

Child Cruelty Consultation

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Consultation

Published on 13 June 2017

The consultation will end on 13 September 2017

About this consultation

To:

This consultation is open to everyone including members of the public, judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.

Duration:

From 13 June 2017 to 13 September 2017

Enquiries (including requests for the paper in an alternative format) to:

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Additional ways to feed in your views:

This consultation exercise is accompanied by a resource assessment and an online questionnaire, all of which can be found at:

www.sentencingcouncil.org.uk

A series of consultation meetings is also taking place. For further information please use the “Enquiries” contact details above.

Response paper:

Following the conclusion of this consultation exercise, a response will be published at:

www.sentencingcouncil.org.uk

Freedom of Information:

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system. In addition, responses may be shared with the Justice Committee of the House of Commons.

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Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. Part of the Council's remit¹ is to conduct public consultations on guidelines for the sentencing of offenders.

Why Child Cruelty?

There is an existing Child Cruelty guideline published by our predecessor body, the Sentencing Guidelines Council (SGC) in 2008. The Council has committed to revising all SGC guidelines in due course to bring them into the newer format used by the Sentencing Council which takes the user through steps to assess the seriousness of the offence.

In 2016 there were 623 offenders sentenced for the offence of cruelty to a child, approximately 42 per cent were dealt with in the magistrates' court, and 58 per cent in the Crown Court.

The existing guideline is made up of a guideline for the offence of cruelty to a child and overarching principles on assaults on children. The Council made the decision to remove the overarching principles section when revising this guideline. This is because the existing definitive Assault guideline already considers some of the factors detailed, such as when a victim is particularly vulnerable. Furthermore, the Council is planning to review the Assault guideline, following the assessment that was published in October 2015. The SGC Overarching Principles on assaults on children will be carefully considered throughout this revision to ensure that all necessary factors are captured.

The Council also decided to extend the scope of the existing Child Cruelty guideline, to include two further offences; causing or allowing a child to die or suffer serious physical harm and failing to protect a child from the risk of female genital mutilation (FGM). Causing or allowing a child to die or suffer serious physical harm is an offence that is similar in its nature to the offence of cruelty to a child and so the Council felt it was appropriate to include such a guideline. In 2016 there were 6 offenders sentenced for causing or allowing death and 23 for causing or allowing serious physical harm offenders.² This offence is indictable only.

¹ ss.118-136 Coroners and Justice Act 2009

² The offence (s.5 Domestic Violence and Crime Act 2005) is causing or allowing a child or vulnerable adult to die or suffer serious physical harm. It is not possible to differentiate between offences that involve child victims or vulnerable adult victims but there is an assumption that the vast majority of offences involve child victims. For more information please see page 21.

The Council has included the guideline for failing to protect a girl from the risk of FGM as FGM is a form of child abuse and it is an offence that applies solely to child victims (the other relevant FGM offences apply to victims of any age). This legislation was announced at the Girl Summit 2014, along with other measures designed to tackle FGM and FGM remains a key topic across Parliament and Government. Due to the currency of such issues the Council felt it was appropriate to consult on such a guideline, despite there being no convictions to date.

The new guideline will provide sentencers across the Crown Court and magistrates' courts with guidance for all of the offences listed below, which will assist in achieving the Council's objective of consistent sentencing, and provide transparency for the public regarding the possible penalties for these offences.

Which offences are covered by the guideline?

The new child cruelty guideline will contain guidance for:

- Cruelty to a child
- Causing or allowing a child to die or suffer serious physical harm
- Failing to protect a girl from the risk of FGM.

For all offences included in the guideline a child is defined as someone under 16 years old.

What is the Council consulting about?

The Council has produced this consultation paper in order to seek views from as many people as possible interested in the sentencing of child cruelty offences.

However, it is important to clarify that the Council is consulting on sentencing these offences and not the legislation upon which such offences are based. The relevant legislation is a matter for Parliament and is, therefore, outside the scope of this exercise.

Through this consultation process, the Council is seeking views on:

- the principal factors that make any of the offences included within the draft guideline more or less serious;
- the additional factors that should influence the sentence;
- the approach taken to structuring the draft guidelines;
- the types and lengths of sentence that should be passed; and
- anything else you think should be considered.

A summary of the consultation questions can be found at Annex A.

What else is happening as part of the consultation process?

This is a 13 week public consultation. During the consultation period, the Council will host a number of consultation meetings to seek views from groups with an interest in this area as well as with sentencers. Once the consultation exercise is over and the results considered, a final guideline will be published and used by all courts.

Alongside this consultation paper, the Council has produced an online questionnaire. The Council has also produced a resource assessment for the draft guideline. The online questionnaire and resource assessment can be found on the Sentencing Council's website: www.sentencingcouncil.org.uk

Section one: Overarching issues and the context of the guidelines

Applicability of guidelines

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues these draft guidelines. Following consultation, when the definitive guidelines are produced they will apply to all offenders aged 18 and older, who are sentenced on or after the implementation date, regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

Structure, ranges and starting points

For the purposes of section 125(3)–(4) of the Coroners and Justice Act 2009, the adult guidelines specify offence ranges – the range of sentences appropriate for each type of offence. For each offence, the Council has specified a number of categories which reflect varying degrees of seriousness. The offence range is split into category ranges – sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. As in earlier Sentencing Council definitive guidelines, this guideline adopts an offence-based starting point. Starting points apply to all offences within the corresponding category and are applicable to all offenders, in all cases. Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only at step four in the decision-making process, after the appropriate sentence has been identified.

The guideline in relation to current practice and existing guidelines

In preparing the guidelines the Council has had regard to the purposes of sentencing and to its statutory duties. The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

The Council considered statistical data from the Ministry of Justice's Court Proceedings Database for the offences covered in the guideline to get a picture of current sentencing levels, where possible (there is no sentencing data available for the offence of failing to protect a girl from the risk of FGM).

The aim of the draft guidelines is to ensure that sentence levels reflect the seriousness of the offences and to ensure consistency across sentences but the Council is not intending to change sentencing practice. As there have been no convictions to date for the offence of failing to protect a girl from the offence of FGM the Council can ensure that sentences are determined consistently from the outset.

Approach to victims

The Council is required to consider the impact of sentencing decisions on victims of offences. The harm caused by an offence is considered at step one of the guidelines, as a principle factor of the offence. The Council was conscious when drafting the guideline of the unique nature of these offences as the vast majority of the offenders are parents of the victim. This adds a further dimension to the consideration of victims, as some sentences may cause further suffering to the child, for example if they will be removed from the family home. The Council has sought to balance the seriousness of the offences with such considerations and has incorporated an additional step to ensure that sentencers consider the impact a custodial sentence can have on children.

Data analysis and research

To support the development of the guideline the following research was undertaken:

- an initial online form was created for sentencers to offer their views on the existing guideline and what the key factors in child cruelty cases are;
- a small number of follow up phone interviews were conducted with two magistrates and one Crown Court judge to further explore the issues raised in the survey;
- analysis of 178 sentencing remarks from the Crown Court was completed (166 for cruelty to a child and 12 for causing or allowing a child to die or suffer serious physical harm) to indicate what the key factors in such cases are; and
- sentencing data was obtained where available to determine current sentencing practice.

Meetings were also held with interested and relevant organisations throughout the process, such as the NSPCC, the FGM Centre and the Home Office.

Research has also begun with the judiciary to determine how these draft guidelines would be used; the outcomes will be analysed alongside consultation responses to inform the definitive guideline.

Section Two: Developing the guidelines

Assessing Seriousness

The guideline sets out a step-by-step decision-making process for the court to use when sentencing each type of offence. This is intended to ensure that all sentencers adopt a consistent approach to sentencing across England and Wales.

