

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

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SC(18)APR06 – Child Cruelty
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1 ISSUE

1.1 This is the third consideration of the child cruelty guidelines following consultation. Revised versions of the guidelines for the Cruelty to a Child and Causing or Allowing offences, incorporating changes made to culpability and harm, and aggravating and mitigating factors, at your meetings in January and March, are attached at Annexes A and B.

1.2 This paper considers sentence levels for these two offences, and some aspects of the Failure to Protect from the Risk of FGM guideline (attached at Annex C). In addition, on 27 March we received the Justice Select Committee's response to the consultation (Annex D), which raises questions about our approach to culpability. Their concerns are summarised below, along with questions asking whether Council wishes to reconsider decisions made in January and March in light of the JSC's consultation response.

2 RECOMMENDATION

2.1 That the Council considers and agrees the amendments proposed to sentence levels set out at **Annex A** (Cruelty to a Child) and **Annex B** (Causing or Allowing), and some elements of the FGM offence guideline (Annex C), and that the Council considers the JSC's response to consultation and whether it wishes to change its approach to assessing culpability.

3 CONSIDERATION

Sentence Levels: Causing or Allowing

3.1 Further consideration of transcripts, including recently received 2016 case transcripts, suggests that the proposed starting points for B2 cases are too high. Often, these are cases where there is a balance between A and C, such as where there is failure to protect from acts involving several culpability A factors, often including prolonged or multiple incidents involving significant force, or using a weapon, but the offender is a victim of domestic abuse. Transcript analysis shows that such cases receive substantially lower sentences than the current sentence levels allow. This is a particular problem because there may be no additional mitigation other than the circumstances covered by Culpability C, so no way of reducing the sentence from the Starting Point (other than for a guilty plea). Transcripts show that in such circumstances, sentences are often suspended, so we need to allow judges to go down to two

years. I would therefore suggest reducing the starting point from four years to three, and giving a range of 18 months to five years, rather than the current two years to six years.

Question One: Does the Council agree to these changes to Category B2?

3.2 The starting point for A3 offences also appears to be somewhat too high. There is a wide gap between the starting points for A3 and B3. There may be little difference in culpability between a “low” category A, particularly a failure to protect case, and a high category B case. I therefore propose reducing the starting point for A3 to three years, and reducing the lower end of the range to 18 months, keeping the upper end at six years to reflect the higher culpability here than in the B2 offences.

Question Two: Does the Council agree to these changes to sentence levels for Category A3?

Causing or Allowing: culpability factors

3.3 Further consideration of sentence levels and new transcripts has shown that the Category A factor “significant force” may be used too often, since the force needed to cause the level of harm necessary for the offence is likely to be very high. The word “significant” may be more appropriate for instances where there is more than a minimal level, but not the most extreme, for that offence. I therefore propose amending the culpability factors so that Category A contains the factor, “Use of very significant force”, Category B contains, “Use of considerable force” and Category C retains the current wording, “Minimal force”.

Question Three: Does the Council agree to amending the wording of culpability factors relating to levels of force?

Causing or Allowing: harm factors

3.4 A related problem was discussed at the Council meeting in March: how to ensure that only the more serious cases of harm were included in Category 2. At your previous meeting you agreed that including “Serious physical” harm was otiose, analysis of additional 2016 transcripts for this offence suggests it may be necessary to reconsider. Only after reading through many transcripts could I develop a picture of the wide range of harm caused by this offending, in order that I could place any case on the scale of harm. The range of harm is quite broad, from cases where there were one or two broken limbs, to cases of severe brain damage alongside multiple rib and limb fractures. There are only around 30 offenders sentenced for this offence each year, so it is unlikely that a judge will have seen many of them. Whilst the descriptions in category 2 make a clear distinction between long and short-term harm, further information would assist judges who do not see this offence very often. It would also help reassure members of the public that the “other harm” is still considered to be serious.

3.5 I therefore suggest two options for describing the differing levels of harm:

- a) We include the word "Serious physical harm that does not fall into category 2 above";
or
- b) This problem is similar to the problem with categorising "highly dangerous weapon" in the guideline on bladed articles and offensive weapons, and could be tackled in a similar way, with additional wording such as:

The harm caused/allowed is defined in legislation as "harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861". The harm required for Category 2 harm must therefore be harm substantially above and beyond the minimum required for grievous bodily harm.

