



**CBA and Bar Council Response to
Consultation on new legislation on offensive and dangerous weapons**

Dated: 9 December 2017

Introduction

The Bar Council

- A. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
- B. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved

Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

The Criminal Bar Association

- C. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
- D. 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.
- E. 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.
- F. The following is the response from the CBA and Bar Council to the above entitled Consultation.

1. Proposal A: Creating offences to prevent knives sold online being delivered to a private residential address and ensuring the age and identity of the purchaser are checked

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1. Do you agree that further action should be taken to ensure knives are not being sold online to under 18s?

- Yes
- No

Please give reasons (max 250 words)

We agree in principle that further action should be taken but are concerned as to the practicalities of the proposal.

Who should fall foul of the law in the event that a knife is delivered to a private residential address; the courier or the retailer? We envisage responsibility resting with the retailer and would endorse that course. The proposed provisions as to the courier may be more difficult to implement unless the onus is on the retailer to ensure that the courier is aware of the item in question and his/her obligations. One option would be mandatory labelling. Absent such a requirement, we are concerned that the reform could criminalise the unknowing postman.

Consideration must also be given to the type of weapons that will be covered by the reform. Section 139 CJA 1988 applies to bladed and sharply pointed articles. If the same definition were adopted then it would be an offence to deliver scissors.

We would also encourage that “private residential address” be defined. Existing case law provides that the upper landing of a block of flats which could be reached without hindrance amounted to a public place because there were no barriers or notices restricting access: *Knox v Anderton* (1982) 76 Cr App R 156. A courier leaving a parcel at such a place might therefore have a defence. Regarding “residential”, must the premises be habitually occupied; what of dual purpose addresses; and what of movable abodes like caravans?

2. Proposal B: Making it an offence to possess certain weapons in private

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2. Proposal B: Making it an offence to possess certain weapons in private?

- Yes
- No

Please give reasons (max 250 words)

We agree in principle with the proposal because a reform of this nature would allow the police to intervene before an offensive weapon could be handled in a public place. However, the prohibition of anything undertaken in private will engage Article 8 of the European Convention on Human Rights and will therefore require careful analysis and consideration.

When drafting the 1988 Order and 1959 Act, the question of which weapons were categorised as ‘offensive’ was considered in light of possession of such a weapon in a public place. If the scope of that legislation is to now be extended to cover possession in private, the considerations are different and the list should be reviewed.

A definitive list of the proposed weapons ought to be provided, if it is to be extended, so that careful consideration can be given to the proportionality of their inclusion in the proposed prohibition.

Further, careful consideration needs to be given to proof of possession. There are certain offences, for example section 57 of the Terrorism Act 2000, where the court may assume that the accused possessed an article if it is on the same premises as him unless he proves that he did not know of its presence or that he had no control of it. Proof of possession may be very problematic, particularly in multi-occupancy addresses, without similar statutory guidance but careful thought must be given before shifting the onus on to the suspect.

3. Proposal C: Making it an offence to possess a knife or an offensive weapon in education institutions other than schools

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3. Do you agree that it is in the public interest to extend the offence of possession of offensive weapons/articles with blade or point to further education colleges, sixth form colleges, designated institutions and 16-19 academies?

Please explain your answer and give evidence where possible, including on the scale and nature of this problem and the likely impact of such an offence.

- Yes
 No

Please give reasons (max 250 words)

Yes, we agree with the proposal. The rationale for prohibiting such possession to schools should extend to other education facilities.

4. Proposal D: Amending the offences of threatening with an article with blade or point or an offensive weapon

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4. Do you agree that we amend the existing offences on threatening with a knife so that the prosecution must instead prove that the victim would have feared that he/she would be likely to suffer serious physical harm?

- Yes
 No

Please give reasons (max 250 words)

We doubt the need for a reform of this nature. An individual guilty of possessing a bladed, pointed or offensive weapon would face a custodial sentence in accordance with the case of Povey [2008] EWCA Crim 1261. The sentence would be higher if the item was possessed in dangerous circumstances which include circumstances where it is feared the blade will be used. The offence of simple possession is also easier to prove than the proposed offence.

