

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

18 May 2018
SC(18)MAY03 – Child Cruelty
Maura McGowan
Eleanor Nicholls
020 7071 5799

1 ISSUE

1.1 This is the final consideration of detail in the child cruelty guidelines. Following decisions taken at this meeting, we will check across the three guidelines for consistency and carry out some further testing against new transcripts before bringing them (and further information on the resource assessment) back for sign off at the meeting in June. Publication is currently scheduled for early September.

1.2 This paper covers those aspects of the FGM Offence guideline (Annex C) which Council members have not yet considered post-consultation, viz: assessment of harm, sentence levels, and aggravating and mitigating factors. The paper then covers some further minor changes to the guidelines for Cruelty to a Child and Causing or Allowing offences.

2 RECOMMENDATION

2.1 That the Council considers and agrees the amendments proposed to the FGM Offence guideline and minor changes to the other two guidelines.

3 CONSIDERATION

FGM Offence: assessment of harm

3.1 The assessment of harm was the most controversial aspect of the FGM guideline for consultation respondents. The draft guideline set out the following harm categories:

Category 1	Cases where the physical and/or psychological harm is particularly severe
Category 2	All other cases

Several respondents agreed with our approach, but two asked us to link the assessment of harm with the four types of FGM set out by the WHO, either using four levels of harm to correspond to the four types, or putting types one to three into Category 1 harm, and type four into Category 2. Some respondents thought that there should only be one category of harm, since all harm caused by this offence is serious. Six respondents asked for further guidance

on the harm which should be classed as “particularly severe”, and especially on how to assess long term harm.

3.2 In developing the draft guideline, the Council decided not to use the four WHO types in determining the level of harm, as they do not necessarily equate with the level of both physical and psychological harm caused, and as they are not the definition of FGM used in the FGM Act 2003. A leading campaigning/education organisation in this field, FORWARD, agreed, saying in their response that they did not think we should link harm to the WHO classification, since the level of harm caused was not necessarily linked to the WHO type.

3.3 Given these responses, I am not proposing to change the guideline harm categories to link them to the WHO classification. However, in response to calls for additional clarification, I am proposing the following wording, adapted from the Causing or Allowing guideline since this FGM offence is also an “allowing” offence:

Category 1	Serious physical, psychological, developmental or emotional harm which has a substantial and/or long term effect.
Category 2	[Serious] harm which does not fall into Category 1

3.4 This wording for Category 1 gives more information than “particularly severe”, and makes this guideline consistent with the Causing or Allowing guideline. The wording also points to some of the factors that would mean certain WHO types of FGM (particularly types 2 and 3) would be most likely to be considered serious, since these are the types likely to have a substantial and/or long-term effect. By giving more detail on the harm necessary for a case to fall into Category 1, it is hoped that fewer of the less serious, cases will mistakenly be placed in that category, a risk highlighted in the consultation response from the Criminal Bar Association.

3.5 In the wording for Category 2, I propose including the word “Serious”, to reflect the fact that, as per the wording above the table in the draft guideline (see below at 3.6) the harm is likely to be serious.

Question One: Does the Council wish to amend the wording of the harm factors as proposed?

3.6 Responses referring to assessment of long-term harm also suggest the need to change the wording above the Harm table, which currently reads:

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.

This sentence refers to “factors that may increase” the harm, but the table does not then list separate factors. Furthermore, whilst the aim of this is to remind sentencers that not every apparently serious case should fall into Category 1, it also appears to assume a level of harm which may not be present in every case. Without any cases it is difficult to know what the levels of harm will be and I therefore propose amending the wording as follows, linking it to the proposed wording for Category 1 harm above at 3.3:

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 some cases may involve more serious harm which has a substantial and/or long term effect ~~there are factors that may increase it further.~~

Question Two: Does the Council agree to amending the wording above the Harm table as proposed?

3.7 To assist sentencers in assessing the level of psychological harm, however, I propose to use the wording already agreed for inclusion in the other two Child Cruelty guidelines:

Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the harm suffered by the victim is minor or trivial.

Question Three: Does the Council wish to adopt the wording used to assist sentencers in assessing psychological, developmental or emotional harm in the other Child Cruelty guidelines?

FGM Offence: culpability factors

3.8 Following the last meeting, I have made the changes you agreed to the culpability factors (see Annex C, pC2). Reviewing these has shown inconsistency between the factors in the three guidelines on failure to protect. In the other two offence guidelines, to make sure that failure to protect was fully covered at all levels, we added in the category C factor from this FGM guideline re steps taken to protect the victim. In the other guidelines we then added related factors to culpability categories A and B. We did not add these to the FGM Offence guideline at the last meeting, and I now propose to add these in, so that the three factors would be:

Category A: Failure to take any steps to protect the victim from the FGM offence
Category B: Limited steps taken to protect victim from the FGM offence
Category C: Steps taken to protect victim but fell just short of what could reasonably be expected

Question Four: Does the Council agree to including these additional culpability factors in Categories A and B?

