

# Sentencing firearms offences: a literature review

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## Introduction

1. Firearms offences are statistically rare yet in light of their potential for harm cause considerable public concern. The offences vary greatly in terms of their nature and possible sentences. As a result, the sentencing exercise is often complex. Courts must weigh the harm caused, intended, or which was reasonably foreseeable, as well as the culpability of the individual offender. Quantifying the harm caused can be particularly challenging where a firearms offence does not have an identifiable victim as firearms offences are inherently potentially harmful. An additional complexity arises in a small number of serious gun crimes which carry a mandatory minimum sentence. When sentencing these offences, the court must also consider whether exceptional circumstances may justify the imposition of a sentence which falls below the statutory minimum.

2. This report examines research and sentencing guidance relating to firearms offences. These offences include a range of crimes varying in seriousness, although most create a risk of serious harm or death. We conducted a literature review of the social and socio-legal databases to uncover relevant publications for the period 2000-2024. As will be seen, most of the scholarship in the area focuses on restricting access to firearms rather than punishing offenders convicted of firearms offences. Within the more restricted domain of sentencing, the majority of publications address mandatory sentencing as a response to gun crime. Most Western nations have introduced mandatory minimum sentences of imprisonment for the more serious forms of gun crime. The project also conducted a review of the public opinion literature to seek any research exploring public knowledge of, and attitudes towards, sentencing for firearms offences. Understanding public opinion is recognised as a relevant consideration by sentencing commissions and councils around the world.

3. With respect to guidance, England and Wales is the only relevant comparator jurisdiction. While gun crime is a near-universal problem, differences in the definition of

offences – and laws around gun ownership – makes it inappropriate to compare sentencing guidance or trends with the United States. Canada, Australia and New Zealand are more comparable countries, but none of these operate formal sentencing guidelines. Many of the firearms offences in Scotland also exist in England and Wales and stem from the same UK legislation. In addition, courts in England and Wales and Scotland also employ sentencing guidelines. These follow a similar step by step approach (albeit with important differences). For these reasons, we restrict our comparisons to England and Wales.

## Contents of the Volume

**Chapter 1 Firearms Offences:** This chapter identifies the offences under consideration, including statistics on the prevalence of the offences, and summarises the current legal framework for sentencing these offences.

**Chapter 2 Firearms Offenders and Associated Offences:** This chapter explores the connection between firearms offences and other violent crime. It addresses the way that the assessment of risk interacts with sentencing for firearms offences and the indicators of further or more serious offending (such as homicide). Finally, it discusses the background of offenders and the intersection between minority ethnic backgrounds and sentencing for firearms offences.

**Chapter 3 Sentencing Guidance for Firearms Offences:** This chapter reviews the principles and purposes of the sentencing of firearms offences and also discusses the sentencing guidelines for firearms offences issued by the Sentencing Council for England and Wales.

**Chapter 4 Research on Sentencing Responses to Firearms Offences:** The final chapter summarises findings from research on the sentencing of firearms offences. The chapter also discusses the limited research exploring public attitudes to sentencing offenders convicted of firearms offences.

## Chapter 1: Firearms Offences

### Overview

4. This chapter focuses on the principal firearms offences in Scotland and the legal framework for sentencing. Where appropriate, we note the approach in England and Wales which currently operates guidelines for various firearms offences. The focus is on discrete firearms offences and not, for example, where a firearm is used to commit another offence such as murder – although the use of a firearm in a homicide can be an important factor considered at sentencing. The chapter first provides background information on firearms offences. It then examines offences within the Firearms Act 1968 (the 1968 Act) and the Customs and Excise Management Act 1979 (the 1979 Act). These contain firearms offences shared with England and Wales. Additionally, the Air Weapons and Licensing (Scotland) Act 2015 (the 2015 Act) will be noted.

5. There are some distinctive Scottish firearms offences and some firearms offences shared with England and Wales. The complexity of the law reflects the history of Scotland, and of the UK more widely, in terms of their experiences with firearms. Historically, within Scotland, weapon carrying generally has been a concern.<sup>1</sup> Following the Dunblane School Massacre changes were made to legislation covering firearms. Other tragedies have shaped the regulation of firearms as well as the sentencing of offenders convicted of firearms offences.

### Prevalence of firearms offences

6. In the latest figures (2021-22), there were 273 offences recorded by police in Scotland in which a firearm was involved.<sup>2</sup> This is a one-fifth decrease from previous years and means that firearms offences are relatively low volume in the context of about

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<sup>1</sup> On knife carrying in Glasgow, see Holligan, C., McLean, R. and Deuchar, R. (2017) 'Weapon-Carrying Among Young Men in Glasgow: Street Scripts and Signals in Uncertain Social Spaces', *Critical Criminology*, 25, 137–151.

<sup>2</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 and 2021-22*, 19 December 2023. Edinburgh: The Scottish Government. Available at: <https://www.gov.scot/publications/recorded-crimes-offences-involving-firearms-scotland-2020-21-2021-22/documents/>.

60,000 convictions recorded that year.<sup>3</sup> However, 26% of recorded offences involving a firearm were for possessing a firearm with intent to endanger life, commit crime, etc.

7. The figures distinguish between different types of weapons (e.g. air weapons; imitation firearms; pistols/revolvers; shotguns; and rifles). The most common type of firearm in Scotland reported in offending is air weapons, which accounted for 30% of cases.<sup>4</sup> Imitation firearms made up 16% and other firearms 14% of the figures. In terms of the sex of the main victim in offences in which a firearm was alleged to have been fired causing fatal or non-fatal injury, in 2021-22, 23 were male and 21 were female.<sup>5</sup> In terms of the sex of the main accused, where known, in offences involving the alleged use of a firearm, 187 were male and eight were female in the same period.<sup>6</sup>

8. Data on sentencing firearms offences was collated by the Sentencing Council for England and Wales as part of their guideline development.<sup>7</sup> As with Scotland, most of those sentenced for firearms offences such as possession were male.<sup>8</sup> Further data on firearms are available from the Home Office<sup>9</sup> and sources such as the National Crime Agency (NCA). The NCA reported 66,233 firearms offences in the year ending September 2023 and that 'firearm discharges from lethal-barrelled weapons account for about one-tenth of firearm offences'.<sup>10</sup> The NCA also noted links between gang violence and firearms. Furthermore, firearms may be linked to terror offences and serious organised crime. The utility of firearms for criminal enterprises is partly why those

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<sup>3</sup> Scottish Government (2023) *Criminal Proceedings in Scotland, 2021-22*. Edinburgh: The Scottish Government. Available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/>.

<sup>4</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 and 2021-22*, p. 7. Edinburgh: The Scottish Government.

<sup>5</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 and 2021-22*, p. 13. Edinburgh: The Scottish Government.

<sup>6</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 and 2021-22*, p. 13. Edinburgh: The Scottish Government.

<sup>7</sup> Accessible at: <https://www.sentencingcouncil.org.uk/publications/item/firearms-offences-data-tables/>.

<sup>8</sup> Firearms offences sentencing guideline consultation – Annex A. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Firearms-consultation-Annex-A.pdf>.

<sup>9</sup> See the ONS analysis, available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/offencesinvolvingtheuseoffirearms/yearendingmarch2019>.

<sup>10</sup> See: <https://www.nationalcrimeagency.gov.uk/threats/nsa-firearms-2024>.

lawfully possessing a firearm must take certain precautions to prevent others from acquiring the weapon. Indeed, Police Scotland warns firearms certificate holders that terrorists ‘covet’ such weapons<sup>11</sup> and the NCA that ‘criminals are likely to use what they can acquire rather than what they want’.<sup>12</sup> Thus, a range of motivations can underlie firearms offences.

### **Firearms Act 1968 and the Customs and Excise Management Act 1979**

9. A key piece of legislation regulating the possession and use of firearms is the Firearms Act 1968 (the 1968 Act).<sup>13</sup> The 1968 Act applies to Scotland and England and Wales although there are some differences. The risks of firearms covered under the 1968 Act are extensive and firearms have been used to facilitate a range of offences including homicide and terrorism. Indeed, in response to events such as the Dunblane Massacre, the 1968 Act has been amended to further regulate firearms: amendments have been made by the 1988 Firearms (Amendment) Act; the Firearms (Amendment) Act 1997; and the Firearms (Amendment) (No. 2) Act 1997.<sup>14</sup> The Customs and Excise Management Act 1979 also creates offences related to the importation of firearms.

10. A firearm is defined widely under the 1968 Act. Section 57(1) of the 1968 Act defines firearm to include a ‘lethal barrelled weapon’ with the required muzzle energy (see section 57(1B)); or a prohibited weapon, which may include flare guns and ‘any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing’ (e.g. mace/pepper spray or tasers) (see section 5 of the 1968 Act).

11. The 1968 Act also covers relevant components of a lethal barrelled weapon (see section 57(1D)). Relevant components can be altered by statutory instrument by virtue

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<sup>11</sup> Police Scotland, ‘Terrorism: “Playing your part”’. Available at: <https://www.scotland.police.uk/spa-media/gtzdi531/firearms-terrorism-leaflet.pdf>.

<sup>12</sup> See: <https://www.nationalcrimeagency.gov.uk/threats/nsa-firearms-2024>.

<sup>13</sup> Minor offences under the Firearms Act 1968 will not be focused on here.

<sup>14</sup> See also Offensive Weapons Act 2019. There have also been various regulations and guidance documents overtime (e.g. the Firearms Rules 1998; the Firearms (Scotland) Rules 1989; etc.).

of section 57B. This may, for instance, be used to keep pace with any developments in technology. On this point, it is notable that it is possible for 3D printers to create firearms based on downloaded blueprints. There have been reports of 3D-printed firearms in Scotland.<sup>15</sup> Printed weapons are already covered by the 1968 Act, and this has been reiterated by the Home Office guidance, which notes that ‘the manufacture, purchase, sale and possession of 3D printed firearms, ammunition or their component parts is fully captured by the provisions in section 57(1) of the Firearms Act 1968. The definition of firearm in the Act includes any component parts’.<sup>16</sup>

12. The 1968 Act creates a range of offences pertaining to firearms and imitation firearms. The focus here is on firearms offences, but it is worth noting that imitation firearms can be used in the commission of offences. For example, section 16A makes it an offence for a person to have possession of a firearm or imitation firearm with (a) intent to cause a person to believe that unlawful violence will be used against them or another, or (b) with intent to enable another person by means thereof to do the same. This offence may be completed equally with a genuine or imitation firearm as it does not require a weapon to be discharged.

### **Air Weapons and Licensing (Scotland) Act 2015**

13. The Air Weapons and Licensing (Scotland) Act 2015 (the 2015 Act), created several offences related to the possession, use and acquisition of air weapons by persons who do not hold a licence or do not act in accordance with the licensing regime. Air weapons in the 2015 Act are defined in line with the Firearms Act 1968, section 1(3)(b): ‘an air rifle, air gun or air pistol which does not fall within section 5(1) and which is not of a type

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<sup>15</sup> See Morris, A. (2024) ‘A new dimension for gun crime’, *1919 Magazine*, Issue 32, January 2024. Available at: <https://1919magazine.co.uk/january2024/>.

<sup>16</sup> Home Office (2022) *Guide on Firearms Licensing Law*, 1 November 2022, sec. 3.7. London: Home Office. Available at: [https://assets.publishing.service.gov.uk/media/6787c8615a1adfc79556df5f/Firearms\\_Guide\\_-\\_November\\_2022.pdf](https://assets.publishing.service.gov.uk/media/6787c8615a1adfc79556df5f/Firearms_Guide_-_November_2022.pdf). See also RUSI Annual Security Lecture 2023 with Graeme Biggar, Director General of the National Crime Agency. Available at: <https://my.rusi.org/events/rusi-annual-security-lecture-2023-with-graeme-biggar-director-general-nca.html>.



declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous.’

14. As a result, the 2015 Act complements other firearms legislation and does not replace the 1968 Act. There were 217 air weapon licensing offences in 2022-23.<sup>17</sup>

15. The 2015 Act covers low-powered (in terms of muzzle energy) firearms or their constituent parts. This can include firearms that propel projectiles via compressed air but may also include spring-loaded BB guns if they are sufficiently powerful.<sup>18</sup> While relatively low-powered, weapons covered under the 2015 Act can inflict serious harm. The Scottish Government has noted that:

‘Air weapons consistently account for around half of all offences allegedly involving a firearm in Scotland. While the overall number of offences reported is significantly lower than ten years ago, air weapon misuse is particularly associated with antisocial behaviour such as common assaults, reckless conduct with a firearm, vandalism and serious assaults. There are regular reports to the police and in the media of domestic animals and wildlife being targeted, as well as less frequent injuries involving people.’<sup>19</sup>

Weapons covered under the 2015 Act can also prove lethal.

16. The 2015 Act established a licensing system for those who wish to own or use an air weapon. Subject to some exceptions noted in Schedule 1 (e.g. pertaining to approved air weapon clubs), anyone who wishes to use or own an air weapon will have

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<sup>17</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 & 2021-22*, Table 17a. Edinburgh: The Scottish Government.

<sup>18</sup> Here the term air weapon will be used to include all weapons covered by the 2015 Act. See Scottish Government (2019) *Guide to Air Weapon Licensing in Scotland*, 22 February 2019, p. 8. Edinburgh: The Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2019/02/guide-air-weapon-licensing-scotland/documents/guide-air-weapon-licensing-scotland/guide-air-weapon-licensing-scotland/govscot%3Adocument/guide-air-weapon-licensing-scotland.pdf>.

