

# Manslaughter Guideline

## Response to consultation

July 2018

# **Manslaughter Guideline**

**Response to consultation**

# Contents

<b>Foreword</b>	<b>3</b>
<b>Introduction</b>	<b>4</b>
<b>Summary of responses</b>	<b>5</b>
Breakdown of respondents	5
Summary	5
<b>Unlawful Act</b>	<b>6</b>
Culpability	6
Harm	7
Aggravating factors	7
Mitigating factors	8
Starting points and ranges	9
<b>Gross Negligence</b>	<b>10</b>
Culpability	10
Aggravating factors	13
Mitigating factors	13
<b>Loss of Control</b>	<b>15</b>

Culpability	15
Aggravating factors	16
Mitigating factors	16
Starting points and ranges	16
<b>Diminished responsibility</b>	<b>17</b>
Assessing responsibility	17
Aggravating factors	18
Mitigating factors	18
Steps Three, Four and Five	19
Starting points and ranges	19
<b>Conclusion and next steps</b>	<b>20</b>
<b>Annex A: Consultation questions</b>	<b>21</b>
<b>Annex B: List of respondents</b>	<b>23</b>

# Foreword



On behalf of the Sentencing Council I thank all those who responded to this consultation. I am also grateful to judges who participated in research exercises to test the guideline at various stages of its development and to those stakeholders who hosted and participated in feedback events.

The views put forward by all respondents were taken into account in revising the draft guidelines. Changes have been made to each of the four guidelines, including extensive changes to the Gross Negligence guideline, which the Council had always recognised as a particularly difficult offence to cover. I would like to acknowledge the assistance of those judges who assisted with testing several iterations of this guideline.

The Council was keenly aware that manslaughter is always a very serious offence because it involves the loss of a life and yet the circumstances of the offending can vary hugely from case to case.

For this reason the Council has taken the time to undertake a detailed review of sentencing practice by obtaining and analysing the sentencing remarks of every manslaughter case in 2014 and in 2016. Even so, the Council has had regard to the fact these cases will not represent every individual case and so has been at pains to ensure that these guidelines allow judges flexibility and discretion within a consistent framework to do justice in individual cases.

**Lord Justice Treacy**

**Chairman, Sentencing Council**

# Introduction

In May 2014 the Sentencing Council was asked by the then Lord Chancellor to develop a guideline for so called 'one punch' manslaughter following public concern about the sentences in some high profile cases. The Council considered that it should look at manslaughter offences in the round and undertook to do so when time and resources allowed.

In July 2017 the Sentencing Council published a consultation on four draft guidelines for manslaughter offences: unlawful act manslaughter, gross negligence manslaughter, manslaughter by reason of loss of control and manslaughter by reason of diminished responsibility. Previously the only sentencing guideline that had existed for manslaughter offences was the Sentencing Guidelines Council (SGC) guideline for manslaughter by reason of provocation issued in 2005 which is now out of date following legislative changes to the partial defences to murder.

This document sets out the Council's consideration of the consultation responses and explains the changes made to the guideline as a result.

# Summary of responses

There were 45 responses in total to the consultation. Some addressed all four guidelines, others focussed on particular guidelines or issues.

## Breakdown of respondents

Type of respondent	Number
Academics	2
Charity/not for profit organisations	3
Government	1
Judiciary (1 representative body and 3 individual responses)	4
Justice Select Committee	1
Legal professionals (7 representative bodies, 6 law firms and 2 individuals)	15
Medical unions/ Royal Colleges	8
Members of the public	1
Other	3
Trade Unions	5
Victims' representative group	2
<b>Total</b>	<b>45</b>

## Summary

The general reaction from respondents was positive, particularly from sentencers and criminal practitioners:

The Criminal Bar Association commented:

The draft guideline is well thought out and a user-friendly document

The Council of Her Majesty's Circuit Judges said:

These guidelines have been particularly well-crafted and work very well. We commend the thought and industry that have gone into the drafting.

