Sentencing Council

Sentencing Council meeting:	**26 January 2024**
Paper number:	**SC(24)JAN04 – Miscellaneous amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the second of two meetings to consider the responses to this year's consultation on miscellaneous amendments to sentencing guidelines before publication of the changes in March which will come into effect on 1 April 2024. The consultation closed on 30 November and we received over 80 responses.

1.2 At this meeting the Council will be asked to consider the responses relating to new mitigating factors and changes to expanded explanations.

2 RECOMMENDATION

2.1 That the Council agrees any changes relating to the mitigating factors (and associated explanatory materials) for the existing factors of:

- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Agee and/or lack of maturity

2.2 That the Council agrees to adopt the proposed new factors, and agrees any changes to the associated explanatory materials, for:

- Difficult and/or deprived background or personal circumstances
- Prospects of or in work, training or education
- Pregnancy and maternity

3 CONSIDERATION

Background

3.1 In 2021, the Council commissioned the University of Hertfordshire to conduct research into and report on Equality and diversity in the work of the Sentencing Council. The research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations for how

to mitigate these disparities, if possible. In light of the findings and the recommendations in the research report (the 'UH report'), the Council published a response in January 2023 setting out the steps being taken which include reviewing the use and application of aggravating and mitigating factors and expanded explanations in sentencing guidelines. In the response the Council undertook to consult on some changes and additions and to conduct research into how these changes might work in practice.

Remorse

3.2 The UH report recommended that the Council should "Extend the expanded explanation for 'remorse', and include 'learning disability, communication difficulties and cultural differences' as influential factors in the evaluation of remorse". The Council consulted on a revised expanded explanation for the mitigating factor as follows:

> **Remorse**
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> Lack of remorse should never be treated as an aggravating factor.
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to for example:
>
> - nervousness
> - a lack of understanding of the system
> - learning disabilities
> - communication difficulties
> - cultural differences
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - a lack of maturity etc.
>
> If a PSR has been prepared it will provide valuable assistance in this regard.

3.3 The explanation differs from that currently in use, in that the examples of what may affect an offender's demeanour (which are currently in a paragraph) were put into a bulleted list and the items in red were added. Additionally (and possibly inadvertently) in the final sentence the current wording 'it may provide' was changed to 'it will provide'.

3.4 Around 33 respondents commented on this proposal. Over half were generally in favour of the proposal and some of those suggested areas for improvement. Around 10 respondents were firmly opposed to the proposals. The main area of disagreement (including among some who were broadly supportive) was in relation to 'cultural differences'.

> The proposed expanded definition includes "cultural differences" as a factor which allegedly might mean the offender's demeanour in court could be misleading.

I do not know what “cultural differences” actually mean in this context and why they are relevant. I note that sentencers who were asked their opinion raised the exact same points and the Council should reflect on these concerns and remove this.

Philip Davies MP

The issue of remorse is subjective, and often open to misinterpretation by the author of a pre sentence report, Currently, remorse is dealt with by way of guilty pleas, co-operation with the probation services during the preparation of the report, and the actions of the defendant. Speculation as regards cultural and other factors makes a proper analysis impossible.

Criminal Law Solicitors Association

We agree with the additional factors listed and welcome the research that underpins these changes. However, given the question that has been raised in the research regarding the term ‘cultural differences’ we hope that there will be follow up research that may address how this term is used in practice.

Sentencing Academy

The Drive Partnership agrees strongly with the addition of learning disabilities and communication difficulties to the expanded explanation for the mitigating factor of remorse. It is important that these factors are considered in the process of sentencing and an inability to articulate and/or present in a certain way does not disproportionately affect sentencing. Many perpetrators of domestic abuse are highly deceitful and able to manipulate professionals, including within the criminal justice system. We would like to see language barriers included under the point of “communication difficulties” to ensure that individuals for whom English is not their first language are not considered to be less remorseful.

The Drive Partnership would urge caution with the inclusion of “cultural differences” within the expanded explanation. Whilst we strongly appreciate the intention behind this change, we would encourage further thinking about the phrasing to ensure that the emphasis rests on those responsible for sentencing being aware of their potential unconscious bias towards those from different cultures, rather than cultural differences being a reason and/or justification for not expressing remorse. Cultural differences are often cited to minimise and justify abusive behaviour by both perpetrators and professionals who work with them, and we are cautious of this being applied in sentencing.

The Drive Partnership

We agree with the inclusion of learning disabilities and communication barriers but are concerned by the lack of detail and consideration regarding the inclusion of cultural differences. This requires more clarity in order to be useful and understood.

End Violence Against Women

Restore Justice questions the point of cultural differences in the same way as in the consultation and quoted above. The relevance of cultural differences in remorse presents too much ambiguity. The Council admits the limitations of the research, and difficulties to define this further, which we consider as significant factors in not adding this particular factor to the expanded explanation list for remorse.

We strongly disagree with adding ‘cultural differences’ to the expanded explanation for the mitigating factor of remorse, or making it a ‘relevant’ factor at all. The alternative suggestion is that ‘cultural differences’ are not to be considered as relevant.

Restore Justice

3.5 Others raised fundamental issues relating to the consideration of remorse

This is the only mitigating factor which has no evidential basis at all, both in its current form and with the expanded explanation. It remains vague and open to interpretation. …

The expanded explanation now adds a whole new breadth of interpretation that allows a court to speculate that the defendant might have said sorry, were it not for a comprehensive list of factors which bring the potential to encompass the vast majority of defendants. It becomes difficult to envisage a finding other than that any defendant is potentially incapable rather than unwilling to express any form of remorse. Members of the bench may disagree in the speculation about each individual - would they if they could, or not?

This mitigating factor is vastly over-used on absolutely no real evidence at all. Sentence is already reduced for those who admit their offence to the police, and with credit for guilty plea in court. This is factual and evidenced. Very occasionally there is something extra - making the call to the police, giving first aid, writing a letter of apology, fixing the fence - something!

A suggestion to either remove 'remorse' as it stands altogether, or leave it there but add 'EVIDENCE of' to exercise the minds of the judiciary. The need to ask 'Why are we reducing the sentence even further for this defendant? What did they actually DO?.

Legal Adviser

The reduction for remorse must be earned and it must be demonstrated. The sentence could topple from custody to community on this factor. It has to be substantiated. …

What did this offender do to demonstrate remorse to the victim, whether an individual or the general public? How can the sentencer be convinced that there is true remorse? What is the evidence of action after the offence took place? For example, they are offering to pay compensation and they have saved it up in the meantime to pay some or all of it immediately, or they present a letter to the court to pass to the victim (monitoring as to whether that actually happens or not!).

Faster Fairer Justice

Remorse is impossible to assess and is almost irrelevant. I have seen and heard offenders congratulating their solicitors for their apology statements that have got them off with suspended sentences laughing at the judiciary. Real remorse should be demonstrated by making amends.