<sup>19</sup> Scottish Government (2019) *Guide to Air Weapon Licensing in Scotland*, 22 February 2019, p. 2. Edinburgh: The Scottish Government.

to obtain a certificate.<sup>20</sup> Failure to comply with the certification requirements can lead to one of approximately 20 offences under the 2015 Act. These include using, possessing, purchasing or acquiring an air weapon without holding a valid Air Weapon Certificate contrary to section 2(1); offences related to selling air weapons (see section 25(2)); and failures to provide information (see section 27(3)).

17. The 2015 Act sets out different maximum sentences for the offences it creates. Several of the offences under the 2015 can lead to a fine upon conviction at summary level (e.g. at Level 3 or Level 4 on the standard scale). However, offences that may be associated with more dangerous behaviours tend to attract more severe sentences. Notably, possessing, purchasing or acquiring an air weapon without holding a valid Air Weapon Certificate contrary to section 2(1) carries a maximum sentence of up to two years imprisonment and the possibility of a fine if convicted on indictment. Breaching restrictions on transactions involving air weapons (e.g. manufacturing, selling, transferring, etc.) can also, under section 24(4)(b), lead to a sentence of imprisonment for up to two years and a fine upon conviction on indictment. The creation of both of these offences, in some way, might be intended to reduce the prevalence of air weapons being used or owned without certification.

18. Other offences under the 2015 Act were created to allow the possibility of imprisonment but for lesser periods. Notably, breaching the requirement for commercial sales of air weapons to be in person can result in a sentence of 12 months and a fine at Level 5 on the standard scale (section 25(4)). Similarly, obstructing the execution of a search warrant under section 26 (an offence by virtue of section 26(4)) can lead to a sentence of 12 months and a fine at Level 5 on the standard scale (section 26(5)). Likewise, making false statements (knowingly or recklessly) in relation to certificates or permits carried the same potential sentence (section 31(3)).

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<sup>20</sup> The process of seeking a certification is beyond the scope here but see: the Air Weapons Licensing (Scotland) Regulations 2016.

19. Less severe custodial sentences were also created for a recreational shooting facility failing to comply with certification requirements. This is an offence under the 2015 Act which may result in six months imprisonment and a fine of Level 5 on the standard scale (see section 23(3)). Finally, it is worth noting there was an offence (created by the Air Weapons and Licensing (Scotland) Act 2015 (Consequential Provisions) Order 2017, which amended section 3 of the Firearms Act 1968) of taking in pawn an air weapon within the meaning of section 1 of the 2015 Act. This offence only applies to Scotland and was enacted with a maximum sentence of three months imprisonment and a fine of Level 3 on the standard scale upon summary conviction.

20. To summarise, there is a hierarchy of offences within the 2015 Act that relates to the likely culpability and potential harms and risks of offending behaviour. There is also a fairly diverse range of offences contained in the Act. At present, there is limited statistical data in the public domain concerning sentences upon conviction under the 2015 Act.

## **Conclusion**

21. Firearms offences are diverse and complex. The weapons include air guns, imitation firearms, (assault) rifles, handguns, shotguns (and sawn-off shotguns), and items such as tasers and pepper spray. The offences are broad and include possession with intent to endanger life, carrying in a public place, and failing to take required precautions for the safe custody of a weapon. Within this ambit of offences, some will pose serious risks to public safety, and some may be ‘technical’ and carry no risk to public safety.<sup>21</sup>

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<sup>21</sup> See the Crown Prosecution Service on public interest considerations, available at: <https://www.cps.gov.uk/legal-guidance/firearms>.

## Chapter 2: Firearms Offenders and Associated Offences

'The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.'<sup>22</sup>

### Overview

22. This chapter begins by providing an overview of the profile of firearms offenders: their age, gender, and social and ethnic backgrounds. Next, it surveys the existing research evidence on the connection between firearms offences and other violent crime, including the indicators of further or more serious offending such as homicide. It then considers how the assessment of risk interacts with sentencing for firearms offences.

23. As noted in Chapter 1, the use of firearms is strictly controlled by the Firearms Act 1968. Scotland operates in the shadow of the 1996 Dunblane Massacre, which prompted swift and decisive action by the UK Parliament on private gun ownership.<sup>23</sup> Although firearms offences are relatively rare in Scotland – the use of firearms in criminal activity constitutes only a small proportion of all offences recorded by the police<sup>24</sup> – mere possession of a firearm has considerable potential to facilitate interpersonal violence with devastating consequences for victims, families, and

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<sup>22</sup> *R v Wilkinson* [2009] EWCA Crim 1925, para. 2.

<sup>23</sup> Solly, M., 'How the 1996 Dunblane Massacre Pushed the UK to Enact Stricter Gun Laws', *Smithsonian Magazine* (12<sup>th</sup> March 2021).

<sup>24</sup> The 273 firearms offences recorded in Scotland 2021-22 were the lowest since records began in 1980: Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland, 2020-21 and 2021-22*. Edinburgh: The Scottish Government.

communities. Even in the hands of an unskilled offender, a gun poses a lethal threat since it can be used to harm or kill indiscriminately and from a distance.<sup>25</sup>

## Profiling firearms offenders

### *Offender characteristics and background*

24. In Scotland in 2021-22, there were 195 firearms offences in which accused persons were identified. Those accused were overwhelmingly male (96%) and their median age was 27. The main accused was under 16 years old in 16% of cleared up offences involving the use of a firearm. Of all offences committed in 2021-22, the most common ages of the main accused were those aged 41 and older, and those aged 16-20, who committed 52 and 42 offences respectively.<sup>26</sup>

25. The problem of firearms offending is most acute in London, where it has been reported that nearly two-thirds of gun crime offenders are aged 25 or younger. Those being treated in hospital for shooting-related injuries are becoming younger, with injuries among mid-to-late teens increasingly common, compared to an average age of around 25 years old in 2012.<sup>27</sup> One dominant narrative in the literature is that gun crime is driven by social and economic deprivation in urban areas,<sup>28</sup> but it should not be overlooked that, in rural areas of Scotland, a firearm is often a necessary part of people's livelihoods and weapons are acquired and used legitimately. Serious and sometimes fatal crime, however, can occur among those with access to guns through farming, hunting communities, or shooting clubs.<sup>29</sup>

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<sup>25</sup> Cook, P.J. and Pollack, H.A. (2017) 'Reducing Access to Guns by Violent Offenders', *RSF: The Russell Sage Foundation Journal of the Social Sciences*, Vol. 3, No. 5, pp. 2-36 and Cook, P.J. (1983) 'The Influence of Gun Availability on Violent Crime Patterns', 4 *Crime and Justice* 49.

<sup>26</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland 2020-21 and 2021-22*. Edinburgh: The Scottish Government.

<sup>27</sup> London Assembly Police and Crime Committee (2018) *Gun Crime in London*. Available at: [https://www.london.gov.uk/sites/default/files/20180123\\_final\\_pcc\\_gun\\_crime\\_findings\\_report.pdf](https://www.london.gov.uk/sites/default/files/20180123_final_pcc_gun_crime_findings_report.pdf).

<sup>28</sup> See, for example, Campbell, L. (2010) 'Responding to Gun Crime in Ireland', 50 *British Journal of Criminology* 414.

<sup>29</sup> See, for example, The Times, 'Mystery as man shot dead while walking his dog on remote path' (27<sup>th</sup> February 2024).

26. Published statistics on firearms offences paint a complex and incomplete picture and must be interpreted cautiously for at least three reasons. First, while some experts point to significant under-reporting by victims of, and witnesses to, gun crime for fear of reprisals, others suggest the very serious nature of gun crime increases the likelihood of reporting.<sup>30</sup> Second, the race and ethnicity of neither victims nor perpetrators of firearms offences has been published by the Scottish government in recent years.<sup>31</sup> In England and Wales, information on the age and ethnicity of victims – but not the perpetrators of firearms offences – has been published.<sup>32</sup> Squires, Grimshaw and Solomon, however, observe that ‘generally speaking’, both offenders and victims of gun crime are ‘disproportionality likely to be black (African Caribbean and Black British)’ and from economically deprived communities.<sup>33</sup> Third, emerging research evidence suggests that the statistical data under-represent the implication of women and girls in gangs – and, by extension, in the commission and facilitation of firearms-related crime, for example, by storing guns or setting up attacks on rival gang members.<sup>34</sup> While a Home Office study found that ‘in general guns were... typically being minded by third parties’,<sup>35</sup> from existing data it is impossible to tell whether the involvement of women and girls is widespread.

### **Firearms offences and other violent crime**

27. Standalone firearms offences involve possessing, carrying, making, or transferring firearms. Where a firearm is used to cause death or injury, other charges such as murder, attempted murder, or causing grievous bodily harm are brought in addition to

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<sup>30</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) *‘Gun Crime’: A Review of Evidence and Policy*. London: Centre for Crime and Justice Studies.

<sup>31</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland 2020-21 and 2021-22*. Edinburgh: The Scottish Government.

<sup>32</sup> Allen, G. and Burton, M. (2022) *Firearm Crime Statistics: England & Wales*. London: House of Commons Library. Available at: <https://researchbriefings.files.parliament.uk/documents/CBP-7654/CBP-7654.pdf>.

<sup>33</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) *‘Gun Crime’: A Review of Evidence and Policy*, p. 45. London: Centre for Crime and Justice Studies.

<sup>34</sup> The Centre for Social Justice (2014) *Girls and Gangs*. London: The Centre for Social Justice.

<sup>35</sup> Hales, G., Lewis, C. and Silverstone, D. (2006) *Gun Crime: The Market in and Use of Illegal Firearms*, p. xiii. Home Office Research Study No. 189. London Home Office. See also The Centre for Social Justice (2018) *It Can Be Stopped: A proven blueprint to stop violence and tackle gang and related offending in London and beyond*. London: The Centre for Social Justice.

the firearms offence. In this way, violent ‘gun crime’ can take a variety of forms, which may share no common features.<sup>36</sup> The use of a firearm has long been treated as a very significant aggravating feature when sentencing cases of murder; this was reiterated most recently by the High Court of Justiciary in *Owens v HMA*, which noted that: ‘the courts have repeatedly made it clear that the use of a firearm to commit murder is something which must be deterred and which will be visited by way of severe penalties’.<sup>37</sup>

28. Some gun activity can prompt a fear of violence, such as the discharge of a gun even where no injury results. The London Assembly Police and Crime Committee heard evidence that ‘a lot of the discharges can be against property’, such as vehicles, houses, or front doors.<sup>38</sup> While such offences do not necessarily result in injury to a person, they can cause significant concern to those directly involved as well as to the wider community. Such incidents might also prompt unarmed rivals to obtain firearms themselves.<sup>39</sup>

29. In Scotland, offences involving or facilitated by firearms are recorded across a range of categories, all involving violence. Offences relating to possession of a firearm with intent to endanger life; breach of the peace; reckless conduct; and common assault account for the largest proportion of offences involving a firearm when air weapons and unidentified weapons are excluded (at 29%, 15%, 13% and 13% of offences, respectively). Serious or homicidal violence involving a firearm is rare. In 2021-22, 2.0% of homicides (one offence), 0.6% of robberies (10 offences) and 0.4% of attempted murders (one offence) involved the alleged use of a firearm.<sup>40</sup>

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<sup>36</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) *‘Gun Crime’: A Review of Evidence and Policy*. London: Centre for Crime and Justice Studies.

<sup>37</sup> [2022] HCJAC 29, para. 18. For a discussion of the use of a firearm as an aggravating factor in murder cases, see Brown, G. (2023) ‘Sentencing murder involving the use of a firearm: *Owens (Jordan) v HM Advocate: Part 2*’, *Scots Law Times*, 4, 23-28.

<sup>38</sup> London Assembly Police and Crime Committee, *Gun Crime in London*, p. 3.

<sup>39</sup> The Centre for Social Justice (2018) *It Can Be Stopped: A proven blueprint to stop violence and tackle gang and related offending in London and beyond*. London: The Centre for Social Justice.

<sup>40</sup> Scottish Government (2023) *Recorded Crimes and Offences Involving Firearms, Scotland 2020-21 and 2021-22*. Edinburgh: The Scottish Government.

30. In England and Wales, offences involving firearms are also recorded across a comparable range of offence categories: offences against the person, criminal damage, possession of weapons, robbery, causing public alarm, fear, or distress, burglary, as well as 'other' firearms offences.<sup>41</sup> Data for homicide by shooting have been collected by the Home Office since 1977 as part of the Homicide Index collection. The latest data, for the year ending 31 March 2021, reveal that there were 35 homicides by shooting, equivalent to 6% of all homicides.<sup>42</sup>

31. Violence levels can also be assessed through the lens of injuries sustained. In 2020-21, of the incidents where a person was injured in England and Wales (including by air and non-air firearms), 2% (36) resulted in a fatal injury. There were serious injuries in 17% of incidents (252) and slight injuries in 80% (1,182).<sup>43</sup> Prior research has established that individual risk factors for sustaining firearm injuries include sex, race, substance abuse, unemployment, history of prior injury, and mental health diagnoses,<sup>44</sup> while interpersonal risk factors include exposure to a victim or perpetrator of violence.<sup>45</sup> There are also close links between victimisation and perpetration of violent crime.<sup>46</sup>

32. Overall, the core message from the existing evidence base is that the nature and causal explanations of violent 'gun crime' are highly complex and interrelated, and that there are substantial gaps in our knowledge of its dimensions and causes.<sup>47</sup> Several

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<sup>41</sup> Allen, G. and Burton, M. (2022) *Firearm Crime Statistics: England & Wales*. London: House of Commons Library.

