

# **Firearms Offences Guidelines**

**Response to consultation**

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December 2020

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# Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to this consultation and to the judges and magistrates who took part in research during the development of the guidelines.

Firearms legislation is notoriously complex, and it has been a challenging exercise to produce sentencing guidelines that take account of this complexity. The comments and suggestions from respondents have been invaluable in ensuring that the guidelines are comprehensive and will meet the needs of users.

Firearms offences are rightly regarded as serious, and the sentences in the guidelines reflect this, although the range of offending covered by some guidelines also includes some less serious behaviour and accordingly less severe sentences. I am confident that these guidelines will provide judges and magistrates with the tools they need to sentence the full range of offending.

You will see below that, as requested by respondents to this consultation, the Council intends to add to this suite of eight guidelines by developing and consulting on a guideline for firearm importation offences in 2021.

You will also note that the Council has taken some measures in the guidelines to address apparent disparities in sentence outcomes based on ethnicity. This is an area that the Council is committed to continue to investigate and will take further action as and when there is evidence of effective measures that can be applied to guidelines.

**Lord Justice Holroyde**  
**Chairman, Sentencing Council**

# Introduction

From 9 October 2019 to 14 January 2020 the Sentencing Council consulted on eight proposed guidelines to cover the most commonly sentenced firearms offences. There was only one sentencing guideline for firearms offences: that of carrying a firearm in a public place which was included in the Magistrates Courts Sentencing Guidelines (MCSG). There were no sentencing guidelines for firearms offences for use in the Crown Court.

Although relatively low volume, firearms offences are regarded as serious with several offences carrying maximum sentences of 10 years or life. Firearms legislation is complex with 35 statutes governing the use of firearms as well as numerous pieces of secondary legislation. The Law Commission reviewed firearms legislation in 2015 and recommended codification, due to the complexity and volume of the legislative provisions. The Policing and Crime Act 2017 made some clarifying amendments to the main legislation, but there were no plans to pursue codification. The Council sought the views of sentencers and concluded that in the absence of steps to codify the law, sentencing guidelines would provide some helpful clarification in this difficult area of sentencing.

In developing these guidelines, the Council has had regard to the purposes of sentencing and aims to provide sentencers with a structured approach to sentencing firearms offences that will ensure that sentences are proportionate to the offence committed and in relation to other offences.

The eight draft guidelines cover the following offences under the Firearms Act 1968:

- Possession, purchase or acquisition of a prohibited weapon or ammunition – sections 5(1), 5(1A);
- Possession, purchase or acquisition of a firearm/ammunition/shotgun without a certificate – sections 1(1), 2(1);
- Possession of a firearm or ammunition by person with previous convictions prohibited from possessing a firearm or ammunition – sections 21(4), 21(5);
- Carrying a firearm in a public place – section 19;
- Possession of firearm with intent to endanger life – section 16;
- Possession of firearm or imitation firearm with intent to cause fear of violence – section 16A;
- Use of firearm or imitation firearm to resist arrest/possession of firearm or imitation firearm while committing a Schedule 1 offence/carrying firearm or imitation firearm with criminal intent – sections 17(1), 17(2), 18; and
- Manufacture/sell or transfer/possess for sale or transfer/purchase or acquire for sale or transfer prohibited weapon or ammunition – section 5(2A).

# Summary of analysis and research

During the consultation period, 26 interviews were conducted with Crown Court judges either over the phone or face-to-face, with the aim of testing the new draft guidelines for possession of prohibited weapon, possession with intent to cause fear of violence and possession with intent to endanger life. Judges were asked to sentence either their own case and/or hypothetical scenarios with the draft guideline.

Additionally, the carrying in a public place guideline was tested at a meeting of magistrates who were divided into 11 groups of two or three individuals. They were asked to sentence a scenario firstly using the draft guideline and then again using the existing guideline.

The research provided valuable information on how the guidelines might work in practice. However, there are limitations to the work (the sample size was small and not necessarily representative, and the scenarios used contained limited information) and as a result the research findings were treated as **indicative** only and not conclusive.

The research found little difference in sentence lengths when comparing sentences given under the draft guideline with sentences given as if the offender was in court at the time of the exercise (pre-guideline), indicating that the draft guidelines may have little impact on disposal types/lengths.

Across the three guidelines tested with Crown Court judges, the judges were generally content with the draft guidelines, suggesting that they were clear and straightforward. There were particular findings that the Council considered in finalising the guidelines post-consultation:

- When sentencing possession with intent to endanger life or possession with intent to cause serious fear of violence, 'Firearm discharged' appeared to be a dominant factor. Most judges felt that if the firearm had been discharged the culpability of the offender was high irrespective of other culpability factors, including factors in lower culpability.
- When sentencing possession of a prohibited weapon, several judges suggested that assessing risk was a challenge. This can be split into two separate issues:
  - The first issue is whether a loaded firearm automatically means a high risk of harm regardless of the circumstances of the case. For example, if a judge determines that an offender has no intention to use the weapon would it still constitute as high risk because it is loaded and therefore capable of causing injury?
  - The second issue is how judges assess risk based on the events that may or may not take place later.
- Whilst there were some positive comments made about step 3 (minimum term) some judges felt this step did not provide any additional guidance to what they already knew and, while most judges applied the guideline as expected, in a small number of cases

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where exceptional circumstances were found, judges were unclear as to how to apply the guideline in deciding the final sentence.

Magistrates overall found the draft guideline preferable to the existing carrying in a public place guideline saying it was more “nuanced” and enabled greater “flexibility”. Applying the draft guideline to a scenario led to a reduction in sentence severity from a low-level community order with the current guideline to a fine using the draft guideline which most magistrates felt was “about right”.



# Summary of responses

There were 21 responses to the consultation and although this is a relatively small number, very helpful responses were received from key interested parties. Most of the responses were from groups or organisations, though some were from individuals.

