



Birth Companions submission to the Sentencing Council consultation 2023: Miscellaneous amendments to sentencing guidelines.

This submission outlines Birth Companions' response to the proposed mitigating factor relating to pregnancy, birth and the postnatal period, including revisions to the draft, and comments shared by members of our Lived Experience Team. At the end of this paper, we also provide brief responses to a number of other questions in the current consultation.

Question 17: Do you agree with the proposed new mitigating factor and expanded explanation relating to pregnancy? If not, please provide any alternative suggestions.

- We strongly agree with the inclusion of a specific mitigating factor and expanded explanation on pregnancy, childbirth and postnatal care, but we do not support the draft version provided in the consultation. As such, we have proposed a number of revisions to ensure this mitigating factor achieves its aims.
- We welcome the recognition of risk but question the fact that this has been downplayed in the draft following research with sentencers who are not the experts in this evidence. The evidence on risk to both mother and child should be included – particularly as this is noted by NHS England's own *National Service Specification for the care of women who are pregnant or post-natal in detained settings (prisons, immigration removal centres, children and young people settings)*¹, and demonstrated so starkly by the deaths of two babies in the prison system since 2019.
- The issues noted in the draft factor include problems with access to specialised midwifery care, but research shows the concerns go much wider in terms of access to appropriate healthcare more generally, and include mental health provision. It is crucial these are recognised given the fact that pregnancy and the postnatal period can pose significant risks to women's health.²
- The word 'child' should be changed to 'baby/ infant' throughout, to reflect the specific vulnerabilities associated with this period.
- We welcome the inclusion of 'postnatal care' in the title, but the factor needs to specify what period this is, as use of the term can vary significantly, and explain this aspect more fully.
- There are clearly evidenced risks to women in the year after birth, from conditions such as sepsis, thrombosis and thromboembolism, and acute mental health risks, linked to high numbers of deaths due to drug and alcohol use or suicide.³ On that basis, the factor should clearly cover, as a minimum, at least 12 months after birth. However, the HMPPS policy framework relevant to the care of pregnant and postnatal women in prison extends this period to up to 24 months after pregnancy, to cover the entirety of the critical 'first 1001 days' from conception to a child's second birthday. Mother and Baby Units also hold mothers whose babies may be up to two years of age. This mitigating factor should therefore cover the same period, in order to reflect the widely recognised physical and mental health needs of both mother and child, and in particular the

¹ NHS England (2022) National Service Specification for the care of women who are pregnant or post-natal in detained settings (prisons, immigration removal centres, children and young people settings). <https://www.england.nhs.uk/wp-content/uploads/2022/06/B1708-National-service-specification-for-the-care-of-women-who-are-pregnant-or-post-natal-in-detained-settings.pdf>

²MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care <https://www.npeu.ox.ac.uk/mbrance-uk/reports>

³ MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care <https://www.npeu.ox.ac.uk/mbrance-uk/reports>

significant, long-term trauma associated with separation during this critical time.^{4,5}

- The risks of separation from a baby⁶, and the challenges and issues inherent in the application process for Mother and Baby Units (MBUs), must be highlighted given the extensive recommendations made by the Chief Social Worker in her recent review of cases⁷.
- This mitigating factor is an important step. However, further guidance is required to ensure mitigation relevant to pregnancy, birth and the postnatal period is applied in cases over the custody threshold, as well as those 'on the cusp', including where there is a mandatory minimum sentence:
 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 two 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 should constitute an 'exceptional circumstance' that makes the imposition of the minimum term disproportionate, and thereby justifies not imposing that minimum.
- It is essential that sentencers recognise the accumulated disadvantage faced by pregnant or postnatal girls and women who are young (typically under 25); from minoritised communities; and/or are care experienced. There is a real risk that these factors, which are recognised elsewhere in sentencing guidance, may be overlooked or not adequately considered when sentencing those who are pregnant or have recently given birth.
- This is especially relevant to the overlap with the age and/or lack of maturity mitigating factor, as pregnant or postnatal girls and women may be perceived as more mature than they are, or, in the case of girls, subject to "adultification"⁸ by virtue of having become pregnant. This will often not reflect the reality of their situation and care will need to be taken to ensure that immaturity, and the presence of neurodiversity, are properly factored in where women and girls are being sentenced under the age of 25.

On the following page we have made **suggested revisions to the draft factor** as it appears in the consultation document. **Birth Companions' additions are marked in red.**

⁴Abbott, 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.