Individual

> Offenders can express remorse in a variety of different ways, including verbally via partial or full apologies and non-verbally through, for example, tears, downward eye gaze, or hanging their head low. Implementing remorse as a mitigating factor already involves asking sentencers to do something that psychological research suggests is very difficult, i.e., evaluating the veracity of a stranger's statement in the absence of an opportunity to carry out detailed questioning. In addition, the proposed amendment would require sentencers to bear in mind that they may be misreading the offender's signals, which may be purposively deceptive. Research suggests that people find it difficult to accurately judge non-verbal cues to deception, and particularly so when these are expressed by someone from a different culture. Consequently, the Council is proposing to make the sentencer's task even more difficult than it is at present. …
>
> Recent research on Crown Court sentencing suggests that written apologies are common practice in the courts and that sentencers may have diverse attitudes regarding their value for assessing remorse. Therefore, it might be helpful to include specific wording somewhere giving the example of a written apology to the victim and stating the Council's position on the value of such evidence.
>
> **Dr Ian K. Belton and Professor Mandeep Dhami**

3.6 Concerns about how remorse is demonstrated and taken into account were also expressed by those with lived experience of the criminal justice system:

> Members outlined concern over mis-intended consequences coming from the way some individuals might express remorse and felt that this was potentially problematic if used in sentencing which has been echoed in our neurodiversity forum which is a factor that is prevalent in the revolving door group Members worried that defendants with learning difficulties would be disadvantaged.
>
> Another explained that she had been assumed to be unremorseful in Court but that this was because of the emotional state she was in at the time. "When I was sentenced, they accused me of not showing remorse, but I was in a state of shock. I didn't really feel anything. It didn't mean I wasn't remorseful because I was just in this state. But that's because I was also suffering with really bad mental health because of the crime as well. But they don't ever take that into consideration, it was just, 'oh she's not showing any remorse at all.'"
>
> Members discussed to what level remorse should be considered in sentencing. There were mixed feelings about this. Some identified that remorse is not indicative of whether a person is ready to start rehabilitation and that it is difficult to assess the validity of displayed remorse. One offered this analysis:
>
> "It is important to note that remorse is not always a reliable indicator of rehabilitation potential. Some persons may express remorse simply because they believe it will help them get a lighter sentence. Others may be genuinely remorseful but may still reoffend due to factors such as addiction or mental health problems."

> Others continued this theme, pointing out what looks like contrition can be more about self-pity. “You can't simply walk into court and say that you're sorry, or, you know, because a certain amount of that will be feeling sorry for oneself as opposed to genuinely remorseful for the crime that's been committed.”
>
> **Revolving Doors**

> We consistently heard people describe remorse as an outdated, archaic concept, and that too much weight was placed on it in sentencing decisions. Remorse can be an inappropriate expectation for people in crisis situations. We frequently heard that, due to issues relating to the crisis that led to the crime, people are unable to show remorse in court, but will feel remorse at a later stage. This means using remorse as a factor in a sentencing decision is ill advised. Whilst remorse might not be recognised, or might not be possible, it can also be easier to appear remorseful if you come from certain backgrounds, as many cultures and backgrounds are taught not to show emotion or display it in ways that may not be recognisable to those making the sentencing decision.
>
> **National Experts Citizen’s Group**

3.7 Dr Laura Janes made suggestions for additions to the expanded explanation. She states “The proposed changes are an improvement but risk an overly restricted view of the circumstances in which genuine remorse may not be apparent”. She proposes:

> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient. However, the offender’s demeanour in court or the way they articulate their feelings of remorse may not accurately reflect the full extent of their remorse, due to for example:
>
> - nervousness
> - a lack of understanding of the system
> - mental disorder
> - learning disabilities
> - communication difficulties
> - cultural differences
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - age and/or a lack of maturity etc.
>
> If a PSR has been prepared it may provide valuable assistance in this regard.

3.8 In previous discussions members have noted the inherent difficulties with the application of remorse as a mitigating factor. It is perhaps worth noting that the expanded explanation starts with:

> **Remorse**
>
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> Lack of remorse should never be treated as an aggravating factor.

3.9 In practice, it is likely that the weight attached to the mitigating factor of remorse will be most significant where there is some evidence of the extent of the remorse – in the ways suggested by respondents, some of which may engage other mitigating factors. However, there may be situations where it is appropriate for a court to take remorse into account where an offender has not provided evidence.

3.10 It is noteworthy that for some offenders the mitigating factor of remorse is not viewed positively.

3.11 Removing remorse as a factor is not an option at this stage because that was not what was consulted on. In any event, the Council may feel that remorse does and will continue to play a part in sentencing, not least because a genuine expression of remorse may provide some solace to victims in certain circumstances.

3.12 The point about being clearer about what is meant by 'cultural differences' and how that relates to remorse is a valid one, but not easy to resolve. If the Council accepts the view of the Drive Partnership, that it is the cultural differences between the sentencer and the offender that are relevant, then it may be preferable to remove it from the list and add a reminder to consider the issues covered by the Equal Treatment Bench Book.

3.13 Taking all of the responses into account, suggested wording is:

> **Remorse**
>
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> **Lack of remorse should never be treated as an aggravating factor.**
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient.
>
> The court should be aware that the offender's demeanour in court or the way they articulate their feelings of remorse may be affected by, for example:
>
> - nervousness
> - a lack of understanding of the system
> - mental disorder
> - learning disabilities
> - communication difficulties (including where English is not their first language)
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present
> - age and/or a lack of maturity etc.
>
> If a PSR has been prepared it may provide valuable assistance in this regard.

Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Question 1: Does the Council wish to adopt any of the suggested changes to the expanded explanation for the mitigating factor of remorse?

Good character and/or exemplary conduct

3.14 The UH report recommended that the Council should *"*Consider providing more inclusive examples of 'good character and/or exemplary conduct', alongside existing examples". In response, the Council said that it would remove the example currently given (of charitable work) and include the factor in the review of the expanded explanations in order to ascertain how sentencers are applying and interpreting it.

3.15 In research interviews with sentencers a version of the factor where the current example of charitable works was removed was received favourably though some suggested a list of examples would be an aid to sentencing. However, none of those that were asked were able to suggest what those examples should be.

3.16 Another finding from the research was that in some cases 'good character' was equated with having no previous convictions, although these are separate factors in guidelines. If a sentencer reads the expanded explanation they will see that the "factor may apply whether or not the offender has previous convictions", but if they think it does not apply, they are unlikely to click on the explanation. The Council therefore consulted on changing the wording of the mitigating factor itself and the accompanying explanation to:

Positive character and/or exemplary conduct (regardless of previous convictions)

- This factor may apply whether or not the offender has previous convictions.
- Evidence that an offender has demonstrated positive good character may reduce the sentence.
- **However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their positive character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

3.17 Around 22 respondents commented on this proposal. Most were supportive of the change, a few felt the change was unnecessary and some raised concerns.

It is hard to separate character from previous convictions. We find it difficult to see how a person who has previous criminal convictions (unless of the lowest type of motoring offences, such as parking or speeding, etc.) could be said to be of good character or exemplary conduct almost by definition.

The change suggested is better than the current text but does not for us solve this dilemma. For the author, “Positive character and/or exemplary conduct (regardless of previous convictions)” creates a significant difficulty and is highly self-contradictory. Exactly what positive character traits or exemplary conduct demonstrated should be taken into account as a mitigating factor, if the defendant is known to have a criminal record? We agree with some of the research views that here more guidance on what is being referred to would be very helpful for sentencers. Such character traits or exemplary conduct would need to be compelling and not self-serving.

