



CBA Response to Sentencing Guidelines Council

Consultation on Child Cruelty

13th September 2017

Introduction

The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

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.

The CBA is the largest specialist Bar association, with over 4,500 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.

The CBA welcomes the proposed Cruelty Guidance which seeks to clarify sentencing procedure and is extended to cover offences of causing or allowing a child to die and failing to protect a girl from female genital mutilation.

Q1

Yes.

A failure to protect may attract the same level of culpability as the person who inflicts the cruelty in the appropriate case, dependent upon the dynamics of the

relationship of the carers, or if the failure to seek medical assistance for the child was clearly unreasonable. There are numerous cases where the failure to protect encourages or prolongs the offending. The failure to protect may have significant psychological trauma on the children, in particular where the perpetrator has a close/familial relationship or otherwise a duty of care towards the child.

In cases where other factors may suggest one person bears more responsibility than another, other lower culpability factors will reduce the culpability of one defendant as regards the other (such as whether one offender has been subjected to domestic violence or whether their culpability is significantly reduced by mental disorder/ learning disability/ lack of maturity). (See answer to question 12).

Q2 Culpability Factors

Category A

The highest culpability should be imposed for those who commit these offences against especially vulnerable children who have a disability, disorder or other medical condition, factors which are not identified in the first of the Category A features, (prolonged and / or multiple incidents of serious cruelty).

“Systemic cruelty, or a campaign which demonstrates premeditation and a degree of planning”, ought to be included as a culpability feature.

The failure to seek medical treatment when it was obviously necessary to do so should also be a specific factor in culpability.

The word 'Blatant' could be replaced by 'obvious'.

Category C: We agree the Culpability factors.

Q3

Yes.

Category 2 'serious' perhaps should be replaced with 'significant' risk.

Q4

None to be added or removed

Q5

No

Q6

No

Q7

Defendant young &/or immature.

Q8

Yes it is vital that step 5 is included; having regard to any information that the court may have about the children's attitude or pressures on the family as a whole. It may be helpful to amend 'cusp of custody' to include the imposition of a custodial sentence of 2 years or less. The word 'cusp' implies that the custody threshold may not be passed. There may be cases where the threshold is passed and without a specific reference to suspension, the sentencing judge may feel obliged to pass a custodial sentence.

Sentencing Exercise

This is a Category B case. No Category A features are present, but there is a greater culpability than in a Category C case.

Whilst there is little or no physical or other harm, there was a serious risk of category 1 harm being caused given the age of the children, which any reasonable person should have foreseen, thus placing the offence within Category 2.

Significant mitigating factors reduce the 1 year starting point.

An appropriate sentence would be a high level Community Order.

There is a possibility that category B is perhaps too wide or undefined

Q10

No.

If the guidelines do not cover vulnerable adults as well as children then the effect will be that in practice practitioners and courts will in any event use the guidelines for children to assist in sentencing vulnerable adults. This will lead to uncertainty as to whether the guidelines should be applied to vulnerable adults with or without additional aggravating or mitigating features or with or without uplifts to sentencing starting points/ ranges.

As recognised by the consultation paper, many of the same considerations in sentencing for offences involving vulnerable adults apply when sentencing offences involving children. Further, the supposed additional "financial motives" involving vulnerable adults could also apply to children in certain circumstances such as abuse by private carers or private foster parents.

As it seems that the majority of cases sentenced before the Crown Court involve children rather than adults given that in 2014 all cases sentenced involved children. It is hoped that there would not need to be extensive further research before the proposed guidelines could be adjusted to reflect sentencing for offences involving vulnerable adults as well as children.

Q11.

There is not an obvious need for a separate sentencing guideline for vulnerable adults as many of the sentencing guidelines, such as those relating to burglary, fraud, violence and sexual offences, already take into account, whether as a result of the categorisation of the offences or as an aggravating feature, the fact that the victim was vulnerable/ particularly vulnerable.

Q12.

It is agreed that in general the assessment of culpability should be treated as the

same level for allowing harm/ death, as causing the same, for the reasons detailed in the consultation paper. In cases where other factors may suggest one person bears more responsibility than another, other lower culpability factors such as whether one offender has been subjected to domestic violence or whether their culpability is significantly reduced by mental disorder/ learning disability/ lack of maturity, will reduce the culpability of one defendant as regards the other.

However, whilst it is agreed that the general approach should be that allowing serious harm/ death should be treated as the same level as culpability as causing it, it is recommended there should be one exception. Culpability ought not to be judged the same in cases of allowing serious harm/ death cases, where steps have been taken to protect the child, which fall just short of what could be reasonably be expected. See Q13 answers below.

We suggest that an additional culpability feature that the child is especially vulnerable and/or has a disability, disorder or other medical condition should be included.

Q13.

An additional culpability factor should be included for lesser culpability in cases of allowing serious harm/ death, namely "steps taken to protect the child but fell just short of what could be reasonably be expected" as is proposed for FGM offences. This will ensure consistency.

It will also allow the sentencing judge to recognise when assessing culpability what steps had been taken to protect the child, which is likely to be a powerful mitigating feature of the case.

Q14.

Yes

Q15.

No.

Q16.

No.

Q17.

An additional mitigating feature should be considered, namely seeking prompt medical assistance post the event. The seeking of prompt medical assistance is likely to be of most relevance to cases of "allowing" rather than "causing" serious harm/death. However, in both cases it may be indicative of remorse and in some cases may make a significant difference to the ultimate effect that the offence has on the child's suffering, which is not otherwise reflected in the categorisation of the case by the harm caused.