⁵ First 1001 Days Movement (2022) The First 1001 Days: An Age of Opportunity <https://parentinfantfoundation.org.uk/1001-days/resources/evidence-briefs/>

⁶ 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.

⁷ Department for Education. (2022). [Applications to mother and baby units in prison: how decisions are made and the role of social work.](#)

⁸ Youth Justice Legal Centre (2023) Dare to Care: Representing care experienced young people <https://yjlc.uk/sites/default/files/attachments/2023-09/YJLC-Guide-DARE2CARE-16-D%20%281%29.pdf>

Pregnancy, childbirth and postnatal care

When considering a custodial or community sentence for a pregnant or postnatal woman (a woman who has given birth in the last two years) the Probation Service should be asked to address the issues below in a pre-sentence report. If a comprehensive pre-sentence report addressing these issues is not available, sentencing should be adjourned until that is available.

Pregnancy and maternity are recognised as protected characteristics under the Equality Act 2010.

When sentencing an offender who is pregnant or postnatal relevant considerations may include:

- the fact that the NHS classifies all pregnancies in prison as high risk;
- any effect of the sentence on the physical and mental health of the offender;
- any effect of the sentence on the unborn/ newborn baby/ infant
- that access to a place in a prison Mother and Baby Unit is not automatic, and the upper age limit is 18 months, with potential to extend to a maximum of 24 months in certain circumstances.

The impact of custody on an offender who is pregnant or postnatal can be harmful for the physical and mental health of both the offender and the unborn/ newborn baby/ infant^{9,10}.

Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy and the period following birth for both the offender and the baby/ infant¹¹. Pregnancy and the postnatal period are a high-risk time in terms of severe mental ill-health in women. There is significant risk of suicide or death as a result of substance use, as evidenced by the annual reports on maternal mortality¹². The mental health risks are exacerbated by the uncertainty faced by those entering prison as to whether they will be able to access a place within a Mother and Baby Unit or have to deal with the trauma of separation. There are also major risks to the physical health of mother and baby, including premature and unassisted labour, pre-eclampsia, haemorrhage, and sepsis¹³.

NHS England states that "it is because of the complexities for women in detained settings that all pregnancies must be classed as high risk."¹⁴ The Royal College of Midwives and the Royal College of Obstetricians and Gynaecologists both emphasise the need for alternatives to prison to be used in sentencing pregnant women wherever possible^{15,16}. Research shows there can be significant difficulties accessing equivalent and appropriate healthcare, including urgent medical assistance or specialist maternity services in custody^{17,18}, and appropriate mental health provision¹⁹.

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 development²⁰.

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 presents significant risk of harm to the pregnant woman, mother and child, either due to separation or because of the risks inherent in the custodial environment. See also the [Imposition of community and custodial sentences guideline](#).

For offenders on the cusp of custody, 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 sentencing²¹.

For offences that carry a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an 'exceptional circumstance' significantly mitigating against imprisonment or custodial sentence length. This reflects the fact that 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 these protected characteristics.

⁹ Knight M., Plugge E. (2005). Risk factors for adverse perinatal outcomes in imprisoned pregnant women: A systematic review. *BMC Public Health*, 5, 111

¹⁰ Pitfield, C., Binley, J., Soni, S., Pontvert, C. and Callender, M., 2023. A rapid evidence review of clinical risk factors for poor perinatal mental health in women's prisons in England. *The Journal of Forensic Psychiatry & Psychology*, pp.1-21.

¹¹ NHS England (2022) National service specification for the care of women who are pregnant or post-natal in detained settings (prisons, immigration removal centres, children and young people settings) <https://www.england.nhs.uk/wp-content/uploads/2022/06/B1708-National-service-specification-for-the-care-of-women-who-are-pregnant-or-post-natal-in-detained-settings.pdf>

¹² MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care <https://www.npeu.ox.ac.uk/mbrance-uk/reports>

¹³ MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care <https://www.npeu.ox.ac.uk/mbrance-uk/reports>

¹⁴ NHS England (2022) National service specification for the care of women who are pregnant or post-natal in detained settings (prisons, immigration removal centres, children and young people settings) <https://www.england.nhs.uk/wp-content/uploads/2022/06/B1708-National-service-specification-for-the-care-of-women-who-are-pregnant-or-post-natal-in-detained-settings.pdf>

¹⁵ RCM (2018) Position Statement: Perinatal women in the criminal justice system www.rcm.org.uk/media/3640/perinatal-women-in-the-criminal-justice-system_7.pdf

¹⁶ RCOG (2021) RCOG Position Statement: Maternity care for women in prison in England and Wales <https://www.rcog.org.uk/media/wwhogs5/rcog-maternity-care-and-the-prison-system-position-statement-sept-2021.pdf>

¹⁷ Abbott, L., Scott, T. and Thomas, H. (2023) Experiences of midwifery care in English prisons. *Birth*, 50(1), pp.244-251.