West London Magistrates Bench

We agree with the recommendation to include examples of what constitutes good character. The need for examples is supported by the apparent lack of consensus amongst sentencers concerning what this mitigating factor means in practice. As the consultation document notes: “Although there was a suggestion that more examples of conduct that may demonstrate good character would be useful, sentencers that were asked about this found it difficult to suggest what these might be.” If the Council were to decide to explore including examples, it would make sense to look at the kind of evidence of good character that is typically presented in court, namely, in the testimonials provided by friends, family, and community members. These testimonials deal with a broad range of character-related issues including public service but also matters such as trustworthiness and reliability as a worker or partner, caring responsibilities, and status within the community – what otherwise could be described as ‘everyday good character’. The challenge here is that there may be substantial difference of opinion amongst sentencers regarding the weight that should be given to such testimonials, as suggested by the findings from Belton’s (2018) interviews with Crown Court sentencers.

Dr Ian K. Belton and Professor Mandeep Dhami

NECG members questioned what criteria decides if someone has ‘good character’ and found the concept to be unclear, subjective, and possibly informed by stigma, labelling and prejudice.

There was consensus that, as with remorse, issues such as learning disabilities, neurodiversity, acquired brain injury, trauma, addiction, mental health crisis, domestic violence, or any combination of these can make it impossible to communicate or show good character. Furthermore, the NECG emphasised that judging ’good character’ was especially problematic in terms of race.

Whilst attempts to address addiction and self-improvement can be viewed positively the inability to achieve this should not be viewed negatively (‘bad character’). There are many factors within the system preventing people from accessing support – often linked to income and circumstances. It is also apparent that different processes can make it harder to evidence remorse or good character, such as an adjourned case allowing more time. It can also be more difficult for people on remand.

The NECG believe that instead of an assessment of ‘character’ the focus should be on understanding the circumstances, context and mitigating factors behind the crime.

National Experts Citizen’s Group

3.18 There was also one response which disagreed with the proposal stating “This is a great opportunity to keep previous convictions or lack of, completely separate to 'demonstration of exemplary conduct' e.g. war veteran record, life-saving activities.” The Council will note that the revised factor no longer includes the term ‘good character’, though it is still used in the expanded explanation.

3.19 The Council may wish to consider revising the bullet point ‘Evidence that an offender has demonstrated positive good character may reduce the sentence.’ Perhaps to: ‘Evidence that an offender has demonstrated a positive side to their character may reduce the sentence.’

3.20 Despite those thoughtful responses that urge the Council to provide examples, the difficulty still arises of how to provide a succinct list of suitable inclusive examples. The suggestions such as testimonials are likely to favour a middle class offender.

Question 2: Does the Council wish to make any changes to the proposed ‘Positive character and/or exemplary conduct (regardless of previous convictions)’ and accompanying expanded explanation?

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

3.21 The UH report noted concerns raised by civil society organisations that sentencers may not always take into account offenders’ efforts to access help, especially when it has been delayed for reasons outside of their control. The Council therefore agreed to consult on amending the expanded explanation that accompanies the mitigating factor of ‘Determination and/or demonstration of steps taken to address addiction or offending behaviour’ to make it clearer that the factor should be applied where support has been sought but not received – by adding the words in brackets:

> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.
>
> Similarly, a commitment to address other underlying issues that may influence the offender’s behaviour (including where support has been sought but not yet received) may justify the imposition of a sentence that focusses on rehabilitation.
>
> The court will be assisted by a PSR in making this assessment.

3.22 We received around 28 responses to this question. Most were supportive of the proposed addition. Three disagreed on the basis that it would encourage unsubstantiated and/or insincere claims of having sought help and one disagreed with the concept of mitigation on this ground entirely. Of those that were broadly in support, some suggested making it clear that the factor applies only when the reasons for the support not having been received are outside the offender's control and others stressed the need for evidence of support having been sought.

3.23 From the perspective of those with lived experience of the criminal justice system, the National Expert Citizen's Group expressed a counterview:

> The group felt that it was difficult for those in addiction to show their potential or demonstrate commitment to change, due to the nature of addiction.
>
> 'What I have experienced from addiction I don't think you can judge people character while during addiction but if they are putting effort into reforming themselves but maybe fall off the wagon then the character reference should be done by those people who have worked with them. But if they have proved they have changed over a period this should be considered. And I think that all the above should be taken into account and should add to the good character. People in addiction can have up and downs and slips but this doesn't mean they are a bad person.'
>
> At the Women's Forum, there was consensus that often, women in the criminal justice system have experience of trauma, which, makes it difficult for them to take any steps to alter their behaviour. This is particularly acute as there is a lack of trauma informed support available:
>
> 'Most women have had years of trauma; the courts are seeing the same women over and over again. They need more safe, rehabilitative spaces to deal with the trauma, otherwise it will not reduce the crime.'
>
> There was also concern about women being afraid to share their problems because of fear of consequences in relation to their children.
>
> 'There is a lot of fear around having your children taken away and presenting as if you don't need help in case they decide you can't cope and remove your children'.

3.24 There were suggestions for explicitly referring to gambling addiction as part of the explanation. The Howard League for Prison Reform suggested:

> Where offending is driven by or closely associated with drug or alcohol abuse, or gambling addiction (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

3.25 The Prison Reform Trust suggested:

> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit or committing acts of disorder or violence whilst drunk), or problem gambling (for example stealing to fund their problem gambling) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence.

3.26 The Drive Partnership ('who have extensive frontline experience and knowledge working with a range of domestic abuse perpetrators across different risk and harm levels and from a range of different communities') responded from the 'point of view of behaviour change interventions for domestic abuse perpetrators' and expressed concerns about the 'the potential for highly manipulative and articulate domestic abuse perpetrators being able to use [the mitigating factor] to their advantage'.

3.27 The Domestic Abuse guideline contains a mitigating factor of 'Evidence of genuine recognition of the need for change, and evidence of obtaining help or treatment to effect that change'. The Council may feel that the concerns expressed by the Drive Partnership could be explored as part of the ongoing evaluation of the Domestic Abuse guideline.

Question 3: Does the Council wish to make any changes to the proposal consulted on for the expanded explanation for 'Determination and/or demonstration of steps having been taken to address addiction or offending behaviour'?

Age and/or lack of maturity

3.28 In response to the recommendation in the UH report: "Consider ways in which more guidance can be issued for sentencing young adults to improve consistency and precision in sentence reduction for young adults", the Council agreed to consider the need for this as part of the expanded explanations research. In some of the scenarios we tested with judges and magistrates in research interviews, the offender was a young adult. The mitigating factor was frequently applied where the offender was 19 years old. However, in scenario versions where the offender was 22 years old, there was more variation in whether or not it was applied as a mitigating factor.

3.29 The content of the expanded explanation raised no issues in research but the Council considered that recognition of this factor by sentencers might be improved if a reference to the age range to which it typically applies were included in the factor itself. The proposal is therefore to change the factor to:

- **Age and/or lack of maturity (typically applicable to offenders aged 18-25)**

3.30 There were around 30 responses to this proposal. Two-thirds of respondents supported the proposal with many of them making additional suggestions. Those that opposed the change did so either because they felt it was unnecessary or because they were opposed to the concept of young adults being treated more leniently.