The particular circumstances of each offence covered by the draft guideline will be different. The draft guideline aims to help the court to decide how serious an offence is by reference to a series of factors which in turn determine what the sentence starting point should be.

The first two steps that the sentencer follows are about assessing the seriousness of an individual offence. These two steps are described below.

STEP ONE

Determining the offence category

The first step is to consider the principal factors of the offence. These are the factors that the Council considers are the most important in deciding the seriousness of the offence. The offence category reflects the severity of the offence and sets the starting point and range of sentences within which the offender is sentenced. The list of factors at step one is exhaustive.

The draft guideline directs the court to consider the factors relating to the culpability of the offender in committing the offence and the harm that has been caused or intended. In broad terms, culpability relates to the role the offender has played, the level of planning involved and the sophistication with which the offence was carried out, but there are some variations. Some offences may have characteristics which fall into different categories. In these cases culpability is to be assessed by balancing the characteristics and reaching an assessment of the offender's overall culpability.

Harm is assessed in terms of the actual or potential harm caused as a result of the offence.

STEP TWO
Starting point and category range

Once the court has determined the offence category the next step is to decide upon a provisional sentence using the relevant starting point and category range. It is at this step that the court should consider any adjustments for previous convictions, if appropriate. The court should also consider any relevant aggravating and mitigating factors and the weight that they are to be given. The factors at step two are non-exhaustive.

The starting points and ranges in the draft guidelines have been proposed based on a combination of statistical data collected by the Ministry of Justice, the starting points and ranges of the current guideline, press reports, reported cases and data gathered from the research activities described above. The starting points and ranges have then been tested against reported cases.

STEP THREE
Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR
Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE
Parental responsibilities for sole or primary carers

In the majority of cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether a custodial sentence would be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly “failure to protect” offences, where the offender has otherwise been a loving and capable parent/carer.

STEP SIX
Totality principle

Where an offender is before the court for more than one offence, the court must consider whether the sentences passed should be consecutive or concurrent. The court must also consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN
Ancillary orders

The court must proceed with a view to making any ancillary orders that may be relevant.

STEP EIGHT
Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentences passed.

STEP NINE
Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Section Three: Cruelty to a child

(Draft guideline at page 43)

This section considers offences of cruelty to a child, contrary to section 1 of the Children and Young Persons Act 1933. In 2016 there were 623 offenders sentenced for cruelty to a child. The offence of cruelty to a child can be broken down into four separate types; assault and ill-treatment, neglect, abandonment and failure to protect. Therefore the factors included within this guideline need to capture a wide spectrum of potential offending behaviour.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender by the assessment of a series of factors.

Culpability factors

Category A – High culpability

There are six factors that indicate the highest level of culpability:

- Prolonged and/or multiple incidents of serious cruelty
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Failure to protect a child from offences with the above factors present

‘Prolonged and/or multiple incidents of serious cruelty’ is intended to capture those cases where the offender’s behaviour has been repetitive and/or ongoing. The word ‘serious’ has been included so as not to capture cases where the cruelty may have occurred more than once but is at the lower end of seriousness. This factor could capture offences of all types; assault and ill-treatment, neglect, abandonment and failure to protect.

‘Gratuitous degradation of victim and/or sadistic behaviour’ is intended to capture the cases where the cruelty is for the offender’s own gratification, which would clearly be a serious offence in terms of culpability. This would be likely to capture offences of assault and ill-treatment and neglect.

Both *‘use of significant force’* and *‘use of a weapon’* would capture the more serious offences of assault and ill-treatment.

'Blatant and deliberate disregard to the welfare of the child' would capture cruelty to a child offences of all types and is intended to capture those cases where the offender is well aware of the cruelty and potential harm they (or others) are inflicting but does nothing to prevent or counteract their behaviour.

'Failure to protect a child from offences with the above factors present' is intended to capture those parents who do not actually inflict the cruelty but who fail to protect the child from the cruelty being inflicted by another, usually their partner. It may be that the co-accused is also charged with cruelty to a child or it may be that they are charged with a different offence, such as assault. Analysing sentencing remarks from 2014 it is apparent that such cases are very common.

The existing SGC Child Cruelty guideline, although different in its approach, also categorises failing to protect a child from a certain type of harm as at the same level of seriousness as actually inflicting the harm. From analysing sentencing remarks it does appear that this is not always the case in practice (despite it being existing guidance). Often two offenders, one having inflicted the cruelty and one having failed to protect from the cruelty, will receive two very different sentences. However, in the majority of cases it is not possible to make a direct comparison and often there will be other factors that may account for the difference in sentences. For example, the person who failed to protect may also suffer from a mental illness or disorder, or be a victim of domestic abuse. If this was the case then, depending on the factors, the offender may on balance be put in a lower culpability category or the starting point for the offence may be reduced due to the mitigation. However, the Council is content that, in the rare scenarios where there are no additional factors to account for why an offender may not have intervened, other than indifference, they are treated as being as culpable as the offender who has actually inflicted the cruelty. Similarly, the Council is content that in cases where it is not possible to determine the exact role that each person took and neither will admit responsibility, they are treated as being the same level of culpability.

Category C – Lesser culpability

There are four proposed factors in lesser culpability:

- Minimal force or failure to protect a child from an incident involving minimal force
- Momentary or brief lapse in judgement
- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse (when linked to the commission of the offence)

'Minimal force or failure to protect a child from an incident involving minimal force' is the counter-factor to the culpability A factor *'significant force'* and is designed to capture lower end cases of assault and ill-treatment. This is the only factor in lower culpability that includes the failure to protect element. It is relevant in this circumstance because knowingly failing to protect a child from an incident involving lesser force is clearly of lower culpability than failing to protect from an act involving significant force. However, for the remainder of the category C factors failing to protect is not relevant; there would not be sufficient time for someone to protect a child (or fail to) from a *'momentary or brief lapse in judgement'* and the remaining two factors relate to personal circumstances.

'Momentary or brief lapse in judgement' is intended to capture those offences where the offender is an otherwise capable and loving parent but their usual standard was not met for a short period of time.

'Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity' is designed to capture cases where an offender is not capable of fully caring for the child in the appropriate manner due to such considerations.

Transcripts of sentencing remarks show that *'victim of domestic abuse'* is a factor that is often relevant. This seems to be particularly applicable in cases where there are co-defendants and one is charged with failing to protect a child from abuse that their partner is inflicting on their child. The Council felt this was a key consideration that may cause an offender to fail to intervene in such instances, although it will apply to all cases of cruelty to a child where domestic abuse is a relevant factor and linked to the commission of the offence. This factor would capture all types of domestic abuse, including coercive and controlling behaviour.

Category B – Medium culpability

Medium culpability is a 'catch all' for *'all other cases that fall between A and C'*. The Council deliberately worded the factor in this way, rather than *'factors from A and C not present.'* Although a nuanced difference, the Council felt that the proposed wording makes it clearer that child cruelty offences can be categorised on a sliding scale and there is not always a clear dichotomy between the high and lesser categories.

There will be cases of cruelty to a child where the basis of the offence itself is the fact that the offender has not sought medical help for the child when they ought to have done, despite not having caused the injury/illness that requires the medical intervention. The Council did consider whether failure to seek medical assistance should be a culpability factor. However, doing so would mean that this type of offence of cruelty to a child would always be categorised at the same level of culpability whereas in reality there will be variations within it, that would likely be captured by other culpability factors. For example, if an offender failed to seek medical assistance for an immediate life threatening injury that could be captured by *'blatant and deliberate disregard to the welfare of the child'* or if they failed to seek medical help for a fractured wrist this could be captured by *'cases falling between A and C'*.

