

## **Imposition of community and custodial sentences guideline Sentencing Council – Consultation**

**21 February 2024**

### **About APPEAL’s Women’s Justice Initiative**

1. APPEAL is a non-profit law practice committed to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession and the public about how and why miscarriages of justice occur and what needs to change to stop them.
2. APPEAL’s Women’s Justice Initiative (WJI) uses strategic litigation to appeal sentences and convictions for women experiencing severe disadvantage in the criminal justice system; women who are victims of domestic abuse, whose mental health has been ill-considered, and who are given damaging short sentences. We empower women to become advocates for reform and use casework to campaign for changes to the law.
3. The Women’s Justice Initiative represents:
  - a. Women imprisoned for minor, non-violent offences when non-custodial options might have been more appropriate;
  - b. Women sent to prison in cases where mental health or learning disabilities were not adequately considered in court;
  - c. Women who are victims of domestic abuse/coercive control/exploitation, where this was relevant to the offence but not adequately explored at trial; and
  - d. Innocent women prisoners, especially those whose ‘crime’ was in fact accidental or the result of natural causes.
4. One area of particular interest to APPEAL’s Women’s Justice Initiative is the sentencing of women offenders to short term custodial sentences, when non-custodial options were available and appropriate. We are grateful for the opportunity to respond to the Sentencing Council’s consultation paper on the imposition of community and custodial sentences guideline (Consultation Paper). We limit our comments to those proposals specifically relating to female offenders.

**Question 13: Do you have any comments on the new section on female offenders?**

5. We support the intent of the new section on female offenders. We are pleased to see the Sentencing Council engaging with the body of research on the differing reasons for female offending and the disproportionate impacts of custodial sentences on women.<sup>1</sup> The conclusions of that research are borne out every day in the experiences of the women we work with. The proposed new section in large part accurately reflects that research and experience.
6. On that basis, we also support the proposed amendment covered by **Question 8** stating that pre-sentence reports may be particularly important for women, those who are pregnant, those who are sole or primary carers for dependent relatives, and those who may have been the victim of domestic abuse, trafficking, modern slavery, or been subject to coercion, intimidation or exploitation. We would, however, amend the list to say “domestic abuse *including coercive and controlling behaviour*”.
7. We comment below on specific amendments we would make to the proposal. Where we have not commented on a particular aspect, that ought to be read as support for the proposal as drafted.
8. We would support the introduction of a standalone overarching guideline for sentencing female offenders, and encourage the Sentencing Council to continue considering this option.

Bullet point one – links to female offending

9. The relevant sentence in the proposal currently reads: “*Female offending is commonly linked to mental health, substance-misuse, or financial and homelessness issues, and female offenders are more likely than male offenders to be victims of domestic abuse or have experienced emotional, physical or sexual abuse as a child.*”
10. This sentence as drafted does not make the link that we see time and time again in our clients’ criminal histories: that the offending itself is, in large part if not entirely, due to an abusive partner’s actions.<sup>2</sup> It may be the case that an abuse victim is convicted as a party to her abuser’s crimes (e.g. being deemed to be involved in her drug dealer partner’s offending because they share a home, or because she has been coerced into participating), or she may be convicted in his place (e.g.

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<sup>1</sup> As set out in the Consultation Paper at 17-18.

<sup>2</sup> See further Williams, K. S., & Earle, J. (2017). “There’s a reason we’re in trouble”: Domestic abuse as a driver to women’s offending. Prison Reform Trust.  
<https://prisonreformtrust.org.uk/publication/theres-a-reason-were-in-trouble>

being blamed for an assault on a child for which he was in fact responsible). We also see primary victims of domestic abuse convicted of assault on their primary perpetrator partners in mutual assault situations, which may rightfully be considered self-defence. We consider it is important to recognise this causative relationship between domestic abuse, especially coercive and controlling behaviour, and female offending in the Sentencing Guidelines, as it impacts culpability as well as the effects of a sentence. Explicit reference to coercive and controlling behaviour is critical as it clarifies the link to culpability.

11. We also consider it is worth adding explicit reference to experience of trauma as a mental health issue that can contribute to culpability. Some of our clients, while accepting responsibility for the facts of the offence, explain their actions as a reaction to a trauma trigger (e.g. an assault on a person whose words or behaviour triggers a sense of being trapped, as she has been before). While there is reference in the bullet point to experience of emotional, physical or sexual abuse as a child, there is no explicit reference to traumatic experiences and victimisation that offenders experience later in life but of which they continue to feel the effect. Without such reference, we are concerned that offenders' histories of trauma and victimisation, both as they are relevant to the offending and the impact of a sentence, will not be appropriately acknowledged.
12. As such, we propose amending the wording of the first sentence of the first bullet point to say "*Female offending is commonly linked to mental health including experience of trauma, substance-misuse, financial or homelessness issues, or domestic abuse including coercive control. Female offenders are more likely than male offenders to be victims of domestic abuse, including coercive control, or have experienced emotional, physical or sexual abuse as a child.*"

#### Bullet point four - pregnancy

13. Regarding the impact of incarceration on pregnant people, we rely on the comments made in our 30 November 2023 submission to the Sentencing Council's consultation on Miscellaneous Amendments to the Sentencing Guidelines regarding the proposed new mitigating factor and expanded explanation relating to pregnancy. We understand the Sentencing Council may use the feedback on this consultation to inform its conclusions on the Miscellaneous Amendments consultation. We hope the reverse is also true. For convenience, we reproduce those comments below:
  - a. We agree with the intention behind the proposed new mitigating factor. We support the extensive work done by civil society organisations like

