

Submission to the Sentencing Council by the London Borough of Barking and Dagenham

Re: the need for a sentencing guideline for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988

1. Proposal

1.1. Having regard to the principles adhered to by the Sentencing Council in determining which areas warrant the provision of a Definitive Sentencing Guideline (“Guideline”), we seek to invite the Council to draft and consult on a Guideline for the offence of selling knives to persons under the age of eighteen, contrary to s.141A of the Criminal Justice Act 1988, as amended.

1.2. We consider that sentencing tribunals in the magistrates’ court would be greatly assisted by a Guideline for this offence (and more generally for all offences concerning age-restricted sales), which would ensure greater clarity and consistency in the sentencing process.

1.3. Whilst this submission is drafted by the London Borough of Barking and Dagenham, it enjoys the support of the Trading Standards Community, from lawyers practising in this area of law and other stakeholders.

1.4. In June 2019, the Mayor of London Office for Policing and Crime (“MOPAC”) wrote to the Lord Chief Justice, Lord Burnett, and members of the Sentencing Council inviting the development of sentencing guidance for the ‘illegal sale of knives’. In that letter, MOPAC expressed the following concern:

“Relatively few retailers are prosecuted but for those convicted, the sentence needs to send a clear message that selling knives to children will have significant consequences and not just a limited financial penalty that can be absorbed as an operating cost.”

1.5 We have appended the outcomes of several prosecutions that have taken place in London.

2. Legislative Background

- 2.1. Section 6 of the Offensive Weapons Act 1996 amended the Criminal Justice Act 1988 (“the Act”) to insert section 141A. By the new s.141A, it became a criminal offence to sell a knife to a person under the age of sixteen.
- 2.2. Parliament legislated following a series of high-profile murders by young persons, including the notorious murder of the headmaster, Philip Lawrence, who was stabbed to death as he intervened during a fight outside his school’s gates¹. The complex causes of knife crime were reflected in the parliamentary and public debates at the time, including the then much quoted comment by Frances Lawrence, the widow of Philip Lawrence, that *"A knife is an inanimate object, and it needs a human being to invest it with murderous properties."*
- 2.3. The Offensive Weapons Act 1996 was not originally intended to introduce age restrictions on sales of knives, but rather to increase penalties for carrying weapons in public and to introduce an offence of having a blade on school premises. However, it was stated that although weapons could still be found by young persons in kitchen drawers, the introduction of a ban would be a deterrent to some people and would send *"...a powerful message of disapproval of such weapons"*².
- 2.4. Furthermore, it was reported there were calls by retailers at the time for a clear ban on sales to young persons as it removed the need for retailers to make on the spot assessments of the reason for purchase³. Parliament decided, therefore, to introduce an amendment to the Bill to restrict the age of sales of knives⁴.

¹ http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_2536000/2536661.stm

² Lady Olga Maitland Hansard HC Deb 26 January 1996 vol 270 para 591 - <https://api.parliament.uk/historic-hansard/commons/1996/jan/26/offensive-weapons>

³ Lady Olga Maitland Hansard HC Deb 26 January 1996 vol 270 para 594 - <https://api.parliament.uk/historic-hansard/commons/1996/jan/26/offensive-weapons>

⁴ Hansard Lords 5th June 1996 column 1346 - <https://publications.parliament.uk/pa/ld199596/ldhansrd/vo960605/text/60605-11.htm>

2.5. Commentators on the Offensive Weapons Act 1996 provisions have referred to them as a form of preventative justice⁵.

2.6. The primary purpose of more recent changes to knife sales age restriction legislation appears to have been to assuage public concerns. During the second reading of the Violent Crime Reduction Bill in October 2006, then Home Office Minister, Greg Clark, stated:

*“Comprehensive legislation is in place to deal with knives and other offensive weapons, but public concern remains, so we intend to raise the age limit of who can be sold a knife from 16 to 18 to limit the distribution of knives among young people.”*⁶

2.7. More recently, in the debate on the Offensive Weapons Act 2019, Victoria Atkins, the Minister for Crime, Safeguarding and Vulnerability, stated that the purpose of introducing measures to restrict online sales of knives to young persons was:

*“...to address the concern expressed to us by charities, the police and others about the ability of young people to get hold of knives.”*⁷

2.8. As discussed below, the Offensive Weapons Act 2019 has introduced a number of new offences relating to the sale of knives.

2.9. It is apparent that there are powerful public policy considerations underpinning the motivation for age restricting the purchase of knives, the fact of which is not reflected in any guidance the courts are required to have regard to. As such, these are considerations which can remain unspoken at the sentencing stage or, of more concern, not acknowledged.