STEP ONE**Determining the offence category**

The court should determine the offence category with reference **only** to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Prolonged and/or multiple incidents of serious cruelty
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Failure to protect a child from offences with the above factors present

B - Medium culpability:

- All other cases that fall between categories A and C

C - Lesser culpability:

- Minimal force or failure to protect a child from an incident involving minimal force
- Momentary or brief lapse in judgement
- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse (when linked to the commission of the offence)

Q1

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

Q2

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

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused to the victim by the offence.

Category 1

There are two factors that indicate the highest level of harm:

- Serious psychological and/or developmental harm
- Serious physical harm (including illnesses contracted due to unsanitary surroundings)

Psychological and physical harm are fairly common factors across the Council's guidelines and sentencers should be used to interpreting these. Developmental harm is unique to this guideline

but there are strong correlations between child abuse, particularly neglect, and developmental harm being caused to children.³

Category 2

There are two factors that indicate category two harm:

- Cases falling between category 1 and 3
- A serious risk of category 1 harm being caused that any reasonable person should have foreseen

As with culpability, the first factor is a ‘catch all’ and is similarly worded to highlight the fact that categories of harm are on a scale rather than absolute.

The second factor is to capture those cases where the cruelty has been serious and the risks were obvious but through fortuity only no serious harm has been caused to the child. The Council believes exposing a child to such serious harm should increase the seriousness of the offence but it does recognise that it is less serious than if the harm had actually been caused (which would be category one harm).

Category 3

There are two factors that indicate the lowest level of harm:

- Little or no psychological and/or developmental harm
- Little or no physical harm

These are the counter-factors to those in higher culpability.

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1

- Serious psychological and/or developmental harm
- Serious physical harm (including illnesses contracted due to unsanitary surroundings)

Category 2

- Cases falling between category 1 and 3
- A serious risk of category 1 harm being caused that any reasonable person should have foreseen

Category 3

- Little or no psychological and/or developmental harm
- Little or no physical harm

Q3

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

Q4

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

³ <http://46y5eh1fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/The-Science-of-Neglect-The-Persistent-Absence-of-Responsive-Care-Disrupts-the-Developing-Brain.pdf>

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database, analysis of first instance transcripts and analysis of Court of Appeal sentencing remarks and by reference to the ranges within the existing SGC guideline.

The highest starting point of six years' custody and the highest range of five to nine years' custody is the same as those in the existing SGC guideline, as is the lowest sentencing option of a low level community order. It is, however, important to note that the ranges are not directly comparable with those in the SGC guideline as the approach to assessing the seriousness of the offence is very different.

STEP TWO			
Starting point and category range			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.			
	Culpability		
Harm	A	B	C
Category 1	Starting point 6 years' custody	Starting point 3 years' custody	Starting point 1 year's custody
	Category range 5 – 9 years' custody	Category range 2 – 6 years' custody	Category range High level community order – 2 years 6 months' custody
Category 2	Starting point 3 years' custody	Starting point 1 year's custody	Starting point 6 months' custody
	Category range 2 – 6 year's custody	Category range High level community order – 2 years 6 months' custody	Category range Medium level community order – 1 year 6 months' custody
Category 3	Starting point 1 year's custody	Starting point 6 months' custody	Starting point High level community order
	Category range High level community order – 2 years 6 months' custody	Category range Medium level community order – 1 year 6 months' custody	Category range Low level community order – 6 months' custody

Q5

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

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors. These lists are non-exhaustive but are intended to contain the most common factors which provide context to the commission of the particular offence.

'Previous convictions' and *'offence committed whilst on bail'* are factors which the court is required by statute to consider when assessing the seriousness of an offence and their inclusion is therefore not subject to consultation. As with previous guidelines issued by the Council, these factors are considered at step two after the starting point has been established.

The following factors are standard aggravating factors that have been included in other definitive guidelines and which are self explanatory. They are not subject to consultation.

- Commission of the offence whilst under the influence of alcohol or drugs
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Failure to respond to interventions or warnings about behaviour
- Attempts to conceal/dispose of evidence or deliberate concealment and/or covering up of the offence

The factor *'failure to seek medical help (where not taken into account at step one)'* is not to capture cases where the cruelty is the act itself of not seeking medical help when it is required, as discussed on page 13. Rather, this factor is to capture cases where a different act of cruelty has taken place which has resulted in a need for medical attention (for example an injury has occurred following a period of neglect and medical attention was not sought).

'Blamed others for the offence' is to capture those cases where an offender has deliberately put the blame onto someone else, often their partner, which analysis of transcripts suggests is a fairly common scenario.

The Council thought carefully about whether to include the factor *'victim particularly vulnerable.'* On one hand the Council acknowledges that all children are vulnerable. However, transcripts of sentencing remarks showed that the particular vulnerability of some children was commonly cited as an aggravating factor, for example a very young baby or a child with a physical or mental disability was often deemed particularly vulnerable.

'Threats to prevent reporting of the offence' will capture both threats to the victim but also threats to others.

Factors increasing seriousness**Statutory aggravating factors:**

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help (where not taken into account at step one)

Commission of offence whilst under the influence of alcohol or drugs

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Failure to respond to interventions or warnings about behaviour

Threats to prevent reporting of the offence

Failure to comply with current court orders

Offence committed on licence or post sentence supervision

Offences taken into consideration

Q6

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

There are no statutory mitigating factors. The majority of factors included within the draft guideline are commonplace within the definitive guidelines and are not subject to consultation. Sentencers are experienced in applying these criteria and attaching the appropriate weight (if any) to them.

'Attempts to address or rectify behaviour (either on own behalf or on behalf of somebody else in an attempt to protect the victim) e.g. seeking support from authorities' is a similar factor to that which is included in other guidelines. However, it has been developed to include attempts to rectify another's behaviour; this is because there may be cases of 'failing to protect' where an offender did seek help for another's behaviour, for example they may have contacted social services or spoke to a medical professional about concerns but sufficient support was not provided.

'Good character and/or exemplary conduct' is a common factor across guidelines. However the caveat *'(the more serious the offence, the less the weight which should normally be attributed to this factor)'* has been included, mirroring the factor used within the definitive guideline for sexual offences. This is because, at times, an offender may take advantage of the fact that their good character in society allows them to abuse a child with less scrutiny than other offenders.

Factors reducing seriousness or reflecting personal mitigation
No previous convictions or no relevant/recent convictions
Remorse
Attempts to address or rectify behaviour (either on own behalf or on behalf of somebody else in an attempt to protect the victim) e.g. seeking support from authorities
Sole or primary carer for dependent relatives (see step five for further guidance on parental responsibilities)
Good character and/or exemplary conduct (the more serious the offence, the less weight which should normally be attributed to this factor)
Serious medical condition requiring urgent, intensive or long-term treatment
Mental disorder or learning disability (where not taken into account at step one)
Co-operation with the investigation

Q7

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

STEPS THREE TO NINE

These steps are identical to the steps that appear across all definitive guidelines produced by the Sentencing Council, save for step five.

STEP FIVE

Parental responsibilities for sole or primary carers

All definitive guidelines take into account, as mitigation, when an offender is a sole or primary carer for dependent relatives. However, the Council felt that further guidance was needed for offences of this nature due to the fact that in the majority of cases the offender will be the parent or carer of the victim(s). This step reflects the judgment in *R v Petherick*⁴ and the Council inserted similar guidance in the definitive guideline on *Imposition of Community and Custodial Sentences* which reads, 'For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.'

This step is only relevant to offenders on the cusp of custody and it is **not** implying that custody cannot be imposed on offenders with parental responsibilities but it is an extra consideration the court should take into account when considering whether the sentence is proportionate to the seriousness of the offence.

It has been placed at step five as, following any appropriate reduction for a guilty plea, the sentencer will then know what the appropriate final sentence is and whether or not it is on the cusp of custody.