Question Four: Does Council wish to adopt either of the above suggested changes to wording of harm categories for this offence?

Sentence levels: Cruelty to a Child

3.6 Further analysis of sentencing data and transcripts suggests that the sentence levels for some of the less serious categories here may be too high. One quarter of those sentenced in 2016 received a community sentence (after guilty plea). However, only one of the categories, C3, has a starting point of a community order. Even accounting for guilty pleas, this suggests that the levels should be revised to include community orders as the starting point for other categories, perhaps C2 and B3, with corresponding ranges as follows:

	C2	B3	C3
Starting point	High level community order	High level community order	Medium level community order
Category Range	Medium level community order – one year's custody	Medium level community order – one year's custody	Low level community order – six months' custody

3.7 Another reason for including more community orders is to prompt consideration of community sentences rather than SSOs; transcripts suggest that this is an offence where sentencers are particularly prone to using SSOs in order to send a message to the offender that their behaviour is serious, and then suspending the sentence to allow the offender to continue contact with their child. Giving starting points of community order may help to remind sentencers that they should be considering these, rather than SSOs. Despite the changes to

the starting points and ranges, I also propose retaining custody in the range for C3, to give sentencers the option in the most serious cases.

Question Five: Does Council wish to make these changes to include more community orders as starting points?

3.8 Changes may also be needed at the upper end of sentence levels for this offence. Data and transcript analysis suggest that on several cases with category 1A facts, the sentence passed was considerably lower than the current proposed range. Only an estimated 2% of all sentences (prior to any guilty plea reduction) were within the range currently proposed for 1A (5 to 9 years' custody) which suggests that this starting point and range are too high. There is also a considerable gap between the starting point of 1A and those for 2A and 1B. As the maximum penalty for this offence is 10 years, and one person did receive a 9 year sentence, we may not wish to move too much lower, however, current sentencing practice suggests that very few cases are so serious as to be sentenced at this level; it may be that the more serious offences against children are charged as assault offences rather than under this offence.

3.9 As cases that would fall into category 1A are rare, this suggests that the sentence levels for 1A should be changed and that we need to ensure cases are not wrongly categorised as 1A, leading to higher sentences. I therefore propose to reduce the starting point of 1A from six years to five, and the range from four to eight years' custody. In addition, I propose making the same changes to the culpability factors relating to levels of force, as for the Causing or Allowing offence (see 3.3 above), to help reduce the number of cases being categorised as 1A. The full sentence levels table is at Annex A.

Question Six: Does Council agree to changes to sentence levels for category 1A?

Question Seven: Does Council wish to amend the culpability factors relating to levels of force?

Cases on the borderline between categories

3.10 In both the Causing or Allowing and the Child Cruelty offences, as discussed at several points in previous meetings and above, the factors for culpability and harm may push too many cases into the highest category and lead to increases in sentences. Although this has been addressed by changes agreed at previous meetings, and I hope by those proposed above, I am still concerned that there is insufficient scope for sentencers to distinguish between cases where, say, there are several Category A factors present, and those where there is only one such factor. Further changes could be made to the wording of Category B Culpability (both offences) and Category 2 harm (Cruelty to a Child) to assist sentencers with weighing the

different factors in these cases. If the Council wishes to make changes I will consider wording for discussion at the next meeting.

Question Eight: Does the Council consider that further wording on this is necessary?

FGM offence: culpability

3.11 We received only 34 responses to the consultation relating to FGM (compared with 42 overall) and some of these were partial responses; some respondents said that they were not qualified to give an opinion on the subject. Views in the responses differed considerably, from those who felt that the harm and culpability were almost always at the highest level, to those who felt that offenders were often likely to be victims themselves of coercion and intimidation, and therefore their culpability was limited. As there have been no prosecutions for the offence to date, so no data from cases, I am proposing limited changes to the version of the guideline which you agreed for consultation.

3.12 On culpability, there was general agreement about the factors, though some respondents wanted more detail and also recognised that there may be overlap between higher and lower culpability factors (for example, an offender's failure to respond to warnings may be as a result of coercion and intimidation). The CPS initially suggested that the high culpability factors "significant planning" and "involving others" may not be appropriate for a "failure to protect" offence like this. However, I have discussed this with them further and they agreed that, whilst they will not be relevant in many cases, they should be kept in, and confirmed that this offence could also be charged in a case where it was clear that the offender had played an active role in planning and arranging the FGM, but it had not been possible to charge an ancillary offence to a section 1 offence (the offence of actually carrying out the FGM procedure).