FGM Offence: sentence levels

3.9 Without any cases, setting sentence levels for this offence has been difficult. Four consultation respondents agreed with all the proposed levels. The Criminal Bar Association felt that the levels for the higher categories were set too high, particularly given the risk that cases would fall into Category 1 for Harm. Three respondents wanted us to increase the starting point for 2C, given the seriousness of the offence. Taking this into account, and looking at the revised sentence levels which you agreed for Causing and Allowing and Cruelty to a Child at your last meeting, I propose the following changes to the sentence levels:

	Culpability A	Culpability B	Culpability C
Harm Category 1	<p>Starting point 4.5 years' custody</p> <p>Category range 3 – 6 years' custody</p>	<p>Starting point 2.3 years' custody</p> <p>Category range 1 year 6 months 2– 5 years' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 3.2 years' custody</p>
Harm Category 2	<p>Starting point 2.3 years' custody</p> <p>Category range 1 year 6 months 2– 5 years' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 3.2 years' custody</p>	<p>Starting point High Medium level community order</p> <p>Category range Low level community order – 1 year's custody</p>

3.9 Most of these changes are made so that this FGM offence, which is similar to the Causing or Allowing offence but with a lower maximum penalty (7 as opposed to 10 years), has slightly lower sentence levels than the comparable categories for the Causing or Allowing offence. However, I have proposed increasing the starting point of 2C as proposed by consultation respondents, to reflect the seriousness of the FGM offence.

Question Five: Does the Council agree with the proposed changes to sentence levels for this FGM offence?

FGM Offence: aggravating factors

3.10 Many comments in response to consultation related to statutory aggravating factors, or asked us to remove factors which are standard in many guidelines without providing a good reason. There were, however, some comments and suggestions which require consideration, as follows.

3.11 For aggravating factor three, “Blamed others for the offence”, I propose to change the wording to match that agreed for the other Child Cruelty offences, “Blame wrongly placed on others”.

Question Six: Does the Council agree to change the wording of this factor?

3.12 The fourth aggravating factor “Victim particularly vulnerable” caused several respondents to ask for further clarification, since victims of this offence are all likely to be vulnerable. The Council decided to remove this factor from the other two Child Cruelty guidelines, so I am proposing to remove it from this guideline as well.

Question Seven: Does the Council agree to removing this factor?

3.13 The Criminal Bar Association suggested a new factor “Offender had given positive assurances that FGM would not take place”. I believe that this is adequately covered by the factors “Failed to respond to warnings”, “Subject to FGM protection order”, and “Concealment of the offence” though these positive assurances would be concealment of intent prior to the offence taking place. I therefore do not propose to add this factor.

Question Eight: Does the Council agree that these circumstances are adequately covered by existing factors and no new factor is needed?

3.14 The South Essex Bench suggested one further aggravating factor, where the “Offender is a community leader/in a position of authority”. This was presumably suggested because of the example which such an individual could set by their behaviour in failing to protect a girl from the risk of FGM. However, as any position as “community leader” would be difficult to define, as would the impact of the offender’s position and potential for aggravating this offence, I do not propose to add this factor.

Question Nine: Is the Council content not to add this new aggravating factor?

FGM Offence – mitigating factors

3.15 Most of the comments from consultation respondents on mitigating factors were, as usual, asking for removal of standard factors which were not considered relevant to the offence. Such comments were often based on a misunderstanding of the concept of “personal mitigation” and I do not propose to remove the majority of factors.

3.16 One factor which attracted significant comment was factor seven, “Good character/exemplary conduct”. Four respondents felt that this should be removed, or adapted, since good character by the standards of a community where FGM was widely practised would not necessarily be helpful here. In relation to this factor the NSPCC referred to the complexity of sentencing for this offence where the offender may be an otherwise loving and “exemplary” parent. This issue was also reflected in comments from FORWARD, which asked us to consider sentencing in cases where the offender cared about the victim’s wellbeing and believed (however wrongly) that they were acting in the victim’s best interests. In light of these, a mitigating factor from Gross Negligence Manslaughter might be relevant here:

The negligent conduct was a lapse in the offender’s otherwise satisfactory standard of care.

3.17 This factor could be adapted for this guideline as follows (factor 6 in Annex C):

Commission of the offence was a lapse in the offender’s otherwise satisfactory standard of care.

Question Ten: Does the Council agree to replace the “Good character” mitigating factor with the above wording?

