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**CLSA Response to the SCG Consultation on Bladed Article Offences**

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

## Overview

1. The Criminal Law Solicitors Association (CLSA) has prepared this response to the above consultation on behalf of its members. The views contained are those of a representative body of criminal practitioners.
2. It is acknowledged that there is a social problem associated with the possession of knives and that the aim of the new guidelines is to address it. However the CLSA make the clear warning that the effect of the proposed guidelines will be to significantly increase the number of custodial sentences and to lengthen custodial sentences, albeit that many possession offences will remain short custodial sentences (i.e. sentences of less than 12 months). If the proposed sentencing guidelines are implemented we are of the view that there is likely to be a noticeable increase in short term immediate custodial sentences.
3. As of 2 December 2016 the prison population was 85,839 (81,903 male and 3,935 female) as against a usable operational capacity of 86,885. This is a spare capacity of 1,046, i.e. 0.012% of the total. A significant proportion of these prisoners are serving short term custodial sentences.
4. The research published by the MOJ in 2015 has confirmed that short term custodial sentences are less effective in preventing offending than community based sentences. Stating:

“Research has previously indicated that offenders who receive short term custody of under 12 months are more likely to re-offend than similar offenders who receive a community or suspended sentence order (e.g. Ministry of Justice, 2013). This finding was replicated in the present study, bringing it up-to-date and showing that it is a consistent effect.”<sup>1</sup>

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399389/impact-of-short-custodial-sentences-on-reoffending.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399389/impact-of-short-custodial-sentences-on-reoffending.PDF)

5. The outgoing Lord Chancellor has concurred noting in his recent Longford Lecture *"And it is an inconvenient truth - which I swerved to an extent while in office - that we send too many people to prison. And of those who deserve to be in custody, many, but certainly not all, are sent there for too long."*
6. The impact assessment attached to the guidelines acknowledges that there is a potential for the number and length custodial sentences to be increased, but suggests that the estimates of that impact are subject to uncertainty.
7. We submit that there is no uncertainty about it - there will be an increase in short term custodial sentences if these proposed guidelines are implemented. There will be an increase in the prison population which the prison estate is ill equipped to cope with.
8. Currently less than 30% of sentences for possession offences result in custodial sentences (resource assessment figure 3), the average custodial sentence length is 6.1 months (para 3.4 resource assessment). The proposed starting points and sentence ranges are such that in most cases there will be a starting point of an immediate custodial sentence. The length of the starting points have been increased. Examples of how the proposed guidelines will increase the number and length of custodial sentences are given at paragraphs 27, 33, 39 and 60 below.
9. It is submitted that the increase in such short term custodial sentences and corresponding impact on the prison population and prison estate has been underestimated. The resource assessment estimate is of an additional 1800 offenders receiving short term custodial sentences (para 5.4 resource assessment). For the reasons stated throughout this paper it is submitted that this is an underestimate, but in any event even that estimate has to be compared with the current spare capacity of the prison estate.
10. It is further submitted that the guidelines Council should consider very carefully the merits of purposely increasing the use of short term custodial sentences as a tool of combating this offending. Why is the Council having the courts resort to a type of sentence which is known to be less effective in reducing reoffending?

**Question 1 Do you agree with the proposed approach to the assessment of culpability?**

11. In principle it is submitted that distinguishing between particularly dangerous weapons and other weapons is desirable. However there is no guidance provided in the guideline as to what amounts to a "highly dangerous weapon". "Highly dangerous" is a term open to wide

interpretation.