3.13 The National Crime Agency suggested adding the high culpability factor "Played a leading role in the commission of the FGM offence", similar to the "Leading role in a group or gang" factor for assault. This may help in cases such as those above, where there was active involvement and not merely failure to protect.

3.14 The risk with including these factors is that the offender may, in effect, be sentenced for a more serious offence of which they have not been convicted, though these factors are still arguably within the scope of the offence. Given the uncertainty around how these FGM offences will be charged and the lack of information about types of offending and circumstances of the offenders that would come before the court, the Council may wish to consider whether we have sufficient evidence on which to base a definitive guideline. If this guideline is not published alongside the other two Child Cruelty offences, it could still be considered at a later date, possibly with other FGM and/or related offences.

Question Nine: Does the Council wish to delay publication of the definitive guideline for the s3A offence?

Question Ten: If not, does the Council wish to include “Leading role in the commission of the FGM offence” as a high culpability factor?

3.15 In light of changes made to the other Child Cruelty guidelines to ensure that appropriate cases are considered in culpability category B, I propose making the same change to the FGM offence guideline so that the Culpability B wording will now read:

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

Question Eleven: Is the Council content to amend the wording for Category B culpability to ensure consistency with the other Child Cruelty offences?

3.16 Some respondents suggested additional high culpability factors relating to “other harmful practices” such as forced marriage or “previous family members being subject to FGM”. I do not propose including any of these, as they are beyond the scope of the offence being sentenced.

3.17 The campaigning organisation FORWARD (the key third sector organisation working in this area) made several comments relating to warnings, interventions and FGM Protection Orders. They felt that the child’s being subject to an FGMPO was not really relevant and did not “make the offence worse”. What mattered was the warnings or interventions, and whether the offender knew that what he/she was doing was wrong. They also felt that the guideline should give more detail or examples of the types of warnings/interventions covered.

3.18 I do not propose making changes to these factors; whilst the child’s being subject of a FGMPO may not increase the harm felt by the victim, it does increase the culpability of the offender, separate from any other warnings/interventions received. In terms of other warnings and interventions we would want to include all types, whoever gave them. Giving examples would risk narrowing the scope, so I do not propose to expand this factor.

Question Twelve: Is the Council content not to make these changes proposed by FORWARD?

3.19 Respondents supported the inclusion of the lower culpability factor “Subjected to coercion, intimidation or exploitation”. The Prison Reform Trust felt that this wording was too strong, as it might not catch cases where there was perhaps little overt coercion, but a cultural/family background which put pressure on the offender. They wanted the guideline to pay more attention to the “relevant cultural context”. I am not proposing to change the factor to include this, however; to do so would be too broad (it would arguably apply in all cases) and the factor as it currently stands enables sentencers to consider the levels of coercion/intimidation/exploitation and decide that the offender is less culpable where appropriate.

Question Thirteen: Is the Council content not to make changes along these lines as proposed by the Prison Reform Trust?

3.20 The harm factors, sentence levels and aggravating/mitigating factors for this offence will be covered at the May meeting, when these guidelines on Child Cruelty offences are due to be signed off.

Justice Select Committee response to consultation

3.21 The committee’s response covers many areas already discussed post-consultation, and is in general supportive of the approach we have taken to these guidelines. As well as some minor proposals for changes to wording, there are two particular concerns which it is worth mentioning, and where decisions may need to be revisited.

3.22 The first and most significant concern relates to assessment of culpability for the Child Cruelty and Causing or Allowing offences. The committee does not agree that failure to protect should be considered of equal culpability with inflicting harm upon the victim. They feel that the two cannot be morally equal, and that the guidelines should be clear that failure to protect is less culpable. They argue this particularly in relation to the Causing or Allowing offence, and “allowing” cases. Their comments are based on the guidelines as consulted on. Following consultation you have agreed several changes to culpability factors so that, whilst in principle a failure to protect offence could be as culpable as an offence where the offender inflicted the harm, it is likely that the failure to protect offences would be considered as of lower culpability. In considering culpability for the “Causing or Allowing” offence, you also considered the changes need to make the guideline apply fairly both to cases where it was clear which offender had caused and which had allowed, and to those cases where it was not clear. I believe that this goes far enough to address the committee’s concerns, whilst maintaining your view failure to protect and inflicting harm could be equally culpable in some cases.