The Council has made changes to each of the four guidelines as a result of the consultation, which are explained in detail in the following sections.

# Unlawful Act

Eleven of the consultation responses directly addressed the questions asked in relation to the Unlawful Act manslaughter guideline.

## Culpability

- Responses were generally in favour of the approach taken to culpability, but concerns were raised by several respondents to the caveat attached to the lower culpability factor relating to reduced responsibility:

The offender's responsibility was substantially reduced by mental disorder,\* learning disability or lack of maturity

*\*Little if any weight should be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.*

Respondents argued that the complex interaction between mental health issues and drug and alcohol misuse was such that the caveat was unhelpful and could lead to injustice. It was also argued that offenders with mental health issues may lead chaotic lives and miss appointments because of their mental health issues.

The same objections were raised to the inclusion of this factor in the other guidelines.

On reflection the Council saw the force in the arguments put forward and has deleted the caveat in each of the guidelines where it appeared. Courts will be able to make an assessment on all of the circumstances of the case as to whether responsibility has been 'substantially reduced'.

- The Criminal Bar Association (CBA) (supported by the Howard League) questioned the use of four levels of culpability in this guideline (and the Gross Negligence Manslaughter guideline) suggesting that it would be preferable to have the more usual three levels with some wording that would allow sentencers to go outside the range in exceptional circumstances. The Council had the benefit of considering this proposal in the light of research that was carried out with judges using the draft guideline to 'sentence' scenarios based on actual cases. The Council concluded that the four levels of culpability were understood and supported by sentencers and would provide the appropriate range of sentence levels.
- The CBA suggested that the guideline would not work for cases of secondary liability. The Council did not accept this suggestion as culpability is assessed with reference to role and intention. Again, research with sentencers supported the approach taken in the guideline and the Council was satisfied that no change was needed.



## Harm

Respondents supported the approach taken to harm, recognising that any case that involves the loss of a life should be considered as having caused the greatest level of harm.

- The CBA queried whether there should be a specific aggravating factor relating to the loss of more than one life even if the indictment included separate counts. No other respondent raised this issue and no difficulties were raised in research with judges on this point. The guideline specifically deals with the approach to sentencing for more than one count of manslaughter with reference to the Totality definitive guideline. The Council was therefore satisfied that the approach to harm across all four guidelines was correct.

## Aggravating factors

Respondents made several very helpful suggestions for amendments or additions to the list of aggravating factors. As a result the following changes were made:

### History of violence or abuse towards victim by offender

- The consultation version referred to 'significant violence'. The Council agreed with the Law Society and others that any history of violence or abuse towards the victim should be sufficient to be taken into account and so removed the word 'significant'.

### Victim was providing a public service or performing a public duty at the time of the offence

- The words 'at the time of the offence' have been added as a result of a suggestion by the London Criminal Courts Solicitors' Association (LCCSA).

### Death occurred in the context of dishonesty or the pursuit of financial gain

- This factor attracted criticism from the LCCSA and the Criminal Law Solicitors' Association (CLSA) who commented that dishonesty was not a key factor in determining the seriousness of the offence. There were also suggestions from the Law Society and others that a factor relating to premeditation or planning should be included. The Council agreed and decided to replace the factor relating to dishonesty with the following:

### Death occurred in the context of an offence which was planned or premeditated

This factor will still apply to many cases that involve dishonesty, but it focusses on the relevant aspect of the offending that makes it more serious.

### Other(s) put at risk of harm by the offending

- There was a suggestion that the guideline should include a factor that reflected the impact of offences committed in public places. The Council felt that the above factor may be relevant in such cases. The Council also considered that it was important to reflect the impact that offending in a domestic setting, for example, could have on children and decided to add the factor:

### Offence committed in the presence of children

### Leading role in group

- This factor was added in response to a suggestion that group offending should make the offence more serious. The Council felt that the factor should reflect the role in the group.