> Whilst lack of maturity may be relevant in very young offenders, it is hard to see how highlighting this for every offence for those up to the age of 25 can be justified in this way.
>
> I am not sure there is anything you cannot do legally at the age of 25 so it is hard to reconcile this with being given special dispensation in court and making magistrates and judges consider the age of up to 25 as being relevant.
>
> A serving police officer aged 25 claiming a lack of maturity if convicted of an offence would clearly be a nonsense. It would be equally ridiculous for a magistrate to do the same if they were convicted of an offence.
>
> Seeing as this will apply to so many offenders, serious offenders may benefit – including sexual and violent offenders. This will naturally be a concern to the public and I do not support this either.
>
> **Philip Davies MP**

> We think that the proposed change to include 'age and/or lack of maturity' factor into the sentencing guidelines for 18- to 25-year-olds is discriminatory, biased, and unfair.
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> People become adults from 18 years of age and as adults assume responsibilities and privileges that come with reaching such a milestone. They can vote, they can already drive, work and pay taxes, they can have sexual relationships, marry, and have children. Immaturity and 18-25 age bracket cannot be separate, distinctive and significant mitigating factors in the criminal justice system and in the sentencing rule book to pursue leniency and sentence reduction.
>
> Most of those who commit crimes know perfectly well what they are doing. If someone has particular learning, psychological or psychiatric issues, these are assessed within the criminal justice process and acknowledged by sentencers. **Purely considering any 18 to 25-year-old offender as neurologically under-developed, less able to evaluate their actions or limit their impulsivity and risk taking is absolutely laughable.**
>
> **We strongly disagree with this proposed change to the age and/or lack of maturity factor to serve as a mitigating factor in sentencing and be applied by the sentencers. There is no alternative suggestion other than omitting this as a factor.**
>
> **Restore Justice**

3.31 Among those who supported the proposal, some made specific suggestions for changes to the text of the factor:

> We welcome the inclusion of the age range in the amended factor. However, we would suggest adding "inclusive" to the age range, so it is absolutely clear that it includes those aged 25. So, it would read as follows (additions in red):

"age and/or lack of maturity (typically applicable to offenders aged 18-25 inclusive)"

It will be important for the Council to continue to monitor the impact of this change. We also recommend that this section of the guidance cross-refers to the equal treatment bench

The Prison Reform Trust

We agree that age and/or lack of maturity is an important factor for sentencers to consider. Given that there is a wide range of defendants for whom age and maturity are not in correlation, we wonder whether it is preferable to say something like:

- Age and/or lack of maturity (typically but not exclusively applicable to offenders aged 18-25); or
- Age and/or lack of maturity (often most prevalent in, but not limited to, offenders aged 18-25).

Crown Prosecution Service

3.32 Others made specific suggestions for changes to the expanded explanation:

It may be that given the errors apparent in the sentencing of children in R v ZA, it would be useful if this expanded explanation could flag the need for sentencers to refer first and foremost to the children's guideline when sentencing any person who has committed an offence when under the age of 18. In addition, this guidance should also point to the fact that the children's guidance will not necessarily cease to be relevant where a young adult offends (see Balogun [2018] EWCA Crim 2933).

Further, many young adults are care experienced but have been passed over or not provided with appropriate support that they are entitled to as a matter of law. If they have been in care at any point, they are more likely to have experienced trauma, rejection and criminalisation that would not have occurred to a child in the family home. …

These are all relevant matters that should be taken into consideration when sentencing young adults.

I would therefore suggest the following changes (shown in red):

Age and/or lack of maturity (typically applicable to offenders aged 18-25)

Where a person has committed the offence under the age of 18, regard should be had to the overarching guideline for children and young people. That guideline may also be relevant to offending by young adults.

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

Where the offender is care experienced or a care leaver the court should enquire as to both the impact of their experience in care and the any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but applying the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the Probation Service should address these issues in a PSR.

It is also the case that young adults from minoritised backgrounds often experience accumulated disadvantage that needs to be factored into sentencing and the guideline does not presently reflect this. It may be that cross referencing to the guidance on difficult or deprived backgrounds may be appropriate here, both in respect of care experienced young people and those from minoritised backgrounds.

Dr Laura Janes

We also welcome the proposal to specify the age range within the mitigating factor which provides helpful clarity about its intended application. We propose that this is strengthened by adding 'inclusive' after the 25 to ensure that it extends up to the age of 26 in practice. We hope that this will be sufficient to improve the extent to which this factor is used in sentencing young adults and note that we have previously proposed that young adults would otherwise benefit from a separate guideline. It is important that the Council continues to monitor the impact of guidelines on young adults to ensure that as much weight is given in sentencing to the protected characteristic of age, as it is for race and gender. Finally, we note that our previous proposal to clarify factors related to atypical brain development was only partially adopted and we suggest that an additional amendment is made to the extended explanation in the paragraph "Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development" so that it reads as follows:

> Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse, may affect development. It can also be affected by neuro-developmental disorders and acquired brain injury.

We would like to see a note be added to cross-refer to the relevant guideline i.e.

> The 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline' may also be of relevance.

Transition to Adulthood (T2A)

3.33 Others who supported the proposal made more general or wide-ranging suggestions:

We believe that more work needs to be done in this area, although this is outside the scope of this consultation and may also be outside of the scope of the Council's remit. The precipitous transition from being sentenced in the Youth Court and the Adult court, we believe, can result in some young adults being sentenced in an inappropriate way. We recognise, however, to resolve this may require legislation.

Legal Committee of HM Council of District Judges (Magistrates' Courts)

We support this proposed change but it does highlight the potential complexity when dealing with the sentencing of young adults that may be better dealt with through a specific guideline for offenders of this age rather than an expanded explanation.

Sentencing Academy

Yes, we support this change. We do however encourage the Council and sentencers to also consider intersectional gender dynamics which should be read alongside any guidance relating to age and/or maturity.

We know that young women and girls have specific needs relating to adverse childhood experiences, particularly in relation to domestic abuse. The London Blueprint recognises that young girls are more likely to have had experienced sexual

violence and intimate partner violence and to have mental health concerns, which are all risk factors in increasing the likelihood of contact with the criminal justice system.

Advance research indicated that 48% of survey participants agreed that previous relationships were a factor in their offending; the same research found that 73% of respondents began their first committed relationship before the age of 16. For young women in contact with the criminal justice system, their age and experiences of abuse are highly likely to intersect and have an impact on their behaviour. It is therefore essential that sentencers are informed and regularly trained on gender dynamics and the impacts of trauma.

Advance

It is important to ensure sentencers use an intersectional approach when considering age and maturity, giving proper consideration to gender and race and the different factors that can be relevant for young women and girls and for Black, minoritised and migrant young people, including Black, minoritised and migrant young women and girls. This must include consideration of the impact of care experience and how this intersects with gender, race and migrant status.

63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship. …

Recent research confirmed that care-experienced children are disproportionately likely to have youth justice involvement compared to those without care experience, with some groups of 'ethnic minority' children being even more likely to have youth justice involvement. A significantly higher proportion of care-experienced children in this study received a custodial sentence compared to non-care-experienced children. Custodial sentences were twice as common among Black and 'mixed ethnicity' care-experienced children compared to white care-experienced children.

The over-representation of care-experienced children in the criminal justice system particularly affects girls: care-experienced girls are more likely to receive both non-custodial and custodial sentences than girls without care experience, with the rates of immediate custodial sentences being 25 times higher for girls who have spent time in care.

Centre for Women's Justice

3.34 These wider points could be discussed by the Equality and Diversity Working Group with a view to bringing any proposals to a Council meeting in the summer (possibly as part of the next miscellaneous amendments consultation).

Question 4: Does the Council wish to adopt any of the suggestions to amend the text of the factor (see 3.31)?

Question 5: Does the Council wish to adopt any of the suggestions to amend the text of the expanded explanation (see 3.32)?

Question 6: Does the Council agree that the wider issues raised should be considered by the E&D working Group?

