

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?