

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

**1 March 2019**  
**SC(19)MAR03 – Public Order**  
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## **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 <sup>2</sup>	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)

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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:

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

#### 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.

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

**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	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 years' custody	<b>Starting point</b> 26 weeks' custody
	<b>Category range</b> 1 year 6 months' – 2 years 6 months' custody	<b>Category range</b> 26 weeks' – 1 year 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody
Category 2	<b>Starting point</b> 1 years' custody	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> 26 weeks' – 1 year 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody	<b>Category range</b> Low level community order – 36 weeks' custody
Category 3	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> Medium level community order – 1 year's custody	<b>Category range</b> Low level community order – 36 weeks' custody	<b>Category range</b> 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.**

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

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.

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

### 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	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 year's custody	<b>Starting point</b> 26 weeks' custody
	<b>Category range</b> 1 year 6 months' – 2 years 6 months' custody	<b>Category range</b> 26 weeks' – 1 year 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody
Category 2	<b>Starting point</b> 1 year's custody	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> High level community order
	<b>Category range</b> 26 weeks' – 1 year 6 months' custody	<b>Category range</b> Medium level community order – 1 year's custody	<b>Category range</b> Low level community order – 36 weeks' custody
Category 3	<b>Starting point</b> 26 weeks' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Medium level community order
	<b>Category range</b> Medium level community order – 1 year's custody	<b>Category range</b> Low level community order – 36 weeks' custody	<b>Category range</b> 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 work<sup>1</sup>, 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

<sup>1</sup> Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the 'pre-guideline' sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

## 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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.