There were also suggestions relating to the following factors which the Council considered but decided not to change:

#### Significant mental or physical suffering caused to the deceased

- Several respondents felt that any suffering caused to the deceased would make the offence more serious – it would not need to be ‘significant’. However, the Council considered that without that requirement the factor would apply to almost all cases and would risk double counting the harm already taken into account in the sentence levels.

#### Commission of offence whilst under the influence of alcohol or drugs

#### Offence involved use of a weapon

- There were suggestions that the above two factors should be clarified. The Council considered that both are factors that appear frequently in guidelines and that sentencers will understand how to apply them. However, the Council will be consulting separately in 2019 on providing additional guidance on factors commonly occurring in guidelines including these two factors.

### Mitigating factors

- There were a number of suggestions for additional mitigating factors including ones for situations where the offender had previously shown care for the deceased or was affected by the loss of the deceased. The Council considered that these matters were adequately covered by the following existing factors:

#### Remorse

#### Good character and/or exemplary conduct

- There was also a suggestion that an additional factor should be included to reflect a degree of mitigation where the victim’s behaviour has contributed to what happened. The Council rejected this suggestion on the grounds that so far as such a consideration might be relevant it was covered by the existing mitigating factor:

#### History of significant violence or abuse towards the offender by the victim

and by the low culpability factor of ‘Death occurred in the course of an act which was in defence of self or other(s) (where not amounting to a defence)’.

- The Council accepted a suggestion by the Law Society to add a factor to reflect that in some cases offenders demonstrate immediate remorse for the consequences of their actions:

#### Attempts to assist the victim

- The CLSA suggested that mental disorder (where not linked to the commission of the offence) should be included as a mitigating factor. The Council considered that there was force in this suggestion, because at step one the consideration is limited to the assessment of culpability and therefore would not take account of the impact of a learning disability or mental disorder more generally. The Council therefore included the following:

#### Mental disorder or learning disability

- It should be noted that the important general caution against double counting aggravating and mitigating factors that have already been taken into account at step one that appeared in the consultation version has been retained in the definitive version across all four guidelines.

## Starting points and ranges

Generally respondents to the consultation and judges in road testing were content with the sentence levels proposed. The Council of HM Circuit Judges commented:

These seem sensible to us, and broadly reflect current sentencing practice. We would only comment that we think the wide ranges and overlaps suggested are correct in giving the sentencer a proper discretion, but will of course mean that consistency is less likely.

In research carried out with sentencers (in 2017) most judges were content with the sentence arrived at using the guideline, but in nearly all cases it represented an increase in the sentence passed in the case (from 2014) on which the scenario was based. The Council noted that overall sentence levels for manslaughter had increased since 2014 and conducted an analysis of all cases sentenced in 2016 to compare sentence levels in the revised guideline with 2016 levels. The Council concluded that taken together with the changes made to the factors, the sentence levels in the guideline do reflect current sentencing practice and therefore has not changed them from the consultation levels. More information on this can be found in the Resource Assessment published on the Council's [website](#).

# Gross Negligence

This guideline attracted the most comment with 33 respondents directly addressing the questions relating to the Gross Negligence Manslaughter guideline. After the consultation a meeting was held with representatives of medical professionals to allow them the opportunity more fully to explain the issues around gross negligence manslaughter in a medical setting.

## Culpability

- The structure of the assessment of culpability was criticised by four respondents, who variously suggested having one, two or three levels of culpability. One respondent queried whether what they characterised as a formulaic approach, could be applied to this offence which is committed relatively infrequently and in so many different circumstances.

The Council noted that in research with judges the structure of the guideline had not presented any difficulties and concluded that the range of offending and sentence outcomes justified the retention of four levels of culpability. However, the Council did note concerns that a guideline could not easily be applied to all of the different circumstances that can occur in gross negligence manslaughter and reflected this in the wording above the culpability factors:

**The court should avoid an overly mechanistic application of these factors particularly in cases to which they do not readily apply.**

- The Council also noted comments from the CPS that the reference below the sentence table in the draft version to the Causing death by dangerous driving guideline for cases of motor manslaughter could be broader to encompass other offence specific guidelines. The Council agreed and has amended it to read:

**Where the offender's acts or omissions would also constitute another offence, the sentencer should have regard to any guideline relevant to the other offence to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline.**

- The consultation version of the guideline included the following culpability factors:

High culpability:

The offender was clearly aware of the risk of death arising from the offender's negligent conduct.

