affray than it is when sentencing for riot. The CBA respectfully suggests that this should be reflected in some way in the culpability and harm assessments for violent disorder and affray. - CBA

Due to the potential for a person acting alone to be convicted of affray as well as multiple offenders, the factors were drafted to provide for individual application. Other respondents including the DJ Legal Committee noted this and approved of the way factors are drafted;

This is an offence which is routinely tried and sentenced in magistrates' and youth courts. The committee endorses the principles set out in the preamble to culpability factors, in so far as that the sentence should relate to the incidence as it bears with riot and violent disorder but rather reflecting the gradation of conduct. This reflects the different nature of elements required to prove the different charges. Similarly, the committee agree with the approach to culpability factors and the rationale therein. – DJ Legal Cttee

3.8 The CBA went on to note that;

The culpability factors would be simpler if culpability B stated 'culpability A and C factors not present'. - CBA

However, other respondents including HM Council of Circuit Judges and the DJ Legal Cttee approved of the categorisations;

The categorisation of culpability into A, B and C as suggested provides flexibility for sentences whilst recognising the many ways in which this offence can be committed. Again, the committee concurs with the approach proposed. - DJ Legal Cttee

'A', 'B' and 'C' cover all reasonably anticipated scenarios of 'culpability' – HM Circuit Judges

3.9 The category B factor 'threat of weapon (whether or not produced)' prompted the following comments from the LCCSA;

The committee was genuinely split upon whether or not a weapon should actually be produced in order for offence to fall into the Culpability B bracket. One view was that it was reasonable for an offence to be placed into this category even if a weapon was not produced because this would be in keeping with the essence of an affray i.e. the intention to cause fear of serious violence, and a person of reasonable firmness present at the scene would undoubtedly feel more afraid when encountering a threat of the use of a weapon. The counter view was that if a weapon is not produced then a defendant could be treated more severely for issuing what amounts to a purely empty threat. The committee was unable to resolve the impasse.- LCCSA

The MA thought the 'whether or not produced' element of the factor should be left to the discretion of sentencers;

In the culpability B factor 'threat of violence by any weapon (whether or not produced)' we would suggest that 'whether or not produced' is not required, as it is appropriate to allow sentencers to decide how valid the threat was and therefore apportion the appropriate weight.- MA

3.10 As noted by the LCCSA, the precise rationale for the factor applying whether or not a weapon is produced in a threat situation relates to the causing of fear; the very essence of affray. The Council debated this issue in developing the guideline, and decided that the culpability in intending to cause fear was the same whether the weapon was produced or not. This factor was present in a number of cases analysed where offenders stated they had a weapon upon their person which they would use. Once such case involved an offender giving the victim his telephone number then wishing his number to be deleted from the victim's phone, so he grabbed at the victim's phone and threatened him with a knife which he stated was in his pocket but was not produced. Similar distinctions in threats with weapons not produced have been included in other guidelines such as robbery, although

placement of factors differ in that guideline to reflect the different nature of the involvement of a weapon in robbery. The Council are asked to consider if the factor should be retained as worded, or if the MA's suggestion should be accepted. The risk of removing the wording to provide discretion is that inconsistency of application of the factor may occur. However, it may be preferable to provide discretion for sentencers in determining whether application of the factor is appropriate to avoid disproportionate categorisations in cases where an offender issues an empty threat (such as threatening to go and get a weapon rather than stating they have one) which may not instil the same level of fear for a victim as a produced weapon.

Question 1: Should the wording (whether or not produced) be removed from the culpability factor 'threat of violence by any weapon'?

3.11 The Law Society questioned the wording of the culpability A factor 'intention to cause fear of serious violence', believing this should be clarified as fear caused to a specific identifiable victim;

In the affray guideline discussion, the paper says that 'intention to cause fear of very serious violence' is intended to capture cases where an innocent victim is on the receiving end of the threats, rather than those cases where an equally enthusiastic opponent in a fight is concerned; with the case analysis showing the latter attracts a lesser sentence than the former. We are not sure that the suggested wording will succeed in establishing this distinction and would suggest instead 'intention to cause victim to fear very serious violence.'

3.12 The DJ Legal Committee approved of the factor as worded, stating;

The guidelines recognise that intention to cause fear of very serious violence can often be a feature of this offence and the guidelines should reflect this. The committee is in full agreement with this approach.

3.13 In drafting the factor it was intended to apply to situations where an individual was put in fear of serious violence, as noted in the consultation discussion at Annex B. Road testing specifically sought to test if this factor was applied to the type of scenario tested, and as worded it was applied consistently and as expected in most cases. However there were specific identifiable victims in the scenario tested. There could be benefit in including the reference to victim, as this would remove the possibility of an individual who behaves aggressively, perhaps in a public place, towards no specific individual from being categorised at the highest level of culpability.

Question 2: Does the council agree that the factor 'intention to cause fear of very serious violence' should be amended to 'intention to cause victim to fear very serious violence' as suggested by the Law Society?

3.14 Road testing did highlight issues with the wording of some culpability factors, with Judges querying what is meant by 'sustained' and 'minimal.' There was evidence of some inconsistency in application of factors, with one Judge in the bouncer fight scenario assessing the incident as sustained, and two finding the violence used as minimal. Other judges testing the scenario apparently balanced the factors and found culpability to fall between the two. While the exercise was small scale and tested with only 7 judges, this could be indicative of the guideline's potential to be applied inconsistently. The use of the word sustained has recently been considered in revising the assault guideline, where 'prolonged' has been included instead. Similarly substituting sustained for prolonged in the affray guideline may clarify the factor for sentencers. It is not thought that the factor referencing 'minimal' is as problematic, although this could be further qualified by expanding the factor to read 'threat or use of minimal or low level violence'.

Question 3: Does the council wish to reword the factors relevant to level of violence by changing 'sustained' to 'prolonged' in culpability A and adding low level to the culpability C factor so it reads as '*threat or use of minimal or low level violence*'?

Harm factors

3.15 It was agreed in developing the guideline that harm in these offences will be fear/distress or physical injury, or both to varying degrees, which is reflected in factors. Nearly all respondents approved of the harm factors, although one individual respondent doubted the relevance of the lowest harm category believing that harm would be caused in every case;

I do agree, but I do not think there should be a Harm Category 3 - if there is very little harm caused to anyone, then the charge of Affray then becomes irrelevant. Affray creates victims and causes harm to them - in every case. We need to reflect that in this approach. – Individual respondent (Probation Service)

This may be a valid point in that it could be unlikely affray would be charged in cases where minimal fear or distress is caused and little or no physical injury eventuates. However, as the offence can still be committed if others are not present the lower harm category will be relevant in some cases. The lowest harm category was also applied in one of the road tested scenarios where harm was found to be of a low level.

An alternative option could be to reword category 3 harm to 'No substantial physical harm/fear/distress caused.' This may increase the threshold for a category 2 categorisation and guard against minimal use of category 3.

Question 4: Does the Council wish to rephrase the category 3 harm factor?

3.16 Road testing highlighted that there was some variation in harm categorisation for one of the scenarios. The harm included in the scenario tested was deliberately low level to identify which category sentencers used. While there was variation in categorisation, this is likely to be attributable to the limited description of harm in the scenario. In a real case more detail of injuries would be available, and given the overwhelming approval for the approach to assessing harm by respondents and the proposed amendment to category 3 it is not thought that the harm factors require further amendment.

Question 5: Does the Council agree the remaining harm factors should be retained as in the draft guideline?

Sentence levels

3.17 **Annex D** includes a sample of cases analysed in developing the guideline. It was noted that the highest sentences in affray offences are attracted where weapons are used to inflict or threaten violence, there is a serious and malicious intention to cause fear of violence, and very serious or sustained violence is involved in an offence. A high proportion of affray cases involve drunken group violence or fighting between groups. Depending on the level of violence used and harm involved, these cases tend to attract sentences around the middle of the statutory maximum of three years imprisonment. Lower level sentences are imposed where no weapons are involved and threat or use of violence is minimal.

3.18 For the most serious offences, the draft guideline sentences were reflective of current sentencing practice which cases illustrated were broadly consistent and attract starting points of two years or more. However, other draft sentence levels were in some places slightly lower than cases illustrated current sentencing practice to be (eg; Bent and Johnson), in the limited case sample analysed. The starting points and ranges included were thought to be proportionate to violent disorder, and provide for non-custodial penalties to be imposed in offences of lower seriousness.

3.19 The majority of respondents had no observations relating to sentences, and thought they were appropriate. An exception was the DJ legal Committee, who disagreed that a fine should be within the range for the lowest category of offence;

'In the hierarchy of Public Order Offences affray is implicitly serious as it requires the use or threat of unlawful violence in a public place.

It is hard to envisage a conviction for Affray where a sentence of a fine would be commensurate with the offending. Any case where the appropriate sentence is a fine should be properly charged under Section 4 of the POA 86 and not Section 3 of the POA 86. It follows therefore that the appropriate range for offences falling into category 3C should be a low-level community order and not a fine.' – DJ Legal Cttee

3.20 Updated statistics for sentence distribution for Affray are as follows;

Year	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with
2013	0%	2%	2%	26%	36%	34%	1%
2014	0%	2%	2%	20%	42%	32%	1%
2015	0%	2%	2%	20%	43%	32%	1%
2016	0%	2%	2%	19%	41%	34%	2%
2017	0%	1%	1%	19%	40%	35%	4%

3.21 While the proportion of fines imposed is very low, in developing the guideline it was agreed that for a very low level offence a fine should be available, as it is in the existing MCSG guidance for affray;

Examples of nature of activity	Starting point	Range
Brief offence involving low-level violence, no substantial fear created	Low level community order	Band C fine to medium level community order
Degree of fighting or violence that causes substantial fear	High level community order	Medium level community order to 12 weeks' custody
Fight involving a weapon/throwing objects, or conduct causing risk of serious injury	18 weeks' custody	12 weeks' custody to Crown Court

3.22 Current statistics for proportions and distribution of immediate custodial sentences are as follows (estimated, prior to any reduction for guilty plea);

Sentence length band ²	Number of offenders sentenced to immediate custody					Proportion of offenders sentenced to immediate custody				
	2013	2014	2015	2016	2017	2013	2014	2015	2016	2017
Up to and including 6 months	141	105	147	141	114	12%	9%	14%	14%	12%
6 - 12 months	353	336	328	362	262	31%	30%	30%	35%	28%
12 - 18 months	340	381	337	294	311	30%	34%	31%	29%	33%
18 months – 2 years	170	179	160	112	132	15%	16%	15%	11%	14%
2 - 2.5 years	89	77	61	72	63	8%	7%	6%	7%	7%
2.5 - 3 years	50	39	49	45	52	4%	3%	5%	4%	6%

At the time of developing the guideline statistics for offences sentenced in 2016 illustrated that 75% of offenders received immediate or suspended custodial sentences and 19% received community orders. These proportions remained the same in 2017. Sentences of more than six and less than or equal to 18 months were the most frequently imposed sentences in 2016. Updated statistics indicate a shift towards longer custodial sentences in 2017, which could be attributable to the types of cases coming before the courts. It is not proposed sentences be revised from the draft levels based on 2016 statistics, and the

evaluation of the guideline will consider if the guideline addresses the recent upward trend and stabilises sentences.

3.23 No issues were identified with sentences in road testing of the draft guideline, and it is not proposed sentence levels are changed from the draft version.

Question 5: Does the Council agree to retain sentences included in the draft guideline?

Aggravating and Mitigating factors

3.24 The consultation sought views on whether the aggravating and mitigating factors were appropriate. Respondents overwhelmingly approved of the factors included, although the MA suggested some amendments or additions;

An aggravating factor of targeting vulnerable people may be useful as distinct from cases where a child or vulnerable person is present. For s4, s4A and s5 offences the following aggravating factor is included: 'victim is targeted due to a vulnerability (or a perceived vulnerability)' and so we would suggest that this should be inserted here for consistency across offences. - MA

The factor was specifically included in the s4, 4A and 5 offences as it was thought to have particular relevance as these offences are usually committed against specific individuals. Analysis of affray cases did not identify this as a particular issue, and rather than increase aggravating factors it is thought the aggravating factor relevant to vulnerability will capture any cases where it is relevant.

The MA also suggested an aggravating factor be included for affray to achieve consistency with some other Public Order draft guidelines;

In addition to 'threats or violence directed towards public servants in the course of their duty' we would suggest that 'injury to animal carrying out public duty' be included. This would be consistent with the guidelines for riot and public disorder. - MA

Again, while relevant to riot and violent disorder given the increased likelihood of police dogs and horses being used in restoring order, this factor was not found to have specific relevance in affray cases so to avoid increasing aggravating factors it is thought it should not be included.

3.25 The MA also proposed the mitigating factor relating to mental disorder or learning disability should not be restricted to being applicable where it relates to the commission of the offence;

The heading for mitigating factors is: 'Factors reducing seriousness or reflecting personal mitigation'. With regard to mental disorders/learning disability the mitigating factor is defined as 'mental disorder or learning disability where linked to commission of offence'. This should

reflect the age/lack of maturity mitigation point which is 'age and/or lack of maturity where it affects the responsibility of the offender' and so we would suggest that the wording be amended to 'mental disorder or learning disability where it affects the responsibility of the offender or where it is linked to commission of offence' – MA

This factor has been included somewhat inconsistently across guidelines in the past, with different thresholds applied depending on whether it is included at step one or step two. Since drafting the public order guidelines the Council has given greater consideration to how an offender may be affected by a mental disorder or learning disability, and the mental health and general guidelines include enhanced guidance as to the extent of applicability of the factor in this complex area. It is proposed that the qualifying wording 'where related to the commission of the offence' be removed and the factor expressed simply as 'mental disorder or learning disability'. This would be consistent with how the factor is included at step two in many other guidelines.

Question 6: Does the Council agree that the mitigating factor should be expressed as 'mental disorder or learning disability' without the qualifying 'where linked to the commission of the offence'?

3.26 HM Circuit Judges disapproved of one of the mitigating factors;

'No members of public present other than those participating in violence' should not always amount to a factor 'reducing seriousness or reflecting personal mitigation'. The absence of members of the public may be a matter of pure chance that does not always reduce the seriousness of the offending behaviour. – HM Circuit Judges

It is not proposed this factor be removed as it was relevant in a number of cases analysed, and as a step two factor sentencers will take it into account where appropriate. As incidents occurring in busy areas can aggravate an offence, including this mitigating factor ensures a proportionate and balanced approach.

3.27 An issue which was identified in road testing was the lack of provocation being available as a mitigating factor. A number of judges stated that in the bouncer scenario they thought it was highly relevant and they would take it into account in sentencing. Due to the potential for affray to be charged in circumstances similar to assault, it is thought the same factor as included in the assault guideline 'significant degree of provocation' should be included.

Question 7: Does the Council agree that 'significant degree of provocation' should be included as a mitigating factor?

4 ISSUES

4.1 There is currently existing guidance in MCSG for sentencing affray cases but no guidance in the Crown Court. Consultation responses broadly welcomed the development of guidelines for the range of public order offences.

5 RISKS

The draft resource assessment did not anticipate any inflationary or deflationary impacts of the guideline, although it is more difficult to assess sentencing behaviour in the absence of any existing guidelines for these offences, as pre and post factor application cannot be considered. Any revisions to the draft guidelines will be considered as part of the final resource assessment to assess whether an impact on current sentence practice is anticipated.

Affray

Public Order Act 1986 (section 3)

Triable either way
Maximum: 3 years' custody

Offence range: Band C fine – 2 years' 6 months' custody

This is a violent specified offence for the purposes of section 226A of the Criminal Justice Act 2003

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 demonstrated by one or more of the following:

A	<ul style="list-style-type: none"> • Targeting of individual(s) by a group • Use of a weapon to inflict violence • Use of serious or sustained violence • Intention to cause fear of very serious violence
B	<ul style="list-style-type: none"> • Threat of violence by any weapon (whether or not produced) • Threat or use of violence falling between levels in categories A and C
C	<ul style="list-style-type: none"> • Threat or use of minimal violence • The offender acted in self-defence or in fear of violence (where not amounting to a defence)

Harm

The level of **harm** is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.

Category 1	<ul style="list-style-type: none"> • Serious physical injury to others • Very serious fear/distress caused
Category 2	<ul style="list-style-type: none"> • Harm falling between categories 1 and 3
Category 3	<ul style="list-style-type: none"> • Little or no physical injury to others • Minimal fear/distress 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 from the appropriate sentence table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
Category 1	Starting point 2 years' custody	Starting point 1 years' custody	Starting point 26 weeks' custody
	Category range 1 year 6 months' – 2 years 6 months' custody	Category range 26 weeks' – 1 year 6 months' custody	Category range Medium level community order – 1 year's custody
Category 2	Starting point 1 years' custody	Starting point 26 weeks' custody	Starting point High level community order
	Category range 26 weeks' – 1 year 6 months' custody	Category range Medium level community order – 1 year's custody	Category range Low level community order – 36 weeks' custody
Category 3	Starting point 26 weeks' custody	Starting point High level community order	Starting point Medium level community order
	Category range Medium level community order – 1 year's custody	Category range Low level community order – 36 weeks' custody	Category range Band C fine – High level community order

The **non-exhaustive** lists below include additional factual elements providing context to the offender's role in an offence and other factors relating to the offender.

First identify factors relating to the offender's role in the offence to identify whether any combination of these should result in an upward or downward adjustment from the sentence arrived at so far.

Other relevant aggravating and mitigating factors should then be considered to determine if further adjustment to the sentence is required.

Factors increasing seriousness**Statutory aggravating factors:**

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence 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

Offence committed whilst on bail

Other aggravating factors:

Incident occurred in busy public area

Leading role where offending is part of group activity

Offender threw missiles/objects

Incident occurred in victim's home

Vulnerable persons or children present during incident

Commission of offence whilst under the influence of alcohol or drugs

History of failing to comply with court orders

Prolonged incident

Planning

Significant impact on public resources

Threats or violence directed towards public servants in the course of their duty

Large number of persons affected

Offence committed while on licence or subject to post sentence supervision

Factors reducing seriousness or reflecting personal mitigation

No previous convictions

Previous good character

Remorse

Incident shortlived

Evidence of steps initially taken to defuse incident

Low level involvement

Minor/peripheral role where offending is part of group activity

No members of public present other than those participating in violence

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability where linked to commission of offence

Sole or primary carer for dependent relatives

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**

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 an extended sentence (section 226A).

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.

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.

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Section five: Affray

Section 3 of the Public Order Act provides for the offence of Affray and states that:

A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

The maximum penalty for the offence is 3 years' imprisonment in the Crown Court, or on summary conviction in the magistrates' court 6 months' imprisonment.

Volumes of this offence are relatively high. In 2016 2,500 offenders were sentenced for this offence in the Crown Court and 530 were sentenced in magistrates' courts.

There is existing guidance in the MCSG for this offence. These include examples of the type of activity and require an assessment of conduct to assess the seriousness of the offence, rather than assessing harm and culpability separately. The draft guidelines developed adopt the standard Sentencing Council guideline approach, assessing individual culpability and harm factors.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

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**.

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.

Culpability demonstrated by one or more of the following	
Culpability A	<ul style="list-style-type: none"> • Targeting of individual(s) by a group • Use of a weapon to inflict violence • Use of serious or sustained violence • Intention to cause fear of very serious violence
Culpability B	<ul style="list-style-type: none"> • Threat of violence by any weapon (whether or not produced) • Threat or use of violence falling between levels in categories A and C
Culpability C	<ul style="list-style-type: none"> • Threat or use of minimal violence • The offender acted in self-defence or in fear of violence (where not amounting to a defence)

The principle that the sentence should relate to the overall incident and not the offender's individual role in an incident does not apply to the offence of affray as it does for riot and in some cases of violent disorder. As the offence requires the use or threat of unlawful violence, the factors proposed reflect gradations of this type of conduct.

Culpability factors

Culpability A

The factors proposed reflect the most serious culpability that could be present in this offence. Where individuals are targeted by a group, this will always make the offence more serious. The Council considers that the use of a weapon or of serious or sustained violence in an offence would infer a high level of culpability on the part of an offender.

The factor "*Intention to cause fear of very serious violence*" has been included to capture serious cases where threats or behaviour towards a victim imply that serious violence will be used. This factor was present in a number of cases which were analysed. In one case an offender entered their neighbour's property and threatened them with a loaded nail gun at night when they were in bed. In another an offender entered a neighbour's property and removed a baby from its cot and implied to the mother a sinister and violent threat of harm towards the child. The Council carefully considered how cases such as these could be appropriately captured in high culpability, while not intending that the factor capture cases where offenders may intend to cause fear of violence to an equally enthusiastic opponent in a fight. The latter cases did not attract sentences as high as the former. As the guideline requires the factors to be balanced it is thought that sentencers will appreciate the distinction required for the application of this factor, but consultee views are sought as to whether alternative expression is required.

Culpability B

This category captures threats by a weapon whether or not produced, as it is implicit that if use of a weapon is threatened it will be intended that the victim fear it will be used. Use of a weapon, however, will always make an offence more serious and reflect a greater level of culpability in the offence.

This category also provides for cases falling between the levels defined in categories A and C to be captured.

Culpability C

This category defines factors which represent the lowest level of culpability of an offender. These include threats or use of minimal violence, and cases where an offender acts in self defence or in fear of violence.

Q12

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Harm factors

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence.

Category 1	<ul style="list-style-type: none"> • Serious physical injury to others • Very serious fear/distress caused
Category 2	<ul style="list-style-type: none"> • Harm falling between categories 1 and 3
Category 3	<ul style="list-style-type: none"> • Little or no physical injury to others • Minimal fear/distress caused

Harm category 1

These factors would capture the most serious harm which could result from a serious incident of affray, where serious physical injury or very serious fear and/or distress is caused. These factors were present in a number of serious affray cases analysed.

Harm category 2

This is a catch all category for cases where harm is more than minimal, but less than the threshold of injury, fear or distress required at category 1.

Harm category 3

This category provides for the lowest level of harm the Council considers would be caused by this offence.

Q13

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database, analysis of first-instance transcripts, analysis of Court of Appeal sentencing remarks and reference to the ranges within the riot and affray guidelines, to ensure relativity within the limitations of the different statutory maximum sentence for offences.

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. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
Category 1	Starting point 2 years' custody	Starting point 1 year's custody	Starting point 26 weeks' custody
	Category range 1 year 6 months' – 2 years 6 months' custody	Category range 26 weeks' – 1 year 6 months' custody	Category range Medium level community order – 1 year's custody
Category 2	Starting point 1 year's custody	Starting point 26 weeks' custody	Starting point High level community order
	Category range 26 weeks' – 1 year 6 months' custody	Category range Medium level community order – 1 year's custody	Category range Low level community order – 36 weeks' custody
Category 3	Starting point 26 weeks' custody	Starting point High level community order	Starting point Medium level community order
	Category range Medium level community order – 1 year's custody	Category range Low level community order – 36 weeks' custody	Category range Band C fine – High level community order

Q14

Do you have any comments on the sentence ranges and starting points?

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors.

The **non-exhaustive** lists below include additional factual elements providing context to the offender's role in an offence and other factors relating to the offender.

First identify factors relating to the offender's role in the offence to identify whether any combination of these should result in an upward or downward adjustment from the sentence arrived at so far.

Other relevant aggravating and mitigating factors should then be considered to determine if further adjustment to the sentence is required.

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence 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

Offence committed whilst on bail

Other aggravating factors:

Leading role where offending is part of group activity

Incident occurred in busy public area

Offender threw missiles/objects

Vulnerable persons or children present during incident

Incident occurred in victim's home

Prolonged incident

Planning

Significant impact on public resources

Threats or violence directed towards public servants in the course of their duty

Commission of offence whilst under the influence of alcohol or drugs

Large number of persons affected

History of failing to comply with court orders

Offence committed while on licence or subject to post sentence supervision

Factors reducing seriousness or reflecting personal mitigation

No previous convictions

Previous good character

Remorse

Incident shortlived

Evidence of steps initially taken to defuse incident

Low level involvement

Minimal/peripheral role where offending is part of group activity

No members of public present other than those participating in violence

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability where linked to commission of offence

Sole or primary carer for dependent relatives

Q15

Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.

Q16

Do you have any other comments on the content and structure of the draft guideline?

Public Order Offences Crown Court Judges Road Testing

Introduction

Twelve interviews were conducted with Crown Court judges to test the *Affray* draft guideline. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered either one or two scenarios (details on the scenarios can be found in table 1), sentencing the scenario 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 *Public Order* guideline. However, there are limitations to the work¹, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Table 1. Scenarios used in interviews and the number of judges sentencing each scenario

Scenario	No. of judges
<p>D was leaving a nightclub where he worked as a security officer when he was attacked by a man he had ejected earlier in the evening. The assailant punched D to the side of the head and wielded a bottle towards him. Others intervened to stop the attack, but D did not take the opportunity to extricate himself from the situation. He attacked the man while he was being restrained and a fight ensued between D and the assailant, which was stopped on the arrival of the Police. Neither party was badly injured, although both suffered bruising and torn clothing. D pleaded guilty on the first day of trial, but in mitigation said he acted in self-defence and was provoked. He was of previous good character.</p>	7
<p>D had an ongoing dispute with neighbours over parking and regularly blocking his drive, and much animosity existed between them. On returning home drunk at 1.00am one morning he found their vehicle parked partly across his driveway and decided to confront them. He went round to knock on the door. On receiving no answer he shouted 'move your fucking car or I will smash it up'. He then tried the handle of the door which was unlocked, entered their property and went upstairs and entered the bedroom where they were asleep. He made loud and violent threats towards them, throwing their television at the wall beside their bed. The victims were terrified, staying in the bed and hiding under the duvet until other neighbours who had seen him enter the property ran in and overwhelmed him.</p> <p>D admitted the offence immediately and was extremely remorseful. He said he had snapped and due to the ongoing issues with his neighbours was suffering from and on medication for depression. He had recently received a police caution for threatening behaviour towards his neighbour in relation to the parking issue, and the neighbours had also been advised not to exacerbate the tension and be more considerate with their parking. He pleaded guilty at the first opportunity.</p>	6

¹ 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.

Summary of key findings

- Generally most judges were content with their final sentences, and the starting points and ranges using the draft guideline. The draft guideline generally led to more consistency in the final sentences for the second scenario compared to the sentences given pre-guideline.
- There were a few issues raised, which Council may wish to consider:
 - There were some issues in distinguishing the ‘level of violence’ at the culpability stage which led to inconsistent culpability categorisation amongst some judges, mostly for scenario one (bouncer) but also to a lesser extent for scenario two (neighbour’s house).
 - Similarly for harm, judges sometimes found it difficult to distinguish the ‘level of serious injury’, which could lead to inconsistent categorisation. However, this was identified only as an issue for the less serious scenario (1 - bouncer) when deciding between harm categories 2 and 3. It should be noted that there was limited information on the harm caused in scenario 1.
 - Most judges considered provocation to be an important consideration when sentencing. For scenario 1 (bouncer), when sentencing the scenario pre-guideline (as if it came before them in court today) a few judges used provocation as a mitigating factor. Accordingly, some judges felt the lack of a factor on provocation in the new draft guideline was an omission.

General Findings

- There was variability in how often judges saw affray offences. One judge dealt with affray at least once a week compared with others who said every couple of months, and one who said a few times a year. This may be due to the location where the judges in this sample sit (the judge who saw more cases was based in a city centre where there are many clubs around).
- When asked to spontaneously specify important factors to consider when sentencing affray offences, most factors the judges suggested were already covered in the guideline. However, one judge did suggest specifically including the offence being committed on business premises at some point in the guideline, for example, whether the incident occurred in a shop premises or nightclub.

Scenario one (bouncer)

- The first scenario found that the judges were inconsistent when categorising the culpability of the offender. All three culpability categories were applied to the offender, although most chose B (4 judges chose B, 2 judges chose C and 1 judge chose A). This was largely due to difficulties in interpreting the level of violence as defined in the guideline, with some judges considering the violence

as 'minimal' (C), some considering the violence as 'falling between A and C' (culpability B), and one judge considering the violence to be 'sustained' (culpability A). This was further supported by judges querying what was meant by terms such as 'sustained' and 'minimal' in the context of the violence.

- Similarly, judges were inconsistent when categorising harm for this scenario. Just over half of the judges applied category 3 to the offender and the remaining judges applied category 2 to the offender. Again, this was due to differing perceptions of physical injury and whether it fell 'between categories 1 and 3' (harm 2) or 'little or no' (harm 3). However, as mentioned above, there was limited harm information provided on this particular scenario.
- Because of the inconsistency with culpability and harm there was variation in the final sentences, ranging from a medium level community order to eight months' custody, suspended. Just over half of the sentences stayed the same pre-and post-guideline and the remaining sentences decreased. Overall this resulted in more community orders being given post guideline compared with pre-guideline for this particular scenario.

Scenario two (neighbours)

- There was greater consistency in the sentencing of this, the more serious affray scenario. Most judges placed the defendant in category A1 due to the 'intention to cause fear of very serious violence' factor, as expected by policy. However, a couple of judges categorised the offender as culpability B (although one was on the cusp of A/B) which identified a small inconsistency based on whether the judge interpreted the offender as using 'serious or sustained violence' or 'intention to cause fear of very serious violence' (culpability A) or 'violence falling between levels in categories A and C' (culpability B) in the scenario. As all judges placed the offender in harm 1 this suggests that judges found it relatively straightforward to distinguish the level of physical injury/fear and distress for the more serious cases.
- For this scenario the guideline led to more consistency in the final sentences compared to the sentences given pre-guideline. There was a slight increase (three to five months) on sentences given pre-guideline on a couple of occasions, but the remaining sentences were similar pre-and post-guideline.

Overall

- Across both scenarios most judges were content with their final sentences, and the starting points and range table.
- Most judges mentioned the importance of provocation when sentencing the first scenario (bouncer) pre-guideline: "*the mitigating features are there's been provocation*". However, they then did not mention provocation as a factor when

sentencing the offender using the guideline. Some judges felt the lack of a factor on provocation in the new draft guideline was an omission.

“It doesn’t mention provocation which normally does appear as a potential mitigating feature, especially in offences of violence. So, I would have expected that to be present and I’ve of taken that into account”.

“There’s nowhere in the guideline that allows me to allow for provocation but I would allow for provocation”.

