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CLSA RESPONSES TO:

The Child Cruelty Consultation

Published on 13 June 2017

The consultation will end on 13 September 2017

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

- 1. Do you agree that an offender who fails to protect a child from cruelty (absent any other relevant consideration) is classed as having the same level of culpability as an offender who actually inflicts the cruelty?**

Yes, in principle. However, a distinction needs to be drawn between an offender who is encouraging cruelty (albeit not actually carrying out the act) and a failure to act by not exercising proper supervision or not appreciating that a failure to act is what has enabled the cruelty to take place.

It is also recognised that in practice it will be extremely rare for there to be no difference in term of relevant matters to be taken into consideration between the parties where one has carried out the act and one has failed to protect.

- 2. Do you agree with the proposed culpability factors? Are there any that should be added or removed?**

The proposed culpability factors are agreed. The Council should consider including longstanding serious neglect as a higher culpability factor and also offences committed jointly with 2 or more others (albeit it is anticipated that this would be rare.)

- 3. Do you agree with the proposed approach to the assessment of harm?**

Yes, this is agreed.

- 4. Are there any harm factors that should be added or removed?**

No

- 5. Do you have any comments on the sentence ranges and starting points?**

If culpability is A, even if caused Category 3 Harm (i.e. little or no psychological/developmental/physical harm caused) the sentencing starting point should reflect that the fact of little/no harm being caused is due to luck rather than the actions of the offender who, normally in such a circumstance if Category A culpability would have caused significant harm. Therefore, it is suggested that the starting point in this category should be 1 year 6 months. The range for this category should increase from High level community order to 3 years imprisonment to reflect the high culpability.

6. Do you agree with the proposed aggravating factors? Please state which, if any, should be added or removed.

It is not agreed that the factor of failing to respond to interventions should be an aggravating factor. If there are outside agencies involved it is their failure if they fail to act to protect a child and cruelty occurs. If a risk by a perpetrator is so serious that child cruelty could occur then the outside agency should act/ take steps to prevent it. If the person does not understand/heed warnings then that does not necessarily mean it should be an aggravating factor.

Repeated acts of cruelty would be an aggravating factor and this would encompass and could take into account occasions when the offender has been warned of behaviour. i.e. not to leave the child with an individual unsupervised but continues to do so may amount to cruelty. If the child is left with an individual and the parent/carer has no knowledge/reason to suspect that person is unsuitable then they are unlikely to be committing an offence.

It should also be seen as an aggravating factor if the person committing the offence is someone who is a person in authority over the child such as carer, teacher, priest etc.

It may be considered to be an aggravating factor if the offender has fabricated illnesses or deliberately induced an illness in a child. This is a recognised type of cruelty which could have serious implications for the child, physically, developmentally and emotionally.

The fact that a child is particularly young may well be an aggravating factor as an older child would be better equipped to deal with a situation and the risks may be less. For example the younger a child is when left alone may well aggravate and offence. However, the age of child subject to serious physical abuse may not be so relevant as the fact of the physical abuse would be serious at any age. That a child is subject to cruelty and is disabled will inevitably be an aggravating factor.

7. Do you agree with the proposed mitigating factors? Please state which, if any, should be added or removed.

Mitigating factors could include being subject to domestic violence/coercion and control themselves. Not being aware of the extent/duration of the cruelty to the child. Lack of premeditation/continuation of the cruelty.

Co-operation with the investigation should also include co-operation with social services who will no doubt also be involved particularly if the offender is a primary carer.

8. Do you agree with the inclusion of step five? If yes, do you have any comments on its wording or placement within the sentencing process?

Yes, the wording and sentiment of step 5 is relevant and important for the sentencing Bench. Without it's inclusion representations on this point may not be heeded. It is important to remind the sentencing bench that they should consider the impact the sentence will have upon the child/complainant when they are considering custody. It may well be the case that it is in the child's interest for the offender to receive a community penalty so that the probation service can work with them to prevent a reoccurrence and educate the offender rather than sending them to prison and the child to long term care of the local authority. The Court should in considering this step take into consideration the views of the local authority who by the time such a case comes to be sentenced should have been informed about the circumstances and made an assessment of the offender, risks posed to the child, risk of a reoccurrence and whether the offender should return to a caring role.

9. What would your final sentence be for case study A and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.

As far as D's culpability is concerned this would be in Category B. This is because the factor for high culpability do not exist. Although it could, perhaps be argued that 2 weeks is prolonged/multiple incidents this would not fall under the category of serious cruelty. However, the factors which would indicate lower culpability such as in category C do not exist in this scenario either as there are repeated instances where D has left his children unattended and at risk of harm, rather than it being a momentary lapse in judgement and there is no evidence that he suffered with learning difficulties etc.

In terms of the risk of harm this case would fall between category 2 and 3. Little or no harm was caused to the children which would indicate a category 3 case. However, it is likely to be argued that by leaving children of this age alone for up to five hours on multiple occasions meant that there was serious risk of category 1 harm being caused that a reasonable person should have foreseen.

Therefore, it is suggested that this a Category 2, level B case and the starting point for sentence is 1 year imprisonment, with a range of high community penalty to 2 years 6 months custody.

It may be viewed that the young ages of the children should be considered as an aggravating factor (particularly vulnerable). However this would not be in the same category as a disabled child or new born baby for example.

There are many of the proposed mitigating factors present. Such as genuine remorse, previous good character, primary carer for the children, his cooperation with the investigation/social services should also be taken into consideration.

