



House of Commons
Justice Committee

Draft Sentencing Guidelines on bladed articles and offensive weapons

Eighth Report of Session 2016–17

*Report, together with formal minutes
relating to the report*

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Justice Committee

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Summary

In this Report we consider three sets of sentencing guidelines published for consultation by the Sentencing Council. These are the guidelines on: possession of a bladed article or offensive weapon; threatening with a bladed article or offensive weapon; and bladed articles and offensive weapons—youths.

The ‘threatening’ offences all carry mandatory minimum sentences of six months’ imprisonment for an adult or four months’ Detention and Training Order for a youth aged 16 or 17. In 2015, in response to public concerns about knife crime, similar mandatory sentences were introduced for second or subsequent possession offences. The Council’s analysis of court data indicates a steady increase in the use and length of custodial sentences for possession offences over the last decade.

The Council expects the new adult guidelines to increase the proportion of offences that result in custodial sentences but it has been unable to estimate with any certainty how sentencers’ behaviour may change. We say that we appreciate the difficulties in making such predictions, but the prospect of a substantial increase in the number of custodial sentences causes us concern. We recommend that the Council ask the Ministry of Justice to consider how any predicted increase in the prison population might be accommodated.

In summary, our other principal recommendations are as follows:

- Analysis of the impact of legislation should be included in the Council’s annual reports on sentencing factors. The report for 2016/17 should consider the impact of mandatory custodial sentences for offences involving bladed articles and offensive weapons.
- We fully agree that possession of a knife should remain an offence of high culpability. The culpability factors proposed in the adult possession guideline should be reconsidered, taking into account observations from respondents about the need for clarification.
- We recommend that consideration be given to extending the category ranges so that the upper limits for sentencing these offences approximate more closely to the statutory maximum penalties.
- The Council should review the proposed lists of aggravating and mitigating factors to clarify descriptions, to avoid the possibility of ‘double-counting’ and to add ‘remorse’ as a mitigating factor.
- The youth guideline should remind sentencers of their legal obligations towards children who offend, particularly under section 44 of the Children and Young Persons Act 1933.
- To avoid confusion, there should be more consistency between the proposed aggravating and mitigating factors in the youth guideline and those in the overarching principles. ‘Offender in a group or gang’ should be limited to situations where the offender was operating within a group or gang and had an active role in committing the offence.

1 Sentencing guidelines and the role of the Committee

The Sentencing Council

1. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice, set up to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. Its primary role is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Council also assesses the impact of guidelines on sentencing practice and promotes public awareness of sentencing practice in the magistrates' courts and the Crown Court.

2. Under section 120 of the Coroners and Justice Act 2009,¹ the Council is required to publish sentencing guidelines in draft before they are finalised. Section 120(6) of the 2009 Act lists the Justice Committee as a statutory consultee on draft guidelines. The Council must also consult the Lord Chancellor and any person that the Lord Chancellor directs should be consulted, together with such other persons as the Council considers appropriate.

Our response to the current consultation

3. In this Report we comment on three sets of draft guidelines published for consultation by the Sentencing Council on 6 October 2016.² These are the guidelines on:

- bladed articles and offensive weapons: possession;
- bladed articles and offensive weapons: threats; and
- bladed articles and offensive weapons: youths (covering all offences involving bladed articles and offensive weapons).³

We welcome the opportunity to consider these draft guidelines and are grateful to the Sentencing Council for the efforts it has made to liaise with us. We also commend the Council for the clarity of its consultation document. As on other recent occasions, we are grateful to the Council for sharing its consultation responses with us⁴ and for agreeing to consider our Report, although it is published after the consultation deadline (7 January 2017). We decided that it was not necessary for us to seek separate evidence, either formally or informally; we also wanted to avoid imposing duplication of effort on those who had already submitted a response to the Council's own consultation.

1 [Coroners and Justice Act 2009](#)

2 The consultation documents and draft guidelines can be found on the [Sentencing Council's website](#).

3 Under [section 139 \(2\) and \(3\) of the Criminal Justice Act 1988](#), a bladed article includes any article which has a blade or is sharply pointed, including a folding pocketknife if the cutting edge of its blade exceeds 3 inches. Under [section 1\(4\) of the Prevention of Crime Act 1953](#), an offensive weapon means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person

4 We do not publish the responses to the Sentencing Council that we receive.

4. As on previous occasions, the Council has produced for us a useful summary of its proposals, and this is appended to our Report. Rather than responding to each of the Council's consultation questions, our Report focuses on particular themes that appear to us to merit further consideration before the definitive guidelines are finalised.