12. The Council has given an example in the consultation document of a bottle adapted to squirt acid (case study A). This is a useful indication of the nature and level of dangerousness that the Council has in mind, however this is not included in the guideline.
13. Whether a weapon is highly dangerous or not makes a significant difference to sentence for a cat 1 offence it is 18 months to 9 months (doubling the sentence), for a cat 2 offence it is 9 months and 3 months (tripling the sentence), and for a cat 3 offence, 3 months to a high level community order (therefore it makes the difference as to whether the offence passes the custodial threshold or not). It is likely that there will be an increase in the amount of court time devoted to Newton hearings on the point.
14. We therefore submit the guideline should include guidance as to the type of implement it is intended "highly dangerous weapon" should include. The consultation document includes a helpful example and it is submitted this should be included in the full guideline so as to provide clarity.
15. There should also be guidance on what the proposed guideline intends by the meaning of "possession of a weapon that falls just short of a reasonable excuse". This makes potentially an even greater difference to sentence - in the case of possession of a knife it is the difference between a culpability A or culpability C offence. Given the offence starting points and sentencing ranges this will make a considerable difference in sentence. For a Category 2 Harm offence it is the difference between 9 months custody and a high level community order.
16. Many sentencing exercises will turn on this interpretation. Given the difference it will make to sentence it is likely that defendants will frequently advance the argument of a reasonable excuse so as to avoid falling into culpability A. It is likely that there will be an increase in the amount of court time devoted to newton hearings on this point also.
17. The consultation document (p16) refers to the example of a an offender who has a knife for work and then forgets it and goes out drinking with it in his pocket, noting that this is something that is unlikely to amount to a reasonable excuse. This is something of an unhelpful example as the High Court has found in *R v Chahal* [2010] EWHC 439 that a reasonable excuse *was* made out in very similar circumstances (Offender worked on Monday placing a knife in his pocket and forgetting it. On Tuesday he went to the cinema in the same jacket and was on his way from the cinema to his cousin's address when stopped by police).

18. As a related point there should also be clarity as to whether a knife could fall into culpability C on the basis of just falling short of a reasonable excuse at all. We assume it is intended that it can, given the comments on page 16 of the consultation document which we have referred to in the preceding paragraph. However the guideline itself simply mentions only "*weapons* that fall short of a reasonable excuse" (our emphasis). If it is intended that knives can fall into this category then the guideline should explicitly say so.
19. We therefore submit that the guideline should also set out guidance as to the type and nature of activity it considers to be a "weapon that falls just short of a reasonable excuse". However in this instance we submit the example given in the consultation document is unhelpful as that example is likely to amount to a full defence. We make an alternative suggestion for an example of: "forgetfulness alone without any other good reason to support it".
20. We submit in addition that culpability C should be amended to read "possession of bladed article or weapon that falls just short of a reasonable excuse".

**Question 2. Are there any culpability factors that should be added or removed?**

21. It is submitted that there should be a distinction between knives that are highly dangerous and those that are not in similar manner to the proposed distinction between highly dangerous weapons and other weapons.
22. We accept that even a small fishing knife can cause harm if used as a weapon and its possession in public without a reasonable excuse should be punished. However there are bladed articles such as samurai swords or machetes which are inherently dangerous and have a violent purpose. It is submitted that the guideline should distinguish between bladed articles such as these which are by their nature dangerous and other knives that are not. Such an approach has been adopted for other offensive weapons, and we submit that this approach should be adopted for bladed articles also (subject to our comments above).
23. We submit that as with offensive weapons, highly dangerous bladed articles such as swords and machetes should be culpability A and other knives should be culpability B.

**Question 3. Do you agree with the proposed approach to the assessment of harm?**

24. Yes

**Question 4. Are there any harm factors that should be added or removed?**

25. No.

**Question 5. Do you have any comments on the sentence ranges and starting points?**

26. The Council should recognise that the proposed sentence ranges and starting points reflect a significant increase in the level of sentence imposed when compared with the current guidelines.

27. As an example, the current guideline has as a starting point of 6 weeks for possession of a weapon not used to threaten or cause fear but possessed in dangerous circumstances, and 12 weeks for possession of a bladed article in the same circumstances. For the same nature of offence, in the proposed guideline possession of a bladed article would have a starting point of 9 months (culpability A, harm 2) – a trebling of the starting point. For an offensive weapon that was not highly dangerous (culpability B, harm 2) it is 3 months – a doubling of the starting point.