Low culpability:

The offender did not appreciate the risk of death arising from the negligent conduct

In order for the offence of gross negligence manslaughter to be made out there must be an obvious risk of death from the negligent conduct – but this in an objective test, there is no requirement to prove that the offender was actually aware of that risk. The draft guideline sought to distinguish between those cases where an offender was aware of the risk and persisted regardless and those where the offender had not appreciated the risk. These two factors were the source of much critical comment from respondents to the consultation and, to a lesser extent, in research with judges.

The Health and Safety Lawyers Association (HSLA) stated:

The 'awareness of risk' culpability factor is also a poor indicator of High Culpability for workplace cases. Workplace managers in positions of authority and responsibility would be expected to be aware that their breach could cause a safety risk; indeed, a grossly negligent manager with awareness of the risks might in many circumstances be less, rather than more, culpable than another grossly negligent manager who was ignorant of the risks.

Other respondents suggest that in the case of workplace deaths if the low culpability factor applied it was highly unlikely that a prosecution would be brought at all and that the high culpability factor would apply in almost all cases. Conversely from the viewpoint of victims of workplace deaths there was concern that the low culpability factor could be inappropriately applied.

The Council concluded that these factors were not helpful in distinguishing the level of culpability and has removed them. However, one reason for including the high culpability factor had been to capture very serious cases such as those where an offender is playing with a loaded gun and it accidentally goes off killing another. In circumstances where the gun was legally held, none of the other high culpability factors would apply. The same issue might apply in some motor manslaughter cases. The Council therefore concluded that there was still a need for a factor to capture those cases where the offender has acted in a way that is so blatantly dangerous as to indicate high culpability and has added:

The offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct

Of necessity this factor allows for judicial discretion in its application; it was tested with judges who were able to apply it in appropriate cases.

- The consultation version included the high culpability factor:

The negligent conduct persisted over a long period of time (weeks or months)

This factor was criticised by those representing doctors and by health and safety lawyers as potentially occurring in a wide range of cases and not necessarily being indicative of high culpability. The HSLA stated:

Health and safety breaches by their nature tend to persist for a period of weeks or more before any accident occurs. A less serious and less culpable breach might take longer to emerge as an accident and might therefore have persisted longer than a more serious and culpable breach that causes an accident in a matter of days. The "negligent conduct" in workplace cases is usually an omission, so an omission that persists for weeks before it is manifest as a fatal accident is not necessarily more culpable than an omission that manifests itself more quickly.

The Council accepted that in some factual scenarios the length of time over which the negligent conduct persists is not a good indicator of culpability and that there was a real danger that the factor could push cases into high culpability that would be more appropriately categorised as medium culpability. The mischief that this factor was designed to address relates more to the motivation for the negligent conduct and to the suffering of the deceased – both of which could be addressed by other factors. The Council has therefore removed this factor.

- Concern was expressed by those representing medical professionals about the factor:

The offender persisted in the negligent conduct in the face of the obvious suffering of the deceased.

The Medical Defence Union stated:

This could apply to a medical setting but the explanation does not specify any connection between the breach of duty and suffering, which we believe is material and should be specified. For example, in a patient's best interests, a doctor may have to perform a procedure that will cause that patient considerable suffering and distress. That suffering may arise irrespective of any breach of duty. It may simply be a consequence of the patient's underlying condition.