<sup>42</sup> Allen, G. and Burton, M. (2022) *Firearm Crime Statistics: England & Wales*, p. 24. London: House of Commons Library.

<sup>43</sup> Allen, G. and Burton, M. (2022) *Firearm Crime Statistics: England & Wales*, p. 27. London: House of Commons Library.

<sup>44</sup> Reitz, A.C.W., Hawk, S.R., Schwimmer, H.D., Hanna, T., and Payne, D.E.S. (2023) 'Utilizing a combined hospital and criminal justice database to identify risk factors for repeat firearm injury or violent-crime arrest among firearm victims', 63(2) *Medicine, Science, and the Law* 93; and Cooper, C., Eslinger, D., Nash, D., Al Zawahri, J., and Stolley, P. (2000) 'Repeat victims of violence: report of a large concurrent case-control study' 135(7) *Archives of Surgery* 837.

<sup>45</sup> Papachristos, A.V., Braga, A.A., and Hureau, D.M. (2012) 'Social networks and the risk of gunshot injury', 89(6) *Journal of Urban Health* 992.

<sup>46</sup> Reitz, A.C.W., Hawk, S.R., Schwimmer, H.D., Hanna, T., and Payne, D.E.S. (2023) 'Utilizing a combined hospital and criminal justice database to identify risk factors for repeat firearm injury or violent-crime arrest among firearm victims' 63(2) *Medicine, Science, and the Law* 93.

<sup>47</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) *'Gun Crime': A Review of Evidence and Policy*. London: Centre for Crime and Justice Studies.



potential explanations exist, and so it would be unwise to treat ‘gun crime’ as a discrete set of offences that can be understood in the round.

### *Gangs and the drug trade*

33. An extensive literature on gang membership provides insight into one possible driver of firearms possession and violent crime. This literature, however, demands a nuanced interpretation. Gangs are not a singular phenomenon and, as Marshall, Webb and Tilley note: ‘There is a need to move away from crude stereotypes of drug dealing, gun wielding gangs and towards acknowledging the considerable complexity of the issues involved’.<sup>48</sup>

34. Gun crime prompted by gang membership might be regarded as a ‘signal’ crime,<sup>49</sup> important not just in and of itself but also for the messages it sends about violence in urban areas, about the breakdown of communities, and the risks and vulnerabilities of modern living. The NCA reports that urban street gang activity accounts for most firearm discharges, the key drivers of which are the drugs trade, ‘turf wars’, criminal debt, feuds, or perceived disrespect. ‘Periodic escalations of violence’ – such as drive-by shootings or shoot-outs between rival gangs – can be directed by criminals elsewhere, for example, from prison or abroad.<sup>50</sup> The problem is not new. Decades ago, possession of firearms became the norm amongst gang members and firearms were increasingly used to settle even the most minor of arguments.<sup>51</sup> Risk factors for involvement with gangs and weapon use include victimisation, family or peer involvement, the absence of

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<sup>48</sup> Marshall, B., Webb, B. and Tilley, N. (2005) *Rationalisation of Current Research on Guns, Gangs and Other Weapons: Phase 1*. London: Jill Dando Institute of Crime Science, University College London.

<sup>49</sup> Innes, M. (2004) ‘Signal crimes and signal disorders: notes on deviance as communicative action’ 55(3) *The British Journal of Sociology* 335.

<sup>50</sup> National Crime Agency, National Strategic Assessment for Serious and Organised Crime (2023) *Firearms crime is currently lower than the long term trend and remains suppressed*. Available at: [https://www.nationalcrimeagency.gov.uk/images/NSA\\_2023\\_Website\\_-\\_PDF\\_Version\\_1.pdf](https://www.nationalcrimeagency.gov.uk/images/NSA_2023_Website_-_PDF_Version_1.pdf).

<sup>51</sup> Felson, M. (1986) ‘Linking Criminal Choices, Routine Activities, Informal Control, and Criminal Outcomes’ in Cornish, D. and Clarke, R., (eds.) *The Reasoning Criminal: Rational Choice Perspectives on Offending*. Hague: Springer-Verlag; Hales, G., Lewis, C. and Silverstone, D. (2006) *Gun Crime: The Market in and Use of Illegal Firearms*. Home Office Research Study No. 189. London: Home Office; and Marshall, B., Webb, B. and Tilley, N. (2005) *Rationalisation of Current Research on Guns, Gangs and Other Weapons: Phase 1*. London: Jill Dando Institute of Crime Science, University College London.

role models, parental indifference or condoning attitudes, and rejection from mainstream institutions.<sup>52</sup>

35. A Scottish study by Deuchar, McLean, and Holligan offers important insights for areas such as Greater Glasgow, which in 2024 was classed as the ‘least peaceful’ major urban centre in the UK, where peace is gauged according to levels of violent crime, homicide, public disorder, firearms offences, and police presence.<sup>53</sup> The authors suggest that the weapon of choice among Scottish gangs has traditionally been the knife and not the gun, and that violence is inherently tied up in issues related to a ‘masculinised territoriality among youth groups’, rather than related directly to drug distribution and supply.<sup>54</sup> Nonetheless, the link between ‘gun crime’ and illegal drug markets is well established elsewhere in the literature.<sup>55</sup> In 2017, for example, the London Assembly heard evidence that during proactive operations to recover firearms, officers recovered a cache of Class A drugs alongside weapons ‘about 70 per cent of the time’.<sup>56</sup>

### *Youth*

36. In their recent study, Villadsen and Fitzsimons studied the childhood and early adolescence factors that predict weapon involvement in middle adolescence, which in this study was exemplified by having carried or used a weapon. Childhood experiences of low family income and domestic abuse between parents predict weapon involvement at age 17. Self-harm in early adolescence, substance use, peer substance use, school

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<sup>52</sup> Felson, M. (1986) ‘Linking Criminal Choices, Routine Activities, Informal Control, and Criminal Outcomes’ in Cornish, D. and Clarke, R., (eds.) *The Reasoning Criminal: Rational Choice Perspectives on Offending*. Hague: Springer-Verlag.

<sup>53</sup> Institute for Economics & Peace (2024) *United Kingdom Peace Index Briefing*. Available at: <https://www.visionofhumanity.org/wp-content/uploads/2024/07/UKPI-2024-briefing-web-1.pdf>. See also Markham, M. (2015) *Understanding Gun Crime Offenders*. West Midlands Police.

<sup>54</sup> Deuchar, R., McLean, R., and Holligan, C. (2022) *Gangs, Drugs and Youth Adversity: Continuity and Change*, p. 26. Bristol: Bristol University Press. See also Squires, P. with Grimshaw, R. and Solomon, E. (2008) ‘*Gun Crime: A Review of Evidence and Policy*’. London: Centre for Crime and Justice Studies.

<sup>55</sup> Hales, G., Lewis, C. and Silverstone, D. (2006) *Gun Crime: The Market in and Use of Illegal Firearms*. Home Office Research Study No. 189. London: Home Office.

<sup>56</sup> Evidence from Detective Chief Superintendent Kevin Southworth, National Crime Agency. Meeting of the London Assembly Police and Crime Committee (5 October 2017).

exclusion, and high levels of electronic gaming can also predict weapon involvement. The authors recommend early intervention and prevention in order to reduce the need for later action.<sup>57</sup> However, where intervention is concerned, the Halliday Review cautioned against the widespread imprisonment of young people since it is 'likely to increase gang formation' and 'escalate levels of gun crime' as they return to the community.<sup>58</sup>

### *Emerging technologies and firearms availability*

37. Despite marked variations in gun culture and legal frameworks across Europe and America, the international literature on the influence of gun availability on violent crime may increasingly be of interest in the UK context. In previous studies, the availability of, and ease of access to, firearms has been connected to higher rates of interpersonal violence.<sup>59</sup> A study by Killias and Haas revealed that owning a handgun significantly increases the risk of committing a violent offence. Notably, their data show that owning several handguns further elevates the risk by 60 per cent per handgun owned.<sup>60</sup>

38. In the UK, criminals are likely to use the weapon they can most easily acquire. The use of fully automatic weapons, such as submachine guns and automatic rifles, remains very rare. Original lethal purpose firearms (mainly handguns) are preferred and are regularly sourced abroad, often online, and smuggled into the UK. Shotguns are typically stolen in residential burglaries in the UK.<sup>61</sup> The National Ballistics Intelligence Service found that, in 90 per cent of the gun discharges it investigates, the weapon has

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<sup>57</sup> Villadsen, A. and Fitzsimons, E. (2023) 'Longitudinal predictors of weapon involvement in middle adolescence: Evidence from the UK Millennium Cohort Study', *Aggressive Behavior*, Vol. 49(1): 5-14.

<sup>58</sup> Halliday, J., French, C. and Goodwin, C. (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, pp. 8-9. London: Home Office.

<sup>59</sup> See, for example, Cook, P.J. (1983) 'The Influence of Gun Availability on Violent Crime Patterns' (1983) 4 *Crime and Justice* 49 and Krüsselmann, K., Aarten, P., and Liem, M. (2021) 'Firearms and Violence in Europe: A Systematic Review' 16(4) *PLoS ONE* 1.

<sup>60</sup> Killias M. and Haas H. (2002) 'The role of weapons in violent acts: Some results of a Swiss national cohort study', 17(1) *Journal of Interpersonal Violence* 14.

<sup>61</sup> National Crime Agency, National Strategic Assessment for Serious and Organised Crime (2023) *Firearms crime is currently lower than the long-term trend and remains suppressed*.

not previously been used in recorded crime, which suggests either a ready supply of weapons or that weapons are freshly stolen.<sup>62</sup>

39. In the 2023 case of *HM Advocate v James Maxwell* (discussed further in Chapter 3), the offender purchased a Glock 17 pistol and 100 rounds of hollow point live ammunition from the USA via the dark web, paying for them in cryptocurrency.<sup>63</sup> In this case, the type of weapon available online was not an incidental matter, but rather had a substantial influence on the nature of the crime envisaged and its potential consequences. Indeed, the research evidence shows that advances in technology are changing the way offenders are accessing guns.<sup>64</sup> The dark web has been described as an ‘enabler’ for the circulation of weapons on the black market,<sup>65</sup> since it allows users and website operators to remain anonymous and untraceable.

40. A related issue identified by the Law Commission of England and Wales is the increased availability of tools that can be used to convert imitation firearms into live firearms. The Law Commission proposed that the law should respond to their ‘ready availability’, particularly over the internet, by introducing a new offence of possessing an article with the intention of using it unlawfully to convert an imitation firearm into a live one.<sup>66</sup> Elsewhere, it has been observed that there is a small but increasing number of weapons originating from Eastern Europe, particularly de-commissioned guns, which are easily converted.<sup>67</sup>

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<sup>62</sup> Hales, G., Lewis, C. and Silverstone, D. (2006) *Gun Crime: The Market in and Use of Illegal Firearms*. Home Office Research Study No. 189. London: Home Office.

<sup>63</sup> Judiciary of Scotland, *Sentencing Statement: HM Advocate v James Maxwell* (2023).

<sup>64</sup> Persi Paoli, G., Aldridge, J., Ryan, N. and Warnes, R. (2017) *Behind the Curtain: The Illicit Trade of Firearms, Explosives and Ammunition on the Dark Web*. Cambridge: RAND Europe; Persi Paoli, G. (2018) *The Trade in Small Arms and Light Weapons on the Dark Web*, UNODA Occasional Papers no. 32. New York: United Nations; and Persi Paoli, G., ‘Connect, buy now, fire: how the dark web allows criminals to buy weapons – anonymously’ *Prospect Magazine* (25 July 2017).

<sup>65</sup> RAND Europe, ‘International Arms Trade on the Dark Web’. Available at: <https://www.rand.org/randeurope/research/projects/international-arms-trade-on-the-hidden-web.html>.

<sup>66</sup> Law Commission (2015) *Firearms Law: Reforms to Address Pressing Problems*, pp. 42-44. LAW COM No 363.

<sup>67</sup> London Assembly Police and Crime Committee (2018) *Gun Crime in London*.

41. Research shows that offenders have a developing interest in hybrid 3D-printed firearms. Offenders have converted some types of blank-firing weapons to fire live or modified ammunition and have sometimes resorted to improvised or homemade weapons with 3D-printed components. There is an ongoing concern that the number of recovered homemade firearms has increased in recent years and that their reliability and functionality are improving.<sup>68</sup>

### *Non-violent crime*

42. Occasionally, offenders are convicted for non-violent crimes alongside firearms offences. In *HM Advocate v James Maxwell*, the offender received an extended sentence of nine years (comprising a custodial term of five years with an extension period of four years) for gun and ammunition charges and was placed on the Sex Offenders' Register for seven years for further offences relating to pornography.<sup>69</sup> In *Turnbull v HM Advocate*, Turnbull appealed unsuccessfully against a minimum sentence of five years' imprisonment for possession of a stun gun disguised as a torch contrary to section 5(1A)(a) of the Firearms Act 1968, alongside a further conviction for producing three cannabis plants. The two charges were not linked.<sup>70</sup>

### **Risk**

43. At sentencing, the notion of 'risk' is of central concern in cases involving firearms.

### *Risk Assessment Orders*

44. Scotland's Risk Assessment Order (RAO) is the first step for a sentencing judge considering an Order for Lifelong Restriction (OLR). The individual might have been convicted of one or more offences but, unlike any other sentence, the OLR is imposed in relation to an individual's risk, and not the offence(s) committed. The OLR is an indeterminate sentence, designed with public protection in mind. The risk criteria are defined in 210E of the Criminal Procedure (Scotland) Act 1995:

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<sup>68</sup> Marshall, B., Webb, B. and Tilley, N. (2005) *Rationalisation of Current Research on Guns, Gangs and Other Weapons: Phase 1*. London: Jill Dando Institute of Crime Science, University College London.