4 *R v Petherick* [2012] EWCA Crim 2214

STEP FIVE**Parental responsibilities for sole or primary carers**

In the majority of cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly “failure to protect” offences, where the offender has otherwise been a loving and capable parent/carer.

Q8

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?

Case Study A

D is a single parent. He left two children, aged four and six, home alone on multiple occasions over a two week period, for lengths of up to five hours at a time. His normal childcare arrangements had fallen through and he couldn't get the time off work or find alternative childcare. He left them with food and water and instructed them not to leave the house or open the door to anyone. He phoned every hour to check that they were well. No harm came to either child during these periods of absence. D is an otherwise loving and capable father to his children and several character references spoke of his great love for his children. He pleaded guilty at the first opportunity and expressed remorse for his actions. He has no previous convictions. His children were removed which greatly distressed D but social services have since been satisfied he is an adequate parent and they have been reinstated into his care.

Q9

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

Section four: Causing or allowing a child to die or suffer serious physical harm

(Draft guideline at page 49)

Under section 5 of the Domestic Violence and Crime Act 2004 it is an offence to cause or allow the death or serious physical harm of a vulnerable adult or a child. In 2016 there were 6 offenders sentenced for causing or allowing death and 23 for causing or allowing serious physical harm. It is not possible to differentiate between cases that involve child or adult victims; however, as part of the Council's research, transcripts of sentencing remarks for all such cases sentenced in 2014 were obtained and all of these involved child victims. Therefore we may assume that the vast majority of cases involve a child victim.

For a person to be convicted of this offence they must be a member of the same household as the victim and have frequent contact with them. To be convicted of causing harm or death the offender will have carried out an unlawful act that caused death or serious physical harm and there will have been a significant risk of serious harm being caused by this act. To be convicted of allowing harm or death the offender will have been, or ought to have been, aware of the risk of serious physical harm being caused to the victim by an unlawful act, would have failed to take steps that they could reasonably have been expected to take to protect the child from the risk and the act would have occurred in a circumstance that the offender foresaw or ought to have foreseen.

The prosecution does not need to prove whether the offender is guilty of causing or allowing the harm or death. In fact, one of the main purposes of such legislation was to address the problem that arises when a child or vulnerable adult suffers an unlawful death⁵ and it can be proved that someone in the household caused it, but not which of them. In such circumstances there may not be enough evidence for a conviction of manslaughter or murder and so, prior to this legislation, those responsible could evade justice by either remaining silent or accusing each other. However, the offence is still serious in its own right and the Home Office states *'The offence will only apply to a person who, because they were members of the household who had frequent contact with the victim, had a duty to protect the victim from harm. It is reasonable that a person in those circumstances should be expected to take some action if this is possible, not simply stand by and do nothing. It is also reasonable that such a person should be expected to account to the court for the circumstances of the victim's death.'*⁶

The Council did consider whether the guideline should cover the offence in relation to both adult and child victims or whether it was better suited focussing only on cases where children are the victims. As this was a Child Cruelty project from the outset and there are clear similarities in the relevant factors with regards to this offence (when the victim is a child) and cruelty to a child it is proposed that the scope is limited to child victims only. There are likely to be different culpability

5 When the legislation was first implemented the offence was causing or allowing death only. The legislation was amended in 2012 to account for cases where serious physical harm was caused/allowed.

6 www.gov.uk/government/publications/the-domestic-violence-crime-and-victims-act-2004

factors relevant to cases involving vulnerable adults that are not typical factors in cases involving children; for example there may be a financial motive in cases involving adult victims. Therefore having one guideline that applies to both types of cases may not be suitable and further research would need to be done to identify what the different factors may be.

The Council may consider producing a separate guideline relating to vulnerable adults in the future, which could include a guideline for causing or allowing a vulnerable adult to die or suffer serious physical harm.

Q10

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

Q11

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

STEP ONE

The first step of the guideline is to consider the culpability level of the offender by the assessment of a series of factors.

Culpability factors

These are identical to those proposed in the guideline for cruelty to a child; see page 11 for a detailed discussion. The offences of cruelty to a child and causing or allowing a child to die or suffer serious physical harm have many similarities and the actions of the offender are likely to be similar within both offences.

As with the cruelty to a child guideline a person failing to protect a child from certain actions is treated as at the same level of culpability as the person who actually commits the action (see page 12 for more information). The lack of distinction between these two types of offenders is particularly important for this guideline. As discussed above, one of the primary purposes of this legislation was to close the loophole created if there is not enough evidence to determine who, when more than one person is present in the household, caused the harm or death. In such circumstances, this offence will be charged and there is no onus on the prosecution to prove which of the offender(s) caused or allowed the harm. Therefore, if the guideline determined that allowing harm was less serious than causing it, in such a case, both offenders would have to be sentenced on the basis of allowing harm, rather than causing it. Having to make this distinction could circumvent the aims of the legislation and would mean that both offenders in such a circumstance would receive a lesser sentence than under the guidelines as currently drafted.

However, there will be some cases where the court is aware which offender caused the harm, and which one allowed it. Although the guideline will treat these as the same level of culpability it is expected, as with cruelty to a child, that there will often be additional circumstances that prevented the person who allowed the harm from being able to intervene or prevent the actions occurring,

which may on balance reduce their culpability or mitigate the seriousness. However, as discussed on page 12, if there are no reasons why the offender who allowed the harm did not intervene when perfectly capable of doing so, they will be treated as having the same culpability as their co-defendant who caused the harm.

STEP ONE

Determining the offence category

The court should determine the offence category with reference **only** to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Prolonged and/or multiple incidents of serious cruelty
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Failure to protect a child from offences with the above factors present

B - Medium culpability:

- All other cases that fall between categories A and C

C - Lesser culpability:

- Minimal force or failure to protect a child from an incident involving minimal force
- Momentary or brief lapse in judgement
- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse (when linked to the commission of the offence)

Q12

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

Q13

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

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence.

Category 1

The only category one factor harm is death.

Category 2

There are four category two harm factors:

- Physical harm which has a substantial and/or long term effect
- Serious psychological harm
- Significantly reduced life expectancy
- A progressive, permanent or irreversible condition

This category will capture cases that cause the highest end of serious physical harm. The offence itself is to cause or allow death or serious physical harm but the Council has also included the factor ‘*serious psychological harm*’ as it is an important consideration when considering the effect on the victim.

Category 3

This category captures all other harm caused.

<p>Harm The court should consider the factors set out below to determine the level of harm that has been caused to the victim.</p>
<p>Category 1</p> <ul style="list-style-type: none"> • Death
<p>Category 2</p> <ul style="list-style-type: none"> • Physical harm which has a substantial and/or long term effect • Serious psychological harm • Significantly reduced life expectancy • A progressive, permanent or irreversible condition
<p>Category 3</p> <ul style="list-style-type: none"> • All other harm caused

Q14 Do you agree with the proposed approach to the assessment of harm?

Q15 Are there any harm factors that should be added or removed?

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database; analysis of first instance transcripts; analysis of Court of Appeal sentencing remarks and reference to the ranges within the draft *Cruelty to a child* guideline.

The statutory maximum for offences resulting in the death of the victim is 14 years' custody, for offences resulting in serious physical harm it is 10 years. When death is caused this will always be assessed as category one harm; where serious physical harm is caused it may be category two or three depending on the degree of the harm.

For offences resulting in death that have the highest level of culpability, the guideline goes up to the statutory maximum of 14 years' custody. In general, guidelines do not go up to the statutory maximum in order to allow for some 'headroom' for exceptional cases. However, in this circumstance the Council feels it is appropriate as the offender's culpability would be exceptionally high and there is no exceptional circumstance that could cause greater harm than death. This reflects the approach taken in the definitive guidelines for *Dog dangerously out of control where death is caused* and *Death by dangerous driving*.