The Council has amended the factor to make it clear that the suffering must be connected to the negligent conduct to be relevant:

The offender continued or repeated the negligent conduct in the face of the obvious suffering caused to the deceased by that conduct

- The consultation version of the guideline contained the high culpability factor:

The offender was in a dominant role if acting with others

And the low culpability factor:

The offender was in a lesser or subordinate role if acting with others

Several respondents (including the Royal College of Physicians) were concerned that the high culpability factor would have the effect of pushing doctors in particular into high culpability. The Medical Defence Union argued that it would open up consultants and even specialist registrars to greater severity unfairly in circumstances where each doctor has an equal professional duty to the patient irrespective of seniority. One judge suggested using 'leading role' as in other guidelines.

The intention behind these factors was to distinguish the role of offenders in a variety of factual circumstances not necessarily in a work setting. For example between two parents in a case where medical assistance was not obtained for a seriously ill child.

The Council has amended the factors to make it clear that the role is only significant if it relates to the offending:

The offender was in a leading role if acting with others in the offending

The offender was in a lesser or subordinate role if acting with others in the offending

- The caveat in relation to mental disorder has been removed from the low culpability factor (as for the Unlawful Act Manslaughter guideline – see page 6 above).

## Aggravating factors

Changes have been as the result of consultation responses as follows:

### History of violence or abuse towards victim by offender

- See page 7 above

### Offender ignored previous warnings

- This factor has been added at the suggestion of several respondents. The Council considered that it could apply to a wide range of factual situations and would indicate greater seriousness.

### Death occurred in the context of dishonesty or the pursuit of financial gain

- The Council has removed this factor having been persuaded that dishonesty was not a key factor in determining the seriousness of the offence and that if the offence is motivated by financial gain it is already covered by a high culpability factor.

### Blame wrongly placed on other(s)

- Many respondents were concerned that this aggravating factor could be applied to any offender who runs a defence based on others being responsible for the fatal incident especially as most gross negligence manslaughter convictions for workplace or medical deaths follow a trial. The Council felt that such an interpretation would be based on a misunderstanding of the factor but for the avoidance of doubt in this guideline the factor has been changed to:

### Investigation has been hindered and/or other(s) have suffered as a result of being falsely blamed by the offender

### The duty of care arose from a close or familial relationship where the deceased was dependent on the offender

- Responses to the consultation and testing the guideline with judges led the Council to conclude that this aggravating factor and the corresponding mitigating factor should be removed as unhelpful:

### The duty of care was temporary one created by the particular circumstances

## Mitigating factors

### Mental disorder or learning disability

### Attempts to assist the victim

- These two factors have been added to the unlawful act manslaughter guideline and apply to this guideline also.

### Self-reporting and/or co-operation with the investigation

- This factor has been added to reflect the complexity of some gross negligence manslaughter cases and the benefit to families of victims that can result from an offender assisting the investigation. It echoes factors in the Health and Safety Offences guideline.

- The Council received many suggestions for additional mitigating factors for this guideline to cater for the many circumstances in which the offence can occur. Representations were made on behalf of medical professionals (which could also apply to others working in high stress environments) for the inclusion of factors to reflect external pressures on an offender which have contributed to the breach of a duty of care. The Council considered that there was merit in adding the following factors:

For reasons beyond the offender's control, the offender lacked the necessary expertise, equipment, support or training which contributed to the negligent conduct

For reasons beyond the offender's control, the offender was subject to stress or pressure (including from competing or complex demands) which related to and contributed to the negligent conduct

For reasons beyond the offender's control, the negligent conduct occurred in circumstances where there was reduced scope for exercising usual care and competence

The negligent conduct was compounded by the actions or omissions of others beyond the offender's control

## Starting points and ranges

Research with judges indicated that the consultation version of the guideline would have led to unintended increases in sentence levels due to some cases being categorised as more serious than had been anticipated. This has been addressed by the changes made to the step one and step two factors outlined above. Further research with judges following these amendments suggest that the guideline will operate as intended and consequently the starting points and ranges have not been changed. More information on this can be found in the Resource Assessment published on the Council's [website](#).