New factors: Difficult and/or deprived background or personal circumstances and Prospects of or in work, training or education

3.35 In response to the recommendation in the UH report: "Consider including 'difficult/deprived backgrounds', 'in work or training' and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines" the Council undertook to test potential new mitigating factors and associated expanded explanations across all offence specific guidelines.

3.36 Two proposed new factors and expanded explanations: 'Difficult and/or deprived background or personal circumstances' and 'Prospects of or in work, training or education' were discussed with groups of judges and magistrates.

3.37 The views on introducing these factors were predominantly negative or neutral from judges and magistrates, though there were also some positive comments for both factors. A frequent comment was that the factors were not necessary as sentencers would take them into account anyway.

3.38 The Council considered that these two factors should be considered as a pair to address concerns that some offenders would be discriminated against by one or other of them. The Council felt that the assertion that sentencers are taking them into account anyway is not necessarily an argument for not including them. Firstly, because if most sentencers are already considering these matters, the presence of the factors and the expanded explanations will help to ensure that the factors are applied in a consistent and appropriate way. Secondly, in the interests of transparency and fairness (particularly for unrepresented offenders), it is important that guidelines include factors that are routinely taken into account.

3.39 The Council therefore consulted on adding the following:

> **Difficult and/or deprived background or personal circumstances**
>
> The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:
>
> - the offender's responsibility for the offence and/or
> - the effect of the sentence on the offender.
>
> Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:
>
> - experience of discrimination
> - negative experiences of authority

- early experience of loss, neglect or abuse
- early experience of offending by family members
- experience of having been a looked after child (in care)
- negative influences from peers
- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)
- low educational attainment
- insecure housing
- mental health difficulties
- poverty
- direct or indirect victim of domestic abuse

There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The Equal Treatment Bench Book contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline may also be of relevance.

Prospects of or in work, training or education

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. See also the Imposition of community and custodial sentences guideline.

Where an offender is in, or has a realistic prospect of starting, work, education or training this may indicate a willingness to rehabilitate and desist from future offending.

Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending.

The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

The absence of work, training or education should never be treated as an aggravating factor.

The court may ask for evidence of employment, training etc or the prospects of such, but should bear in mind any reasonable practical difficulties an offender may have in providing this.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less (if any) weight.

3.40 There were round 34 responses relating to the proposed 'Difficult and/or deprived background or personal circumstances' factor and 27 relating to the 'Prospects of or in work, training or education' factor. Around two-thirds of respondents broadly agreed with the proposals though several of those had suggestions for changes. Of those who disagreed,

several had strong objections particularly to the ‘Difficult and/or deprived background or personal circumstances’ factor.

3.41 Some objected on the grounds that many people come from a poor or deprived background and do not offend. Others noted that these matters are already taken into account and the court is best placed to assess mitigation without the guidelines being over-prescriptive:

> This is an incomplete and potentially misleading attempt to identify the 'nth' degree of mitigation known as 'any other mitigation'. The court is capable of identifying endless additional factors in relation to the particular individual and the particular offence - let the court do that. This list cannot possibly be digested for reference on every sentence and much of it is totally irrelevant to some offences but could be wrongly brought into play. The other danger is that defendants who exhibit the flip sides could be unfairly disadvantaged - those who are not poor, those who live in secure housing, those who have the security of family life. These matters should all be left for the application of judicial discretion within the excellent training of the Equal Treatment Bench Book - the book is much bigger than this list and PSRs may address as necessary with evidence.
>
> **Legal Adviser**

> Sentencing decisions must be based on all of the personal factors of the individual offender. This expansion carries the danger of limiting the personal factors towards a limited set of unfortunate circumstances which may or may not have any effect at all on the offence. Additionally, it has the danger of presenting as a full list of personal factors. The exact opposites of the factors can equally be causes of offending behavior e.g. the educated, rich, intelligent, middle class offender may be far more naive and vulnerable in relation to some offending behavior.
>
> Let the bench determine the relevance of personal factors for each offender and their offence. We're in the realms of psychology to assess this simply as a listed prompt.
>
> **Faster, Fairer Justice**

> Many people have gone through any or all of the above and/or many other adverse circumstances and disadvantages, however those perceived disadvantages should never be considered either as a reason for offending or as a predisposition to offending, nor should they be considered [by the Council and sentencers] as mitigating factors. This would be biased and prejudiced in itself. There are many people who haven’t gone down the criminal route but have experienced difficult circumstances or faced multiple disadvantages at some point in their lives or throughout their lives and have overcome those difficulties and disadvantages whilst being law-abiding good citizens. So why should any such disadvantages define an offender?
>
> We strongly disagree that the proposed changes related to difficult and/or deprived background or personal circumstances should form new mitigating factors. We do not propose an alternative.

Restore Justice

We believe this is generally extremely patronising – not least to law-abiding working-class communities. Often it is actually those who come from the poorest communities who will be the victims of the crimes in these cases.

Low educational attainment and poverty are not excuses to commit crimes. Other examples are very subjective – for example, citing experience of discrimination could, on the one hand, apply to everyone in some way or another. If it is not supposed to apply to everyone, how would a sentencer truly know if someone had experienced discrimination and why and to what extent this should have a bearing on their sentence?

We object very strongly to this new mitigating factor being included and note that we are not alone as it seems that, according to your consultation document, only a minority of judges and magistrates shared positive views when asked to comment on the proposed change in focus group discussions.

Blue Collar Conservatives

I do not agree that having a difficult or deprived background makes you less culpable for committing an offence – such as robbery with all the violence that entails and the fear caused to the victim. However, I am at even more of a loss to understand why this mitigation is being suggested for all offences.

I also do not think that "experience of discrimination" or "negative experiences of authority" (if they can even be verified or quantified) should have any bearing whatsoever on sentencing. Neither should having been in care/having low educational attainment etc.

I object very strongly to this whole section as a mitigating factor for any offence never mind all offences.

Philip Davies MP

3.42 These last two responses were echoed in the response from the Lord Chancellor who states:

As regards the ‘difficult and/or deprived’ factor, the Government is clear that many of the examples of difficulty or deprivation that have been set out in the consultation, such as low educational attainment and poverty, ought not to be relied upon as excuses to commit crimes. Presupposing that relatively low income for example (or indeed other deprivation) indicates a propensity to commit crime risks appearing patronising at best, or inaccurate at worst. Moreover, many in society, including no doubt judges and MPs, will have encountered young people from modest educational or financial backgrounds who have shown scrupulous integrity and a commitment to leading a law-abiding life.

It is also important to note that victims of many types of crime, including violent crime, are often themselves from most deprived communities. The factor is highly subjective and many of the examples, including ‘negative experiences of authority’ and

‘deprived background’ could potentially have a very broad application. It is unclear from the factor how evidence of a deprived background could be established and what the bearing should be on the sentence. I note that similar concerns were raised by the judicial focus group, including that the factor could potentially cover the majority of those sentenced and that the link to mitigation is unclear.

3.43 The Lord Chancellor went on to say:

That said, I want to emphasise my support for ensuring that custody is used as a last resort. I consider that there may be scope for further exploration by the Council as to whether mitigating factors, which are more narrowly focussed, may be appropriate. As currently presented in the consultation, these factors are too broad in terms of the circumstances they include and the type of offending they could apply to.