The offence of causing or allowing a child to die has some similarities to the offence of gross negligence manslaughter. The Council is currently drafting a proposed manslaughter guideline, which will be consulted on in due course, and so these sentence levels were drafted with the manslaughter guideline in mind.

Category two and three are offences where serious physical harm occurs. This offence is obviously similar to cruelty to a child and as previously discussed the culpability factors in both guidelines are identical. Therefore the harm levels have been drafted to be comparable (ignoring category one where death is caused, so 2A in this guideline would be comparable to 1A in the cruelty to a child guideline). However, as the harm threshold for this offence is higher, since causing/allowing *serious* physical harm is higher, the sentence levels are drafted marginally higher than their counterparts in the cruelty to a child guideline.

STEP TWO**Starting point and category range**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.

Harm	Culpability		
	A	B	C
Category 1	Starting point 9 years' custody	Starting point 5 years' custody	Starting point 2 years' custody
	Category range 7 – 14 years' custody	Category range 3 – 8 years' custody	Category range 1 – 4 years' custody
Category 2	Starting point 7 years' custody	Starting point 4 years' custody	Starting point 1 year 6 months' custody
	Category range 5 – 9 year's custody	Category range 2 – 6 years' custody	Category range 6 months – 3 years' custody
Category 3	Starting point 4 years' custody	Starting point 1 year 6 months' custody	Starting point 9 months' custody
	Category range 2 – 6 years' custody	Category range 6 months – 3 years' custody	Category range High level community order – 2 years' custody

Q16

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

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors. These lists are non-exhaustive but are intended to contain the most common factors which provide context to the commission of the particular offence.

The aggravating and mitigating factors are identical to those proposed in the cruelty to a child guideline, other than the inclusion of the additional factor '*Prolonged suffering prior to death.*'

Factors increasing seriousness***Statutory aggravating factors:***

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help (where not taken into account at step one)

Prolonged suffering prior to death

Commission of offence whilst under the influence of alcohol or drugs

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Failure to respond to interventions or warnings about behaviour

Threats to prevent reporting of the offence

Failure to comply with current court orders

Offence committed on licence or post sentence supervision

Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Remorse

Attempts to address or rectify behaviour (either on own behalf or on behalf of somebody else in an attempt to protect the victim) e.g. seeking support from authorities

Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)

Good character and/or exemplary conduct (the more serious the offence, the less weight which should normally be attributed to this factor)

Serious medical condition requiring urgent, intensive or long-term treatment

Mental disorder or learning disability (where not taken into account at step one)

Co-operation with the investigation

Q17

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

Step five

Parental responsibilities for sole or primary carers

This step is identical to that included within the Cruelty to a child guideline, see discussion at page 19 for more information.

Case Study B

D's partner A has been charged with manslaughter following the death of their two year old son. The cause of death was a brain haemorrhage caused by vigorous shaking of the baby, V. The post-mortem showed previous injuries consistent with deliberate harm being caused to V in the run-up to his death (over a period of at least four weeks).

D stated that A's actions were accidental and that he had never hurt V prior to this incident and never would intentionally. However, she did admit that she had noticed bruising on V's arms but when she questioned A he said he didn't know what had happened.

There is a history of domestic abuse by A towards D and the police have been called out to their property several times, although A has never been charged. D admits that A has been violent towards her on previous occasions and that he can be frightening when he loses his temper. The prosecution presented text messages between D and A where D has stated, 'You just scare me when you get mad. I know V is difficult and stressful but you can't get so wound up.'

D was found guilty after trial. She is 18 and psychiatrist reports suggest her naivety prevents her from facing up to the reality of the situation. She has no previous convictions and was employed as a nursery nurse prior to the offence; her employees have all spoken highly of her good character.

Q18

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

Section five: Failing to protect a girl from the risk of female genital mutilation

(Draft guideline at page 55)

Section 3A of the FGM Act 2003 makes it an offence to fail to protect a girl from the risk of FGM. This means that if FGM is committed on a girl under the age of 16 then each person who is responsible for the girl at the relevant time is guilty of an offence. It is a defence if the person(s) responsible for the girl can show that they reasonably did not think there was a significant risk of FGM being committed against the girl and could not reasonably have been expected to be aware that a risk existed or that they took reasonable steps to protect the girl.

There have been no convictions for any of the offences under the FGM Act 2003. However, the World Health Organisation (WHO) predicts that there are 137,000 women and girls affected by FGM in England and Wales.⁷

WHO has classified FGM into four major types as follows:

- Type 1:** Often referred to as clitoridectomy, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- Type 2:** Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).
- Type 3:** Often referred to as infibulation, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).
- Type 4:** This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

In legislation FGM is defined as being the excision, infibulation or otherwise mutilation of the whole or any part of a girl's labia majora, labia minor or clitoris. What constitutes mutilation has not been defined legally, and so whether a particular procedure (that does not involve excision or infibulations) amounts to mutilation will be a matter for the court to consider.

7 https://www.city.ac.uk/_data/assets/pdf_file/0004/282388/FGM-statistics-final-report-21-07-15-released-text.pdf

The then President of the Family Division considered this issue in some detail, stating *‘It will be seen that for the purposes of the criminal law what is prohibited is to “excise, infibulate or otherwise mutilate” the “whole or any part” of the “labia majora, labia minora or clitoris.” This brings within the ambit of the criminal law all forms of FGM of WHO Types I, II and III [...] But WHO Type IV comes within the ambit of the criminal law only if it involves “mutilation” [...] whether a particular case of FGM Type IV [...] involves mutilation is [...] a matter properly for determination by a criminal court as and when the point arises for decision in a particular case.’*⁸

Therefore whether the WHO definition of type 4 FGM is an offence or not depends on the particular circumstances of the case and will be for the (criminal) court to determine.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender by the assessment of a series of factors.

Culpability factors

Category A – High culpability

There are four factors that indicate the highest level of culpability:

- Significant planning (where not charged as a separate offence)
- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings e.g. from medical professionals/social services etc
- Involving others through coercion, intimidation or exploitation

‘Significant planning’ and *‘involving others through coercion, intimidation or exploitation’* both capture offenders who have taken active steps in arranging or facilitating the FGM procedure. It is difficult to predict how such a case may be charged. It may be that it would be charged as aiding or abetting the offence of FGM itself (section 1, FGM Act 2003) but it could be that it is charged as failing to protect a girl from the risk of FGM. Therefore the Council wanted to account for both possibilities and include relevant factors for such an offence in higher culpability.

FGM Protection Orders (FGMPOs) are granted by a court to protect a child at risk of FGM. Its conditions are unique to each case but include certain conditions that are deemed relevant; for example, they could prevent the child being taken abroad if there is a risk of FGM being performed abroad. *‘Child was subject to an FGM Protection Order’* clearly constitutes high culpability as such an order is only imposed if there is a risk to the child, therefore the offender must have been fully aware of such a risk, as well as having full knowledge of the dangers and illegality of the procedure.

‘Failure to respond to interventions or warnings’ is similar. Often, if a girl is identified as being at risk of FGM (this may be because when giving birth the mother is identified as having undergone FGM herself) then appropriate health services or outreach groups will work with the family to ensure they are aware that the procedure is illegal and harmful and what the risks and consequences are, as well as offer support and plans to protect the child (e.g. how to manage risks from other family members etc). Therefore a failure to respond to such interventions or warnings would be at the highest culpability.

Culpability C – Lesser culpability

There are four factors that indicate the lowest level of culpability:

- Steps taken to protect child but fell just short of what could reasonably be expected
- Offender victim of domestic abuse (where linked to commission of the offence)
- Subjected to coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

If an offender took steps to protect the child, but they were not quite sufficient, this would indicate lesser culpability.