## Breakdown of respondents

Type of respondent	Number of responses
Academic	1
Charity / not for profit organisations	1
Government / Select committee	2
Judiciary	2
Legal professional	4
Magistrate	6
Member of the public/ unknown	2
Police/ Law enforcement	2
Prosecutor	1

## Overview

Most responses were broadly in support of the proposals. Details of the responses to each guideline are detailed below.

# Possession of a prohibited weapon

All but one respondent commented on the possession of a prohibited weapon guideline.

## Culpability

In general, respondents were supportive of the two-stage culpability model used (type of weapon and other culpability factors), recognising that the type of weapon was a crucial factor in determining the seriousness of the offence.

Some respondents sought greater clarity on the categorisation of type of weapon. The Sentencing Academy suggested adding descriptions in addition to the statutory provisions to make the guidelines more accessible to members of the public. The Justice Select Committee made a similar point. In research, one judge found that the type of weapon table was not 'user friendly' and suggested including a brief summary of the weapons in each type.

The Council agreed that a brief description of the weapon covered by each statutory provision would be helpful and has added 'drop-down' descriptions taken from the legislation to the digital guideline. Some additional text has also been added to Type 2 weapons to clarify that section 5(1A)(a) includes disguised stun guns when charged under that section.

Several respondents commented on the 'other' culpability factors. Some sought clarity as to how a prohibited firearm could be intended for use other than for an unlawful purpose while the Crown Prosecution Service (CPS) suggested:

'other than for a lawful purpose' should be included in the factor 'firearm discharged'. This would ensure consistency with the rest of the guidelines. The CPS queries whether someone who uses a prohibited weapon for an ostensibly lawful purpose i.e. pest control should be placed into the highest category of culpability. There is a risk that as currently drafted the guidelines do not adequately delineate between organised criminals and others.

The Sentencing Academy raised another issue:

It seems to us there is (at least potentially) a significant difference between the person who holds a firearm for another not knowing that it is one, and the person who knows that they are being asked to hold a firearm for those they know plan to use it in criminal activity. It may, for example, be factually impossible to show that the offender intended for the firearm to be used in criminal activity, but possible to show that the offender clearly knew of the risk of such a use and still took possession or acted as a courier. Here, unless they held it with ammunition, or the firearm was in fact used (and that could be proven) such an offender would fall into the lower culpability bracket.

The Prison Reform Trust (PRT) commented:

In assessing culpability and harm at step one, the guidelines need to take better account of the particular vulnerabilities of individuals who may have been intimidated or coerced into possessing a weapon either through domestic abuse or criminal exploitation. While we welcome the inclusion of “held on behalf of another through coercion, intimidation, or exploitation” as a mitigating factor at step two, we recommend that this factor is considered at step one as a factor indicating reduced culpability

The Council undertook a review of a sample of cases where a vulnerable offender had been used as a custodian of a weapon to which the minimum term applies and concluded that the aspect of the sentencing exercise that had the biggest influence on the sentence outcome in such cases was whether the judge found exceptional circumstances to justify not imposing the minimum term. Further, the way that the guideline is constructed means that the assessment of ‘culpability –other culpability factors’ only has a fairly limited influence on the sentence outcome within those offences that have a maximum of 10 years and a minimum of five. If the type of weapon is a hand gun (which it tends to be in custodian cases) then the overall culpability category will be either A or B. Therefore, mitigating factors at step 2 can have as much, if not more of an effect on the final sentence as step 1 factors. The Council therefore decided to keep the reference to coercion at step 2.

The Council considered all the suggestions and comments and agreed that the culpability factors should be redrafted as follows:

**High culpability**

- Offender uses firearm/ammunition for a criminal purpose
- Offender intends firearm/ammunition to be used for a criminal purpose, or is reckless as to whether it would be so used

**Medium culpability**

- Firearm/ammunition produced or used (where not at High culpability)
- Firearm loaded or held with compatible ammunition or stun gun that is charged (where not at High culpability)
- Offender intends firearm/ammunition to be used or is reckless as to whether it would be used (where not at High culpability)

**Lower culpability**

- No use or intention to use

**Harm**

There were fewer comments on the harm categorisation; most who did comment expressed approval. In research with judges some suggested that assessing risk was a challenge. There were two issues:

- Whether a loaded firearm automatically means a high risk of harm regardless of the circumstances of the case. For example, if a judge determines that an offender has no intention to use the weapon would it still constitute a high risk because it is loaded and therefore capable of causing injury?
- How to assess risk based on the events that may or may not take place later.

Some respondents, including the Criminal Bar Association (CBA), felt that the wording above the harm factors relating to location and the presence of children etc should be given more prominence by incorporating them into factors.

The Council took the view that the assessment of harm for this offence will nearly always involve an exercise of judgement based on the circumstances of the individual case. For example, a loaded weapon stored securely and out of sight might not be considered to represent category 1 harm, if there was no intention to use it; whereas an unloaded weapon in other circumstances could still represent a high risk of serious harm.

For that reason, the Council rejected the idea that the harm factors should give specific examples of circumstances that would represent the different levels of harm. The Council did agree to revise slightly the wording above the harm table to give greater prominence to location as a relevant factor in assessing risk of harm.

### **Sentence levels**

In research only a small number of judges commented on the starting points and ranges and generally they were felt to be 'about right' and 'pretty well constructed'. Respondents were generally content with the sentence levels in the draft guideline. The Magistrates' Association (MA), while otherwise supportive of the range of disposals, said:

We note that Table 2, Culpability B, Category 3 shows a range of Band D fine to High Level Community Order, which we find surprising given that a Band D fine is a community order equivalent sentence. We suggest this should read Band C fine.

The Council agreed with the MA and this has now been changed.

### **Aggravating factors**

There was general agreement with the aggravating and mitigating factors consulted on with some respondents making suggestions. The National Crime Agency (NCA) suggested the following additions:

[A]n aggravating factor dealing with the use or attempted use by the offender of vulnerable proxies or associates to hold the firearm of their behalf.

