

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**26 January 2018**  
**SC(18)JAN07 – Child Cruelty**  
**Maura McGowan**  
**Eleanor Nicholls**  
**020 7071 5799**

## **1 ISSUE**

1.1 This is the first consideration of the child cruelty guidelines following consultation. The consultation ran from 13 June to 13 September 2017. We received 42 responses in total, including nine from magistrates (individuals and benches), seven from other agencies/bodies in the criminal justice system, four from each of the voluntary sector, local government, NHS bodies and members of the public, three each from barristers and solicitors (or their representatives), and two from the police and the Crown Court judiciary.

1.2 The guidelines were ‘road tested’ with 20 sentencers in early 2017. Specific findings are discussed below.

1.3 There are four meetings scheduled to consider these guidelines before sign-off at the Council meeting in May. Responses to the questions on guidelines for the cruelty to a child offence (“Cruelty to a Child”) and causing or allowing a child ...to die or to suffer serious physical harm (“Causing or Allowing offence”) were very similar, particularly when it came to views on the approach to assessing culpability and harm. Responses to questions on failing to protect a girl from the risk of FGM (“the FGM offence”) were of course somewhat different from those to questions on the first two offences.

1.4 This paper therefore covers the approach to culpability and culpability factors across both the Cruelty to a Child and the Causing or Allowing offences, with revised versions of these guidelines at Annexes A and B. Further meetings will consider the approach to harm and harm factors, sentence levels, aggravating and mitigating factors, the question of including vulnerable adults, and the FGM offence guideline in its entirety.

## **2 RECOMMENDATION**

2.1 That the Council considers the consultation responses to the approach to assessing culpability, and culpability factors within the guidelines for the Cruelty to a Child and Causing or Allowing offences, and the results of the road testing exercise, and considers the amendments proposed at **Annex A** (Cruelty to a Child) and **Annex B** (Causing or Allowing).

### 3 CONSIDERATION

#### *Approach to assessment of culpability*

3.1 Under the existing SCG child cruelty guidelines, failing to protect a child from harm is capable of being treated as seriously as actually inflicting the harm, whilst recognising that in many cases there will be additional mitigating factors meaning that the person who failed to protect is less culpable than the person who inflicted the harm. The consultation proposed replicating this approach for both the Cruelty to a Child offence and the Causing or Allowing offence, where “allowing” is capable of being treated as seriously as “causing” the death/serious injury.

Consultation Question 1: 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?

Consultation Question 12: 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?

3.2 There was broad agreement to both these questions. Of the 34 people who answered Q1, 25 broadly agreed with the proposed approach. Of the 29 people who answered Q12, 26 agreed. However, there were several concerns about the need to ensure that the other relevant considerations were taken into account, and also that more explanation needed to be given about how to balance factors in Categories A and C in serious failure to protect cases.

3.3 Those who disagreed primarily did so because they felt that failure to protect could not morally be equated with inflicting cruelty. Others disagreed because they had not taken into account the phrase “absent relevant considerations”, so made the point that relevant considerations needed to be taken into account.

3.4 However, consultation responses and road testing reveal concerns that the draft guidelines do not sufficiently distinguish between different types or levels of failure to protect. This issue was separate from how to treat failure to protect when other factors were present (see below para 3.12 for more information on balancing factors in different categories), and related instead to the offender’s behaviour and any attempts which had been made to protect the victim.

3.5 In consultation, seven respondents to Q1 and three respondents to Q12 felt that it was important to distinguish between cases where the offender “actively” failed to protect (i.e., they took some action to encourage or support the person inflicting the cruelty), and those where the offender “merely” failed to protect the victim, with the latter being less culpable. Several respondents linked this with the level of knowledge which the offender had, as sometimes

failure to protect was linked with lack of knowledge of the offending taking place. Comments from these respondents suggest a change to the wording of the factors so that cases of more “active” failure to protect should fall into Category A, with a lesser form of offending falling into Category B.