R v Larter [2014] EWCA Crim 1610 (A1)

Fake hostage situation. Police called by appellant. He said he was armed with rifles and shotguns, that he was holding his daughter in his house, that he would "do his daughter" and that he would shoot any police who came to his house. The police responded with an armed response vehicle. During event, the appellant made further threats against police officers who attended and said that he was holding his step-son. A police negotiator was instructed to engage with the appellant. A substantial number of officers were engaged. The police soon became aware that the appellant's daughter and step-son were not in fact in the house, but the duration of the stand-off was in the region of four hours. The appellant spoke of coming out of the house "all guns blazing" and of killing as many of the police as he could. In the end he left the house voluntarily, stripping to show that he was not armed. Guilty plea, full credit, 27 months reduced to 18 for plea (serious previous convictions exacerbated sentences which Court of Appeal upheld noting it was severe, but not manifestly excessive.)

R v Barratt [2015] EWCA Crim 1534

Offender and her husband forced entry to property of neighbour on day injunction had been granted against them prohibiting them from causing any nuisance to neighbour or her family. Offender threatened neighbour and offender's husband (also convicted of affray) went upstairs and took victim's baby out of cot, and stood with it at top of stairs threatening "This is what will happen and we're not afraid to do it". He put the child down and came downstairs. He then threatened to cut the brakes of the car of victim's partner. Offence was planned, victim was 8 months pregnant and alone with children in her home at night when offence occurred. Serious distress and fear caused with lasting impact. Late guilty plea so only 10% credit. Sentences: 25 months imprisonment imposed on both offenders in first instance (28 months pre plea). Court of Appeal agreed with sentences but reduced appellant's sentence to 18 months applying Petherick principle due to three children and newborn baby. No mention of husband's sentence being appealed so 25 months after plea appropriate sentence in absence of issues specific to mother and Petherick consideration.

R v Beale (1st instance)

Shouted loud and violent threats to kill neighbours, forced entry to their flat and fired a nail gun (not loaded but victims did not know it was not) more than once. Victims terrified. Guilty plea at first opportunity, full credit. Sentence: 2 years imprisonment.

R v Parry, Burns, Williams, Mann & Nicoll (1st instance case)

Mindless, unprovoked, drunken violence in a small community public house holding a charity event which was ruined because of appalling behaviour. Terrifying incident, during which serious injuries were caused. Offenders described by more than one witness as behaving like wild animals. Heavily influenced by alcohol, behaviour escalated from boorish bravado, ignoring several polite requests to leave by those in charge, to what was an incident of serious violence, which they instigated and which resulted in the indiscriminate punching of people on the floor, kicking of people on the floor, having a total disregard to whether victims were male or female; described as group violence at its worst. One victim suffered a fractured skull, and had to undergo five general anaesthetics to stitch the wound and to stem the bleeding, and to have a plate inserted in his skull, landlady was punched to the face, females were kicked, some witnesses feared that victims were dead, glasses were broken determinately and people thought that those glasses were to be used as weapons; the public were left utterly shocked and frightened. Joint responsibility between offenders for causing utter terror. Guilty pleas on day of trial so only 10% credit.

Sentences all post plea (varied depending on relevant previous convictions): Burns 18 months custody; Nicoll 16 months custody; Parry 16 months custody; Williams 16 months custody; Mann 12 months custody.

R v Khalid [2014] EWCA Crim 2709

Bizarre incident where offender gave victim telephone number then wished his number to be deleted from victim's phone, so grabbed at victim's phone and threatened him with a knife (not produced). Sentence: Guilty plea 12 months (18 months before plea) imposed in first instance, reduced to 8 months (12 months before plea) by Court of Appeal.

R v Fox and Hicks [2005] EWCA Crim 1122

Football related group violence. Involved shouting, swearing and throwing debris, including stone, masonry and beer cans, in the direction of rivals and later the police who were trying to keep the two groups apart. Took place in a busy high street, crowded with traffic and with many members of public present. Continued over a significant period of time and calm was only restored after mounted police had arrived to supplement the uniformed police. Chaotic scenes which Judge said would have caused considerable alarm and disturbance to those present at the time.

Sentences: Fox – Guilty plea on day of trial for violent disorder to alternative count of affray. Credit not specified. Good character and not involved in second serious incident involving confrontation with police officers, so lesser role determined. 12 months reduced to 8 months imprisonment by Court of Appeal.

Hicks – Guilty plea on day of trial for violent disorder to alternative count of affray. Credit not specified. Recent and relevant previous convictions. Sentence of 12 months imprisonment upheld by Court of Appeal.

R v Bent (1st instance case)

Retaliation by offender when attacked by another by punching and being hit with a bottle. Could have extricated himself but did not; sought retribution and attacked with a plastic cleaning cone and bundled attacker to ground – appalling display. Only the two involved in fight were hurt. Guilty plea (full credit).

Sentence: 8 months imprisonment suspended for 12 months, including 200 hours of unpaid work.

R v Johnson (1st instance case)

Incident in betting shop in which offender retaliated after being punched. He continued confrontation, picking up the lid of a bin and wielding it in the course of that confrontation. No contact was made due to other party picking up a chair and fending it off and it was a short incident which was interrupted by the police but, nonetheless, frightening for those who were involved in the betting shop at the time and causing disorder. Behaviour continued when Police arrived. NG plea- found guilty after trial. Sentence: 3 months custody suspended for 12 months (without requirements).

R v Tomkinson & Jackson (1st instance case)

Incident started in takeaway at end of a night out with another group. Not clear who instigated. Violence involved offenders punching, kicking and throwing others to the floor. Potential for serious injuries to be caused but only bumps and bruises eventuated. Judge said incident self-limiting (resolved itself) and not sustained. Considered immediate custodial sentence but offenders bailed with electronic monitoring for four months prior to hearing which Judge said

was equivalent to two month custodial sentence. Guilty plea (offered on basis) – credit not specified.

Sentences: Intensive alternative to custody Community Order imposed on each offender, including: 12 months supervision, unpaid work 120 hours (Jackson) 160 hours (Tomkinson due to breach of SSO and precons). Electronically monitored curfew four months 8.00pm-7.00am. Accredited programme to address alcohol related aggression or violence, and three victim awareness sessions.

R v Grant, Grant, Tyres and Grant (1st instance case)

Revenge attack, offenders descended on the complainants' property. Tyres armed with a Samurai sword. There was some fighting. Hayley Grant threw a brick, and there was some scuffling involving Mark Grant. Donna Grant was verbally aggressive. The Prosecution said the Complainants 'gave as good as they got'. Anyone seeing it or witnessing it would be extremely frightened. All pleaded guilty on the day of trial.

Sentences: Tyres (possessed sword)- 6 months custody suspended for two years including supervision requirement for twelve months. With guideline – Category B2 case. Hayley Grant - Community Order with 100 hours unpaid work. Mark Grant - Community Order with 100 hours unpaid work. Donna Grant - Community Order with supervision for a period of twelve months.

Sentencing Council

Sentencing Council meeting: 1 March 2019
Paper number: SC(19)MAR04 – Arson & Criminal Damage
Lead Council member: Rebecca Crane and Sarah Munro
Lead officials: Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the third meeting to consider the consultation responses to the guideline, and will concentrate on sentence levels across all the offences. Consultation respondents generally agreed with the proposed sentence ranges, with some small suggestions and amendments, which are discussed within each individual guideline. The changes to the guidelines discussed at the last meeting have been made and can be seen within **Annexes B to G**.

1.2 The final meeting to discuss this guideline, and to sign it off ahead of publication will be the April meeting. The definitive guideline will then be published in July, and come into force in October.

2 RECOMMENDATION

That the Council:

- Considers the proposed changes to sentence levels within the individual guidelines
- Considers the findings regarding the level of alcohol/drug/mental health issues within criminal damage cases, and agrees to retain the proposed wording regarding community orders and alcohol/drug/mental health treatment orders

3 CONSIDERATION

Sentencing data - Annex A

3.1 Annex A contains updated sentencing data for 2017 (where possible) across the offences. The Council may recall that when drafting sentence ranges for consultation, both pre and post guilty plea (from 2016) was used. Sentencing data provided by the MOJ contains information on the length of immediate custodial sentences after any guilty plea reductions have been applied. In order to make this data more comparable to the pre-guilty plea starting points and sentence ranges included within guidelines, estimates of pre-guilty plea sentence lengths are computed using MOJ's data.

3.2 Over the last year, the A&R team have further developed the methodology used to estimate pre-guilty plea sentence lengths, to ensure it is as robust as possible, and encompasses the full range of data sources available. For arson and criminal damage offences, this includes sources such as the Crown Court Sentencing Survey (CCSS), along with the bespoke data collection carried out in a sample of magistrates' courts in 2017-18. Pre-guilty plea data shown in Annex A may therefore differ to that used prior to the consultation, due to the improved methodology which has been used to create these estimates.

3.3 As the Council are aware, a number of changes to the culpability/harm factors have been made post consultation. To examine the sentence ranges post consultation, the updated data contained in Annex A is used to indicate where any changes may need to be made, along with considering the responses from the consultation. The revised guidelines are then used to resentence cases from Crown Court transcripts, comparing what sentence the draft guideline would give rise to, compared to the actual sentence given in the real case. This exercise can indicate issues that may need addressing within the draft guidelines, perhaps a particular factor is causing an inappropriate number of cases to fall into too high a category, or a draft sentence range is not high enough. This process adds another layer of scrutiny and testing to the process of finalising robust guidelines.

Annex B- arson offences

3.4 This is a fairly low volume offence, with 406 adult offenders sentenced in 2017. The CPD data for 2017 shows that sentence severity for this offence has remained fairly stable over time; the mean sentence length (pre guilty plea) in 2017 was 2 years 4 months, and the median sentence length was 2 years (page 3 of Annex A). The Council will also note from table 5 on page 10 of Annex A that 75% of offenders sentenced to immediate custody in 2017 received a pre-guilty plea sentence of 3 years or less.

3.5 Generally, consultation respondents agreed with the proposed sentence ranges. The Council of Circuit Judges thought that there should be a custodial option within every custody range. The Legal Committee of the Council of District Judges commented that the wording above the sentence table (page 3 of Annex B) should not just refer to 'exceptional cases'. They argued that, because arson is such an easy crime to perpetuate, but that the effects can be devastating, going above the top of the range of eight years should be available for the most serious of cases – not just 'exceptional cases'.

3.6 Having taken these comments into account, along with the results of resentencing cases using the revised guideline, it is recommended that there are some slight increases across the sentence ranges. These can be seen in track changes on page three of Annex B, namely, to increase the top of the range in C3 to 6 months custody, to increase the top of the ranges in C2 and B3 to 1 years' custody, and to increase the top of the range in B1 to 4 years custody. This will broaden the ranges slightly to try to encompass better the varied types of offending behaviour seen in these offences. For example, an offender may commit an offence on impulse (low culpability) but great harm could be caused. Conversely, an offender may be highly culpable, have planned the offence, acting in revenge, intending to cause great harm but, due to the variability of fire, the competency of the offender, or chance, only low harm was caused.

3.7 It is recommended that the wording above the table is not changed, so it will only refer to exceptional cases. The top of the range in A1 goes to eight years custody, and although the maximum for this offence is life imprisonment, the sentencing data shows that very few offenders are getting sentences above eight years, so the wording seems appropriate.

Question 1: Does the Council agree to the recommended increases to the ranges for this offence?

Annex C: criminal damage/arson with intent to endanger life or reckless as to whether life endangered

3.8 Due to a change in the way arson endangering life offences are recorded, data for these cases is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and reckless', however most of these offences are now captured under a new code which groups 'intent' and 'reckless' offences together. The volumes for the separate intent / reckless arson cases shown on page one of Annex A are very low because courts have instead recorded these cases

using the new code (which groups intent and reckless together). Overall figures for arson endangering life (intent and reckless combined) are shown on pages 12-13 of Annex A. Pages 1-11 of the annex present figures for intent/reckless arson separately. Data on outcomes and sentence lengths relate to 2016, as this is the most recent year for which sufficient volumes are available to produce meaningful analysis for each type of offence individually.

3.9 Between 2007 and 2015, the number of adult offenders sentenced for arson endangering life was around 400-500 each year. Since 2015, volumes have been steadily decreasing, and around 280 offenders were sentenced in 2017. By comparison, criminal damage endangering life cases are much lower in volume, with around 30 offenders sentenced each year. Due to low volumes, data shown for criminal damage endangering life is not separated out by intent/reckless. In addition, data presented in Annex A for this offence relates to 2015, due to a data issue in the CPD which affected records in 2016 and 2017, which means data for this year are not reliable.

3.10 As Council may recall, the structure of this guideline reflects the fact that, although one offence, cases involving intent are treated by courts as the more serious of the two types, and are sentenced accordingly. The structure fixes the assessment of culpability, with intent culpability A, and reckless at B, which then allows for differences in sentencing between the two to be accommodated within one sentence table.

3.11 Page three of Annex A shows that, for intent, the pre-guilty plea mean sentence length in 2016 was 5 years 6 months, and the median, 5 years 2 months. For reckless, the pre-guilty plea mean sentence length was 4 years 4 months, and the median 4 years.

3.12 As with arson, the majority of the consultation respondents agreed with the proposed sentence ranges. The Council of Circuit Judges disagreed however, stating that the sentencing table starts far too low. They said that eight years as a starting point in A1 is not sufficiently high enough for the most serious cases of intent to endanger life, that most Judges would be looking at starting in double figures where there has been intent to endanger life, very serious physical/psychological harm caused or risked, and a great deal of damage caused. They suggest that the starting point in A1 should at least be 10 years, category 2 at least 7 years and category 3, three years. They state that they have less problem with the ranges in B, for reckless, although they think they should each start a year higher.

3.13 A summary of the findings of the road testing with Crown Court judges on this guideline is attached at Annex D. This showed no issues with the sentencing of intent cases. For one of the reckless scenarios, whilst most sentences stayed the same, some sentences were lower using the draft guideline and some judges felt the starting point under culpability B felt a little low, potentially pointing towards the need to increase the starting point. However, it should be remembered that the road testing only gives us a flavour of how sentencers *might* behave when using the guideline, as the sample size is small and scenarios are simplified.

3.14 When setting the ranges for consultation, alongside considering the CPD data, the Council was also mindful of *Myrie*¹. In *Myrie*, the court said that the starting point for arson with intent was in the range of 8-10 years, following a trial, and in cases involving reckless arson, that the range would be rather below that. The starting point in A1 is at the lower end of the range suggested in *Myrie*, as the available sentencing data shows the majority of sentences given are eight years or less. The resentencing of cases using the revised guideline post consultation did not indicate the need to make any changes to the ranges, except to increase the top of the range in B3, from two years six months to three years.

3.15 If the Council wanted to increase the starting points for intent, to the top end of the range indicated in *Myrie*, and to deal with the concerns raised by the Council of Circuit Judges, then it may mean having very broad ranges. For example, if the starting point in A1 was increased from eight to 10 years, the category range would probably need to increase from 12 to 14 years, giving a range of nine years, from five years to 14 years. In A2, if the starting point was increased from six years to seven, then the top of the range would possibly need to be increased from eight to 10 years, giving a range of four to ten years. If the starting point in A3 was increased from two years to three, the top of the range would possibly need to be increased from three years to five years. The ranges then become so wide that they then offer little guidance. There is no evidence to suggest that the bottom of the ranges needs to be increased, which would have been a way of reducing the range, if the top of the range were to be increased.

3.16 There is a possible risk that making the increases to the top of the ranges for intent/reckless offences may increase sentencing severity, as the data on pages 12-13 for combined intent/reckless arson cases shows that 88% of all offenders sentenced to immediate custody received a pre-guilty plea sentence of 8 years or

¹ AG's reference no 68 of 2008 (*Myrie*) [2008] EWCA Crim 3188

less, and 97% received a sentence of 12 years or less. The impact of any increase in severity, however, is likely to be low, due to low volumes.

3.17 Moreover, the starting points in the ranges for this guideline are less influential in terms of the final sentence arrived at, because there could be more of an upwards movement within the range from the starting point for these offences compared to within other offences, because the aggravating factors will be more influential. Given the structure of the guideline, with fixed culpability, the factors that can make offending more serious, revenge, drinking/drugs, use of accelerant, multiple people endangered, etc, are aggravating factors. So, a large number of the cases that fall into the top boxes may well end up higher in the range than remaining at the starting point, once aggravating factors are considered. Therefore, the argument to increase the starting point for these offences carries less weight, than it may have done for a guideline which has the standard assessment of culpability, with less influential aggravating factors, with a correspondingly pitched starting point.

3.18 Also, there is the wording above the table that says that for exceptional cases, sentences above the top of the range may be appropriate. Currently that wording just refers to A1, but it could be changed to include a reference to B1 as well, as a small number of offenders sentenced for reckless appear to have pre- GP sentences of over 10 years. The wording could read:

'In exceptional cases within categories A1 and B1, sentences above the top of the ranges may be appropriate'

3.19 In summary therefore, it is recommended that other than the one small change to B3, and potentially a change to the wording regarding exceptional cases, no other changes are made to the sentence table.

Question 2: Does the Council agree to the recommendation not to make any changes to the sentence table, except to increase the top of the range in B3 to three years?

Question 3: Does the Council wish to amend the wording regarding exceptional cases to include a reference to B1 as well?

Annex E- Criminal damage over £5000

3.20 This is quite a low volume offence, with 286 offenders sentenced in 2017. Page three of Annex A shows that the pre-guilty plea mean sentence length for this offence in 2017 was 1 year, and the median 6 months' custody. Figure two on page six shows that the vast majority of pre-guilty plea sentences were four years or less

in 2017, with one offender at the nine year mark. Comparing the data to that of the preceding year shows that sentence severity has remained fairly stable.

3.21 Consultation respondents generally agreed with the proposed sentence levels, except for the Legal Committee of District Judges, who argued that the starting points in categories one and two were a little too low. The ranges have been reconsidered, but it is proposed that no changes are warranted, the resentencing exercise conducted with the revised guideline against crown court transcripts did not indicate any problem with the sentence levels. In addition, the information within table five in Annex A (page 10) shows that 71% of all offenders sentenced to immediate custody received a sentence of one year or less.

Question 4: Do the Council agree with the recommendation that no changes are made to the sentence table for this offence?

Annex F – Criminal damage under £5000

3.22 This is a high volume offence, with 19,020 offenders sentenced in 2017, although numbers sentenced have been gradually dropping since 2010. The pre-guilty plea mean sentence length for this offence in 2017 was two months' custody, and the median was one months' custody. Sentencing for this offence has stayed fairly static over time. The maximum custodial sentence for this offence is three months' custody.

3.23 The vast majority of consultation respondents agreed with the proposed sentence levels, one of the few comments made was by a magistrate who stated he thought the starting point in A1 should cross the custody threshold. The ranges have been reconsidered, but it is proposed that no changes are necessary. The resentencing exercise did not show any problem with the sentence levels, and in any case, with a maximum of three months custody, it would be quite difficult to alter the ranges. Potentially the starting point in A1 could increase from a high level community order to six weeks custody, but that would be a very short custodial sentence, it may be more appropriate to leave the starting point as it is and have a reasonably wide sentencing range.

Question 5: Does the Council agree with the recommendation that no changes are made to the sentence table?

Annex G: Threats to destroy or damage property

3.24 This is a fairly low volume offence, with 467 offenders sentenced in 2017, numbers sentenced have been declining since 2015. The pre-guilty plea mean

sentence length in 2017 was eight months, with the median three months. Table 5 on page 11 of Annex A shows that 75% of offenders received a custodial sentence of six months or less (pre-guilty plea), and there was only one sentence over four years.

3.25 The majority of responses agreed with the proposed ranges, two magistrates who did comment on the ranges said they thought they were too high. Re-examining the ranges using 2017 data, and conducting the resentencing exercise has indicated that there may be justification for reducing some of the ranges, potentially in A1. A fair proportion of the cases resentenced fell into A1, frequently due to the presence of the high culpability factor of '*threat to burn or bomb property*', which often causes serious distress to the victim. Using the draft guideline to resentence did give slightly higher sentences that were given in the actual cases. Possibly the bottom of the range in A1 could be lowered from 1 year to 9 months, however, this would make the range quite wide, 9 months to 5 years, and may cause a presentational issue, for a serious offence with a ten year maximum, the bottom of the sentencing range in the highest category starting at nine months. It should be noted that the sample of resentenced cases was small, so may not be representative of sentencing overall.

Question 6: Does the Council wish to lower any of the sentence ranges for this offence?

Community order/treatment requirements wording within the guidelines

3.26 At the last meeting the Council considered the recommendation to insert the wording suggesting community orders with drug/alcohol or mental health treatment requirements as alternatives to a short or moderate sentence, within both criminal damage and the threats to destroy/damage offences. The Council had previously agreed to include it within both 'simple' and aggravated arson, and this can be seen on page three of Annex B. The Council were concerned as to whether this was appropriate or not, thinking that mental health considerations in particular were no more relevant for criminal damage than for other offences, and asked that the A&R team check any information on the prevalence of mental health issues in criminal damage cases.

3.27 This has been done, and the findings show that although mental health, drug and alcohol issues are not as common within criminal damage as for arson, on average they are more common than within most other offences. It is therefore recommended that this wording is included across all the offences within this guideline, there seems to be no obvious risk to including the wording. Take up of community orders generally is low, as the Council are aware, so it seems reasonable

to add in a slight prompt to sentencers to consider them, especially to help tackle one of the causes of offending, which certainly within criminal damage seems to be excessive intake of alcohol. Including this wording would also mean that there is consistency across all the offences.

Question 7: Does the Council agree with the recommendation to include the wording relating to community orders across all the offences within this guideline?

Changes agreed at the last meeting- criminal damage guidelines- Annexes E and F

3.28 At the last meeting the Council agreed to add wording within both criminal damage offences to provide guidance on the point raised by the Criminal Bar Association. This has been done, and can be seen on the front of both criminal damage guidelines, the last line of the wording slightly differs, as appropriate between the two guidelines. The Council also agreed to make similar changes to the culpability factors that had already been agreed with the arson offence, these can be seen on page two within the guidelines. The reference to great sentimental value has been removed from harm, and instead there is a new aggravating factor, (page four within both guidelines) using the wording from the burglary guideline.

Changes agreed to the threats to destroy/damage property guideline-Annex G

3.29 The two new factors, one in higher and one in lower culpability agreed at the last meeting have been added, and can be seen on page two of the guideline, also the new harm factor has been added.

4 IMPACT/RISK

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

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Table 1: Number of adult offenders sentenced for arson and criminal damage offences, 2007-2017¹

Offence	Court type	Number of adult offenders sentenced										
		2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Arson, Criminal Damage Act 1971, S1(3)	MC	233	249	259	292	286	241	223	215	214	219	208
	CC	326	343	313	331	347	324	279	225	264	260	198
	Total	559	592	572	623	633	565	502	440	478	479	406
Arson with intent to endanger life, Criminal Damage Act 1971, S1(2) ²	MC	-	-	-	-	0	0	0	0	0	0	0
	CC	-	-	-	-	72	71	66	46	34	14	2
	Total	-	-	-	-	72	71	66	46	34	14	2
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2) ³	MC	-	-	-	-	0	0	0	0	0	0	0
	CC	-	-	-	-	378	391	340	293	276	132	11
	Total	-	-	-	-	378	391	340	293	276	132	11
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)	MC	-	-	-	-	246	234	199	230	208	252	205
	CC	-	-	-	-	36	44	40	48	71	82	81
	Total	-	-	-	-	282	278	239	278	279	334	286
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)	MC	22,667	24,239	25,553	25,594	24,729	22,641	21,742	21,932	22,055	20,339	18,462
	CC	160	217	312	438	527	557	512	582	591	584	558
	Total	22,827	24,456	25,865	26,032	25,256	23,198	22,254	22,514	22,646	20,923	19,020
Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2)	MC	-	-	-	-	0	0	0	0	0	*	*
	CC	-	-	-	-	5	21	28	26	26	*	*
	Total	-	-	-	-	5	21	28	26	26	*	*
Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2	MC	335	314	298	355	367	369	369	438	436	422	401
	CC	73	75	79	83	91	66	66	84	113	84	66
	Total	408	389	377	438	458	435	435	522	549	506	467
Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30	MC	187	172	159	161	167	180	148	139	127	119	123
	CC	38	33	23	40	32	18	15	12	14	13	11
	Total	225	205	182	201	199	198	163	151	141	132	134

Source: Court Proceedings Database, Ministry of Justice

Notes

1) Excludes data for Cardiff magistrates' court for April, July and August 2008

2) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson with intent to endanger life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.

3) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson recklessly endangering life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.

- Data for this offence not available prior to 2011

* Figures have not been shown due to a data issue

Table 2: Sentence outcomes for adult offenders sentenced for arson and criminal damage offences, 2017

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Arson, Criminal Damage Act 1971, S1(3)	0	24	7	75	90	174	36	406
Arson with intent to endanger life, Criminal Damage Act 1971, S1(2) ^{2,3}	0	0	0	0	2	9	3	14
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2) ^{3,4}	0	0	0	5	16	91	20	132
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)	0	40	32	76	52	70	16	286
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)	87	5,412	4,780	4,931	764	1,090	1,956	19,020
Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2) ⁵	0	0	1	0	7	16	2	26
Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2	1	99	76	113	58	100	20	467
Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30	0	6	26	55	26	17	4	134

Source: Court Proceedings Database, Ministry of Justice

Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Arson, Criminal Damage Act 1971, S1(3)	0%	6%	2%	18%	22%	43%	9%	100%
Arson with intent to endanger life, Criminal Damage Act 1971, S1(2) ^{2,3,6}	0%	0%	0%	0%	14%	64%	21%	100%
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2) ^{3,4}	0%	0%	0%	4%	12%	69%	15%	100%
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)	0%	14%	11%	27%	18%	24%	6%	100%
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)	0%	28%	25%	26%	4%	6%	10%	100%
Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2) ⁵	0%	0%	4%	0%	27%	62%	8%	100%
Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2	0%	21%	16%	24%	12%	21%	4%	100%
Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30	0%	4%	19%	41%	19%	13%	3%	100%

Source: Court Proceedings Database, Ministry of Justice

Notes

- 1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders
- 2) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson with intent to endanger life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.
- 3) Data shown for this offence relates to 2016, due to the lack of data available for 2017
- 4) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson recklessly endangering life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.
- 5) Data shown for this offence relates to 2015, due to data issues in 2016 and 2017
- 6) Proportions should be treated with caution, due to the low volumes for this offence in the data available

Table 3: Average and maximum custodial sentence lengths for adult offenders sentenced to immediate custody for arson and criminal damage offences, 2017

Offence	Post guilty plea			Pre guilty plea (estimated)		
	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Maximum sentence length	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Maximum sentence length
Arson, Criminal Damage Act 1971, S1(3)	1 year 8 months	1 year 4 months	8 years (and Life)	2 years 4 months	2 years	12 years (and Life)
Arson with intent to endanger life, Criminal Damage Act 1971, S1(2) ^{4,5,6}	3 years 9 months	3 years 5 months	5 years 4 months (and Life)	5 years 6 months	5 years 2 months	8 years (and Life)
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2) ^{5,7}	3 years 1 month	3 years	7 years 6 months	4 years 4 months	4 years	10 years 6 months
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)	9 months	6 months	9 years	1 year	6 months	9 years
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)	1 month	1 month	3 months	2 months	1 month	3 months
Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2) ^{8,9}	2 years 7 months	2 years 7 months	4 years	3 years 8 months	3 years 10 months	5 years 3 months
Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2	6 months	3 months	4 years	8 months	3 months	6 years
Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30 ⁹	2 months	3 months	4 months	3 months	4 months	6 months

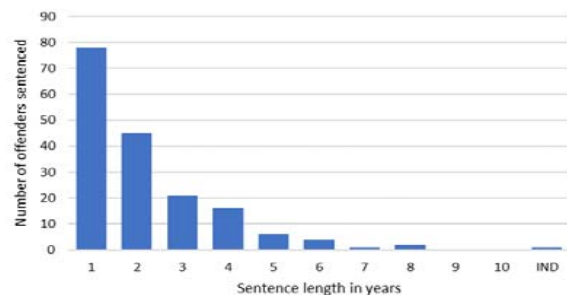
Source: Court Proceedings Database, Ministry of Justice

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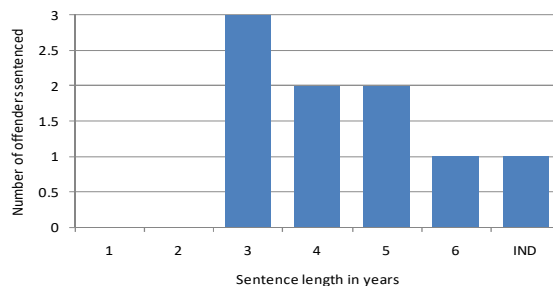
- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order
- 3) Excludes life and indeterminate sentences
- 4) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson with intent to endanger life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.
- 5) Sentence length information for this offence relates to 2016, due to a lack of data available for this offence in 2017
- 6) Mean and median should be treated with caution, due to the low volumes for this offence in the data available
- 7) Due to a change in the way arson endangering life offences are recorded, data for the specific offence of 'Arson recklessly endangering life' is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.
- 8) Data shown for this offence relates to 2015, due to data issues in 2016 and 2017
- 9) Mean and median should be treated with caution, due to the relatively low number of offenders sentenced to immediate custody for this offence

Figure 1: Distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for arson and criminal damage offences, after any reduction for guilty plea, 2017

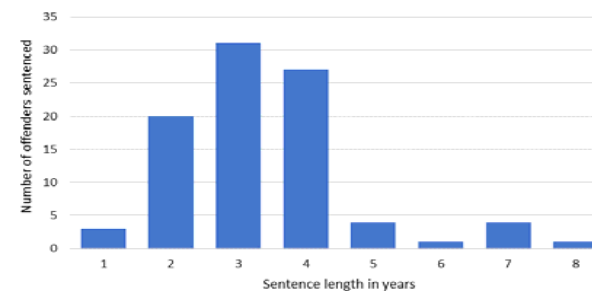
Arson, Criminal Damage Act 1971, S1(3)



Arson with intent to endanger life, Criminal Damage Act 1971, S1(2)



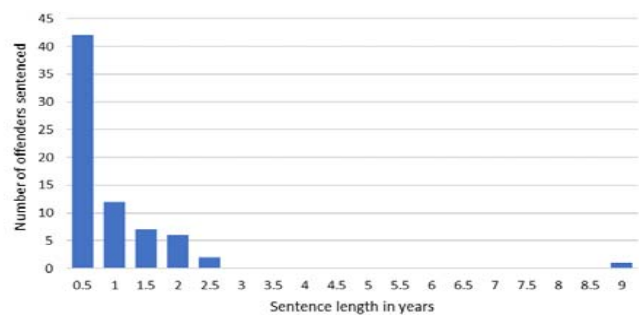
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2)



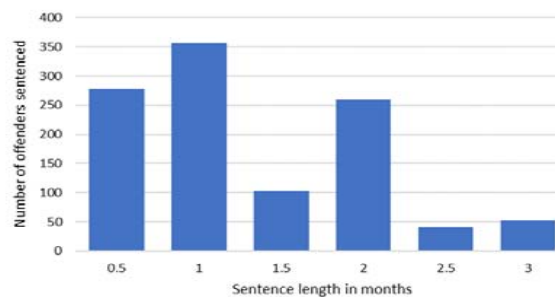
Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

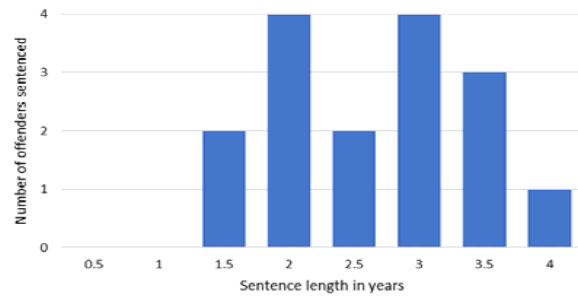
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)



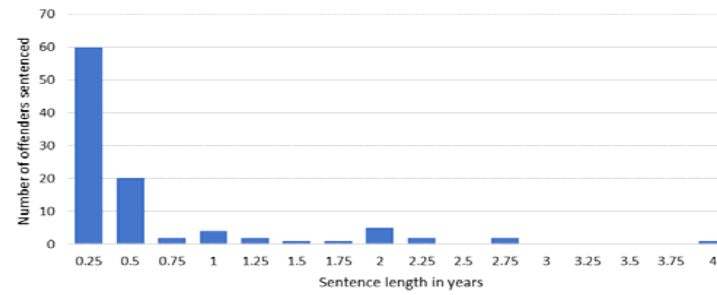
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)



Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2)

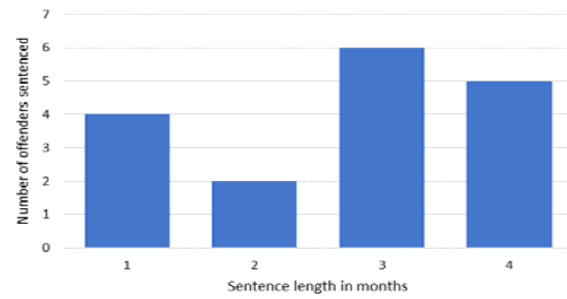


Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2



Note: Figures shown relate to 2015, due to data issues in 2016 and 2017.

Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30

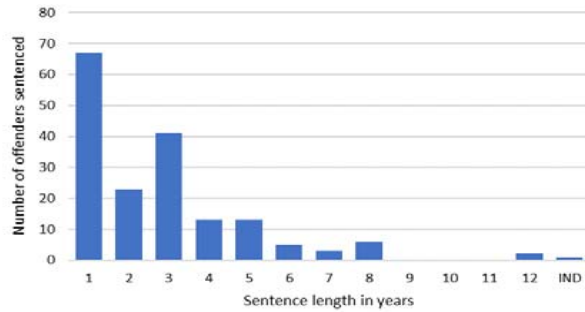


Source: Court Proceedings Database, Ministry of Justice

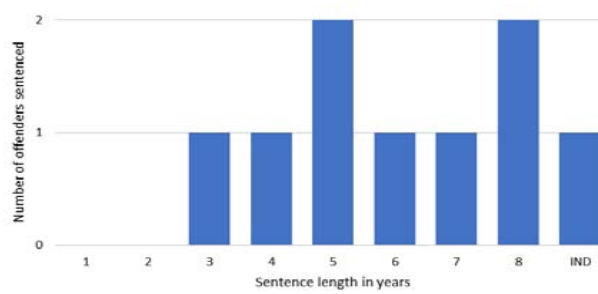
Note
Sentence length intervals include the upper bound sentence length (i.e. that shown on the chart). For example, the category '1' includes sentence lengths less than and equal to 1 year, and '2' includes sentence lengths over 1 year, and up to and including 2 years.

Figure 2: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for arson and criminal damage offences, before any reduction for guilty plea, 2017

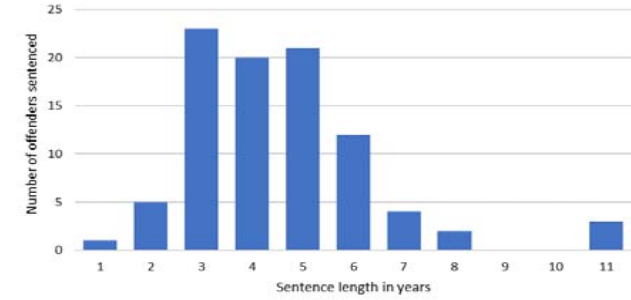
Arson, Criminal Damage Act 1971, S1(3)



Arson with intent to endanger life, Criminal Damage Act 1971, S1(2)



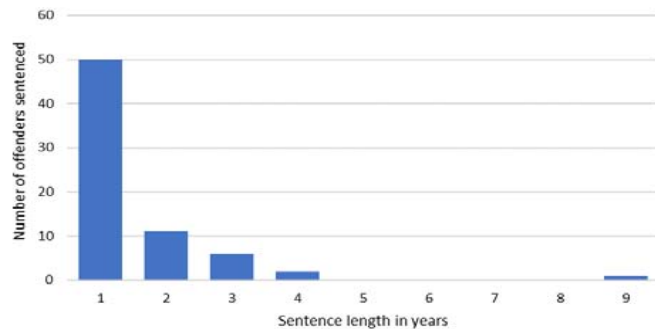
Arson recklessly endangering life, Criminal Damage Act 1971, S1(2)



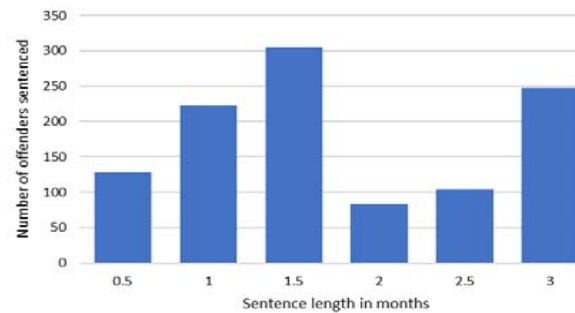
Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

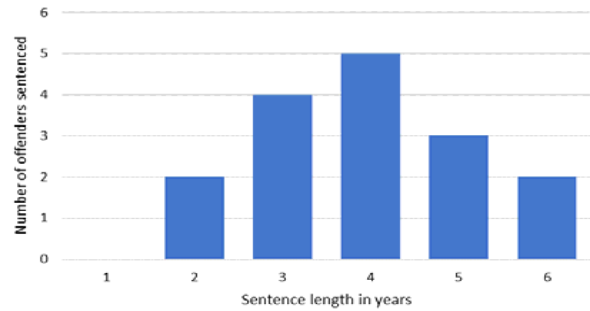
Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)



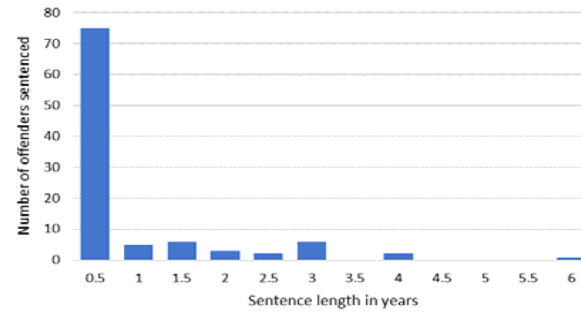
Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)



Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2)

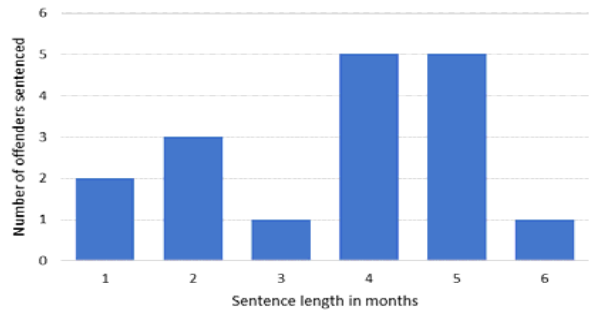


Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2



Note: Figures shown relate to 2015, due to data issues in 2016 and 2017.

Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30



Source: Court Proceedings Database, Ministry of Justice

Note
Sentence length intervals include the upper bound sentence length (i.e. that shown on the chart). For example, the category '1' includes sentence lengths less than and equal to 1 year, and '2' includes sentence lengths over 1 year, and up to and including 2 years.

Table 4: Distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for arson and criminal damage offences, after any reduction for guilty plea, 2017

Arson, Criminal Damage Act 1971, S1(3)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	78	45%
1-2	45	26%
2-3	21	12%
3-4	16	9%
4-5	6	3%
5-6	4	2%
6-7	1	1%
7-8	2	1%
8-9	0	0%
9-10	0	0%
Indeterminate	1	1%
Total	174	100%

Arson with intent to endanger life, Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	0	0%
1-2	0	0%
2-3	3	33%
3-4	2	22%
4-5	2	22%
5-6	1	11%
6-7	0	0%
7-8	0	0%
Indeterminate	1	11%
Total	9	100%

Arson recklessly endangering life, Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	3	3%
1-2	20	22%
2-3	31	34%
3-4	27	30%
4-5	4	4%
5-6	1	1%
6-7	4	4%
7-8	1	1%
Total	91	100%

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	54	77%
1-2	13	19%
2-3	2	3%
3-4	0	0%
4-5	0	0%
5-6	0	0%
6-7	0	0%
7-8	0	0%
8-9	1	1%
Total	70	100%

Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)

Sentence length (months)	No. of offenders sentenced	Proportion of offenders sentenced
<=0.5	278	26%
0.5-1	356	33%
1-1.5	103	9%
1.5-2	259	24%
2-2.5	41	4%
2.5-3	53	5%
Total	1,090	100%

Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=0.5	0	0%
0.5-1	0	0%
1-1.5	2	13%
1.5-2	4	25%
2-2.5	2	13%
2.5-3	4	25%
3-3.5	3	19%
3.5-4	1	6%
Total	16	100%

Note: Figures shown relate to 2015, due to data issues in 2016 and 2017.

Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30

Sentence length (months)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	4	24%
1-2	2	12%
2-3	6	35%
3-4	5	29%
Total	17	100%

Source: Court Proceedings Database, Ministry of Justice

Note

Sentence length intervals do not include the lower bound, but do include the upper bound sentence length. For example, the category '<=1' includes sentence lengths less than and equal to 1 year, and '1-2' includes sentence lengths over 1 year, and up to and including 2 years.

Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=0.5	80	80%
0.5-1	6	6%
1-1.5	3	3%
1.5-2	6	6%
2-2.5	2	2%
2.5-3	2	2%
3-3.5	0	0%
3.5-4	1	1%
Total	100	100%

Table 5: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for arson and criminal damage offences, before any reduction for guilty plea, 2017

Arson, Criminal Damage Act 1971, S1(3)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	67	39%
1-2	23	13%
2-3	41	24%
3-4	13	7%
4-5	13	7%
5-6	5	3%
6-7	3	2%
7-8	6	3%
8-9	0	0%
9-10	0	0%
10-11	0	0%
11-12	2	1%
Indeterminate	1	1%
Total	174	100%

Arson with intent to endanger life, Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	0	0%
1-2	0	0%
2-3	1	11%
3-4	1	11%
4-5	2	22%
5-6	1	11%
6-7	1	11%
7-8	2	22%
Indeterminate	1	11%
Total	9	100%

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Arson recklessly endangering life, Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	1	1%
1-2	5	5%
2-3	23	25%
3-4	20	22%
4-5	21	23%
5-6	12	13%
6-7	4	4%
7-8	2	2%
8-9	0	0%
9-10	0	0%
10-11	3	3%
Total	91	100%

Note: Figures shown relate to 2016, due to the lack of data available for 2017. (Due to a change in the way arson endangering life offences are recorded, data for this specific offence is limited. Prior to 2014, data for these offences were recorded under separate codes for 'intent' and 'reckless', however, most of these offences are now captured under a new code which groups 'intent/reckless' offences together.)

Criminal damage to property over £5,000, Criminal Damage Act 1971, S1(1)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	50	71%
1-2	11	16%
2-3	6	9%
3-4	2	3%
4-5	0	0%
5-6	0	0%
6-7	0	0%
7-8	0	0%
8-9	1	1%
Total	70	100%

Criminal damage to property under £5,000, Criminal Damage Act 1971, S1(1)

Sentence length (months)	No. of offenders sentenced	Proportion of offenders sentenced
<=0.5	128	12%
0.5-1	222	20%
1-1.5	305	28%
1.5-2	83	8%
2-2.5	104	10%
2.5-3	248	23%
Total	1,090	100%

Criminal damage endangering life (intent and reckless), Criminal Damage Act 1971, S1(2)

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	0	0%
1-2	2	13%
2-3	4	25%
3-4	5	31%
4-5	3	19%
5-6	2	13%
Total	16	100%

Note: Figures shown relate to 2015, due to data issues in 2016 and 2017.

Threats to destroy/damage property (includes intent to endanger life), Criminal Damage Act 1971, S2

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=0.5	75	75%
0.5-1	5	5%
1-1.5	6	6%
1.5-2	3	3%
2-2.5	2	2%
2.5-3	6	6%
3-3.5	0	0%
3.5-4	2	2%
4-4.5	0	0%
4.5-5	0	0%
5-5.5	0	0%
5.5-6	1	1%
Total	100	100%

Racially/religiously aggravated criminal damage, Crime and Disorder Act 1998, S30

Sentence length (months)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	2	12%
1-2	3	18%
2-3	1	6%
3-4	5	29%
4-5	5	29%
5-6	1	6%
Total	17	100%

Source: Court Proceedings Database, Ministry of Justice

Note

Sentence length intervals do not include the lower bound, but do include the upper bound sentence length. For example, the category '<=1' includes sentence lengths less than and equal to 1 year, and '1-2' includes sentence lengths over 1 year, and up to and including 2 years.

Combined data for arson endangering life offences (intent and reckless)

Table 6: Number of adult offenders sentenced for arson endangering life offences, 2007-2017

Court type	Number of adult offenders sentenced										
	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
MC	0	0	0	0	0	0	0	0	0	0	0
CC	388	404	449	432	461	486	421	393	420	355	278
Total	388	404	449	432	461	486	421	393	420	355	278

Table 7: Sentence outcomes for adult offenders sentenced for arson endangering life offences, 2017

Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
1	0	0	3	46	200	28	278
<0.5%	0%	0%	1%	17%	72%	10%	100%

Note

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders

Table 8: Average and maximum custodial sentence lengths for adult offenders sentenced to immediate custody for arson endangering life offences, 2017

Post guilty plea			Pre guilty plea (estimated)		
Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Maximum sentence length	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Maximum sentence length
3 years 9 months	3 years 2 months	12 years	5 years	4 years	15 years

Notes

1) The mean is calculated by taking the sum of all values and then dividing by the number of values

2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order

3) Excludes life and indeterminate sentences

Figure 3: Distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for arson endangering life offences, after any reduction for guilty plea, 2017

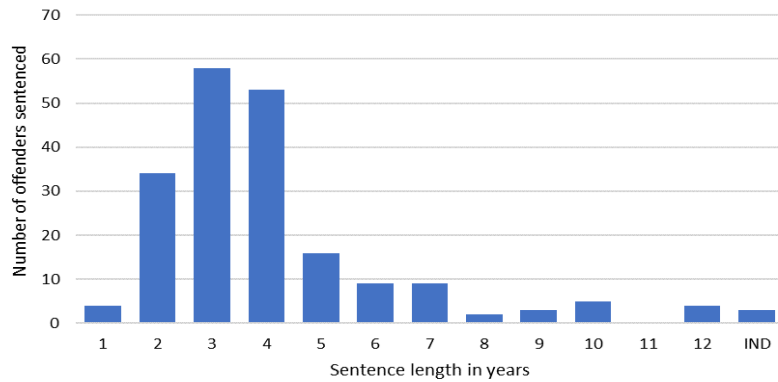


Figure 4: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for arson endangering life offences, before any reduction for guilty plea, 2017

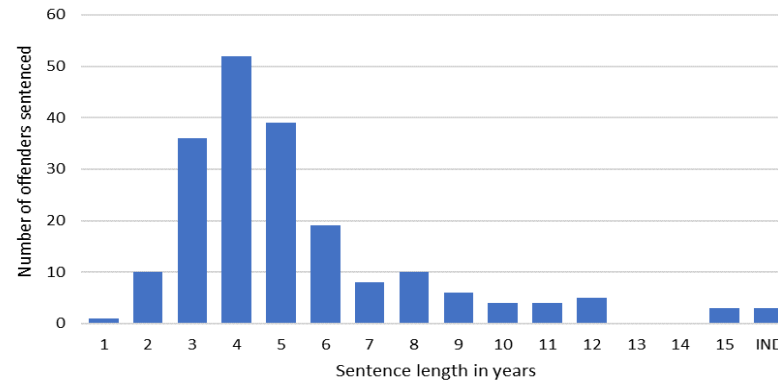


Table 9: Distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for arson endangering life offences, after any reduction for guilty plea, 2017

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	4	2%
1-2	34	17%
2-3	58	29%
3-4	53	27%
4-5	16	8%
5-6	9	5%
6-7	9	5%
7-8	2	1%
8-9	3	2%
9-10	5	3%
10-11	0	0%
11-12	4	2%
Indeterminate	3	2%
Total	200	100%

Table 10: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for arson endangering life offences, before any reduction for guilty plea, 2017

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=1	1	1%
1-2	10	5%
2-3	36	18%
3-4	52	26%
4-5	39	20%
5-6	19	10%
6-7	8	4%
7-8	10	5%
8-9	6	3%
9-10	4	2%
10-11	4	2%
11-12	5	3%
12-13	0	0%
13-14	0	0%
14-15	3	2%
Indeterminate	3	2%
Total	200	100%

Source: Court Proceedings Database, Ministry of Justice

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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

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, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to 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
- Intention to create a high risk of injury to persons

B - Medium culpability:

- 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
- Some planning
- Recklessness as to whether very serious damage to property caused
- Recklessness as to whether serious injury to persons caused

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Recklessness as to whether some damage to property caused
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Involved through coercion, intimidation or exploitation

Harm

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

Category 1

- Serious physical and/or psychological harm caused
- Serious consequential economic or social impact of offence

<ul style="list-style-type: none"> • High value of damage caused
<p>Category 2</p> <ul style="list-style-type: none"> • Harm that falls between categories 1 and 3
<p>Category 3</p> <ul style="list-style-type: none"> • No or minimal physical and/or psychological harm caused • Low value of damage caused
<p>STEP TWO Starting point and category range</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>

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, 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.

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

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

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

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 and /or cultural 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.** Steps taken to minimise the effect of the fire or summon assistance
- 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 (tagged curfew)

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

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, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to 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 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.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol, **which is linked to the offending**, 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.

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

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

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
- 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

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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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)¹, 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 work², and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Scenario	Summary of scenario
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.

¹ 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.

² 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 were³: 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).

³ 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.

Criminal damage (other than by fire) value over £5,000

Criminal Damage Act 1971, s.1 (1)

Triable either way

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

Maximum when tried on indictment: 10 years

Offence range: Discharge – 4 years' custody

Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30

Triable either way

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

Maximum when tried on indictment: 14 years

Note:

Where an offence of criminal damage is added to the indictment at the Crown Court the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value is under £5,000 regard should also be had to the under £5,000 guideline.

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

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
- Intention to cause very serious damage to property
- Intention to create a high risk of injury to persons

B - Medium culpability:

- 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
- Some planning
- Recklessness as to whether very serious damage to property caused
- Recklessness as to whether serious injury to persons caused

C - Lesser culpability:

- Little or no planning; offence committed on impulse
- Recklessness as to whether some damage to property caused
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Involved through coercion, intimidation or exploitation

Harm

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

Category 1

- Serious distress caused
- Serious consequential economic or social impact of offence
- High value of damage

Category 2

- Harm that falls between categories 1 and 3

<p>Category 3</p> <ul style="list-style-type: none"> • No or minimal distress caused • Low value damage
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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.

Maximum when tried on indictment: 10 years' custody

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point 1 year 6 months' custody</p> <p>Category range 6 months to 4 years' custody</p>	<p>Starting point 6 months' custody</p> <p>Category range High level Community order to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium Level community order – 1 years' custody</p>
Category 2	<p>Starting point 6 months' custody</p> <p>Category range High level Community order- 1 year 6 months' custody</p>	<p>Starting point High level community order</p> <p>Category range Medium level community order-1 year's custody</p>	<p>Starting point Low level Community order</p> <p>Category range Band C fine-High level Community order</p>
Category 3	<p>Starting point High level Community order</p> <p>Category range Medium level Community order- 1 year's custody</p>	<p>Starting point Low level Community order</p> <p>Category range Band C fine- High level Community order</p>	<p>Starting point Band B fine</p> <p>Category range Discharge- Low level Community order</p>

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: disability, sexual orientation, or transgender identity.

Other aggravating factors:

- A4. Damaged items of great value to the victim (whether economic, commercial, sentimental or personal value)
- A5. Commission of offence whilst under the influence of alcohol or drugs
- A6. Victim is particularly vulnerable
- A7. Damage caused to heritage and or cultural assets
- A8. Established evidence of community/wider impact
- A9. Failure to comply with current court orders
- A10. Offence committed on licence or post sentence supervision
- A11. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

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

**RACIALLY OR RELIGIOUSLY AGGRAVATED CRIMINAL DAMAGE
OFFENCES ONLY**

Having determined the category of the basic offence to identify the sentence of a non aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence in accordance with the guidance below. The following is a list of factors which the court should consider to determine the level of aggravation. Where there are characteristics present which fall under different levels of aggravation, the court should balance these to reach a fair assessment of the level of aggravation present in the offence.

Maximum sentence for the aggravated offence on indictment is 14 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

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

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation was the predominant motivation for the offence. ▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion. ▪ Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered at step one). ▪ Aggravated nature of the offence caused serious fear and distress throughout local community or more widely. 	<p>Increase the length of custodial sentence if already considered for the basic offence or consider a custodial sentence, if not already considered for the basic offence.</p>
MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation formed a significant proportion of the offence as a whole. 	<p>Consider a significantly more onerous penalty of the same type <u>or consider a</u></p>

<ul style="list-style-type: none"> ▪ Aggravated nature of the offence caused some distress to the victim or the victim’s family (over and above the distress already considered at step one). ▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely. 	<p>more severe type of sentence than for the basic offence.</p>
<p>LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION</p>	<p>SENTENCE UPLIFT</p>
<ul style="list-style-type: none"> ▪ Aggravated element formed a minimal part of the offence as a whole. ▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim’s family (over and above the distress already considered at step one). 	<p>Consider a more onerous penalty of the same type identified for the basic offence.</p>

Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence would result in a sentence in excess of their powers. If so, they must commit for sentence to the Crown Court.

The sentencer should state in open court that the offence was aggravated by reason of race or religion, and should also state what the sentence would have been without that element of aggravation.

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**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**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 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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Criminal damage (other than by fire) value under £5,000

Criminal Damage Act 1971, s.1 (1)

Triable only summarily:

Maximum: Level 4 fine and/or 3 months' custody

Offence range: Discharge to 3 months' custody

Racially or religiously aggravated criminal damage

Crime and Disorder Act 1998, s.30

Triable either way

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

Maximum when tried on indictment: 14 years

Note:

Where an offence of criminal damage is added to the indictment at the Crown Court the statutory maximum sentence is 10 years' custody regardless of the value of the damage. In such cases where the value is under £5,000, the over £5,000 guideline should be used but regard should also be had to this guideline.

<p>STEP ONE Determining the offence category</p> <p>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.</p>
<p>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.</p>
<p>Culpability demonstrated by one or more of the following:</p>
<p>A - High culpability:</p> <ul style="list-style-type: none"> • High degree of planning or premeditation • Revenge attack • Intention to cause very serious damage to property • Intention to create a high risk of injury to persons
<p>B – Medium culpability</p> <ul style="list-style-type: none"> • <u>All other cases that fall between categories A and C because:</u> • <u>Factors are present in A and C which balance each other out and/or</u> • <u>The offender’s culpability falls between the factors described in A and C</u> • Some planning • Recklessness as to whether very serious damage to property caused • Recklessness as to whether serious injury to persons caused
<p>C - Lesser culpability:</p> <ul style="list-style-type: none"> • Little or no planning; offence committed on impulse • Recklessness as to whether some damage to property caused • Offender’s responsibility substantially reduced by mental disorder or learning disability • Involved through coercion, intimidation or exploitation
<p>Harm The level of harm is assessed by weighing up all the factors of the case.</p>
<p>Category 1</p> <ul style="list-style-type: none"> • Serious distress caused • Serious consequential economic or social impact of offence • High value of damage
<p>Category 2</p> <ul style="list-style-type: none"> • All other cases

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.

Under £5,000 maximum Level 4 fine and/or 3 months

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point High level Community order</p> <p>Category range Medium level Community order- 3 months' custody</p>	<p>Starting point Low level community order</p> <p>Category range Band C fine- High level Community order</p>	<p>Starting point Band B fine</p> <p>Category range Discharge-Low level Community order</p>
Category 2	<p>Starting point Low level Community order</p> <p>Category range Band C fine- High level Community order</p>	<p>Starting point Band B fine</p> <p>Category range Discharge- Low level Community order</p>	<p>Starting point Band A fine</p> <p>Category range Discharge- Band B fine</p>

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: disability, sexual

orientation, or transgender identity.

Other aggravating factors:

A4. Damaged items of great value to the victim (whether economic, commercial, sentimental or personal value)

A5 Commission of offence whilst under the influence of alcohol or drugs

A6. Victim is particularly vulnerable

A7. Damage caused to heritage and or cultural assets

A8. Established evidence of community/wider impact

A9. Failure to comply with current court orders

A10. Offence committed on licence or post sentence supervision

A11. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

M1. No previous convictions or no relevant/recent convictions

M2. Remorse

M3. Good character and/or exemplary conduct

M4. Serious medical condition requiring urgent, intensive or long-term treatment

M5. Age and/or lack of maturity where it affects the responsibility of the offender

M6. Sole or primary carer for dependent relatives

M7. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

RACIALLY OR RELIGIOUSLY AGGRAVATED CRIMINAL DAMAGE OFFENCES ONLY

Having determined the category of the basic offence to identify the sentence of a non aggravated offence, the court should now consider the level of racial or religious aggravation involved and apply an appropriate uplift to the sentence in accordance with the guidance below. The following is a list of factors which the court should consider to determine the level of aggravation. Where there are characteristics present which fall under different levels of aggravation, the court should balance these to reach a fair assessment of the level of aggravation present in the offence.

Maximum sentence for the aggravated offence on indictment is 14 years' custody (maximum when tried summarily is a level 5 fine and/or 6 months)

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

HIGH LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation was the predominant motivation for the offence. ▪ Offender was a member of, or was associated with, a group promoting hostility based on race or religion (where linked to the commission of the offence). ▪ Aggravated nature of the offence caused severe distress to the victim or the victim’s family (over and above the distress already considered at step one). ▪ Aggravated nature of the offence caused serious fear and distress throughout local community or more widely. 	<p>Increase the length of custodial sentence if already considered for the basic offence or consider a custodial sentence, if not already considered for the basic offence.</p>
MEDIUM LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Racial or religious aggravation formed a significant proportion of the offence as a whole. ▪ Aggravated nature of the offence caused some distress to the victim or the victim’s family (over and above the distress already considered at step one). ▪ Aggravated nature of the offence caused some fear and distress throughout local community or more widely. 	<p>Consider a significantly more onerous penalty of the same type <u>or consider</u> a more severe type of sentence than for the basic offence.</p>

LOW LEVEL OF RACIAL OR RELIGIOUS AGGRAVATION	SENTENCE UPLIFT
<ul style="list-style-type: none"> ▪ Aggravated element formed a minimal part of the offence as a whole. ▪ Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered at step one). 	<p>Consider a more onerous penalty of the same type identified for the basic offence.</p>

Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence would result in a sentence in excess of their powers. If so, they must commit for sentence to the Crown Court.

The sentencer should state in open court that the offence was aggravated by reason of race or religion, and should also state what the sentence would have been without that element of aggravation.

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

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**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 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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Threat to destroy or damage property

Criminal Damage Act 1971, s.2

Triable either way

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

Maximum when tried on indictment: 10 years custody

Offence range: Discharge to 5 years' custody

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, a medical practitioner, or where it is necessary, ordering a psychiatric report, so to both ascertain whether the offence is linked to a mental disorder or learning disability (to 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:

- Significant planning or premeditation
- Offence motivated by revenge
- Offence committed to intimidate, coerce or control
- Threat to burn or bomb property

B - Medium culpability:

- 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

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

Harm

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

Category 1

- Serious distress caused to the victim
- Serious disruption/inconvenience caused to others

<ul style="list-style-type: none"> • <u>High level of consequential financial harm and inconvenience caused to the victim</u>
<p>Category 2</p> <ul style="list-style-type: none"> • Harm that falls between categories 1 and 3
<p>Category 3</p> <ul style="list-style-type: none"> • No or minimal distress caused to the victim
<p>STEP TWO Starting point and category range</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>

Harm	Culpability		
	A	B	C
Category 1	<p>Starting point 2 years 6 months' custody</p> <p>Category range 1 year to 5 years' custody</p>	<p>Starting point 9 months' custody</p> <p>Category range 6 months to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium level Community order-9 months' custody</p>
Category 2	<p>Starting point 9 months' custody</p> <p>Category range 6 months to 1 year 6 months' custody</p>	<p>Starting point High level Community order</p> <p>Category range Medium level Community order-9 months' custody</p>	<p>Starting point Medium level Community order</p> <p>Category range Band C fine-High level Community order</p>
Category 3	<p>Starting point High level Community order</p> <p>Category range Medium level Community order-9 months' custody</p>	<p>Starting point Medium level Community order</p> <p>Category range Band C fine- High level Community order</p>	<p>Starting point Band B fine</p> <p>Category range Discharge- Medium level Community order</p>

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. Victim is particularly vulnerable

A6. Threats made in the presence of children

A7. Considerable damage threatened

A8. Established evidence of community/wider impact

A9. Failure to comply with current court orders

A10. Offence committed on licence or post sentence supervision

A11. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

M1. No previous convictions **or** no relevant/recent convictions

M2. Remorse

M3. Good character and/or exemplary conduct

M4. Serious medical condition requiring urgent, intensive or long-term treatment

M5. Age and/or lack of maturity where it affects the responsibility of the offender

M6. Sole or primary carer for dependent relatives

M7. 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.

