

**RESPONSE TO MISCELLANEOUS AMENDMENTS TO SENTENCING GUIDELINES  
CONSULTATION — NOVEMBER 2023****QUESTION 17: NEW MITIGATING FACTOR ON PREGNANCY, MATERNITY AND POSTNATAL  
CARE****1. COMMENTS****Background: introduction of a new mitigating factor**

There should be a new mitigating factor which specifies that pregnancy, maternity and the postnatal period are relevant to the sentencing of a female defendant convicted of any crime, and that an associated explanation should be included in the sentencing remarks.

However, we consider that the mitigating factor and associated explanation currently proposed are insufficient.

We agree that this is an area where particular emphasis should be placed on avoiding custodial sentences where cases are “on the cusp”. However, additional measures should also be introduced to avoid custody where a pregnant woman’s sentence is over the custody threshold or she is facing a mandatory minimum sentence. In practical terms, this means:

1. Where a woman is on the cusp of custody, a non-custodial sentence must be considered;
2. Where a woman is over the custody threshold and facing a custodial sentence of up to 2 years, a suspended sentence must be considered based on the significant harm custody or separation causes to pregnant and postnatal women and their dependants;
3. Where a woman is facing a sentence of over two years, or a mandatory minimum sentence, pregnancy and the postnatal period to constitute an ‘exceptional circumstance’ that makes the imposition of the minimum term a disproportionate sentence and would justify not imposing the statutory minimum sentence.

This approach gives due weight to the significant harm caused by custody to the pregnant woman, her unborn child and a baby who may be born in prison. It also prioritises the best interests of the child over separation.

**The need to provide evidence to sentencers**

The views expressed by sentencers in focus group discussions revealed a worrying lack of understanding about the impact of custodial sentences on pregnant women and their babies. In our view, this only increases the importance of explicit measures to avoid custodial sentencing for pregnant women wherever possible, whose needs may not otherwise be recognised by those sentencing them.

The views expressed in focus group discussions with sentencers were predominantly neutral or negative. Some sentencers questioned the evidence base relating to the practical impact of custody upon pregnant women and their safety. This demonstrates a lack of engagement with the available research and indeed the Ministry of Justice’s own acceptance that all pregnancies in prison are high risk.

It is the expert view of the Royal College of Midwives<sup>1</sup> that “prison is no place for pregnant women”, and both the Royal College of Midwives and Royal College of Obstetricians and Gynaecologists have emphasised the need for non-custodial alternatives for pregnant women<sup>2</sup>.

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<sup>1</sup> Independent, [Calls for urgent review over number of pregnant women being sent to prison](#) (2022)

<sup>2</sup> RCOG (2021) [RCOG Position Statement: Maternity care for women in prison in England and Wales](#)

In 2021, His Majesty's Prisons and Probation Ombudsman reported that all pregnancies in prison are "high risk by virtue of the fact that the woman is locked behind a door for a significant amount of time"<sup>3</sup>. As of 2022, NHS Health and Justice also classifies all pregnancies in prison as "high risk" on account of 'the complexities for women in detained settings'<sup>4</sup>. The Ministry of Justice also accepts that all pregnancies in prison are high risk.

Pregnancy and the postnatal year is a high-risk period for severe mental ill-health in women generally. There are also major risks to physical health, including pre-eclampsia, haemorrhage, and sepsis.<sup>5</sup>

Women in custody are likely to have complex health needs, which increase the risks associated with pregnancy for both the woman and the baby:

- Pregnant women in prison are seven times more likely to suffer a stillbirth than women in the community<sup>6</sup>
- Pregnant women in prison are almost twice as likely to give birth prematurely as women in the general population, which puts both the mothers and their babies at risk<sup>7</sup>
- Over one in five pregnant women in prison miss midwifery appointments, increasing the risk of premature birth, miscarriage and stillbirth<sup>8</sup>
- One in ten pregnant women in prison give birth in-cell or on the way to hospital<sup>9</sup>
- Pregnant women in prison are at greater risk of perinatal mental health difficulties<sup>10</sup>

Sentencers must be made aware that when sentencing a pregnant offender to custody, they are effectively sentencing them to a high-risk pregnancy, potentially a preterm birth or worse: a stillbirth with associated trauma.