3.6 Transcript analysis, consultation responses to scenario questions, and road testing also showed that judges tend to consider failure to protect on a continuum rather than as a binary question – in several “failure to protect” cases judges gave the offender some credit for small steps which had been taken to protect the victim such as (perhaps belatedly) seeking medical attention or contacting social services. This was independent of whether or not other culpability factors were involved. It was this consideration of a range of “failure to protect” behaviour which sometimes led road testers to decide to place an offender into Category B, or to find alternative means (by giving additional weight to some other factors, or by going outside the category range) to reach a sentence which they felt appropriate given the particular level of failing to protect.

3.7 Road testing also highlighted problems with the draft guideline approach to “failure to protect” particularly in relation to the Causing or Allowing offence cases. In six out of eight cases where judges were asked to “re-sentence” their own cases of Causing or Allowing offences where failure to protect was involved, use of the draft guidelines increased the sentence, in some cases considerably. In many of these cases, judges had originally considered different types or levels of failure to protect which they felt could not be considered under the new draft guideline.

3.8 In addition, the Law Society suggested that the wording for culpability in the “Failure to protect from the risk of FGM” guideline could be brought into these guidelines as an additional factor in Category C. This wording states “Steps taken to protect victim but fell just short of what could reasonably be expected”. This could apply in cases where other category A or B factors were present, so may be balanced against other factors.

3.9 In light of the consultation responses and difficulties in road testing, I propose that additional wording should be added to all categories to make it clear that there is a range of behaviour involved in failure to protect, with a corresponding range in culpability. New culpability factors for this would be as follows (full table including all factors is at Annexes A and B):

Category A: Failure to take any steps to protect a child victim from offences with the above factors present

Category B: Limited steps taken to protect victim in cases with Category A factors present

Category C: Steps taken to protect victim but fell just short of what could reasonably be expected [wording taken from draft FGM guideline]

**Question One: Does the Council wish to amend the culpability factors to take into account different levels of “failure to protect”? If so, does the Council agree with the above wording?**

3.10 A further difficulty arises because of the need for flexibility in sentence levels as the guideline will cover situations where there are proven differing levels of culpability, particularly with the Causing or Allowing offence. Drafting of factors relating to failure to protect is particularly difficult because in some cases it will not have been proven whether the offender caused or allowed the death or serious harm.

3.11 Given this need for flexibility I propose that the sentence levels for Category A should be lowered to allow a greater overlap with the top end of Category B in cases where there was failure to protect or culpability cannot be attributed differently to the co-defendants. I intend to cover the sentence levels themselves at the next meeting and, subject to Council’s views here, will revise the Category A levels accordingly.

**Question Two: Does the Council wish us to revise the Category A ranges so that there is greater overlap with the top end of Category B sentence ranges?**

3.12 Several respondents sought more guidance on how to balance factors where there are both category A and category C factors present, most commonly where there is prolonged cruelty and serious harm, but where the offender is a victim of domestic abuse or has mental health problems. There were several suggestions for how to do this, including putting all such cases explicitly in Category B, or making weighting clear.

3.13 Road testing also showed that judges were unsure how and when to balance factors where the case showed both Category A and C factors. In road testing of a “failure to protect case”, only two out of the ten judges balanced the category A and C factors and placed the offender in category B as anticipated. In particular, judges were reluctant to move a case out of category A even where there were several clear Category C factors present, such as the offender being a victim of domestic abuse and/or having a mental disorder. This reluctance led to placing the case in Category A but reconsidering harm so that the sentence could go into the overall category which they felt appropriate, or picking out mitigating factors to justify going below the range for that category.

3.14 In answering the questions on scenarios, consultation respondents had similar difficulties. Some respondents explained that they had found both Category A and Category C factors present so had placed the case in Category B. Others, however, despite saying that

they found Category A and Category C factors, said that they were unsure what to do next, and appeared to consider sentences only in A and C, rather than B.

3.15 Sentencers are already expected to be familiar with balancing potentially conflicting factors to arrive at the appropriate category, and there is already information on the face of the guideline above the list of culpability factors to remind them of the need to do this. However, given the concerns expressed in responses, and the difficulties in balancing factors found at road testing, this could perhaps be clearer. As part of digitising the Crown Court guidelines there will be more options for presenting information to make certain aspects clearer, and prompts relating to balancing of factors can be considered as part of that project.

3.16 However, the wording used for balancing factors in the draft Gross Negligence manslaughter guideline is helpful and could be used for the Cruelty to a Child and Causing or Allowing offences. This wording is below. Full revised factors for culpability can be found in Annexes A and B.