⁵ Judith Rowbotham, Kim Stevenson *Behaving Badly: Social Panic and Moral Outrage - Victorian and Modern Parallels*, Routledge 2003

⁶ Hansard Commons 20 Jun 2005: Column 557 <https://bit.ly/2pShjtH>

⁷ Hansard Commons 2018-11-28 <http://bit.ly/30SIS3U>

3. Rise in Knife Crime

- 3.1 It is uncontroversial to observe that the endemic problems with knife crime in London and across England and Wales remain prominent and well-documented.
- 3.2 Since the year ending March 2011, there has been a volume increase of 44% in the number of recorded offences involving a knife or sharp instrument⁸. In the year ending June 2019, there was a 7% volume rise to 44,076 offences.
- 3.3 The above figures do not include the simple offence of ‘possession of an article with a blade or point’, in respect of which during the same period there was a 5% increase in the number of offences dealt with by the Criminal Justice System⁹.
- 3.4 The total number of 22,306 offences concerning possession of an offensive weapon or knife is the highest in the last ten years, and is driven by possession of an article with a blade or point offences. Nearly a quarter of those offences were committed by offenders between the age of 10 and 17.
- 3.5 Whilst there are Guidelines for the court to follow in sentencing youths caught carrying, or worse, using a knife or bladed article, there is no Guideline for sentencing those that might have sold the knife.

4. Absence of a Definitive Guideline

- 4.1 The absence of a Guideline creates an anomaly in sentencing practice, which, it is respectfully submitted, is inimicable to the interests of justice, for the reason that its absence leads to the occurrence of inconsistent and arbitrary outcomes¹⁰.

⁸ Office of National Statistics Report on ‘Crime in England and Wales: year ending June 2019’

⁹ Ministry Of Justice Report on Knife and Weapon Sentencing Statistics, England and Wales, published 24 October 2019

¹⁰ See Appendix A

- 4.2 Our research demonstrates, with one notable exception, that fines are disproportionately low having regard not only to the public interest factors referred to at paragraph 2 above, but also having regard to the size of the organisation before the court; a factor upon which modern sentencing practice has come to place substantial emphasis.
- 4.3 It should be observed that there is a gulf between the highest fine imposed and the next highest fine imposed for the s.141A offence, which could not be attributable solely to the difference between the turnovers of the respective defendant companies. We address this in further detail at paragraph 6 below.
- 4.4 The Sentencing Council's consultation on the Health & Safety Guideline in November 2014 followed a review of sentencing practice across the UK that revealed inconsistencies in the way sentencing decisions were being reached. In addition, the Food Standards Agency had conveyed concerns to the Sentencing Council that penalties being imposed were not reflecting the seriousness of the matters before the court, and that fines being passed on corporate offenders in particular were too low.
- 4.5 The vast majority of defendants in prosecutions for offences contrary to s.141A are corporate bodies. This is true of most age restricted sales and product safety prosecutions by Trading Standards Services. Although the only disposal available to the court is a financial penalty, there is no scale to follow in setting the size of that penalty. In consequence, the same inconsistencies revealed by the review into sentencing practice in health and safety cases pervade sentencing practice in this area too.
- 4.6 In the absence of a Guideline, there is little more than comment that might be put before a sentencing tribunal to assist in determining the relevant factors they might wish to have regard to. As such, the sentence is dependent to a certain degree not just on the extent of any assistance provided to the court by the prosecution, either by way of submission or evidence, but also on the willingness of the court to accept and reflect such matters in the sentence passed.

4.7 We would submit that the interests of justice are not served if sentencing practice is reliant on the assiduousness of the prosecutor and the willingness of lay magistrates to adopt analogous guidelines.

5. **Analogous Offences?**

5.1 We recognise that the recently published ‘General Guideline: Overarching Principles’ enjoins the court in the absence of an offence specific Guideline to have regard to guidelines for analogous offences, but it is our experience that courts are reluctant to have regard to the tables showing appropriate starting points and brackets for fines dependent on the size of the offending organisation.

5.2 In our opinion, this is not surprising. The common refrain from magistrates’ courts is that it would not be appropriate to have regard to the tables in other guidelines as the offences are not truly analogous.

5.3 Even if it is accepted that it is possible to extrapolate general principles from guidelines for roughly analogous offences, there is no table of fines to apply those principles to. This artificialises the process of drawing parallels.

5.4 After all, the sole purpose of determining levels of culpability and harm is to categorise the offence for the purpose of placing it within the table of fines at Step Two.