3.44 The Sentencing Academy made a slightly different point:

Given the lukewarm reception that this amendment received in the focus groups we would suggest caution before proceeding with its introduction – particularly, as noted, that it will cover a large number of offenders who fall to be sentenced. Whilst these factors may be of greater relevance the first time an offender appears before the court, most of these factors are static and it is questionable as to whether they should provide mitigation every time that an offender is sentenced.

3.45 Those who supported the proposal for the ‘Difficult and/or deprived background or personal circumstances’ put counter arguments:

It has to be right that all circumstances relevant to the offender should be taken into account. Whilst poverty and social deprivation do not of their own accord increase criminal behaviour, the impact upon a defendant should not be overlooked.

Criminal Law Solicitors Association

Whilst it is true that this factor may apply to very many defendants, this does not in the author’s view, make it any less worthy of consideration as mitigation. As with all mitigating factors, it is up to the sentencers to assess how this may be considered mitigation for the particular offence/offender and what weight should be placed on it when considering sentence. This new factor should be included.

The bullet list of disadvantages to look out for is very helpful.

The counter-argument can be made that these circumstances apply to very many people who do not commit crimes, so why should they be considered to potentially reduce any sentence? The facts of the individual offence and offender will always be the deciding factors here as to what weight (if any) is given to this factor.

West London Magistrates Bench

I strongly support the change proposed for the following reasons.

Sentencers are, with few exceptions, drawn from those who have been able to make a success of life and who have been born into an environment with many

opportunities. Those who are sentenced usually do not fall into either of those categories.

… The fact that some sentencers might give weight to such things anyway is fallacious, as the Sentencing Council points out.

The need to address this issue is now acute.

Social mobility (as opposed to inclusivity) has been in retreat in recent decades. … A pronounced people like us culture has developed in the full time judiciary and the number and geographical distribution of magistrates' courts has been greatly reduced. Both of these phenomena have, despite efforts to increase inclusivity, lowered the level of exposure to and familiarity with the factors listed in the bullet points in the Sentencing Council's identification of the issue on the part of sentencers.

… I accept the point that the factors identified in the bullet points are common features of those sentenced. The truth of that observation is consistent with the existence of a sentencing system which disproportionately punishes and fails to deflect from crime or rehabilitate those who factors beyond their control have predisposed to criminality.

Although I am a supporter of guidelines for sentencing, one of their unintended consequences has been that there is a de-humanising of, and a lack of subjectivity in the sentencing process. This effect is reflected in the objection recorded from some sentencers in the research groups referred to "….that these issues were not mitigation in the sense that they make the offence less serious". Objectively that is true, but sentencing, if it is to be effective in reducing offending and maintaining confidence, especially in the communities most affected by crime and from which most of those sentenced come, needs to be focussed on offenders. Guidelines need to emphasise this more. A failure in that respect leads to an increased prison population, damage to social cohesion (and essential co-operation with the police) an adverse effect on families and the next generation and no worthwhile benefit in crime reduction.

… The chances of ending up in prison if you have been in care are so high as to constitute a scandal, and a scandal that the sentencing system has failed to address.

Retired Circuit Judge

It is understandable that some sentencers in the reference group felt that these factors could apply to virtually every offender they sentence and were therefore not very helpful.

However, they are matters that are routinely and legitimately raised in mitigation and ought to be considered. It is therefore right that they are included in the guidelines.

The Law Society

We welcome the inclusion of the proposed new mitigating factor and associated expanded explanation "difficult and/or deprived background or personal circumstances". Many people involved in the criminal justice system will have

experienced multiple disadvantage, which relates to their offending behaviour. People from lower socio-economic groups are often over-represented in the criminal justice system , and individuals released from prison are often released with debts which have built up during their sentence, adding to the problems they face on release.

The Prison Reform Trust

We support the intent of the proposed new mitigating factor of difficult and/or deprived background or personal circumstances, and its associated expanded explanation. For the reasons set out in the Consultation Paper, we consider that setting out a non-exhaustive list of factors to consider helps to ensure consistency, transparency and fairness. As is to be expected, our clients all have experience of at least one, and usually many, of the listed factors. The factors usually have direct relevance to their offending behaviour.

APPEAL's Women's Justice Initiative

Some members felt that the circumstances of the individual and the state they were living in was often due to systemic issues and that this needed consideration within sentencing, particularly within the context of those impacted by multiple disadvantages.

Members were also clear that offending does not happen in a vacuum and so personal circumstances at the time an offence occurred needed consideration.

There was also consensus that age, previous experience of the care system and experience of abuse and neurodiversity needed to be considered.

Members were also eager that sentencers were able to have understanding of causal factors of offending – and could find sentences most likely to help the person sentenced to address the causes of their offending.

Members particularly felt experiences of trauma needed to be considered in sentencing.

Revolving Doors

The Committee recognises that, in practice, these factors are already taken into account by the courts. We support the inclusion of the new mitigating factors and recognise that they will promote consistency of sentencing and support making sentencing more transparent to the public.

Justice Committee

3.46 Suggestions for changes to the proposals include:

- Adding a references to relevant sections of the ETBB
- Changing 'the court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background etc…'. to say 'the court may be assisted…', instead of 'will' – as there are occasions where the information regarding difficult and/or deprived background or personal

circumstances could be obtained from other sources, without the need for a pre-sentence report

- In relation to 'negative influences from peers' expanding it to say '(may be particularly relevant to offenders aged 18-25 or where there is a lack of maturity or particular vulnerability)'
- Adding 'and family members' to 'negative influences from peers'
- Changing the wording relating to having been in care ('experience of having been a looked after child (in care)' to cover those who are care experienced more widely, so that it reads 'experience of having been in care or in contact with social services as a child'
- Alternatively, 'experience of being a child in care (looked after child)'
- Adding a reference to coercive or controlling behaviour to 'direct or indirect victim of domestic abuse'
- Adding 'experience of trauma (including a history of sexual exploitation)'

3.47 Several respondents commented on:

- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)

3.48 The Legal Committee of HM Council of District Judges (Magistrates' Courts) put forward two views from its members:

> One view expressed was to agree with this factor being included. However, those in favour of that view suggest the actual wording of the aggravating feature that is in the existing guidelines be used, namely 'but note commission of an offence whilst under the influence of alcohol or drugs is an aggravating feature' rather than 'being voluntarily intoxicated at the time of the offence is an aggravating feature'.
>
> Another view expressed was that the inclusion of this factor leaves the Guidelines open to an appearance of internal inconsistency and may be confusing to sentencers and others. Moreover, that view continues, whilst early exposure to misuse of drugs and alcohol may be regarded as a mitigating factor, the words chosen namely "difficulties relating to the misuse of drugs and/or alcohol" are too vague and broad. They do not reflect sufficiently either the element of choice that may be involved in such difficulties arising & continuing, nor the fact that such drug misuse likely involved engagement in criminal behaviour. There will be multiple circumstances where it would be inappropriate to treat such 'difficulties' as matters of mitigation.

3.49 The Prison Reform Trust challenged the reference to "being voluntarily intoxicated" stating that it suggests that people have agency over their addiction.

> We would urge the Council to reconsider the wording of this point, to avoid contradiction and to give more weight to taking into account difficulties relating to the misuse of drugs and/or alcohol

3.50 The Criminal Sub-Committee of HM Council of Circuit Judges noted:

> We continue to have concerns as to the confusion that arises by the inclusion of "difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)". This has the potential for unnecessary confusion.

