

## **Miscellaneous amendments to sentencing guidelines Sentencing Council – Consultation**

**30 November 2023**

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

1. APPEAL is a non-profit law practice dedicated 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 prisoners for offences in which their personal circumstances, including domestic abuse and coercive and controlling behaviour, and mental health and learning disabilities, were not sufficiently considered. We are grateful for the opportunity to respond to the Sentencing Council's consultation paper on miscellaneous amendments to the sentencing guidelines (Consultation Paper).

## **Summary of APPEAL's consultation response**

5. We have focused on the areas in the Consultation Paper of direct relevance to our clients, women who have been convicted of criminal offending where we believe the conviction and/or sentence to be wrongful or inappropriate.
6. In summary:
  - a. Question 11: We support the proposed changes to the mitigating factor of remorse.
  - b. Question 12: We support the proposed changes to the mitigating factor of good character.
  - c. Question 13: We support the proposed changes to the mitigating factor of determination and/or demonstration of steps taken to address addiction or offending behaviour.
  - d. Question 14: We support the proposed changes to the age and/or lack of maturity factor.
  - e. Question 15: We support the intent of the proposed new mitigating factor of difficult and/or deprived background or personal circumstances but suggest amendments to include reference to coercive or controlling behaviour, and history of trauma.
  - f. Question 16: We support the intent of the proposed new mitigating factor of prospects of or in work, training or education, but suggest amendments to clarify that some offenders' circumstances make it harder to participate in work, training or education.
  - g. Question 17: We support the intent of the proposed new mitigating factor of pregnancy and maternity but suggest amendments to strengthen the description of the risks of pregnancy in prison, and to incorporate reference to reproductive healthcare and abortion.
  - h. Question 19: We support the intent of the proposed amendments to the mitigating factor relating to coercive or controlling behaviour in the manslaughter guidelines, but suggest further policy work on the stage(s) in the sentencing process at which coercive or controlling behaviour is addressed.

**Question 11: Do you agree with the proposed changes to the expanded explanation for the mitigating factor of remorse? If not, please provide any alternative suggestions.**

7. We support the proposal to add learning disabilities, communication difficulties and cultural differences to the expanded explanation for the mitigating factor of remorse. We have not identified this issue at sentencing for our clients. However, one client, A, was asked repeatedly by police at interview why she was not displaying signs of distress at her husband's death, and the officers appeared to interpret this as suspicious. A is from an immigrant community with numerous cultural differences, spoke little English at the time of her husband's death, and has since been diagnosed with a learning disability. Her lack of obvious signs of distress during the police interview was attributable to many innocent factors, including confusion, a concern to behave appropriately in a formal context, and communication difficulties. We consider similar issues could well arise at sentencing when assessing a defendant's remorse and thus support the proposal.

**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.**

8. We support the proposal to remove reference to charitable works as an example of good character. We agree with the sentencers' comments in the Consultation Paper that it is too restrictive, particularly if the offender is from a lower socio-economic background and therefore less likely to have the time or finances to volunteer.

**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.**

9. We support the proposal to clarify that credit may be given for demonstrating a commitment to address an underlying drug or alcohol abuse issue, or other underlying issue influencing the offender's behaviour, if support has been sought but not yet received. Institutional failure to provide timely support for issues like addiction should not be held against the offender.

**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.**

10. We agree with the proposed change to add “(typically applicable to offenders aged 18-25)” in the title of the age and/or lack of maturity factor. Changing the title of the factor will be a clearer reminder to sentencers that considering age in those aged up to 25 is consistent with brain development science.<sup>1</sup>

**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.**

11. 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.
12. The final factor listed is “direct or indirect victim of domestic abuse”. We suggest adding to this “including coercive or controlling behaviour”. This would remind sentencers of the relevance of abuse that is not necessarily physical violence. As we explore further below, domestic abuse including coercive or controlling behaviour is a major driver of female offending,<sup>2</sup> and may be relevant to both a defendant’s culpability for her offending as well as the effect of a sentence.
13. One of our clients, B, was convicted of murder on joint enterprise principles. She has always maintained her innocence of that offending. Her presence at the murder, frozen in shock and fear, arose from the

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<sup>1</sup> See, for example, research commissioned by the Scottish Sentencing Council: Suzanne O’Rourke, Heather Whalley, Sarah Janes, Niamh MacSweeney, Asaly Skrenes, Suzy Crowson, Laura MacLean, Matthias Schwannauer, ‘The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts’ (University of Edinburgh) February 2020.

<sup>2</sup> 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>

presence of many of the listed factors: negative experiences of authority, experience of having been a looked after child (in care), negative influences from peers, difficulties relating to the misuse of drugs and alcohol, low educational attainment, insecure housing, and mental health difficulties. Other disadvantages were relevant too, which do not fit comfortably in the current list, particularly a history of sexual exploitation and rape.