One further amendment made at the suggestion of Unite and the TUC was that the guideline should recommend disqualification from acting as a director in appropriate cases. The Council recognised that while this would apply in only a limited number of cases it would be useful to include a reference to director disqualification at step seven of the guideline.



# Loss of Control

Nine respondents specifically addressed questions relating to the manslaughter by reason of loss of control guideline. These responses were broadly positive although suggestions were made for changes which are addressed below.

## Culpability

### Planning of criminal activity (including the carrying of a weapon) before the loss of control

#### Loss of self-control in circumstances which only just met the criteria for a qualifying trigger

- Concerns were raised by one respondent that these factors could be applied inappropriately to victims of domestic abuse who kill their abuser. In the development of the guideline the Council had considered the scenario of the domestic abuse victim who uses a weapon to kill her physically stronger abuser. The guideline was drawn up on the basis that in such a case the loss of control could be deemed to have occurred **before** the decision to obtain a weapon (each case will turn on its own facts). The Law Society foresaw that it may be difficult for courts to decide whether the loss of self-control was in 'circumstances which only just met the criteria for a qualifying trigger'. The legislation recognises that the loss of control need not be sudden and therefore courts will take into account all of the surrounding circumstances in assessing the severity of the qualifying trigger that led to the loss of control. The sentencer will inevitably be required to make a judgment on the facts of the individual case. This will be no different from the SGC Manslaughter by Reason of Provocation Guideline which required the sentencer to distinguish between a low, substantial and high degree of provocation. On balance the Council was satisfied that these factors would operate as intended.

#### Use of a firearm (whether or not taken to the scene)

- There was some suggestion in response to consultation and in research with judges that use of other weapons (particularly a knife) should be a step one factor, making the point that but for the weapon there would not have been a death. In the context of manslaughter by reason of loss of control, the Council took the view that the main significance of the use of a weapon at step one was the degree to which it indicated prior planning. Firearms were singled out as their use would be likely to represent both planning and a disproportionate response to the qualifying trigger as well as putting others at risk. Any more rigid reference to the use of a weapon at step one would cause difficulty with the situation discussed above. The Council therefore took the view not to include a wider reference to weapons at step one.

#### Qualifying trigger represented an exceptionally high degree of provocation

- There was some concern that the use of the word 'exceptional' in this low culpability factor would mean that the factor would be rarely used and could therefore lead to increased sentences. The Council has therefore amended to the factor to read:

#### Qualifying trigger represented a very high degree of provocation

## Aggravating factors

### History of violence or abuse towards victim by offender

- See page 7 above

### Death occurred in the context of dishonesty or the pursuit of financial gain

- The Council has removed this factor because it agreed that dishonesty is not a key factor in determining the seriousness of the offence.

### Victim was providing a public service or performing a public duty at the time of the offence

- The words 'at the time of the offence' have been added as in the Unlawful Act guideline.

### Offence included the use of a weapon

- As mentioned in the discussion of the culpability factors above, there were some concerns from respondents and judges who tested the guideline that either weapons were given too much or too little prominence. The Council was satisfied that it was appropriate to have this factor at step two of the guideline (subject to the proviso to avoid double counting).

## Mitigating factors

The caveat relating to mental health which was removed from step one of the Unlawful Act and Gross Negligence guidelines has also been removed at step two of this guideline.

No other changes were made to the mitigating factors for this guideline.

## Starting points and ranges

Respondents to consultation were broadly supportive of the sentence levels in the guideline. The Justice Select Committee noted that the starting point for high culpability was 14 years compared with 12 years in the SGC Provocation guideline and expressed concern that this could lead to higher sentences for some loss of control cases. Having reviewed cases sentenced in 2016 and looked at sentence levels across the four manslaughter guideline, the Council was satisfied that a 14 year starting point for high culpability reflected current sentencing practice and was proportionate to the seriousness of the offending. No changes have been made to the starting points or ranges.

More information on current sentencing practice and the anticipated impact of the guideline can be found in the Resource Assessment published on the Council's [website](#).