Beyond concerns around birth, sentencers should be aware of the postnatal period and the longer-term developmental harm that maternal imprisonment causes to the child, which is likely to outlast the length of a custodial sentence:

- Criminal justice proceedings and imprisonment are highly distressing environments for pregnant women.<sup>11</sup> Antenatal stress is proven to increase levels of the hormone cortisol in the mother's body, which, when it crosses the placenta, can affect the health of the baby, brain development, emotional attachment and early parenting interactions.<sup>12</sup>
- Many women who give birth during their time in prison, or who enter prison during the postnatal period, will be separated temporarily or permanently from their baby, interrupting breastfeeding and risking significant trauma in a time at which the mother-baby attachment is shown to be crucial in supporting long-term development.<sup>13</sup>

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<sup>3</sup> Prisons and Probation Ombudsman, '[Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019](#)' (2021)

<sup>4</sup> NHS England, '[Service specification: National service specification for the care of women who are pregnant or post-natal in detained settings](#)' (2022)

<sup>5</sup> MBRRACE-UK (2023) '[Saving Lives, Improving Mothers' Care](#)

<sup>6</sup> Observer, '[Pregnant women in English jails are seven times more likely to suffer stillbirth](#)' (2023)

<sup>7</sup> Ibid

<sup>8</sup> Nuffield Trust, '[Ill-equipped prisons and lack of health care access leave pregnant prisoners and their children at significant risk](#)' (2022)

<sup>9</sup> Nuffield Trust (2022), '[Pregnancy and childbirth in prison: what do we know?](#)

<sup>10</sup> NHS England (2023), '[A review of health and social care in women's prisons](#)

<sup>11</sup> Abbott, L et al (2020) Pregnancy and childbirth in English prisons: institutional ignominy and the pains of imprisonment, *Sociology of Health & Illness* Vol. 42 No. 3 2020 ISSN 0141-9889, pp. 660–675

<sup>12</sup> Gerhardt, S. (2003) *Why love matters: how affection shapes a baby's brain*. Hove, East Sussex: Brunner-Routledge.

<sup>13</sup> Abbott, L., Scott, T. and Thomas, H., 2023. Compulsory separation of women prisoners from their babies following childbirth: Uncertainty, loss and disenfranchised grief. *Sociology of Health & Illness*, 45(5), pp.971-988.

- As many as 19 out of 20 children are forced to leave their home when their mother goes to prison.<sup>14</sup>
- The imprisonment of a household member is one of ten adverse childhood experiences (ACEs) known to risk significant negative impact on children's long-term health and wellbeing, their school attainment, and later life experiences.<sup>15</sup>
- Separation for both parent and child is traumatic and can have long term effects.<sup>16</sup>

It is concerning that sentencers are not more aware of the severity of some of these risks, especially after the high-profile prison baby deaths of Aisha Cleary in September 2019 (and the related inquest conclusions) and Brooke Powell in June 2020.

Reliance upon the assertion that a new factor is unnecessary "as courts would always take this (i.e., pregnancy) into account" is inadequate, because "take into account" is meaningless without a specific duty being enshrined. The basis for that proposition can only be anecdotal and such an approach is inadequate to ensure the consistency and understanding needed in this area. Research has shown that sentencers have a lack of awareness of case law relating to the sentencing of primary carers<sup>17</sup> and that many women reported that their role as a primary carer was not considered by the court.<sup>18</sup>

### **The benefits of non-custodial sentences for pregnant and post-natal women**

The Ministry of Justice Female Offender Strategy identifies that "custody is particularly damaging for women" and that many female offenders could be more successfully supported in the community, where reoffending outcomes are better<sup>19</sup>.

A report from His Majesty's Inspectorate of Probation has found that community women's centres, which help women to build the capacity to address their issues, rather than just addressing offending behaviour, are a far more cost-effective response than custody and are proven to reduce reoffending.<sup>20</sup> We note that this mitigating factor will affect very few cases, given that women make up only 21% of individuals dealt with by the Criminal Justice System<sup>21</sup>. Very few women come before the courts for serious offending. Sentencing a woman to imprisonment is therefore an exceptional exercise; let alone a pregnant woman or mother of an infant.

Pregnancy has been recognised as a unique window of opportunity to work proactively with families and lays the foundations for the child's future physical, emotional, social and cognitive development<sup>22</sup>.

The best approach for pregnant and postnatal offenders, for their children, and for the community at large is an out of custody setting that allows for a safe birth, protects against separation and provides frameworks within which women can be rehabilitated whilst caring for their newborns.

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<sup>14</sup> Home Office (2007) [The Corston Report: A review of women with vulnerabilities in the criminal justice system](#)

<sup>15</sup> Felitti, V., Anda, R., Nordenberg, D., Williamson, D., Spitz, A., Edwards, V., Koss, M. and Marks, J. (1998) Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study, *American Journal of Preventive Medicine* 14(4) 245-258

<sup>16</sup> Minson, S. (2020) Maternal sentencing and the rights of the child.

<sup>17</sup> Minson, S. (2020) Maternal sentencing and the rights of the child.