28. We repeat the comments made in our opening remarks about the impact and merits of the increase in the level of sentencing that this represents.

**Question 6. Do you agree with the aggravating factors? Please state which, if any, should be removed or added.**

29. We agree with the proposed aggravating and mitigating factors and do not propose any alteration.

**Question 7. Are there any mitigating factors that should be added or removed?**

30. As above

**Question 8. Does the section on minimum sentences provide adequate explanation of the provisions**

31. Yes

**Question 9. Do you agree that the guidance on minimum sentences is at the right stage of the sentencing process?**

32. Yes

**Question 10. Do you consider that the sentence imposed in Case Study A is proportionate? If you do not agree, please tell us what sentence should be**

**imposed and why.**

33. Under the current sentencing guidelines the starting point for this offence would be 6 weeks custody as the weapon was not used to threaten or cause fear but was possessed in dangerous circumstances. It would be expected that currently the sentence would be significantly above this due to the number of aggravating circumstances outlined in the example. The current sentencing range is up to crown court and it we anticipate the defendant would be sentenced to more than 6 months in the crown court. However the sentence under the proposed guidelines of 2 ½ years is significantly above what would be a likely sentence currently. The current sentencing practice has an average sentence of 6.1 months and of 1 year for offences more serious than this when a weapon is used to cause fear (resource assessment para 3.4). This is a further example of the increase in sentences that will occur under the guidelines and we repeat our submissions made above about the impact of this.

**Question 11. Do you agree with the proposed approach to the assessment of culpability?**

34. We repeat our submissions regarding the meaning of “highly dangerous”.

**Question 12. Are there any culpability factors that should be added or removed?**

35. We repeat our submissions that there should be a distinction between knives that are inherently dangerous and have a violent purpose, such as a machete, and knives that are not.
36. We agree that in the circumstances of a knife or weapon used to cause fear, planning and premeditation are significant aggravating features which justify their being reflected at this stage in the sentence calculation.

**Question 13. Do you agree with the proposed approach to the assessment of harm?**

37. Yes

**Question 14. Are there any harm factors that should be added or removed?**

38. It is submitted that a potential mitigating factor could be where a weapon has been used in self-defence that was disproportionate (so as not to amount to a defence) or where there is a degree of provocation. Consideration should be given to introducing this at this stage as an example of category 3 behaviour

**Question 15. Do you have any comments on the sentence ranges and starting points?**

39. Currently 60% of threat offences result in a custodial sentence and the average length is 1 year. The Council should take note of the fact that the proposed starting point and sentencing ranges reflect an increase in the sentence levels and will result in an increase in the number and length of custodial sentences. It is acknowledged that the number of custodial sentences will increase in any event due to the mandatory minimum sentence, but the nature of the proposed starting points and ranges are vastly above this minimum.

40. The resource assessment suggests that the proposed guidelines will not have any impact on prison and probation resources. It is respectfully submitted that this is highly unrealistic. The Council should recognise that there is a likely impact of longer custodial sentences and there will be a consequent impact on the prison population.

**Question 16. Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.**

41. Please see our comments in para 38 above about potential mitigating features. If not included at step one it is submitted they should be included here.

**Question 17. Does the section on minimum terms provide adequate explanation of the provisions?**

42. yes

**Question 18. Do you agree that the guidance on minimum terms is at the right stage of the sentencing process?**

43. Yes.

**Question 19. Do you consider that the sentence imposed in Case Study B is proportionate? If you do not agree, please tell us what sentence should be imposed and why.**

44. We agree in this instance the proposed sentence is proportionate. However we note in passing that notwithstanding the introduction of the threat offence, in our experience it remains CPS practice to charge a public order offence such as affray in addition to a simple offensive weapon charge for cases of this nature. When considering the potential impact of this guideline the Council may wish to undertake a comparative analysis with the sentences imposed for public order offences committed with bladed articles and other weapons.