'Offender victim of domestic abuse' is considered a lesser culpability factor if as a result they were not able to challenge the procedure taking place or take such steps as would usually be deemed reasonable.

'Subjected to coercion, intimidation or exploitation' is to capture cases where pressure may be exerted on the offender to allow FGM to be carried out but it is not captured by the above factor. Such pressure may be exerted on them by partners or by wider family members, such as grandparents.

Finally, if the offender has a mental disorder or learning disability that has had an effect on their ability to foresee the risk to the girl, or take appropriate actions to prevent such a risk becoming reality, then this would be a lesser culpability factor. Unlike in the two previous guidelines this factor does not include cases where the offender's responsibility is reduced by a lack of maturity. This is because in the previous guidelines (for offences of cruelty to a child and causing or allowing a child to die or suffer serious physical harm) a lack of maturity may mean offenders are unable to cope with the pressures and demands of parenthood, which could lead them to neglect and harm the baby. However, for this offence such a lack of ability to cope with being a parent would not have a direct bearing on the offender's inability to prevent FGM occurring. Therefore the Council determined that for such offences it was more appropriate as a mitigating factor.

Culpability B – Medium culpability

Medium culpability has only one factor and is a 'catch all' for cases falling between culpability A and C.

STEP ONE**Determining the offence category**

The court should determine the offence category with reference **only** to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Significant planning (where not charged as a separate offence)
- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings e.g. from medical professionals/social services etc
- Involving others through coercion, intimidation or exploitation

B - Medium culpability:

- All other cases that fall between categories A and C

C - Lesser culpability:

- Steps taken to protect child but fell just short of what could reasonably be expected
- Offender victim of domestic abuse (where linked to commission of the offence)
- Subjected to coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

Q19

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

Q20

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

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence. The Council carefully considered how to approach the assessment of harm in such cases. It is aware that in all cases FGM causes serious harm to a girl, both physically and psychologically, but did consider that there are some cases where that harm may be more severe than in others.

The Council did consider whether there was any merit in categorising the harm based on the different types of FGM, as some types are clearly more invasive than others. However, although some types may be less invasive there is research to suggest that there can still be severe long term psychological and physical problems. Many FGM victims report suffering from depression, post traumatic stress syndrome and psychosexual problems (e.g. difficulty in establishing intimate relationships) and there can be severe physical consequences with all types of FGM, including urinary problems or complications during pregnancy or childbirth.

The Council therefore decided a harm model based on the different types of FGM would not be appropriate. The proposed harm model recognises that there is a baseline of harm inherent in any such offence and states, *'For all cases of failing to protect a girl from the risk of female genital mutilation there will be serious physical and psychological harm (likely both immediate and long-term but there are factors that may increase it further).'*

Category 1

This category is to capture the cases where the harm caused is beyond the baseline that will be present in all offences and has only one factor:

- Cases where the physical and/or psychological harm is particularly severe

Category 2

Category two will capture all other cases.

Harm

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

For all cases of failing to protect a girl from the risk of female genital mutilation there will be serious physical and psychological harm (likely both immediately and long-term) but there are factors that may increase it further.

Category 1

- Cases where the physical and/or psychological harm is particularly severe

Category 2

- All other cases

Q21

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

Q22

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

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

Sentence levels

The statutory maximum for this offence is seven years' custody. In order to draft proportionate sentence levels the Council drew on the expertise of members, as well as considering other guidelines and the ranges included within them in relation to their relevant maximum sentences. However, as there have been no convictions for this offence there is no existing data to base the starting points and ranges on; therefore the Council is particularly keen to hear views from respondents on the proposed sentence levels.

FGM offences are unique in the fact that in many cases, even some higher culpability cases, the offender may genuinely believe they are acting in the best interests of the child. Nevertheless FGM is a serious form of child abuse and must be treated as such. The Council is therefore proposing a custodial starting point for all but the least serious cases.

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.

Harm	Culpability		
	A	B	C
Category 1	Starting point 5 years' custody	Starting point 3 years' custody	Starting point 1 year's custody
	Category range 3 – 6 years' custody	Category range 2 – 5 years' custody	Category range High level community order – 3 years' custody
Category 2	Starting point 3 years' custody	Starting point 1 year's custody	Starting point Medium level community order
	Category range 2 – 5 years' custody	Category range High level community order – 3 years' custody	Category range Low level community order – 1 year's custody

Q23 Do you have any comments on the sentence ranges and starting points?

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence.

These factors are included to give the court the opportunity to consider the wider context of the offence and any relevant circumstances relating to the offender. It is at the court's discretion whether to remain at the starting point or to move up or down from it. The presence of any of the factors included within the list does not mean it must be taken into account if the sentencer does not consider it to be significant in the particular case. The court will need to attribute appropriate weight to the factors. These lists are non-exhaustive but are intended to contain the most common factors which provide context to the commission of the particular offence.

The aggravating and mitigating factors are similar to those proposed in the previous two guidelines (*Cruelty to a child* and *Causing or allowing a child to die or suffer serious physical harm*) but there are a few differences.

'Failure to respond to warnings about behaviour' is not included as an aggravating factor to avoid 'double counting' (as culpability A includes the factor 'Failure to respond to interventions or warnings e.g. from medical professionals/social services etc').

'Steps taken to address offending behaviour' has been removed as a mitigating factor as it is not relevant to this offence and culpability C will capture cases where the offender has attempted to seek help to address another's behaviour.

Furthermore an additional mitigating factor has been included, *'Offender particularly isolated with limited access to support.'* This could capture offenders who have pressure exerted on them from family members and do not know where they can turn to in order to seek help to prevent the FGM, perhaps because they do not speak English and/or are not aware of what services are available or how to access them.

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help when necessary

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Threats to prevent reporting of the offence

Failure to comply with current court orders (where not taken into account at step one)

Offence committed on licence or post sentence supervision

Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigationNo previous convictions **or** no relevant/recent convictions

Remorse

Offender particularly isolated with limited access to support

Appropriate medical care sought for victim

Sole or primary carer for dependent relatives **(see step five for further guidance on parental responsibilities)**

Good character and/or exemplary conduct

Serious medical condition requiring urgent, intensive or long-term treatment

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability (where not taken into account at step one)

Co-operation with the investigation

Q24

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

Step five**Parental responsibilities for sole or primary carers**

This step is identical to that included within the *Cruelty to a child* and *Causing or allowing a child to die or suffer serious physical harm* guideline; see discussion at page 19 for more information.

Case Study C

When pregnant it was identified that D had undergone FGM. After giving birth to a daughter, V, a specialist midwife spoke with her and D confirmed that she and her husband were planning to have FGM performed on her daughter once she was older. The midwife explained that it is an offence in England and Wales and explained what the legal consequences could be, as well as the physical consequences for her daughter. Over the next 6 years a local outreach programme visited the family three times, to reiterate the messages and assess whether the daughter appeared to be at risk. They noted that D was aware that FGM was illegal and had assured them that V would not undergo it.

However, aged six years old V was taken on holiday to visit her grandparents and when she returned to school her teachers noticed that she seemed uncomfortable sitting down for long periods of time and was frequently asking to go to the toilet. The school contacted the authorities and it was discovered that D's husband had taken V abroad to visit his parents and arranged for FGM to be performed whilst there. D did not go on this trip and stated she was unaware of his intention, but she did admit that she knew that both he and his parents were strongly supportive of FGM and believed it should be performed on V.

V has since recovered from the procedure and medical professionals are confident that she will be able to have a normal pregnancy and birth in the future although she may lack sexual enjoyment. She appears to have recovered emotionally from the procedure, although psychologists suggest that there is a strong correlation between FGM and future psychosexual issues. V is still currently living with her parents and brothers in their family home.