Cases falling between high and lesser culpability because:

- Factors in both high and lesser categories are present which balance each other out and/or
- The offender's culpability falls between the factors as described in high and lesser culpability

**Question Three: Does the Council agree to amend the wording for Category B as above to make clearer the need to balance factors in Categories A and C?**

*Culpability factors – Category A*

3.17 Respondents generally agreed with the inclusion of these factors. A small number wanted more clarification about what would count as a “weapon”. This question is covered by the proposed revisions to the Seriousness guideline, and links will be available in the digital version of the Child Cruelty guidelines to the relevant sections of the Seriousness guideline so I do not propose further changes here.

3.18 Three respondents asked for changes to the “gratuitous degradation” factor. The North London Bench suggested that the word “gratuitous” should be removed, broadening the factor, as any degradation should place the offender in Category A. In contrast, the Law Society felt that the factor should be narrowed, making a clearer distinction between gratuitous degradation and momentary/brief lapses by otherwise good parents. The Magistrates’ Association felt that the wording was unclear, and capable of misinterpretation. Given the low level of responses and contrasting views, I do not propose any changes to the wording of this factor.

3.19 Respondents also suggested changes to the “blatant and deliberate disregard for the welfare of the child” factor, with the Magistrates’ Association and Criminal Bar Association both suggested it should be broadened, perhaps by removing “deliberate”. However, I would propose retaining “deliberate”, as it points specifically to high culpability suitable for a Category A cases – a case in which the disregard was not deliberate could fit within Category B. In addition, three respondents suggested the inclusion of an additional factor, medical neglect, which may come under this “blatant and deliberate disregard” factor; this will be considered below.

3.20 The Oxfordshire Bench and North London Bench questioned what was meant by “significant” force. Whilst this phrase is used in several other guidelines, it is very offence specific and is not currently covered by the proposed Seriousness guideline. As it depends very much on the context, and was only queried by two respondents, I propose to retain the factor as currently drafted.

3.21 The other main responses in relation to Category A factors related to failure to protect, discussed above.

**Question Four: Subject to any changes in relation to Questions One to Three, above, is the Council content to retain the wording of the Category A factors?**

*Culpability factors – Category B*

3.22 In addition to the concerns expressed relating to failure to protect and how to balance factors so that appropriate cases were put into Category B, discussed above, there was one specific concern about the wording of the Category B “catch-all” factor. The Oxfordshire Bench felt that this factor may lead to sentence inflation as sentencers were unsure what cases to put in this medium category, so may put too many cases in Category A.

3.23 This problem should to a great extent be covered by change of wording as per Questions one to three above. I will explore the potential for further road testing of this part of the guideline to assess the effect of these changes prior to publication of the definitive guideline.

**Question Five: Subject to any changes in relation to Questions One to Three, above, is the Council content not to make further changes to the Category B factors?**

*Culpability factors – Category C*

3.24 Three respondents questioned the inclusion of some factors here, saying that if these had been present to any relevant degree, the offender would not have been convicted. However, we expect most sentencers to understand that, as with low culpability/harm factors

in all guidelines, these should be taken to mean “short of a defence to the commission of the offence” and do not propose that any further wording on this is necessary.

3.25 The most controversial factors in Category C were “Offender’s responsibility substantially reduced by mental health disorder or learning disability or lack of maturity” and “Victim of domestic abuse (when linked to the commission of the offence)”. On the domestic abuse factor, two respondents suggested removing it, as with the mental health factor. As mentioned above there were some difficulties balancing this factor in cases where Category A factors were also present. In road testing, one scenario involved an offender who was a victim of domestic abuse. Of the three judges who placed this offender in Category A, none identified the presence of this factor as expected, although some mentioned some sort of control or the offender being “in thrall” to the co-defendant. This suggests that additional guidance is needed to ensure that judges take domestic abuse into account as intended, including where that abuse is coercive and controlling behaviour rather than physical violence.