[A]n aggravating factor to deal with a subject having taken steps to adapt / convert a firearm to something more dangerous. Several of our investigations have involved subjects who have tooling / equipment to convert firearms; have partially disassembled the firearm/s; or have downloaded / accessed instruction manuals explaining how this process can be completed. This is exacerbated by the fact that the legislation is constructed to consider the conversion of an imitation firearm to a firearm, whereas the most common modus operandi we encounter is the conversion from a S5(1)(b) to a S5(1)(aba) (i.e. from one type of firearm to another, more dangerous type).

The Council considered that the second of these suggestions was already covered by the factor 'Firearm modified to make it more dangerous'. Regarding the first suggestion, most of the cases considered when developing this guideline involved a single individual in personal possession of the weapon. However, there are cases where the weapon is in the joint possession of more than one offender or where it has been stored at the home of another person. The factor 'Offence was committed as part of a group (except where already taken into account at step 1)' may be relevant where the weapon is in the joint

possession of more than one person. The expanded explanation for this factor includes a reference to ‘the involvement by the offender of others through coercion, intimidation or exploitation’. It does not capture the situation where an offender has stored the weapon in the home of an unwitting third party. The harm associated with this is captured at step 1, but not the additional culpability. The Council therefore agreed to add an aggravating factor ‘involvement by the offender of others through coercion, intimidation or exploitation’.

The MA suggested adding ‘or other authorised user’ to the factor ‘Abuse of position as registered firearms dealer or certificate holder’ to include other positions which could be abused (e.g. police officer). The Council agreed and made the change across all of the guidelines.

The MA also suggested adding a factor for the location of the offence, for example if it took place in a densely-populated public place or in a school or hospital. A magistrate suggested adding ‘Children exposed to risk from firearms’. The CPS suggested adding ‘carrying in a public place’ because a charge of possession of a prohibited weapon (carried in a public place) would be preferred over a charge of carrying in a public place. The Council considered that these suggestions could lead to double counting as the location and exposure to vulnerable groups is to be taken into account at step 1 when assessing risk of harm.

The Sentencing Academy expressed concern with the breadth of the aggravating factor:

- Offender has contact with criminal associates, including through the purchase or supply of drugs.

Clearly such a factor *can* be aggravating as it increases the potential – perhaps the likelihood – of the prohibited weapon being used in the course of other criminal activity but care might need to be taken to ensure that any ‘criminal associates’ the offender may have are not entirely unrelated to the possession of the prohibited weapon. Take the example of an offender who has associates who are known to be involved in the supply of drugs but where there is no evidence that the offender is, or ever has been, involved in the supply of drugs themselves: does this rightly aggravate their possession of a prohibited weapon offence? Surely a closer connection between the associates and the possession offence ought to be required prior to increasing the severity of the sentence to be imposed. Merely having criminal associates is not an aggravating factor in the guideline for bladed articles and offensive weapons offences

The Council recognised that this was a valid point and considered amending the factor but ultimately decided to remove it (in this and other guidelines). The reasons for this are twofold: firstly, that having changed the culpability factors (as outlined above) there was a danger that this factor could lead to double counting because criminal associates would be relevant to the assessment of intention or recklessness regarding criminal use; secondly, the Council considered that this was a factor that could be applied disproportionately to some demographic groups. See further the discussion on page 30 below.

### **Mitigating factors**

There were few comments about the mitigating factors. The NCA expressed concern with the blanket application of the factors:

- Firearm incomplete or incapable of being discharged (including stun gun that is not charged and not held with a functioning charger)

- No knowledge or suspicion that firearm/ammunition is prohibited

The Council was satisfied that a court (with the assistance of submissions from the parties) would be able to identify the situations where these factors provided genuine mitigation and apply them appropriately.

### **Step 3 – minimum term and exceptional circumstances.**

This step was generally considered to be helpful by respondents to the consultation:

These were useful and well explained additional steps. The distinction between adult and younger offenders was particularly helpful in incorporating a reminder to reference the Sentencing Children and Young People guideline. We feel that consistent reference to specific sections of the Sentencing Children and Young People guideline would be more likely to promote proper consideration, particularly if the digital version of the guideline has the appropriate hyperlink. **HM Council of District Judges**

I am particularly pleased to see the inclusion of guidance on when the minimum sentence applies for some offences. We want to ensure that the principle of justifying the disapplication of the five-year minimum term is consistently applied and setting out the principles in the guideline will likely increase consistency in approach. I also welcome the separate guidance provided in the guideline on applying the minimum terms for under 18s.  
**Ministry of Justice**

The Sentencing Academy suggested a change to the opening sentence of paragraph 10, 'The circumstances must be truly exceptional':

– but 'truly exceptional' might be considered to differ from merely 'exceptional'. Re-phrasing this to 'The circumstances must truly be exceptional' would seem to meet the concern that the minimum sentence is not being imposed in circumstances that are not exceptional without any risk of creating a new test of 'truly exceptional' circumstances being required.

The Council agreed with this suggestion and the change has been made.

There was one comment from a respondent questioning the guidance in paragraph 3 and in research one judge commented that it would be useful to have text to remind people that where the minimum term applies the sentence cannot go below five years for a guilty plea. This indicated to the Council that the wording of this paragraph could be improved, and it has been reworded to read:

- 3 The minimum term applies to *all* such offences including the first offence. Where it applies the sentence cannot be reduced below the minimum term for a guilty plea (see Step 5 – Reduction for guilty pleas).

A note has also been added to paragraph 13 to clarify that where exceptional circumstances are found not to impose the minimum sentence then the guilty plea reduction applies in the normal way.

A note has been added to paragraph 2 to remind sentencers that the minimum term does not apply to offences charged as conspiracies.

Some respondents requested further guidance on what could amount to exceptional circumstances. This was reflected to a certain extent by judges in research some of whom felt this step did not provide any additional guidance to what they already knew.

The Council had some sympathy with those who wanted more specific guidance but as the test is one of exceptional circumstances, it follows that these cannot be defined. The guidance was designed to reflect case law and the responses to consultation and research with judges indicate that this has been achieved.