<sup>69</sup> Judiciary of Scotland, *Sentencing Statement: HM Advocate v James Maxwell* (2023).

<sup>70</sup> *Turnbull v HM Advocate* [2017] HCJAC 85.

'[T]he risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.'

45. In the 2008 High Court of Justiciary decision, *HM Advocate v Henderson*,<sup>71</sup> the question for the court was whether an RAO should be made in respect of an individual who had entered a guilty plea for possession of a firearm without a certificate in contravention of section 1(1)(a) of the Firearms Act 1968.

46. In order to make an RAO, the index offence must be one of, or a combination of three, specific kinds of offence: violent, sexual, or life endangering. Even if the index offence cannot be clearly categorised, the court may still proceed if the nature of the index offence or the circumstances of its commission suggest a propensity or inclination to commit violent, sexual, or life endangering crimes against the person in the future. Only then may the court proceed to the risk criteria. The risk criteria entitle the judge, if necessary, to look beyond the offence itself to a pattern of behaviour on the part of the offender which could be manifest from previous convictions. In *Henderson*, the issue was whether possession of a firearm without a certificate shows a propensity of the kind described above. While the simple possession of a firearm has great potential to cause personal violence and endanger life, *Henderson* reminds us that 'extraneous potentiality' is not enough: 'potentiality is not caught by s 210B(1)(a) of the Act. Actuality is'.<sup>72</sup> However, Henderson's index offence might be described as 'passive though extremely serious', especially in view of his previous convictions.<sup>73</sup> As such, an RAO was made.

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<sup>71</sup> *HM Advocate v Henderson* [2008] HCJAC 4 (HCJ).

<sup>72</sup> Case comment: *HM Advocate v Henderson* (2009) Jan, *Scottish Criminal Law* 34 at 44.

<sup>73</sup> Case comment: *HM Advocate v Henderson* (2009) Jan, *Scottish Criminal Law* 34 at 44.

### *Previous convictions as risk factors*

47. When an offender is sentenced, the court must treat any previous convictions as an aggravating factor, provided it is reasonable to do so. The court will consider the nature of the previous offence, its recency, and its relevance to the current offence. The presence of an aggravating factor can increase the severity of a sentence.<sup>74</sup> There is evidence from the US that purchasers of handguns with only one previous conviction – and no convictions for offences involving firearms or violence – were nearly five times as likely as those with no prior criminal history to be charged with new offences involving firearms or violence. These results should, however, be interpreted with care, given the distinctive culture of gun ownership in the US and the ‘exceptionalist’ nature of firearms offending which takes place there.<sup>75</sup>

### *Circumventing the criminal process*

48. In Scotland, we recently witnessed the circumvention of the sentencing court entirely in the interests of risk management and the disruption of future criminal activity. In 2020, David Collins, who confessed to police that he was ‘addicted’ to firearms, was given Scotland’s first ‘standalone’ Serious Crime Prevention Order (SCPO) outside of the criminal process.<sup>76</sup>

49. The SCPO is a civil court order. The ‘default’ approach is for the Lord Advocate to apply for the SCPO when a person has been convicted of a serious offence. There is provision, however, for a ‘standalone’ application when there has been no conviction and by implication no sentencing process – the order to which Collins was subject. In allowing for intensive monitoring of an individual, the SCPO might, for example, restrict access to communication devices, limit travel, or impose financial reporting

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<sup>74</sup> See, for example, Sentencing Council for England and Wales, *Aggravating and Mitigating Factors*. Available at: <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> and Scottish Sentencing Council, *Sentencing Factors*. Available at: <https://www.scottishsentencingcouncil.org.uk/sentencing-information/sentencing-factors>.

<sup>75</sup> Wintemute, G.J., Drake, C.M., Beaumont, J.J., Wright M.A. and Parham, C.A. (1998) ‘Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-related Criminal Activity among Authorised Purchasers of Handguns’, 280(24) *Journal of the American Medical Association* 2083.

<sup>76</sup> Scottish Legal News, ‘Man “addicted” to firearms given Scotland’s First Standalone SCPO’ (9 October 2020).

requirements. The conditions which are sought vary from case to case and are tailored to the circumstances of the individual.

50. Collins had two previous convictions for firearms offences and one for carrying a bladed object in public. He had also made threats to kill family members, colleagues, police officers, and members of the public. He had been recalled to prison for breaching both his parole and a Supervised Release Order. The SCPO prohibited Collins from possessing firearms and was in place for three years. In October 2021, a ‘standalone’ SCPO had been granted only once in Scotland, and there have been no updates since.<sup>77</sup>

51. The next chapter explores the existing sentencing guidance that is available to courts for the sentencing of firearms offences.

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<sup>77</sup> Criminal Justice Committee 8th Meeting, 2021 (Session 6) ‘Written submissions from witnesses and from other organisations and individuals’ (27<sup>th</sup> October 2021), para. 44.



## Chapter 3: Sentencing Guidance for Firearms Offences

### Overview

52. This chapter reviews existing guidance available to courts sentencing firearms offences. The Sentencing Council for England and Wales has issued nine separate firearm-offence guidelines, several of which cover multiple offences. The first section lists these guidelines and clarifies a court's duty under sections 59 and 60 of the Sentencing Act 2020 to follow offence-specific guidelines. Each guideline identifies factors relevant to culpability, harm, aggravation and mitigation. The sections that follow address each in turn, identifying common themes and, on occasion, raising issues that would benefit from clarification. Many firearms offences are subject to a statutory minimum sentence and consideration is then given to guidance from the Scottish courts on how they should be implemented.

### The English and Welsh sentencing guidelines

53. Section 59 of the Sentencing Act 2020 stipulates that every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case and must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless 'the court is satisfied that it would be contrary to the interests of justice to do so'. Section 60(2) states that the 'principal guidelines duty includes a duty to impose on the offender, in accordance with the offence-specific guidelines, a sentence which is within the offence range'. There are nine offence-specific firearms guidelines:

- Firearms – Importation
- Firearms – Carrying in a public place
- Firearms – Possession by person prohibited
- Firearms – Possession of prohibited weapon
- Firearms – Possession with intent – other offences
- Firearms – Possession with intent to cause fear of violence
- Firearms – Possession with intent to endanger life
- Firearms – Possession without certificate

- Firearms – Transfer and manufacture

54. England and Wales has eight firearms guidelines covering the Firearms Act 1968 and one covering the Customs and Excise Management Act 1979. These guidelines cover key offences, provide sentencing ranges, and set out aggravating and mitigating factors. *Simplified* tables are provided in Appendix A of this report which summarises key features of the guidelines. The guidelines set out a range of considerations concerning relevant factors and adopt the format common to offence-specific guidelines.<sup>78</sup> Where a minimum sentence may apply the guidelines take this into account.

55. The sentence ranges within the guidelines may be informative for Scotland as a 'cross-check'.<sup>79</sup> However, as the courts have noted, this comparison cannot be pressed too far. Therefore, more general points from the English and Welsh guidelines will be focused on here. First, the guidelines provide a logical way to group the various offences for the purposes of creating guidelines. The grouping of offences into guidelines provides an efficient form of guidance. For example, section 5(1) and section 5(1A) are grouped together as both concern possession. Even if, given its different context, the Scottish guidelines vary from those in England and Wales, this grouping may be a useful consideration.

56. Second, the stepped approach taken in the guidelines may be instructive given they contain elements adapted for firearms offences. For example, in determining culpability the type of firearm is considered important and a two-part approach is used for culpability in several of the guidelines: the first being the type of firearm (based on one of three types) and the second pertaining to other culpability factors. The stepped approach (at step 2 of the guidelines) also allows for aggravating and mitigating factors

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<sup>78</sup> Roberts, J.V and Rafferty, A. (2011), 'Sentencing Guidelines in England and Wales: Exploring the New Format', *Criminal Law Review*, 9: 680-689.

<sup>79</sup> *HM Advocate v AB* 2016 SCCR 47.

to be logically set out (e.g. if a person has no knowledge or suspicion that the item possessed was firearm).<sup>80</sup> Additionally, firearms offences vary in terms of the sentencing options (e.g. for some offences Schedules 15, 18, and 19 to the Sentencing Act 2020 are relevant which can trigger different types of sentences).

57. Step 3 of the guidelines allows for consideration of minimum sentences, and this may also be useful in the Scottish context where these apply to some cases (the guidelines provide two sentence tables where appropriate). Likewise, some guidelines specifically invoke considerations of dangerousness. For example, step 6 of the guideline on possession with intent to endanger life requires consideration of ‘whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Act 2020 it would be appropriate to impose a life sentence (sections 274 and 285) or an extended sentence (sections 266 and 279)’. Thus, overall, the guidelines set out a structure for working through the complex and varied requirements of sentencing firearms offences.

58. Third, and relatedly, another point to focus on in the guidelines is the selection of factors generally (statutory and otherwise). From the tables in Appendix A, it can be seen that a range of factors are relevant to harm and culpability and that these can vary according to the offence. For instance, some common culpability factors considered across several of the guidelines (related to possession and carrying) are the type of weapon and whether it was used for a criminal purpose (or if the offender had the intention for, or was reckless about, such use). Common harm factors include: the degree of alarm or distress caused; the risk of death or serious physical or psychological harm; and the risk of serious disorder. Similarly, it might be noted that other offences share common factors.<sup>81</sup> For example, some offences under the 1968 Act (pertaining to manufacturing; selling; possessing for sale; or purchasing or acquiring for sale or transfer prohibited weapons or ammunition) share common factors with those

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<sup>80</sup> Important for strict liability offences.

<sup>81</sup> The Sentencing Council drew on case law where appropriate in selecting factors. See *R v Avis* [1997] EWCA Crim 3423.

considered under the 1979 Act. Likewise, a similar point might be made with aggravating and mitigating factors.

59. Fourth, the guideline ranges do not always encompass the maximum sentence. This may be because the maximum sentence may only be necessary in exceptional cases; incorporating the maxima into guidelines may mean the guidelines are less nuanced for most cases coming before the courts.

60. The offence-specific guidelines must be read in conjunction with the overarching sentencing guidelines, which will not be considered further here. However, the following overarching guidelines would appear especially apposite in the context of firearms offences:

- General guideline: overarching principles
- Imposition of community and custodial sentences
- Offences taken into consideration
- Reduction in sentence for a guilty plea
- Totality

61. To the extent that guidelines increase the consistency and hence predictability of sentences, and are known to potential offenders, they may enhance any limited deterrent effect of criminal penalties. In addition, by highlighting important sources of relevant mitigation, guidelines may promote more proportionate outcomes – particularly by clarifying the circumstances which may be considered exceptional for the purpose of imposing a sentence beneath the mandatory sentence.

62. In its response to the public consultation, the Sentencing Council noted the purpose of these guidelines: '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'.<sup>82</sup> As with almost all its guidelines, the Sentencing Council's aim is to promote a more consistent approach to sentencing, rather than to affect either sentencing practice or achieve greater reductions in the volume of offending.<sup>83</sup>

63. Guidelines may additionally serve to highlight the relevant mitigating factors, particularly those meriting specific attention in firearms related cases. Offenders in these categories are likely to be young adults and may have additional vulnerabilities counting towards personal mitigation. Because of this, it may be particularly important for sentencers to rely on pre-sentence reports to inform their understanding of the offender's personal circumstances when sentencing firearms offences. Squires, Grimshaw, and Solomon argue that it is essential to examine the individual contexts and motivations for firearm offences rather than citing a monolithic 'gang activity' to explain the personal circumstances behind types of offences. For example, individual offenders may have experienced group pressure and coercion into firearm offences or may have held genuine fears for their safety.<sup>84</sup>

64. The Prison Reform Trust has additionally drawn attention to the potential vulnerabilities of women convicted of firearm possession offences, who are more likely to have experienced domestic abuse and may have committed the offence due to partner coercion or intimidation.<sup>85</sup> The English and Welsh sentencing guidelines for firearm possession offences include a mitigating factor for cases in which the firearm was 'held on behalf of another through coercion, intimidation, or exploitation'.<sup>86</sup> The expanded explanation of this factor notes particular relevance of this factor for offenders

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<sup>82</sup> Sentencing Council (2020) *Firearms offences guidelines: Response to consultation*, p. 4.

<sup>83</sup> 'Overall, the guidelines aim to improve consistency of sentencing, but not to change sentencing practice', Sentencing Council (2020) *Final Resource Assessment: Firearms Offences*, p. 6.

<sup>84</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) 'Gun Crime'. *A review of evidence and policy*, p. 27. London: Centre for Crime and Justice Studies.

<sup>85</sup> Prison Reform Trust (2020) *Prison Reform Trust response to Sentencing Council Firearms Offences Guidelines Consultation – January 2020*.