5.5 Undoubtedly, there are some culpability factors in the Definitive Guideline for the Sentencing of Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences (“the Health and Safety Guideline”) that might readily be thought capable of applying to an assessment of the culpability of a business that has sold a knife to a child, but unless the court is prepared to have regard to the tables as well, the mere recognition of such factors provides limited guidance for reaching the appropriate fine.

- 5.6 It is our opinion that it is by no means guaranteed that a sentencing tribunal will accept that other current guidelines are sufficiently analogous that they should be applied to the s.141A offence.
- 5.7 We acknowledge that the Health and Safety Guideline concerns a range of offences which share some characteristics with those restricting the sale of knives to young persons, namely (i) assessing the extent to which the reasonable precautions taken, and due diligence exercised, by the offender fell short of expected standards and (ii) there is a risk of harm from the s.141A offence that does not equate to direct evidence of harm.
- 5.8 However, there are several other (non-exhaustive) factors relevant to the s.141A offence, which do not apply to health and safety or food offences, such as:
- i) The underlying public policy for age restricted sales
 - ii) The age or putative vulnerability of the purchaser
 - iii) The serious, often fatal, harm that can be caused by the criminal use of a knife
 - iv) The risk to the purchasing youth of being prosecuted for mere possession of the knife
 - v) The extent of the due diligence systems in place which are unique to age restricted sales e.g. signage, refusals registers, being signatories to voluntary codes, training of staff, till prompts etc.
- 5.9 As to the (iii) above, with the exception of one notorious prosecution¹¹, we are aware only of prosecutions for the sale of knives to young persons which have been the result of test purchases rather than the purchase of a knife by a young person which has been used in an act of violence.
- 5.10 That notorious exception concerns a prosecution by the Trading Standards Service at Islington of a shop manager and the company which owned the

¹¹ *Islington v City Supermarket (UK) Ltd* (2015), Highbury Magistrates' Court - see <https://www.islington.media/news/shopkeeper-fined-for-selling-knife-to-stab-crime-teenager>

business. The defendants had sold two knives to a 17-year old who used them minutes later to stab another young person seven times in a near fatal attack. Having been convicted after a trial, the company was fined £750 and the manager £500.

5.11 The primary harm detected by underage knife test purchases is the risk of harm which arises from a retailer failing to have sufficient correctly implemented precautions in place to prevent knives being placed in the hands of young persons. It is one step removed from the risks which arise when a young person goes out with a knife in their pocket or bag, facing not only the risk of being in a potentially deadly confrontation but also of being subject to criminal proceedings for knife possession¹², as set out at point (iv) above.

5.12 In this regard, it is unfortunate that current sentencing practices routinely fail to acknowledge the harm, or risk of harm, identified by Trading Standards test purchases, despite young persons facing custodial sentences (in some cases with minimum terms) when caught in possession of knives without lawful excuse¹³. This lack of acknowledgment is in the face of sentencing guidelines for bladed articles and offensive weapons referring explicitly to quantifiable harm as including the risk of harm¹⁴.

6. Sentencing in Practice

6.1 We have carried out extensive research into how the s.141A offence is being sentenced across London, where the issue of knife crime remains a substantial unabated problem, which has revealed both inconsistency and a lack of understanding by magistrates as to the issues that might, or should, properly be taken into account when passing sentence.

¹² Referred to by District Judge Lucie when sentencing *LBBB v B&M Retail Ltd* at Barkingside Magistrates Court (see below)

¹³ Criminal Justice Act 1988 s.139 (1)

¹⁴ Sentencing Council *Bladed Articles and Offensive Weapons Possession Definitive Guideline*

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/bladed-articles-and-offensive-weapons-possession/>

- 6.2 The genesis of this submission emanates from the sentences passed against two high street retailers (both very large organisations for the purposes of existing guidelines) that were convicted, upon their own pleas, of s.141A offences.
- 6.3 On 13/03/18, Decathlon UK Limited was fined £20,000 for a single offence, having entered a guilty plea at the first opportunity. Decathlon UK Limited is a substantial business with a turnover in excess of £250 million. Their parent company, Decathlon SA has an annual turnover of \$12 billion.
- 6.4 Six months later, on 22/09/18, B&M Retail Limited was fined £480,000 following guilty pleas to three offences. B&M has a turnover in excess of £2 billion. The fine was subsequently reduced on appeal to £330,000.
- 6.5 Since the sentencing of Decathlon and B&M, there have been a number of other prosecutions for s.141A offences which have resulted in the range of fines set out at Appendix A.
- 6.6 The most recent prosecutions in the last month (which are not included at Appendix A) have resulted in further inconsistency.
- 6.7 On 26/02/20, Shop Direct Home Shopping Limited (which trades as ‘Very’ and is said to be the largest exclusively online retailer in the UK) was convicted after trial at Croydon Magistrates’ Court of one offence contrary to s.141A, having sold a three-piece knife set to a 13-year-old test purchaser.
- 6.8 Shop Direct Home Shopping Limited had an average turnover during the relevant period of approximately £1.5 billion. The company acknowledged that it has specifically considered the risk of knives being purchased by children but decided that such an event was unlikely. It had no age verification measures in place to guard against the risk. The company was fined £20,000.

