



## **CBA Response to Sentencing Council Consultation entitled Bladed Articles and Offensive Weapons Guideline Consultation**

**9<sup>th</sup> January 2017**

### **Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

## Bladed Articles and Offensive Weapons: Possession

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

4. We suggest that the focus of the assessment of culpability should be upon levels of culpability determined by reference to the offender's intention, purpose and/or motivation in possessing the weapon.
5. The inherent dangerousness of the weapon itself should instead be addressed as part of the assessment of harm, since that includes the *risk of harm* both to victims and to the public at large (i.e. that which might/would have arisen were the weapon to have been produced and/or used). See further §10-11 below.
6. Further, we have related concerns that on the present draft objectionable anomalies may arise in the assessment of offenders' culpability, for example:
  - a. Between the culpability of an offender 'A' who was in possession of a knife but did not produce it (whose culpability would be high on the present draft) and that of an offender 'B' in possession of a non-"highly dangerous" weapon who produces and uses it to threaten or cause fear (whose culpability would be medium, on the present draft); and
  - b. Between the culpability of an offender 'C' whose possession of a non-"highly dangerous" weapon fell just short of a reasonable excuse (whose culpability would on the present draft – rightly, in our view – be lesser) and that of an offender 'D' in possession of a non-"highly dangerous" weapon who had no good reason at all for his possession of that weapon (but yet whose culpability is equated to that of 'C', on the present draft, provided D's weapon was not used to threaten or cause fear).
7. The proposed classification of weapons as those that are "highly dangerous" and those that are not, and making that a key determinant of culpability, may tend to obscure the fact that all weapons falling within the legislation are capable of causing, at least, fear. There may also be difficulties of interpretation and of

consistency associated with this classification (between highly dangerous and non-highly dangerous weapons).

8. Consistent with our suggested focus upon the offender's intention, purpose and/or motivation when assessing culpability, we have suggested below an additional characteristic of high culpability: where the offender possessed the weapon for the purposes of criminal activity and/or in connection with his/her association with a gang. Culpability, expressed in terms of the offender's motivation or purpose, will be high in those contexts, and for practical/empirical reasons the argument for deterrent sentences perhaps at its most forceful.

**Question Two: Are there any culpability factors that should be added or removed?**

9. For the reasons set out at §4-8 above, we would suggest the following alternative structure for the culpability characteristics:

- a. **High Culpability (A)**

- Offender intended that the weapon (of any description), whether in fact produced or not, be used by the offender or another to cause injury and/or fear.
- Offender possessed the weapon for the purposes of criminal activity and/or in connection with his/her association with a gang.
- Offender 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.

- b. **Medium Culpability (B)**

- In all other cases where characteristics for categories A and C are not present.

- c. **Lesser Culpability (C)**

- Offender's possession falls just short of reasonable excuse.

**Question Three: Do you agree with the proposed approach to the assessment of harm?**

10. For the reasons set out at §5 above, we would suggest that it is in the assessment of harm that the court should assess the relative dangerousness of the offender's conduct, including the likelihood of harm occurring and the gravity of the harm that could have resulted. The gravity of the harm that could have resulted will include consideration of the inherent dangerousness of the weapon. This is consistent with Section 143(1) CJA 2003 "*....any harm which the offence caused, was intended to cause or might foreseeably have caused.*"

**Question Four: Are there any harm factors that should be added or removed?**

11. See §5 and §10 above. We suggest the additional Category 1 harm factor of:

- Weapon of a type that carries a high risk of harm if used (whether or not in fact used or produced in the commission of the offence). Note: This would include bladed articles and other (as classified on the present draft) "highly dangerous" weapons.

12. Where no 'actual harm' has occurred the court will be concerned with an assessment of the relative dangerousness of the offender's conduct. We therefore also question whether or not the Category 3 factor of "no/minimal distress" ought to be accorded the decisive weight of being included as a harm factor, as distinct from constituting a mitigating factor.

**Question Five: Do you have any comments on the sentence ranges and starting points?**

13. No, although we have set out above at §6 above some anomalies that may arise on the present draft of the culpability and harm factors at Step One and which may therefore lead to disproportionate sentences as between offenders.