> We question the extent to which the misuse of alcohol and/or drugs should be regarded as a matter of general mitigation. Many offences of violence are committed by those who have developed problematic use/abuse of alcohol and/or drugs. How should the sentencing exercise operate when saying "your offence is aggravated by the fact that you were drunk at the time but mitigated by the fact that you have been drinking to excess for so long that you now have a problem".?

3.51 The aggravating factor of 'Commission of offence whilst under the influence of alcohol or drugs' (which appears in almost all guidelines) has the following expanded explanation:

> The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
>
> This applies regardless of whether the offender is under the influence of legal or illegal substance(s).
>
> In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.
>
> An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

3.52 It is concerning that responses on behalf of judges have raised issues with the bullet relating to the misuse of drugs or alcohol. The point is a slightly complex one: as the Council of Circuit Judges say, the court may be balancing the aggravating factor of having committed the offence under the influence with the mitigating factor of having a problem with substance abuse. In practice, as always, the court will have to consider what weight, if any, to attribute to each of these. Suggestions for how to word this point in the expanded explanation more helpfully are welcome!

3.53 Some of the objections raised may overlook the fact that the explanation talks in terms of: 'such factors **may** be relevant'; 'multiple disadvantages which may have a bearing on their offending' and 'Such disadvantages include but are not limited to'. The Council has tried to strike a balance between drawing sentencers' attention to the potentially relevant considerations without being over prescriptive. Other objections may overlook the fact that the two new proposed factors should be considered as a pair.

3.54 In relation to the proposed factor of 'Prospects of or in work, training or education', those that objected to the factor or had reservations suggested that it is unnecessary (as courts take it into account anyway), is difficult to evidence or is discriminatory.

The prospects of work, training or education may be an important factor which sentencers consider during the sentencing exercise. We are concerned that there is a possible lack of clarity about how this could amount to mitigation/reduction in seriousness merely by the fact that an offender is in work, training or education.

Similarly, it may tend to discriminate against those who are not, or cannot be, in work, training or education.

CPS

Whilst we generally agree with the suggested amendment, we consider that it should be tempered with a warning to the effect that the court should have in mind that there are many people who appear before them who are unable to work for various reasons and the court must ensure that this group is not in any way discriminated against when considering this additional mitigating feature.

Legal Committee of HM Council of District Judges (Magistrates' Courts)

[I]t is well known that employment is closely interwoven with desistance. We encourage the Council to consider that when a custodial sentence is imposed, sizeable barriers to finding work upon release are created, and so a cycle of unemployment, poverty, and criminalisation either begins or is perpetuated. Where work is then secured, it would be preferable to impose a suspended or community sentence, to avoid sending someone back to square one in their job search upon release.

As with the majority of cases of women's offending, their rehabilitation needs are much better met in the community anyway, with a prison sentence creating a gap in someone's CV, and separation from family and community networks.

We suggest the Council considers voluntary work, apprenticeships and education/training with the same weight as paid work, as all are purposeful activities associated with desistance. We do identify with the concern stated about those groups who are unable to work, as this might well discriminate, so urge an intersectional and pragmatic approach.

It is also worth considering the longer-term impacts of a criminal conviction on someone's employability prospects, and so convictions which become spent sooner (eg. non-custodial sentences) are beneficial in terms of someone's chances of finding meaningful employment later in life. Our own research shows a great deal of employer prejudice towards people with convictions, so the weight of a criminal record to disclose hampers someone's chances of finding employment later in life (which disproportionately impacts women, as they are more likely to build careers in sectors which require Enhanced DBS checks). When sentencing takes place, it is worth considering the impact this has on subsequent years of someone's life and career, and the barriers to employment and desistance that is created.

These barriers to employment are even more significant for women and people of marginalised genders, Black and racially minoritised communities. This should be considered in sentencing, as a criminal record is often one of many factors which prevent people from finding work, holding down a job, and progressing in a career.

Working Chance

> We support this proposed change in principle, but suggest one amendment to the expanded explanation, to add "The absence of work, training or education should never be treated as an aggravating factor, especially where childcare responsibilities, disability, or other matters make participation in work, training or education more challenging."
>
> Being a sole or primary caregiver for dependents is already a standalone mitigating factor, but we consider this addition would clarify the position. Practical ability to work or be in education or training varies between people and their situations, and a commitment to rehabilitation can be demonstrated in different ways.

APPEAL's Women's Justice Initiative

3.55 The wording of the expanded explanation does cover most of the points raised by respondents even if not in as much detail as they suggest. In practice, the factor will be considered alongside other relevant factors and it may be unhelpful to make the explanation much longer by adding further details or cross referencing to other factors.

3.56 Again, it is worth remembering that evidence suggests that courts often do take both of these two proposed factors into account and that the two factors should be considered as a pair.

Question 7: Does the Council wish to make any changes to the proposed 'Difficult and/or deprived background or personal circumstances' factor? (see paragraphs 3.46 and 3.52)

Question 8: Does the Council wish to make any changes to the proposed 'Prospects of or in work, training or education' factor?

Pregnancy and maternity

3.57 The UH report recommended that the Council should: "Specify pregnancy and maternity as a discrete phase where medical conditions are referred to in the guidelines". In response, the Council proposed to remove the reference to pregnancy from the factor of 'Sole or primary carer for dependant relative(s)' and to create a new mitigating factor and consult on that new factor and the associated expanded explanation.

3.58 The current reference to sentencing pregnant offenders in the expanded explanation for the mitigating factor 'Sole or primary carer for dependent relative(s)' states:

In addition when sentencing an offender who is pregnant relevant considerations may include:

- any effect of the sentence on the health of the offender and
- any effect of the sentence on the unborn child

3.59 The Council consulted on adding the following factor and expanded explanation:

> **Pregnancy, childbirth and post-natal care**
>
> When considering a custodial or community sentence for a pregnant offender the Probation Service should be asked to address the issues below in a pre-sentence report.
>
> When sentencing an offender who is pregnant relevant considerations may include:
>
> - any effect of the sentence on the physical and mental health of the offender and
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant can be harmful for both the offender and the child.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> 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. 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 sentencing.

3.60 There were around 64 responses to this proposal. The vast majority were supportive, though many made suggestions for changes or additions to the text consulted on. There were just six responses that opposed adding this as a discrete factor. Most did so on the grounds that it would be abused by women who would use pregnancy as an excuse to avoid prison. One also claimed that the factor was discriminatory as it only applies to women and was counter to equality. One respondent made an interesting point from a health perspective:

> No. Do the statistics consider alternative reasons for those poorer outcomes (eg preterm birth) e.g. isn't it likely that those women may have comorbidities such as drug and alcohol misuse for example and these directly impact stillbirth rates, prematurity, birth defects etc. Therefore, not all being directly contributed to being held on remand or in prison.

> Increasing mitigation, has the potential to create a precedent that women keep an otherwise unwanted baby to have a more favourable sentence. Furthermore, may be the reason not to have an abortion creating a perpetuating cycle of ACEs with a baby born into poor condition.
>
> I feel it would be more beneficial to put in place better health measures for women held on remand and for women in prison including regular access to onsite maternity care, appropriate access to supplementation, mental health support and rehabilitation against whatever offenders are in for.
>
> Those held on remand are usually for serious crimes for which it is appropriate that they are held, pregnant or otherwise.
>
> **Dr Daisy Wiggins, Senior midwifery lecturer**

3.61 This point is relevant in the context of the consensus view among most respondents who cited evidence of poor outcomes for pregnant women in prison compared to the general population, such as:

> A study published in 2020 found that 22% of pregnant prisoners missed midwife appointments, compared with 14% in the general population, and that 30% missed obstetric appointments, compared with 17% in the general population.
> 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
> Women in prison are seven times more likely to suffer a stillbirth than those in the general population, according to figures obtained through freedom of information requests sent to 11 NHS trusts serving women's prisons in England.
>
> **Leigh Day**

3.62 The Council may feel that, though health outcomes for the cohort of pregnant women who appear before the courts for sentence could be lower than the general population even without custody, there is still a compelling case for courts to consider the needs of both offender and child at the point of sentence.