# Diminished responsibility

Eleven responses were received which specifically addressed the Diminished Responsibility guideline. The majority were broadly supportive of the approach taken by the guideline although some respondents had serious reservations about certain aspects.

In addition the Council had the benefit of hearing a presentation from Dr Adrian Grounds a forensic psychiatrist with research interests which include the needs of mentally disordered prisoners and the provision of secure psychiatric services, who assisted the Council in understanding the extent to which expert psychiatric evidence can play a role in the sentencing process.

## Assessing responsibility

The Council of Her Majesty's Circuit Judges (CHMCJ) supported the approach taken in the guideline:

We think that this is a good way of distinguishing between the levels of responsibility. We think that this is a far better way of assessing responsibility than assessing the relevant sentence for murder had diminished responsibility not applied. As is recognised, manslaughter by reason of diminished responsibility arises in very many ways and is usually fact-specific.

In contrast the CLSA stated:

The draft guideline gives no guidance as to when or in what general circumstances the level of responsibility retained is high, medium or low. This is understandable given the fact sensitive nature of these sentencing exercises but the lack of guidance (and in addition the inclusion of step 5) renders the guideline of limited assistance either to sentencing judges or to those advising an offender as to what to expect in sentence. It is difficult to see how the guideline will achieve any consistency in sentencing.

We take the view that there should be no guideline for this offence.

- The Council accepted the suggestion from some respondents that further and more balanced guidance on the assessment of responsibility would be helpful. The definitive guideline therefore now includes the following additional explanation of the assessment of responsibility retained:

In considering the extent to which the offender's behaviour was voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be relevant.

The degree to which the mental disorder was undiagnosed and/or untreated may be a relevant consideration. For example:

- where an offender has sought help but not received appropriate treatment this may reduce responsibility.

## Aggravating factors

### History of violence or abuse towards victim by offender

- See page 7 above

### Victim was providing a public service or performing a public duty at the time of the offence

- The words 'at the time of the offence' have been added as in the Unlawful Act guideline.
- The Royal College of Psychiatrists queried the aggravating factor:

### Commission of offence whilst under the influence of alcohol or drugs

[This factor] will need to be reviewed within the psychiatric evidence as drugs can sometimes be used to 'self-medicate' to try and reduce symptoms. It should also be noted that patients with serious mental illness may have little insight into their disorder which leads them into behaviour that can exacerbate their condition. They may stop their treatment as a consequence of symptoms such as auditory hallucinations or paranoid beliefs leading them to believe they are being poisoned. Although the Court may wish to consider the role of drugs and alcohol before sentencing, we advocate against enshrining this as an aggravating factor in these circumstances.

To address this concern the Council has amended the wording to read:

Commission of offence whilst under the influence of alcohol or drugs (the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor)

## Mitigating factors

- The Royal College of Psychiatrists challenged the inclusion of remorse as a mitigating factor:

[Remorse] is commonly shown to have no relationship with reoffending and is impossible to determine reliably. Psychotic patients may not show remorse due to their mental disorder and should not be penalised for this. For example, it is quite common, on the contrary, for a person has been driven to the offence by a delusion, for example that s/he is saving someone from a worse catastrophe than death or has been taken over by an alien force, to feel relief after the killing.

The Council considered this view carefully but concluded that as the absence of remorse (or any other mitigating factor) would not increase the sentence, there was no reason not to include it. There are cases of diminished responsibility manslaughter where the offender (having recovered sufficiently from the mental disorder to understand what occurred) is genuinely remorseful, and this can significantly reduce sentences in some cases.

There were no other concerns regarding mitigating factors and so no changes were made.

## Steps Three, Four and Five

The Diminished Responsibility guideline differs from the other manslaughter guidelines in that it contains additional steps relating to dangerousness, mental health disposals and the requirement to review the sentence as a whole to ensure that it is fair and proportionate.