2 Draft adult guidelines on bladed articles and offensive weapons

Resource implications

5. The Sentencing Council explains in its consultation paper the need for a consistent guideline for offences involving bladed articles and offensive weapons. There are magistrates' court guidelines⁵ produced by the Council's predecessor body, the Sentencing Guidelines Council, which cover some of the adult offences, but there are none applicable to the Crown Court or to young offenders. In addition, new offences have been introduced: possession of bladed articles/offensive weapons in prisons;⁶ and threatening with a bladed article or offensive weapon in a public place or on school premises.⁷ The threats offences all carry mandatory minimum sentences of six months' imprisonment for an adult or four months' Detention and Training Order (DTO) for a youth. In 2015, in response to public concerns about knife crime, similar mandatory sentences were introduced for second or subsequent possession offences.⁸

6. In preparing these draft guidelines, the Council drew on content analysis of transcripts of Crown Court sentencing remarks and a telephone survey of judicial office holders, as well as seeking early feedback on its draft from its 'research pool' of magistrates and District Judges. It also considered sentencing data on court proceedings from the Ministry of Justice (MoJ).⁹ The Sentencing Council's analysis of this data¹⁰ indicated a steady increase in the use and length of custodial sentences for possession offences over the last decade, in relation to both bladed articles and offensive weapons.¹¹ For example, in 2015, nearly two thirds (62%) of sentences for possession of bladed articles were custodial (with a roughly even split between immediate custody and suspended sentences) and the average term was 6.1 months—a significant increase on the average of 3.5 months in 2005. For the newer offence of threatening with a bladed article, immediate custody accounted for 65% of convictions in 2015, and suspended sentences accounted for 29%; the average length of custodial sentences that year was around 12 months.

7. In the 2008 case of *Povey* the Court of Appeal recommended that, when sentencing for an offence involving a knife, the court should normally apply the relevant guidelines 'at the most severe end of the appropriate range of sentences'.¹² Following this judgment, and in the context of extensive media attention on knife crime, the Sentencing Guidelines Council published an additional note in August 2008¹³ to supplement its magistrates' court guidance; this note stated that the starting point for a first time offender in possession of knife that is not used to threaten or to cause fear would be 12 weeks' custody, before any

5 Page 32, [Magistrates' Court Sentencing Guidelines, Sentencing Guidelines Council, 2008](#)

6 Introduced by [section 78 of the Serious Crime Act 2015](#)

7 Introduced by [section 142 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)

8 Introduced by [section 28 and Schedule 5 of the Criminal Justice and Courts Act 2015](#)

9 [Ministry of Justice Criminal Justice System quarterly statistics](#)

10 [Bladed articles and offensive weapons: sentencing data](#). Sentencing Council, October 2016

11 Separately, the Ministry of Justice maintains [quarterly statistics on knife crime in England and Wales](#), sourced from the Police National Computer; these indicate that knife possession offences resulting in a caution or sentence fell between 2008 and 2014, since when they have increased in volume. Over the same period, there has been a steady increase in the proportion of custodial sentences.

12 [R v Povey \[2008\] EWCA Crim 1261](#)

13 [Sentencing for possession of a weapon — knife crime](#); Sentencing Guidelines Council, August 2008

reduction for a guilty plea. The note went on to state that: ‘When the current concerns have been overcome, courts will be notified that the approach should return to the guideline as published.’¹⁴

8. According to the Council’s resource assessment,¹⁵ in spite of the rise in the severity of sentencing, current sentencing practice for adult possession offences still does not fully reflect the existing guidance; for example, 38% of bladed article offences in 2015 led to a non-custodial sentence. Under the proposed new guideline, such offences would continue to attract a minimum starting point of 12 weeks’ custody at the lowest level of harm and the Council’s intention is that sentencing practice would more accurately reflect this starting point. However, in its consultation on the draft guideline the Council does not expressly address the proviso in its predecessor’s additional note—that is, by considering whether the concerns expressed in 2008 have been sufficiently overcome to allow the approach to return to that of the original magistrates’ court guidelines.

9. In our 2016 report on the Council’s reduction in sentence for a guilty plea draft guideline,¹⁶ we expressed concerns about the potentially serious impact of that guideline on the prison population, widely perceived as being under intense strain. Although the new guidelines on bladed articles and offensive weapons are expected to increase the proportion of offences which result in custodial sentences, the resource assessment concludes that ‘it is not possible to estimate with any certainty the proportion of offenders who may now receive a custodial sentence.’¹⁷ It estimates that, were all such offences to lead to imprisonment, this could result in up to 1,800 additional custodial sentences per year of around two months—taking into account guilty plea reductions—with a net additional cost of £2.7 million to the prison and probation services (no estimate is offered of the number of additional prison places that would be required). However, the Council considers it ‘very unlikely’ that all offenders would receive custodial sentences under the new guideline and so suggests that the actual figure is likely to be lower.