The CBA said:

One obvious query is why this is structured to appear at Step 3 as in any real sentencing exercise the first Question the sentencing judge would have to resolve is whether to disapply the minimum sentence presumption.
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This view was reflected by the approach taken by judges in research. One suggested that the information in paragraphs 13 and 14 of step 3 (regarding how a sentencer should proceed if exceptional circumstances are found) should be moved to the sentence table. Another was keen that the mention of Newton Hearings should be earlier in the guideline.

The Council considered this issue and felt that it was important to retain the normal structured approach to proportionate sentencing in this guideline: the court should consider culpability and harm in the usual way, leading to a sentence based on whether the offence is subject to the minimum term or not and then consider whether to adjust it because of exceptional circumstances. The Council concluded that the concerns expressed could be addressed by improved signposting within the guideline to the information at step 3 and some changes to the headings and sub headings within step 3.

# Possession without certificate

There were seven responses that directly addressed this guideline.

## Culpability

There were only a few comments from respondents on the type of weapon table. One noted the difficulty of identifying what is meant by 'very small quantity of ammunition' and another that this factor would leave considerable discretion to the sentencer which could lead to inconsistency. The Council considered these comments and chose not to attempt to define this factor precisely, preferring to leave it to the discretion of the sentencer who would be best placed to make the categorisation in the occasional cases where it would be relevant. The same decision applies to other guidelines where this factor appears.

It was helpfully pointed out by Hampshire Police that in the 'type of weapon' table there is a distinction drawn between shotguns and firearms, but the 'other culpability' factors use the term 'firearms' to encompass both. The Council agreed that this could be confusing and has changed the terminology to 'shotgun/firearm'.

The Law Society noted that it was helpful to take a consistent approach to harm and culpability across the guidelines. The Council agreed with this and has made the same changes to the 'other culpability' factors in this guideline as have been outlined above in the possession of a prohibited weapon guideline.

## Harm

There were no changes made to the harm factors (save for those set out above under the possession of a prohibited weapon guideline and correcting a formatting error).

## Sentence levels

There were a few comments on the sentence levels. Some were critical of including fines on the grounds that the offence will always be serious enough to justify at least a community order whereas others were concerned that the guideline could result in unduly severe sentences (see further the discussion relating to mitigating factors).

HM Council of District Judges commented:

It would appear that most offences are likely to fall within the B2 range with a starting point of 12 months but a range of up to 2 years and down to include community orders. However, the statistical bulletin shows a mean length of sentence outside the powers of the Magistrates' Courts.

About two thirds of possession without a certificate cases are sentenced in the Crown Court. Of the Crown Court cases for which the Council has transcripts of sentencing remarks about half would be likely to fall into B2 and this is in line with the sentences imposed in most cases. The average custodial sentence length (ACSL) after reduction for a guilty plea was around 2 years 3 months in 2019 (which might suggest that the sentence levels in B2 are too low), but only just over a third of offenders were sentenced to immediate custody and so the ACSL does not represent the 'average' sentence overall.



The Council reviewed the sentences in the draft guideline and considered that they were appropriate for the wide range of offending that could be encompassed by the offence.

### **Aggravating and mitigating factors**

The Law Society, the CBA and a magistrate raised concerns that the guideline did not adequately deal with cases of inadvertent lapse of a certificate or where the offender is unaware of the nature of the weapon.

The Council noted that there were several mitigating factors that could be relevant in such cases:

- No knowledge or suspicion that item possessed was firearm/ammunition
- Steps taken to obtain certificate
- Certificate not obtained/renewed due to genuine oversight or misunderstanding
- Good record of firearms licensing compliance

The Council considered that these factors (in conjunction with the harm and culpability factors at step 1) adequately cater for cases of inadvertent possession or failure to renew a licence. No changes were therefore made.

# Possession by person prohibited

There were 10 responses to questions relating to this guideline.

## Culpability

In the type of weapon table, the West London Bench queried 'very small quantity of ammunition' in Type 3. Their objection was twofold: firstly, the difficulty of knowing what is meant by 'very small quantity' and secondly, they suggest that if the ammunition is capable of inflicting lethal injury it should not be at Type 3 regardless of quantity. The Council decided to retain the reference to a 'very small quantity' (as discussed on page 14 above) but noted that the references to ammunition for this offence could be a little confusing. If it is prohibited it would always be Type 1. If a certificate is required it would be type 2 unless very small quantity, in which case it would be Type 3. If a certificate is not required (e.g. blank cartridges) the guideline did not specify how it should be categorised.

Hampshire Police suggested adding 'Antique' to the Type 3 weapons in culpability. Section 58(2) of the Firearms act 1968 exempts an antique weapon kept as a curiosity or ornament from the provisions of the Act with the exception of section 21. The Council agreed that antique weapons should be included as suggested.

Taking into account the various points raised the Council decided to revise the type of weapon table to clarify which weapons or ammunition would fall into which type:

<b>Type 1</b>	<ul style="list-style-type: none"> <li>• Firearm or ammunition prohibited under section 5 (where not at Type 2)</li> </ul>
<b>Type 2</b>	<ul style="list-style-type: none"> <li>• Weapon prohibited under section 5(1)(b)</li> <li>• Firearm, for which a certificate is required</li> <li>• Shotgun for which a certificate is required</li> <li>• Air weapon for which a certificate is required</li> <li>• Ammunition for which a certificate is required (where not at Type 3)</li> </ul>
<b>Type 3</b>	<ul style="list-style-type: none"> <li>• Air weapon that is not prohibited and for which no certificate is required</li> <li>• Antique weapon (kept as a curiosity or ornament) that is not prohibited and for which no certificate is required</li> <li>• Ammunition that is not prohibited and for which no certificate is required</li> <li>• Very small quantity of ammunition for which a certificate is required</li> </ul>

The Council made the same changes to the 'other culpability' factors in this guideline as have been outlined above in the possession of a prohibited weapon guideline (with slight modifications of terminology).