The Court will need to consider step 5. Without the caveat of step 5 it is likely the court would consider that this offence has crossed the custody threshold (even if a suspended prison sentence was imposed.) However, given the view taken by social services that the children are safe to continue to be cared for by the offender and the potential emotional damage that would be caused to them if he were to receive custodial sentence, I would sentence D to a high community sentence.

I may well be considered by the court that this Offence was committed out of desperation as his circumstances and without consideration of the potential risks involved. Since his arrest for the offence it would appear he had tried to mitigate the offence and had no previous convictions. In addition the endorsement by social services would be highly significant.

10. Do you agree that the guideline should exclusively focus on child victims?

No, as the offence covers vulnerable adults as well and there should not be a separate guideline for vulnerable adults. Given that most offences of this nature are in relation to children the guideline could still focus on children. It seems it would be unlikely for there to be much disparity in sentence between a child and a vulnerable adult as the victim, particularly as the offence itself puts them on a par.

This offence relates to children and vulnerable adults and so the guideline should deal with both.

11. Should the Council consider producing separate guidelines for offences against vulnerable adults? If so, which offences should such guidelines cover?

The Council should consider producing guidelines for offences which specifically relate to vulnerable adults. For the purposes of these guidelines it is only necessary to include vulnerable adults if they are included in the offence such as this one.

12. Do you agree with the proposed approach to the assessment of culpability, particularly with regards to the fact that allowing harm/death is treated as the same level of culpability as causing it?

Yes. This was clearly the intention when the legislation was drafted. This offence was supposed to close a loophole which existed where it could not be proved who actually caused the harm. However, there should be a distinction between someone who encouraged the harm and was party to it rather than someone who was not aware of the full extent of the harm being inflicted. It must also be recognised that there will usually be significant differences in the mitigating factors between offenders in these type of cases.

13. Are there any culpability factors that should be added or removed?

The culpability factors are agreed

14. Do you agree with the proposed approach to the assessment of harm?

Yes

15. Are there any harm factors that should be added or removed?

The harm factors are agreed.

16. Do you have any comments on the sentence ranges and starting points?

The sentencing ranges are appropriate. This guideline relates to serious/harm or death being caused. Therefore, it is agreed that it would be rare for any sentence other than custody to be appropriate.

17. Do you agree with the proposed aggravating and mitigating factors? Please state which, if any, should be added or removed.

Mitigating factors could include being subject to domestic violence/coercion and control themselves. Not being aware of the extent/duration of the cruelty to the child. Lack of premeditation/continuation of the cruelty.

Co-operation with the investigation should also include co-operation with social services who will no doubt also be involved particularly if the offender is a primary carer.

18. What would your final sentence be for case study B and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.

I would deal with D as category C culpability as she has a history of domestic violence from the other party and this is linked to the offence and there is evidence of a lack of maturity. However, it may also be said that there have been multiple incidents of cruelty (whether or not serious is not clear) and she has failed to protect her child from those incidents and that could, potentially, be at category A culpability case.

Given the information available we would consider this case to be more suitably dealt with in category C.

With regard to the level of harm, this is clearly a category 1 case as the child died.

Therefore, the case would attract a sentencing with a starting point of 2 years with a range of 1-4 years.

Taking into account the aggravating factor that D knew that A was violent and had difficulty controlling his temper with V and also the mitigating factor of her previous good character and the references from her colleagues, her age and naivety I would pass a sentence of 18 months and give consideration to suspending the sentence if appropriate.

19. Do you agree with the proposed approach to the assessment of culpability, particularly the higher culpability factors?

Yes, however a failure to respond to warnings may also go hand in hand with factors suggesting lower culpability such as domestic violence and coercion and control.

20. Are there any culpability factors that should be added or removed?

No, beyond the comment to question 19.

21. Do you agree with the proposed approach to the assessment of harm? Yes the proposed approach is agreed

22. Are there any harm factors that should be added or removed? Perhaps in line with the previous guideline serious developmental harm should also be included.

23. Do you have any comments on the sentence ranges and starting points?

The sentence ranges and starting points are appropriate. The Court should be reminded that this may well be the type of offence where a restraining order would be appropriate.

24. Do you agree with the proposed aggravating and mitigating factors? Please state which, if any, should be removed or added.

The proposed factors are agreed.

25. What would your final sentence be for case study C and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.

In relation to culpability, if the court finds that D knew about the trip and reasons for it it may fall under category A as then it could be said to have included significant planning. However, if the Court accepts she did not know the reason for the trip I would consider this case to fall under category B.

In relation to harm there does not appear to have been any sever harm caused to V. Therefore I would assess the Harm to be category 2.

On the above basis the starting point for sentence would be a starting point of 1 year custody and a range from high community order to 3 years custody.

Whilst D was convicted after a trial and therefore remorse is not a factor in this case the court should take into account her previous good character. There are no aggravating factors to be considered.

The Court will need to consider that V is placed back with D and that there are other children also living with D being their primary carer. The court would need to consider the impact of a custodial sentence upon them.

I would sentence D to a custodial sentence of 12months but suspend it for 18months on the basis of the information we have available. It would be a condition of the suspended sentence that D is supervised by the probation service.

26. Are there any equality or diversity matters that the Council should consider for the guidelines discussed? Please provide evidence of any issues where possible.

None identified that would impact upon these proposed guidelines.