3.63 There were several suggestions that were common to many of the responses:

- It should be made clear what is meant by 'post-natal' the consensus being that this is period of 12 months from birth
- There should be a strengthening of the importance of a PSR for pregnant or post-natal offenders
- The text should contain more information on the health risks to mothers and babies in prison
- The text should contain more information about the wider consequences of imprisonment on both mother and child including the impact of separation
- The text should refer to suspended sentences
- It should state that pregnancy and the post-natal period should be considered an 'exceptional circumstance' not to impose a mandatory minimum sentence
- Where an immediate custodial sentence is imposed, the reasons for sentence should be required to address:

- 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

3.64 These issues are argued in the response from Level Up ('a coalition of lawyers, academics, psychiatrists and organisations with significant interest in, and long experience working with, perinatal women in the criminal justice system') which is reproduced in full at **Annex A**, and by Birth Companions ('a women's charity dedicated to tackling inequalities and disadvantage during pregnancy, birth and early motherhood') reproduced at **Annex B** and which contains responses from women with lived experience of imprisonment while pregnant or post-natal. One or both of these responses were endorsed by several other respondents (including Working Chance, the Prison Reform Trust, No Births Behind Bars, Deborah Hunt Clinical Nurse Specialist, Laura Janes, the Howard League, Maternity Action, Centre for Women's Justice, Support Not Separation, Radical Therapist Network, End Violence Against Women Coalition).

3.65 Some respondents made wider points relating to the use of remand for pregnant offenders or other maters outside the Council's remit.

3.66 The revised text proposed by Level up is:

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.

3.67 Birth Companions propose:

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.

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/ infant. 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 mortality. 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 sepsis.

NHS England states that "it is because of the complexities for women in detained settings that all pregnancies must be classed as high risk." 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. Research shows there can be significant difficulties accessing equivalent and appropriate healthcare, including urgent medical assistance or specialist maternity services in custody and appropriate mental health provision.

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.

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 sentencing.

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.

3.68 Other respondents proposed similar changes but with some differences. For example from Birthrights:

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 a pregnant or postnatal woman, 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
- the medical needs of the pregnant woman, 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 effect of the sentence on the physical and mental health of the pregnant or postnatal woman;
- Pregnancy and maternity are recognised as protected characteristics under the Equality Act 2010.

The impact of custody on a woman who is pregnant or postnatal is very likely to cause significant harm to her physical and mental health. Prison is a high-risk environment for pregnant women. It poses inherent barriers to accessing medical assistance and specialist maternity care.

Pregnant and postnatal 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.

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 a pregnant or postnatal woman 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

3.69 The Lullaby Trust, Bliss, End Violence Against Women Coalition and the Centre for Women's Justice suggested changing the word 'child' to 'baby/infant' throughout, to "reflect the specific vulnerabilities associated with this period".

3.70 Birth Companions and Dr Laura Janes make the point that there is an overlap with the 'Age and/or lack of maturity' factor and a danger that young pregnant women may be perceived as more mature than they are.

3.71 The Council may feel that some strengthening of the expanded explanation and some additional information would be appropriate. Suggested items for inclusion are:

> When considering a custodial or community 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 suitable pre-sentence report is not available, sentencing should normally be adjourned until one is available.
>
> When sentencing a pregnant or postnatal woman, relevant considerations may include:
>
> - the medical needs of the offender including her mental health needs
> - any effect of the sentence on the physical and mental health of the offender
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant or postnatal can be harmful for both the offender and the child including by separation, especially in the first two years of life.
>
> Access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child. The NHS classifies all pregnancies in prison as high risk.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> 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. 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 sentencing.
>
> Where immediate custody is imposed, the court should address the issues above when giving reasons for the sentence.

3.72 The Council may also wish to consider whether to address the issue of whether pregnancy or the post-natal period can constitute an 'exceptional circumstance not to impose a mandatory minimum term.

Question 9: Does the Council wish to make any of the suggested changes to the expanded explanation for the 'Pregnancy, childbirth and post-natal care' factor?

4 EQUALITIES

4.1 As noted throughout this paper some responses make points relating to equalities. The impetus behind most of these changes was to address any disparity in sentencing outcomes across demographic groups.

5 IMPACT AND RISKS

5.1 It is difficult to quantify any impact that the proposed changes may have. With regard to the proposed new factors, the evidence we have is that sentencers do often take these matters into account already. Any impact would be to reduce the sentence imposed

5.2 Several respondents noted the lack of published data on sentencing of pregnant or postnatal women:

> 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. 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.
>
> **Level Up**

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[1] 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[2].

[1] Independent, Calls for urgent review over number of pregnant women being sent to prison (2022)
[2] 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"[3]. 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'[4]. 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.[5]

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[6]
- 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[7]
- Over one in five pregnant women in prison miss midwifery appointments, increasing the risk of premature birth, miscarriage and stillbirth[8]
- One in ten pregnant women in prison give birth in-cell or on the way to hospital[9]
- Pregnant women in prison are at greater risk of perinatal mental health difficulties[10]

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.[11] 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.[12]
- 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.[13]

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

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

[5] MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care

[6] Observer, Pregnant women in English jails are seven times more likely to suffer stillbirth (2023)

[7] Ibid

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

[9] Nuffield Trust (2022), Pregnancy and childbirth in prison: what do we know?

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

[11] 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

[12] Gerhardt, S. (2003) Why love matters: how affection shapes a baby's brain. Hove, East Sussex: Brunner-Routledge.

[13] 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.[14]
- 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.[15]
- Separation for both parent and child is traumatic and can have long term effects.[16]

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[17] and that many women reported that their role as a primary carer was not considered by the court.[18]

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[19].

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.[20] 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[21]. 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[22].

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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[14] Home Office (2007) The Corston Report: A review of women with vulnerabilities in the criminal justice system
[15] 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
[16] Minson, S. (2020) Maternal sentencing and the rights of the child.
[17] Minson, S. (2020) Maternal sentencing and the rights of the child.
[18] Baldwin, L. and Epstein, R. (2017) Short but not sweet, a study of the impact of short sentences on mothers and their children.
[19] Ministry of Justice (2018) 'Female Offender Strategy'
[20] HM Inspectorate of Probation, The evidence: women
[21] Ministry of Justice (2022), Statistics on Women and the Criminal Justice System 2021
[22] 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.[23] 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.

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

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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

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

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

significant, long-term trauma associated with separation during this critical time.[4,5]

- The risks of separation from a baby[6], 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 cases[7].

- 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.

[4]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.

[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/ infant[11]. 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 mortality[12]. 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 sepsis[13].

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 provision[19].

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[20].

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 sentencing[21].

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/mbrrace-uk/reports
[13] MBRRACE-UK (2023) Saving Lives, Improving Mothers' Care https://www.npeu.ox.ac.uk/mbrrace-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/wwhogsk5/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 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 systems[22].

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.