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

14. Given that Deliberate Humiliation of Victim (including by social media etc.) is an aggravating factor for these offences when committed by those under 18, we suggest it ought also to be included for those aged 18 or over.

**Question Seven: Are there any mitigating factors that should be added or removed?**

15. No.

**Question Eight: Does the section on minimum sentences provide adequate explanation of the provisions?**

16. Yes.

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

17. Yes.

**Question Ten: 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.**

18. If the defendant is to be charged only with the offence of possession of an offensive weapon arising out of this incident, the sentence imposed for that offence ought, in our view, to fall close to the top of the spectrum (at around 3 ½ years), and therefore outside the upper parameter of the A1 sentencing range on the present draft.

19. For the reasons set out **at §9 above**, we suggest that the true reasons that this ought properly to be characterised as A1 offence are as follows:

Step One – Culpability and Harm

- Culpability: The offender intended (but for the intervention of the police) to use the spray bottle containing acid 'to take away the victim's pretty smile' (i.e. to cause her serious and permanent injury).

- Harm: The weapon was of a type that carries a high risk of harm if used.
20. There are serious aggravating factors including not only significant planning and previous relevant offending, but also the location of the offence, at/outside the victim's home.

**Bladed Articles and Offensive Weapons: Threats**

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

21. As in relation to the draft possession guideline, we suggest that the inherent dangerousness of the weapon itself should not be addressed at the assessment of culpability, but instead at the assessment of harm.

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

22. For the same reasons, we suggest that the first two high culpability factors relating to the inherent dangerousness of the weapon should be removed here.
23. We consider that our proposed additional characteristic of high culpability (where the offender threatened another person with a weapon possessed the weapon for the purposes of criminal activity and/or in connection with his/her association with a gang) would apply equally to the Threat offences.

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

20. As in relation to the draft possession guideline, the inherent dangerousness of the weapon should be considered here, as part of the assessment of harm. A victim will be more frightened when threatened with such a weapon and there is a greater risk of serious injury.

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

21. For the same reasons, we suggest the additional Category 1 harm factor of:

- a. Weapon of a type that carries a high risk of harm. Note: This would include bladed articles and other (as classified on the present draft) “highly dangerous” weapons.

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

22. No.

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

23. Yes.

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

24. Yes.

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

25. 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.**

26. Yes.

## **Bladed Articles and Offensive Weapons: Youth Guideline**

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

27. Yes.

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

28. Yes.

**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.**

29. The amalgamation of the culpability and harm factors on the present draft may not provide sufficient guidance as to how the court is to achieve consistency when resolving those factors when they point in opposing directions. For example, in the case of a youth offender who is in possession of a bladed article (whether produced or not, where a custodial sentence or YRO will be indicated) in circumstances that amounted to a fleeting incident with no/minimal distress and/or where there was no/minimal risk of the weapon being used to threaten or cause harm (where a non-custodial sentence may be the most suitable disposal).

30. We would therefore favour an approach to culpability and harm structured similarly to that in the adult guideline (A1-3, B1-3 etc.), so as to enable the court to sentence youths consistently.

31. On the present structure the potential for anomalies between the sentences received by youth offenders of the sort indicated in relation to adults (at §6 above) is perhaps even greater than it is with adult offenders. For the same reasons we suggest that the nature of the weapon (its inherent dangerousness), ought not, in effect, to be accorded the status of the determinant factor in prescribing a custodial sentence for youth offenders. For example, as presently



drafted, a youth offender who (but for the intervention of the police) intended to use a non-highly dangerous weapon to cause fear or injury in a planned attack, does not 'trigger' any of the harm and culpability factors indicating a custodial sentence at Step One.

**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.**

32. See §29-31 above.

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

33. Yes.

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

34. No.

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

35. No. However, in circumstances where Steps One and Two apply regardless of the degree of the offender's youth (i.e. whether e.g. 13 or 17), it may be appropriate to emphasise the need to have regard to this important factor before arriving at a sentence.

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

36. Yes.

**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.**

37. Yes.

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

38. No.

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

39. No.