## Harm

The CBA made suggestions for changes to the harm assessment:

[I]f the council conclude that location of the weapon is more relevant to harm than culpability, then we suggest that it should be a specific factor in the categorisation of the

assessment of harm, and we suggest that where offenders possess a firearm in public, then that should be a feature that would bring the offence into category 1.

Similarly, our view is that where the evidence suggests that there is a risk of children having access to a weapon or it being visible to them, then that should be and specific factor set out in category 1. Our view is that these two suggestions for inclusion in category 1 are likely to be of greater assistance to the courts, rather than the more uncertain factors presently identified which may require an element of speculation that the courts are reluctant to undertake. For example there is unlikely in many cases to be an well established evidential basis to conclude that “serious alarm/distress [was] caused” or that there is a “high risk of disorder” and consequently, offenders may be rarely placed into Category 1 Harm (sic).

The Council considered these points in relation to all the guidelines and was not minded to make changes to the harm factors other than those set out above under the possession of a prohibited weapon guideline, but took these comments into account when considering sentence levels.

### **Sentence levels**

As noted above, the CBA suggested that for this offence, harm would rarely be assessed as category 1. The Council looked at the evidence from transcripts of sentencing remarks of the circumstances of cases and sentencing outcomes. This analysis showed that while it is right to say that category 1 harm would be unusual, the guideline would result in sentences that are broadly in line with current sentencing practice.

The CBA also queried whether it was appropriate to have a custodial sentence at B3, because of the low level of harm. In the Council’s assessment few cases will be categorised as B3 because where harm is assessed as ‘no distress caused/ minimal risk of serious harm or disorder’ the case is likely to come under lower ‘other’ culpability (no use or intention to use) and so in order to fall into B3 the weapon would have to be prohibited. For such cases the Council considered it appropriate to have a custodial sentence in the range.

The MA commented:

Sentence levels are the same for someone who has been specifically prohibited as for someone who has not got a certificate. We would expect the starting points for this offence to be higher, maybe midway between the current starting points and the top of the range.

The Council noted that the ACSL for possession without a certificate is roughly twice that for possession by a person prohibited, although the proportion of offenders sentenced to custody is slightly lower for possession without a certificate (61% compared to 68%). The Council was satisfied that the sentence levels are proportionate and reflect current sentencing practice.

### **Aggravating and mitigating factors**

Respondents were generally supportive of these factors. The Law Society made the following suggestion:

It may be useful to have an aggravating factor that refers specifically to previous firearm offences. Of course, all previous offences will aggravate the offence, but for this offence, aimed squarely at those who have been sentenced to custody and therefore previously

found guilty of a serious offence, we consider including a specific aggravating factor relating to prior firearms offences will possibly work to discourage future lack of compliance.

The Council considered this point and noted that a previous firearms conviction could be relevant to the assessment of culpability (intention to use for a criminal purpose) or harm (likelihood of injury or disorder) as well as being a highly relevant previous conviction for the purposes of the statutory aggravating factor at step 2. Other convictions could also be of particular relevance (for example a robbery where an offensive weapon was used, or supply of drugs which indicates association with a network of criminals). The Council considered that there is a danger that singling out previous firearms offences could lead to double counting and/or minimising the relevance of other offending history.

# Carrying in a public place

There were 11 responses to questions relating to this guideline.

## Culpability

Respondents generally agreed with the approach to assessing culpability. There were no suggestions for changes to the type of weapon table. The Council noted that unlike the other possession offences, this offence cannot be committed by the possession of ammunition alone. The words 'or ammunition' have therefore been removed.

The 'other culpability' factors have been amended as outlined above in the possession of a prohibited weapon guideline (with slight modifications of terminology).

## Harm

The comments on the harm factors reflected those made in relation to other guidelines. The Council made the same changes as set out above under the possession of a prohibited weapon guideline.

## Sentence levels

The CBA suggested that the bottom of the range for A2 should be changed from 6 months' custody to a high level community order. The Council felt that it was difficult to envisage a case that could fall into A2 that did not pass the custody threshold as it would have to involve either a prohibited weapon or a loaded weapon for which a certificate is required.

The Justices' Clerks' Society (JCS) made a point regarding the wording above the sentence table in the carrying in a public place guideline:

At Step 2 "Where the minimum sentence applies" we would suggest removing "unless there are exceptional circumstances" at this stage of the guideline. We would suggest that the phrase "See STEP 3 for further details on the minimum sentencing provisions and exceptional circumstances" is sufficient explanation at this step. Otherwise the sentencer may risk addressing their mind to exceptional circumstances when assessing the five-year starting point at step 2 rather than at step 3.

The Council agreed that this wording could be simplified and in line with changes already considered for the possession of a prohibited weapon guideline, this wording has been modified across all relevant guidelines.

## Aggravating and mitigating factors

Most respondents were content with the aggravating and mitigating factors. The MA suggested that an additional aggravating factor should be added covering the location of the offence, for example if it was in a school or hospital. The Law Society again suggested a specific aggravating factor relating to previous firearms offences. The JCS queried the need for the text in brackets in this aggravating factor:

- Offence was committed as part of a group (except where already taken into account at step 1)

Given that the location of the offence is specifically mentioned as relevant to the assessment of harm the Council decided not to add an aggravating factor relating to location. The Council agreed with the JCS, bearing in mind that the expanded explanation for this factor warns against double counting, that the words in brackets should be removed in this and other guidelines where there is no mention of group offending at step one.

### **Ancillary orders**

With reference to step 7 in this guideline (and step 6 in other guidelines) the JCS noted:

We understand that the carrying of an air weapon in a public place under s19 is not an offence related “specifically to air weapons” as defined by section 57(3). Therefore, we propose highlighting that section 52 does apply to air weapons for s19 offences and deleting the reference to paragraphs 7 and 8 Part II to Schedule 6 of the Firearms Act 1968.