10. The resource assessment acknowledges the difficulty of predicting with any precision how sentencers’ behaviour may be affected by the new guidelines. The document states:

Strong assumptions must also be made, in part because it is not possible precisely to foresee how sentencers’ behaviour may be affected across the full range of sentencing scenarios. Historical data on changes in sentencing practice can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. Therefore any estimates of the impact of the new guideline are subject to a large degree of uncertainty.¹⁸

11. The Council accepts that in spite of its efforts to gather information from a range of sources to inform the development of the new guidelines, it cannot fully eliminate a risk that the resource assessment is inaccurate. To try to ensure that sentencers interpret the

14 At paragraph 4

15 Paragraph 5.2, [Consultation Stage resource assessment: bladed articles and offensive weapons](#). Sentencing Council, October 2016

16 [House of Commons Justice Committee, First Report of session 2016 -17; Reduction in sentence for a guilty plea guideline, HC 168](#).

17 [Sentencing Council: Consultation Stage resource assessment: bladed articles and offensive weapons](#), paragraph 5.3

18 [Sentencing Council: Consultation Stage resource assessment: bladed articles and offensive weapons](#), paragraph 4.2

guidelines as intended, the Council plans to provide explanatory material to use alongside the definitive guidelines, and will use Ministry of Justice data to monitor sentence outcomes, thus identifying any divergence from the aims of the new guidelines as quickly as possible.

12. As noted above, offenders convicted of a second or subsequent possession offence should receive a minimum custodial sentence of six months' imprisonment. Likewise, the threats offences carry mandatory minimum custodial sentences of six months. The Council's resource assessment does not anticipate that these aspects of the adult guidelines would have any impact on prison or probation resources, as any increase in prison or probation resources would result from the underlying legislation rather than from the guidelines themselves.

13. We appreciate the difficulties that the Council may face in predicting the impact of its sentencing guidelines without conducting the comprehensive and sophisticated modelling exercises that would be required to do this more accurately. However, the prospect of a substantial and not fully quantified increase in the number of custodial sentences causes us concern, especially if the guidelines are introduced in their present form without a better understanding of their impact, together with a commitment by the Ministry of Justice to provide sufficient resources to meet any additional demand on prison and probation services. We recommend that the Council ask the Ministry of Justice to consider how any predicted increase in the prison population might be accommodated.

Sentencing factors report

14. Section 130 of the Coroners and Justice Act 2009¹⁹ requires the Sentencing Council to produce an annual sentencing factors report, as part of its annual report to the Lord Chancellor. This is an assessment of the actual or potential effect of any changes in the courts' sentencing practice on resources required in the prison, probation and youth justice services. While acknowledging that sentencing practice can be affected by factors such as Court of Appeal guideline judgments, legislation, and changing attitudes towards different offences, the Council's most recent report²⁰ only considers the impact of its five definitive sentencing guidelines published during the twelve months up to 31 March 2016.²¹

15. Analysis of the impact of legislation on sentencing practice has the potential to provide a crucial source of evidence for public and parliamentary scrutiny of sentencing policy. We recommend that the Sentencing Council's future reports consider the effect of a wider range of sentencing factors—including the impact of legislation on the practice of the courts. We further recommend that the Council's sentencing factors report for 2016/17 consider the effect of the mandatory minimum custodial sentences for offences involving threats with bladed articles or offensive weapons and for second or subsequent convictions for possession offences.

19 [Coroners and Justice Act 2009](#)

20 [Sentencing Council, Annual Report 2015/16](#), Annex C

21 During this period, the Sentencing Council published definitive guidelines on theft; health and safety, food safety and hygiene and corporate manslaughter; allocation; robbery; and dangerous dogs.

Assessment of culpability

16. Under the draft guideline for possession offences, any offence involving a bladed article or a ‘highly dangerous’ weapon, whether produced or not, would be categorised as ‘high culpability’.²² In comparison, using a less dangerous weapon ‘to threaten or cause fear’ would be categorised as an offence of ‘medium culpability’, notwithstanding the apparent similarity to the more serious ‘threats’ offences. While some respondents, including the Crown Prosecution Service, the Magistrates Association and HM Council of District Judges, broadly agreed with this approach, others²³ expressed some disquiet about this aspect of the draft guideline, suggesting that it would be fairer and less confusing for simple possession of a knife, in the absence of any evidence of hostility, to be categorised as ‘medium culpability’.

17. Some respondents, including the Crown Prosecution Service, thought that the term ‘highly dangerous’ was open to a range of interpretations and would benefit from further clarification, especially as this factor would indicate high culpability, whether or not the weapon was produced. Others, including the National Crime Agency, thought that possession falling ‘just short of reasonable excuse’ should be explained; according to the draft guideline, this would lead to an assessment of lesser culpability and so would be a critical aspect of many sentencing exercises. In the view of the Criminal Law Solicitors’ Association, high numbers of defendants seeking to advance this argument would lead to an increase in court time devoted to Newton hearings.²⁴

18. We fully agree that possession of a knife should remain an offence of high culpability. We recommend that the Council give further consideration to the section of the possession guideline concerned with determining the offence culpability category, taking the observations from respondents above into account.