<sup>86</sup> Firearms – Possession of prohibited weapon guideline. Available at: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-possession-of-prohibited-weapon/>.

who have been previous victims of domestic abuse and reminds courts that offenders who have been coerced may find it difficult to communicate this.

65. We now turn to a thematic evaluation of the guidelines introduced in England and Wales in January 2021 to consider the key issues of culpability, harm, aggravation and mitigation.

### **Issues of culpability**

66. An initial determination relates to the seriousness of the offence. The Sentencing Act 2020 stipulates that this is calculated with regard to the offender's culpability and the harm associated with the offence. Culpability can be difficult to quantify, but the offence-specific guidelines outline various factors of relevance. In some cases, there may be factors indicating high culpability alongside factors indicating lower culpability.

Sentencers have to achieve overall balance and fairness in such cases. The subheadings here are not found in the guidelines, rather they draw together factors thematically.

#### *The nature and use or intended use of the weapon*

67. The type of firearm and the use or intended use of the firearm is of relevance to culpability. The type of weapon is a primary concern in five of the firearms guidelines. If the offender uses the weapon for a criminal purpose, intends to use the weapon for a criminal activity or is reckless about the weapon being used for a criminal activity, their culpability is to be regarded as high. Where the firearm is produced or used (but not for a criminal purpose), or where the offender intends the weapon to be used or is reckless about it being used (again, not for criminal activity), that is deemed to be medium culpability. If the weapon was not used and the offender had no intention to use the weapon, that is to be regarded as lower culpability. If the firearm or imitation firearm is discharged, that is seen to be treated as a high culpability factor in the guidelines for possession with intent (other offences), possession with intent to cause fear of violence and possession with intent to endanger life. Where the firearm or imitation firearm is not produced or visible or there is no intention to cause injury, the culpability is lower. If the

firearm was loaded or held with compatible ammunition that is to be treated as a medium culpability factor for most offences.

#### *Planning and sophistication of the offence*

68. Distinctions are drawn based on the amount of planning behind the offence. Significant planning (including but not limited to significant steps to evade detection) is to be treated as a high culpability factor, some degree of planning (again including steps taken to evade detection) indicates medium culpability, whilst a lack of planning or no planning is to be viewed as lower culpability. The sophisticated nature of an offence is listed as a separate high culpability factor, though it is difficult to see how such an offence would not also involve considerable planning.

#### *Group offending*

69. When group offending is present, several of the guidelines distinguish between an offender who plays a leading role (high culpability), significant role (medium culpability) or lesser role (lower culpability). Involving others through coercion, intimidation or exploitation is indicative of high culpability, whereas involvement through coercion, intimidation or exploitation is to be viewed as a lower culpability factor.

#### *Abuse of a position of trust or responsibility and offence motivation*

70. Why the offender committed some of the offences under discussion matters when considering culpability. The guidelines draw a distinction between an expectation of substantial financial or other advantage (high culpability), expectation of significant advantage (medium culpability) and expectation of limited, if any, financial advantage (lower culpability). Abuse of a position of trust or responsibility, for example, where the offender is a registered firearms dealer or customs official, is seen as a high culpability factor.

#### *The nature of the incident*

71. Three final factors can be grouped together as they relate specifically to the criminal incident. The first relates to the duration of the incident: where this is prolonged, it is to

be regarded as high culpability; by contrast, conduct limited in scope and duration should be treated as low culpability. Conduct which is intended to maximise fear or distress is to be regarded as high culpability. For the purposes of possession with intent to commit another offence, the serious nature of the intended or actual associated offence is deemed high culpability.

### **Issues of harm**

72. Harm is quantified into three categories in descending order of severity from one to three. For other types of offence, quantifying harm can be comparatively straightforward. Firearms offences are more complicated because there is often marked discrepancy between the harm that materialised and the potential for far more serious harm had the weapon discharged or been used in other criminal activity.

#### *Actual harm*

73. Many of the guidelines make explicit reference to the type and degree of harm suffered directly by victims. The guidelines for possession with intent to endanger life, possession with intent to cause fear of violence, and possession with intent (other offences) distinguish between severe physical harm caused (Category 1) and serious physical harm caused (Category 2). A similar distinction is drawn between severe (Category 1) and serious (Category 2) psychological harm. One might question what the distinction is between 'severe' and 'serious' harm and whether this could be expressed and expanded upon in a guideline, especially as these offences attract very lengthy terms of custody and the distinction could have a real bearing on the term. For these three offences, causing alarm or distress would be classed as Category 3. Harm is relevant to the remaining offences, such as carrying a firearm in a public place, even though physical or psychological injury or alarm or distress is not an offence requirement. Causing serious alarm or distress places the offence in Category 1 in such instances. This contrasts with cases where no or minimal alarm or distress is caused which are categorised as Category 3 offences.



### *Potential harm*

74. The potential for serious harm is a central concern when sentencing firearm offences. Differentiating between harms which have not occurred is complicated and it is suggested that this is an area requiring serious reflection on the basis that this determination can have a profound bearing on the sentence imposed. (It should be remembered that intended harm is a separate issue from potential harm and should be regarded as a culpability issue.)

75. A high risk of death or serious physical or psychological harm is classified as a Category 1 offence in contrast to cases where there is no or a minimal risk of death or serious physical or psychological harm which falls within Category 3. For the offences of possession with intent to endanger life, possession with intent to cause fear of violence and possession with intent (other offences), a high risk of death or severe physical or psychological harm is deemed a Category 2 offence.

76. Disorder is also recognised as a potential harm. A high risk of serious disorder falls within Category 1 whereas no or minimal risk of serious disorder is seen as Category 3. For the offences of possession with intent to endanger life, possession with intent to cause fear of violence and possession with intent (other offences), a high risk of serious disorder puts the offence into Category 1.

### *Potential link to other criminality*

77. Another potential harm associated with firearms is their link to other criminality and this is reflected in two of the offence-specific guidelines: firearms importation and firearms transfer and manufacture. With regards to the latter offence, the guideline distinguishes between evidence that the firearm / ammunition was subsequently used to cause serious injury or death or 'in close connection to other serious criminal activity' (Category 1); evidence that the firearm / ammunition was subsequently used in criminal activity (not at Category 1) (Category 2); and evidence that the firearm / ammunition was not subsequently used in criminal activity (Category 3). There is overlap with a

further criterion: connection with other criminal activity. Where the connection is close, this is perceived to be a Category 1 offence; where there is no or minimal connection, the offence falls within Category 3.

### *The nature of the enterprise*

78. The guidelines for firearms importation and the transfer and manufacture of firearms distinguish between large-scale commercial enterprises (Category 1), medium-scale enterprises (Category 2) and smaller scale and unsophisticated enterprises (Category 3). This overlaps with the sophistication of the offence as it relates to culpability which has been discussed separately. It would be worth reflecting on whether this is best addressed as an issue of culpability or harm, or, as in the English guidelines, should be considered with regards to both.

### **Aggravating factors**

79. As is common with guidelines from the Sentencing Council for England and Wales, there are lengthy, non-exhaustive lists of aggravating factors. These can be broken down into three categories: statutory aggravating factors; factors specific to firearms offences (which are divided here into factors relating to the firearm or imitation firearm and other factors); and other generic aggravating factors. A concern which is recognised by the Sentencing Council is that there is a risk of double counting: factors indicative of high culpability or a Category 1 offence can sometimes also be listed as an aggravating factor.

### *Statutory aggravating factors*

80. All of the offences covered in the nine guidelines are subject to two statutory aggravating factors. The first concerns 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. This factor is distinct from another aggravating factor found in all of the firearms guidelines: the offender is prohibited from possessing weapons or ammunition because of a previous conviction.

The second statutory aggravating factor applicable to all of the offences is where the offence was committed when the offender was on bail. An additional statutory aggravating factor applies in cases of possessing a firearm with intent (other offences), possessing a firearm with intent to cause fear of violence and possessing a firearm with intent to endanger life. It is an aggravating factor if the offence is 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.

*Aggravating factors relating to the firearm or imitation firearm*

81. A number of aggravating factors relate to the firearm or imitation firearm. Where an offender modifies a firearm to make it more dangerous, takes steps to disguise a firearm or takes steps to make an imitation firearm more realistic, these are seen to aggravate the offence. Similarly, an offence is aggravated where firearms or ammunition is kept with multiple weapons and / or a substantial quantity of ammunition. The type of firearm is also an aggravating factor in the guidelines for possession with intent (other offences), possession with intent to cause fear of violence and possession with intent to endanger life. An automatic firearm aggravates all of these offences (as well as the offence of transferring or manufacturing a firearm). Finally, for the offences of possession with intent (other offences) and possession with intent to cause fear of violence, the fact that an imitation firearm can be readily converted is an aggravating factor.

*Other aggravating factors specific to firearms offences and the risk of double counting*

82. One factor listed as aggravating in all of the guidelines (bar the guideline for importing firearms) is that the offence was committed as part of a group. The Sentencing Council recognised the danger of double counting by stating that it should not be considered if it has already been considered when determining the seriousness of the offence. The potential for double counting presents itself again when the

guidelines stipulate that the abuse of the position as a registered firearms dealer or certificate holder is an aggravating factor.

### *Generic aggravating factors*

83. The following aggravating factors are listed in all of the firearms guidelines but are found in most offence-specific guidelines: commission of the offence whilst under the influence of alcohol or drugs; failure to comply with current court orders; and the offence being committed on licence or post sentence supervision.

### **Mitigating factors**

84. There are no statutory mitigating factors (note a guilty plea is not treated as mitigation in England and Wales). There are, however, well-established general grounds for mitigation and these apply to firearms offences. They are listed in the section on generic mitigating factors. There are also mitigating factors unique to this category of offence. As will be seen, some of these have the effect of tempering the effect of strict criminal liability.

### *Mitigating factors specific to firearms offences and the risk of double counting*

85. There are various mitigating factors specific to offences involving firearms. The first three relate to harm or potential harm: the firearm was incomplete or incapable of being discharged (including a stun gun that is not charged and not held with a functioning charger); the imitation firearm is unrealistic and unconvincing; and the importation of firearms was both very small scale and carried a very low risk of harm to others.

86. Other mitigating factors relate to the offender's culpability. Examples include a genuine belief that the firearm / ammunition will not be used for a criminal purpose or that the offence was committed through coercion, intimidation or exploitation. The following factors appear to mitigate the effects of strict liability: no knowledge or suspicion that the item possessed was a firearm / ammunition; no knowledge or suspicion that the firearm / ammunition was prohibited; genuine mistake about whether

covered by lawful authorisation; genuine misunderstanding about terms of prohibition; certificate not obtained / renewed due to genuine oversight or misunderstanding; and steps taken to obtain certificate.

### *Generic mitigating factors*

87. The following mitigating factors apply to all firearms offences:

- No previous convictions or no relevant / recent convictions
- Good character and / or exemplary conduct
- Offender co-operated with investigation and / or made early admissions
- Remorse
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and / or lack of maturity
- Mental disorder or learning disability
- Sole or primary carer for dependent relative

### **Ethnicity and sentencing outcomes evidence from the Sentencing Council for England and Wales**

88. In preparing its guidelines for firearms offences, the Sentencing Council for England and Wales conducted analysis on the demographic makeup of offenders for firearms offences. It emerged that there are disparities in sentence outcomes for some firearms offences based on ethnicity, where ethnicity in the data was recorded as White, Black, Asian, other, or unknown.<sup>87</sup> A sentencing guideline also offers a means to address any ethnicity-related differences in sentencing outcomes.<sup>88</sup>

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<sup>87</sup> Sentencing Council for England and Wales, 'New sentencing guidelines for firearms offences published' (9 December 2020). Available at: <https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guidelines-for-firearms-offences-published/>. See also Walker, J., 'Sentencing Guidelines for Firearms – 1<sup>st</sup> January 2021' *Libertas Chambers* (March 2021) and Tarbert, J., 'Sentencing Guidelines for Firearms Offences in the Magistrates' Court and Crown Court – out with the old and in with the new?' *Mountford Chambers* (11 January 2021).

<sup>88</sup> Research in other jurisdictions, including Canada and the US has documented the disproportionate impact of mandatory firearms sentences on visible minorities e.g. Mahar, A. and Cooper, J.S. (2020) *The Problems of Mandatory Sentencing: The troubling legacy of Michigan's felony firearm law*, p. 20. Lansing, MI: Safe & Just Michigan. Available at: [https://www.safeandjustmi.org/wp-content/uploads/2020/10/The\\_Problems\\_of\\_Mandatory\\_Sentencing.pdf](https://www.safeandjustmi.org/wp-content/uploads/2020/10/The_Problems_of_Mandatory_Sentencing.pdf).

89. It was found that while firearms offences are most often committed by White men under the age of 40, when compared with the demographics of the population as a whole, there is an over-representation of offenders from the Black, Asian and other ethnic groups. Notably, there was a strong indication that minority ethnic offenders are dealt with more severely 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.

90. The Sentencing Council considered possible reasons for these disparities. One relates to the significance given to previous convictions in sentencing firearms cases. The issue might also be illustrative of the problem of criminal justice more generally. It has long been known that ethnic minorities are overrepresented throughout the criminal process: as such, a Black offender may have a more significant criminal record than a White offender of the same age.<sup>89</sup>

91. The Sentencing Council stated that it is committed to investigating apparent disparities in sentencing outcomes across all offences and will take further action as and when there is evidence of effective measures that can be applied to guidelines. The Council also included the following note within some, but not all, of its firearms offences guidelines:

‘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.’