This helpful comment led the Council to the conclusion that the guidance at step 7 of the draft guideline was misleading. A review of the legislation showed that the exception for offences specifically relating to air weapons does not apply to any of the offences covered by the guidelines so it would be clearer to remove that reference and the reference to Schedule 6 (which is only relevant when the exception applies) in all guidelines. The Council has therefore simplified the text in all guidelines to read:

### **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 of the Firearms Act 1968 provides that a court may order the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of this offence **and** is given a custodial sentence **or** a community order containing a requirement not to possess, use or carry a firearm.

# Possession with intent to endanger life

There were 11 responses to questions relating to this guideline.

## Culpability

There were only a few suggestions for changes to the culpability factors. The NCA suggested:

specifying in the overarching “high culpability” category that significant planning / sophistication should include the intentional acquisition or use of specialised equipment, devices, encryption, or other technology to further the criminal activity concerned.

The Sentencing Academy noted:

the culpability factor “leading role” (and others) is restricted by the reference to group offending; the Council will be aware that in the context of drugs offences, the CACD has held that a ‘sole trader’ can in effect perform leading role as the approach of determining roles is a proxy for culpability. Accordingly, ought the Council consider whether it is correct to take a different approach in this guideline?

The CBA:

are firmly of the view that the weapon being in possession of the offender in a public place should be a specific factor indicative of High Culpability. If the SGC reject that approach, we suggest that possession of the item in a public place it to be a specific factor identified in Category 1 Harm.

The Council concluded that regarding the NCA suggestion – there was no reason to give examples of what could indicate ‘Sophisticated nature of the offence/ significant planning’ and it was preferable to leave the factor unchanged. The Council noted that the Sentencing Academy point failed to take account of the fact that culpability in the drugs guidelines is defined solely in terms of role – in this guideline role is just one feature of each level of culpability. The Council was satisfied that there were sufficient factors in high culpability to capture any appropriate cases of an offender acting alone. The CBA suggestion has been considered in relation to other guidelines and the same minor change has been made to the harm table in this guideline.

In research with judges some queried the meaning of the word ‘large’ in the culpability factor:

- Distribution or supply of firearms on a large scale

In the cases for which the Council had obtained transcripts there were cases where the quantity of weapons was undeniably large (for example 80 or 100 firearms) but there were others where around 10-12 firearms were involved which might be more difficult to categorise as ‘large’. The Council took the view that it would be preferable to change the

factor to make it clear that in appropriate cases such quantities could be placed in high culpability, so that it now reads:

- Distribution or supply of firearms on a significant scale

The Council considered whether any difficulties would be caused by the finding from research with judges that when using the draft guideline, 'Firearm discharged' appeared to be a dominant factor. A review of transcripts of sentencing remarks indicated that the discharge of a firearm is almost always considered very serious and applying the guideline to such cases did not produce disproportionate sentences.

## Harm

Hampshire Police asked if high risk of death should be in category 1 rather than category 2. The Sentencing Academy thought 'death' should be a category 1 factor saying, 'There will be (albeit limited) circumstances in which a defendant is convicted of possession with intent where death has occurred where it was not possible to achieve a conviction for murder or conspiracy to murder'. Suffolk Magistrates' Bench suggested that a definition of the difference between 'severe' harm as category 1 and 'serious' harm at category 2 would be useful.

By the nature of this offence, a high risk of death will be present in many cases and the Council took the decision to reserve the highest harm category to severe actual harm (whether physical or psychological). The Council considered that in any case where this offence is charged where a death has occurred a court would have no difficulty in finding that this was 'severe physical harm'. The point made by the magistrates was not repeated by any of the respondents who sentence or practice in the Crown Court (this offence is indictable only) and the Council felt confident that sentencers would be able to make the necessary distinction.

## Sentence levels

The CPS, Law Society and CBA all commented that the sentence levels seemed appropriate. Hodge, Jones and Allen commented:

This offence is not usually charged alone and is usually coupled with other very serious offences. It would be more user friendly if reference could be made to a totality principle in the event that a defendant is convicted of both offences. This could be done by way of clarifying the uplift to the sentence.

The Council noted that there is some wording below the harm table which was included because harm factors include reference to physical or psychological harm caused to victims:

**Where separate charges apply, for example in relation to any death or injury caused, the court should have regard to totality (see step 7).**

A review of cases showed that a small minority of offenders are receiving sentences above the top of the range for this offence. In all such cases the offender was being sentenced for several offences (typically offences of violence and/or drug supply) and the sentence for the firearms offence often reflected the totality of offending. The Council considered that it would be helpful to add the following wording immediately below the sentence table



**In cases involving multiple counts of serious offending, sentences above the top of the range may be justified having regard to totality (see step 7).**

### **Aggravating and mitigating factors**

There were suggestions for additional aggravating factors:

- Intent to endanger the life of more than one person
- Possession with intent to endanger life committed in a public place, i.e. in prison, near schools and hospitals
- Links to organised criminal groups

The Council considered that the first of these suggestions is adequately covered by the guideline. If there is more than one victim who suffered physical injury this would be reflected in multiple counts. In the situation, for example, where a weapon is discharged in a crowd the category 1 harm factor 'severe psychological harm caused' could apply to one or more persons present. Where there is a more general risk to more than one victim, that is taken into account in the wording above the harm table that says that the number and vulnerability of people exposed is a relevant consideration. The Council felt that the fact that aggravating factors are non-exhaustive can be relied on in cases where there is more than one victim that is not taken into account at step 1 or by multiple counts.

The second factor is already covered by the reference to location in the assessment of harm. The third suggestion is covered by the existing aggravating factors:

- Offence was committed as part of a group (except where already taken into account at step 1)
- Offence committed to further organised criminal activity (except where already taken into account at step 1)

# Possession with intent to cause fear of violence

There were eight responses to questions relating to this guideline.

## Culpability and Harm

There were no suggestions for changes to the culpability factors. The same point about whether high risk of death should be harm category 1 was made for this guideline (see discussion above).