- 6.9 On 06/03/20, Today Tech LLP was convicted after trial at Lavender Hill Magistrates' Court of one offence contrary to s.141A, having sold a retractable craft knife to a 13-year-old test purchaser.
- 6.10 It was accepted between the parties that the LLP had failed to have any regard to its obligation not to sell knives to children, having failed even to identify knives as age-restricted products on its website. The LLP had a turnover during the relevant period of approximately £2 million but was not a profitable organisation. The LLP was fined £1000.
- 6.11 Both Shop Direct Home Shopping Limited and Today Tech LLP had been warned in advance of the test purchases that they would be taking place.
- 6.12 At the sentencing stage of each case, DJ Dean and DDJ Gladwell, respectively, invited assistance from the parties as to how they should approach sentence, both having expressed uncertainty about how they should do so.

7. Offensive Weapons Act 2019

- 7.1 Part 3 of the Offensive Weapons Act 2019 has created several new offences concerning the sale and delivery of knives to persons under the age of eighteen.
- 7.2 It is anticipated that Trading Standards Services (and presumably Police Services) will be engaged in testing compliance with the new legislation and active enforcement of the relevant provisions, which it should be assumed will lead to prosecutions, the sentencing of which has no Guideline.

8. Options

- 8.1. We would respectfully submit that the current Guideline for the sentencing of 'Bladed articles and offensive weapons' could be augmented to provide guidance on sentencing the s.141A offence.

- 8.2. If the Sentencing Council is of the view that it would consider issuing a Guideline for the s.141A offence, but only as part of a Guideline grouping similar offences, we would welcome the opportunity to make further submissions on which other offences might be grouped together.
- 8.3. The London Borough of Barking and Dagenham are well-placed, and willing, to conduct a wider study into sentencing decisions for prosecutions of all age-restricted products and product safety offences.
- 8.4. Similar factors of risk of harm, corporate culpability, and the availability to sentencing magistrates of unlimited fines apply to a wide range of offences enforced by Trading Standards Services.
- 8.5. In consequence, it is our experience that a similar level of disparity exists across the spectrum of Trading Standards work, for which the absence of any Guidelines is in part accountable.
- 8.6. This disparity is likely to persist unless the Sentencing Council takes steps to address it. Age restricted sales remain a focus for Trading Standards Services.
- 8.7. Between September 2018 and September 2019, Trading Standards Services in London attempted 1,051 test purchases of knives, leading to 119 sales. In addition, Croydon Trading Standards (leading a Home Office funded operation) made 100 online attempts to purchase knives from UK-based retailers, leading to 41 sales¹⁵.
- 8.8. The volume of offences prosecuted is greater than other offences for which there are guidelines.
- 8.9. The enactment of the Offensive Weapons Act 2019 will serve only to increase the already burgeoning number of prosecutions taken each year for, or related to,

¹⁵ <https://www.tradingstandards.uk/news-policy/news-room/2019/london-retailer-agreement-launched-to-crackdown-on-underage-knife-sales>

the s.141A offence. This fact, together with the overwhelming public interest in curbing knife crime involving young persons, is sufficient justification, in our respectful submission, for the Sentencing Council to prioritise the drafting of a Guideline.

For and on behalf of the London Borough of Barking and Dagenham

April 2020

This submission has the full support of the following organisations:

- *Association of Chief Trading Standards Officers*
- *National Trading Standards*
- *East of England Trading Standards Association*
- *Local Government Association*
- *London Councils (representing London's 32 borough councils and the City of London)*
- *London Trading Standards (representing 33 Local Authority Trading Standards services in the London region)*

Appendix A

Preamble

- a. In September 2019, Trading Standards Services in London were asked to provide details of recent sentencing decisions for prosecutions arising from the sales of knives to children. Results were obtained from nine Boroughs for sentences handed down by seven magistrates' courts and one Crown Court (on appeal).
- b. The results show a significant disparity of sentence. Of the thirty-four fines imposed, six are £500 or less, and ten are £1000 or less. The range of fines is from £0 to £120,000.
- c. In prosecutions taken by London Borough of Croydon during the Autumn of 2019 as part of a Home Office funded online test purchasing project, fines in the region of £8000 have been imposed apart from one case where a fine of £5000 was imposed upon conviction following a trial.
- d. Further disparities can be seen in that after a not guilty plea and trial, and having been convicted in 2016 for the same offence, Poundstretcher Ltd were fined £50,000, whereas on appeal B&M Retail Ltd had two £90,000 fines and one £120,000 fine imposed after guilty pleas and significant co-operation with the investigation.