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<sup>89</sup> See, for example, The Rt Hon Mr David Lammy (2017) *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*. London: Ministry of Justice; and Roberts, J.V., and Bild, J. (2021) *Ethnicity and Custodial Sentencing: A Review of the Trends 2009-2019*. London: Sentencing Academy.

92. This acknowledgment of perceived ethnic disparities at sentencing and the inclusion of this notice within the body of the guidelines is significant, and it is likely that similar notices will appear in other guidelines in the future. Each guideline also refers to the Equal Treatment Bench Book, which details important aspects of fair and equal treatment and aims to increase awareness and understanding of the diverse circumstances of individuals brought before the courts.<sup>90</sup> Drawing sentencers' attention to evidence of disparities in sentencing may be especially important for firearms offences as popular associations between cultural or ethnic groups and gang related firearms offences may trigger stereotyping. Owusu-Bempah conducted a study of 38 English criminal trials in which rap music was used as evidence against the defendant, 32 of which related to firearms offences.<sup>91</sup> The association between rap music and dangerousness or bad character may be especially impactful in categories of offences focused on risk prevention, such as firearm possession offences.<sup>92</sup>

### **Scottish cases on minimum sentences and 'exceptional circumstances'**

93. In Scotland, section 51A of the 1968 Act requires that where the person convicted of certain offences is at least 21 years old at the time of the offence they are subject to the required minimum term sentence of five years 'unless the court is of the opinion that there are exceptional circumstances relating to the offence'. If the person is under 21 then the required minimum term is three years unless there are exceptional circumstances.<sup>93</sup>

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<sup>90</sup> Judicial College, *Equal Treatment Bench Book* (February 2021 edition with April 2023 revisions). For the Scottish version, see Judicial Institute for Scotland, *Equal Treatment Bench Book* (2019).

<sup>91</sup> Owusu-Bempah, A. (2022) 'Prosecuting rap: what does the case law tell us?', *Popular Music* 41: 427- 445.

<sup>92</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) '*Gun Crime*'. *A review of evidence and policy*, p. 32. London: Centre for Crime and Justice Studies.

<sup>93</sup> Minimum sentences for firearms offences in England and Wales are contained in section 311 of the Sentencing Act 2020 (which applies to offences listed in Schedule 20 to the Sentencing Act 2020). Minimum sentences must be imposed unless there are 'exceptional circumstances'. The requirement for minimum sentences is reflected in the English guidelines at step 2 (starting point and category range) and step 3 (minimum term and exceptional circumstances). The minimum sentences are five years for those aged 18 years old or over and three years for those under 18.

94. Exceptional circumstances will, where present, allow a wider range of sentencing options. The first Scottish case to consider section 51A minimum sentences appears to have been *HM Advocate v McGovern*.<sup>94</sup> *McGovern* considered ‘the policy of Parliament in enacting sec 51A of the Firearms Act’ and derived principles from case law in England and Wales. The principles are set out below:

‘The principles which may be derived from these cases appear to us to be as follows. In enacting section 51A of the Firearms Act, Parliament intended, that, for the protection of the public against the dangers arising from the unlawful possession of firearms, considerations of retribution and deterrence should be given greater emphasis, and the personal circumstances of the offender less emphasis, than would normally be the case in sentencing. **While there may be cases in which exceptional circumstances are found to exist, the emphasis is on the word ‘exceptional’, and such cases will be rare.** In deciding whether or not exceptional circumstances exist, it is necessary to consider as a whole all relevant circumstances relating both to the offence and to the offender. Some circumstances may amount to aggravation and some to mitigation, and some may be relatively neutral, which is why it is to the circumstances taken as a whole that regard must be had. We do not accept the submission of senior counsel for the respondent that it is only those circumstances that are claimed to be exceptional that fall to be taken into account’ (Emphasis added).<sup>95</sup>

95. The court ultimately concluded in the appeal that, ‘while there were some mitigating features, they were, in our judgment, considerably outweighed by the aggravating features, such that, taken as a whole, the circumstances could not properly be regarded as exceptional’.<sup>96</sup> Thus, exceptional circumstances are not expected to be frequently invoked.

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<sup>94</sup> [2007] HCJAC 21.

<sup>95</sup> *HM Advocate v McGovern* [2007] HCJAC 21, para. 11.

<sup>96</sup> *HM Advocate v McGovern* [2007] HCJAC 21, para. 32.



96. Three Scottish cases all involving stun guns disguised as other objects have considered when it may be appropriate to depart from the statutory minimum sentence. In all cases, it was held that there were no exceptional circumstances which would justify departure from the statutory minimum. It is instructive to see that personal mitigation will not ordinarily suffice. Mitigation becomes relevant once the court determines that the statutory minimum must apply. A further point of note is that, on appeal, it was argued in each case that the offender either did not know possession of the firearm was an offence or that a stun gun was a firearm. One could see this as an attempt to rely on the exceptional circumstances provision to mitigate the effects of strict liability.

97. In *Dinsmore v HM Advocate*,<sup>97</sup> the appellant pleaded guilty to a charge under section 5(1A)(e) of the 1968 Act of possessing five stun guns disguised as torches, a charge of possessing firearms without a firearms certificate contrary to section 1(1)(a) of the 1968 Act, and a charge of possessing five steel telescopic truncheons. The weapons were purchased lawfully in Bulgaria and found by border control staff when he returned to Edinburgh airport. Dinsmore was sentenced to five years' imprisonment for the section 5(1A)(a) charge with concurrent sentences of 18 months and 6 months for the remaining charges. No exceptional circumstances were found that warranted departure from the statutory minimum sentence.

98. Counsel for the appellant argued on appeal that the sentencing judge had erred in coming to such a conclusion. Dinsmore had co-operated fully and attributed his actions 'to stupidity'; supposedly he had purchased the stun guns and truncheons as he thought they would make 'unusual gifts'. Counsel claimed that, whilst Dinsmore accepted wrongdoing, he did not appreciate the seriousness of the offence as he did not realise that stun guns were firearms and believed that he would receive a 'slap on the wrist' if caught. Personal circumstances were also advanced: he was of good character; had a

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<sup>97</sup> *Dinsmore v HM Advocate* [2017] HCJAC 11.

consistent work history; and was assessed as being suitable for an alternative to custody.

99. The appeal was refused. It was recognised that cases were fact-specific, making comparison difficult, but as a matter of principle:

‘In order to identify exceptional circumstances for the purposes of the legislation, we consider it is important both to have regard to the policy and intention of Parliament and the need to avoid a sentence which is arbitrary and disproportionate in respect of a particular individual. We consider that if in a particular case, taking account of all the relevant circumstances, it appears that the case falls outside the range of cases which Parliament can be taken to have had in mind as the norm, an imposition of the statutory minimum may be said to be arbitrary and disproportionate. In such a case the court may have little difficulty in concluding that the exceptional circumstances provision applies.’<sup>98</sup>

100. *Morton v HM Advocate*<sup>99</sup> involved the importation of two stun guns (this time disguised as iPhones). Morton pleaded guilty to a charge of possessing firearms disguised as another object and to a charge of possessing firearms without a licence. When he was stopped at the airport, Morton claimed that he thought the stun guns were iPhones. Video emerged on Facebook of him holding one of the stun guns and saying that he planned to bring them into the country in order to sell them. He was sentenced to five years’ imprisonment on the first charge of possessing the stun guns with a concurrent sentence of 21 months’ imprisonment on the remaining charge.

101. His appeal was also refused. Morton claimed that the Facebook video had been posted when he was drunk and that he had no intention to sell the weapons. It was submitted that he had no intention to cause harm. And, as in *Dinsmore*, there was an argument about his comprehension of illegality. The claim was subtly different. Whereas

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<sup>98</sup> *Dinsmore v HM Advocate* [2017] HCJAC 11, para. 15.

<sup>99</sup> *Morton v HM Advocate* [2017] HCJAC 21.

in *Dinsmore* there was an acceptance of wrongdoing, in *Morton* it was claimed that he did not know that bringing the stun guns into the country was illegal as they were being sold openly (again in Bulgaria).

102. *Morton* is helpful in discussing the relevance and value of the English Court of Appeal decision in *R v Avis*<sup>100</sup> in the context of section 51A(2) of the 1968 Act. *Avis* would appear to have little applicability; it pre-dates the statutory minimum sentence and the sentencing guidelines in England and Wales. The case had set out four ‘*Avis* questions’ applicable to sentencing firearms offences:

- (1) What sort of weapon was involved;
- (2) What use had been made of the firearm;
- (3) With what intention (if any) did the accused possess or use the firearm; and
- (4) What was the accused’s record.

103. It was submitted on appeal that the questions would assist courts in deciding whether exceptional circumstances existed such that departure from the statutory minimum sentence could be justified. The court concluded:

‘The purpose of the judgment in *Avis* was to provide guidance as to how discretion should be exercised over a range of offences of varying severity... They provide an analytical structure for sentencers when exercising a discretion which is unrestricted other than by the statutory maximum. This is not the situation faced by the sentencer who has to consider the application of section 51(A) of the 1968 Act. Parliament has intervened to limit his discretion unless there are exceptional circumstances. The *Avis* questions have no very obvious role in determining whether there are exceptional circumstances. However where there are exceptional circumstances and the level of appropriate sentence comes to be at large they may come to be of assistance.’<sup>101</sup>

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<sup>100</sup> *R v Avis* [1997] EWCA Crim 3423.

<sup>101</sup> *Morton v HM Advocate* [2017] HCJAC 21, para. 20.

104. The *Avis* rules then may come into play *after* a separate decision has been taken that there are exceptional circumstances in the case that justify departing from the mandatory sentence. In England and Wales, the Sentencing Council guidelines have supplanted *Avis*.

105. *HM Advocate v Cuthill*<sup>102</sup> further illustrates the approach of the Scottish courts. The respondent pleaded guilty to three charges. The first two were contraventions of section 170(2)(b) of the Customs and Excise Management Act 1979. The Royal Mail intercepted a parcel containing five cannisters of CS spray and a stun gun he had bought over the internet.

106. The police obtained a warrant and searched his house where they found a stun gun disguised as a torch. This find was the basis of the final charge which libelled that the respondent was in possession of a firearm disguised as another object, contrary to section 5(1A)(a) of the 1968 Act. At Dundee Sherriff Court, a *cumulo* sentence of 16 months' imprisonment was imposed, taking into account his guilty plea. It transpired that the sheriff had been unaware that the statutory minimum sentence of five years' imprisonment applied to the final count and he had received no submissions about whether there were exceptional circumstances which would allow departure. On appeal, counsel for the respondent accepted that the sheriff had misdirected himself but contended that there were nonetheless exceptional circumstances in the case. Three arguments were advanced: the respondent was not aware that possessing a disguised stun gun was illegal or that the offence carried a statutory minimum sentence; an early guilty plea had been entered; finally, the respondent, a reformed drug addict, did valuable work with Narcotics Anonymous.

107. After considering *Morton*, the court held that that there were no exceptional circumstances which would justify departure from the statutory minimum. Unlike the previous cases, *Cuthill* had previous convictions, including a sentence of six years'

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<sup>102</sup> Unreported 8 October 2017 (HCJ Appeal).

imprisonment for assault, robbery and abduction and a comparatively recent conviction for knife-possession which had also resulted in a custodial sentence. The court also concluded that Cuthill was fully aware that the items were illegal based on search terms he had used on the internet.

108. The court's concern was not whether there could be a departure from the statutory minimum on grounds of exceptionality, but whether the minimum sentence adequately reflected the gravity of the offending. The Crown's appeal was allowed. Concurrent sentences of 22 months' imprisonment on each of the first two charges and a concurrent sentence of five years' imprisonment for the third charge were imposed.

109. In England and Wales, guidance has been given by the Sentencing Council on how 'exceptional circumstances' should be interpreted. This guidance is reproduced in Appendix B.

#### *Effect of a guilty plea*

110. A guilty plea may be taken into account (in terms of section 196 of the Criminal Procedure (Scotland) Act 1995), provided that the final sentence is not less than the minimum period. For example, following an appeal against sentence for a conviction under section 5(1A)(a) of the 1968 Act, it was held that the section 196 'provision applies generally, and so applies to offences for which Parliament has provided a minimum sentence, with the important proviso that the discounted sentence cannot fall below that minimum sentence'.<sup>103</sup>

111. In England and Wales, the position in terms of plea-based sentence reductions (under section 73 of the Sentencing Act 2020) is similar in that 'a court must impose a sentence of at least five years' custody irrespective of plea unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the

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<sup>103</sup> *McMahon (Ronald) v HMA* [2021] HCJAC 14, para. 6.

offender which justify its not doing so'.<sup>104</sup> This has parallels to case law before the introduction of the sentencing guidelines (this case law also provides guidance on exceptional circumstances in addition to the guidelines). In terms of sentence reductions, it was noted that: 'It [the section] is plain and unambiguous on the face of it, and it applies whenever an individual is convicted. The contention that Parliament cannot have intended to prevent the reduction of a sentence following a plea is not, in our view, correct. Parliament was plainly aware, in passing the 2003 Act, of guilty pleas and how they should be regarded.'<sup>105</sup>

112. Thus, sentence reductions are potentially limited when section 311 of the Sentencing Act 2020 applies. Indeed, the treatment of section 311 is somewhat different to other minimum sentences (for example under sections 312-315) where sections 73(3) and 73(4) mean that the 'mandatory sentence requirement does not prevent the court... from imposing any sentence which is not less than 80 per cent of the sentence which would otherwise be required by that requirement'.

