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**CLSA response to Burglary offences guideline  
Consultation -response 1<sup>st</sup> September 2021**

The Criminal Law Solicitors Association response to this consultation on the sentencing for burglaries both domestic and non-domestic is based on our experienced practitioners in both the magistrates court and the Crown Court.

We note with interest the introduction to the consultation, namely the rise in prison sentences for those sentenced for non-domestic burglary. Perhaps of equal importance and significance is the finding that normal domestic burglary cases when the sentence is in the magistrates' court are more likely to result in a custodial sentence.

It is often the experience of members of the Criminal Law Solicitors' Association that magistrates are less flexible in interpreting both the guidelines and the facts of a case and are also less flexible in allowing community-based orders. It is a matter of concern and has been for some time there is such a disparity in the way that magistrates and Crown Court judges behave. The fact that this has been noted in the consultation document reinforces the experience of our members.

Our primary observation is that a number of the guideline's 'features' used to assess the capability of an offender do not take into account that many such features will be present in almost every case of this type given the nature of the offences. The consequences are two-fold. Firstly, there is a risk of an element of 'double counting' of certain elements of an offence, and secondly, the category features become meaningless since a large number of offences will be found to fall in to higher categories despite having no genuine aggravating features beyond the bare minimum actions required to be guilty of the offence. Put another way, we would not expect 'the victim died' to be a sentencing element on sentencing for a murder, since the death of the victim is an essential feature of the offence.

### **High Culpability**

In regards to the revised guidelines, with culpability, it is generally not possible to assess whether any targeting is due to the vulnerability of a victim or hostility based on disability race sexual orientation. Non-dwelling burglary is often committed by those with a substance addiction issues and a need for easy access to goods, rather than due to the nature of the victim themselves. Consequently, there can be no characteristics using the high culpability factor and this has been, in our view, often wrongly interpreted historically.

### **Planning and organisation**

In relation to the judicial assessment of 'a significant degree of planning or organisation' and the carrying of a weapon with them carried these are not sufficiently specific. Any targeting and breaking into a premises may require a tool or weapon and possibly some planning. Consequently, the question of any significant degree of planning or organisation needs to be interpreted strictly. We accept it can be an aggravating feature where a weapon is carried particularly a knife or a gun; that deals with aggravating features.

Being a member of a group or gang again is difficult to assess as often these offences are often committed by more than one person, but would not be what could otherwise be described as a group or gang.

Consequently, subject to the issue of culpability, there should be a definition of what is meant by a significant degree of planning, or organisation. This also applies to the definition as to what is to be classed as a weapon.

### **Low culpability**

With respect to lower culpability, the issue of mental disorder needs to be addressed more fully. Does this take into account addiction, alcohol withdrawal or drug induced psychosis? The definitions are too loose but a much-needed review is long overdue.

### **Harm**

We believe the approach to assessing harm is too subjective; we are dealing with non-dwelling properties and therefore there can be no limited scope for emotional impact. It is suggested that this should be an aggravating feature as opposed to a harm assessment.

If there is violence used or threatened then the offence is one of aggravated burglary and should therefore not be part of category one for the lesser offence of burglary. This is an approach we have seen often with sentencing guidelines and we believe it is wholly inappropriate. It should not be for the sentencing guidelines to seek to go behind, or even correct, a charging decision or the verdict of a court for a lesser offence by applying aggravating features of a more serious offence. The defendant should be sentenced for the offence for which he has been convicted, which means the conduct alleged which amounts to the offence in question, and not elements of some hypothetical offence which either the Court did not convict the defendant of, or the Crown do not think it appropriate to charge.

For Category two, the test 'have a greater emotional impact on the victim' whoever the victim is, is too subjective. Consequently, it is not accepted that the categories as outlined adequately.

In response to Question three, this is proportionate and indeed necessary bearing in mind the likely offenders for this sort of offence.

## **CRIMINAL LAW SOLICITORS' ASSOCIATION**

### **RESPONSE TO THE CONSULTATION ON THE BURGLARY SENTENCING GUIDELINES**

The Criminal Law Solicitors' Association have long been concerned with the way that sentencing has been undertaken for non-domestic burglaries

Clearly every case must depend upon its merit. It is with that in mind that the category range proposed is too high in category one and perhaps 1 to 3 years custody should be the appropriate category range.

The proposed statutory aggravating features include an offence motivated by demonstrating hostility based on characteristics of the victim's religion, race, disability or sexual orientation or transgender identity. The Criminal Law Solicitors' Association are somewhat confused as to how they can be relevant for non-domestic burglary for the reasons set out in this response.

The proposed aggravating features "the offence is committed as part as a group" needs to specify as to what constitutes a group.

Offences taken into consideration to be used as an aggravating feature may well prevent offenders from admitting matters which may assist in a long-term and should be removed as it is entirely inconsistent with the purpose behind 'TICs'.

The Criminal Law Solicitors' Association have no further comments as regards the non-domestic Burglary guidelines.

#### **Domestic burglary**

Criminal Law Solicitors' Association do not agree that Pharmacies or Doctors surgeries should be included in the guidelines for domestic burglaries. They are not domestic. There is however no reason why burglaries of these locations should not be an aggravating feature of a non-domestic burglary.

As regards high culpability, this would seem both proportionate and appropriate. There does however need to be a definition of a weapon as opposed to a piece of equipment used in order to commit the offence, for example a crow bar used to gain entry and carried for that purpose.

As far as medium culpability is concerned and as far as lower culpability is concerned the Criminal Law Solicitors' Association have nothing to add.

#### **Question eight**

Criminal Law Solicitors' Association are concerned as to the issue of a much greater emotional impact on the victim than would normally expected. How this is to be assessed is unknown and far too subjective. The use of Personal Victim Impact Statements is fraught with danger as they are usually accepted in written form without questioning, whereas if too greater reliance is placed upon them to assess the emotional impact, this may result on the need for Newton hearings, or the cross-

examination of the victim solely because there is a dispute as to the true extent of the emotional impact on them. This would clearly be undesirable.

#### **Question nine**

The Criminal Law Solicitors' Association agree unequivocally with the additional wording relating to the consideration of a community order with an alcohol treatment requirement order. Many burglaries are as a result of alcohol or drugs dependency.

#### **Question 10**

The Criminal Law Solicitors' Association do agree with the proposed sentencing table for this offence.

#### **Question 11**

As with all cases these are guidelines and not tramlines; care should be taken in ensuring that there is a certainty on sentencing and however gravity is defined it needs to be consistent.

The aggravating and mitigating factors as outlined are consistent proportionate and appropriate.

#### **Question 13**

There are no further comments on the domestic burglary guidelines.

#### **Aggravated burglary**

The issue of high culpability needs some evidence to support what is meant to be high culpability and in this case there would need to be evidence of planning to a significant degree or organisation and beyond the 'routine' planning that might be an essential element of the basic offence.

For medium culpability there are no comments to be added. As far as lower culpability is concerned, the concern here is as to whether there is a blurring between coercion intimidation or exploitation, and whether any of those are a defence.

#### **Question 14**

The Criminal Law Solicitors' Association has nothing to add

#### **Question 15**

The proposals are proportionate and appropriate

#### **Question 17**

The proposed sentence for this offence is a matter for the government and the sentencing council.

It is acknowledged on behalf of the Criminal Law Solicitors' Association that aggravated burglary is the most traumatic of all.

**Question 18**

Yes, there is little that the Criminal Law Solicitors' Association can add

**Question 19**

Yes, there is little that the Criminal Law Solicitors' Association can add

**Question 20**

Yes

**Question 21**

No

**Question 22**

No