Harm factors

19. Both the draft adult guidelines include as a Category 1 harm factor an offence having been committed at a school, ‘or other place where vulnerable people may be present.’²⁵ Some respondents questioned whether the meaning of this phrase was sufficiently clear and/or comprehensive, and various suggestions were made as to how it might be expanded—for example, to include public playgrounds, public transport, hospitals and GP surgeries.

20. We note that some respondents to the Council’s consultation suggested that the phrase ‘other place where vulnerable people may be present’ is lacking in precision and should be further clarified. Rather than attempting to produce an exhaustive list of locations, the guidelines should assist sentencers by offering some examples by way of illustration.

21. We note that the current magistrates’ court guidelines for possession of a bladed article/offensive weapon include as a factor indicating a greater degree of harm ‘offence

22 Page 16 of the consultation paper.

23 For example, Criminal Bar Association, London Criminal Courts Solicitors’ Association, the Law Society.

24 A Newton hearing allows a judge to decide which party is telling the truth in the face of conflicting evidence. The procedure is generally used when a defendant pleads guilty to an offence but there are factual issues (relating, for example, to the appropriate sentence) that need to be resolved between the prosecution and defence.

25 Pages 17 and 26 of the consultation paper.

committed at large public gathering, especially where there may be risk of disorder'. **We consider that this factor should be included in the new guideline, to deal with gatherings such as festivals and public demonstrations where possession of bladed articles or offensive weapons creates a particularly serious risk. We recommend an amendment to both adult guidelines, so that the Category 1 harm factor referring to 'offences committed in prison or in other premises where there may be a risk of serious disorder' continues: 'or large public gatherings.'**

Sentence starting points and category ranges

22. The Sentencing Council explains in its consultation paper that the starting points and category ranges for these offences have been based on statistical data from the Court Proceedings Database, analysis of court transcripts and Court of Appeal sentencing remarks, sentencing ranges within the existing magistrates' court guidelines and guidance from the Court of Appeal in the 2008 *Povey* case. As noted above, the resource assessment acknowledges that the new adult guidelines are expected to increase the proportion of custodial sentences.

23. A few respondents, including West Sussex Magistrates' Bench and HM Council of Circuit Judges, considered that sentence starting points should be higher and/or the category ranges should be extended. However, others disagreed, arguing that the proposed framework would lead to sentence inflation—in particular, an increase in the number and length of custodial sentences and a consequential increase in the prison population. We were interested to read the response of the Criminal Justice Alliance (CJA), whose general position is not to support heavier sentencing without clear indications that this would cause a reduction in offending.

24. **We note that other purposes of sentencing will be relevant, including punishment, and that sentences can signify exceptional public concern about or disapproval of particular behaviour. For this reason, we recommend that the Sentencing Council consider whether the proposed category ranges for the offences of possession and threatening with bladed articles/offensive weapons, with a maximum of 2 years 6 months and 3 years custody respectively, should approximate more closely to the statutory maximum penalty of 4 years imprisonment.**

Aggravating and mitigating factors

25. The draft guidelines set out non-exhaustive lists of aggravating and mitigating factors,²⁶ based on the context of the offence and factors relating to the offender; application of these factors may lead to the court making an upward or downward adjustment from the sentence provisionally arrived at. As well as suggesting that particular aggravating or mitigating factors should be added and/or removed from the lists, including the addition of 'remorse',²⁷ some respondents felt that particular factors needed additional clarification. For example, the Magistrates Association was concerned about the risk of 'double-counting': 'location' is listed as an aggravating factor, while in another context location (that is, schools and other places where vulnerable people might be present) may also be part of the assessment of harm. There was also potential for double-counting in relation to

26 Pages 19 to 21 and page 28 of the consultation paper.

27 'Remorse' is included as a mitigating factor in several definitive guidelines, for example the guidelines on sexual offences, theft, dangerous dogs and robbery.

vulnerable victims, again reflected in the harm assessment. The London Criminal Court Solicitors' Association suggested that being 'part of a group' be distinguished from 'part of a gang', which it considered were two very different concepts.

26. We accept that the lists of aggravating and mitigating factors are not intended to be exhaustive, but we are surprised that 'remorse' has not been expressly mentioned. We also note that respondents' comments suggest more might be done to avoid any possibility of double-counting and to clarify the descriptions of particular factors. *We agree with these comments, and we specifically recommend that 'remorse' be added to the list of mitigating factors.*

27. We also note that 'planning' is included in the proposed list of aggravating factors, while 'no planning' is a factor that would contribute to mitigation. In the context of possession offences, we are unclear how a mitigating factor of 'no planning' would apply, and question its relevance.

3 Draft youth guideline on bladed articles and offensive weapons

The Sentencing Council's approach

28. In developing the draft youth guideline, the Sentencing Council has adopted a structure and approach similar to its draft guidelines for sentencing youths for sexual offences and robbery. These were published for consultation on 12 May 2016, together with the draft guideline on overarching principles for sentencing youths, and our comments on these draft guidelines are included in our Fifth Report of Session 2016–17.²⁸ The Council explains²⁹ that the guideline on bladed articles and offensive weapons should be read in conjunction with its guideline on overarching principles for sentencing youths, which provides greater detail on procedure and on the different sentencing options that are available.

