



CBA Response to The Sentencing Council: Invitation to Comment on the Draft Firearms Offences Guidelines Consultation

January 2020

Introduction

The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Question 1:

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Question 2:

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Question 3:

The Criminal Bar Association.

Question 4:

The CBA understands the rationale for the selection of offences included within the proposed guideline. It is acknowledged that very low frequency offences or the more obscure firearms offences do not fit neatly within the broad categories of offending identified within the guideline.

It would be helpful explicitly to stipulate within the final guideline those offences that have been excluded with their maximum sentences.

Question 5:

The Step 1 determination of culpability by reference to the type of weapon is clearly set out and helpfully makes plain that it is a simple Question of assessing what the weapon is irrespective of whether it was loaded, working or complete. Sentencers ought to have little difficulty with this part as it is largely by the section that has been charged.

In relation to other culpability factors it may be helpful to try and elaborate upon the difference between high culpability firearm intended for use for criminal purpose and medium culpability firearm produced (where not at high culpability). Equally medium culpability firearm intended for use (where not at high culpability) might merit some clarification.

The categorisation of harm assessment is clearly spelled out and seems adequately to reflect the different types of harm posed by these offences.

Question 6:

The minimum sentence provision necessarily has caused Table 1 to be very limited in its scope (as is acknowledged), it may be worth considering whether presentencing a sentencing range in this tabular format is the most effective way of providing sentencing guidance.

Table 2 provides a much wider range of sentencing options for those offences where the minimum sentence provisions do not apply. It is noted that the Council's intention is that the guideline will not alter overall sentence levels for the offence and it is assumed that close scrutiny of the impact on sentencing of the final guideline will be undertaken as this overall guideline has the potential for unforeseen impacts on the approach to sentencing.

Question 7:

It is always helpful when sentencing guidelines provided a detailed recitation of what may amount to an aggravating or mitigating factor. As ever the suggested factors are not intended to be exhaustive but it is envisaged that they would reflect the vast majority of potential circumstances relevant to establishing the extent to which the offence is aggravated or mitigated.

Question 8:

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. The consultation expresses surprise about the frequency of disapplication of the minimum sentence. In practice this is happening because possession of disguised tasers is a comparatively common offence committed often by person who in reality would be highly unlikely to discharge a firearm in public or as part of a criminal endeavour. The serious

sentencing consequences of being in possession of guns and ammunition is widely understood but defendants are invariably taken completely by surprise when told that disguised tasers ordinarily should attract sentences of 5 years' imprisonment.

Otherwise this is a helpful recitation of the principles to be applied in determining whether exceptional circumstances are made out.

Question 9:

No.

Question 10:

It may be useful in the medium culpability factors to set out what is meant by firearm produced. Does this mean in public or private? On display or brandished? Also firearm held with compatible ammunition what does 'held' mean – in the same container? Same building? Or on the defendant's person?

Question 11:

It is unclear whether it is intended that the guideline should set out in its final form that 'most cases expected to fall into culpability B or C' but the sentencing table does seem to reflect that these are offences that can span possession in circumstances where someone of unblemished character having lawfully held a certificate for many years has inadvertently allowed it to lapse to serious criminals intent on serious harm possessing firearms that have been adapted to cause serious injury.

With these particular offences it is especially important that sentencers do not mechanistically apply the guideline without having sufficient regard to all the background circumstances of the offence.

Question 12:

The aggravating and mitigating factors do seek to address the concerns articulated in relation to Question 11. One Question for consideration is whether they should

appear within the determination of culpability given how important they are to ensuring a just sentencing outcome.

Question 13:

Consistent with the approach taken throughout the draft guidelines, we agree that the principal factor in determining culpability should be the type of weapon involved. However, we note that the location of the weapon is identified in the harm section but we Question whether this should in fact be a factor in assessing culpability.

It is our view that the guideline should deem possessing a weapon in a public place considered as an aggravating factor in relation to culpability rather than harm. If so, we would suggest that it should be a specific aggravating feature in determining high culpability, to acknowledge the different culpability between those who possess a firearm in a private location (such as in their home) as contrasted to those who have are prepared to carry them in public places.

We acknowledge that having a firearm in a public place is a separate offence under section 19 but our experience is that this section rarely used and instead prosecutors charge offenders under sections of the Firearms Act (as is borne out by figures in the statistical bulletin).

Regarding 'harm', we note that the 'relevant considerations' include various matters and the section is much more expansive than for most if not all other sentencing guidelines. We are concerned that the courts may struggle in identifying how much weight should be given to those considerations (*vulnerability of people exposed, especially children, accessibility and visibility of the weapon and the location of the offence*). We suggest that saying courts "*may include*" these considerations, is too vague and may lead to inconsistency. We prefer the more rigid approach where factors of relevance are set out either in the 'step one' categories or as material aggravating factors.

To that end, if 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 a 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.

Question 14:

We are in broad agreement with the type and level of sentence. However, we question whether custodial sentences should ever be considered for category 3, culpability B offences bearing in mind the low level of harm that would have been identified by the court in arriving at category 3. We would argue that custody should only be an option for category 3 often.

Question 15:

We agree that the additional mitigating feature identified is appropriate and have no further comment to make.

Question 16:

Consistent with the approach taken throughout the draft guidelines, we agree that the principal factor in determining culpability should be the type of weapon involved. In accordance with our response to Question 13, it is our view that a)

possession of a weapon in a public place and b) where the circumstances are such that the firearm may be discovered by or be visible to a child, should be specific factors that lead to the inclusion of an offence in 'High culpability' or 'Category 1 harm.'

Question 17:

We broadly agree with the sentence levels set out in the draft guidelines. However, we would suggest that a high level community order should be the start of the lowest end of the range for Category 2, Culpability A offences.

Question 18:

We agree with the aggravating and mitigating factors set out and have no further suggestions.

Question 19:

In accordance with our answer to Question 13, we 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.

Question 20:

The CBA fully recognise the particular seriousness of this offence and we agree with the sentence levels identified by the SGC and consider them to be largely in accordance with the approach taken by the courts to date.

Question 21:

We broadly agree with the proposed aggravating and mitigating factors. In particular we support the inclusion of 'Firearm under section 5(1)(a) (automatic weapon as being an identified aggravating factor

Question 22:

We agree with the approach to culpability and harm

Question 23:

Subject to our answer to question 32, we agree with the sentencing levels

Question 24:

We agree with the aggravating and mitigating factors identified

Question 25:

In category 2 of "Harm" there is reference to a "High risk of serious disorder". It is not clear whether this refers to physical or mental disorder or public disorder. Otherwise we agree with the approach to culpability and harm.

Question 26:

Subject to our answer to question 32, we agree with the sentencing levels

Question 27:

We agree with the aggravating and mitigating factors identified.

Question 28:

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.

Question 29:

We broadly agree with the sentencing levels identified, although we question whether the starting point for category 3C is too high (and the range too ungenerous) given the potential mitigating factors which may be present.

Question 30:

We agree with the aggravating and mitigating factors.

Question 31:

Our view is that these guidelines reflect the serious view which is rightly taken of offences involving firearms.

Question 32:

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.

Question 33:

We have no further comments.