Good character – Cruelty to a Child and Causing or Allowing offences

3.18 At last month’s Council meeting, following comments from the Justice Select Committee, you asked me to look again at the mitigating factor re good character (factor 5 at pA6, Annex A, or pB5, Annex B), and particularly at the wording used in the overarching Domestic Abuse guideline, to see whether it could be adapted for the Child Cruelty guidelines. The wording used in the Domestic Abuse guideline is as follows:

Positive good character - as a general principle of sentencing, a court will take account of an offender’s positive good character. However, it is recognised that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face. In respect of offences committed within a domestic context, an offender’s good character in relation to conduct outside these offences should generally be of no relevance where there is a proven pattern of behaviour.

3.19 As in some Domestic Abuse cases, good character may be considered irrelevant, or could be used to conceal the offending behaviour. In child abuse cases social workers describe the phenomenon of “disguised compliance” where parents suddenly appear to cooperate with authorities to prevent them looking too closely into what is happening within the home. However, this is more specifically about “concealment” than in Domestic Abuse cases,

and using “good character” as a disguise would be covered by the "concealing" factor, so I do not propose to use or adapt the DA wording for the Child Cruelty guidelines. For further guidance on good character, I would still suggest using the explanatory wording in the sex offences guideline:

Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor.

Question Eleven: Does the Council agree to adding this explanatory wording to the mitigating factor on “Good character/exemplary conduct” in the Cruelty to a Child and Causing or Allowing offence guidelines?

3.20 In Cruelty to a Child, “Good character” is more relevant in cases where the parents/carers are in general good parents, and the particular circumstances of the offence were “out of character” or a “one off”. This is often seen in transcripts of “over-chastisement” cases, where an otherwise loving parent has, perhaps on only one occasion, used excessive force to punish their child. The wording proposed above for the FGM guideline would therefore also be relevant here, and I propose to amend the “Momentary lapse in judgement” factor in Culpability Category C of the Cruelty to a Child guideline as follows:

Commission of the offence (including in cases of neglect) was a Momentary or brief lapse in judgement the offender’s otherwise satisfactory standard of care including in cases of neglect.

3.21 Removing the words “momentary” and “brief” from this factor gives the sentencer discretion to consider the length and nature of the lapse in the circumstances of each case, including cases of neglect where the lapse (for example, failure to seek medical help for a minor condition) may have lasted a short period of time rather than being “momentary”, but where the offender’s standard of care was otherwise good.

Question Twelve: Does the Council wish to adapt this culpability factor as proposed in the Cruelty to a Child guideline?

4. Risks and Impact

4.1 We have now analysed the 2016 case transcripts we have received for the causing or allowing offences, and also looked again at more of the 2014 transcripts. Analysis suggests that sentence levels may be too high in some cases. Following this meeting, we will again check consistency of factors and levels between guidelines. Any further changes needed as a result of this analysis, and a draft resource assessment will be presented to Council at your meeting in June alongside the guidelines for sign-off.

Blank page

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 serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Blatant and deliberate disregard to the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

B - Medium culpability:

- Use of significant force
- 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
- Commission of the offence (including in cases of neglect) was a momentary or brief lapse in judgement the offender's otherwise satisfactory standard of care including in cases of neglect.
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

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.

Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

Category 1	<ul style="list-style-type: none"> • Serious psychological, developmental, and/or emotional harm • Serious physical harm (including illnesses contracted due to neglect)
Category 2	<ul style="list-style-type: none"> • Cases falling between category 1 and 3 • A high likelihood of category 1 harm being caused
Category 3	<ul style="list-style-type: none"> • Little or no psychological, developmental, and/or emotional 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	<p>Starting point 6 years' custody</p> <p>Category range 4 – 8 years' custody</p>	<p>Starting point 3 years' custody</p> <p>Category range 2 – 6 years' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range High level community order– 2 years 6 months' custody</p>
Category 2	<p>Starting point 3 years' custody</p> <p>Category range 2 – 6 years' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range</p>	<p>Starting point High level community order</p> <p>Category range</p>

Annex A: revised draft guideline

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

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:

1. 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
2. Offence committed whilst on bail

Other aggravating factors:

1. Failure to seek medical help (where not taken into account at step one)
2. Commission of offence whilst under the influence of alcohol or drugs
3. Deliberate concealment and/or covering up of the offence
4. Blame wrongly placed on others
5. Failure to respond to interventions or warnings about behaviour
6. Threats to prevent reporting of the offence
7. Failure to comply with current court orders
8. Offence committed on licence or post sentence supervision
9. Offences taken into consideration
10. Offence committed in the presence of another child

Annex A: revised draft guideline

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (~~the more serious the offence, the less weight should normally be attributed to this factor~~ where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor)
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder or learning disability (where not taken into account at step one)
8. 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/carers.