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

1 March 2019
SC(19)MAR05 – Firearms paper 1
Maura McGowan
Sophie Klinger
07976 300962

1 ISSUE

1.1 This is the sixth meeting to consider the firearms guideline. This paper asks the Council to consider three guidelines covering possession with intent offences. The paper discusses revisions to culpability and harm following the January Council meeting and the meeting of the Firearms Working Group on 11 February. The Council is also asked to consider aggravating and mitigating factors and sentence levels.

1.2 Currently, there are three further meetings scheduled to discuss the firearms guideline. The aim is to sign off the consultation version at the June 2019 meeting, if possible, with consultation planned for September 2019. These timelines will continue to be monitored and amended as required.

2 RECOMMENDATION

2.1 It is recommended that the Council:

- agrees the approach to type of weapon developed by the Firearms Working Group (FWG) for each guideline (see paragraph 3.1 onwards);
- agrees further specific changes to culpability and harm factors (see paragraph 3.12 and 3.16);
- considers aggravating and mitigating factors (see paragraph 3.19 and 3.28); and
- considers sentence levels (see paragraph 3.34 onwards).

3 CONSIDERATION

Possession with intent guidelines

This paper focuses on possession with intent offences. There are three possession with intent guidelines, as follows:

Guideline	Offence(s)	Description	Maximum penalty	Volumes (2017)
Guideline 5 (Annex A)	S16 Possession with intent to endanger life	Possession of any firearm or ammunition with intent to endanger life, or to enable another person to endanger life, whether injury caused or not.	Life	77
Guideline 6 (Annex B)	S16A Possession with intent to cause fear of violence	Possession of any firearm or imitation firearm with intent to cause, or to enable another person to cause, any person to believe that unlawful violence will be used against him or another person.	10 years	261
Guideline 7 (Annex C)	S17(1) Use of firearm to resist arrest	Making or attempting to make use of a firearm or imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or another person.	Life	1
	S17(2) Possession while committing a Schedule 1 offence	At the time of committing or being arrested for an offence in Schedule 1, having in possession a firearm or imitation firearm, unless possessed for a lawful object.	Life	16
	S18(1) Carry firearm with intent to commit indictable offence	Having a firearm or imitation firearm with intent to commit an indictable offence, or to resist arrest or prevent the arrest of another, while having the firearm or imitation firearm with him.	Life	16

Culpability and type of weapon

3.1 At the January meeting the Council considered the proposed three-tier type of weapon table. It was agreed to explore having two tiers instead. The FWG0 met in February to consider this issue further. Various options were explored. Difficulties were identified with a two-tier type of weapon step, including problems with satisfactorily structuring the final culpability table in a three by two grid with three culpability levels. In each guideline it has been decided to omit the type of weapon table at culpability A and address the type of weapon through alternative means. The following section sets out the approach recommended by the FWG for each possession with intent guideline.

Guideline 5 – Possession with intent to endanger life

3.2 This offence covers firearms and ammunition. It does not cover imitation firearms. Sentencing data for the period 2011-2017 shows that this offence involved 99% firearms and 1% ammunition. There is no data available on the type of weapon, but the majority of the firearms involved are likely to be prohibited weapons attracting the minimum term, based on analysis of transcripts and sentence levels.

3.3 In the draft guideline at **Annex A**, the type of weapon table has been omitted from culpability altogether and instead the type of weapon is addressed at step two. An option involving a two-tier type of weapon table in culpability was considered, with minimum term items at type 1 and all other firearms at type 2. However, because few cases would involve non-minimum term firearms, the type of weapon distinction in culpability seemed to add little value. Instead, it is now proposed to address the type of weapon at step two through a mitigating factor (M6) where the firearm is *not* a prohibited weapon attracting the minimum term. Mitigating for a non-minimum term weapon was considered preferable to aggravating for a minimum term weapon, since most cases are expected to involve minimum term weapons.

3.4 Under this approach culpability will be determined by the factors previously at step B of the two-pronged culpability model. The approach is considered suitable for this offence as it is more straightforward and the type of weapon is less of a driver of culpability compared with the possession guidelines.

Question 1: Does the Council agree with the approach to type of weapon for guideline 5 (endanger life)?

Guideline 6 – Possession with intent to cause fear of violence

3.5 This offence covers firearms and imitation firearms. In 2017, firearms comprised 28% of offences and imitation firearms 72%. Again, it is not possible to set out precisely how many of the firearms offences involved weapons subject to the minimum term. The data from transcripts and sentence levels is not clear-cut. Sentence levels show that in 2017 around 32% of offenders sentenced for possessing a firearm with intent to cause fear of violence received a custodial sentence of 5 years or more (after any reduction for guilty plea), suggesting these may be cases involving minimum term firearms. Analysis of transcripts indicated that the majority may be prohibited weapons. On balance the proportion of minimum term firearms is expected to be fairly low for this offence, certainly lower than for the endanger life offence.

3.6 As with guideline 5 above, consideration was given to a two-tier type of weapon table at culpability A, based on prohibited versus non-prohibited weapons. However the FWG agreed that for this offence the key distinction is between firearms and imitation firearms, rather than between prohibited and non-prohibited weapons. Transcripts and sentence levels indicate that cases involving imitation firearms attract much lower sentences than genuine firearms. Nearly half of the imitation firearms offences in 2017 received a pre-guilty plea sentence length of 2 years or less, compared with around a quarter for firearms. The median ACSL for imitations was 2 years 3 months compared with 5 years for firearms. Accordingly, it is appropriate to separate imitation firearms out from firearms.

3.7 In the guideline at **Annex B**, the distinction between firearms and imitation firearms is made through two separate sentence tables, rather than as a step in culpability. The type of weapon step has been omitted.

3.8 Since the firearms table will encompass both minimum term and non-minimum term firearms, it is necessary to recognise the minimum term cases elsewhere. An aggravating factor (A8) has been included where the firearm is a prohibited firearm attracting the minimum term. Based on 2017 sentence levels, this may apply to around 9% of total cases (around 32% of the 74 cases involving firearms).

3.9 The FWG also sought to distinguish between certain types of imitation firearms, in light of the relatively high volumes of cases likely to fall into this category. An aggravating factor (A9) has been included for readily convertible imitation firearms.¹ A mitigating factor (M4) has been included for imitation firearms that are crude or unrealistic. This was chosen over an aggravating factor for more realistic firearms as it should be easier to assess and affect a smaller proportion of cases.

Question 2: Does the Council agree with the approach to type of weapon for guideline 6 (cause fear of violence)?

Guideline 7 – Possession with intent to resist arrest/commit indictable or Schedule 1 offence

3.10 These offences, like guideline 6, cover both firearms and imitation firearms. In 2017, 16% involved firearms and 84% imitation firearms, although volumes are low and the proportion of imitations was lower in previous years so caution should be taken with these figures.

¹ A firearm is readily convertible if: (a) it can be so converted without any special skill on the part of the person converting it in the construction or adaptation of firearms of any description; and (b) the work involved in converting it does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes (section 1(6) of 1982 Act). Generally forensic evidence will be required to establish this.

3.11 As with guideline 6, the important distinction for this offence was considered to be firearm/imitation firearm rather than minimum term/non-minimum term. Accordingly, the approach taken in this guideline at **Annex C** is the same as for guideline 6, with separate tables for firearms and imitations, aggravating factors for minimum term firearms and readily convertible imitations, and a mitigating factor for crude or unrealistic imitations. Because volumes for these offences are very low, the data on which to develop separate sentence tables is very limited so there are risks associated with the two table approach. It was considered desirable for consistency with guideline 6 to retain the separate tables.

Question 3: Does the Council agree with the approach to type of weapon for guideline 7 (resist arrest and commit offence)?

Additional changes in culpability

3.12 **'Firearm discharged'** – All guidelines currently contain this factor at high culpability. While discharge of the firearm is rare in simple possession cases, it is more common in possession with intent cases. In transcripts analysed, this factor was present in nearly 50% of possession with intent to endanger life cases, and 25% of possession with intent to cause fear of violence cases. It is possible that including this factor at high culpability could put too many cases into that category, particularly in the intent to endanger life guideline. This may risk an inflationary effect on sentences. The FWG was not in favour of making changes to address this issue and preferred to retain the factor at high culpability. Therefore no changes are proposed, but the Council is asked to note the risk of an inflationary effect.

3.13 Road-testing will be needed to assess how sentencers would balance this factor against those in lower categories. For example in a case of group offending where the firearm was discharged but some individuals had a lesser or significant rather than leading role (for example assisting in the aftermath of the shooting), or limited planning. In addition, the sentence tables will need to encompass a wider range at culpability A if up to 50% of endanger life cases and 25% of cause fear of violence cases may fall into high culpability due to this factor. If there are no (or few) balancing factors to take it out of high culpability, a case where a firearm is discharged will have at least a starting point of 10 years and a range of 8-12 years (at lowest harm), or 14 years with a 11-17 range (at medium harm). There are few mitigating factors beyond the standard ones and some aggravating factors that may arise frequently so the sentences would likely fall at the higher end of the range.

3.14 If the Council were minded to narrow this factor to reduce the scope of the 'Firearm discharged' factor, possible wording could be 'Firearm used to inflict violence' (from high culpability in robbery) or 'Firearm discharged at a person' (as distinct from cases where it is fired at a house or vehicle).

3.15 **Firearm not produced or visible** – The FWG agreed to include this factor at lower culpability in all guidelines, and remove the factor ‘Firearm produced (where not at high culpability)’ from medium culpability. There was a concern that the ‘Firearm produced’ factor would put almost all cases into medium culpability or higher, unduly limiting the cases that might fall into lower culpability. The firearm being produced is a common feature of this offending, occurring in around three quarters of transcripts. Putting ‘Firearm not produced or visible’ at lower culpability does not preclude a case where the firearm is produced falling into this category, provided there are sufficient other lower culpability factors present. However, there is a risk that lower culpability could be interpreted as excluding cases where the firearm is produced. It may be worth including wording to make it clear that a case may fall into lower culpability even where the firearm is produced.

Question 4: Is the Council content with these changes to culpability?

Additional changes in harm

3.16 **‘Severe physical harm caused’ and ‘Severe psychological harm caused’** – These factors are in harm at category 1. Previously, these factors referred to ‘serious’ rather than ‘severe’ harm. The evaluation of the robbery guideline, which similarly included ‘serious physical or psychological harm’ at the highest level of harm, indicated that serious psychological harm was present in around one third of cases. The evaluation stated that the introduction of ‘psychological harm’ as part of harm may have played a role in the increase in sentencing severity, particularly in relation to dwelling and professionally planned commercial robberies, where psychological harm was often deemed serious. To avoid contributing to a similar increase in firearms sentencing levels, the FWG decided to substitute ‘severe’ for these factors. Since the category 1 factors are now ‘severe’ rather than ‘serious’, the equivalent factors in category 2 have been changed to ‘serious’ from ‘less serious’.

3.17 **‘Alarm/distress’** – This factor is now only at category 3. Previously, harm included ‘Serious alarm/distress caused’ at category 2 and ‘Limited alarm/distress caused’ at category 3. Given that in the vast majority of these cases, the firearm is visible and observed by at least one witness, alarm and distress is common. The FWG agreed it was no longer necessary to include both ‘Serious alarm/distress’ and ‘Less serious psychological harm’ in category 2. ‘Serious alarm/distress’ has been omitted from category 2 altogether and the category 3 factor amended to ‘Alarm/distress caused’, without ‘Limited’.

3.18 **Risk-based factors moved to harm category 2**– The risk-based factors that were at category 1 have been shifted to category 2. These factors are: ‘Offence committed in circumstances where person(s) put at high risk of serious physical injury or death’ and

'Offence committed in circumstances where there is a high risk of serious disorder'. In light of the change of the harm factors to 'severe' in category 1, it seems out of step to include these risk-based factors at category 1 as well, above actual 'serious' harm which is at category 2. They also may be present in quite a few cases which could distort category 1, particularly in intent to endanger life. Therefore these factors have been moved to category 2, to sit alongside what is now 'serious' physical harm and psychological harm and the catch-all factor. This means that category 1 is reserved for severe actual physical or psychological harm, and category 2 covers both serious actual harm and a high risk of serious physical injury, death or serious disorder.

Question 5: Is the Council content with these changes to harm?

Aggravating factors

3.19 The step two factors are similar to those used earlier for the possession guidelines. Amendments and additions compared with the possession guidelines have been tracked in Annex A but not B and C. Additions and changes of note are set out below. References are to the factors in **Annex A** except where otherwise specified.

3.20 A3 'Offence motivated by, or demonstrating hostility based on any of the following characteristics ...' – This statutory aggravating factor was not relevant in simple possession but may be relevant in the possession with intent offences, so has been included here using wording consistent with other guidelines.

3.21 A5 – The factor 'Contact with criminal associates ...' has been omitted since would affect a very high proportion of these offences. Instead 'Offence committed to further organised criminal activity or protect territory' has been included. This is included in guidelines 5 and 6 only, not guideline 7.

3.22 A10 'Steps taken to make imitation firearm appear more realistic ...' – This has been included to capture activity such as painting the coloured sections of a firearm black. It is proposed it could be included across the guidelines including the possession guidelines considered earlier.

3.23 A11 'Serious damage to property caused...' – The Council agreed at the last meeting to move this factor from harm to step two in this form.

3.24 A12 'Abuse of position as registered firearms dealer or certificate holder' – additional wording referring to certificate holders as some transcripts involved misuse of firearms held under certificate or holding some firearms under a certificate to increase respectability and reduce scrutiny. It is proposed this change could be made across the package of guidelines.

3.25 A13 'Expectation of substantial financial gain (except where already taken into account at step one)' – This factor has been included to capture cases with significant commercial elements that were not covered under the high culpability factors.

3.26 Annex C (Guideline 7) contains two additional aggravating factors specific to resisting arrest at A6 and A7, of 'Offender's actions resulted in a suspect avoiding arrest' and 'Offender's actions resulted in a significant waste of resources'. This latter factor is aimed at cases where a large number of officers have been engaged or armed response teams have been called out to disarm an offender (and where the gun may not even have been a genuine firearm).

3.27 Other new factors relating to imitation firearms and prohibited weapons have been discussed above.

Question 6: Does the Council agree with the aggravating factors?

Mitigating factors

3.28 Again the mitigating factors are very similar to the possession guidelines. The main change to note is as follows: M3 'Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)'. It is proposed to include this wording across all the guidelines, particularly to address the possession cases involving a stun gun, where it was regarded as less serious when a stun gun was not charged and not held with a means of doing so.

3.29 Certain factors from possession have not been carried across from possession as they are less relevant to these offences, including 'No knowledge or suspicion that item possessed was firearm/ammunition' and 'Unaware firearm/ammunition is prohibited'.

3.30 Other new factors relating to imitation firearms and prohibited weapons have been discussed above.

Question 7: Does the Council agree with the mitigating factors?

Sentence table – Guideline 5 – Possession with intent to endanger life

3.31 One table only has been used for this offence. The FWG gave consideration as to whether separate tables were needed for minimum term and non-minimum term cases, as in possession. Because the offence is relatively low volume (77 cases in 2017), and because sentence levels in 2017 suggested that the sentence table could start around 5 years, it was agreed only one table was necessary.

3.32 The offence has a maximum penalty of life imprisonment. Most cases (94%) received immediate custody, with a small number otherwise dealt with. The ACSL for this offence is

the highest of all the firearms offences being covered, at a median of 12 years pre-guilty plea.

3.33 Sentence levels are set out in the sentence table at page 4 of **Annex A**. The table has been drafted to reflect current sentence levels based on 2017 data. There will be a question about parity with the manufacture/transfer offence (see paper 2) when levels for that offence are considered. The figures are indicative at this stage. Further testing against transcripts will be carried out to refine the detail of the tables.

Question 8: Does the Council agree in principle with the sentence table for the endanger life offence?

Sentence tables – Guideline 6 – Possession with intent to cause fear of violence

3.34 This offence carries a maximum penalty of 10 years. In terms of outcomes, in 2017 the proportion receiving immediate custody was still high, at 70%, but significantly lower than for the endanger life offence. Nearly one quarter of cases received a suspended sentence. A small proportion received a community order (3%) and there was one conditional discharge in 2017. The median ACSL is 2 years 6 months pre-guilty plea.

3.35 Indicative levels are in the sentence table at page 4 of **Annex B**. As noted above, there are two tables, covering firearms and imitation firearms. There is significant overlap between the firearm and imitation firearm tables, to recognise that higher-end cases involving imitation firearms can be as serious as offences involving a genuine firearm in some instances.

Question 9: Does the Council agree in principle with the sentence table for the cause fear of violence offence?

Sentence tables – Guideline 7 – Possession with intent to resist arrest/commit indictable or Sch 1 offence

3.36 These offences all carry a maximum of life imprisonment. The vast majority of cases (88-94%) received immediate custody in 2017. The median ACLS (pre-guilty plea) range slightly from 4 years 3 months for resist arrest, to 5 years 8 months for possession while committing Sch 1 offence, to 7 years for possession with intent to commit an indictable offence.² As the volumes are low these figures should be taken with caution.

² The median ACSL for resist arrest is based on data covering the period 2011-2017, due to low volumes. For possession while committing a Sch 1 offence/ an indictable offence, the median ACSLs relate to 2017.

3.37 Indicative levels are in the sentence table at page 4 of **Annex B**. As with guideline 6, there are separate tables for firearms and imitation firearms, and overlap between the levels for the two tables. Because of low volumes, it is more difficult to identify appropriate sentence levels for the tables, particularly across two tables. Data covering the last five years has been used to increase the data on which to base sentence levels. These levels have been developed with some regard to the sentence table in the [robbery guideline \(street and less sophisticated commercial\)](#) as many s17(1) and s18 offences are sentenced alongside robbery using the robbery guideline. Based on transcripts, courts often impose the same sentence (concurrent) for the robbery and the possession of firearm with intent offence. Broadly, the imitation firearm levels are similar to the robbery guideline and the firearm levels are slightly higher.

Question 10: Does the Council agree in principle with the sentence table for the resist arrest/commit offence guideline?

Minimum term guidance

3.38 Detailed guidance on the minimum term and exceptional circumstances will be included at step three once the wording is agreed in relation to possession.

3.39 In step two, a line has been added above the sentence table in each guideline to highlight that, where the minimum term applies and the sentence reached by application of the guideline would fall below 5 years, the sentence should be increased to 5 years. Alternatively, this point could be incorporated into the minimum sentence guidance for these guidelines in step three.

This offence is subject to minimum sentence provisions. Where the minimum sentence applies,³ and the sentence reached by application of the guideline would be lower than the minimum term, it should be increased to 5 years, unless there are exceptional circumstances. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.

Question 11: Does the Council agree with this wording and its location above the sentence table?

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 2018 meeting that the guideline should aim to replicate current sentencing practice (subject to

³ The minimum term applies in respect of a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af), (c) or section 5(1A)(a) of the Firearms Act 1968.

consideration of the sentencing tables and any future decisions around the objective of the exceptional circumstances guidance). The impact on resources within the system is likely to be negligible if the guideline continues to be developed in line with the aim of replicating current practice.

5 RISK

5.1 As noted above, there are risks in guideline 7 of developing two separate sentence tables using very low volumes of data, although for the same reason of low volumes, the potential impact is also likely to be small.

5.2 The Offensive Weapons Bill completed its committee stage in the House of Lords on 22 February 2019. The report stage has yet to be scheduled. As noted previously, the Bill will prohibit two further items: rapid firing rifles⁴ and bump stock devices.⁵ Both items will be subject to the minimum term. They will be incorporated into the type of weapon table in the possession guidelines once the bill has passed.

⁴ Certain chambered weapons from which cartridge cases are extracted by propellant gas. According to the Home Office, these fire at a rate that is significantly greater than a conventional bolt-action rifle, making them closer to self-loading rifles, which are already prohibited.

⁵ A bump stock device is an attachment that increases the rate of fire, so that a semi-automatic weapon can fire almost as quickly as an automatic weapon.

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Firearms – Possession with intent to endanger life

Possession with intent to endanger life

Firearms Act 1968 (section 16)

Indictable only

Maximum: Life imprisonment

Offence range: 4 – 18 years' custody

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence).

This is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

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**.

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.

Culpability demonstrated by one or more of the following:
<p>A – High culpability:</p> <ul style="list-style-type: none"> • Sophisticated nature of offence/significant planning • Leading role where offending is part of a group activity • Distribution or supply of firearms on a large scale • Firearm discharged • Prolonged incident
<p>B – Medium culpability:</p> <ul style="list-style-type: none"> • Firearm loaded or held with compatible ammunition but not discharged • Significant role where offending is part of a group activity • Some degree of planning • Other cases falling between high and lower culpability
<p>C – Lower culpability:</p> <ul style="list-style-type: none"> • Lesser role where offending is part of group activity • Little or no planning or unsophisticated offending • Firearm not produced or visible • Conduct limited in scope and duration

Harm	
The court should consider the steps set out below to determine the level of harm that has been caused or was risked .	
This step is assessed by reference to the risk of injury/death or disorder occurring and/or actual harm 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.	
Category 1	<ul style="list-style-type: none"> • Severe physical harm caused • Severe psychological harm caused
Category 2	<ul style="list-style-type: none"> • Serious physical harm • Serious psychological harm • Offence committed in circumstances where person(s) put at high risk of serious physical injury or death • Offence committed in circumstances where there is a high risk of serious disorder • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
Category 3	<ul style="list-style-type: none"> • Alarm/distress caused • Offence committed in circumstances where person(s) put at no/minimal risk of serious physical injury or death • Offence committed in circumstances where there is no/minimal risk of serious disorder

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.

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

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.			
This offence is subject to minimum sentence provisions. Where the minimum sentence applies, ¹ and the sentence reached by application of the guideline would be lower than the minimum term, it should be increased to 5 years, unless there are exceptional circumstances. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
Harm	Culpability		
	A	B	C
Category 1	Starting point 18 years Category range 16 – 22 years	Starting point 14 years Category range 11 – 17 years	Starting point 10 years Category range 8 – 12 years
Category 2	Starting point 14 years Category range 11 – 17 years	Starting point 10 years Category range 8 – 12 years	Starting point 7 years Category range 5 – 9 years
Category 3	Starting point 10 years Category range 8 – 12 years	Starting point 7 years Category range 5 – 9 years	Starting point 5 years Category range 4 – 7 years

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

¹ The minimum term applies in respect of a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af), (c) or section 5(1A)(a) of the Firearms Act 1968.

- 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. Offence was committed as part of a group (except where already taken into account at step one)
- A5. ~~Offender has contact with criminal associates, including through the purchase and supply of drugs (except where already taken into account at step one)~~
Offence committed to further organised criminal activity or protect territory
- A6. Commission of offence whilst under the influence of alcohol or drugs
- A7. Firearm/ammunition kept held with multiple weapons (See step seven on totality when sentencing for more than one offence.)
- A8. Firearm modified to make it more lethal
- A9. Steps taken to disguise firearm (where not firearm under section 5(1A)(a))
- A10. Steps taken to make imitation firearm appear more realistic (where not charged separately)
- A11. Serious damage to property caused (where not charged separately)
- A12. Abuse of position as registered firearms dealer or certificate holder
- A13. Expectation of substantial financial gain (except where already taken into account at step one)
- A14. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- A15. Offences taken into consideration
- A16. Failure to comply with current court orders
- A17. 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 (including stun gun that is not charged and not held with a functioning charger)
- M4. Voluntary surrender of firearm/ammunition
- M5. ~~No knowledge or suspicion that item possessed was firearm/ammunition~~
- M6. ~~Unaware firearm/ammunition is prohibited~~Firearm/ammunition is not prohibited under section 5
- M7. ~~Held on behalf of another through~~Involved through coercion, intimidation, or exploitation

- M8. Serious medical condition requiring urgent, intensive or long-term treatment
- M9. Age and/or lack of maturity
- M10. Mental disorder or learning disability
- M11. Sole or primary carer for dependent relatives
- M12. Co-operation with the police

STEP THREE

Minimum Terms

[To come once finalised]

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

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 244A 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

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 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

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 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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Firearms – Possession with intent to cause fear of violence

Possession with intent to cause fear of violence

Firearms Act 1968 (section 16A)

Indictable only

Maximum: 10 years' custody

Offence range: Medium level community order – 9 years' custody

This is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

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**.

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.

Culpability demonstrated by one or more of the following:
<p>A – High culpability:</p> <ul style="list-style-type: none"> • Intention falling just short of intent to endanger life • Conduct intended to maximise fear or distress • Sophisticated nature of offence/significant planning • Leading role where offending is part of a group activity • Firearm discharged • Prolonged incident
<p>B – Medium culpability:</p> <ul style="list-style-type: none"> • Firearm loaded or held with compatible ammunition but not discharged • Significant role where offending is part of a group activity • Some degree of planning • Other cases falling between high and lower culpability
<p>C – Lower culpability:</p> <ul style="list-style-type: none"> • No intention to cause injury to persons • Lesser role where offending is part of group activity • Little or no planning or unsophisticated offending • Firearm not produced or visible • Conduct limited in scope and duration

Harm	
The court should consider the steps set out below to determine the level of harm that has been caused or was risked .	
This step is assessed by reference to the risk of injury/death or disorder occurring and/or actual harm 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.	
Category 1	<ul style="list-style-type: none"> • Severe physical harm caused • Severe psychological harm caused
Category 2	<ul style="list-style-type: none"> • Serious physical harm caused • Serious psychological harm caused • Offence committed in circumstances where person(s) put at high risk of serious physical injury or death • Offence committed in circumstances where there is a high risk of serious disorder • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
Category 3	<ul style="list-style-type: none"> • Alarm/distress caused • Offence committed in circumstances where person(s) put at no/minimal risk of serious physical injury or death • Offence committed in circumstances where there is no/minimal risk of serious disorder

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.

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

STEP TWO			
Starting point and category range			
<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> <p>Table 1 should be used if the offence is in respect of a firearm. Table 2 should be used for an imitation firearm.</p> <p>The offence may be subject to a minimum sentence. Where the minimum sentence applies,¹ and the sentence reached by application of the guideline would be lower than the minimum term, it should be increased to 5 years, unless there are exceptional circumstances. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.</p>			
TABLE 1	Firearm		
Harm	Culpability		
	A	B	C
Category 1	Starting point 8 years Category range 7 – 9 years	Starting point 6 years Category range 4 – 8 years	Starting point 4 years Category range 2 – 7 years
Category 2	Starting point 6 years Category range 4 – 8 years	Starting point 4 years Category range 2 – 7 years	Starting point 2 years Category range 1 – 4 years
Category 3	Starting point 4 years Category range 2 – 7 years	Starting point 2 years Category range 1 – 4 years	Starting point 1 year 6 months Category range 6 months – 2 years
TABLE 2	Imitation firearm		
Harm	Culpability		
	A	B	C
Category 1	Starting point 7 years Category range 6 – 8 years	Starting point 5 years Category range 3 – 7 years	Starting point 3 years Category range 1 – 5 years
Category 2	Starting point 5 years Category range 3 – 7 years	Starting point 3 years Category range 1 – 5 years	Starting point 1 year Category range 6 months – 2 years
Category 3	Starting point 3 years Category range 1 – 5 years	Starting point 1 year Category range 6 months – 2 years	Starting point 6 months Category range Medium level community order – 1 year

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
- 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. Offence was committed as part of a group (except where already taken into account at step one)
- A5. Offence committed to further organised criminal activity or protect territory
- A6. Commission of offence whilst under the influence of alcohol or drugs
- A7. Firearm/ammunition held with multiple weapons (See step seven on totality when sentencing for more than one offence.)
- A8. Firearm is prohibited under section 5 and subject to minimum term
- A9. Imitation firearm is readily convertible¹
- A10. Firearm modified to make it more lethal
- A11. Steps taken to disguise firearm (where not firearm under section 5(1A)(a))
- A12. Steps taken to make imitation firearm appear more realistic (where not charged separately)
- A13. Serious damage to property caused (where not charged separately)
- A14. Abuse of position as registered firearms dealer or certificate holder
- A15. Expectation of substantial financial gain (except where already taken into account at step one)
- A16. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)

¹ [Drop-down box to show relevant statutory provision or link to statute]

- A17. Offences taken into consideration
- A18. Failure to comply with current court orders
- A19. 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 (including stun gun that is not charged and not held with a functioning charger)
- M4. Imitation firearm is crude or unrealistic
- M5. Voluntary surrender of firearm
- M6. Involved through coercion, intimidation, or exploitation
- M7. Serious medical condition requiring urgent, intensive or long-term treatment
- M8. Age and/or lack of maturity
- M9. Mental disorder or learning disability
- M10. Sole or primary carer for dependent relatives
- M11. Co-operation with the police

STEP THREE

Minimum Terms

[To come once finalised]

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

Dangerousness

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 an extended sentence (section 226A).

STEP SIX

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 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

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 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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Firearms – Possession with intent – other offences

Use of firearm to resist arrest

Firearms Act 1968 (section 17(1))

Possession while committing a Schedule 1 offence

Firearms Act 1968 (section 17(2))

Carrying firearm with criminal intent

Firearms Act 1968 (section 18)

Indictable only

Maximum: Life imprisonment

Offence range: High level community order – 16 years' custody

These are serious specified offences for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

These are offences listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence).

These are specified offences for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

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**.

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.