D was convicted after trial and has no previous convictions (her husband has been charged separately).

Q25

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

Equality impact

The Council carefully considered any equality impact the *Child Cruelty* guideline could have throughout the drafting process. Proportionately more women than men are sentenced for these offences; in 2016 56 per cent of offenders sentenced for offences of cruelty to a child, 67 per cent of offenders sentenced for offences of causing or allowing a child or vulnerable adult⁹ to die and 52 per cent of causing or allowing a child or vulnerable adult to suffer serious physical harm were women.¹⁰

The guidelines should promote consistency within sentencing, regardless of gender, and all factors can be used when relevant to any offender. The Council therefore does not anticipate any equality impacts, but would welcome views or any evidence on this issue.

Q26

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

⁹ It is not possible to break down the statistics to determine which offence involves vulnerable adult victims and which involve children.

¹⁰ These percentages do not include cases where the offender's gender was unknown.

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Annex A: List of consultation questions

Section three: Cruelty to a child

- Q1 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?
- Q2 Do you agree with the proposed culpability factors? Are there any that should be added or removed?
- Q3 Do you agree with the proposed approach to the assessment of harm?
- Q4 Are there any harm factors that should be added or removed?
- Q5 Do you have any comments on the sentence ranges and starting points?
- Q6 Do you agree with the proposed aggravating factors? Please state which, if any, should be added or removed.
- Q7 Do you agree with the proposed mitigating factors? Please state which, if any, should be added or removed.
- Q8 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?
- Q9 What would your final sentence be for case study A and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.

Section four: Causing or allowing a child to die or suffer serious physical harm

- Q10 Do you agree that the guideline should exclusively focus on child victims?
- Q11 Should the Council consider producing separate guidelines for offences against vulnerable adults? If so, which offences should such guidelines cover?

- Q12 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?
- Q13 Are there any culpability factors that should be added or removed?
- Q14 Do you agree with the proposed approach to the assessment of harm?
- Q15 Are there any harm factors that should be added or removed?
- Q16 Do you have any comments on the sentence ranges and starting points?
- Q17 Do you agree with the proposed aggravating and mitigating factors? Please state which, if any, should be added or removed.
- Q18 What would your final sentence be for case study B and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.

Section five: Failure to protect a girl from the risk of FGM

- Q19 Do you agree with the proposed approach to the assessment of culpability, particularly the higher culpability factors?
- Q20 Are there any culpability factors that should be added or removed?
- Q21 Do you agree with the proposed approach to the assessment of harm?
- Q22 Are there any harm factors that should be added or removed?
- Q23 Do you have any comments on the sentence ranges and starting points?
- Q24 Do you agree with the proposed aggravating and mitigating factors? Please state which, if any, should be added or removed.
- Q25 What would your final sentence be for case study C and why? Please detail the relevant culpability, harm, aggravating and mitigating factors.
- Q26 Are there any equality or diversity matters that the Council should consider for the guidelines discussed? Please provide evidence of any issues where possible.

Annex B: Background to guidelines

Statutory requirements

In producing these draft guidelines, the Council has had regard to a number of statutory requirements.

The purposes of sentencing are stated in section 142 of the Criminal Justice Act 2003:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.

The Sentencing Council has also had regard to the statutory duties in the Coroners and Justice Act 2009 which set out requirements for sentencing guidelines as follows:

- guidelines may be general in nature or limited to a particular offence;
- the Council must publish them as draft guidelines;
- the Council must consult the following persons about draft guidelines: the Lord Chancellor, such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons, such other persons as the Council considers appropriate;
- after making appropriate amendments, the Council must issue definitive guidelines;
- the Council may review the guidelines and may revise them;¹¹
- the Council must publish a resource assessment in respect of the guidelines;¹² and,
- the Council must monitor the operation and effect of its sentencing guidelines.¹³

Section 125(a) of the Coroners and Justice Act 2009 states that, '*every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case*'. Therefore, courts are required to impose a sentence consistent with the guidelines, unless contrary to the interests of justice to do so. Therefore, the Sentencing Council is keen to ensure that the guidelines are as accessible as possible for sentencers.

¹¹ s.120 Coroners and Justice Act 2009

¹² s.127(2) *ibid*

¹³ s.128(1) *ibid*

When preparing sentencing guidelines, the Council must have regard to the following matters:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and,
- the results of monitoring the operation and effect of its sentencing guidelines.¹⁴

When publishing any draft guidelines, the Council must publish a resource assessment of the likely effect of the guidelines on:

- the resources required for the provision of prison places;
- the resources required for probation provision; and
- the resources required for the provision of youth justice services.¹⁵

In order to achieve these requirements, the Council has considered case law on the offences included within the guidelines, where it is available, evidence on current sentencing practice and drawn on members' own experience of sentencing practice. The intention is for the decision making process in the proposed guideline to provide a clear structure, not only for sentencers, but to provide more clarity on sentencing for the victims and the public, so that they too can have a better understanding of how a sentence has been reached.

The Council has had regard to these duties throughout the preparation of this draft guideline. In developing an understanding of the cost and effectiveness of different sentences, the Council has considered the available information and evidence and these are contained in the resource assessment which accompanies this consultation paper.

¹⁴ s.120(11) Coroners and Justice Act 2009

¹⁵ s.127(3) *ibid*

Annex C: Draft guidelines

Child Cruelty – Assault and ill treatment, abandonment, neglect and failure to protect

Cruelty to a child

Children and Young Persons Act 1933 (section 1(1))

Triable either way

Maximum: 10 years' custody

Offence range: Low level community order – 9 years' custody

This guideline applies only to offenders aged 18 and older

Please note this is a draft guideline and is not in force

STEP ONE**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following

A – High culpability

- Prolonged and/or multiple incidents of serious cruelty
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Failure to protect a child from offences with the above factors present

B – Medium culpability

- All other cases that fall between categories A and C

C – Lesser culpability

- Minimal force or failure to protect a child from an incident involving minimal force
- Momentary or brief lapse in judgement
- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse (when linked to the commission of the offence)

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1

- Serious psychological and/or developmental harm
- Serious physical harm (including illnesses contracted due to unsanitary surroundings)

Category 2

- Cases falling between category 1 and 3
- A serious risk of category 1 harm being caused that any reasonable person should have foreseen

Category 3

- Little or no psychological and/or developmental harm
- Little or no physical harm

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
Category 1	Starting point 6 years' custody	Starting point 3 years' custody	Starting point 1 year's custody
	Category range 5 – 9 years' custody	Category range 2 – 6 years' custody	Category range High level community order – 2 years 6 months' custody
Category 2	Starting point 3 years' custody	Starting point 1 year's custody	Starting point 6 months' custody
	Category range 2 – 6 year's custody	Category range High level community order – 2 years 6 months' custody	Category range Medium level community order – 1 year 6 months' custody
Category 3	Starting point 1 year's custody	Starting point 6 months' custody	Starting point High level community order
	Category range High level community order – 2 years 6 months' custody	Category range Medium level community order – 1 year 6 months' custody	Category range Low level community order – 6 months' custody

The table on the next page contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness**Statutory aggravating factors:**

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help (where not taken into account at step one)

Commission of offence whilst under the influence of alcohol or drugs

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Failure to respond to interventions or warnings about behaviour

Threats to prevent reporting of the offence

Failure to comply with current court orders

Offence committed on licence or post sentence supervision

Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Remorse

Attempts to address or rectify behaviour (either on own behalf or on behalf of somebody else in an attempt to protect the victim) e.g. seeking support from authorities

Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)

Good character and/or exemplary conduct (the more serious the offence, the less weight which should normally be attributed to this factor)

Serious medical condition requiring urgent, intensive or long-term treatment

Mental disorder or learning disability (where not taken into account at step one)

Co-operation with the investigation

STEP THREE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE**Parental responsibilities for sole or primary carers**

In the majority of cruelty to a child cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly "failure to protect" offences, where the offender has otherwise been a loving and capable parent/carer.