## Sentence levels

There was only one suggestion for a change to sentence levels, from an anonymous respondent who suggested that the bottom of the range should be high level community order rather than medium level. The Council of HM Circuit Judges queried whether offences involving an imitation firearm will always be less serious as it will often be impossible for a victim to tell whether the weapon is real or an imitation. This was a comment on a statement in the consultation document rather than on the sentence levels as such.

The CBA made this general point in relation to several guidelines:

We are concerned that the sentencing guidelines may not take sufficiently into account that those who are coerced, intimidated or exploited by reason of vulnerabilities which are outside their control (e.g. learning difficulty, severe long-term abuse or mental illness) may not receive sufficient allowance when assessing culpability and sentencing levels.

This issue was discussed in relation to the possession guidelines and the decision was made that involvement through coercion, intimidation, or exploitation should remain a mitigating factor rather than a step 1 factor (see page 9 above).

The structure of the possession with intent guidelines is different and so the Council reconsidered the issue for these guidelines. The Council noted that role is a factor in assessing culpability, and a review of transcripts of sentencing remarks for possession with intent cases indicated that the combination of step 1 and step 2 factors means that the guidelines adequately cater for cases where the offender is coerced or vulnerable.

# Possession with intent – other offences

There were five responses to questions relating to this guideline.

There were no suggestions for changes to culpability factors. The same point about whether high risk of death should be harm category 1 was made and for this guideline was supported by the Council of HM Circuit Judges (see discussion above).

There were no suggestions for changes to sentence levels or to aggravating or mitigating factors for this guideline.

This guideline relates to three offences under the Firearms Act 1968:

- Use of firearm or imitation firearm to resist arrest (section 17(1))
- Possession of firearm or imitation firearm while committing a Schedule 1 offence (section 17(2))
- Carrying firearm or imitation firearm with criminal intent (section 18)

In a review of transcripts of sentencing remarks there were several cases where the offender pointed a weapon (whether real or imitation) at the victim at close range which did not have other high culpability factors. The Council concluded a high culpability factor 'Conduct intended to maximise fear or distress' which is used in the *Possession with intent to cause fear of violence* guideline would also be appropriate for this guideline.

The draft guideline contained a high culpability factor of 'Serious nature of intended offence' to capture relevant cases under section 18 – carrying a firearm or imitation firearm with criminal intent. The Council decided to amend that factor so that it also applies to offences under s17(2) – possession of a firearm or imitation firearm while committing a Schedule 1 offence. The revised wording is:

- Serious nature of intended or actual associated offence

# Transfer and Manufacture

There were eight responses to questions relating to this guideline.

## Culpability and harm

The NCA cited examples of cases which they said showed ‘a significant disparity in the trafficking of firearms cases between those in fast parcels compared to accompanied detections.’ They posited that the high culpability factor ‘Significant planning, including but not limited to significant steps to evade detection’ would be unlikely to apply in cases of transfer by post.

This is a very low volume offence and the available evidence is therefore very limited but based on the small sample of cases available, it appeared that the method of transfer was not a significant factor in sentencing. Applying the guideline to these cases the Council was satisfied that there would be no unjustified discrepancies in sentencing between transfers by post and transfers in person.

The NCA also stated:

In the harm category we would also recommend a consideration, alongside the number of weapons involved, which dealt with the relative capability of the firearm (as per the R v Wilkinson principles). For example, production of fully automatic / mass casualty weapons would be considered more serious than a self-loading pistol and this would be a factor in determining relative culpability.

The CBA commented:

We are concerned that the category of harm depends on the actual use to which the firearm was put rather than the offender’s knowledge or understanding about its actual (or potential) use when it was transferred or manufactured. A person who does intend or expect that the weapon will be used to cause death or serious injury (but it never is so used) should not be in a better position than someone who has no such intention or expectation but the weapon is so used.

Similarly, someone who had little or no idea that the weapon would be used for killing or causing serious harm should not automatically be elevated into category 1.

The Council considered these points and, having reviewed the available cases, was satisfied that the guideline would enable courts to achieve a proportionate outcome in the wide range of offending covered.

## Sentence levels

In developing the draft guideline for consultation, the Council considered the position of the hobbyist who manufactures weapons for the challenge of doing so and the bottom of the range was set at four years to accommodate such cases. All of the offences covered by the guideline could apply to s5(1)(b) ‘any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing;’ e.g. a stun gun. The ‘transfer’ offences (which are the most numerous) could also apply to s5(1A)(a) ‘any

firearm which is disguised as another object', e.g. a disguised stun gun. Looking at the available transcripts of sentencing remarks (27 cases covering 67 offenders), for all but four offenders the offence appears to relate to weapons subject to the minimum term provisions. Those four offenders all received sentences below the bottom of the range in the draft guideline. Two further offenders received sentences below the minimum term where exceptional circumstances applied. Although the number of offenders receiving sentences below four years is low - it represents a significant proportion of offenders sentenced.

From the transcripts it appears that the key factors present in cases receiving lower sentences are either lack of criminal intent or coercion/ exploitation. In all of these cases lower culpability factors would apply ('Lesser role', 'Involved through coercion, intimidation or exploitation', 'Little or no planning' and/or 'Expectation of limited, if any, financial or other advantage'). In most cases, category 3 harm would also clearly apply and, where appropriate, mitigating factors would enable a court to arrive at a sentence below the starting point. In order to maintain current sentencing practice the Council therefore reduced the bottom of the range from four to three years' custody but left the starting point unchanged at six years' custody.

# Importation offences

The consultation set out six offences that the Council had considered covering but had decided not to because of low volumes and sought views on whether any other offences should be covered. Several respondents including the NCA and the CPS urged the Council to develop guidelines for importation offences.

The Council had made the decision not to proceed with guidelines for these offences based on sentencing data from 2017. More recent data show that volumes for importation offences under the Customs and Excise Management Act 1979 have increased. While the volumes are still low (25 offenders sentenced in 2019) they are higher than for some offences for which guidelines have been developed. The Council also considered feedback from judges indicating that a guideline for importation offences would be useful and agreed to develop one.