¹⁸ Davies, M et al (2022) Inequality on the inside: Using hospital data to understand the key health care issues for women in prison

<https://www.nuffieldtrust.org.uk/research/inequality-on-the-inside-using-hospital-data-to-understand-the-key-health-care-issues-for-women-in-prison>

¹⁹ Pitfield, C. et al. (2023) A rapid evidence review of clinical risk factors for poor perinatal mental health in women's prisons in England, *The Journal of Forensic Psychiatry & Psychology*, DOI: 10.1080/14789949.2023.2212657

²⁰ First 1001 Days Movement (2022) The First 1001 Days: An Age of Opportunity <https://parentinfantfoundation.org.uk/1001-days/resources/evidence-briefs/>

²¹ Minson, S (2019) Maternal sentencing and the rights of the child, Hampshire: Palgrave

Evidence from our Lived Experience Team

In November 2023 we held an online focus group with six members of our Lived Experience Team – women who have been remanded and/ or sentenced to prison by the courts while pregnant or postnatal.

The discussions were led by the women, who had all reviewed the consultation document in detail in advance of the meeting. Their responses are outlined below, under themed headings.

Women didn't feel their pregnancy or postnatal status had been considered in their sentencing.

Several of the women talked of how they felt there was little or no consideration of their pregnancy or recent birth by the sentencer, or the risks that posed. Some felt their pregnancy actually made the sentencing decision harsher.

"I feel lucky that the second time I was in court, the judge did take the fact that I had a young baby into account in my sentencing. He said he decided my sentence length in order to avoid a separation and allow tag. The first judge, when I was pregnant, did not take my pregnancy, health or anything into consideration at all."

"The judge didn't take it [my pregnancy] into consideration at all – in fact, they said that I'd be ok because 'there are loads of other pregnant ladies in there', and said the MBU was sufficient extra care for her."

"So many women were in prison from doing things men asked them to do. In my personal experience I now know I was groomed, but back then I don't think people understood how women are groomed. I was bailed for 2 years and was working and was told [I'd get a] suspended sentence. I got pregnant on bail. Then once I was pregnant they used the father of my child's criminal history against my character. Even though I never knew the father of my baby when I was arrested for the crime. It was like because I got pregnant and my baby's father had a past it made me look worse, as up until that point I was told suspended sentence."

"When I was about to be sentenced, every woman in the prison said to me "let's hope you don't get a female judge!" – it was so well known that female judges will come down harder on you because you're a woman who did this thing while pregnant or while a mother."

One woman's probation officer, before sentencing, told her *"there's nothing wrong with you, is there?"* and *"loads of women have had successful births in prison"*. That mother felt that the significant risks of pregnancy and birth in prison need to be made really explicit to all involved.

Another described how surprised she had been to receive a custodial sentence given everything she'd been led to expect. *"Throughout the whole process, my case was seen as community – they wrote it down that they were going for a community sentence. I had asked the judge not to mention that I was pregnant, as I didn't want the jury to know. The judge herself stepped it up to custodial from community, even though she knew I was 7 weeks pregnant. She knew and she decided to move me up instead of down."*

Sentencers' lack of knowledge relating to pregnancy and early motherhood in custody, including MBUs.

Women talked of the need for more training, including detailed case studies of the issues, risks and outcomes for women sentenced to custody while pregnant or in the postnatal period. There was a sense that sentencers have little understanding of key details like eligibility and the application process for an MBU, or what care is really provided for pregnant women.

"My judge never had a clue. My barrister had to explain how long I could keep the baby after my barrister researched it. No one seemed to know anything."

"Being sentenced to a prison with an MBU is all well and good, but they don't take into account the availability of MBU places."

"So much disparity between judges and their decisions. They gave me a sentence that enabled me to not be separated, but then put nothing in place to avoid a separation. No planning. I ended up separated from baby for two months while things were sorted out – no support to breastfeed during this time. No way to account for what trauma that caused. So much recovery time needed, also with my older child who I was separated from. I also think there is a race element to this – different women are treated different."