113. Overall, required minimum terms restrict the range of sentencing options in a number of ways. In England and Wales, this is recognised in the guidelines and the approach taken to setting this out is logical and consistent across guidelines.

### **Sentencing offences under the Firearms Act 1968 in Scotland**

114. In terms of sentencing trends, there is limited data in the public domain concerning sentences for a conviction under the 1968 Act in Scotland. However, several observations can be made about sentencing these offences. While firearms offences are rare, they can be complex to sentence. This complexity was part of the reason the Sentencing Council for England and Wales issued guidelines for low volume firearms offences.<sup>106</sup> Indeed, the number of firearms offences and the way they can vary in

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<sup>104</sup> See step 3 of the guideline for Firearms – Possession of prohibited weapon. Available at: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-possession-of-prohibited-weapon/>.

<sup>105</sup> *R. v Jordan, Alleyne, and Redfern* [2004] EWCA Crim 329, para. H7.

<sup>106</sup> See: <https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guidelines-for-firearms-offences-published/>.

practice, has been reflected in Scottish case law. Moreover, firearms can be linked to a wide array of serious offending behaviours: including homicide, gang violence, serious organised crime, and terrorism. Therefore, breaches of the regulations controlling the use and possession of firearms are taken seriously by sentencers in both jurisdictions.

115. Some firearms convictions involve multiple offences. This may mean multiple firearms offences as well as non-firearms charges (either as part of a criminal course of conduct involving firearms or unrelated conduct). The recent Scottish case of *HMA v James Maxwell*<sup>107</sup> illustrates potentially salient features of firearms offences. In *HMA v James Maxwell* there were multiple offences pertaining to purchasing and attempting to acquire a firearm contrary to the 1968 Act and the 1979 Act. Three of the charges were under the 1968 Act and one charge was under the 1979 Act. There were also convictions for offences unrelated to firearms. The sentence for each firearms charge (before taking into account a guilty plea) was:

- An extended sentence of 10 years' imprisonment (with a custodial period of six years and an extension period of four years) for a charge under section 5(1)(aba) of the 1968 Act;
- Three years for a charge under section 1(1)(a) of the 1968 Act;
- Three years for a charge under section 1(1)(b) of the 1968 Act;
- Three years for a charge under section 170(2)(b) of the 1979 Act.

116. The case had several features that suggested a grave risk to the public – including indications of a possible planned school shooting (there were internet searches pertaining to the Dunblane School Massacre and school schedules) and an attempt to acquire 100 rounds of ammunition. Thus, *HMA v James Maxwell* also illustrates that the nature of some firearms offences and offenders means there will be significant risks to the public. In such cases, sentencing may entail an extended sentence for public

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<sup>107</sup> Judiciary of Scotland, *Sentencing Statement: HM Advocate v James Maxwell* (2023). Available at: <https://judiciary.scot/home/sentences-judgments/sentences-and-opinions/2023/10/26/hma-v-james-maxwell>.

protection, as it did here. Additionally, the case also serves an illustration of how the law may seek to prevent serious offending by tightly controlling access to firearms.

## Conclusion

117. There is limited statistical data on sentencing firearms offences in Scotland, with the way in which offences are grouped together in the *Criminal Proceedings in Scotland* data releases preventing analysis of current sentencing practice at this statistical level. At present, the main source of information is sentencing statements and appeal judgments. While not as broad as statistical data in terms of the number of cases covered, these judgments do provide a more nuanced insight into key principles underpinning sentencing firearms offences (at least in those cases where a judgment or sentencing statement is reported). For example, the case law reveals the strict interpretation of ‘exceptional circumstances’ and the broad range of factors that might influence a firearms sentence, such as public risks. The case law also reveals (although this is not an issue that is unique to firearms offences) the complexity of real cases in that they can involve multiple offences – whether multiple firearms offences, offences related to firearms offences, or unrelated offences. Factors such as these would mean, for instance, that statistical data that reflects a single charge (e.g. the data might reflect a conviction under Section 5(1)(aba) in *James Maxwell* under the principal offence approach), would omit salient features of the offence (e.g. the implications of a school shooting being planned). Thus, especially for relatively low-volume offences such as firearms offences, a different approach may be beneficial to gather data on sentences for the relevant offences.

118. Some firearms offences may be (relative to *HMA v James Maxwell*) less serious and there are a wide range of distinct firearms offences that may be committed (such as some of the offences contained in the Air Weapons and Licensing (Scotland) Act 2015 discussed above). It is for this reason that England and Wales implemented nine separate guidelines covering about 20 firearms offences and that, for some offences, the guideline range includes a discharge.



## Chapter 4: Research on Sentencing Responses to Firearms Offences

### Overview

119. This chapter summarises key findings from the diverse literature exploring sentencing responses to firearms offences. We note the research and commentary relating mandatory sentencing laws and this is followed by a discussion of the limited research on public attitudes to sentencing gun crime in a neighbouring jurisdiction (England and Wales). In the present context, guidelines can contribute to more effective and proportionate sentencing for firearms offences. We discuss the purpose and nature of sentencing guidelines for this offence issued by the Sentencing Council for England and Wales.

120. Most of the research and responses to gun crime focuses on restricting access to firearms, removing or restricting access to weapons from individuals convicted of firearms offences, or the question of whether to arm police officers. As with crime prevention more generally, sentencing may play only a limited role in preventing firearms offending. Restricting access and other preventive strategies are likely to contribute more to reducing the volume of such crimes than the sentences imposed on offenders convicted of these offences. With respect to sentencing, a primary means of preventing firearms offences in most Western nations has involved mandatory sentences of imprisonment. McDowall, Loftin and Wiersema note that: 'No policy designed to prevent firearm violence is more popular than mandatory sentence enhancements for gun crimes.'<sup>108</sup> There is a large research literature on the effectiveness of mandatory sentencing laws as a means of preventing gun crime. Almost all of this research was conducted in the US; nevertheless, the key findings are

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<sup>108</sup> McDowall, D., Loftin, C. and Wiersema, B. (2005) 'A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes', in S. Bushway and D. Weisburd (eds.) *Quantitative Methods in Criminology*, p. 378. London: Routledge. See also Roberts, J.V. (2006) *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*. Ottawa: Department of Justice Canada.

relevant to Scotland and the other UK nations as they relate to the mandatory nature of sentencing laws.<sup>109</sup>

121. Academic commentary has been critical of mandatory sentences of imprisonment in general, and for firearms offences in particular. Mandatory sentences have been criticised on two principal grounds. First, they undermine proportionality at sentencing: although the use or possession of a firearm may meet some common threshold of seriousness, the offender's culpability cannot be established in advance. Accordingly, the imposition of the same sentence on all offenders convicted of the offence prevents a court from reflecting the culpability of the individual offender.

122. A lack of individualisation may be particularly troubling for cases of illegal possession of a firearm without any culpable intention. This profile of case was clearly not the intended target of the mandatory legislation, which aimed to deter offenders from acquiring, possessing, or storing firearms for the purpose of facilitating other offences. This category of gun crime is sometimes referred to as 'non-violent' or 'incidental' firearms offending.<sup>110</sup> The English case of *Burton*<sup>111</sup> is a good example of a conviction for possession of an illegal firearm where there was no malign intent: the offender, who had attempted to take his own life with a firearm, came to the attention of the police as a result of the self-inflicted wound. A mandatory sentence may also violate the principle of restraint at sentencing. This stipulates that the shortest sentence commensurate with the seriousness of the crime should be imposed. The principle is an element of sentencing in most common law jurisdictions.

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<sup>109</sup> Almost all the published research in this area focuses on England and Wales rather than Scotland or the United Kingdom as a whole – for example, Squires, P. with Grimshaw, R. and Solomon, E. (2008). '*Gun Crime: A review of evidence and policy*'. London: Centre for Crime and Justice Studies.

<sup>110</sup> Weiss, R. (2022) 'Rethinking prison for non-violent gun possession', *Journal of Criminal Law and Criminology* 112: 665-682; Campbell, L. (2010) 'Responding to Gun Crime in Ireland', *The British Journal of Criminology*, 50: 414-434; and Loftin, C. and McDowall, D. (1981) 'One With a Gun Gets You Two: Mandatory Sentencing and Firearms Violence in Detroit', *The Annals of the American Academy of Political and Social Science*, 455: 150-167.

<sup>111</sup> [2012] EWCA Crim 1781.

123. Possession offences raise additional challenges to individualising assessments of the degree of harm in a particular case. Possession of weapons offences are treated as especially serious due to the risk of injury they represent rather than actual harm resulting from mere possession of a weapon.<sup>112</sup> Because of this, sentencers take into account not only harm caused by the offender but also the harm risked by their offending. The English and Welsh sentencing guidelines for possession of firearms note at step 1 that ‘harm is assessed by reference to the risk of harm or disorder occurring and / or actual alarm / distress caused’.<sup>113</sup> In cases where little or no harm eventuated but an offender’s possession of a weapon posed a risk to the safety of the public, sentencers will consider what the offender risked doing. This may result in insufficient individualisation at sentencing where offenders are being assessed by imagined or risked harms which are remote from their actual actions or intentions.<sup>114</sup> Cases in which little or no harm has taken place may still be subject to lengthy custodial sentences due to the mandatory minimums in place, further restricting sentencers’ discretion to individualise sentences in these cases.

124. The second branch of academic criticism focuses on the principal justification for creating a mandatory sentence of imprisonment for firearms offences, namely general deterrence.<sup>115</sup> A number of empirical studies have suggested that add-on penalties or mandatory sentences of imprisonment are an ineffective deterrent.<sup>116</sup> This research supports a wider academic critique of general deterrence as a crime prevention strategy.<sup>117</sup> Squires, Grimshaw and Solomon, in their review of firearms policy, noted

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<sup>112</sup> Ashworth, A. (2011) ‘The Unfairness of Risk-Based Possession Offences’, *Criminal Law and Philosophy* 5: 237–257, p. 237.

<sup>113</sup> <https://www.sentencingcouncil.org.uk/offences/crown-court/item/firearms-possession-of-prohibited-weapon/>.

<sup>114</sup> Ashworth, A. (2011) ‘The Unfairness of Risk-Based Possession Offences’, *Criminal Law and Philosophy* 5: 237–257, p. 253.

<sup>115</sup> For a comprehensive summary of the arguments and research, see Ashworth, A. (2019) ‘The Common Sense and Complications of General Deterrent Sentencing’, *Criminal Law Review*, 564-578.

<sup>116</sup> This was recognised in the influential review of sentencing in England and Wales: Halliday, J., French, C. and Goodwin, C. (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, p. 8. London: Home Office.

<sup>117</sup> Sundt, J. and Boppre, B. (2021) ‘Did Oregon’s tough mandatory sentencing law “measure 11” improve public safety? New evidence about an old debate from a multiple-design, experimental strategy’, *Justice Quarterly*, 38: 1363-1384.

‘the scepticism about the wisdom of addressing firearm offending by means of sentencing policy’.<sup>118</sup> They conclude that: ‘there is no compelling evidence to suggest that the approach being pursued by the government – with its emphasis on punitive, mandatory sentencing – is likely to prove a durable or effective way of dealing with firearm-related offending.’<sup>119</sup>

125. Finally, it is important to acknowledge dissenting voices in this debate. Advocates of mandatory sentencing suggest that the limited deterrent effect of these laws is due to inadequate implementation or a high rate of judicial deviation from the statutory mandatory sentence. In their review of responses to gun crimes, Golding and McClory report findings from a Police Federation of England and Wales survey, noting that: ‘Police officers also felt that mandatory sentences for gun and knife crime are not being enforced as they should be. In fact, less than 3% of respondents felt that sentences are being enforced as they should be. And an overwhelming 85% of responding officers felt that mandatory sentences are simply not carried out the way they should be.’<sup>120</sup> One of the authors’ recommendations was that: ‘Mandatory jail sentences with respect to gun crime offending should be applied as intended’.<sup>121</sup>

126. The Sentencing Council for England and Wales has published data on the volume of sentences for a mandatory minimum firearms offence which fell below the statutory minimum. The most recent statistical bulletin revealed that, in 2018, approximately one third (31%) of cases where the minimum sentence applied received a term of imprisonment below the five year minimum sentence.<sup>122</sup>

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<sup>118</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) ‘*Gun Crime*’. *A review of evidence and policy*, p. 37. London: Centre for Crime and Justice Studies.

<sup>119</sup> Squires, P. with Grimshaw, R. and Solomon, E. (2008) ‘*Gun Crime*’. *A review of evidence and policy*, p. 45. London: Centre for Crime and Justice Studies. Silvestri et al. draw similar conclusions regarding the effectiveness of deterrent sentencing in the context of gun crime involving young offenders (Silvestri, A., Oldfield, M., Squires, P. and Grimshaw, R. (2009) *Young People, Knives and Guns. A Comprehensive Review, Analysis and Critique of Gun and Knife Crime Strategies*. London: Centre for Crime and Justice Studies).

<sup>120</sup> Golding, B. and McClory, J. (2008) *Going Ballistic. Dealing with Guns, Gangs, and Knives*, p. 37. London: Policy Exchange.

<sup>121</sup> Golding, B. and McClory, J. (2008) *Going Ballistic. Dealing with Guns, Gangs, and Knives*, p. 68. London: Policy Exchange.