3.26 The link to the Overarching Domestic Abuse guideline will help with understanding of this factor, though that guideline is aimed at situations where the offender is the perpetrator of domestic abuse, so the abuse aggravates the offence, not where the offender is themselves the victim of domestic abuse and the abuse mitigates the offence. One further suggestion from the Law Society was to broaden this factor using the wording in the FGM guideline “Offender subject to coercion, intimidation or exploitation”. Using this wording would potentially broaden the scope of the factor, and be consistent with the FGM guideline. The wording in the latter is drafted thus in order to capture non-domestic cases of intimidation particularly relevant to that offence, so may not be wholly relevant here. However, some of this wording could be added to the current wording to make this clearer, for example:

- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)

**Question Six: Does the Council agree to amending the current domestic abuse factor as proposed?**

3.27 On the mental health/lack of maturity factor, two respondents felt that the factor should be removed, as it should not ever reduce culpability, and one suggested that it should be amended so that it would only apply if the offender had engaged with relevant services. One respondent (the NSPCC) felt that the factor should be expanded and further guidance given on how to assess evidence for mental disorders and lack of maturity. Other respondents agreed with the inclusion of these factors. Given this, and the fact that the overarching Seriousness guideline and proposed Overarching Mental Health guideline will give further

guidance, I would recommend retaining the wording of this factor, as it gives sentencers discretion to consider a wide range of circumstances.

**Question Seven: Is the Council content to retain the Category C mental health factor as currently drafted?**

3.26 In addition, on road testing it became apparent that because sentencers are used to seeing mental health and domestic abuse as mitigating factors at Step Two, some were overlooking their presence here as Culpability factors. This was also clear in responses to the scenario questions in consultation, where respondents agreed a culpability category at Step One, ignoring the mental health or domestic abuse aspects of the case, then mentioned them as mitigating factors at Step Two. This meant that the factors were not given sufficient weight but were only used to adjust the sentence within the category range. I therefore propose re-ordering the Category C factors so that mental health and domestic abuse are at the top of the list.

**Question Eight: Does the Council agree to re-ordering the Category C factors as proposed?**

*Culpability factors – new factors suggested*

3.28 Consultation respondents suggested several other factors which, though potentially relevant, seem to fit better as aggravating/mitigating factors at step two, and will therefore be considered at a future meeting. These included:

- a. Significant planning
- b. Offence being witnessed by another child
- c. The victim being particularly vulnerable (for example, having a disability)

3.29 Several respondents suggested various additional factors relating to neglect in guidelines for both offences, particularly the Cruelty to a Child offence. Neglect is mentioned on the title page of the draft guideline, but nowhere else, and these respondents felt that it should be given a further emphasis and explanation, and mentioning specific types of neglect such as medical neglect (including missing medical and dental appointments and ignoring medical advice). The consultation document makes it clear that many of the factors apply in cases of neglect as well as ill-treatment, but respondents felt that this was not clear. Several of the culpability factors were intended to cover neglect offences, and this could be made more explicit in the wording of the first two factors in Category A, and one corresponding factor in Category C, as follows:

Category A

- Prolonged and/or multiple incidents of serious cruelty, including neglect
- Gratuitous degradation of victim and/or sadistic behaviour, including neglect



### Category C

- Momentary or brief lapse in judgement, including in cases of neglect

3.30 Comments on neglect were most common in relation to the Cruelty to a Child offence, because it is specified as part of that offence, though there was one mention of it in relation to the Causing or Allowing offence. Given that neglect is not a specific part of the Causing or Allowing offence, I do not propose to add similar wording on neglect to the guideline for this offence. However, to ensure consistency between guidelines Council may wish to make this change for both offences.

**Question Nine: Does the Council agree to amend the culpability factors for the Child Cruelty offence to make the inclusion of neglect more explicit? Does the Council wish to extend this change to the Causing or Allowing offence?**

3.31 One further factor worth considering at step one was suggested by the Association of YOT Managers. They felt that it was important to recognise that offenders who had professional care over children and were in a position of trust or authority over them, such as staff in custodial settings, should be considered as more culpable than offenders who did not have such a position. Only two cases seen in transcripts involve such offenders, but judges did consider this a factor in those cases. I would therefore suggest adding a factor to Category A in both offences to cover this:

Offender with professional care over the victim (where linked to the commission of the offence)

**Question Ten: Does the Council agree to add this additional factor to culpability Category A in both offences?**

## 4 RISKS AND IMPACT

4.1 The preliminary evidence from the road testing and consultation responses indicates that sentences could increase slightly for some offences, particularly those involving failure to protect. We will consider any potential for inflationary impacts as we consider sentence levels over the coming months, and will order some additional transcripts for 2016 to check that our analysis is up to date.