Work has commenced on the development of an importation guideline, but the Council decided not to delay the publication of the eight guidelines already consulted on and so the importation guideline will be consulted on separately in 2021.

# Impact of the changes

## Resource impact

This is explored in more detail in a [resource assessment](#) published by the Council.

## Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not;
- the need to foster good relations between those who share a “protected characteristic” and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published information on the demographic makeup (specifically age, ethnicity and sex) of offenders for firearms offences. Ethnicity in the data used is recorded as White, Black, Asian, Other or unknown. The consultation document noted that while firearms offences are most often committed by White males under the age of 40, when compared with the demographics of the population as a whole, there is an over-representation of Black, Asian and Other ethnicity offenders. It also noted that there is a large over-representation of young adults compared to the population as a whole.

The consultation also noted that for possession offences to which the minimum term applied a higher proportion of White offenders received a sentence below the minimum term compared to Black or Asian offenders.

The consultation sought suggestions from respondents as to how these (and any other issues of equality and diversity) could be addressed by the guidelines. HM Council of District Judges endorsed the inclusion of reference to the Equal Treatment Bench Book in the guidelines and suggested that ‘reference to specific sections of the Bench Book would be more likely to promote proper consideration, particularly if the digital version of the guideline has the appropriate hyperlink’.

## The Council’s response

Apparent disparity in sentencing outcomes between different demographic groups is an issue that the Council takes very seriously across all offences and is taking steps to obtain more evidence and explore possible causes and remedies.

In the context of the offences covered by these guidelines, the Council has undertaken a further review of sentence outcomes across different demographic groups. The analysis

was based on sentence outcomes taken from the Ministry of Justice Court Proceedings Database and does not take account of the features of individual cases. It is important to note that many of the offences covered by the guidelines are of low volume and ethnicity is not always recorded, so care should be taken when interpreting data on ethnicity. The number of females sentenced for most offences covered by the guidelines is too small to make any meaningful comparisons based on sex.

The full data tables (which include data over a five-year period) are published on the [Council's website](#).

While there may be many legitimate reasons why individual cases may be dealt with more severely than others, the overall findings give a strong indication that Black, Asian and Other ethnicity offenders are dealt with more severely by the courts for firearms offences than White offenders both in terms of the proportion receiving an immediate custodial sentence and the length of that sentence. These differences are most evident in the strict liability possession offences.

The Council considered the possible reasons for the apparent disparities. One potential feature of sentencing that could have an impact is the significance given to previous convictions in sentencing firearms cases. There is an overrepresentation of Black, Asian and Other ethnic groups at many stages throughout the criminal justice system compared to the White ethnic group which means that, for example, a Black offender may have a more significant record than a White offender of the same age.

These guidelines (as with all Sentencing Council guidelines) consider the statutory aggravating factor of previous convictions at step 2 which limits the influence of an offender's record on sentence outcomes. Having made changes to the culpability factors in the four strict liability possession guidelines (see page 11 above), the Council reconsidered the aggravating factors and identified that the factor 'Offender has contact with criminal associates, including through the purchase or supply of drugs' as one that could potentially be applied disproportionately. The Council considered that this factor did not add anything useful to those four guidelines and should be removed.

The Council also identified the danger that the aggravating factor 'Offender prohibited from possessing weapon or ammunition because of previous conviction' could lead to double counting with previous convictions. The Council felt that the factor was highly relevant and should be retained but decided to add a specific reminder to sentencers not to double counts matters taken into account when considering previous convictions.

As noted in the consultation document, all guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

The Council agreed with the suggestion by HM Council of District Judges that a more specific reference to the relevant sections would be helpful. At the time of publication, it is not possible to hyperlink directly to particular sections of the ETBB, but the Council will endeavour to find a way to do so in the future.



The Council noted that the disparity in outcomes varies across different offences and considered that a tailored reference to the evidence of disparities in sentencing and to the ETBB should be added to those guidelines where there was sufficient evidence of disparity in sentence outcomes. The general reference is retained in the header to the guideline and a second more specific reference has been added above the sentence table to draw attention to it as an integral part of the sentencing process. These new sections are listed below.

**Possession of a prohibited weapon:**

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that where the minimum term applies, a higher proportion of White offenders receive a sentence below the mandatory minimum term, and as a result less severe sentences compared to Black, Asian and Other ethnicity offenders. Where the minimum term does not apply, a slightly lower proportion of White offenders receive an immediate custodial sentence compared to Black, Asian and Other ethnicity offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

**Possession without certificate:**

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Asian offenders receive an immediate custodial sentence than White offenders and that for Black offenders custodial sentence lengths have on average been longer than for White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

**Possession by person prohibited:**

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black offenders receive an immediate custodial sentence than White offenders and that for Black offenders custodial sentence lengths have on average been longer than for White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

**Carrying in a public place:**

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Other ethnicity offenders receive an immediate custodial sentence than White and Asian offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

**Possession with intent to cause fear of violence:**

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Asian offenders receive an immediate custodial sentence than White offenders and that for Black and Asian offenders custodial sentence lengths have on average been longer than for White offenders

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

# Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (<https://www.sentencingcouncil.org.uk>) on 9 December 2020 and come into force on 1 January 2021.

The final resource assessment is published on 9 December 2021 on the Council's website.

Following the implementation of the definitive guidelines, the Council will monitor their impact.

# Consultation respondents

Tony Hill, Head of Firearms & Explosives Licensing, Hampshire Constabulary

West London Bench

Suffolk Magistrates' Bench

National Crime Agency

Council of HM Circuit judges

HM Council of District Judges (MC)

Sentencing Academy

Chris Philp MP, Parliamentary Under Secretary of State, Ministry of Justice

Justices' Clerks' Society

Magistrates' Association

Prison Reform Trust

Crown Prosecution Service

Criminal Bar Association

Law Society

Anon

C Vander Magistrate

L Tench Magistrate

H Emblem

Ian Allott JP

Hodge, Jones and Allen

Justice Select Committee