Question Fourteen: Does the Council agree to retain culpability factors as revised post-consultation, allowing for failure to protect being of equal culpability with inflicting harm in some cases, or do you wish to reconsider this approach?

3.23 The committee also suggested changes to mitigating factors. The most significant change was to the “Good character” factor, which they believe should be qualified in these offences, as good character may either be irrelevant to this particular offence, or may actually facilitate the commission of the offence. Similar concerns were raised in relation to domestic abuse and sexual offences. The committee proposed using the wording from the sexual 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 Fifteen: Does the Council wish to retain the current wording for good character or to use the wording taken from the sexual offences guideline? Should such a change apply to all three offences within this group of Child Cruelty guidelines?

4. Risks and Impact

4.1 We have now received and analysed most of the 2016 case transcripts for the causing or allowing offences, and also looked back at the 2014 transcripts used to develop the guideline. This analysis has fed into proposals on sentence levels above. Once the sentence levels are agreed at this meeting, we will carry out further impact assessment in preparation for sign off of these guidelines in May.

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

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 considerable 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, including in cases of neglect
- Minimal force or failure to protect the victim from an incident involving minimal force
- Low level of neglect

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 5-6 years' custody</p> <p>Category range 4-5 — 8-9 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 High level community order – 2 years 6 months' custody</p>	<p>Starting point 6 months' custody High level community order</p> <p>Category range Medium level community order – 1</p>

			year's 6 months' 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 6 months' custody High level community order</p> <p>Category range Medium level community order – 1 year's 6 months' custody</p>	<p>Starting point <u>Medium</u> High-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:

- 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
- Blame wrongly placed on others
- 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
- Offence committed in the presence of another child

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- 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
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct (the more serious the offence, the less weight should normally be attributed to this factor)
- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

STEP THREE

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

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Parental responsibilities for sole or primary carers

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

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.

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 considerable 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
- Minimal force or failure to protect the victim from an incident involving minimal force
- Low level of neglect

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"> • 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"> • <u>[Option A] Serious physical H</u>arm that does not fall into Category 2

[Option B] The harm caused/allowed is defined in legislation as "harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861". The harm required for Category 2 harm must therefore be harm substantially above and beyond the minimum required for grievous bodily harm.

STEP TWO**Starting point and category range**

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

Harm	Culpability		
	A	B	C
Category 1	Starting point 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

Category 2	Starting point 7 years' custody Category range 5 – 9 years' custody	Starting point <u>3</u> 4 years' custody Category range <u>18 months</u> <u>2</u> – <u>5</u> 6 years' custody	Starting point 1 year 6 months' custody Category range 6 months – 3 years' custody
Category 3	Starting point <u>3</u> 4 years' custody Category range <u>18 months</u> <u>2</u> – 6 years' custody	Starting point 1 year 6 months' custody Category range 6 months – 3 years' custody	Starting point 9 months' custody Category range High level community order – 2 years' 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:

- 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
- Blame wrongly placed on others
- 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
- Offence committed in the presence of another child

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- 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
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct (the more serious the offence, the less weight should normally be attributed to this factor).
- Serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

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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.

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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

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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: Low level 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:

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

B - Medium culpability:

- ~~Cases falling between A and C~~
- 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.

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

Category 1	<ul style="list-style-type: none"> Cases where the physical and/or psychological harm is particularly severe
Category 2	<ul style="list-style-type: none"> All other cases

STEP TWO

Starting point and category range

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

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

- Previous convictions, having regard to a) the **nature** of the offence to which the

conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

- Offence committed whilst on bail

Other aggravating factors:

- Failure to seek medical help when necessary
- Deliberate concealment and/or covering up of the offence
- Blamed others for the offence
- Victim particularly vulnerable
- Threats to prevent reporting of the offence
- Failure to comply with current court orders (where not taken into account at step one)
- Offence committed on licence or post sentence supervision
- Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Offender particularly isolated with limited access to support
- Appropriate medical care sought for victim
- Sole or primary carer for dependent relatives (**see step five for further guidance on parental responsibilities**)
- Good character and/or exemplary conduct
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability (where not taken into account at step one)
- Co-operation with the investigation

STEP THREE

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

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Parental responsibilities

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

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The Right Hon Lord Justice Treacy
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27 March 2018

Draft Sentencing Council Guideline on Child Cruelty

The Justice Committee thanks the Sentencing Council for giving it the opportunity of responding to the draft guideline on child cruelty, and in particular for permitting this response to be made after the thirteen-week consultation period has ended. Once again, we are grateful to the Council for agreeing to share with us the responses that it received to its consultation on this guideline, and for providing a helpful summary of its proposals and analysis of the consultation responses.