<sup>122</sup> Sentencing Council (2019) *Firearms Offences Guideline: Consultation*, p. 6.

## Public attitudes to sentencing firearms offences

127. A search of the public opinion literature revealed no surveys outside the US which have explored public attitudes to sentencing for firearms offences in any detail. The different scale of the gun control problem (and the nature of responses in the US), means that this literature carries little relevance for sentencing firearms offences in Scotland. A small number of surveys have explored related issues in England and Wales, which is a better comparator for Scotland. These limited surveys show considerable public concern over gun crime and the State response, despite the low volume of firearms offences in the United Kingdom.

128. In 2007, YouGov posed a series of questions about gun crime to its national sample frame. Over four-fifths of the public *disagreed* with the statement that ‘the government has done enough to address the rise in gun crime’; the most frequent response was to strongly disagree with this statement (57% of sample).<sup>123</sup> This concern over the government’s response was reflected in public views of the mandatory sentences: approximately two-thirds of the sample ‘strongly supported’ an increase in the five year minimum penalty for possession of an illegal firearm. A further one-quarter of respondents ‘somewhat’ supported raising the minimum sentence. These surveys suggest that the public sees a key role for sentencing in responding to firearms offences. It is noteworthy that the percentage supporting tougher sentencing laws was much higher than the proportion favouring increasing the number of armed police officers.<sup>124</sup> It is also interesting to note that public support for tougher sentencing also exceeds support for a ban on firearms ownership.<sup>125</sup>

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<sup>123</sup> YouGov (2007) Results for Policy Exchange. Available at: <https://d3nk13psvxxpe9.cloudfront.net/documents/YG-Archives-lif-policyex-gunknife-071109.pdf>.

<sup>124</sup> Only one-third of respondents ‘strongly supported’ increasing the number of armed police officer patrols. A subsequent YouGov survey in June 2019 found that over half the sample opposed a proposal to arm police officers. Available at: <https://yougov.co.uk/topics/politics/survey-results/daily/2019/06/04/7bb29/2>.

<sup>125</sup> Just over one-third of respondents endorsed a complete ban on private ownership of firearms in a 2021 YouGov survey. Available at: [https://ygo-assets-websites-editorial-emea.yougov.net/documents/YouGov\\_-\\_Gun\\_laws.pdf](https://ygo-assets-websites-editorial-emea.yougov.net/documents/YouGov_-_Gun_laws.pdf).

129. To conclude, the public would appear to favour severe, and possibly mandatory, sentences for the more serious firearms offences. However, several caveats should be considered. First, these limited surveys did not provide specific cases for respondents to consider.<sup>126</sup> It seems likely (on the basis of previous research) that the public had the most serious forms of gun crime in mind, and not ones involving ‘inadvertent’ or historical possession. Second, public support for mandatory sentencing likely reflects a mistaken belief in the deterrent effectiveness of such sanctions. Third, if the public were sensitised to the threat to concepts such as proportionality, individualisation and parsimony, there may be greater support for more judicial discretion.

130. Although the Sentencing Council for England and Wales conducted a public consultation of its draft guidelines for sentencing firearms offences, it did not conduct or commission research into public attitudes to the issue. We uncovered no surveys or polls exploring public attitudes to sentencing firearms offences in Scotland. For this reason alone, it would be useful to explore public views regarding firearms offences. Notably, any such research might seek to elicit from the public what they perceive to be the main objectives when sentencing such offences. For example, to what extent does the public prioritise public protection, punishment, rehabilitation, denunciation, or other aims of sentencing such as holding offenders to account? It may be, given the range of circumstances in which firearms offences may be committed (e.g. gang-related offences, individual offences, terror offences, etc.), that there will be varied views based on the context. Additionally, it may be useful to seek public views on the appropriate sentencing factors for firearms offences. If guidelines specify factors that the public considers important then this may allow the public to feel that the guideline (and sentencing more generally) is meeting desired goals, such as holding offenders to account and censuring criminal behaviour.<sup>127</sup>

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<sup>126</sup> See discussion in Roberts, J.V. (2003) ‘Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings’, *Criminal Justice and Behavior*, 20: 1-26.

<sup>127</sup> Other general guidelines may also help in this regard, for example the Scottish Sentencing Council’s *Principles and Purposes of Sentencing* guideline.

## Conclusion

131. Sentencing represents only one part of a comprehensive and effective response to firearms offences. Sentencing guidance is useful because it contributes to more proportionate and effective sentencing outcomes. Mandatory minimum sentences have been a popular policy in several jurisdictions as a deterrent policy against firearms offences, but these have been criticised as ineffective responses to firearms risk and as threats to individualisation of sentences. Public attitudes have generally appeared to support punitive sentencing of firearms offences, but insufficient data has been collected in Scotland for a clear picture of public attitudes on the appropriate sentences for firearms offences in this jurisdiction.

## Conclusion

132. This report has examined the available research on sentencing firearms offences and has found only limited relevant research – and very little pertaining specifically to Scotland. However, this is an area in which sentencing guidance has been developed, in particular by the Sentencing Council for England and Wales, and this guidance illustrates some of the complexities of sentencing firearms offences. There is a diverse range of firearms offences and the type of weapon and the intention with which it may have been possessed has great bearing on sentencing outcomes. Although firearms offences are relatively rare in Scotland, the possession of a firearm has the potential to facilitate the most serious interpersonal violence. It is for this reason that the UK Parliament, in common with many other common law jurisdictions, has introduced mandatory custodial sentences of considerable length for firearms possession offences. The use of a firearm in the commission of another offence is treated by the courts as a very significant aggravating factor.

133. Scottish courts currently have ample guidance on the issue of ‘exceptional circumstances’ when considering whether a mandatory sentence applies for a firearms possession offence and it is clear from the cases discussed in this report that the threshold for departing from the mandatory minimum sentence is high. However, the case law also demonstrates the complexity of sentencing firearms offences more generally, particularly where additional related or unrelated offences fall to be sentenced at the same time. Even the sentencing of a single firearms offence can be a far from straightforward process and the guidelines produced by the Sentencing Council for England and Wales, which group together a larger number of separate offences into nine guidelines, may provide assistance to any other guideline-producing body that is considering developing offence-specific guidelines for firearms offences. Common themes, such as the type of weapon and the use or intended use of the firearm, are relevant to culpability for most firearms offences. Quantifying harm can be more complicated in the case of firearms offences when it is the potential or intended harm that is often the primary consideration rather than the actual harm caused.



134. With developments such as the growing potential use of hybrid 3D-printed firearms and/or firearm components, the nature of some firearms offences may evolve in the coming years. Both the criminal law and sentencing guidance may have to respond to these developments as the range of firearms offences becomes ever more complex. Sentencing guidelines should constantly evolve in response to changes in the offence and social reaction to the crime and to emerging research; this is particularly true for firearms offences.

## Appendix A: Summary of the Guidelines Issued by the Sentencing Council for England and Wales

Nature of the offences covered in guideline	Offences covered by section of the 1968 Act	Statutory sentence range	Guideline range	Guideline culpability factors	Guideline harm factors
Possession, purchase or acquisition of a prohibited weapon or ammunition	s.5(1) and 5(1A)	Up to 10 years custody  Minimum sentences may apply	Discharge to 10 years' custody	Type of weapon  Whether used for a criminal purpose or intention or recklessness about such use	Degree of alarm or distress caused  Risk of death or serious physical or psychological harm  Risk of serious disorder
Possession, purchase or acquisition of a firearm; ammunition; or shotgun without a certificate	s.1(1)(a); s.1(1)(b); and s.2(1)	Up to 5 years custody or up to 7 years for s.1(1) offence if aggravated by s.4(4)	Discharge to 4 years 6 months custody	Type of weapon  Whether used for a criminal purpose or intention or recklessness about such use	Degree of alarm or distress caused  Risk of death or serious physical or psychological harm  Risk of serious disorder
Possession of a firearm or ammunition by person with previous convictions prohibited from possessing a firearm or ammunition	s.21(4) and (5)	Up to 5 years custody	Discharge to 4 years 6 months custody	Type of weapon  Whether used for a criminal purpose or intention or recklessness about such use	Degree of alarm or distress caused  Risk of death or serious physical or psychological harm  Risk of serious disorder

Nature of the offences covered in guideline	Offences covered by section of the 1968 Act	Statutory sentence range	Guideline range	Guideline culpability factors	Guideline harm factors
Carrying a firearm in a public place	s.19	Up to 7 years custody (12 months for imitation firearm and 6 months for an air weapon)  Minimum sentences may apply	Discharge to 4 years custody	Type of weapon  Whether used for a criminal purpose or intention or recklessness about such use	Degree of alarm or distress caused  Risk of death or serious physical or psychological harm  Risk of serious disorder
Possession of firearm with intent to endanger life	s.16	Up to life imprisonment  Minimum sentences may apply  Schedule 19 offence; specified offence listed in part 1 of Schedule 18; listed in part 1 of Schedule 15	4 to 22 years custody	Sophistication of offence and degree of planning  Contribution or role played if group activity  Whether distribution or supply of firearms on a significant scale  Whether firearm discharged  Duration of incident	Degree of physical or psychological harm caused and/or risked

Nature of the offences covered in guideline	Offences covered by section of the 1968 Act	Statutory sentence range	Guideline range	Guideline culpability factors	Guideline harm factors
Possession of firearm or imitation firearm with intent to cause fear of violence	s.16A	Up to 10 years custody  Minimum sentences may apply  Specified offence listed in part 1 of Schedule 18	Community order to 9 years custody	Whether intention to cause injury and to what degree  Degree of fear intended  Sophistication of offence and degree of planning  Contribution or role played if group activity  Whether firearm discharged  Duration of incident	Degree of physical or psychological harm caused and/or risked
Use of firearm or imitation firearm to resist arrest; possession of firearm or imitation firearm while committing a Schedule 1 offence; and carrying firearm or imitation firearm with criminal intent	s.17(1); s.17(2); and s.18	Up to life imprisonment  Minimum sentences may apply  Schedule 19 offence; specified offence listed in part 1 of Schedule 18; listed in part 1 of Schedule 15	Community order to 16 years custody	Sophistication of offence and degree of planning  Contribution or role played if group activity  Whether firearm discharged  Duration of incident  Whether intention to cause injury or fear and distress  Seriousness of underlying offence	Degree of physical or psychological harm caused and/or risked

Nature of the offences covered in guideline	Offences covered by section of the 1968 Act	Statutory sentence range	Guideline range	Guideline culpability factors	Guideline harm factors
<p>Manufacture; sell; possess for sale; or purchase or acquire for sale or transfer prohibited weapon or ammunition</p>	<p>s.5(2A)(a); s.5(2A)(b); s.5(2A)(c); and s.5(2A)(d)</p>	<p>Up to life imprisonment</p> <p>Minimum sentences may apply</p>	<p>3 to 28 years custody</p>	<p>Contribution or role played if group activity</p> <p>Degree of planning</p> <p>Whether there was an abuse of a position of trust or responsibility</p> <p>Expectation of financial or other advantage</p> <p>Whether involved others through coercion, intimidation or exploitation or was involved through coercion, intimidation or exploitation</p>	<p>Category ranges based on the scale and sophistication of the enterprise (e.g. may be indicated by the number of firearms/ammunition involved)</p> <p>Whether firearm/ammunition subsequently used to cause serious injury or death</p>

Nature of the offences covered in guideline	Offences covered by section of the 1968 Act	Statutory sentence range	Guideline range	Guideline culpability factors	Guideline harm factors
Improper importation; and fraudulent evasion of prohibition/restriction	s.50(3), (4) and (5A)(a); and s.170(1)(b), (2), (3) and (4A)(a)	Up to 7 years custody or life imprisonment if specific weapons noted in s.5(1) of the 1968 Act	Fine to 28 years custody	<p>Contribution or role played if group activity</p> <p>Degree of planning</p> <p>Whether there was an abuse of a position of trust or responsibility</p> <p>Expectation of financial or other advantage</p> <p>Whether involved others through coercion, intimidation or exploitation or was involved through coercion, intimidation or exploitation</p>	Category ranges based on the scale and sophistication of the enterprise (e.g. may be indicated by the number of firearms/ammunition involved)

## Appendix B: Extract from Firearms Offences Guideline: Exceptional Circumstances

6. 'In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:

- the particular circumstances of the offence **and**
- the particular circumstances of the offender

either of which may give rise to exceptional circumstances

7. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions 9.3.3 Sentencing.

8. Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

### Principles

9. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

10. The circumstances must truly be exceptional. It is important that courts do not undermine the intention of Parliament and the deterrent purpose of the minimum term provisions by too readily accepting exceptional circumstances.

11. The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

12. The mere presence of one or more of the following should not in itself be regarded as exceptional:

- One or more lower culpability factors
- The type of weapon or ammunition falling under type 2 or 3
- One or more mitigating factors
- A plea of guilty

Where exceptional circumstances are found

13. If there are exceptional circumstances that justify not imposing the statutory minimum sentence, then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.**

Note: a guilty plea reduction applies in the normal way if the minimum term is not imposed (see step 5 – Reduction for guilty pleas).

14. The court may find it useful to refer to the range of sentences under culpability A of Table 2 (Offences not subject to the statutory minimum sentence) in step 2 above. The court should impose a sentence that is appropriate to the individual case.'

Source: [Firearms – Possession of prohibited weapon – Sentencing \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk).



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