STEP SIX**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN**Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

STEP EIGHT**Reason**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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Causing or allowing a child to suffer serious physical harm

Domestic Violence, Crime and Victims Act 2004 (section 5)

Indictable only

Maximum: 10 years' custody

Offence range: High level community order – 9 years' custody

Causing or allowing a child to die

Domestic Violence, Crime and Victims Act 2004 (section 5)

Indictable only

Maximum: 14 years' custody

Offence range: 1 year's custody – 14 years' custody

Please note this is a draft guideline and is not in force

This guideline applies only to offenders aged 18 and older and when the victim of the offence is aged 15 or under.

STEP ONE**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following

A – High culpability

- Prolonged and/or multiple incidents of serious cruelty
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Failure to protect a child from offences with the above factors present

B – Medium culpability

- All other cases that fall between categories A and C

C – Lesser culpability

- Minimal force or failure to protect a child from an incident involving minimal force
- Momentary or brief lapse in judgement
- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse (when linked to the commission of the offence)

Harm

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

Category 1

- Death

Category 2

- Physical harm which has a substantial and/or long term effect
- Serious psychological harm
- Significantly reduced life expectancy
- A progressive, permanent or irreversible condition

Category 3

- All other harm caused

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
Category 1	Starting point 9 years' custody	Starting point 5 year's custody	Starting point 2 years' custody
	Category range 7 – 14 years' custody	Category range 3 – 8 years' custody	Category range 1 – 4 years' custody
Category 2	Starting point 7 year's custody	Starting point 4 years' custody	Starting point 1 year 6 months' custody
	Category range 5 – 9 years' custody	Category range 2 – 6 years' custody	Category range 6 months – 3 years' custody
Category 3	Starting point 4 years' custody	Starting point 1 year 6 months' custody	Starting point 9 months' custody
	Category range 2 – 6 years' custody	Category range 6 months – 3 years' custody	Category range High level community order – 2 years' custody

The table on the next page contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness**Statutory aggravating factors:**

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help (where not taken into account at step one)

Prolonged suffering prior to death

Commission of offence whilst under the influence of alcohol or drugs

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Failure to respond to interventions or warnings about behaviour

Threats to prevent reporting of the offence

Failure to comply with current court orders

Offence committed on licence or post sentence supervision

Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Remorse

Attempts to address or rectify behaviour (either on own behalf or on behalf of somebody else in an attempt to protect the victim) e.g. seeking support from authorities

Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)

Good character and/or exemplary conduct (the more serious the offence, the less weight which should normally be attributed to this factor)

Serious medical condition requiring urgent, intensive or long-term treatment

Mental disorder or learning disability (where not taken into account at step one)

Co-operation with the investigation

STEP THREE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE**Parental responsibilities for sole or primary carers**

In the majority of cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability/harm cases, particularly "failure to protect" offences, where the offender has otherwise been a loving and capable parent/carer.

STEP SIX**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN**Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

STEP EIGHT**Reason**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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Child Cruelty – Failing to protect a girl from the risk of female genital mutilation

Failure to protect a girl from risk of genital mutilation

Female Genital Mutilation Act 2003 (section 3A)

Indictable only

Maximum: 7 years' custody

Offence range: Low level community order – 6 years' custody

This guideline applies only to offenders aged 18 and older.

Please note this is a draft guideline and is not in force

STEP ONE**Determining the offence category**

The court should determine the offence category with reference **only** to the factors in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following

A – High culpability

- Significant planning (where not charged as a separate offence)
- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings e.g. from medical professionals/ social services etc
- Involving others through coercion, intimidation or exploitation

B – Medium culpability

- All other cases that fall between categories A and C

C – Lesser culpability

- Steps taken to protect child but fell just short of what could reasonably be expected
- Offender victim of domestic abuse (where linked to commission of the offence)
- Subjected to coercion, intimidation or exploitation
- Offender's responsibility substantially reduced by mental disorder or learning disability

Harm

The court should consider the factors set out below to determine the level of harm that has been caused to the victim.

For all cases of failing to protect a girl from female genital mutilation there will be serious physical and psychological harm (likely both immediately and long-term) but there are factors that may increase it further.

Category 1

- Cases where the physical and/or psychological harm is particularly severe

Category 2

- All other cases

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Harm	Culpability		
	A	B	C
Category 1	Starting point 5 years' custody	Starting point 3 years' custody	Starting point 1 year's custody
	Category range 3 – 6 years' custody	Category range 2 – 5 years' custody	Category range High level community order – 3 years' custody
Category 2	Starting point 3 years' custody	Starting point 1 year's custody	Starting point Medium level community order
	Category range 2 – 5 years' custody	Category range High level community order – 3 years' custody	Category range Low level community order – 1 year's custody

The table on the next page contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness**Statutory aggravating factors:**

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Failure to seek medical help when necessary

Deliberate concealment and/or covering up of the offence

Blamed others for the offence

Victim particularly vulnerable

Threats to prevent reporting of the offence

Failure to comply with current court orders (where not taken into account at step one)

Offence committed on licence or post sentence supervision

Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Remorse

Offender particularly isolated with limited access to support

Appropriate medical care sought for victim

Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)

Good character and/or exemplary conduct

Serious medical condition requiring urgent, intensive or long-term treatment

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability (where not taken into account at step one)

Co-operation with the investigation

STEP THREE**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE**Parental responsibilities for sole or primary carers**

In the majority of failing to protect a child from the risk of female genital mutilation cases the offender will have parental responsibility for the victim. When the case is on the cusp of custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children the offender may care for). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lesser culpability cases where the offender has otherwise been a loving and capable parent/carer.

STEP SIX**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN**Ancillary orders**

In all cases the court should consider whether to make ancillary orders.

STEP EIGHT**Reason**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Annex D: Fine bands and community orders

FINE BANDS

In this guideline, fines are expressed as one of three fine bands (A, B, C).

Fine Band	Starting point (<i>applicable to all offenders</i>)	Category range (<i>applicable to all offenders</i>)
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income

COMMUNITY ORDERS

In this guideline, community sentences are expressed as one of three levels (low, medium or high).

An illustrative description of examples of requirements that might be appropriate for each level is provided below.

Where two or more requirements are ordered, they must be compatible with each other. Save in exceptional circumstances, the court must impose at least one requirement for the purpose of punishment, or combine the community order with a fine, or both (see section 177 Criminal Justice Act 2003).

Low	Medium	High
Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate	Offences that obviously fall within the community order band	Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include: <ul style="list-style-type: none"> • 40 – 80 hours of unpaid work • prohibited activity requirement • curfew requirement within the lowest range (e.g. up to 16 hours per day for a few weeks) • Attendance centre requirement (where available) • Exclusion requirement, without electronic monitoring, for a few months 	Suitable requirements might include: <ul style="list-style-type: none"> • greater number of hours of unpaid work (for example, 80 – 150 hours) • prohibited activity requirement • curfew requirement within the middle range (for example, up to 16 hours for 2 to 3 months) • exclusion requirement lasting in the region of 6 months 	Suitable requirements might include: <ul style="list-style-type: none"> • 150 – 300 hours of unpaid work • curfew requirement up to 16 hours per day for 4 – 12 months • exclusion order lasting in the region of 12 months

The *Magistrates' Court Sentencing Guidelines* includes further guidance on fines and the *Imposition of Community and Custodial Sentences* guideline provides further guidance on community orders.