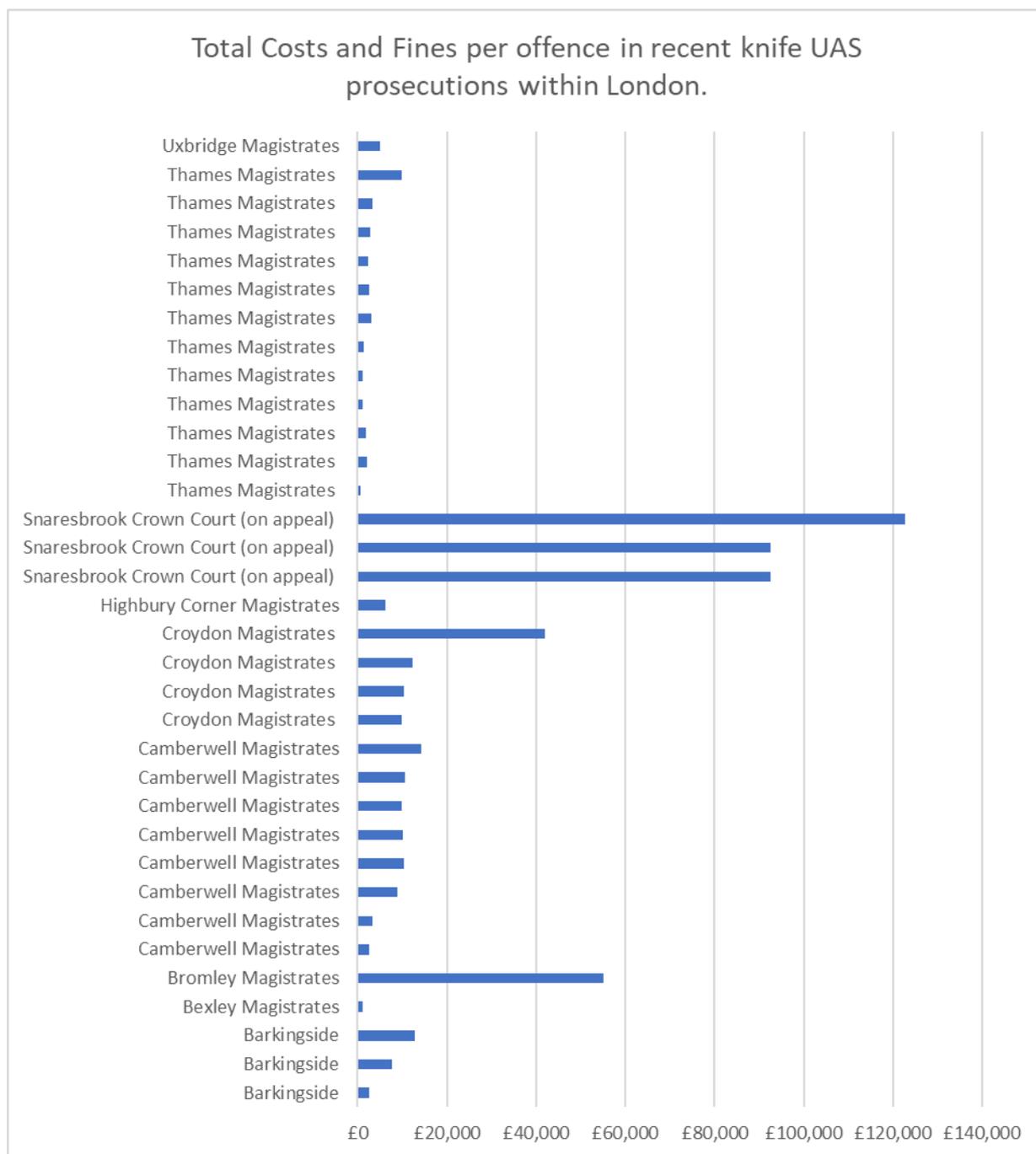


Table 1: Recent fines and costs totalled for underage sale of knife prosecutions at different Magistrates Courts within London.