Culpability demonstrated by one or more of the following:
<p>A – High culpability:</p> <ul style="list-style-type: none"> • Sophisticated nature of offence/significant planning • Leading role where offending is part of a group activity • Firearm discharged • Prolonged incident • Serious nature of intended offence
<p>B – Medium culpability:</p> <ul style="list-style-type: none"> • Firearm loaded or held with compatible ammunition but not discharged • Significant role where offending is part of a group activity • Some degree of planning • Other cases falling between high and lower culpability
<p>C – Lower culpability:</p> <ul style="list-style-type: none"> • No intention to cause injury to persons • Lesser role where offending is part of group activity • Little or no planning or unsophisticated offending • Conduct limited in scope and duration • Firearm not produced or visible • Less serious nature of intended offence

Harm	
The court should consider the steps set out below to determine the level of harm that has been caused or was risked .	
This step is assessed by reference to the risk of injury/death or disorder occurring and/or actual harm 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.	
Category 1	<ul style="list-style-type: none"> • Severe physical harm caused • Severe psychological harm caused
Category 2	<ul style="list-style-type: none"> • Serious physical harm caused • Serious psychological harm caused • Offence committed in circumstances where person(s) put at high risk of serious physical injury or death • Offence committed in circumstances where there is a high risk of serious disorder • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
Category 3	<ul style="list-style-type: none"> • Alarm/distress caused • Offence committed in circumstances where person(s) put at no/minimal risk of serious physical injury or death • Offence committed in circumstances where there is no/minimal risk of serious disorder

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.

Where separate charges apply, for example in relation to any injury caused, the court should have regard to totality (see step seven).

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.			
This offence is subject to minimum sentence provisions. Where the minimum sentence applies, ¹ and the sentence reached by application of the guideline would be lower than the minimum term, it should be increased to 5 years, unless there are exceptional circumstances. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
TABLE 1	Firearm		
Harm	Culpability		
	A	B	C
Category 1	Starting point 12 years Category range 10 – 16 years	Starting point 9 years Category range 7 – 11 years	Starting point 7 years Category range 5 - 9
Category 2	Starting point 9 years Category range 7 – 11 years	Starting point 7 years Category range 5 – 9 years	Starting point 4 years Category range 2 – 6 years
Category 3	Starting point 7 years Category range 5 – 9 years	Starting point 4 years Category range 2 – 6 years	Starting point 2 years Category range 1 – 3 years
TABLE 2	Imitation firearm		
Harm	Culpability		
	A	B	C
Category 1	Starting point 9 years Category range 6 – 12 years	Starting point 7 years Category range 5 – 9 years	Starting point 5 years Category range 3 – 7 years
Category 2	Starting point 7 years Category range 5 – 9 years	Starting point 5 years Category range 3 – 7 years	Starting point 2 years Category range 1 – 4 years
Category 3	Starting point 5 years Category range 3 – 7 years	Starting point 2 years Category range 1 – 4 years	Starting point 1 year Category range High level community order – 3 years

¹ The minimum term applies in respect of a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af), (c) or section 5(1A)(a) of the Firearms Act 1968.

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
- 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. Offence was committed as part of a group (except where already taken into account at step one)
- A5. Commission of offence whilst under the influence of alcohol or drugs
- A6. Offender's actions resulted in a suspect avoiding arrest
- A7. Offender's actions resulted in a significant waste of resources
- A8. Firearm/ammunition held with multiple weapons (See step seven on totality when sentencing for more than one offence.)
- A9. Firearm prohibited under section 5 and subject to minimum term
- A10. Imitation firearm is readily convertible²
- A11. Firearm modified to make it more lethal
- A12. Steps taken to disguise firearm (where not firearm under section 5(1A)(a))
- A13. Steps taken to make imitation firearm appear more realistic (where not charged separately)
- A14. Serious damage to property caused (where not charged separately)
- A15. Abuse of position as registered firearms dealer or certificate holder
- A16. Expectation of substantial financial gain (except where already taken into account at step one)

² [Drop-down box to show relevant statutory provision or link to statute]

- A17. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- A18. Offences taken into consideration
- A19. Failure to comply with current court orders
- A20. 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 (including stun gun that is not charged and not held with a functioning charger)
- M4. Imitation firearm is crude or unrealistic
- M5. Voluntary surrender of firearm
- M6.
- M7. Involved through coercion, intimidation, or exploitation
- M8. Serious medical condition requiring urgent, intensive or long-term treatment
- M9. Age and/or lack of maturity
- M10. Mental disorder or learning disability
- M11. Sole or primary carer for dependent relatives
- M12. Co-operation with the police

STEP THREE

Minimum Terms

[To come once finalised]

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

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 244A 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

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 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

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 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 D

Table 1: Number of adult offenders sentenced for offences under the Firearms Act 1968, 2007-2017

Guideline group	Legislation	Section	Offence	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Group 5 (Maximum: Life)	Firearms Act 1968	16	Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so	47	63	53	48	69	64	70	44	54	53	77
Group 6 (Maximum: 10 years)	Firearms Act 1968	16A	Possess a firearm with intent to cause fear of violence ¹	-	-	-	-	101	81	82	74	77	98	74
			Possess an imitation firearm with intent to cause fear of violence ¹	-	-	-	-	146	139	138	145	162	180	187
			TOTAL SECTION 16A OFFENCES	299	327	257	274	250	230	221	221	241	280	261
Group 7 (Maximum: Life)	Firearms Act 1968	17(1), 17(2), 18(1)	Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence ¹	-	-	-	-	18	15	13	10	7	11	5
			Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence ¹	-	-	-	-	34	17	20	28	17	20	27
			TOTAL SECTION 17(1), 17(2), 18(1) OFFENCES	96	81	73	50	52	34	33	38	24	31	33

Source: Court Proceedings Database, Ministry of Justice

Note

1) Data for these specific offences not available prior to 2011.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 5 (Maximum: 16)	16	Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so	0	0	0	0	0	72	5	77
Group 6 (Maximum: 16A 10 years)	16A	Possess a firearm with intent to cause fear of violence Possess an imitation firearm with intent to cause fear of violence	0	0	0	1	12	59	2	74
		TOTAL SECTION 16A OFFENCES	0	1	0	9	61	184	6	261
Group 7 (Maximum: 17(1), 17(2), 18(1) Life)	17(1), 17(2), 18(1)	Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence	0	0	0	0	0	4	1	5
		TOTAL SECTION 17(1), 17(2), 18(1) OFFENCES	0	0	0	1	2	29	1	33

Source: Court Proceedings Database, Ministry of Justice

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 5 (Maximum: 16)	16	Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so	0%	0%	0%	0%	0%	94%	6%	100%
Group 6 (Maximum: 16A 10 years)	16A	Possess a firearm with intent to cause fear of violence Possess an imitation firearm with intent to cause fear of violence	0%	0%	0%	1%	16%	80%	3%	100%
		TOTAL SECTION 16A OFFENCES	0%	<0.5%	0%	3%	23%	70%	2%	100%
Group 7 (Maximum: 17(1), 17(2), 18(1) Life)	17(1), 17(2), 18(1)	Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence	0%	0%	0%	0%	0%	80%	20%	100%
		TOTAL SECTION 17(1), 17(2), 18(1) OFFENCES	0%	0%	0%	4%	7%	89%	0%	100%

Source: Court Proceedings Database, Ministry of Justice

Note

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 3: Estimated average custodial sentence lengths (pre guilty plea) for adult offenders sentenced to immediate custody, and sentence ranges for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Sentence range (using estimated pre GP sentence lengths)
Group 5 (Maximum: Life)	16	Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so	12 years 5 months	12 years	1 year 8 months - 27 years' custody (and indeterminate)
Group 6 (Maximum: 10 years)	16A	Possess a firearm with intent to cause fear of violence	4 years 10 months	5 years	CO - 10 years' custody
		Possess an imitation firearm with intent to cause fear of violence	2 years 8 months	2 years 3 months	Discharge - 9 years 9 months' custody
		TOTAL SECTION 16A OFFENCES	3 years 4 months	2 years 6 months	Discharge - 10 years' custody
Group 7 (Maximum: Life)	17(1), 17(2), 18(1)	Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence ⁴	13 years 11 months	12 years	7 years 6 months - 24 years' custody
		Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence	5 years 11 months	6 years	CO - 12 years' custody
		TOTAL SECTION 17(1), 17(2), 18(1) OFFENCES	7 years 4 months	7 years	CO - 24 years' custody

Source: Court Proceedings Database, Ministry of Justice

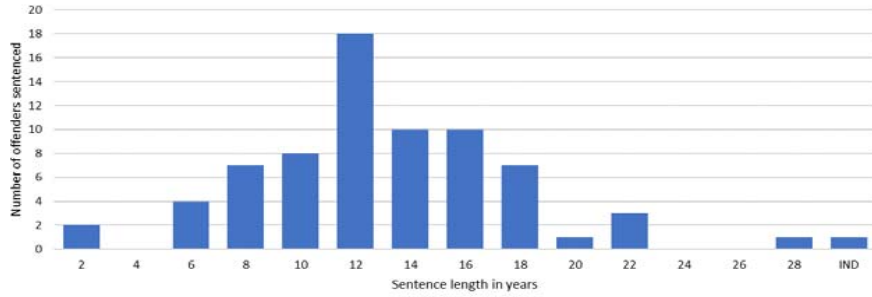
Notes

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) These figures should be treated with caution, due to the low number of offenders sentenced for this offence involving a firearm.

Figure 1: Estimated distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, before any reduction for guilty plea, 2017

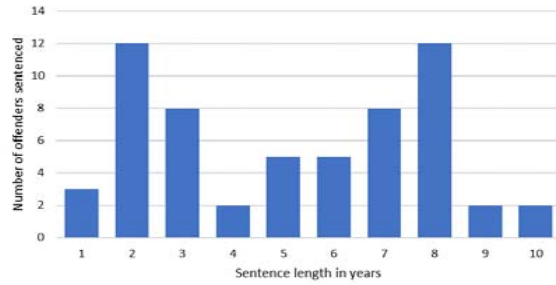
Group 5 (Maximum: Life)

Section 16 (total) - Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so

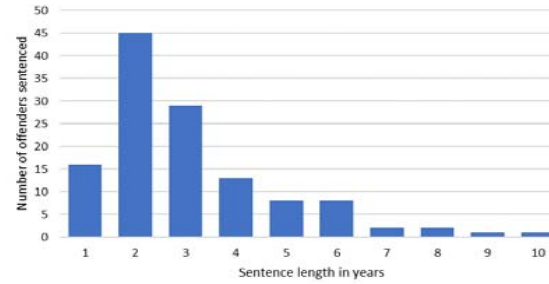


Group 6 (Maximum: 10 years)

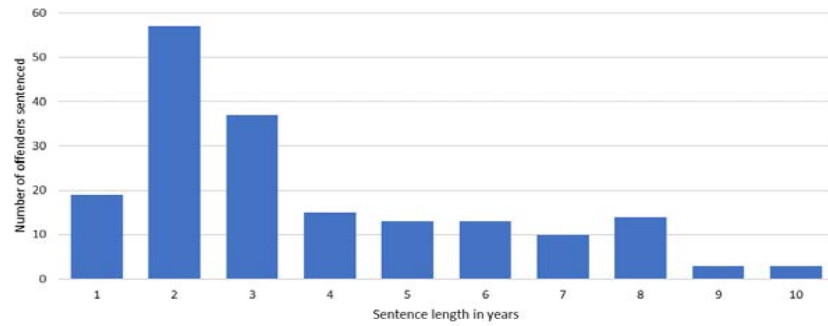
Section 16A - Possess a firearm with intent to cause fear of violence



Section 16A - Possess an imitation firearm with intent to cause fear of violence

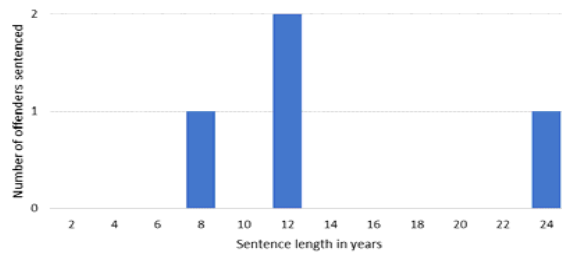


Section 16A (total) - Possess a firearm/ imitation firearm with intent to cause fear of violence

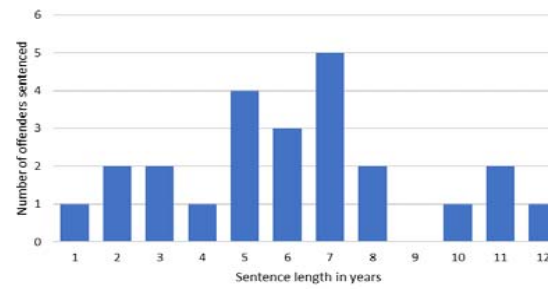


Group 7 (Maximum: Life)

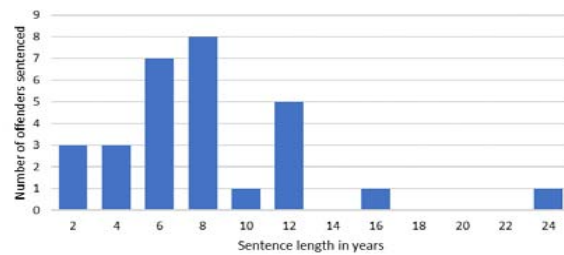
Sections 17(1), 17(2), 18(1) - Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence



Sections 17(1), 17(2), 18(1) - Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence



Sections 17(1), 17(2), 18(1) (total) - Possess a firearm/ imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence



Source: Court Proceedings Database, Ministry of Justice

Note

Sentence length intervals include the upper bound sentence length. For example, the category '2' includes sentence lengths less than and equal to 2 years, and '4' includes sentence lengths over 2 years, and up to and including 4 years.

Table 4: Distribution of estimated custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, before any reduction for guilty plea, 2017**Group 5 (Maximum: Life)**

Section 16 (total) - Possess a firearm/ ammunition/ shotgun/ air weapon with intent to endanger life / enable another to do so

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
2	2	3%
4	0	0%
6	4	6%
8	7	10%
10	8	11%
12	18	25%
14	10	14%
16	10	14%
18	7	10%
20	1	1%
22	3	4%
24	0	0%
26	0	0%
28	1	1%
Indeterminate	1	1%
Total	72	100%

Group 6 (Maximum: 10 years)

Section 16A - Possess a firearm with intent to cause fear of violence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
1	3	5%
2	12	20%
3	8	14%
4	2	3%
5	5	8%
6	5	8%
7	8	14%
8	12	20%
9	2	3%
10	2	3%
Total	59	100%

Section 16A - Possess an imitation firearm with intent to cause fear of violence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
1	16	13%
2	45	36%
3	29	23%
4	13	10%
5	8	6%
6	8	6%
7	2	2%
8	2	2%
9	1	1%
10	1	1%
Total	125	100%

Section 16A (total) - Possess a firearm/ imitation firearm with intent to cause fear of violence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
1	19	10%
2	57	31%
3	37	20%
4	15	8%
5	13	7%
6	13	7%
7	10	5%
8	14	8%
9	3	2%
10	3	2%
Total	184	100%

Group 7 (Maximum: Life)

Sections 17(1), 17(2), 18(1) - Possess a firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
2	0	0%
4	0	0%
6	0	0%
8	1	25%
10	0	0%
12	2	50%
14	0	0%
16	0	0%
18	0	0%
20	0	0%
22	0	0%
24	1	25%
Total	4	100%

Sections 17(1), 17(2), 18(1) - Possess an imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
1	1	4%
2	2	8%
3	2	8%
4	1	4%
5	4	17%
6	3	13%
7	5	21%
8	2	8%
9	0	0%
10	1	4%
11	2	8%
12	1	4%
Total	24	100%

Sections 17(1), 17(2), 18(1) (total) - Possess a firearm/ imitation firearm with intent to resist arrest/ commit a Schedule 1 offence/ commit an indictable offence

Sentence length in years	Number of offenders sentenced	Proportion of offenders sentenced
2	3	10%
4	3	10%
6	7	24%
8	8	28%
10	1	3%
12	5	17%
14	0	0%
16	1	3%
18	0	0%
20	0	0%
22	0	0%
24	1	3%
Total	29	100%

Source: Court Proceedings Database, Ministry of Justice

Note

Sentence length intervals include the upper bound sentence length. For example, the category '2' includes sentence lengths less than and equal to 2 years, and '4' includes sentence lengths over 2 years, and up to and including 4 years.

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

1 March 2019
SC(19)MAR06 – Firearms paper 2
Maura McGowan
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1 ISSUE

1.1 This is the sixth meeting to consider the firearms guideline. This paper asks the Council to consider factors in steps one and two in the guideline on the transfer and manufacture of prohibited weapons at **Annex A**. Sentence levels will be developed once the culpability and harm models are agreed but the Council is also asked an initial question about parity with the possession with intent to endanger life offence.

1.2 The Council is asked to consider whether it wishes to proceed with developing a guideline for the offence of possession of articles for conversion.

1.3 Currently, there are three further meetings scheduled to discuss the firearms guideline. The aim is to sign off the consultation version at the June 2019 meeting, if possible, with consultation planned for September 2019. These timelines will continue to be monitored and amended as required.

2 RECOMMENDATION

2.1 It is recommended that the Council:

- considers the culpability model (paragraph 3.7-3.12)
- considers the harm model (paragraph 3.13-3.16)
- considers the aggravating and mitigating factors (paragraph 3.18 and 3.20)
- agrees *not* to include a factor relating to connections with a locality where gun crime is particularly serious (paragraph 3.17)
- considers the relative seriousness of this offence and possession with intent to endanger life, in terms of sentence levels (paragraph 3.22-3.23)
- agrees *not* to develop a guideline for the offence of possession of articles for conversion (S4A) (paragraph 3.24-3.25)

3 CONSIDERATION

Offences to be covered

3.1 This paper focuses on offences relating to transfer of prohibited weapons. It is proposed to cover the following offences in one guideline:

Offence	Description	Maximum penalty	Volumes (2017)
S5(2A)(a)	Manufacture any weapon or ammunition specified in section 5(1), without authority	Life	0 (4 in 2016)
S5(2A)(b)	Sell or transfer any prohibited weapon or prohibited ammunition, without authority	Life	19
S5(2A)(c)	Possess for sale or transfer any prohibited weapon or prohibited ammunition, without authority	Life	5
S5(2A)(d)	Purchase or acquire for sale or transfer any prohibited weapon or prohibited ammunition, without authority	Life	1
TOTAL			25

3.2 All the offences are indictable only. The minimum term provisions will apply in any case where the firearm concerned is a specified firearm prohibited under S5.¹ There is no data available on the proportions of these offences where the minimum term applies. However, from the sentence levels (see **Annex B**) and transcript analysis, it appears that the majority of offences involve firearms subject to the minimum term. Law enforcement were aware of a few instances of transferring or manufacturing stun guns which would generally fall under section 5(1)(b) unless disguised, and would not attract the minimum term.

3.3 There is significant overlap between the transfer offences and the possession with intent to endanger life cases that involve firearms supply, but transfer offences are much lower volume than possession with intent to endanger life offences. The transfer offence lacks an intent element so may be preferable as a charge in certain cases. The CPS have advised it is sometimes offered as a plea instead of the endanger life offence. Unlike the endanger life offence, these offences are not subject to the dangerousness provisions, which may account for some of the lower volume.

3.4 All of the manufacture and transfer offences have the same maximum penalty of life imprisonment and appear together in the same subsection of section 5. Manufacture and transfer often occur together, and the offenders will often be charged together and be part of

¹ The minimum term applies in respect of a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af), (c) or section 5(1A)(a) of the Firearms Act 1968.

the same network. The central factors around role and scale of offending are the same. These offences are also so low-volume that the evidence would be very limited when considering sentence levels across two guidelines. For these reasons they have been grouped together in one single guideline.

Question 1: Does the Council agree with the grouping for this guideline?

3.5 There is a guideline judgment for the transfer of prohibited weapons in *Attorney General's References (Nos 128-141 of 2015 and 8-10 of 2016)* [2016] EWCA Crim 54 (*R v Stephenson*) (at **Annex C**). The court reviewed 17 sentences that had been imposed on offenders for a large-scale conspiracy to transfer prohibited weapons and ammunition, increasing 16 out of 17 sentences. It was in the context of a large-scale commercial supply operation, involving a variety of weapons, across the UK. The decision is summarised in the following extract:

“[7] If a life sentence is not passed, as was made clear in *Wilkinson*, courts must impose long determinate sentences commensurate with the role played in any activity in relation to the supply of guns. Sentences must reflect the hierarchy of the supply enterprise, the role played in individual transactions and any previous convictions in relation to guns. In the present case our conclusions can be summarised as follows:

i) for the leader of the enterprise which was in the business of supplying guns and lethal ammunition, a very long determinate sentence was required. It appears to have been assumed (because the minimum term imposed on Wilkinson, the head of the enterprise in the case determined in 2009 who received a life sentence, was 11 years) that the maximum determinate sentence was 22 years for a large scale enterprise engaged in the supply of guns. No such maximum was indicated by this court in that case. In the present case, we consider that the appropriate sentence for the leader was 25 years, prior to discount for his plea. However, in the light of the mistaken view taken of *Wilkinson*, we must make clear that courts should not take this as a maximum. For example, a materially greater sentence would be appropriate if there was any previous conviction for offences involving guns. Nor can it make any difference that the criminal enterprise here was engaged in converting or acquiring guns rather than importing them; the same level of sentence is appropriate, as the essence of the criminality is the organisation of a criminal enterprise to supply guns and lethal ammunition to customers, irrespective of the source of the guns and ammunition. Those engaged in the criminal enterprise under the leader should have received sentences reflecting the sentence for the leader (before any discount for plea), depending on the role they played;

ii) in the case of those seeking to buy a gun and lethal ammunition from this criminal enterprise, we have proceeded on the basis that the purchaser must have required the gun and lethal ammunition to “kill and maim, terrorise or intimidate”; two of the customers were engaged in the supply of Class A drugs. In our judgement the appropriate sentences for the purchasers in this case should have been in the region of 15 years, significantly higher sentences than that being required in the event of any previous convictions in relation to guns; and

iii) the role played by those who assisted in these transactions varied, but as Parliament has stipulated a minimum sentence of five years for those in possession of a gun, we consider that it was inappropriate to pass sentences with a starting point of less than eight years for those who assisted in putting guns into circulation. Their criminality lay in assisting in putting guns and lethal ammunition into the hands of a purchaser. Sentences materially greater were required in cases where the assistance was significant; in the present case the sentences should have ranged from 12–8 years, depending on the role they played and any previous association with guns.

[8] Such sentences are severe but reflect the intention of Parliament to punish gun crime in a manner that will deter criminals from engaging in dealing in guns and lethal ammunition.”

3.6 From analysis of transcripts, when this decision is being applied, sentencers are considering the *relative* scale of the criminal operation, compared with the large-scale Stephenson case, and seeking to reflect that in the sentence levels. For this reason, the harm model focuses in part on the scale of the operation (see paragraph 3.15).

Culpability model

3.7 The culpability model focuses mainly on the offender’s role. Above the table, there is wording to give guidance on how to consider role. This is broadly based on the factors used in the [drug supply guideline](#) and factors from *Stephenson* although these elements also appear in other guidelines. It reads as follows:

When considering the **offender’s role**, relevant considerations may include the offender’s level in the hierarchy of the enterprise, the role played in individual transactions or manufacturing, awareness and understanding of the scale of operation, and the offender’s involvement of, links to, or influence on, others in a chain.

Question 2: Does the Council agree with this wording providing guidance on assessing the offender’s role?

3.8 **Role:** The culpability table then contains a factor under each level relating to role, expanding the factors used in possession with intent to pick up elements from *Stephenson*:

- **High:** ‘Leading role where offending is part of a group activity, including but not limited to head of enterprise, a lead armourer or a key facilitator’
- **Medium:** ‘Significant role where offending is part of a group activity, including but not limited to a purchaser or a provider of significant assistance in facilitating transfer or manufacture’
- **Lower:** ‘Lesser role where offending is part of a group activity including but not limited to performing a limited function under direction’

Question 3: Does the Council agree with the wording of these factors on role?

3.9 **Planning:** As with the other possession with intent guidelines, there is also a factor relating to planning at each level of culpability. This is aimed at planning activity by an individual (as opposed to the overall sophistication of the operation, which is addressed in harm). These factors are the same as the possession with intent guidelines, except with additional wording at high and medium relating to steps taken to evade detection, as this was a particular feature noted in the transfer transcripts.

3.10 **Financial or other advantage:** Each level also contains a factor related to expectation of financial or other advantage. The intention is to align the wording of these with the wording to be adopted in the revised drugs guideline.

3.11 **Other high culpability factors:**

- 'Use of business as a cover' and 'Abuse of position of trust or responsibility, for example registered firearms dealer'. The latter factor has been at step two in other firearms guidelines but it is proposed to include it at step one in this guideline as it is more central to this offending. Placement at step one is consistent with the drugs and fraud guidelines.
- 'Involves others through coercion, intimidation or exploitation'. This factor is aimed in part at county lines-type exploitation of children and young people to transfer firearms. The wording is slightly different to the new factors being introduced in the drugs guideline.

3.12 **Other lower culpability factors:**

- 'Involved through coercion, intimidation or exploitation' – in previous firearms guidelines this factor was included at step two but since the factor for the person doing the involving is at high culpability, it is appropriate to include this here to balance that factor.
- 'Firearm/ammunition not intended for criminal purpose, for example belief that purchaser is collector with no criminal associates' – this factor recognises that although the offence does not contain an intent element, the intent of the transfer may be relevant to sentencing, particularly where there is no intention that the firearm is used in crime.
- 'Firearm/ammunition not subject to minimum term' – this factor would apply in those few cases where the relevant item was not a minimum term weapon. As drafted, this

factor would capture stun guns only where not disguised. If the Council wished for disguised stun guns also to fall at lower culpability (recognising they are less serious) then a factor could be added to address these items.

Question 4: Does the Council agree with the remaining culpability factors?

Harm model

3.13 The proposed harm model focuses on the scale and nature of the criminal enterprise, including the level of sophistication, and on actual harm caused. This is a departure from the approach in the intent to endanger life guideline which included large scale distribution or supply of firearms as a high culpability factor. In the endanger life offence, only some cases concerned a gun supply enterprise operating at scale, while other offences involved a specific shooting incident. In this offence, the scale and nature of the enterprise is a central factor and it is a useful proxy for the scale of harm or risk of harm caused by the offending.

3.14 There is text above the harm table providing guidance on assessing the scale and nature, again drawing on *Stephenson*:

When considering the **scale** and **nature** of the enterprise, relevant considerations may include the number, type and variety of weapons involved, the value of profits, the number of people involved, the period of time and geographic range over which the enterprise operated, and connections to organised criminal groups.

Question 5: Does the Council agree with this wording providing guidance on assessing the scale and nature of the enterprise?

3.15 The criminal enterprises involved ranged from very large scale, UK-wide industrial operations where a variety of firearms were being worked on and distributed, through to individuals operating on their own doing home-made alterations or manufacture that may be very rudimentary, such as constructing a single shotgun out of pipes. There is a factor related to scale and sophistication at each level:

- Category 1: 'Large-scale commercial and/or highly sophisticated enterprise' – the bar is set high to limit this category.
- Category 2: 'Medium-scale enterprise and/or some degree of sophistication'
- Category 3: 'Smaller-scale and/or unsophisticated enterprise'

Question 6: Does the Council agree with the wording of these factors on scale and sophistication?

3.16 Actual harm is addressed through the following factors at each level:

- Category 1: ‘Evidence firearm/ammunition used extensively to cause serious injury or death’ – again the bar is set high to prevent this factor applying to too many cases.
- Category 2: ‘Evidence firearm/ammunition used in serious criminal offending (where not at category 1)’
- Category 3: ‘Evidence firearm/ammunition not used in serious criminal offending’

Question 7: Does the Council agree with the wording of these factors on actual harm?

3.17 The *Stephenson* case also referred to one additional feature of offending: ‘any specific factors connecting the criminal enterprise to a locality where gun crime was *particularly serious*’ (at [21]). This is similar to the ‘prevalence’ factor in the drugs guideline. It is proposed not to incorporate this factor into the guideline at harm or step two. *R v Bondzie* noted that sentencing guidelines take account of collective social harm, so sentences should not be aggravated because of their harmful social effect on a community.² It is therefore considered it would be of limited value while raising a range of issues and should be omitted from the guideline.

Question 8: Does the Council agree *not* to incorporate a factor relating to connections with a locality where gun crime is particularly serious?

Aggravating factors

3.18 These factors are based on the previous guidelines. Some factors have been omitted that are now captured at step one (offence committed as part of a group; abuse of position; expectation of gain; furtherance of organised criminal activity) or are not relevant to this offence (offences taken into consideration; factors relating to imitation firearms; offence motivated by certain characteristics). Other factors have been omitted because they are common features of this offending so would be applicable in too many cases: ‘Firearm modified to make it more lethal’ (as this may be applicable in many manufacturing cases) and the factor relating to contact with criminal associates, including through drug supply.

3.19 New aggravating factors are:

² R v Marco Bondzie (Practice Note) [2016] EWCA Crim 552.

- A5 'Compatible ammunition and/or silencer(s) supplied with firearm' – In transcripts it was regarded as more serious where the transfer or manufacture involved compatible ammunition or silencers, as it makes the weapon more dangerous and ready for use. Ammunition supply featured in quite a few transcripts so it will be necessary to ensure this factor is not going to aggravate the majority of cases.
- A7 'Firearm under section 5(1)(a) (automatic weapon)' – Based on transcripts and *Stephenson*, automatic weapons are regarded as particularly dangerous so an aggravating factor is appropriate. The vast majority of weapons involved in this offence are already very serious, dangerous weapons so there is no need to broaden this factor further to include other types of prohibited weapons, and to do so would risk aggravating too many cases.
- A8 'Others put at risk of harm (where not taken into account at step 1), including by location or method of manufacture or transfer' – In transcripts, occasionally the location of the manufacture or transfer put others at particular risk, such as a property where children were present. Discussions with firearms technical experts also identified that methods of manufacture can increase the risk to the user of the weapon (for example an unskilled conversion of a weapon could make it more difficult to handle because of instability or sharp edges, or a part could blow out rather than firing properly). There are connections with the drugs guideline factor currently worded as 'Exposure of others to more than usual danger'. Although the drug guideline factor is going to be expanded to address couriers, end users and makers explicitly, it is considered the broad wording of 'others put at risk of harm' is sufficient in this case.

Mitigating factors

3.20 A factor on 'remorse' (M6) has been added as it featured in several transcripts.

3.21 The mitigating factor 'involved through coercion, intimidation or exploitation' in other firearms guidelines is now at step one rather than here. Although they are not in the possession with intent guidelines, the factors M4 'No knowledge or suspicion that item possessed was firearm/ammunition' and M5 'Unaware firearm/ammunition is prohibited' have been retained. There were some instances in transcripts where a person was involved in the transfer of a bag or container that they did not know contained a firearm, where this was treated as less serious.