Birth Companions to research and raise awareness of the issues facing pregnant people in prison.<sup>3</sup>

- b. Pregnant women in custody in England often go hungry, and are not provided with necessary items like extra pillows, mattresses and breast pads.<sup>4</sup> The medical care provided is variable and inconsistent, and access to medication can be poor.<sup>5</sup> Access to antenatal classes and resources varies between prisons.<sup>6</sup> Many pregnant prisoners describe being handcuffed or in chains while attending medical appointments, and experiencing this as humiliation and stigmatisation.<sup>7</sup> Pregnant prisoners report high rates of depression and anxiety.<sup>8</sup> In 2019-2020, two babies died when their mothers went into labour inside prison.<sup>9</sup>
- c. Research published by Nuffield Trust in July 2022 found that pregnant women are more likely to miss midwifery and obstetrics appointments, and to experience preterm labour.<sup>10</sup>
- d. While there have been efforts to address these issues in recent years,<sup>11</sup> it will take time to embed new practices, and many of the issues incarcerated pregnant people face are systematic and inherent in the prison context.<sup>12</sup> When considering whether to sentence a pregnant person to imprisonment, judges ought to clearly understand the risks of doing so.
- e. We prefer the wording of the initial proposal, rather than the amended version after consultation with focus groups. The initial proposal's wording included "Pregnant women in custody are more likely to have high risk pregnancies with reduced access to specialised maternity services. There may also be difficulties accessing medical assistance

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<sup>3</sup> See in particular Birth Companions' "Birth Charter for Women in Prison" (2016).

<sup>4</sup> Rachel Dolan, "Pregnant Women in Prison: Mental Health, Admission to Prison Mother and Baby Units and Initial Outcomes for Mother and Child" (PhD thesis, University of Manchester) (31 Dec 2018) at 237-238.

<sup>5</sup> Laura Jane Abbott, "The Incarcerated Pregnancy: An Ethnographic Study of Perinatal Woman in English Prisons" (DHRes thesis, University of Hertfordshire) (February 2018) at 102-103.

<sup>6</sup> Abbott at 107-108.

<sup>7</sup> Abbott at 122-123.

<sup>8</sup> Dolan.

<sup>9</sup> See <https://www.welevelup.org/active-campaigns/pregnancy-in-prison/> for LevelUp's campaign to end the imprisonment of pregnant women after the deaths of Aisha Cleary and Brooke Powell.

<sup>10</sup> Miranda Davies, Rachel Hutchings and Ellis Keeble, "Inequality on the Inside: Using Hospital Data to Understand the Key Healthcare Issues for Women in Prison" Nuffield Trust (July 2022).

<sup>11</sup> Such as Public Health England's "Gender Specific Standards to Improve the Health & Wellbeing for Women in Prison" (2018) and Her Majesty's Prison & Probation Service, The Women's Team "Guidance on Working with Women in Custody and the Community" (2018).

<sup>12</sup> Kathryn Cahalin, Matthew Callender and Valentina Lugli, "Perinatal women's experiences of access to expertise, information and appropriate medical attention in prison" 257 Prison Service Journal 12.

and with being transported to hospital when in labour and giving birth”. The new proposal instead states “Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and child. There may be difficulties accessing medical assistance or specialist maternity services”.

- i. Firstly, the new proposal wording positions the pregnant people’s ‘complex health needs’ as the problem, not the institutional issues in prisons preventing the provision of appropriate healthcare services to pregnant prisoners. The first version is a clearer reminder to sentencers about the difficulties pregnant people in prison experience with accessing healthcare and other necessary support.
  - ii. Secondly, despite the assertion of some of the judges and magistrates consulted, there is a wealth of evidence to support the initial proposal’s wording, as cited above.
  - iii. Finally, the initial proposal’s wording also reflects the recent NHS England service specification for pregnant women in custody that all pregnancies in detained settings must be considered as high risk.<sup>13</sup>
- f. We also consider there ought to be a reference in the expanded explanation to reproductive healthcare and abortion services. Recent data obtained by investigative journalism organisation OpenDemocracy shows there has been a 75% drop in abortions in prison in two years, despite a rise in the general population, sparking concerns that prisoners are not getting access to the reproductive healthcare they need.<sup>14</sup> This would be consistent with the widespread issues of women in prison not accessing medical appointments in a timely way, or at all.<sup>15</sup>

14. Further, we note the disproportionate impact of incarceration on women who are post-partum, up to 24 months post-birth. Sentencers ought to consider the (un)likelihood that a post-partum woman’s ongoing health needs will be met in prison, as well as the developmental implications of separation on the child, and the trauma of separation on both the child and the mother. We support Level Up’s submissions that post-partum factors ought to be explicitly recognised in the appropriate sentencing

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<sup>13</sup> NHS England (2022) Service specification 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) [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](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)

<sup>14</sup> Nic Murray “Exclusive: Abortions in Prison Fall by 75% Despite Rise in General Population” OpenDemocracy (2 November 2023), <https://www.opendemocracy.net/en/5050/abortions-in-prisons-fall-england-exclusive-barriers-access-healthcare-women/>

<sup>15</sup> Davies, Hutchings and Keeble at 33-35.

guidelines, as well as their broader submissions on the relevance to sentencing of pregnancy and the postnatal period.