29. The Council's resource assessment for the draft youth guideline³⁰ does not anticipate that the guideline will have an effect on the number of community orders or custodial sentences imposed, or on their length. Consequently, it concludes that there will be no significant impact on correctional resources—other than any increase arising from the recent introduction of mandatory Detention and Training Orders (DTOs) for second and subsequent possession offences.

30. The consultation paper states that the main aim of the draft youth guideline is to assist youth sentencers in deciding whether the case before them has crossed the custody threshold. Unlike the adult guidelines, the youth guideline requires sentencers to decide at the outset whether a mandatory minimum sentence—four months' Detention and Training Order (DTO)—applies to the particular case: that is, to 16 and 17 year olds convicted of an offence of threatening with a bladed article or offensive weapon, or of a second or subsequent possession offence, 'unless the court is of the opinion that there are particular circumstances relating to the offence or the offender which make it unjust to do so in all the circumstances'.³¹ The legislation setting out this test reminds the court that, in making its decision, it must also consider its duty to have regard to the welfare of the child³²—although this reminder has been omitted from the draft guideline. If mandatory sentences do apply, then sentencers are asked to move to Step Two of the guideline which deals with aggravating and mitigating factors, omitting Step One (which considers offence seriousness).

31. Several respondents to the Council's consultation, including the Standing Committee on Youth Justice,³³ noted that the draft guideline offered no further explanation of the critical phrase 'unjust to do so in all the circumstances', on which decisions depend as to

28 [House of Commons Justice Committee, Fifth Report of Session 2016–17: Sentencing Council draft guidelines on sentencing of youths and magistrates' court sentencing, HC646](#)

29 See pages 31 and 55 of consultation paper.

30 Sentencing Council, October 2016. [Consultation stage resource assessment: bladed articles and offensive weapons \(youths\)](#)

31 See page 31 of the consultation paper. This is a statutory test based on the wording of [Section 139A \(5B\) Criminal Justice Act 1988](#), inserted by the Criminal Justice and Courts Act 2015

32 [Section 139A \(5D\) Criminal Justice Act 1988; Section 44\(1\) Children and Young Persons Act 1933](#)

33 Also Dr Tim Bateman (Reader in Youth Justice, University of Bedfordshire); Howard League for Penal Reform; the Magistrates Association; the Youth Justice Board.

whether or not the mandatory minimum sentence should be imposed. Some respondents³⁴ also wanted to see the draft guideline more clearly linked to the Council’s overarching principles for sentencing youths and/or to the welfare principle, including at the final stage of reviewing the sentence (Step Five within the draft guideline).

32. We note that the overarching principles emphasise the court’s duty to have regard to both the principal aim of the youth justice system (to prevent offending by children and young people³⁵) and to the welfare of the child.³⁶ The principles also state that a custodial sentence can only be imposed as a measure of last resort, and that the court must state its reasons why the offence is so serious that no other sanction would be appropriate and, in particular, why a Youth Referral Order with Intensive Supervision and Surveillance—a community sentence equivalent to custody—could not be justified. This proviso reflects Article 37(b) of the UN Convention on the Rights of the Child (UNCRC), which states that imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time.³⁷

33. We accept that the regime of mandatory minimum sentences for 16 and 17 year olds in relation to certain offences sits uneasily with the Council’s individualised approach to the sentencing of youths, as set out in its overarching principles. This makes it all the more important to remind sentencers of their legal obligations towards children who offend, and to emphasise the primacy of the overarching principles.

34. We recommend that the draft youth guideline on bladed articles and offensive weapons be amended to remind sentencers that they must apply the test: ‘unjust to do so in all the circumstances’ by reference to general statutory provisions on the sentencing of children, particularly s44 of the Children and Young Persons Act 1933.

Culpability and harm factors

35. The draft guideline provides examples of the type of culpability and harm factors that may indicate a non-custodial sentence.³⁸ This is followed by an illustrative list of factors that may indicate a custodial sentence, or a Youth Referral Order with Intensive Supervision and Surveillance or Fostering. While a number of respondents including the Law Society, the Crown Prosecution Service and the Youth Justice Board agreed with the Council’s approach, other respondents³⁹ were concerned that the second list of factors (headed by ‘possession of a bladed article whether produced or not’) indicated a presumption in favour of custody or Youth Referral Order for first time offenders; it was suggested that this was inconsistent with factors in the first list (such as ‘fleeting incident’), as well as with current sentencing practice and the UK’s obligations under the UNCRC. The main issue for the Association of YOT Managers (AYM) was prevention of offending—particularly for young people who carry weapons out of fear; AYM thought that the starting point for simple possession of a bladed article should be a community sentence.