Blank page

## **Annex A: revised draft guideline**

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

### **Cruelty to a child**

Children and Young Persons Act 1933 (S1(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

## Annex A: revised draft guideline

### 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, including neglect
- Gratuitous degradation of victim and/or sadistic behaviour, including neglect
- Use of significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the child
- Offender with professional care over the victim (where linked to the commission of the offence)
- Failure to take any steps to protect a child victim from offences with the above factors present

#### **B - Medium culpability:**

- Limited steps taken to protect victim in cases with Category A factors present
- Other Cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement, including in cases of neglect
- Minimal force or failure to protect a child from an incident involving minimal force

## Annex A: revised draft guideline

### 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.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious psychological and/or developmental harm</li> <li>• Serious physical harm (including illnesses contracted due to unsanitary surroundings)</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Cases falling between category 1 and 3</li> <li>• A serious risk of category 1 harm being caused that any reasonable person should have foreseen</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Little or no psychological and/or developmental harm</li> <li>• Little or no physical harm</li> </ul>

### 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
<b>Category 1</b>	<p><b>Starting point</b> 6 years' custody</p> <p><b>Category range</b> 5 – 9 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>	<p><b>Starting point</b> 6 months' custody</p> <p><b>Category range</b> Medium level community order – 1 year 6 months' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> High level community order – 2 years 6 months' custody</p>	<p><b>Starting point</b> 6 months' custody</p> <p><b>Category range</b> Medium level community order -1 year 6 months' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order – 6 months' custody</p>

## Annex A: revised draft guideline

The table below 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 the weight which should normally be attributed to this factor)
- Serious medical condition requiring urgent, intensive or long-term treatment

## Annex A: revised draft guideline

- 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 involving a momentary lapse in judgement 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

#### Reasons

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 A: revised draft guideline**

Blank page



## **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

This guideline applies only to offenders aged 18 and older and when the victim of the offence is aged 17 or under.

## Annex B: Revised draft guideline

### 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
- Offender with professional care over the victim (where linked to the commission of the offence)
- Failure to take any steps to protect a child victim from offences with the above factors present

#### **B - Medium culpability:**

- Limited steps taken to protect victim in cases with Category A factors present
- Other Cases falling between A and C because:
  - Factors in both high and lesser categories are present which balance each other out and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C - Lesser culpability:**

- Offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- Victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- Steps taken to protect victim but fell just short of what could reasonably be expected
- Momentary or brief lapse in judgement
- Minimal force or failure to protect a child from an incident involving minimal force

## Annex B: Revised draft guideline

### Harm

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

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Death</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Physical harm which has a substantial and/or long term effect</li> <li>• Serious psychological harm</li> <li>• Significantly reduced life expectancy</li> <li>• A progressive, permanent or irreversible condition</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• All other harm caused</li> </ul>

### 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
<b>Category 1</b>	<p><b>Starting point</b> 9 years' custody</p> <p><b>Category range</b> 7 – 14 years' custody</p>	<p><b>Starting point</b> 5 years' custody</p> <p><b>Category range</b> 3 – 8 years' custody</p>	<p><b>Starting point</b> 2 years' custody</p> <p><b>Category range</b> 1 year– 4 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 7 years' custody</p> <p><b>Category range</b> 5 – 9 years' custody</p>	<p><b>Starting point</b> 4 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 6 months – 3 years' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 4 years' custody</p> <p><b>Category range</b> 2 – 6 years' custody</p>	<p><b>Starting point</b> 1 year 6 months' custody</p> <p><b>Category range</b> 6 months – 3 years' custody</p>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> High level community order– 2 years' custody</p>

## Annex B: Revised draft guideline

The table below 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 the weight which should normally be attributed to this factor).
- Serious medical condition requiring urgent, intensive or long-term treatment

## Annex B: Revised draft guideline

- 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

#### **Reasons**

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 B: Revised draft guideline**

Blank page