Steps three and five were largely uncontroversial but there were mixed reactions to step four from respondents to the consultation. The Law Society and CHMCJ welcomed the guidance as being helpful, whereas the CLSA commented that judges would apply the steps anyway without being prompted by the guideline. The Royal College of Psychiatrists had more fundamental concerns about the use of s45A orders in general and the standard of care in prisons for those with mental disorders. Those representing the families of victims were concerned that mentally disordered offenders should not be left unsupported and insufficiently supervised in the community.

The Council has not made any changes to steps three and five, but step four has been revised considerably to reflect as far as is possible the concerns raised by respondents and the judgment in *R v Edwards* [2018] EWCA Crim 595. The sentencer is referred back to the level of responsibility retained as determined at step one in deciding whether a penal element to the sentence is appropriate.

## Starting points and ranges

The starting points and ranges in the guideline broadly reflect current sentencing practice and the guideline affords sentencers considerable discretion to sentence according to the circumstances of the offence and the offender. No changes have been made to sentence levels.

More information on current sentencing practice and the anticipated impact of the guideline can be found in the Resource Assessment published on the Council's [website](#).

# Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline.

Responses received from a variety of sources informed changes made to the definitive guideline.

The guideline will apply to all offenders aged 18 or over sentenced on or after 1 November 2018, regardless of the date of the offence.

Following the implementation of the definitive guideline, the Council will monitor its impact.

# Annex A: Consultation questions

## **Unlawful Act manslaughter**

Question 1: Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Question 2: Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

Question 3: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Question 4: Do you have any comments on the sentence ranges and starting points?

Question 5: Do you have any views on the application of the guideline to case 1?

Question 6: Do you have any views on the application of the guideline to case 2?

Question 7: Do you have any views on the application of the guideline to case 3?

Question 8: Do you have any views on the application of the guideline to case 4?

## **Gross negligence manslaughter**

Question 9: Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Question 10: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Question 11: Do you have any comments on the sentence ranges and starting points?

Question 12: Do you have any views on the application of the guideline to case 5?

Question 13: Do you have any views on the application of the guideline to case 6?

## **Manslaughter by reason of loss of control**

Question 14: Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Question 15: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

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

Question 17: Do you have any views on the application of the guideline to case 7?

Question 18: Do you have any views on the application of the guideline to case 8?

**Manslaughter by reason of diminished responsibility**

Question 19: Do you agree with the proposed approach to the assessment of responsibility? Please give reasons where you do not agree.

Question 20: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Question 21: Do you have any comments on the sentence ranges and starting points?

Question 22: Do you have any comments on steps three, four and five? Please give reasons.

Question 23: Do you have any views on the application of the guideline to case 9?

Question 24: Do you have any views on the application of the guideline to case 10?

Question 25: Do you have any other general comments that you wish to make about the draft guidelines?



# Annex B: List of respondents

Anon  
Anon  
Anon  
Association of Personal Injury Lawyers  
BLM Law LLP  
British Medical Association  
Charles De Lacy  
Council of Her Majesty's Circuit Judges  
Criminal Bar Association  
Criminal Law Solicitors' Association  
Crown Prosecution Service  
CWU  
Gradus Ltd.  
Greater Manchester Hazards Centre  
Groups of Doctors  
Health and Safety Lawyers Association  
HHJ Durham Hall QC  
HHJ Field QC  
HHJ Hilliard QC  
Howard League for Penal Reform  
Hundred Families charity  
Justice Select Committee  
Kennedys Law LLP  
Law Society  
London Criminal Courts Solicitors' Association  
Matthew Dyson, University of Oxford  
MDDUS  
Medical Defence Union  
Mike Ponsonby  
Ministry of Justice  
Mr and Mrs Charnock  
Nautilus International  
Northumbria University School of Law  
Pinsent Mason LLP  
Prison Reform Trust  
RoadPeace  
Royal College of Paediatrics and Child Health  
Royal College of Physicians  
Royal College of Psychiatrists  
Thompsons Solicitors  
TUC  
Turnstone Law  
Unison  
Unite Union  
Wah Chan