34 For example, the Magistrates Association; Youth Justice Board; Standing Committee on Youth Justice; Dr Tim Bateman.

35 [Section 37\(1\) Crime and Disorder Act 1998](#)

36 [Section 44\(1\) Children and Young Persons Act 1933](#)

37 The [UN Convention on the Rights of the Child](#) was ratified by the UK in 1991

38 Pages 32, 33 and 56 of the consultation paper.

39 Respondents who raised concerns included the Magistrates Association, the Standing Committee on Youth Justice; Dr Tim Bateman.

36. We are concerned at the risk of inconsistency within the illustrative list of factors creating a risk of unintended sentence inflation, in particular for simple possession of a bladed article. *We recommend that the Council reconsider its approach to listing these factors, as well as inserting within this section of the guideline an express cross-reference to the overarching principles for sentencing youths.*

37. *We also recommend that sentencers be expressly reminded that, before imposing a custodial sentence, they must be satisfied that the child cannot be dealt with by a Youth Rehabilitation Order with Intensive Supervision and Surveillance or with Fostering.*

Aggravating and mitigating factors

38. The Council has proposed non-exhaustive lists of aggravating and mitigating factors relevant to these offences, together with a further list of mitigating factors relevant to the offender.⁴⁰ While many of these factors also feature in the overarching principles for sentencing youths, this is not the case for all of them—for example, ‘significant degree of planning/premeditation’ and ‘failure to respond to warnings about behaviour’ are not included as aggravating factors in the overarching principles. As with the draft adult guideline, ‘remorse’ does not appear as a mitigating factor, although it is listed in the overarching principles. It also appears inconsistent that ‘deliberate humiliation of victim, including but not limited to the filming of the offence ...’ is an aggravating factor in the youth guideline on bladed articles and offensive weapons, but not in the adult guidelines. **We believe that several aspects of the aggravating and mitigating factors for the youth guideline may be confusing for sentencers, especially when read alongside the overarching guideline. We recommend that the Council adopt a more consistent approach to the relationship between aggravating and mitigating factors in the two guidelines. We also recommend that the deliberate humiliation of victims should appear as an aggravating factor in both adult and youth guidelines in the interests of consistency and fairness.**

39. The proposed aggravating factor ‘offender in a group or gang’ was criticised by some, including the Magistrates Association; the Standing Committee on Youth Justice expressed concerns about the information used to establish whether or not a child is part of a gang, and in particular the fears that police intelligence disproportionately categorises Black and minority ethnic children as gang affiliated. The Standing Committee also considered it unclear why being a member of a group should be an aggravating factor where the group was not involved in, or related to, the offence.

40. The inclusion of this aggravating factor appears to sit uneasily with the welfare issues identified in the overarching principles, where reference is made to: ‘negative influences from peer associates’ as one of the additional factors regularly present in the background of young offenders.⁴¹ Similarly, for offences relating to bladed articles and offensive weapons, ‘participated in offence due to peer pressure/bullying’ is proposed as a factor in mitigation. **We recommend that the aggravating factor ‘offender in a group or gang’ be reworded so that it is limited to situations where the offence was committed by a group or gang and where, in addition, the offender was operating within the group or gang and had an active role in committing the offence.**

40 See pages 33 to 35 and 57 of the consultation paper.

41 Sentencing Council: Draft guidelines: overarching principles - sentencing youths, paragraph 1.12

Conclusions and recommendations

Draft adult guidelines on bladed articles and offensive weapons

1. We appreciate the difficulties that the Council may face in predicting the impact of its sentencing guidelines without conducting the comprehensive and sophisticated modelling exercises that would be required to do this more accurately. However, the prospect of a substantial and not fully quantified increase in the number of custodial sentences causes us concern, especially if the guidelines are introduced in their present form without a better understanding of their impact, together with a commitment by the Ministry of Justice to provide sufficient resources to meet any additional demand on prison and probation services. *We recommend that the Council ask the Ministry of Justice to consider how any predicted increase in the prison population might be accommodated.* (Paragraph 13)
2. Analysis of the impact of legislation on sentencing practice has the potential to provide a crucial source of evidence for public and parliamentary scrutiny of sentencing policy. *We recommend that the Sentencing Council's future reports consider the effect of a wider range of sentencing factors—including the impact of legislation on the practice of the courts. We further recommend that the Council's sentencing factors report for 2016/17 consider the effect of the mandatory minimum custodial sentences for offences involving threats with bladed articles or offensive weapons and for second or subsequent convictions for possession offences.* (Paragraph 15)
3. We fully agree that possession of a knife should remain an offence of high culpability. *We recommend that the Council give further consideration to the section of the possession guideline concerned with determining the offence culpability category, taking the observations from respondents above into account.* (Paragraph 18)
4. We note that some respondents to the Council's consultation suggested that the phrase 'other place where vulnerable people may be present' is lacking in precision and should be further clarified. *Rather than attempting to produce an exhaustive list of locations, the guidelines should assist sentencers by offering some examples by way of illustration.* (Paragraph 20)
5. We consider that 'offence committed at a large public gathering' should be included as a factor in the new guideline, to deal with gatherings such as festivals and public demonstrations where possession of bladed articles or offensive weapons creates a particularly serious risk. *We recommend an amendment to both adult guidelines, so that the Category 1 harm factor referring to 'offences committed in prison or in other premises where there may be a risk of serious disorder' continues: 'or large public gatherings.'* (Paragraph 21)
6. As well as reducing offending, we note that other purposes of sentencing will be relevant, including punishment, and that sentences can signify exceptional public concern about or disapproval of particular behaviour. *For this reason, we recommend that the Sentencing Council consider whether the proposed category ranges for the offences of possession and threatening with bladed articles/offensive weapons, with a*