14. We consider experience of trauma, like B's history of sexual exploitation and rape, ought to be added to the list, or perhaps the mental health difficulties factor could be amended to include it explicitly. The 'early' in the 'early experience of loss, neglect or abuse' factor implies, we suggest, childhood, which would not necessarily include the traumatic experiences and victimisation defendants like B have experienced later in life, but of which they continue to feel the effect. Without such reference, we are concerned that defendants' histories of trauma and victimisation, both as they are relevant to the offending and the impact of a sentence, will not be appropriately acknowledged.

**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.**

15. 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."
16. 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.

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

17. 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>

18. 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>
19. 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>
20. 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.
21. We prefer the wording of the initial proposal, rather than the amended version after consultation with focus groups. The initial proposal's

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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 (n 5) at 107-108.

<sup>7</sup> Abbott (n 5) at 122-123.

<sup>8</sup> Dolan (n 4).

<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 Eilis 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.

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 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”.

- a. 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.
- b. 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.
- c. 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>

22. 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>

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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](http://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 (n 10) 33-35.

**Question 19: Do you agree with the proposed change to the aggravating and mitigating factors relating to coercive or controlling behaviour in the manslaughter guidelines? If not, please provide any alternative suggestions.**

23. Our response to this question focuses on the proposal to amend the guidelines relating to coercive or controlling behaviour towards the offender by the victim of manslaughter. We agree with the need for coercive or controlling behaviour to be addressed at sentencing of those convicted for the manslaughter of their abusive partner. However, we consider there has been insufficient thought put into which stage(s) in the sentencing process is or are most appropriate for that consideration.
24. Women are the primary victims of domestic abuse, including coercive and controlling behaviour.<sup>16</sup> Over half the women in prison report experience of domestic violence.<sup>17</sup> Domestic abuse, including coercive and controlling behaviour, is a strong driver of female offending, from coercion by a partner to participate in illegal drug activity to homicide.<sup>18</sup> When the abuse drives victims to kill their partners, they are often failed by the inflexibility of partial and full defences to a charge of murder, and end up serving life sentences for saving their own lives.<sup>19</sup> Where victims of abuse are convicted of manslaughter, judges have significant discretion in imposing sentence, from life imprisonment to a non-custodial sentence. In sentencing for manslaughter, it is critical that the coercive or controlling behaviour the defendant experienced is properly understood and contextualised, including how it relates to her personal vulnerability as well as how it drove the offending itself.
25. The Sentencing Council guidelines for manslaughter provide two stages at which consideration of coercive or controlling behaviour could occur.<sup>20</sup>

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<sup>16</sup> See e.g. Clare Wade KC, “Domestic Homicide Sentencing Review” (March 2023) (“Wade Review”)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1143045/domestic-homicide-sentencing-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1143045/domestic-homicide-sentencing-review.pdf) at [5.1.5].

<sup>17</sup> Ministry of Justice. (2018). Female Offender Strategy.

<https://www.gov.uk/government/publications/female-offender-strategy>, cited in Prison Reform Trust “Why Focus on Reducing Women’s Imprisonment?” (August 2022)

<https://prisonreformtrust.org.uk/wp-content/uploads/2022/08/Why-women-2022-briefing.pdf>

<sup>18</sup> Katy Swaine Williams & Jenny Earle ““There’s a Reason We’re in Trouble”: Domestic Abuse as a Driver to Women’s Offending” Prison Reform Trust (December 2017)

<https://prisonreformtrust.org.uk/publication/theres-a-reason-were-in-trouble>

<sup>19</sup> Centre for Women’s Justice “Women Who Kill: How the State Criminalises Women We Might Otherwise Be Burying” (February 2021)

[https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/602a9a87e96acc025de5de67/1613404821139/CWJ\\_WomenWhoKill\\_Rpt\\_WEB-3+small.pdf](https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/602a9a87e96acc025de5de67/1613404821139/CWJ_WomenWhoKill_Rpt_WEB-3+small.pdf)

<sup>20</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf> It is noted that the mitigating factor in question is not present for gross negligence manslaughter. It is not clear on the wording of the Consultation Paper whether



Step one involves consideration of culpability.<sup>21</sup> Step two includes consideration of aggravating and mitigating factors relevant to seriousness.

26. The Consultation Paper proposes to amend the current mitigating factor at step two to read “History of significant violence or abuse (which may include coercive or controlling behaviour) towards the offender by the victim”. The Consultation Paper says this is a departure from the recommendation made by Clare Wade KC in the Domestic Homicide Sentencing Review (the Wade Review) to include consideration of coercive or controlling behaviour at step one, going to culpability. However, the Wade Review does not state a preference for consideration at step one rather than step two; in fact, the text of the recommendation changes at different points in the Review. The Table of Recommendations at the end of the Review states in Recommendation 13: “Further, that consideration should be given to making coercive control towards the perpetrator of the killing by the victim of the killing a factor *denoting lower culpability*” (emphasis added), indicating an amendment to step one.<sup>22</sup> But the text of Recommendation 13 in the body of the Review states: “Further, that consideration ought to be given to making coercive control by the victim of the killing towards the perpetrator of the killing a *mitigating factor reducing seriousness*” (emphasis added), indicating an amendment to step two.<sup>23</sup> On our reading, the discrepancy is not explained, nor is there detailed consideration in the text of the Wade Review of the pros and cons of each option. The Government Response to the Wade Review represented the in-text Recommendation 13, referring to “a mitigating factor reducing seriousness”, indicating an amendment to step two.<sup>24</sup>

27. Thus, the Consultation Paper’s assertion that the Wade Review recommended an adjustment to step one, which the Council then proposes to reject, does not appear entirely accurate.