Question 9: Does the Council agree with the aggravating and mitigating factors?

Relativity in sentence levels between possession with intent to endanger life and transfer/manufacture

3.22 There is a question to consider about parity of sentencing between manufacture/transfer and intent to endanger life. As noted above, there is some overlap between the two, with larger-scale supply and distribution cases often being charged under the endanger life offence. Based on pre-guilty plea ACSLs in 2017 (bearing in mind the low volumes of transfer cases), the intent to endanger life offence is the more serious, at 12 years compared with 9 years for transfer. In 2017 intent to endanger life had a similar range, going up to 27 years pre-guilty plea (estimated), compared with 26 years 6 months for transfer, but the volumes at this high end of endanger life were very low. In 2017, 6% of determinate sentences for endanger life cases had a pre-guilty plea sentence over 20 years, compared with 12% for transfer cases (although these proportions should be treated with caution due to low volumes).

3.23 The starting point for a box A1 case based on *Stephenson* might be 25 years (see extract at paragraph 3.5 above). The top box in the intent to endanger life guideline currently starts at 18 years with a range of 16-22 years (see **Annex A of paper 1, page 4**), reflecting current sentence levels. An 18 year starting point and a range going up to 22 years was selected for endanger life because only one single case went above 22 years in 2017 (an outlier at 27 years). Increasing the top of the endanger life sentences to align with *Stephenson* levels would likely inflate current sentencing levels. On the other hand, aligning the top box of both guidelines at 18 years with a 16-22 year range may seem out of step with the guidance for highest-end cases in *Stephenson*.

Question 10: Does the Council want sentence levels for the transfer/manufacture guideline to be the same as possession with intent to endanger life?

Guideline on possession of articles for conversion

3.24 At the scoping meeting in July 2018, the Council agreed to explore the viability of developing a guideline on the offence of possession of articles (S4A). A person, other than a registered firearms dealer, commits this offence if:

- (a) the person has in his or her possession or under his or her control an article that is capable of being used (whether by itself or with other articles) to convert an imitation firearm into a firearm, and
- (b) the person intends to use the article (whether by itself or with other articles) to convert an imitation firearm into a firearm.

3.25 This is a new offence that came into effect in May 2018, with a maximum penalty of 5 years. It was introduced following a recommendation by the Law Commission as part of its review of firearms law, to fill an identified gap in the law. The articles might be items such as a drill or specialised drill bit used for removing obstructions in a barrel. Thus far, no offences under this provision have shown up in available sentencing data. The CPS were aware of two cases. The consensus from the CPS and law enforcement appears to be that this offence will not be charged frequently. This is due to the intent element, the infrequency of detection of conversion operations, issues with the drafting of the offence, and preferences for other offences with a higher maximum penalty where there is evidence of conversion or transfer. It is recommended not to proceed with developing a guideline for this offence, as it is likely to be very low volume and there is currently no evidence base on which to develop a guideline. The CPS agreed there would be limited value in a guideline for this offence if it is rarely charged.

Question 11: Does the Council agree not to proceed with a guideline on the possession of articles for conversion offence?

Firearms – Manufacture and transfer

Manufacture weapon or ammunition specified in section 5(1)

Firearms Act 1968 (section 5(2A)(a))

Sell or transfer prohibited weapon or ammunition

Firearms Act 1968 (section 5(2A)(b))

Possess for sale or transfer prohibited weapon or ammunition

Firearms Act 1968 (section 5(2A)(c))

Purchase or acquire for sale or transfer prohibited weapon or ammunition

Firearms Act 1968 (section 5(2A)(d))

Indictable only

Maximum: Life imprisonment

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**.

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

When considering the **offender's role**, relevant considerations may include the offender's level in the hierarchy of the enterprise, the role played in individual transactions or manufacturing, awareness and understanding of the scale of operation, and the offender's involvement of, links to, or influence on, others in a chain.

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:

- Leading role where offending is part of a group activity, including but not limited to head of enterprise, a lead armourer or a key facilitator
- Significant planning, including but not limited to significant steps to evade detection
- Use of business as a cover
- Abuse of position of trust or responsibility, for example registered firearms dealer
- Expectation of substantial financial or other advantage
- Involves others through coercion, intimidation or exploitation

B – Medium culpability:

- Significant role where offending is part of a group activity, including but not limited to a purchaser or a provider of significant assistance in facilitating transfer or manufacture
- Some degree of planning, including but not limited to some steps to evade detection
- Expectation of significant financial or other advantage, whether or not operating alone
- Other cases falling between high and lower culpability

C – Lower culpability:

- Lesser role where offending is part of a group activity including but not limited to performing a limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no planning
- Expectation of limited, if any, financial or other advantage
Firearm/ammunition not intended for criminal purpose, for example belief that purchaser is collector with no criminal associates
- Firearm/ammunition not subject to minimum term

Harm	
The court should consider the steps set out below to determine the level of harm caused.	
This step is assessed by reference to the scale and nature of the enterprise and any actual harm caused.	
When considering the scale and nature of the enterprise, relevant considerations may include the number, type and variety of weapons involved, the value of profits, the number of people involved, the period of time and geographic range over which the enterprise operated, and connections to organised criminal groups.	
Category 1	<ul style="list-style-type: none"> • Large-scale commercial and/or highly sophisticated enterprise • Evidence firearm/ammunition used extensively to cause serious injury or death
Category 2	<ul style="list-style-type: none"> • Medium-scale enterprise and/or some degree of sophistication • Evidence firearm/ammunition used in serious criminal offending (where not at category 1) • All other cases falling between category 1 and category 3 because: <ul style="list-style-type: none"> ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
Category 3	<ul style="list-style-type: none"> • Smaller-scale and/or unsophisticated enterprise • Evidence firearm/ammunition not used in serious criminal offending

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.

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.			
This offence may be subject to minimum sentencing provisions. See STEP THREE for further details on the minimum sentencing provisions and exceptional circumstances.			
Harm	Culpability		
	A	B	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

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. Commission of offence whilst under the influence of alcohol or drugs
- A4. Firearm/ammunition held with multiple weapons (See step six on totality when sentencing for more than one offence.)
- A5. Compatible ammunition and/or silencer(s) supplied with firearm
- A6. Steps taken to disguise firearm (where not firearm under section 5(1A)(a))

- A7. Firearm under section 5(1)(a) (automatic weapon)
- A8. Others put at risk of harm (where not taken into account at step 1), including by location or method of manufacture or transfer
- A9. Offender prohibited from possessing weapon or ammunition because of previous conviction (where not charged separately)
- 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
- A12. Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)
- M3. Voluntary surrender of firearm/ammunition
- M4. No knowledge or suspicion that item possessed was firearm/ammunition
- M5. Unaware firearm/ammunition is prohibited
- M6. Remorse
- M7. Serious medical condition requiring urgent, intensive or long-term treatment
- M8. Age and/or lack of maturity
- M9. Mental disorder or learning disability
- M10. Sole or primary carer for dependent relatives
- M11. Co-operation with the police

STEP THREE
Minimum Term
[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 **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 required 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

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.

Table 1: Number of adult offenders sentenced for offences under the Firearms Act 1968, 2014-2017^{1,2}

Guideline group	Legislation	Section	Offence	Number of adult offenders sentenced			
				2014	2015	2016	2017
Group 8	Firearms Act 1968	5(2A)(a)	Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968	0	0	4	0
		5(2A)(b)	Sell / transfer prohibited weapon / ammunition	0	0	10	19
		5(2A)(c)	Possess prohibited weapon / ammunition for sale / transfer	0	0	4	5
		5(2A)(d)	Purchase / acquire prohibited weapon / ammunition for sale / transfer	0	0	0	1
		TOTAL SECTION 5(2A) OFFENCES		0	0	18	25

Source: Court Proceedings Database, Ministry of Justice

Notes

1) These offences came into force on 14 July 2014.

2) Cases in 2016 may have been sentenced prior to the Stephenson judgment.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ²	Total
Group 8	5(2A)(a)	Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968 ¹	0	0	0	0	0	4	0	4
	5(2A)(b)-(d)	Sell / transfer prohibited weapon / ammunition, Possess/purchase/acquire prohibited weapon / ammunition for sale / transfer	0	0	0	0	0	25	0	25

Source: Court Proceedings Database, Ministry of Justice

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ²	Total
Group 8	5(2A)(a)	Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968 ¹	0%	0%	0%	0%	0%	100%	0%	100%
	5(2A)(b)-(d)	Sell / transfer prohibited weapon / ammunition, Possess/purchase/acquire prohibited weapon / ammunition for sale / transfer	0%	0%	0%	0%	0%	100%	0%	100%

Source: Court Proceedings Database, Ministry of Justice

Notes

1) Data shown for this offence relates to 2016 (as no offenders were sentenced in 2017), and may therefore include cases sentenced prior to the Stephenson judgment.

2) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 3: Estimated average custodial sentence lengths (pre guilty plea) for adult offenders sentenced to immediate custody, and sentence ranges for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}	Sentence range (using estimated pre GP sentence lengths)
Group 8	5(2A)(a)	Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968 ^{4,5}	17 years 9 months	20 years 3 months	8 years - 22 years 6 months' custody
	5(2A)(b)-(d)	Sell / transfer prohibited weapon / ammunition, Possess/purchase/acquire prohibited weapon / ammunition for sale / transfer	12 years	9 years	5 years 7 months - 26 years 6 months' custody

Source: Court Proceedings Database, Ministry of Justice

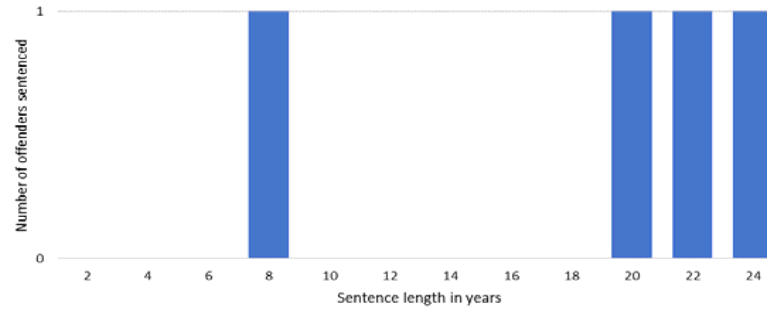
Notes

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) The ACSLs and ranges shown for this offence relate to 2016 (as no offenders were sentenced in 2017), and may therefore include cases sentenced prior to the Stephenson judgment.
- 5) These figures should be treated with caution, due to the low number of offenders sentenced for this offence.

Figure 1: Estimated distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, before any reduction for guilty plea

Section 5(2A)(a) offences - Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968, 2016^{1,2}

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=2	0	0%
2-4	0	0%
4-6	0	0%
6-8	1	25%
8-10	0	0%
10-12	0	0%
12-14	0	0%
14-16	0	0%
16-18	0	0%
18-20	1	25%
20-22	1	25%
22-24	1	25%
Total	4	100%

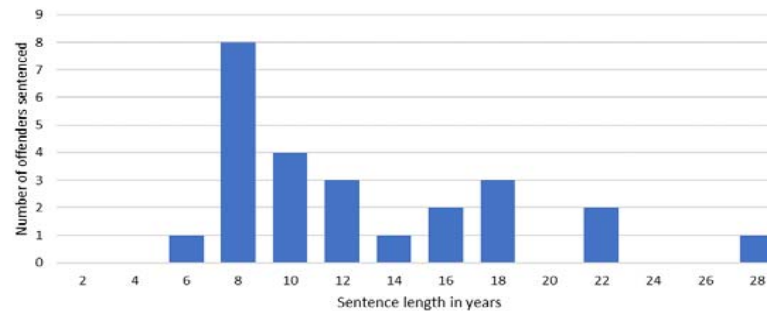


Notes:

- 1) The data shown for this offence relates to 2016 (as no offenders were sentenced in 2017), and may therefore include cases sentenced prior to the Stephenson judgment.
- 2) These proportions should be treated with caution, due to the low number of offenders sentenced for this offence.

Section 5(2A)(b)-(d) offences - Sell / transfer prohibited weapon / ammunition, Possess/purchase/acquire prohibited weapon / ammunition for sale / transfer, 2017

Sentence length (years)	No. of offenders sentenced	Proportion of offenders sentenced
<=2	0	0%
2-4	0	0%
4-6	1	4%
6-8	8	32%
8-10	4	16%
10-12	3	12%
12-14	1	4%
14-16	2	8%
16-18	3	12%
18-20	0	0%
20-22	2	8%
22-24	0	0%
24-26	0	0%
26-28	1	4%
Total	25	100%



Source: Court Proceedings Database, Ministry of Justice

Notes:

Separate sentence length breakdowns for section 5(2A)(b)-(d) offences have not been shown due to low volume. Sentence length intervals do not include the lower bound, but do include the upper bound sentence length. For example, the category '<=2' includes sentence lengths less than and equal to 2 years, and '2-4' includes sentence lengths over 2 years, and up to and including 4 years.

**ATTORNEY GENERAL’S REFERENCE (NOS
128–141 OF 2015 AND 8–10 OF 2016)
(R. v STEPHENSON)**

COURT OF APPEAL (CRIMINAL DIVISION)

Lord Thomas of Cwmgiedd (The Lord Chief Justice of England and
Wales), Jeremy Baker and Carr JJ: 9 March 2016

[2016] EWCA Crim 54; [2016] 2 Cr. App. R. (S.) 12

Ⓒ Ammunition; Conspiracy; Firearms offences; Prohibited firearms; Sentence
length; Undue leniency

H1 *Firearms—prohibited firearms—transferring prohibited firearms—sentencing
levels—guidance—conspiracy*

H2 The Lord Chief Justice gave guidance on the sentencing of those involved in
the transfer of prohibited weapons.

H3 Under the unduly lenient sentence scheme, the Attorney General referred
sentences imposed on multiple defendants following convictions or guilty pleas
to conspiracy to transfer prohibited weapons and ammunition.

H4 Over a period of approximately 10 months, six individuals were involved in a
conspiracy to supply other criminals with firearms and ammunition. In addition,
charges were brought in relation to specific incidents of supplying firearms. The
six individuals, representing various positions within the hierarchy of the conspiracy,
were sentenced as follows:

- (i) for the leader of the criminal enterprise, a starting point of 19 years six
months. For the armourer and the other four principals who were members
of the enterprise (referred to by the judge as the “key facilitators”) and
assisted in the transactions, starting points of between 17 years six months
and 11 years;
- (ii) for those who purchased guns and weapons on four specific occasions,
starting points of between 11 and seven years six months; and
- (iii) for those who assisted the purchaser on those occasions, starting points of
between 12 and five years.

H5 **Held**, that (1) the Lord Chief Justice had summarised the gravity of gun crime
in *R. v Wilkinson* [2009] EWCA Crim 1925; [2010] 1 Cr. App. R. (S.) 100 (p.628):

“The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise
and intimidate. That is why criminals want them: that is why they use them:
and that is why they organise their importation and manufacture, supply and
distribution. Sentencing courts must address the fact that too many lethal

weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.” ([2].)

H6 (2) Offences involving the possession or use of firearms had therefore attracted increasingly severe sentences:

- (i) in 1997, in *R. v Avis* [1998] 1 Cr. App. R. 420, the Court of Appeal gave guidance on the approach to sentencing for firearms offences under the Firearms Act 1968 (the 1968 Act). Lord Bingham CJ, giving the judgment of the court, set out four questions that the court should ask itself in order to assess the seriousness of the offence;
- (ii) with effect from January 2004, a mandatory minimum term of five years for possession of a firearm was enacted in s.51A of the 1968 Act (by s.287 of the Criminal Justice Act 2003);
- (iii) in 2009, in *R. v Wilkinson* [2009] EWCA Crim 1925; [2010] 1 Cr. App. R. (S.) 100 (p.628), the court gave further guidance as to the level of sentences, principally in relation to offences under s.16 of the 1968 Act, possession with intent to endanger life, an offence that carried a maximum sentence of life imprisonment;
- (iv) at [26] of the judgment in *Wilkinson*, the court observed that the sentence for importing firearms or being in possession with intent to supply should carry a maximum penalty of life imprisonment; and
- (v) that observation was adopted when, in 2014, Parliament through the Anti-Social Behaviour, Crime and Police Act 2014 amended s.5 of the by inserting a new section, s.5(2A), amending s.51 and amending Pt 1 of Sch.6. The effect of the amendments, which came into force on 14 July 2014, was to provide for a new offence of transferring prohibited weapons and to increase the maximum penalty to life imprisonment ([3]).

H7 (3) The instant court did not reconsider the use of the statutory life sentence for crimes involving lethal weapons, whether under s.225 of the CJA 2003 or under provisions specifying a maximum sentence of life imprisonment (as summarised in *Attorney General’s Reference (No.27 of 2013) (R. v Burinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209). The sentencing judge was of the view that the instant case was not an appropriate one for a sentence being imposed on the principal offender under s.225 of the CJA 2003 as he was not dangerous within the meaning of the CJA 2003 given that there was no significant risk of him committing serious crimes in the future. The judge took the same view in relation to the other offenders. He did not consider whether or not a life sentence should have been imposed under other statutory provisions. The court was, however, not persuaded that this issue should be revisited. Nonetheless, criminals who were prepared to deal in lethal weapons invariably represented a serious public danger and therefore a sentence of life imprisonment always arose for consideration and had to expressly be considered by the judge ([6]).

H8 (4) If a life sentence was not passed, the courts had to impose long determinate sentences commensurate with the role played in any activity in relation to the supply of guns. Sentences had to reflect the hierarchy of the supply enterprise, the role played in individual transactions and any previous convictions in relation to

guns. Disposing of the individual references, the following propositions could be identified:

- (i) for the leader of the enterprise that was in the business of supplying guns and lethal ammunition, a very long determinate sentence was required. It appeared to have been assumed (because the minimum term imposed on *Wilkinson*, the head of the enterprise in the case determined in 2009, who received a life sentence, was 11 years) that the maximum determinate sentence was 22 years for a large-scale enterprise engaged in the supply of guns. No such maximum was indicated by the court in that case. In the instant case, the appropriate sentence for the leader was 25 years, prior to discount for his plea. However, in the light of the mistaken view taken of *Wilkinson*, it had to be made clear that the courts should not take that figure as a maximum. For example, a materially greater sentence would be appropriate if there was any previous conviction for offences involving guns. Nor could it make any difference that the criminal enterprise in the instant case was engaged in converting or acquiring guns rather than importing them; the same level of sentence was appropriate as the essence of the criminality was the organisation of a criminal enterprise to supply guns and lethal ammunition to customers irrespective of the source of the guns and ammunition. Those engaged in the criminal enterprise under the leader should have received sentences reflecting the sentence imposed on the leader (before any discount for plea) and depending on the role that they played;
- (ii) in the case of those seeking to buy a gun and lethal ammunition from the criminal enterprise in the instant case, the court proceeded on the basis that the purchaser had to have required the gun and lethal ammunition to “kill and maim, terrorise or intimidate”; two of the customers were engaged in the supply of Class A drugs. The appropriate sentences for the purchasers in the instant case should have been in the region of 15 years, with significantly higher sentences being required in the event of any previous convictions in relation to guns; and
- (iii) the role played by those who assisted in those transactions varied but, as Parliament had stipulated a minimum sentence of five years for those in possession of a gun, it was inappropriate to pass sentences with a starting point of less than eight years for those who assisted in putting guns in circulation. Their criminality lay in assisting in the putting of guns and lethal ammunition into the hands of a purchaser. Sentences materially greater were required in cases where the assistance was significant. In the present case, the sentences should have ranged from 12 to eight years, depending on the role that each of the offenders had played and on whether or not there had been any previous association with guns ([7]).

H9 **Per curiam.** (1) A particular difficulty that the sentencing judge faced was that he was not put in a position where he could sentence all of the offenders on the same occasion and in order of their culpability. Listing officers must, for the future, ensure that, in a complex case of the instant kind, a date was set for sentencing as soon as possible after the conclusion of the trials and that all the defendants and their counsel were present on the same occasion. If there were any possible difficulties in ensuring that happened, the Resident or Presiding Judge had to be

consulted and had to direct that arrangements were made to enable all to be sentenced together ([11]).

H10 (2) The increasing danger posed by criminals putting antique firearms into working order and providing ammunition to fit the firearms was a matter that should be considered by the Home Office and by Parliament with a view to a re-examination of the exemption provided for in the Firearms Act 1968 s.58(2) ([16]).

H11 **Editorial note:** the individual sentences were all increased, save in the case of the respondent, Mattu. See the judgment at [9]–[64] for the individual disposals.

H12 **Cases cited:**

Attorney General's Reference (No.27 of 2013) (R. v Burinskas) [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209

R. v Avis [1998] 2 Cr. App. R. (S.) 178

R. v Newton (1982) 77 Cr. App. R. 13

R. v Wilkinson [2009] EWCA Crim 1925; [2010] 1 Cr. App. R. (S.) 100 (p.628)

R. v Wiwczaryk [1980] 2 Cr. App. R. (S.) 309

H13 **References:** *Current Sentencing Practice*, B3-3.2.

H14 *R. Buckland QC MP* (Solicitor General), *T. Cray* and *T. Kenning* for the Attorney General.

A.N. Bajwa QC for Stephenson and Miah.

B. Singh for Nazran and Hussain (Usman).

H. Kubik for McDermott.

R. Butcher for Wiggan.

M. Graffius for Gul.

N.M. Smith for Ducram.

R. Lallie for Mattu.

C. Jutla for Ghalib.

J. Anders for Abdin.

P. Brunt for Hussain (Ifra).

T. Rashid for Fedar.

S. Kolodynski for Mohammed.

S. Rashid for Officer.

S. Wallace for Smith.

S. Reiz for Mentore.

JUDGMENT

LORD THOMAS OF CWMGIEDD CJ:

- The Solicitor General has referred to the court under s.36 of the Criminal Justice Act 1988, the sentences passed on 17 offenders by HH Judge Burbidge QC on 27 November 2015 (*AG Refs 128–141 of 2015*) and 22 January 2016 (*AG Refs 8–10 of 2016*). All the offenders had pleaded guilty or were convicted of conspiracy to transfer prohibited weapons and ammunition. We grant leave in respect of all the offenders.

Introduction

- 2 Lord Judge CJ in *R. v Wilkinson* [2009] EWCA Crim 1925, [2010] 1 Cr. App. R. (S.) 100 summarised the gravity of gun crime:

“The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.”

- 3 Offences involving the possession or use of firearms have therefore attracted increasingly severe sentences:

- i) in 1997 in *R. v Avis* [1998] 1 Cr. App. R. 420; [1998] 2 Cr. App. R. (S.) 178 this court gave guidance on the approach to sentencing for firearms offences under the Firearms Act 1968 (the 1968 Act). Lord Bingham CJ in giving the judgment of the court set out four questions the court should ask itself to assess the seriousness of the offence;
- ii) with effect from January 2004, a mandatory minimum term of five years for possession of a firearm was enacted in s.51A of the 1968 Act (by s.287 of the Criminal Justice Act 2003);
- iii) in 2009, in *R. v Wilkinson* [2009] EWCA Crim 1925; [2010] 1 Cr. App. R. (S.) 100 this court gave further guidance as to the level of sentences principally in relation to offence under s.16 of the 1968 Act, possession with intent to endanger life, an offence that carried a maximum sentence of life imprisonment;
- iv) at [26] of the judgment in *Wilkinson* the court observed that the sentence for importing firearms or being in possession with intent to supply should carry a maximum penalty of life imprisonment; and
- v) this observation was adopted when in 2014 Parliament through the Anti-Social Behaviour, Crime and Police Act 2014 amended s.5 of the 1968 Act by inserting a new section, s.5(2A), amending s.51 and amending Pt 1 of Sch.6. The effect of the amendments which came into force on 14 July 2014 was to provide for a new offence of transferring prohibited weapons and increase the maximum penalty to life imprisonment.

- 4 In these references and appeals we are concerned with:

- i) a criminal enterprise of six persons that dealt in the supply of handguns and lethal ammunition manufactured for use in the guns supplied. This was charged as Count 1 in the indictment;
- ii) those who on a specific occasion bought guns and lethal ammunition from the criminal enterprise. These occasions were the subject of Counts 2, 3 4 and 6 of the indictment; and
- iii) those who assisted in one of the specific transactions.

- 5 The judge sentenced them as follows:

- i) the leader of the criminal enterprise, the armourer and the other four principals who were members of the enterprise (referred to by the judge as

the key facilitators) and assisted in the transactions. The judge set the sentence he would have passed on the leader at 19-and-a-half years (before the discount for plea) and passed on the others sentences of between 17-and-a-half years and 11 years, before a discount for plea;

- ii) those who purchased guns and weapons on four specific occasions. The judge set the sentence he would have passed on the purchasers at between 11 and seven-and-a-half years, before a discount for plea; and
- iii) those who assisted the purchaser on those occasions. The judge set the sentence he would have passed at between 12 and five years (on those who assisted the purchasers) before a discount for plea.

6 In these references we did not reconsider the use of the statutory life sentence for crimes involving lethal weapons, whether under s.225 of the CJA 2003 or under provisions specifying a maximum sentence of life imprisonment (as summarised at [6(ii)] of the judgment in *R. v Burinskas* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209; [2014] 2 Cr. App. R. (S.) 45 (p.359). The judge was of the view that this was not an appropriate case for a sentence on the principal offender under s.225 of the CJA 2003, as he was not dangerous within the meaning of the CJA 2003 as there was no significant risk of him committing serious crimes in the future; he took the same view in relation to the other offenders. He did not consider whether a life sentence should have been imposed under other statutory provisions. We are, however, not persuaded that we should revisit the decisions not to impose a life sentence. Nonetheless, as was pointed out in *Wilkinson* at [27] (at a time where the court had available not only a sentence of life imprisonment but also a sentence of imprisonment for public protection), criminals who are prepared to deal in lethal weapons invariably represent a serious public danger and therefore a sentence of life imprisonment always arises for consideration and therefore must expressly be considered by the judge.

7 If a life sentence is not passed, as was made clear in *Wilkinson*, courts must impose long determinate sentences commensurate with the role played in any activity in relation to the supply of guns. Sentences must reflect the hierarchy of the supply enterprise, the role played in individual transactions and any previous convictions in relation to guns. In the present case our conclusions can be summarised as follows:

- i) for the leader of the enterprise which was in the business of supplying guns and lethal ammunition, a very long determinate sentence was required. It appears to have been assumed (because the minimum term imposed on *Wilkinson*, the head of the enterprise in the case determined in 2009 who received a life sentence, was 11 years) that the maximum determinate sentence was 22 years for a large scale enterprise engaged in the supply of guns. No such maximum was indicated by this court in that case. In the present case, we consider that the appropriate sentence for the leader was 25 years, prior to discount for his plea. However, in the light of the mistaken view taken of *Wilkinson*, we must make clear that courts should not take this as a maximum. For example, a materially greater sentence would be appropriate if there was any previous conviction for offences involving guns. Nor can it make any difference that the criminal enterprise here was engaged in converting or acquiring guns rather than importing them; the same level of sentence is appropriate, as the essence of the criminality is

the organisation of a criminal enterprise to supply guns and lethal ammunition to customers, irrespective of the source of the guns and ammunition. Those engaged in the criminal enterprise under the leader should have received sentences reflecting the sentence for the leader (before any discount for plea), depending on the role they played;

- ii) in the case of those seeking to buy a gun and lethal ammunition from this criminal enterprise, we have proceeded on the basis that the purchaser must have required the gun and lethal ammunition to “kill and maim, terrorise or intimidate”; two of the customers were engaged in the supply of Class A drugs. In our judgement the appropriate sentences for the purchasers in this case should have been in the region of 15 years, significantly higher sentences than that being required in the event of any previous convictions in relation to guns; and
 - iii) the role played by those who assisted in these transactions varied, but as Parliament has stipulated a minimum sentence of five years for those in possession of a gun, we consider that it was inappropriate to pass sentences with a starting point of less than eight years for those who assisted in putting guns into circulation. Their criminality lay in assisting in putting guns and lethal ammunition into the hands of a purchaser. Sentences materially greater were required in cases where the assistance was significant; in the present case the sentences should have ranged from 12–8 years, depending on the role they played and any previous association with guns.
- 8 Such sentences are severe but reflect the intention of Parliament to punish gun crime in a manner that will deter criminals from engaging in dealing in guns and lethal ammunition.

Count 1: the overall conspiracy to manufacture and supply guns and lethal ammunition

- 9 There was based in Birmingham between March 2014 and January 2015 a sophisticated criminal enterprise which supplied firearms and lethal ammunition to other criminals in the West Midlands and elsewhere in the UK. Six individuals who played a role in this enterprise were identified and indicted as a result of intense and careful surveillance by the West Midlands Police. The two principals were:
- i) Nosakhere Stephenson, aged 41, was the head of this enterprise. He was the person to whom criminals in the Midlands would turn when they wished to purchase a gun and lethal ammunition. He pleaded guilty on a basis of plea on 3 November 2015, the second day of the trial. That basis of plea accepted that he was involved in the supply by the enterprise of five guns, the subject of the other five counts. The judge took the starting point for his sentence as 19-and-a-half years, reducing it to 16-and-a-half years years imprisonment, giving a 10% discount for the guilty plea, and then adding six months for the impact that the plea had on others; and
 - ii) Sundish Nazran, aged 32, was the second in command and the enterprise’s chief armourer. He entered his plea at a case management hearing on 3 August 2015. There was no agreed basis of plea, a matter to which we draw special attention and return to at [26]–[27] below. He was sentenced to 13

years' imprisonment, a 25% reduction from the starting point of 17-and-a-half years years, on the basis of his involvement in the enterprise and the specific transactions in Counts 2, 4, 5 and 6.