maximum of 2 years 6 months and 3 years custody respectively, should approximate more closely to the statutory maximum penalty of 4 years imprisonment. (Paragraph 24)

7. We accept that the lists of aggravating and mitigating factors are not intended to be exhaustive, but we are surprised that ‘remorse’ has not been expressly mentioned. We also note that respondents’ comments suggest more might be done to avoid any possibility of double-counting and to clarify the descriptions of particular factors. *We agree with these comments, and we specifically recommend that ‘remorse’ be added to the list of mitigating factors. (Paragraph 26)*
8. We also note that ‘planning’ is included in the proposed list of aggravating factors, while ‘no planning’ is a factor that would contribute to mitigation. In the context of possession offences, we are unclear how a mitigating factor of ‘no planning’ would apply, and question its relevance. (Paragraph 27)

Draft youth guideline on bladed articles and offensive weapons

9. We accept that the regime of mandatory minimum sentences for 16 and 17 year olds in relation to certain offences sits uneasily with the Council’s individualised approach to the sentencing of youths, as set out in its overarching principles. This makes it all the more important to remind sentencers of their legal obligations towards children who offend, and to emphasise the primacy of the overarching principles. (Paragraph 33)
10. *We recommend that the draft youth guideline on bladed articles and offensive weapons be amended to remind sentencers that they must apply the test: ‘unjust to do so in all the circumstances’ by reference to general statutory provisions on the sentencing of children, particularly s44 of the Children and Young Persons Act 1933. (Paragraph 34)*
11. We are concerned at the risk of inconsistency within the illustrative list of culpability and harm factors creating a risk of unintended sentence inflation, in particular for simple possession of a bladed article. *We recommend that the Council reconsider its approach to listing these factors, as well as inserting within this section of the guideline an express cross-reference to the overarching principles for sentencing youths. (Paragraph 36)*
12. *We also recommend that sentencers be expressly reminded that, before imposing a custodial sentence, they must be satisfied that the child cannot be dealt with by a Youth Rehabilitation Order with Intensive Supervision and Surveillance or with Fostering. (Paragraph 37)*
13. We believe that several aspects of the aggravating and mitigating factors for the youth guideline may be confusing for sentencers, especially when read alongside the overarching guideline. *We recommend that the Council adopt a more consistent approach to the relationship between aggravating and mitigating factors in the two guidelines. We also recommend that the deliberate humiliation of victims should appear as an aggravating factor in both adult and youth guidelines in the interests of consistency and fairness. (Paragraph 38)*

14. *We recommend that the aggravating factor 'offender in a group or gang' be reworded so that it is limited to situations where the offence was committed by a group or gang and where, in addition, the offender was operating within the group or gang and had an active role in committing the offence. (Paragraph 40)*

Appendix: Bladed Articles and Offensive Weapons Consultation: Note by the Sentencing Council¹

1 Aim and summary of the proposals

1.1 This package includes three separate guidelines; possession of a bladed article/offensive weapon; threatening with a bladed article/offensive weapon, and a youth guideline which covers all offences involving bladed articles and offensive weapons.

1.2 Through the production of these draft guidelines the Council aims to ensure that all courts have guidelines that are up to date, and take into account changes to legislation since the last guidelines were produced in 2008. The guidelines also seek to address the growing concern over recent years about the number of people carrying bladed articles and other weapons on the streets, by ensuring appropriate sentencing levels.

1.3 The two new adult guidelines follow the Council's step by step approach to sentencing which involves an assessment of culpability and harm. In line with the concerns about knife crime the Council has taken the view that offences involving bladed articles should fall within the highest bracket of culpability. However the Council is also aware that there are other types of weapons that can be equally dangerous and can have devastating effects, such as acid. For this reason the Council has also included 'highly dangerous' weapons in the highest culpability category, which enables sentencers to use their discretion to determine, on a case by case basis, whether the particular weapon used was 'highly dangerous'. The other high culpability factors include offences which are motivated by hostility toward a victim on the basis of a protected characteristic and, for threatening offences, there is an additional high culpability factor of 'significant degree of planning or premeditation'.