The aggravated offence of threatening with a blade carries with it much harsher sentences in recognition of the real risk of actual harm, as opposed to that which is perceived. The two offences ought not to be conflated.

In any event, the proposed reform would not necessarily make the offence easier to prove, if that is what is sought to be achieved, for it retains an objective element: the victim must be reasonable in his/her fears. Thus,

- a. The law would fail to protect a victim who was so frightened that he/she failed to contemplate the extent of the harm that he/she might suffer;

- b. The proposed reform would fail to protect victims who chose not to attend court. The law, as it currently stands, would allow bystanders to give evidence of the use of a weapon and the circumstances in which it had been used. In the absence of a victim, there may not be any admissible evidence to prove what he/she feared would happen.

There are arguably simpler ways to reform section 139AA of the CJA 1988, for example:

- a. To remove the requirement that the risk be *immediate*;
- b. To remove the requirement that the immediate risk be of *serious* harm.

5. Proposal E. Updating definition of a flick knife

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5. Do you agree with our updated definition of a flick knife?

- Yes
- No

Please give reasons (max 250 words)

We agree that definition should be amended to reflect changes.

6. Proposal F: Making it an offence to sell products with certain corrosive substances to under 18s

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6. Do you agree that we should make it an offence to sell certain corrosive substances to under 18s?

- Yes
- No

Please give reasons (max 250 words)

We agree in principle that it should be an offence to sell the most harmful corrosive substances to those without an obvious legitimate reason for purchasing them. The particular corrosive substances to be prohibited must however be identified sufficiently. We would be keen to avoid a blanket prohibition on obvious household substances that might be corrosive as we are concerned that otherwise those aged over 16 living independently may have difficulties if they were to wish to buy certain household substances.

Further, it should be apparent as to who is to fall foul of the provision in the event of such a sale (should it be the retailer or the till-operator?); we envisage that there should be offences in relation to both with suitable defences of reasonable enquiries being made.

Consideration should also be given to a regulatory penalty, such as a restriction on the ability of a retailer to trade in specific products in the event of breach.

7. Proposal G: Making it an offence to possess a corrosive substance in a public place

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7. Do you agree that it should be an offence to possess a corrosive substance in a public place?

- Yes
- No

Please give reasons (max 250 words)

We agree that there should be such an offence but what constitutes “corrosive substance” should be identified sufficiently. There is concern that to not identify substances could lead to possession of a number of “legitimate” substances potentially criminalising members of the public.

We agree that a defence that the possessor had lawful authority or a reasonable excuse should exist.

8. Proposal H: Prohibit .50 calibre ‘materiel destruction’ rifles and rapid firing rifles under section 5 of the Firearms Act 1968

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8. Do you agree that we should prohibit these specific weapon types under section 5 of the Firearms Act 1968?

- Yes
- No

Unable to provide a definitive answer.

Please give reasons (max 250 words)

As a matter of principle we welcome legislation that addresses an identified need to protect the public. At the same time legislation that impinges on the freedom of individuals and organisations requires careful scrutiny. No information is provided in the consultation as to whether rifles of the description set out have been used to cause harm on the UK mainland or have demonstrably fallen into criminal hands. Although the numbers of sports people currently holding these rifles must be very low prohibiting possession of the weapons would curtail their sporting and recreational activities. Ultimately insufficient information has been provided as to the risk posed for the CBA to adopt a clear stance on this issue.

9. Business and trade

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The CBA is unable to comment on this section.

10. About you

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Please use this section to tell us about yourself. Providing this information is voluntary. Please be assured that responses will be treated as personal data by the Home Office in compliance with government guidance on holding personal information.

27. Your details:

The Bar Council
The Criminal Bar Association.

28. Would you like your response to remain anonymous?

- Yes
- No

29. Do you have any comments about the proposals in this consultation in relation to impact on protected characteristics under the Equalities Act 2010: age; disability; pregnancy and maternity; race; religion or belief; gender; sexual orientation?

- Yes
- No