<sup>18</sup> Baldwin, L. and Epstein, R. (2017) [Short but not sweet, a study of the impact of short sentences on mothers and their children.](#)

<sup>19</sup> Ministry of Justice (2018) '[Female Offender Strategy](#)'

<sup>20</sup> HM Inspectorate of Probation, [The evidence: women](#)

<sup>21</sup> Ministry of Justice (2022), [Statistics on Women and the Criminal Justice System 2021](#)

<sup>22</sup> All Party Parliamentary Group (APPG) '[First Steps 1001 Critical Days. Building Great Britains: Conception to age 2](#)' (2015)

## 2. THE PROPOSED CHANGE

We would suggest modifications to the current draft mitigating factor in order to clarify it and strengthen its effect as follows. Our additions are in red.

### **Pregnancy, childbirth and post-natal care**

When considering a custodial, community or **suspended** sentence for a pregnant **or postnatal offender (someone who has given birth in the previous 12 months)** the Probation Service should be asked to address the issues below in a pre-sentence report.

**If a comprehensive pre-sentence report addressing the below issues is not available, sentencing should be adjourned until one is available.**

When sentencing an offender who is pregnant relevant considerations **must** include:

- **the established high-risk nature of pregnancy and childbirth in custody and the harm custody causes to pregnant and postnatal women and their dependants, including by separation;**
- **the medical needs of the pregnant woman and her unborn child, including her mental health needs;**
- **that access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years;**
- **the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant, irreversible harm to both mother and child);**
- **the effect of the sentence on the physical and mental health of the woman and;**
- **the effect of the sentence on the child once born.**

The impact of custody on a woman who is pregnant **is very likely to cause significant harm to the physical and mental health of both the mother and the child. Prison is a high-risk environment for pregnant women. It poses inherent barriers to accessing medical assistance and specialist maternity care and causes harm to dependent children.**

Women in custody are likely to have complex health needs, **including a need for specialist trauma services**, which **will** increase the risks associated with pregnancy for both her and the child.

Imprisonment should not be imposed where there would be an impact on dependants, which would make a custodial sentence disproportionate to achieving the aims of sentencing.

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. **It is also relevant where a suspended sentence is being considered, as custody will result in significant harmful impact to the pregnant woman and child, either due to separation or because of the custodial environment.** See also the Imposition of community and custodial sentences guideline.

**For offences that carry a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an 'exceptional circumstance' strongly gravitating against imprisonment or lengthy imprisonment. That is so because the imposition of a mandatory minimum term on a woman who is pregnant or postnatal results in a disproportionately severe sentence when compared with the imposition of such a sentence upon a person who is not affected by such considerations.**

## **Introduction of a new sentencing guideline**

Without a full medical and social picture of the pregnant or postnatal woman, there is a significant risk that sentencers will be unwittingly sentencing a mother to a stillbirth, a baby to death or other serious complications, or an infant to developmental trauma. There is currently no guidance on what information sentencers should consider, or from what source, despite the vast amount of research and evidence available. We therefore suggest, in addition to a new mitigating factor, the introduction of a specific sentencing guideline for pregnant and postnatal women.

### **3. THE NEED FOR REASONS**

The consequences and impact of a prison sentence for a pregnant or postnatal woman and her child are too often disproportionate to the offence. For the reasons outlined above, whenever a custodial sentence is passed upon a pregnant or postnatal woman, the sentencer should explain in detail why, notwithstanding the considerations set out herein, a custodial sentence is justified.

Reasons for all sentences of pregnant or postnatal women should address the following:

- that increased pregnancy risks are an intrinsic consequence of the imposition of a custodial sentence on a pregnant woman;
- that custody poses inherent barriers to accessing medical assistance and specialist maternity care, causes trauma to pregnant and postnatal women in particular and has an adverse impact on a child's development;
- the medical needs of a pregnant or postnatal woman and her child, including her mental health needs;
- the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant harm to both mother and child);
- the effect of the sentence on the physical and mental health of the woman;
- the effect of the sentence on the child once born;
- the fact that prisons are overcrowded;
- why a community or suspended sentence is not appropriate.

### **4. IMPACT**

We note with concern that the Sentencing Council, at the time of opening this consultation, did not have access to data on the number of pregnant or postnatal women sentenced each year. Since this consultation has been opened, some of this data has been made available.

A freedom of information request, the results of which were published in *The Observer* on 29 October 2023 found that between April 2022 and March 2023, in the 80% of cases where data was available for pregnant women in prisons, 34% were on remand, 49% had been sentenced and 17% had been recalled.<sup>23</sup> We urge the Sentencing Council to require the Ministry of Justice to collect and publish data on the pregnant and postnatal prison population.

Since this consultation was launched, the government has announced plans to introduce a presumption against all sentences of 12 months and under. If this legislation is passed, it may impact a significant cohort of female offenders, including pregnant and postnatal ones, and adds strength to the proposition that sentencing guidelines must ensure sentencers fully understand the threat to life and wellbeing posed by imprisoning a pregnant or postnatal woman, even for a short period of time.

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<sup>23</sup> Observer (2023) [Revealed: One in three jailed pregnant women in England and Wales still to face trial](#)

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