Annex A: revised draft guideline

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.

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, including serious neglect
- Gratuitous degradation of victim and/or sadistic behaviour
- Use of very significant force
- Use of a weapon
- Deliberate disregard for the welfare of the victim
- Failure to take any steps to protect the victim from offences in which the above factors are present
- Offender with professional responsibility for the victim (where linked to the commission of the offence)

B - Medium culpability:

- Use of significant force
- 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
- Use of some force or failure to protect the victim from an incident involving some force
- Low level of neglect

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.

Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological/developmental harm suffered by the victim is minor or trivial.

Category 1	<ul style="list-style-type: none"> • Death
Category 2	<ul style="list-style-type: none"> • Serious physical harm which has a substantial and/or long term effect • Serious psychological, developmental or emotional harm • Significantly reduced life expectancy • A progressive, permanent or irreversible condition
Category 3	<ul style="list-style-type: none"> • Serious physical harm that does not fall into Category 2

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 Category range 7 – 14 years' custody	Starting point 5 years' custody Category range 3 – 8 years' custody	Starting point 2 years' custody Category range 1 year– 4 years' custody

Annex B: Revised draft guideline

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

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:

1. 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
2. Offence committed whilst on bail

Other aggravating factors:

1. Failure to seek medical help (where not taken into account at step one)
2. Prolonged suffering prior to death
3. Commission of offence whilst under the influence of alcohol or drugs
4. Deliberate concealment and/or covering up of the offence
5. Blame wrongly placed on others
6. Failure to respond to interventions or warnings about behaviour
7. Threats to prevent reporting of the offence
8. Failure to comply with current court orders
9. Offence committed on licence or post sentence supervision
10. Offences taken into consideration
11. Offence committed in the presence of another child

Annex B: Revised draft guideline

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
4. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
5. Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating ~~the more serious the offence, the less weight should normally be attributed to this factor~~).
6. Serious medical condition requiring urgent, intensive or long-term treatment
7. Mental disorder or learning disability (where not taken into account at step one)
8. 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.

Annex B: Revised draft guideline

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.

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

Failure to protect a girl from risk of genital mutilation
Female Genital Mutilation Act 2003 (S3A)

Indictable only

Maximum: 7 years' custody

Offence range: Community order – 6 years' custody

This guideline applies only to offenders aged 18 and older

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:

- Child was subject to an FGM Protection Order
- Failure to respond to interventions or warnings including, but not limited to, those from medical professionals/social services
- Involving others through coercion, intimidation or exploitation
- Failure to take any steps to protect the victim from the FGM offence

B - Medium culpability:

- Limited steps taken to protect victim from the FGM offence
- 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:

- 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.

Psychological, developmental or emotional harm

A finding that the psychological, developmental or emotional harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the harm suffered by the victim is minor or trivial.

Annex C: Draft Guideline

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 some cases may involve more serious harm which has a substantial and/or long term effect ~~there are factors that may increase it further.~~

Category 1	<ul style="list-style-type: none"> Cases where the physical and/or psychological harm is particularly severe <u>Serious physical, psychological or developmental harm which has a substantial and/or long term effect</u>
Category 2	<ul style="list-style-type: none"> All other cases <u>Serious harm which does not fall into Category 2</u>

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 4 5 years' custody Category range 3 – 6 years' custody	Starting point 2 3 years' custody Category range <u>1 year 6 months</u> 2 – 5 years' custody	Starting point 1 year's custody Category range High level community order – 3 2 years' custody
Category 2	Starting point 2 3 years' custody Category range <u>1 year 6 months</u> 2 – 5 years' custody	Starting point 1 year's custody Category range High level community order – 3 2 years' custody	Starting point High Medium level community order Category range Low level community order – 1 year's custody

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:

1. 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
2. Offence committed whilst on bail

Other aggravating factors:

1. Failure to seek medical help when necessary
2. Deliberate concealment and/or covering up of the offence
3. Blame wrongly placed on others~~others for the offence~~
4. ~~Victim particularly vulnerable~~
5. Threats to prevent reporting of the offence
6. Failure to comply with current court orders (where not taken into account at step one)
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Offender particularly isolated with limited access to support
4. Appropriate medical care sought for victim
5. Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
6. Commission of the offence was a lapse in the offender's otherwise satisfactory standard of care.
7. ~~Good character and/or exemplary conduct~~
8. Serious medical condition requiring urgent, intensive or long-term treatment
9. Age and/or lack of maturity where it affects the responsibility of the offender
10. Mental disorder or learning disability (where not taken into account at step one)
11. 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

In the majority of failing to protect a child from 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 lower culpability cases or 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 C: Draft Guideline