1.4 In relation to harm the Council was aware that these offences are unlikely to involve physical harm but will involve fear or distress and so 'serious alarm or distress' is a high harm factor. In addition the Council is concerned with the risk of harm and so the highest harm levels also include those cases where the offender is in possession of a weapon at a school, prison or other location where vulnerable people may be present, or where there is a risk of serious disorder. For threatening offences there is an additional high harm factor of 'prolonged incident'.

1.5 The new youth guideline is designed to assist sentencers to determine when a case has crossed the custody threshold and should ensure a consistent approach is adopted by sentencers. The guideline also encourages sentencers to consider, in far greater detail, the age/maturity, background and individual circumstances of each offender in order to reach the most appropriate sentence that will best achieve the aim of preventing reoffending, which is the main function of the youth justice system.

1 This document is an overview of the Sentencing Council's consultation on the bladed article and offensive weapons guidelines prepared for the Justice Select Committee. Full details of the proposals can be found at the Council's website: www.sentencingcouncil.org.uk

1.6 All three guidelines provide guidance on the different mandatory minimum sentencing provisions that apply.

2. Why produce a new bladed article/offensive weapon guideline?

2.1 Courts deal with a relatively high number of cases involving knives and other weapons cases. In 2015 there were approximately 7,800 adult offenders and 1,400 young offenders sentenced for the offences covered by the draft guidelines.

2.2 There is a current guideline issued by the Council's predecessor body, the Sentencing Guidelines Council (SGC) in 2008 which provides guidance on possession of bladed articles and offensive weapons for the magistrates' court. However there is no guidance for youths; for adults being sentenced for threatening offences; or for those being sentenced in the Crown Court. In recent years there have been changes to the legislation, introducing mandatory minimum sentences for some offences, and creating new offences.

2.3 The new guidelines will provide sentencers with guidance for all offences, which will help ensure a consistent approach to sentencing and provide transparency for the public in terms of how sentence levels are decided.

3 Reaction to the proposals

3.1 The consultation closed earlier this month (7th January). The Council have not yet considered the responses, however officials have had the time to read them. The responses were broadly positive, but there were a number of areas where consultees felt change was required:

- Many felt that 'highly dangerous weapon', which is used across all three guidelines, needed definition or explanation
- Under the mandatory minimum sentences section on all three guidelines there should be further guidance on what would make it 'unjust in all of the circumstances' to impose the mandatory minimum term.
- Many consultees suggested that 'committed in a domestic context' should be included as an aggravating factor in all guidelines to cover domestic abuse type cases.
- A number of respondents felt that mere possession of a bladed article should not be a high culpability factor.
- In the adult possession guideline the step 1 harm factors include locations where the presence of a weapon could lead to a higher risk of harm. It was suggested by a number of respondents that other locations might be relevant such as 'public transport'.
- In the adult possession and threats guidelines some consultees suggested that there should be an advanced warning at the start of the guideline that mandatory minimum sentences may apply, so that sentencers are given the 'heads up' from the beginning

4 The Council's response

4.1 The Council will discuss the responses to the consultation (including the response from the JSC) at its meetings in March, April and May 2017 with a view to publishing the definitive guideline in September 2017. However, this timetable may change if the Council considers that more time is needed to refine the proposals.

Formal Minutes

Wednesday 1 March 2017

Members present:

Robert Neill, in the Chair

Alex Chalk

Mr David Hanson

Philip Davies

Victoria Prentis

Kate Green

Draft Report (*Draft Sentencing Guidelines on bladed articles and offensive weapons*), proposed by the Chair, brought up and read the first time.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 40 read and agreed to.

Summary read and agreed to.

A paper was appended to the Report.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 7 March at 9.15am

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2015–16

First Report	Draft Allocation Guideline	HC 404
Second Report	Criminal courts charge	HC 586 (HC 667)
Third Report	Appointment of HM Chief Inspector of Prisons and HM Chief Inspector of Probation	HC 624
Fourth Report	Criminal Justice inspectorates	HC 724 (HC 1000)
Fifth Report	Draft sentencing guideline on community and custodial sentences	HC 876
Sixth Report	Prison Safety	HC 625 (HC 647)
First Special Report	Women offenders: follow-up: Government response to the Committee's Thirteenth Report of Session 2014–15	HC 374

Session 2016–17

First Report	Reduction in sentence for a guilty plea guideline	HC 168
Second Report	Courts and tribunals fees	HC 167 (Cm 9300)
Third Report	Appointment of the Chair of the Judicial Appointments Commission	HC 416
Fourth Report	Restorative Justice	HC 164 (Cm 9343)
Fifth Report	Sentencing Council draft guidelines on sentencing of youths and magistrates' court sentencing	HC 646
Sixth Report	The role of the magistracy	HC 165 (Cm 9368)
Seventh Report	The treatment of young adults in the criminal justice system	HC 169 (Cm 9388)
First Special Report	Prison safety: Government Response to the Committee's Sixth Report of Session 2015–16	HC 647