In the light of the resources available to us and the Council's own timetable for finalising the guidelines, our letter does not aim to provide a comprehensive response to each of the consultation questions. We have instead focused on particular themes where we felt that our observations could contribute most usefully to the discussion.

Failure to protect (Q1)

In its consultation document, the Council questioned whether, as in the current definitive guideline, a "failure to protect" a child (absent other factors) should carry the same level of culpability as actually inflicting cruelty. We note that respondents' views were divided. While some agreed that culpability should be the same, others argued that there was a moral distinction between inflicting cruelty and a failure to protect; or at least that active encouragement should be distinguished from a failure to act.

It was argued by some that a vulnerable person who fails to protect the victim might be less culpable; the draft guideline for these offences already lists vulnerability factors that indicate lesser culpability: mental disorder, learning disability, lack of maturity, or being a victim of domestic abuse. Respondents also emphasised the potential complexity of family dynamics and possible overlap between mental illness,

domestic abuse and substance abuse.

We believe that a change is needed in this area of the guideline. We acknowledge that the guideline already contains a number of mitigating factors which might be thought sufficiently to account for the lower culpability in the case of a person who fails to protect a child from cruelty, rather than inflicting it. However, we believe that in cases where these apply, they do not fully capture the extent of the moral distinction between inflicting cruelty and allowing it to occur. Further, in cases where none of these mitigating factors apply, we consider that there is still an important moral difference between inflicting cruelty on a child and failing to prevent it taking place, even where that is for no other reason than indifference.

For these reasons, we consider that the definitive guideline ought to set a lower starting point for offenders who have failed to protect a child from cruelty, as opposed to inflicting it.

Definition of serious harm (Q3)

The consultation proposes an approach to the assessment of harm in which Category 1 (the most severe) includes "Serious psychological and/or developmental harm." We note that several respondents to the Council's consultation thought this level needed further explanation or guidance; and/or considered that emphasis should be placed on the need for expert evidence, particularly on psychological harm/developmental harm. We felt this assessment should be left to sentencers, as it depends so closely on the facts of the case. However, we agree with those respondents who argued that sentencers should be asked to consider obtaining expert evidence on the psychological/ developmental harm inflicted on a child. This is an area in which expert advice may be essential.

Aggravating factors (Q6)

The consultation proposes a range of aggravating factors. We agree with those respondents who felt that where an offender is a person in authority, for example a teacher or priest, this should be an aggravating factor.

Mitigating factors (Q7)

The consultation proposes a number of mitigating factors, including remorse and good character. We agree with those who argued that if remorse is taken into consideration as a mitigating factor, it is essential that it must be genuine. We note that good character is a mitigating factor, and that the consultation proposed that "the more serious the offence, the less weight which should normally be attributed to this factor". We do not believe good character is always relevant in such cases, because a person of apparent good character can make use of it to inflict harm without being detected. We made a similar point in our response to your earlier

consultation on the guideline on domestic abuse, where we made reference to the definitive guideline on Sexual Offences. This states, "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". We think the same, or a similar qualification should be made in this guideline.

Causing or allowing a child to die or suffer serious physical harm (Q12)

As with the cruelty to a child guideline, the consultation explains that "a person failing to protect a child from certain actions is treated at the same level of culpability as the person who actually commits the action". The document goes on to explain that this lack of distinction is "particularly important for this guideline" because a primary purpose of the legislation was "to close the loophole created if there is not enough evidence to determine who, when more than one person is present in the household, caused the harm or death". Prosecutors do not have to show which of the people present caused the harm and which allowed it, and both are sentenced at the same level. The consultation says that in cases where the court does not know which of the people involved caused the harm, the result of a distinction between the sentences given for causing harm and for allowing it would be that both offenders "would have to be sentenced on the basis of allowing harm, rather than causing it". We acknowledge the importance of avoiding this difficulty in cases where it is not known to the court who has caused the harm.