- 10 They were supported by four who were described as “key facilitators”:
- i) Louis McDermott, aged 36, pleaded guilty at a plea and case management hearing on 5 June 2015; there was no basis of plea. The judge sentenced him, on the basis that he was involved in the criminal enterprise and in the transactions charged as Counts 2, 3 and 4, to nine years and four months imprisonment, a 33% reduction from the starting point of 14 years;
 - ii) Theodore Wiggan, aged 28, pleaded guilty at the plea and case management hearing; there was no basis of plea. He was sentenced by the judge on the basis of his involvement in the criminal enterprise and Counts 2, 4 and 5, to 10 years' imprisonment, a 33% reduction from the starting point of 15 years;
 - iii) Rowan Gul, aged 33 years, pleaded guilty on the second day of the trial on a written basis of plea which accepted his involvement in the criminal enterprise and in the supply set out in respect of Counts 3 and 6 and a limited involvement in 4. He was sentenced to imprisonment for 12 years three months, a 10% reduction from the starting point of 14-and-a-half years years and an additional nine months because of understandable delay in his plea; and
 - iv) Fitzroy Ducram, aged 50, pleaded guilty at the plea and case management hearing on 15 June 2015. He was sentenced by the judge, on the basis of his involvement in the criminal enterprise and his specific involvement in Count 4, to seven years four months' imprisonment, a reduction of 33% from the starting point of 11 years.

(i) The scale and nature of the enterprise

- 11 Although, as is apparent, we have taken a different view to that of the judge as to the level of sentences required, we wish to pay tribute to the meticulous and careful way in which he dealt with this complex matter. A particular difficulty he faced was that he was not put in a position where he could sentence all the offenders on the same occasion and in the order of their culpability. Listing officers must for the future ensure that in a complex case of this kind, a date is set for sentencing as soon as possible after the conclusion of the trials and all the defendants and their counsel are present on the same occasion. If there are any possible difficulties in ensuring this happens, the resident judge or presiding judge must be consulted and must direct that arrangements are made to enable all to be sentenced together.
- 12 The judge assessed the criminal enterprise as conduct of the utmost gravity. In our judgement that cannot be doubted. The criminal enterprise was in the business of obtaining and, where necessary, putting guns into working order and supplying them with lethal ammunition. There can be only one purpose of acquiring a gun and ammunition—to kill or injure—and those supplying guns plainly knew this. As the judge stated, the supplier and purchaser knew of the intended use and that must have been to endanger life.
- 13 The city of Birmingham, like some other cities, has seen the effect of the use of guns. The judge pointed to the drive-by shooting which killed two young women

in 2003, an attempted murder on the doorstep of Selfridges and the Barton Arms shooting at the police in 2011.

- 14 There can be no doubt that in respect of the first three questions posed in *Avis*, the enterprise was engaged in the supply of weapons with ammunition specifically made so as to enable the guns to be used to kill or injure and that the supply was made in the knowledge that they were being acquired for that purpose and were likely to be used for that purpose. The fourth question relating to the record of the individual offender falls to be taken into account when considering each offender.
- 15 Many of the weapons in which they dealt were antique firearms; these can generally be held legally without a licence if possessed as a curiosity or ornament (see s.58(2) of the 1968 Act). We were told by the Solicitor General (as subsequently set out in a report prepared for this court) that criminals obtain such weapons, put them into working order and acquire ammunition for them; at least four fatal shootings have involved the use of antique firearms. It is apparent from the information supplied to us that an increasing and significant number of obsolete antique firearms have been recovered by the police; in 52% of these recoveries, ammunition has also been recovered. We were also provided with a statement by Mr David Dyson, a forensic practitioner in the field of firearms.
- 16 The increasing danger posed by criminals putting antique firearms into working order and providing ammunition to fit them is a matter that should be considered by the Home Office and by Parliament with a view to a re-examination of the exemption in s.58(2).
- 17 The criminal enterprise put these guns into working order and manufactured, or sourced the manufacture of, ammunition for them, thus making them lethal so that they could be used to kill or injure. Even though the ammunition was of various calibres, forensic examination suggested all came from a common source.
- 18 Each of the six had full knowledge of the nature of the criminal enterprise charged in Count 1 of the indictment. That included the continuing need for secrecy in sourcing, collecting and storing firearms and ammunition and in the eventual sale of the weapons and realisation of the proceeds. We have already noted their use of antique firearms and the use made of these by criminals; in the present case, on the evidence available to us, we do not treat this as an aggravating factor. The scale of the conspiracy over the period of nine months from March 2014 to January 2015 is shown by the fact that the police recovered eight firearms—a Mach 10 machine pistol, six handguns and a sawn-off shotgun, together with 492 live rounds of ammunition of various calibres, including commonly manufactured ammunition. All the weapons recovered were test fired and found to be in working order.
- 19 Throughout the period of activity of the conspirators, they were aware of police investigative techniques and tried to defeat those techniques by the use of various stratagems and devices. The participants in the enterprise used the usual measures to try and escape detection, including the use of cheap unregistered mobile phones, the use of intermediaries and hired cars.

(ii) The leader: Nosakhare Stephenson

- 20 He was the leader and had an involvement in each of the transactions. He had a previous conviction for perverting the course of justice in 2002 for which he received a sentence of three months' imprisonment. He was described by the judge as a "family man", in the light of the testimonials provided which spoke of the

guidance he had given others and the help he had given to his family who looked up to him. The judge drew attention to the fact that he had spent five years in custody in respect of a count of murder of which he was acquitted, but rightly did not take that into account in accordance with the decision of this court in *R. v Wiwczaryk* (1980) 2 Cr. App. R. (S.) 309.

- 21 As we have made clear, there is nothing in the decision in *Wilkinson* or the other fact specific cases that indicates that a court should consider a sentence of 22 years as the top of the range. A court must assess the entire factual circumstances, including the number and type of weapons in which the members of the criminal enterprise dealt, the provision of lethal ammunition, the period of time over which the criminal enterprise operated, the level of sophistication employed, the geographic range over which the criminal enterprise operated and any specific factors connecting the criminal enterprise to a locality where gun crime was particularly serious.
- 22 In the present case we have assessed the seriousness of the criminality by considering the factors we have outlined. Although the fact that Stephenson was a family man can count for little, we do take into account the fact that Stephenson only had one previous conviction. In those circumstances we consider the judge should have taken 25 years as the appropriate sentence before a discount for plea and that the sentence of 19-and-a-half years taken by the judge resulted in a sentence which was unduly lenient. We consider that the judge was right to allow a discount of 10% and six months because of the circumstances in which the plea was made. We therefore quash the sentence of 16-and-a-half years and impose a sentence of 22 years.

(iii) The armourer: Nazran

- 23 Nazran was a supplier of the antique guns and the ammunition, in short, the armourer to the criminal enterprise where he played the second most important role. He was involved specifically in the matters the subject of Count 2 (where his involvement was limited to two of the three guns), Counts 4 and 5 (where the judge sentenced him on the basis that he had supplied factory manufactured ammunition) and Count 6 (where he was extensively involved in the arrangements to supply the weapon).
- 24 He had a conviction for a previous offence which was not relevant. He was also described by the judge as a “family man” who had acted legitimately in business. He was a member of the West Midlands Shooting Club and held other weapons and ammunition legally. The judge rightly considered his culpability as extremely high because of his role in the enterprise and his use of his position in holding weapons legitimately to facilitate the supply by the criminal enterprise.
- 25 We agree with the judge’s assessment of his culpability only being a little less than that of Stephenson; for the reasons we have explained, the sentence for Stephenson was too low and therefore that for Nazran should have been 23 years before any discount for plea. On this basis, allowing the same discount (25%) for a guilty plea as the judge, the sentence was unduly lenient. We therefore quash the sentence of 13 years and substitute a sentence of 17 years and three months.
- 26 As we have observed, we have considerable concern about the way in which the basis on which Nazran was to be sentenced was dealt with. Although he pleaded guilty in August 2015, there was then no basis of plea. We were told by Mr Balbir

Singh that that was because the papers had not all been served and he therefore asked and was granted time to put forward a basis of plea. It appears that there was still an argument about the basis of plea at the time of this very complex sentencing hearing. The prosecution had refused to accept what was put forward.

- 27 This should not have happened. The basis of plea should have been put forward at the time the plea was entered and, if not accepted by the prosecution, arrangements should have been made then and there for a *Newton* hearing. As this court has repeatedly made clear, a defendant does not need prosecution papers to enable him to set out his involvement in the crime to which he pleaded guilty. It is clear that Nazran was attempting to claim credit for an early guilty plea and prevaricating as to his role. He should not have been allowed to do that as it significantly interfered with the proper procedure at the time of sentence. The judge was exceptionally generous in allowing a discount of 25%. We do not seek on this occasion to go behind that, but what was done in this case should not be done again; if it is, then a court should not hesitate in disallowing any discount or allowing only a nominal discount.

(iv) The other members of the criminal enterprise

- 28 The judge ranked the order of culpability of the other members of the criminal enterprise as follows:

29 Wiggan

- i) He was a key facilitator in the criminal enterprise, playing the highly trusted role of storing the guns and ammunition, as illustrated by Count 5 when he was apprehended taking a selection of bullets out of the store to show to others to solicit a purchase. His involvement in the specific offence charged in Count 2 was minding the firearms and in Count 4 delivering the firearm to Ducram, another facilitator. He had also hired cars.
- ii) He had the trappings of outward respectability as he was a barber and was secretary of a football club and participated in other community organisations.
- iii) His culpability in the judge's view was high as he had supplied key services to the criminal enterprise making use of his apparent respectability in the community.
- iv) He had some previous convictions which the judge rightly held did not aggravate his sentence. Of the main participants, he was the only participant against whom the prosecution did not seek a serious crime prevention order, a matter relied on by him in this court.
- v) The judge had before him a letter expressing remorse and testimonials as to his community work. He was using his time in prison constructively.
- vi) As we have indicated, the appropriate sentence for the others engaged in the enterprise should have reflected the sentence of 25 years we have set out for the leader. In our judgement the appropriate sentence for Wiggan, before any discount for plea, should have been 20 years. On this basis, applying the discount of 33% which the judge applied, the sentence was unduly lenient. We therefore quash the sentence of 10 years and impose a sentence of 13 years and four months.

30 Gul

- i) He was also a key facilitator and was known on the streets as someone who had direct contacts with those who could source firearms and was trusted by the leader. His involvement in the specific offences was set out in the basis of plea to which we have referred at [10.iii)] above. He was a significant link in the criminal enterprise being directly involved in the transfer of the firearm in Count 6. He was not at the highest level of culpability.
- ii) He had 70 previous convictions, including one for armed robbery in 2006 and possession of a firearm with intent for which he received a sentence of five years' imprisonment; this involved the robbery of a jewellery shop where a shotgun was discharged. He was acting as the driver. The judge rightly concluded that this aggravated his criminality as he had again become involved with guns.
- iii) The judge sentenced him on the basis that he came from a troubled background, that he was susceptible of being led by others and that he was remorseful.
- iv) His culpability in view of his previous conviction was only marginally less than that of Wiggan. In our judgement the appropriate sentence should have been 19-and-a-half years, before any discount for plea. On this basis, applying the discount of 10% which the judge applied and the further nine months, the sentence was unduly lenient. We therefore quash the sentence of 12 years and three months and impose a sentence of 16 years and nine months.

31 McDermott

- i) He was a key facilitator in the criminal enterprise and was involved in the specific transactions charged as Count 2, 3 and 4. He was trusted by Stephenson.
- ii) He had some previous convictions, including a sentence passed in 2002 of eight years for importing class A drugs. He had written to the judge accepting full responsibility and was seeking to make good use of his time in prison. Testimonials were put before the judge. The judge took account of the fact he had a young son and his expressed remorse.
- iii) His culpability was only a little less than that of Wiggan. In our judgement the appropriate sentence should have been 19 years, before any discount for plea. On this basis, applying the discount of 33% which the judge applied, the sentence was unduly lenient. We therefore quash the sentence of nine years and four months and impose a sentence of 12 years and eight months.

32 Ducram

- i) He was engaged in the criminal enterprise and highly trusted by the other members. He was specifically involved in Count 4, storing the gun overnight and then delivering it to the customer.
- ii) He had three previous convictions, but the judge rightly considered that they were not aggravating factors. The judge described him as a family man. He was remorseful and putting his time in prison to good use.
- iii) His culpability in view of his previous conviction was less than that of Wiggan. In our judgement the appropriate sentence should have been 16

years, before any discount for his plea. On this basis, applying the discount of 33% which the judge applied, the sentence was unduly lenient. We therefore quash the sentence of seven years and four months and impose a sentence of 10 years and eight months.

Count 2: The supply of a revolver and ammunition on 7/8 April 2014

- 33 This count involved the supply of a revolver and ammunition to Joga Mattu, aged 31, as an intermediary storing guns on one occasion for the criminal enterprise or a customer. He pleaded guilty with no basis of plea on 14 July 2014 to a count that was treated as the equivalent to Count 2 and was sentenced to five years imprisonment, a discount of 33% from the sentence of seven-and-a-half years which the judge considered appropriate. Nazran was the principal member of the criminal enterprise engaged in this supply.
- 34 The evidence was that on the afternoon of 8 April 2014 Mattu arrived at Nazran's house. After an hour he left, followed by Nazran in his car. They went towards Mattu's house where they were stopped by armed police. Mattu ran off and threw away the bag he was carrying. It contained a Munts Amsterdam Dutch police revolver and 51 rounds of .41 ammunition. The ammunition had been adapted so it could be fired from the revolver.
- 35 Nazran was arrested at the same time. Both houses were searched. At Mattu's house and in the boot of his car the police found a Walther PPK pistol capable of firing .32 calibre ammunition. At Nazran's house, hidden under his shed they found a US Colt "New Police" revolver manufactured after 1926. It was in working order and capable of firing .32 calibre ammunition. Even though there was no basis of plea, the judge agreed to sentence Nazran on the basis that someone else had hidden the Colt New Revolver under the shed.
- 36 Analysis of mobile phones recovered showed phone traffic between the members of the criminal enterprise (Stephenson, Nazran, Wiggan, McDermott and Gul) which indicated that Mattu was being used to store guns before they were supplied to a customer. It also showed that the main conspirators were making arrangements for the storing and imminent supply of a gun to a customer on 8 April 2014.
- 37 Nazran was released on bail in May 2014 and resumed his role as one of the principal members of the criminal enterprise.
- 38 Mattu
- i) He was involved in one transaction when he stored the guns to which we have referred for Nazran for a fee.
 - ii) The offence was committed when the maximum penalty was 10 years, as the prosecution did not charge him with the offence that then carried a sentence of life imprisonment, though the judge thought that they could have.
 - iii) He worked as a part time care worker and the judge was provided with testimonials as to his work. He had minor previous convictions.
 - iv) If Mattu had been charged with the offence with which he should have been charged or if the offence had been committed after July 2014, the sentence he would have received would have been significantly greater. However in view of the offence with which he was charged and the then maximum

sentence, the sentence passed by the judge was within the range which the judge was entitled to pass.

- v) Although we grant leave, we do not alter his sentence.

Count 3: supply of an automatic sub machine pistol and ammunition in early August 2014

39 This count involved the supply by the principal members of the enterprise, particularly Stephenson, to the following:

- i) Mohammed Miah, 24 years old, was found by the judge to be the primary person who sought the supply of a Mach 10 sub-machine pistol and ammunition. He pleaded guilty on the second day of the trial on 2 November 2015; his basis of plea was rejected. He also pleaded guilty to an indictment charging conspiracy to supply heroin, based on drugs recovered at the same time. He was sentenced to nine years for the firearms conspiracy (being a 10% reduction from a sentence of 10 years) with consecutive sentences of three years and one year's imprisonment for two counts of supplying heroin, making a total of 13 years.
- ii) Joynal Abdin, aged 26 years. He played the role of a junior partner of Miah in the acquisition of the gun. He was convicted on Count 3 on 24 November 2015 and sentenced to seven years three months imprisonment.
- iii) Amar Ghalib, 32 years of age, played the role of an intermediary in the transaction. He pleaded guilty on the second day of the trial on 3 November 2015 on a basis of plea that, as he was a drugs user, he was told by his supplier to convey messages to Stephenson as an intermediary; he knew of the transfer of a gun for use on the street. He was sentenced to four years and 11 months imprisonment, a 10% discount on a sentence of five-and-a-half years.

40 The supply was arranged as follows:

- i) On the late evening of 31 July 2014 two friends of Abdin were shot at by a passing car in Aston, Birmingham. The likelihood is that this shooting was precipitated by a dispute over drugs. Immediately thereafter Miah contacted Abdin and then Miah made attempts to call Ghalib who was believed to be able to source firearms through his contacts.
- ii) The judge concluded that weapons were sought by Miah to retaliate or to use for protection in the criminal purposes in which Miah was engaged, probably drug dealing. Abdin was his junior partner in the transaction.
- iii) On 3 August 2014 Ghalib contacted Miah and an hour later Ghalib called Stephenson to pass on the order for firearms. After further phone calls, the deal to supply firearms was set up on the morning of 4 August 2014 between Stephenson, Gul and Ghalib who reported back to Miah what he had arranged for him. Gul then met Miah and was called by Stephenson while he was with Miah. The sequence of telephone calls was entirely consistent with making and confirming the arrangements for the transfer of a weapon or weapons.
- iv) Following that meeting, there were no calls between the members of the criminal enterprise or between them and Miah and Ghalib.

- v) The transfer of the guns must have taken place between 4 and 10 August 2014. It was not observed by the police.

41 After the delivery:

- i) It is clear that Mohamed Ullah, a young man of 18 who subsequently pleaded guilty to the charge of possession of the prohibited weapon, was asked to store the guns acquired as a custodian for Miah.
- ii) On 10 August 2014 armed officers attended at Ullah's address. Buried in the garden the police recovered a Mach 10 sub-machine pistol with live ammunition. The Mach 10 is a modern weapon capable of automatic fire. There was a 9mm round in the chamber, nine found in the magazine and four x 9mm rounds in the bag. They also recovered a sawn-off pump action shotgun (a Berretta) and four shotgun cartridges. A single 9mm round was found in Ullah's car.
- iii) At the commencement of the raid Ullah attempted to call Miah; this was consistent with Ullah informing him of the police raid. After the raid both Miah and Stephenson stopped using the mobile phones which had been used to make the arrangements.
- iv) In the car, 11 bags each containing one ounce of heroin with a purity of 50% were found which had Miah's fingerprints on them; the evidence before the court indicated that this was mid-market dealing with a street value of just under £30,000.

42 Subsequently on 17 September 2014 he was arrested when in possession of approximately half a kilo of heroin of high purity with a street value of £48,700 and at his house cash was found.

43 Stephenson accepted in his basis of plea that he had acted as a broker for the supply of the a Mach 10 sub-machine pistol (but not the sawn off shotgun), but said he did not know of the precise details of the gun supplied. Gul accepted in his basis of plea that he introduced the purchaser to the seller, but said he was not aware of the precise nature of the gun and ammunition.

44 We turn to consider the three offenders who were charged specifically on Count 3 in the order of their culpability:

45 Miah:

- i) It is clear he was the customer who sought out the purchase of the gun in question to use for the purpose of using in the criminal purposes in which Miah was engaged, probably the protection of his drug dealing area in Aston. He knew that it was a machine pistol capable of automatic fire and would be supplied with a quantity of ammunition.
- ii) The judge expressed the view that the sentences he imposed for the drugs offences for which he took a starting point of four-and-a-half years were "generous". He reduced each by 33% to reflect the early pleas and the second offence to 12 months for totality.
- iii) He had no relevant previous convictions. He had held down employment, he was relatively young, had expressed remorse and was making good use of his time in prison.
- iv) In our judgement, the appropriate sentence for the firearms offence should have been 15 years as not only was he the person who sought out the purchase of the firearm and ammunition for use in his criminal business,

but also the firearm was a particularly dangerous weapon capable of automatic fire. On this basis, applying the discount of 10% which the judge applied, the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of nine years and impose a sentence of 13 years and six months for the firearms offence. The sentence for the drugs offences remains as passed, making a total sentence of 17 years five months.

- v) Miah sought leave to appeal against the sentences for the firearms offence on the grounds of disparity. The application is refused. He was the prime mover on this count and, as adjusted, there is no disparity.

46 Abdin

- i) The judge who heard the trial found that Abdin was the junior partner to Miah; it was likely that he had envisaged someone being shot at with the weapon to be acquired. He did not know that the gun was an automatic weapon.
- ii) He had 52 previous convictions. Many of them were for possession of class A drugs, but including a sentence of nine months imprisonment for affray. The judge considered that his wife and family would suffer as a result of his conviction.
- iii) In our judgement, the appropriate sentence for the firearms offence should have been 12 years as he was the junior partner to the person who sought out the purchase of the firearm and ammunition for use in his criminal business, but he did not know that the firearm was a particularly dangerous weapon capable of automatic fire. On this basis the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of seven years and three months and impose a sentence of 12 years.

47 Ghalib

- i) Ghalib was used to convey instructions, knowing that he was involved in a transaction that would put a gun on the street.
- ii) He had 44 previous convictions, including a sentence of three-and-a-half years in 2007 for supplying class A drugs.
- iii) In our judgement, the appropriate sentence for the firearms offence should have been eight years as he was knowingly involved in a transaction that would put a gun on the street, though he did not know that the firearm was a particularly dangerous weapon capable of automatic fire and played a limited role. On this basis, applying the discount of 10% the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of four years and 11 months and impose a sentence of seven years and two months.

Count 4: 17 August 2014—supply of a revolver and ammunition

48 This count involved the supply of a revolver and ammunition to three persons:

- i) Clinton Officer, 32 years old, was the customer for the supply of a WW Super Revolver and ammunition. He was convicted on 26 August 2015 and sentenced on 22 January 2016 to 11 years' imprisonment.

- ii) Darren Mentore, 35 years old, was an intermediary. He was convicted on 26 August 2015. He was sentenced to 12 years' imprisonment on 22 January 2016.
- iii) Jamal Smith, 34 years old, was another intermediary. He had pleaded guilty on 5 June 2015 and was treated as pleading to Count 4 on a basis of plea that he was the driver to carry the cash and, although he initially thought the cash was for drugs, he realised it was for the purchase of a gun when he was driving. He was sentenced on 22 January 2016 to six years' imprisonment, receiving approximately a 33% discount from a sentence of nine years.

49 The supply of the revolver and ammunition was organised as follows:

- i) It appears that on 10 August 2014 Officer, who lived in west London, wanted to acquire a gun. He discussed this with his friend Mentore who made contact with Jamal Smith, an old friend who had moved back to Birmingham. He thought Smith could supply him with a gun as Smith was a friend and relative of McDermott, a trusted key facilitator in the criminal enterprise.
- ii) On 15 August 2014 Mentore went to Birmingham to make arrangements for the purchase. It appears from contacts between Smith and McDermott on Saturday, 16 August 2014 and between McDermott and other members of the criminal enterprise, the terms of the deal were discussed and arrangements made for the supply of the gun to Officer and Mentore on 18 August 2014.
- iii) The night before the supply, various arrangements, phone calls and movements took place between Stephenson, Gul, McDermott, Ducram and Wiggan. The gun was brought by Wiggan from a place which the police subsequently discovered was used as a store by the enterprise in Great Barr, Birmingham to Ducram's house at Raglan Road, Handsworth for safekeeping by Ducram until the next day when it was due to be handed over. Gul and Stephenson were present at or after the time the revolver arrived.
- iv) On Monday 18 August 2014 Officer drove to Birmingham. After phone calls between Ducram and McDermott, Ducram left his house with the gun at 17.48 and drove to the rendezvous in Birmingham. At the rendezvous Ducram got into the car driven by Officer; in the car were Mentore, McDermott and Smith. Ducram handed over the gun and ammunition and got out of the car. Officer then handed over half of the money to McDermott whilst Mentore checked the gun over and started loading it with bullets.
- v) The police then swooped and arrested those present. On searching the car they found a WW Super Revolver, five rounds of .41 calibre ammunition loaded into the chamber and a further 20 rounds in the bag in the car. The gun was in working order. The ammunition had been modified by a similar process to the ammunition recovered under Count 2. £1,500 cash was found in the car and £1,500 on McDermott, it being clear that £3,000 was paid for the gun.
- vi) Within minutes of the arrest Stephenson was in contact with other members of the conspiracy. He dumped the phones he had been using. He accepted in his basis of plea his role in the supply of the revolver and ammunition.

Gul accepted from his presence on 17 August 2014 that he knew of the transfer.

50 We turn to consider the three offenders who were charged specifically on Count
4 in the order of their culpability.

51 Officer

- i) He was the customer who wanted a firearm and ammunition and was prepared to pay for them. Although the judge was not able to find the precise purpose for which the gun and ammunition were bought, it was not bought for show and, if used, it would have put lives in danger.
- ii) He had a previous conviction for the supply of class A drugs in 2002 for which he received a sentence of three-and-a-half years with two less serious convictions thereafter.
- iii) In his application for leave to appeal against sentence he contended that the sentence was too long as the judge erred in attributing a particular intent to him. The point is unarguable. It is clear that Officer wanted a gun with lethal ammunition; he can only have wanted it for the purpose of killing, terrorising intimidating or maiming. Leave to appeal is refused.
- iv) In our judgement the appropriate starting point for Officer as the purchaser for this type of gun was 14 years. On this basis the sentence of 11 years was unduly lenient and we therefore quash it and substitute a sentence of 14 years.

52 Mentore

- i) He was a go-between, closely associated with the purchaser and present when the gun and ammunition were handed over.
- ii) He had previous convictions for robbery in 2004 for which he received a sentence of nine years and, in 2010, for the supply of Class A drugs for which he received a sentence of seven years.
- iii) In our view, Mentore as an intermediary actually involved in the handover to the extent of loading the gun and with a significant criminal record fell to be sentenced at the top end of the range of sentences for intermediaries. In our judgement the appropriate sentence for him was 14 years. On this basis the sentence of 12 years was unduly lenient. We therefore quash the sentence of 12 years and substitute a sentence of 14 years.

53 Smith

- i) He was one of the go-betweens who arranged the supply and we are satisfied that he was present when the gun and ammunition were handed over.
- ii) Photographs of firearms and ammunition were found on his phone.
- iii) He had a previous conviction in 2001 for possession of a firearm with intent and wounding with intent arising out of an incident when he shot two people for which he received a sentence of nine years.
- iv) In our view, Smith as an intermediary actually involved in the handover and with a conviction for gun crime (even though many years before) fell to be sentenced at the top end of the range of sentences for intermediaries. In our judgement the appropriate sentence for him was also 12 years. On this basis the sentence of six-and-a-half years was unduly lenient, taking into account a discount 33%. We therefore quash the sentence of

six-and-a-half years and substitute a sentence of eight years, giving him the full 33% discount.

Count 5: discovery of a cache on 19 November 2014

- 54 This count related to the discovery of a NSW police revolver and a cache of ammunition on 19 November 2014; it was the prosecution case that Wiggan was in possession of live rounds of different calibres which he had obtained from a cache and was taking to show potential customers or to check which ammunition fitted a particular gun
- i) On 19 November 2014 Wiggan was seen going into a lock-up garage in Great Barr, Birmingham. He was stopped by officers and found to be in possession of three bullets.
 - ii) A search was conducted of the lock-up garage where a rucksack was discovered which contained a .45 calibre NSW police revolver. About 400 rounds of ammunition were also recovered of varying calibres including ammunition capable of being fired from the revolver. The other ammunition was capable of being fired from other .41 calibre revolvers, .32 calibre pistols and 9mm automatic or semi-automatic weapons. All the ammunition had been specially made or adapted.
- 55 When his phone was seized, phone records show that he kept in regular contact with the leader of the conspiracy, Stephenson. Stephenson specifically accepted his involvement in this court.
- 56 No persons other than those engaged in the main criminal enterprise were involved.

Count 6: the supply of a revolver and ammunition 14–16 January 2015

- 57 This count involved the supply of a revolver and ammunition to the following four:
- i) Ifran Hussain, 25 years of age and brother to Usman. He was, with his brother, the customer for a revolver and ammunition. He pleaded guilty on 5 June 2015. He also pleaded guilty to conspiracy to supply heroin, cocaine and possession of criminal property. He was sentenced to seven-and-a-half years on Count 6 (receiving a discount of 25% from a sentence of 10 years), and a consecutive sentence of three years four months for the drugs offences, making a total sentence of 10 years and 10 months;
 - ii) Usman Hussain, 31 years old, was found by the judge to be the person who assisted his brother Ifran in the purchase of a revolver and ammunition. He pleaded guilty at the plea and case management hearing on 5 June 2015 and was sentenced to five years' imprisonment, receiving a 33% discount from a sentence of seven-and-a-half years;
 - iii) Mohammed Fedar, 27 years of age, assisted the Hussain brothers. He pleaded guilty on 5 June 2015 and was sentenced to four years four months' imprisonment, receiving a discount of 33% from a sentence of six years and six months; and
 - iv) Janed Mohammed, 21 years of age, assisted the Hussain brothers. He pleaded guilty on the first day of the trial on 10 August 2014 on a written basis of

plea. He was sentenced to four years and six months imprisonment, receiving a 10% discount from a sentence of five years.

58 The supply was organised as follows:

- i) Ifran Hussain wanted to obtain a gun and ammunition. He discussed this with his brother Usman. Usman Hussain asked Gul to source a gun for Ifran;
- ii) after speaking to Stephenson on 14 January 2015 Gul downloaded a series of images of pistols and revolvers onto his phone;
- iii) on the following day, arrangements were underway for the supply and collection of the gun on 16 January 2015. Ifran made plans with Fedar and Mohammed to meet up with Usman to go and collect the weapon from Gul. On 15 January 2015 there were numerous calls from Ifran to Usman, from Usman to Gul and Gul to Stephenson and Nazran to make arrangements for the handover the following day. Stephenson and Nazran met;
- iv) on the morning of 16 January 2015 Mohammed, Fedar and Gul met at Usman Hussain's address; Mohammed brought a bag containing cash which had been given to him by Fedar. The four then set off in two cars just before midday. Gul collected Stephenson. They followed a complex series of manoeuvres and phone calls which were designed to try and shake off any police surveillance. At 13.22 Mohammed's car was stopped and he, Usman Hussain and Fedar, were arrested. A bag was found on the back seat containing a French 1873 St Etienne revolver and 12 rounds of 11mm calibre ammunition. The ammunition had been adapted and could be fired from the gun;
- v) Gul drove Stephenson back to his home where Stephenson was arrested; and
- vi) police searched a flat connected to Ifran Hussain and found 82.2g of heroin and 116.26g of crack cocaine, together with £7,000 in cash. The drugs were arranged into wraps for sale to users. The value of the drugs was £19,360. He was charged with possession with intent to supply and possession of criminal property.

59 Stephenson accepted his involvement in the supply of this revolver and ammunition. Gul accepted he delivered the revolver to Usman Hussain.