"They need training, and insight into what it's actually like."

"Some kind of training, videos explaining the emotional impacts of imprisonment on pregnant women and kids. Videos on the impact on the women and also the children that are left behind, the impact, so they can have a different perspective."

"I had to do so much research and planning for myself. It required so much determination and persistence. But there should be someone in the courts doing this work, supporting women to make sure all these things get done. The system should provide this care and support."

One woman shared her more positive experience of having the needs of her and her baby considered, and being supported by a well-informed judge to avoid separation while in custody.

"The judge delayed sentencing, which allowed birth, recovery, early bonding, breastfeeding. They sentenced me on the basis of allowing me to leave prison with my baby at the end of the MBU period. My child could have ended up in care, her entire life could have been so different. Judges need to have more of an empathetic heart. Case studies like mine could be so powerful in helping judges see the positive impacts their sentencing decisions can have. Let them see the longer-term outcomes, what happens next etc."

Concerns that the draft mitigating factor would not be strong enough to ensure adequate/consistent consideration.

While acknowledging the value of the proposed new factor, women were concerned that this may not be applied by sentencers in all cases. They wanted stronger, mandatory directions on sentencing pregnant and postnatal women, given the severity of the risks and the long-term impacts for mother and child.

"Judges don't have to follow these guidelines, so we need something stronger."

"Judges can go outside of guidelines – they are not mandatory."

"I can't believe how poor the sentencing guidelines were before – [pregnancy wasn't] even under medical! – absolutely shocking. Didn't fully understand how bad it was."

"It feels like they make examples of women to show "others" that getting pregnant isn't a get 'get out of jail free card'."

The value of community alternatives to custody.

Women in the focus group felt community sentences are not being properly considered for many pregnant and postnatal women.

"Pre-sentence reports are not looked at enough. Mine recommended a community sentence. But it wasn't even looked at, at all."

"Why are judges not looking and considering and giving women a chance for a community sentence? If it's a first offence, a nonviolent offence, and if she's pregnant or a mother – why do you need to send her to prison?"

"Focus on community sentences, treatment programmes, support and so on would be much better as imprisonment does affect the kids the women leave behind."

"They need to take everyone's circumstances into account, and act accordingly. It would be better if women didn't go to prison, and had community sentences. The majority of women I saw in the system in that year, so many were first time offenders, lots of pregnant women and new mothers."

"Most women are low risk, otherwise we wouldn't get a place on the MBU."

Other consultation questions

In the following section we have outlined our responses to several other questions in the consultation.

Question 12: Do you agree with the proposed changes to the wording of the factor and expanded explanation for the mitigating factor of good character? If not, please provide any alternative suggestions.

- We support this change, given the fact it avoids the use of examples that may not reflect the opportunities and circumstances of many individuals, including those facing disadvantage and inequality.

Question 13: Do you agree with the proposed additions to the Determination and/or demonstration of steps taken to address addiction or offending behaviour expanded explanation? If not, please provide any alternative suggestions.

- We support these additions, in order to acknowledge the limited provision of/ difficulties in accessing support in many areas.

Question 14: Do you agree with the proposed change to the age and/or lack of maturity factor? If not, please provide any alternative suggestions

- We agree with this change.

Question 15: Do you agree with the proposed new mitigating factor and associated expanded explanation: Difficult and/or deprived background or personal circumstances? If not, please provide any alternative suggestions.

- Yes, although we feel that the language of *trauma* should be included in this factor, as well as disadvantages, to reflect the wider emphasis on trauma-informed approach across systems²².

Question 16: Do you agree with the proposed new mitigating factor and associated expanded explanation: Prospects of or in work, training or education? If not, please provide any alternative suggestions.

- Yes, we support this new factor. It is vital that it specifies that a lack of work, training or education must never be an aggravating factor, as for many mothers these may be unavailable or difficult to secure.

For further information on this submission, or other aspects of our work with pregnant and postnatal women in contact with the criminal justice system, please contact Kirsty Kitchen, Head of Policy and Communications, at kirsty@birthcompanions.org.uk

²² OHID (2022) Guidance: working definition of trauma-informed practice <https://www.gov.uk/government/publications/working-definition-of-trauma-informed-practice/working-definition-of-trauma-informed-practice#:~:text=Trauma%20results%20from%20an%20event,as%20harmful%20or%20life%20threatening>.