However, the consultation document then acknowledges that "there will be some cases where the court is aware which offender caused the harm, and which one allowed it". It suggests that in such cases there will often be circumstances which prevented the person who only allowed the harm from being able to intervene, which "may on balance reduce their culpability or mitigate the seriousness" of the offence. Absent such circumstances, though, the offender who allowed the harm will be treated as having the same culpability as their co-defendant who caused the harm. We do not agree with this approach. As noted above in our response to Q1, we consider that there is an important moral distinction between causing and allowing harm which is not sufficiently captured by the possible presence of other circumstances.

In some jurisdictions, a "Good Samaritan" law applies, but this is not a feature of English law. We recognise that a person who is a member of a victim's household has a close connection to the victim and a greater responsibility to protect them from harm. However, we do not feel this responsibility is enough to erase the distinction between causing and allowing harm.

We are of the opinion that this distinction should be reflected in a lower starting point in sentencing for offenders who have allowed harm. This will of course only be

relevant in cases where it is known to the court which offender caused the harm.

Sentence ranges and starting points for the offence of failing to protect a girl from the risk of FGM (Q23)

This guideline related to Section 3A of the FGM Act 2003. The guidelines note that there have been no convictions for any of the offences under the Act. We note that some respondents to the consultation, including the National Crime Agency and the NSPCC, thought that sentencing for this offence should take into account the complex cultural and social context which leads parents to mistakenly believe that FGM is in a girl's best interests; they argue that, rather than lengthy sentences, it would be better to challenge communities' attitudes and beliefs through education. This would be broadly consistent with the approach advocated by the World Health Organisation (WHO). In contrast, other respondents felt that sentencing ranges for this offence should be as high as for other child cruelty offences, if not higher, and that proposed mitigating factors were too lenient. The Council is proposing a custodial starting point for all but the least serious cases.

We note that a Home Affairs Committee report on this topic, published in 2016, referred to FGM as a "national scandal" and lamented the lack of prosecutions for the "failure to protect" offence. The Committee called for an increase in the number of prosecutions, in line with other countries in Europe.

We support the Sentencing Council's approach. We believe that a custodial starting point is appropriate for sentencing for all but the least serious cases. Challenging communities' attitudes and beliefs, while welcome, should in our view go alongside offering support to people in affected communities who are trying to combat the practice of FGM; both are, of course, outside the scope of the consultation. We believe that it is appropriate to confirm our opposition to this practice as a society by taking a firm line on sentencing, and would hope to see progress in prosecuting cases under this Act.

Inconsistency between sentencing decisions

As part of the consultation process, respondents were asked to use the draft guideline to consider three case scenarios, one for each of the offences, and to indicate their final sentences – detailing the culpability, harm, aggravating and mitigating factors. We note that the respondents' assessments vary widely. Although many respondents would not in practice be involved in sentencing, this divergence of views might be thought to suggest that the guideline gives too much scope for discretion, potentially undermining consistency in sentencing; on the other hand,

discretion may be considered desirable.

We were doubtful of the value of this exercise. The cases described, and the sentencing decisions they give rise to, are by their nature very fact sensitive. It is therefore hard in an exercise like this to capture the subtleties of case scenarios in a meaningful way, without giving rise to red herrings. This means the varied responses will do little to help assess the clarity and consistency of the guideline. The Council should in its final definitive guideline acknowledge the broad range of circumstances that may arise in offences of these kinds. But we are unconvinced that the Council should continue to produce scenarios of this type for future consultations.

Equality impact

The consultation paper contains a brief paragraph acknowledging that more women than men are sentenced for these offences, but concludes that no equality impacts are anticipated (because the guidelines should promote consistency in sentencing); however, the Council 'would welcome views or any evidence on this issue'.

A minority of respondents considered that the Council should conduct a more detailed assessment of equality impact in relation to gender. It was also suggested that the race equality impact of sentencing for FGM offences should be better understood. We consider that, in relation to all guidelines, the Commission should keep equality issues under review, especially around race in relation to FGM offences.

We hope you will be able to take our observations into account in preparing your definitive guideline, and look forward to your reply.

Bob Neill MP
Chairman
Justice Committee

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a smaller 'N' and a horizontal line underneath.

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