Further there should be an additional mitigating feature that the defendant is young &/or immature.

We further submit that the court should have regard to whether the defendant has responsibility for the child. Careful consideration should be given to the effect that custody would have on family life of the victim. Please see Q 8 answer.

Q18.

This is a Category A offence. Vigorous shaking and significant force was used. It is noted that the co-defendant has been charged with manslaughter and not murder.

No other A factors are relevant on the facts of this case - whilst there are earlier incidents of deliberate harm there is no evidence that these were "multiple incidents of serious cruelty".

In relation to Category C- lower culpability factors are present. D is 18. The

comments in her psychiatric report ("her naivety prevents her facing up to the reality of the situation" _falls short of placing her in the "substantially reduced" category, she has been the victim of domestic abuse and it does appear to be linked to the commission of the offence. The text messages presented by the Crown suggest that A loses his temper when dealing with V and that D is scared when A loses his temper. The fact that D has been subjected to domestic abuse at the hands of A is therefore likely to provide a partial explanation for why she did not intervene to protect V from A's violence.

Given that the A and C factors are present, this case should be sentenced as a category B case.

This is a Category 1 case as it involves death.

The starting point of 5 years imprisonment is aggravated by the V's particular vulnerability as she is two years old and unable to take steps to protect herself from violence.

The starting point is mitigated by D's lack of previous convictions, good character, youth and naivety.

A sentence of 4-5 years would seem appropriate in these circumstances.

Q19

The higher culpability factors seem to encompass all those situations in which an offender's culpability for an offence would be especially heightened. One observation regarding medium culpability acting as a 'catch all', is that many cases will involve factors listed in High culpability and Lesser culpability. This may lead to an inconsistency of approach in determining when culpability is sufficiently diminished as to equate to Medium culpability or sufficiently heightened as to no longer amount to Lesser culpability.

In addition, we suggest that the additional culpability feature that the child is especially vulnerable and/or has a disability, disorder or other medical condition should be included.

Q20

It may be that foreign travel is already envisaged as being caught by the significant planning criterion but given the prevalence of FGM occurring abroad, there may be deterrent effect in specifically stipulating that foreign travel is something that aggravates culpability.

Q21

There is an obvious tension inherent in determining how harm should be assessed. If harm is tied too closely to the WHO definitions then sentencing would become very technical and perhaps unduly determined by medical definitions. However the alternative approach encapsulated by the proposal here is that the assessment of harm becomes potentially vague.

Furthermore the long-term psychological effect of FGM cannot be known in circumstances where a prosecution is brought when the victim is still a child. The reluctance to spell out what types of FGM should result in what level of harm determination is understandable. However there is a danger that leaving the categorization of harm as vague as is proposed will result in sentencers almost inevitably placing cases into Category 1 for want of clear guidance.

Q22

Plainly in any case of FGM one would expect, as a matter of course, expert evidence to canvas the different types of FGM and their consequences. However if the guideline does not engage with an assessment of harm by reference to category of level of FGM, there is a danger that any sentence passed will be for a form of assault wholly outside their knowledge and experience. Accordingly there may be a need for some sort of guidance regarding categorisation within the harm analysis.

Q23

If the concern raised above, (that harm will be categorised as Category 1) is well founded, then it is highly likely that the vast majority of offenders convicted of this offence would be sentenced to immediate custody. Whilst this may be appropriate in many cases, it is important to take account of the fact that the vast majority of girls who experience FGM do so at the hands or behest of those that believe implicitly that they are doing the right thing.

A parent who is in every other respect a loving and caring presence in their daughter's life would, if convicted of this offence, almost certainly be imprisoned. This may reflect society's disapproval of this conduct, but it carries the danger of sending a message to other parents minded to arrange or tolerate FGM for their children, that they should be even more secretive than they otherwise might in their plans, thus driving the practice even further underground.

Q24

It is difficult to see how 'Offences taken into consideration' could ever be appropriate as an aggravating factor for this offence. FGM is not like a burglary offence; it is hard to see how a multiple incident case could possibly result in a TIC schedule rather than separate charges.

It is agreed that the "failure to respond to warnings" factor is necessary, and we suggest an additional factor of "positive assurances given that FGM would not take place", be included.

The particularly vulnerable state of the victim is another potentially vexed factor. Clearly a baby girl is more vulnerable than a 15 year old but it would be wrong to assume that a 15 year old spirited out of the country for FGM would be in any better position to resist than a baby. Furthermore the older the child the more likely they are to have a living memory of the procedure. Accordingly this factor may require further elucidation.

Q25

Culpability

Two Category A features are present.

There is a failure to respond to official advice and clear warnings given by a specialist midwife.

There are three visits by a local outreach programme over 6 years, restating the position and an agreement by D that FGM was illegal and an assurance that her daughter would not undergo it.

Harm

This is a Category 2 case. There is no evidence that any physical and/or psychological harm caused was particularly severe.

Aggravating feature

The victim was particularly vulnerable

Mitigating features

No previous convictions

Primary carer for dependent relatives

Accordingly it would be appropriate to deem this a Culpability A case but in Category 2. Falling away from the starting point to the bottom end of the category range would be justified by the other mitigating factors in the case.

Given the almost certain custodial sentence that would be imposed on the husband and father of V the need to enable the primary carer to remain with the family would outweigh any determination that immediate custody was justified.

A sentence of two years' imprisonment suspended for two years would be appropriate.