**Question 20. Does the section on minimum sentences provide adequate explanation of the provisions?**



45. Yes

**Question 21. Do you agree that the guidance on minimum sentences is at the right stage of the sentencing process?**

46. It is submitted that the minimum sentence provisions should be considered at the end of the process as is the case with adults.
47. Youth sentencing should result in fewer custodial sentences than adult sentencing as youth custody should be a last resort. As can be seen from the later steps suggested by the guideline the primary decision for a sentencing court is whether the custodial threshold is passed. By undertaking a full sentencing exercise prior to the consideration of the minimum sentence, the court takes into account all aggravating and mitigating factors which will result in a fully formed view as to whether custody would otherwise be justified but for the minimum sentence. As such the decision as to whether is unjust or not to impose the minimum sentence can be informed by what the sentence might otherwise be.
48. To consider the minimum sentence at the beginning of the process encourages a sentencing court to go no further than the minimum sentence provisions and not take into account the full circumstances of the offence and offender. Such an approach would be contrary to the statutory considerations that the court *must* have regard to the principle aim of the youth justice system which is to prevent offending *and* the welfare of the offender.<sup>2</sup>
49. Placing consideration of the minimum sentence at the end of the process also achieves consistency with the approach for sentencing adults.

**Question 22. Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why**

50. As stated earlier the meaning of “falls just short of a reasonable excuse” requires clarification.
51. We repeat our submissions that there should be a distinction between knives that are inherently dangerous and have a violent purpose, such as a machete, and knives that do not.
52. As related point is that the categories suggested for youths are not mutually exclusive. For example a defendant could have a knife (therefore in the

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<sup>2</sup> Children and Young Persons Act 1933 s44(1) and para 1.2 of the sentencing guidelines overarching principles sentencing youths

custodial category) but also in circumstances where there is no or minimal risk of it being produced (and therefore in the community category). In which category does the Council propose this offence should be placed?

**Question 23. Do you agree with the harm and culpability factors proposed at step one which indicate that the starting point should be a custodial sentence? If not, please specify which you would add or remove and why.**

53. Please see out answers in paragraphs 48-49 above.

**Question 24 Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.**

54. Yes

**Question 25. Are there any offence-specific mitigating factors that should be added?**

55. No

**Question 26. Are there any offender-specific mitigating factors that should be added?**

56. No

**Question 27. Do you agree with the inclusion of the 'Review the Sentence' step? Please state what, if anything, should be removed or added.**

57. This potentially mitigates the difficulty identified above in relation to the minimum sentence being placed at the beginning of the sentence, but is nevertheless submitted that the better approach is that for the minimum sentence to be considered at this stage when the sentence is being reviewed.

**Question 28. Do you consider that the sentence imposed in Case Study C is proportionate? If you do not agree, please tell us what sentence should be imposed and why.**

58. The sentence in this case is proportionate

**Question 29. Are there any equality or diversity matters that the Council should consider? Please provide evidence of any issues where possible.**

59. No

**Question 30. Do you have any further comments you wish to make about any of the guidelines?**

60. In relation to the youth guideline it is submitted that the Council has had insufficient regard for the potential for the proposed guidelines to increase the number and length of custodial sentences for youths. Figure 3 of the

impact assessment shows that the majority of sentences imposed, even for threat offences, are non-custodial. The impact assessment for the youth guideline states it is not anticipated that more offenders will receive a custodial sentence. It is respectfully submitted that this assessment is unrealistic given the proposed guideline. At present 8% of offenders are sentenced to custody for possession offences, however the proposed guideline places the starting point blade possession offence as passing the custodial threshold. This will inevitably lead to more custodial sentences than the 8% that there are at present. Custody for a youth should be a last resort not a starting point.