60 We turn to consider the three offenders who were charged specifically on Count 6 in the order of their culpability:

61 Ifran Hussain

- i) The judge found that he was a customer for a gun and ammunition who employed his brother Usman to source it for him. The judge inferred that he wanted the gun for use in connection with his trade in Class A drugs.
- ii) He had been sentenced in 2007 as a juvenile to an eight months detention and training order for assault occasioning actual bodily harm, blackmail and intimidation of a witness.
- iii) The judge expressed the view that the drug dealing was Category 3 and he had a significant role rather than a leading role. He imposed a sentence of three years four months for the drugs offence after a discount of 33% for the early plea; a concurrent sentence of eight months was imposed for the possession of criminal property.

- iv) He sought leave to appeal against sentence on the basis that the judge had not expressly applied the principle of totality and on the basis of disparity with the sentence passed on Miah, as the judge had taken the same starting point for the firearms offence, despite the nature of the weapon which Miah had sought (the gun capable of automatic fire). We accept that there is force in the comparison with Miah and have approached the matter on that basis. The sentence for the drugs offence sufficiently reflects the principle of totality. We therefore refuse leave.
- v) In our judgement, the appropriate sentence for the firearms offence should have been 14 years as he was the person who sought out the purchase of the firearm and ammunition for use in his criminal business; we have taken into account the fact that it was not an automatic weapon and therefore reflected this in the view we have taken. On this basis, applying the discount of 25% which the judge applied, the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of seven-and-a-half years and impose a sentence of 10-and-a-half years for the firearms offence. The sentence for the drugs offences remains as passed, making a total sentence of 13 years 10 months.

62 Usman Hussain

- i) The judge found that he sought out the gun and ammunition, was present when it was delivered and knew it was to be used in the drugs trade.
- ii) He had 25 previous convictions for offences of dishonesty, disobedience to court orders and for drugs. However he had not received a custodial sentence. The judge considered he was a family man and he would feel imprisonment and the separation from his children keenly. He was making good use of custody.
- iii) In our judgement, the appropriate sentence for the firearms offence should have been 12 years as he was the person who sought out the weapon and ammunition knowing it was for use in his brother's criminal business and was present on its delivery. On this basis the sentence, applying the discount of 33%, the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of five years and impose a sentence of eight years.

63 Fedar

- i) The judge found that he aided Usman Hussain to take the cash and was present at the exchange of the cash for the gun. His home had been fortified and the judge was in no doubt that he tried to assist in lawlessness in a significant way.
- ii) He had no previous convictions, he was remorseful and was putting his time in prison to good use
- iii) In our judgement, the appropriate sentence for the firearms offence should have been 10 years as he accompanied Usman Hussain with a bag of cash and was present at the delivery of the firearm. On this basis the sentence, applying the discount of 33%, was unduly lenient. We therefore quash the sentence of four years and four months and impose a sentence of six years and eight months.

64 Mohammed

- i) His role was to drive Fedar with cash knowing it was to be used for something illegal. He originally believed it was for drugs, but learnt once embarked on the journey that it was for a gun.
- ii) He had no previous convictions, was 20 at the time of the offence. He was remorseful and found custody difficult, but was making good use of it.
- iii) In our judgement, the appropriate sentence for the firearms offence should have been six years as he was driving someone who had cash which he discovered in the course of the journey was for the purchase of the firearm and ammunition, but an allowance should be made for his youth and previous good character. On this basis, applying the discount of 10% the sentence for the firearms offence was unduly lenient. We therefore quash the sentence of four years and six months and impose a sentence of five years and five months.

1 March 2019
Paper number:

Lead official:

1 March 2019
SC(19)MAR07 – Bladed article / offensive
weapon
Ruth Pope
0207 071 5781

1 ISSUE

1.1 The Justices' Clerks' Society (JCS) has asked for the Council's view on whether the appropriate custodial sentence (minimum term) for bladed article/ offensive weapons offences can be suspended (absent a finding of particular circumstances that would make it unjust to impose the minimum term).

2 RECOMMENDATION

2.1 That the Council should:

- Confirm that references to custodial sentences in guidelines include suspended sentences (where the conditions in section 189 of the Criminal Justice Act apply¹) and that for the avoidance of doubt this applies where the custodial sentence is an 'appropriate custodial sentence' defined as 'a sentence of imprisonment for a term of at least 6 months'.
- Agree to notify the JCS of this view.

3 CONSIDERATION

Offences subject to a six month minimum sentence

3.1 The six month minimum term applies to the following offences:

Threatening with an offensive weapon in a public place, Prevention of Crime Act 1953 (section 1A)

Threatening with an article with blade/point in a public place, Criminal Justice Act 1988 (section 139AA(1))

¹ (1) If a court passes a sentence of imprisonment or, in the case of a person aged at least 18 but under 21, a sentence of detention in a young offender institution for a term of least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment or detention in a young offender institution is not to take effect unless—

(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and
(b) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.

Threatening with an article with blade/point or offensive weapon on school premises, Criminal Justice Act 1988 (section 139AA(1))

3.2 It also applies to the following offences where the offender has one or more previous convictions for a relevant offence:

Possession of an offensive weapon in a public place, Prevention of Crime Act 1953 (section 1(1))

Possession of an article with blade/point in a public place, Criminal Justice Act 1988 (section 139(1))

Possession of an offensive weapon on school premises, Criminal Justice Act 1988 (section 139A(2))

Possession of an article with blade/point on school premises, Criminal Justice Act 1988 (section 139A(1))

Question asked of the JCS

3.3 The JCS was asked the following question:

In relation to knife crime minimum sentences, does the court have the power to suspend the sentence applying the usual criteria for suspended sentences, or must the court find it to be unjust to impose the minimum term before it could suspend the sentence?

3.4 On an analysis of the legislation, the JCS initially reached the following conclusion:

Looking at one of the mandatory minimum term provisions in isolation, section 139 Criminal Justice Act 1988,² the legislation states that the court must impose an appropriate custodial sentence (with or without a fine) unless the court is of the opinion that there are particular circumstances which relate to the offence, to the previous offence or to the offender, and would make it unjust to do so in all the circumstances.³ An appropriate custodial sentence means, in the case of a person aged 18 or over when convicted, a sentence of imprisonment for a term of at least 6 months; and in the case of a person who is aged at least 16 but under 18 when convicted, a detention and training order of at least 4 months.⁴

Turning then to section 189 Criminal Justice Act 2003, the legislation states that a suspended sentence (which has not been activated) is to be treated as a sentence of imprisonment for the purposes of all enactments and instruments.⁵

² Offence of having article with blade or point in public place

³ Section 139 (6B) Criminal Justice Act 1988

⁴ Section 139 (6C) Criminal Justice Act 1988

⁵ Subject to any provision to the contrary, section 189 (6) Criminal Justice Act 2003

We therefore take the view that a 6 month suspended sentence⁶ imposed on an adult does meet the criteria of being an “appropriate custodial sentence.” The court does not have to be persuaded of factors which would make the minimum sentence unjust before deciding whether to suspend.

R v Whyte

3.5 The JCS then became aware of the case of *Whyte* [2018] EWCA Crim 2437 (attached as Annex A) which cast doubt on this conclusion. The two Judge court stated:

10. The first matter we would observe is that due to his antecedents the appellant was subject to the minimum sentencing provisions of section 139(6A) to (6G) of the Criminal Justice Act 1988, such that in the absence of circumstances relating either to the previous offences, the present offence or the offender, which would make it unjust to impose the minimum sentence, the court was obliged to impose a sentence of 6 months' imprisonment.

11. Although section 189 of the Criminal Justice Act 2015 empowers the court to suspend a sentence of imprisonment, we consider that the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of immediate imprisonment. Furthermore, in the present case, we do not consider there is anything relating to the previous offences or the present one which would make it unjust to impose the minimum term.

3.6 It does not appear that the court in *Whyte* heard detailed argument on the question of whether it was permissible to suspend the minimum term and it is respectfully submitted for the reasons set out below that it came to the wrong conclusion.

The intention behind the legislation

3.7 The relevant legislation makes no mention of suspended sentences in relation to the minimum term provisions. There is no mention of suspended sentences in the explanatory notes to the legislation or in the circulars issued by MoJ on the commencement of the legislation. In the absence of any express disapplication of section 189 of the Criminal Justice Act 2003, it must apply to these sentences of imprisonment as it does to all others. This view is supported by the following information.

3.8 The [Impact Assessment](#) of the Criminal Justice and Courts Act 2015 published by the Ministry of Justice states at paragraph 14:

⁶ Prior to any reduction in sentence for credit for a guilty plea

Judges will continue to have the discretion not to impose custody if there are particular circumstances where they deem it unjust to do so, and the court also has the ability to impose the minimum sentence and suspend it. There are, therefore, reasons to expect that not all of those affected will be sentenced to immediate custody. This is currently the case where other minimum sentences apply.

3.9 Parliamentary Questions were asked about the implementation of the legislation after it had come into force:

Q: To ask the Secretary of State for Justice, how many and what proportion of all sentences handed down for (a) possession of and (b) threatening with a knife were custodial sentences in the last year for which figures are available.

A: In 2017 11,809 possession of a blade or point offences resulted in a conviction and of these 7,339 received some form of custodial sentence (62%). A custodial sentence can be either an immediate custodial sentence or a suspended sentence order. There were 649 threatening with a blade or point offences in 2017 receiving a conviction and of these 522 received some form of custodial sentence (80%).⁷

3.10 Courts are, in fact, imposing suspended sentence orders where the minimum term provisions apply. In approximately 30 per cent of cases where the minimum term applies and a sentence of six months or more is imposed, that sentence is currently being suspended.

3.11 If all such cases were subject to immediate custody, this could lead to a requirement for approximately 200 more prison places per year.⁸

The guidelines

3.12 The [Bladed articles and offensive weapons – threats](#) and [Bladed articles and offensive weapons – possession](#) guidelines do not refer to suspended sentences. The only Sentencing Council guideline that explicitly refers to suspended sentences is the [Imposition of community and custodial sentences](#) guideline in which it states: 'A suspended sentence is a custodial sentence.' The whole thrust of the Council's work in developing and promoting the *Imposition* guideline was to ensure that this message was understood by sentencers.

3.13 The issue of whether the minimum term can be suspended was raised in a Council paper during guideline development, but the decision log shows that the discussion was deferred. There is no record of the issue being discussed at a later meeting, but the

⁷ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-05-08/141740/>

⁸ These figures are estimates based on the available data. The data we have available on 'second strike' possession offences is not broken down by sentence length and so has been estimated.

recollection of those involved is that the Council did not want explicitly to mention suspended sentences in this guideline, as it does not do so in any other offence specific guidelines.

The JCS response

3.14 The JCS has drafted two different responses to the question at paragraph 3.3 and seeks the view of the Council as to which is the correct one. From the magistrates' court viewpoint the issue is whether the decision in *Whyte* is binding:

Concluding that the minimum term cannot be suspended	Concluding that the minimum term can be suspended
<p>In <i>R v Whyte</i>⁹ the Court of Appeal clearly decided as part the judgement in that case that the minimum sentence could not be suspended. The magistrates' courts are bound by this judgement as the legislation is ambiguous. The minimum sentence provisions make no specific reference to whether the minimum sentence must be immediate or may be suspended.</p> <p>We are aware that some commentators take the same view:</p> <p><i>It is submitted that, notwithstanding the CJA 2003, s. 189 (power to suspend sentence of imprisonment), the reference in s. 1A(6)(a) to 'sentence of imprisonment' must mean 'sentence of immediate imprisonment'. Blackstone's Criminal Practice 2019, E5.17</i></p>	<p>Whilst the Magistrates' Courts must normally treat decisions of the Court of Appeal as binding or persuasive, the courts must first follow the legislation literally if it is clear. The sections do appear to be clear and unambiguous. A suspended sentence is to be treated as a sentence of imprisonment. We therefore take the view that a 6 month suspended sentence imposed on an adult does meet the criteria of being an "appropriate custodial sentence." The court does not have to be persuaded of factors which would make the minimum sentence unjust before deciding whether to suspend.</p> <p>We are not persuaded that the inability to suspend a Detention and Training Order supports the contention that the legislation must mean an adult minimum sentence of imprisonment is immediate. A different sentencing regime applies to youths.</p>

⁹ 2018 EWCA Crim 2437

3.15 The Council is invited to conclude that the decision in Whyte is not binding on magistrates' courts because the legislation (supported by the *Imposition* guideline) is clear - a suspended sentence is a custodial sentence.

3.16 The Criminal Appeal Office is looking out for any other cases that raise this issue so that the Court of Appeal can address the question more fully and clarify the position. In the meantime if the Council felt able to write to the JCS stating its view, this would enable them to settle on the advice they should give.

Question 1: Does the Council agree that courts do have the power to suspend an appropriate custodial sentence of up to two years?

Question 2: If so, does the Council agree to write to the JCS stating that it is of that opinion?

4 RISKS

4.1 As stated at paragraph 3.11 there is a danger that if the legislation and the guidelines are interpreted as excluding the option of suspending minimum term sentences, there could be a significant impact on prison resources.

4.2 By explicitly stating that the minimum term can be suspended (something that the Government avoided drawing attention to during the passage of the relevant legislation) the Council could draw criticism for undermining the minimum sentence provisions.

Neutral Citation Number: [2018] EWCA Crim 2437

No: 201802937/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 19 October 2018

B e f o r e:

MR JUSTICE JEREMY BAKER

MRS JUSTICE CUTTS DBE

R E G I N A

v

GRAHAM PATRICK WHYTE

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Mr S Stephens (Solicitor Advocate) appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. MR JUSTICE JEREMY BAKER: On 11 July 2018, Graham Patrick Whyte, appeared in the Crown Court at Birmingham and having previously pleaded guilty in the Magistrates' Court and committed for sentence, he was sentenced to 12 months' imprisonment for an offence of possession of a bladed article in a public place, contrary to section 139(1) of the Criminal Justice Act 1988.
2. His application for leave to appeal against sentence has been referred to the Full Court by the single judge. We grant leave.
3. The circumstances giving rise to the offence were that on the evening of 28 July 2017 a motor vehicle was being pursued by firearm officers in the Erdington area of Birmingham. There were three occupants in the vehicle, one of whom was the appellant who initially gave a false name on his arrest.
4. After being conveyed to Perry Barr custody facility, where he was going to be stripped searched, the appellant disclosed that he had a lock-knife clipped to his boxer shorts from where it was recovered.
5. Initially the appellant made "no comment" in interview but later said that he carried the knife for protection as people had tried to shoot him in the past.
6. The appellant is 32 years of age and has a number of previous convictions including robbery in 2003, possession of heroin with intent to supply and having an article with a blade in 2006 and robbery and possession of an imitation firearm in 2009, for which he received a total sentence of 5 years and 3 months' imprisonment.
7. In his sentencing remarks the judge stated that knife crime, including the possession of knives, was regarded by the public with great concern, due to the potential for serious harm or death being caused by those who carry them. He determined that under the Sentencing Council's Guideline for Bladed Articles and Offensive Weapons this was a category 2A offence, culpability A being present due to the possession of a bladed article and harm 2 being indicated in the absence of any of harm 1 factors being present. Therefore, the appropriate starting point was 6 months' custody with a category range of between 3 months and 1 year.
8. However, the judge also indicated that in his judgment the appellant's antecedents disclosed a worrying pattern of his possession of carrying weapons, including a lethal one, the last two convictions showing that he had firstly, a knife and secondly, an imitation firearm in order to facilitate firstly, drug supplying and secondly, robbery. He noted that there was a gap in the appellant's offending since his release from custody in 2012, but maintained that the pattern of offending was a serious aggravating factor of his present offending, such that it was necessary to impose a period of custody outside the category range. He determined that after a trial a period of 18 months' custody would be justified, which after deduction of 33% to reflect the timing of the appellant's plea of guilty would be reduced to 12 months' imprisonment.

9. In his grounds of appeal, it is argued that the judge was wrong to determine this offence justified going outside the category range under the guidelines. Secondly, that the judge failed sufficiently to take into account the mitigation available to the appellant. Thirdly, it is argued that any sentence of custody ought to have been suspended in its operation.
10. The first matter we would observe is that due to his antecedents the appellant was subject to the minimum sentencing provisions of section 139(6A) to (6G) of the Criminal Justice Act 1988, such that in the absence of circumstances relating either to the previous offences, the present offence or the offender, which would make it unjust to impose the minimum sentence, the court was obliged to impose a sentence of 6 months' imprisonment.
11. Although section 189 of the Criminal Justice Act 2015 empowers the court to suspend a sentence of imprisonment, we consider that the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of immediate imprisonment. Furthermore, in the present case, we do not consider there is anything relating to the previous offences or the present one which would make it unjust to impose the minimum term.
12. We have been asked to consider whether, as the present offence was the first one committed after the appellant's release from custody in 2012, and the appellant has an offer to study for a Certificate of Higher Education Skills in the Workplace at Wales University, these are factors which might make it unjust to impose the minimum sentence. In our judgment, given the nature and extent of the appellant's previous convictions, we do not consider that these matters, taken either in isolation or in combination, would make it unjust.
13. However, although knife crime was rightly described by the judge as a matter of "great public concern", especially, as here, where there has been repeat offending, we are concerned as to whether the facts of this case, taken in combination with his antecedents, justified a sentence outside the recently introduced sentencing guidelines for such offences. It is necessary to have regard to the fact that although the maximum sentence for possession of a bladed article is 4 years' custody, this was not a category 1A offence under the guidelines. Moreover, the last time upon which the appellant was convicted of being in possession of a bladed article was now some 12 years ago.
14. In these circumstances, we are of the view that whereas the judge was entirely correct in treating the appellant's antecedents as a serious aggravating factor, justifying a sentence after trial at the top of the relevant category range, we do not, with respect, consider that it justified going outside the category range on this occasion.
15. In these circumstances, we propose to quash the sentence of 12 months' imprisonment and to substitute a period of 8 months' imprisonment, which reflects a sentence after trial at the top of category 2A of the guidelines, less a full 33% discount to reflect the timing of the appellant's plea of guilty in the Magistrates' Court.
16. To this extent the appeal is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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ANALYSIS AND RESEARCH

NOTE OF SUBGROUP MEETING

24th January 2019

Members present: Alpa Parmar (Chair), Rebecca Crane

Apologies Maura McGowan

In attendance: Steve Wade (Head of Office)
Emma Marshall (Head of Analysis and Research)
Amber Isaac (Statistician)
Pamela Jooman (Statistician)
Caroline Nauth-Misir (Statistician)
Sarah Poppleton (Social Researcher)
Heidi Harries (Social Researcher)
Husnara Khanom (Social Researcher)

1 SOCIAL RESEARCH UPDATE

- 1.1 Sarah Poppleton (SP) gave an overview of the social researchers' current work; in brief: three reports are due for publication within the next few months (assessments of impact for the Robbery and Theft Offences guidelines, and public confidence in sentencing); we are currently road testing the draft s18, s20 and ABH guidelines with Crown Court judges, and we will be testing the mental health overarching principles from February onwards; lastly, we are setting up the second, post-guideline stage of our online data collection in magistrates' courts, the first phase of which ran in 2016/17. This new stage covers all magistrates' courts rather than a sample, and five offences (breach of a community order, breach of a suspended sentence order, breach of a protective order, s2 harassment and stalking, and possession of a bladed article or offensive weapon). The exercise will run from 23 April to 30 September 2019.

2 UPDATE ON STATISTICAL AND RESOURCE ASSESSMENT WORK

- 2.1 Amber Isaac (AI) told the group about some of the statisticians' current projects: we are working closely with the Home Office and Border Force to obtain new data on drugs seizures to feed into the development of the revised Drug Offences guideline; we are setting up a data sharing agreement with the Criminal Appeals Office so that we can access data on appeals to contribute to our guideline evaluations, and we are developing a tool to automate the production of the statistical bulletin tables that are published alongside draft guidelines. The team is also busy drafting a report summarising the findings from the Health and Safety guideline evaluation and a draft resource assessment for the Mental Health

guideline, both of which will be circulated to Council members in due course. Analysis of the effect of offenders' race and gender on sentencing outcomes for drugs offences is also under way, and outcomes from this are scheduled to be presented at the April Council meeting.

3 REVIEW OF SUBGROUP TERMS OF REFERENCE

- 3.1 The group discussed and agreed the subgroup terms of reference (ToR). Alpa Parmar (AP) asked about how membership was decided; EM noted that this was traditionally the academic member and representatives from both the magistrates' courts and Crown Court. Steve Wade (SW) noted that it is possible there could be a fourth member, once new members of the Council had been recruited.
- 3.2 SW set out the role of the subgroup. He explained that the subgroup "owns" the Analysis and Research (A&R) programme and strategy, including the budget, although in practical terms, the available budget is currently so limited that the A&R team do not currently have much flexibility. The group also owns the A&R risk register, with the Governance subgroup looking across all risk registers and reporting back to individual subgroups if they feel any action is needed in particular areas. In addition, the Chair of the subgroup may periodically give a precis of their subgroup meetings at Council meetings, which would give an opportunity to flag key themes, including any emerging from the group's assessment of risks.
- 3.3 The group discussed the budget of the A&R team, and whether there were other sources we could draw on. SW explained that funding for the type of work we do is limited and opportunities are few and far between. Emma Marshall (EM) noted that this is why we are pursuing opportunities to collaborate with external academics. In the past, on occasion, we have also been able to receive some funding from MoJ for work that they have specifically requested. However, this is unlikely to be the case in the near future.
- 3.4 SW explained that MoJ is an unprotected department and therefore the likely best-case scenario for the budget next year is the same as this year, plus inflation.
- 3.5 Rebecca Crane (RC) asked about the subgroup's role in assisting in the liaison with the wider academic community and research bodies (as reflected in the ToR). This could cover members' support of our activities in this area (e.g. support for the academic seminar), rather than needing to specifically undertake any actions. It would also encompass AP "championing" our work in the context of her academic background and contacts. EM offered to amend the wording for this part of the ToR to ensure it is clear.

Action: EM to amend the wording for the final point in the ToR

4 REVIEW OF RISK REGISTER AND BUDGET

Risk register

- 4.1 EM explained that the bottom 3 risks - 5, 6 and 7 – are shaded in yellow to indicate that these have been identified as higher level risks and as a result are included on the Council-wide risk register that is considered by the Governance subgroup.
- 4.2 The group considered these risks in turn. Risk 5 (guidelines have an impact on correctional resources that cannot be assessed or the resource assessment does not anticipate) is currently rated as 'High' ("impact" 4/ "likelihood" 3), but has a target rating of 'Medium' ("impact" 3/ "likelihood" 2). The group discussed the ways in which this risk is being mitigated, including carrying out bespoke data collections, using alternative data sources where available (for example on the mental health guideline), and investigating options of data collection using the common platform (however, it was noted that this is unlikely to yield outcomes in the near future). After some consideration the group decided that this risk should continue to be acknowledged as 'High', and would therefore remain unchanged (rather than lowering the "target impact" rating to 'Medium').
- 4.3 The group then considered risk 6 (sentencers interpret guidelines incorrectly), currently 'Medium' ("impact" 3/ "likelihood" 3). EM explained how this risk is mitigated, for example by undertaking rigorous road-testing. RC suggested adding in an additional control of feeding into sentencers' training in guidelines, as well as the fact that the Council evaluates its guidelines which helps to identify any potential issues with guideline interpretation. EM mentioned that one option for future collaboration with academics may be a project that helps us to examine how sentencers use the digital guidelines. The group decided that the current risk rating, as well as the target rating should be reduced to 'Low' ("impact" 2/ "likelihood" 2).
- 4.4 In relation to risk 7 (Criticism that guidelines do not take account of specific minority groups, including BAME), which is currently rated as 'Very high' (both "impact" and "likelihood" rated as 4), EM explained that the piece of analytical work on race and sentencing for drug offences has started, and the A&R team will ensure that this is prioritised. The group agreed this risk should remain 'Very high', particularly in light of the current context surrounding the Lammy Report.
- 4.5 The group then moved on to discuss the A&R risks that appear on this register only (1 to 4). Risk 1 (analytical strategy is unable to meet the Council's needs) is currently rated as 'High' ("impact" 4 / "likelihood" 3). EM outlined that the Office is now running bespoke data collections to fill data gaps, but response rates have been low; ways to mitigate this involve circulating evaluation summaries to sentencers to show how the collected data has been used (although there is inevitably a time lag before we can publicise this). RC suggested incorporating a five-minute slot into the annual training undertaken by all district and deputy district judges, to explain the importance of the data collection (for example a short video).
- 4.6 Due to time constraints, it was agreed that the subgroup would provide any comments in relation to risks 2, 3 and 4 via email after the meeting.

Action: EM to amend risks 1, 5 and 6.

Action: SP to liaise with relevant contacts regarding annual training for district/deputy judges.

Action: AP/RC/Maura McGowan (MM) to send EM any further comments on the risk register via email.

Budget

- 4.7 Caroline Nauth-Misir (C N-M) updated the group on the current A&R budgetary position. Currently our full year forecast spend is similar to our budget, so we are likely to break even. However, there is a chance of an overspend of around £2,000 due to a disputed invoice relating to the last financial year. Any overspend can be accommodated within the overall office budget, where there is a surplus. Subgroup members asked various questions about how we manage overspend and underspend and they commented on the high volume of work that is achieved on a very small budget.
- 4.8 C N-M confirmed that we have not yet received our budget allocation from MoJ for the next financial year.

5 ROAD TESTING TO SUPPORT THE MENTAL HEALTH GUIDELINE

- 5.1 SP presented the plans for road-testing the mental health guideline. The subgroup was positive about the two-stage design and felt this was suitable within the context of limited time and resources and particularly liked the idea of piloting. AP asked about the sample and whether there would be a balance of gender. SP highlighted that we don't select by gender but we do aim to get a good demographic spread of sentencers, so some female sentencers will definitely be included.
- 5.2 The issue of self-selection bias in our research pool was raised. The team explained that whilst there is this issue, we are also doing more group testing at events, such as the MA Annual AGM, and through this we can reach a wider mix of people. RC suggested asking the Chief Magistrate to nominate judges to take part in road testing which may help to increase participation. She also suggested testing the guideline with district judges.
- 5.3 With reference to the time lag between the first and second stage of road testing, it was felt that 3-6 weeks was too long and that 2-3 weeks would work better and keep up the momentum.
- 5.4 There was some discomfort with the question in the draft topic guide about asking how the guideline may affect colleagues' behaviour. Concerns were principally around it being too anecdotal and the responses being misleading. This will now be removed.
- 5.5 SP asked the subgroup their opinion on asking participants to take part without specifically revealing that we are testing the mental health guideline (in order not to bias responses). It was agreed that we should try this, but be clear in communications about why we cannot disclose the guideline at the first stage but explain that it will be revealed before the second stage interview.
- 5.6 The subgroup was asked if they would be happy to assist with the piloting stage for this work and all agreed (MM having agreed by email, previously).

Action: SP to incorporate the tweaks to the research proposal suggested above, pilot the online work with the group in February and engage with the Chief Magistrate to nominate judges.

6 STRATEGY FOR PUBLICATION/ANALYSIS OF DATA

- 6.1 Pamela Jooman (PJ) presented a paper on options for publishing the data collected as part of the Council's bespoke data collections.
- 6.2 RC noted that a disadvantage of not publishing the data would be that the Council may receive requests for the data under the Freedom of Information Act 2000. Publishing the data therefore helps to alleviate this risk.
- 6.3 There was a discussion regarding how the data analysis included in a guideline assessment report would differ to that that might be included in a summary report published alongside a dataset (akin to the approach previously used when publishing the Crown Court Sentencing Survey data). PJ explained that an assessment report focuses on the relevant guideline and its impact, whereas a summary report would cover a lot more, including more detailed information on the prevalence of each sentencing factor and information on guilty pleas. EM added that because of this, the Crown Court Sentencing Survey summary reports were very resource-intensive to produce, and there had been little feedback from users to suggest that the reports were useful. Instead, feedback has suggested that users (predominantly academics) are only interested in accessing the data so that they can conduct their own analysis. It was concluded that in light of the limited resources available, and that since the assessment reports already provide a summary of the data, publishing the datasets without an accompanying summary report should be sufficient.
- 6.4 RC questioned the suggestion of conducting a survey with users to find out what their data needs are. EM explained that some users of the CCSS data express a preference for the data to be published in a different way. For example, sentence lengths had been grouped into bands, but some users said they would find detailed sentence lengths more useful. In order to comply with data protection legislation, the Council would need to remove other sensitive information from the datasets if this data were to be added in. Surveying users to ask which of several options they would find most useful would be an effective way of balancing the various issues. AP added that running a survey would demonstrate that the Council takes users' views into account and would help to justify the decisions made if academics came back with any queries about the published data.
- 6.5 AP suggested that the survey be widened out to capture the views of not just sentencing academics, but of other experts and users. However, as the survey would be publicised on the Sentencing Council website, it would be possible for anyone with an interest to feed in their views.
- 6.6 RC and AP agreed with the timings proposed in the paper: for the datasets to be published sometime after the publication of the relevant guideline assessment. EM added that the work to prepare and publish datasets would always be fitted around other priorities, and if higher priority work arose then timings may need to shift.

Action: A&R team to develop a plan for publishing the datasets and share this with Council members.

7 COLLABORATION WITH ACADEMICS

- 7.1 EM outlined that we had recently held a brainstorming session in the Office to gather ideas for areas where we might usefully collaborate with academics. The group discussed some of the ideas raised and were asked for any other suggestions.
- 7.2 RC suggested exploring the impact of the digital work on judges' decision making, suggesting that it may have an impact on how sentencers absorb information.
- 7.3 When discussing the public confidence project, it was suggested by SP that there were gaps in the evidence and that further work into public confidence to address these gaps would be useful.
- 7.4 When discussing totality and the potential need to do more work on this, RC asked whether we knew how often each guideline is accessed (this might be one way of identifying how many people are using the totality guideline).
- 7.5 When discussing mental health, RC highlighted that it was important to know more about hospital orders as sentencers often do not know what happens to the individual after the sentence is handed down.

Action: EM to look into the web statistics for the totality guideline

Action: EM to collate suggested ideas for subgroup to review before sending to Council

8 DATE OF NEXT MEETING

- 8.1 The dates of future meetings need to be agreed. RC and AP have a preference to attend in person, and RC has a preference to meet during the afternoon (rather than evening). As the group needs to feed progress into the Governance subgroup, it was agreed that that we would look internally at the timings of all subgroups and then get back to the group with suggested dates.

Action: EM to contact subgroup members with suggestions for dates for future meetings.