28. The reason put forward in the Consultation Paper for preferring an amendment to step two over step one is that there is insufficient evidence of courts failing to take coercive or controlling behaviour into

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that is intended to change; we understand there is no proposal to add such a mitigating factor to the gross negligence guideline.

<sup>21</sup> Except for the guideline for diminished responsibility manslaughter, which refers to ‘responsibility’ rather than ‘culpability’.

<sup>22</sup> Wade Review at 105. Emphasis added.

<sup>23</sup> Wade Review at 79. Emphasis added.

<sup>24</sup> Ministry of Justice “Domestic Homicide Sentencing Review: Government Response to the Independent Review by Clare Wade KC” (July 2023)  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1172232/domestic-homicide-sentencing-review-case-review-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172232/domestic-homicide-sentencing-review-case-review-response.pdf) at 23.

account in relevant manslaughter cases when using the guidelines. We take issue with this approach for three reasons.

- a. First, it appears the Council relies only on analysis of manslaughter cases. We consider it artificial not to include in the analysis murder cases where the defendant could feasibly have been found guilty of manslaughter, especially if better evidence of coercive or controlling behaviour had been before the court. As the Wade Review states, where victims of coercive and controlling behaviour who kill their partners are convicted of murder, this is often because of failings in the criminal justice system, and because “the dominant discourse is not yet one of coercive control, which... underpins domestic abuse”.<sup>25</sup> This would of course be a broader exercise for the Council, but it would provide a far more accurate view to the Court of how coercive or controlling behaviour is being considered in sentencing women who kill abusive partners.
  - i. One of our clients, C, was convicted of the murder of her partner in circumstances which, if evidence of her partner’s coercive and controlling behaviour had been properly adduced and contextualised, we consider she may well have been convicted of manslaughter. Her sentencing decision does not take coercive control into account, and in fact minimises and dismisses the physical violence she experienced as well. It would be odd to claim, as the Council does, that “the evidence we have is that courts are taking coercive or controlling behaviour into account in sentencing manslaughter” without acknowledging that the very failure to take it into account could take the case out of the remit of the analysis.
- b. Second, and as the Wade Review states, looking at sentencing decisions and considering whether they mention coercive or controlling behaviour is not an accurate way of determining whether there was coercive or controlling behaviour in the relationship.<sup>26</sup> By definition, a court’s failure to take coercive or controlling behaviour into account in sentencing may not be evident on the sentencing transcript’s face. From our perspective,<sup>27</sup> our clients’ experiences of domestic abuse and coercive and controlling behaviour, where they have been raised

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<sup>25</sup> Wade Review at [5.3.2]-[5.3.3].

<sup>26</sup> Wade Review at [1.4.12] and [5.4.17].

<sup>27</sup> Acknowledging that our clients are largely convicted of murder, where partial defences argued at trial have failed, rather than convicted of manslaughter.

at all, have been regularly downplayed or ignored by the court. The Wade Review also reflects this position.<sup>28</sup>

- c. Third, as the Consultation Paper states about other proposed new factors, “the assertion that sentencers are taking them into account anyway is not necessarily an argument for not including them”.<sup>29</sup>

29. As such, we support the introduction of a reference to coercive or controlling behaviour in the manslaughter sentencing guidelines. In cases of defendants who are victims of coercive or controlling behaviour who kill their abusive partners, explicit reference in the sentencing guidelines should prompt sentencing judges to contextualise the offending and ensure the sentence appropriately reflects the defendant’s culpability in the situation she was in.

30. How and where, exactly, to incorporate this reference, however, is a task requiring more consideration. Neither the Wade Review nor the Consultation Paper gives a proper policy analysis of the value of amending step one over step two, or vice versa. A third option, which we consider is worth exploring, is amending both steps.

31. Coercive or controlling behaviour can be relevant both to a person’s culpability for their offending, and to the seriousness and personal mitigation relating to the offence. This is true too of other factors, for example mental disorder and learning disability, which are reflected in both step one and step two of some of the manslaughter guidelines.<sup>30</sup> It would enable appropriate consideration of the impact of coercive or controlling behaviour where it was directly relevant to the offence, for example where an abuse victim commits manslaughter by reason of loss of control triggered by severely controlling behaviour, or where the court finds it to be less directly related to the offence itself, but still relevant to personal mitigation. Judges could continue to be cautious of double counting any allowance given for the coercive or controlling behaviour. Having the reference at both stages would allow for “greater flexibility in the sentencing framework so that the culpability of women offenders who are also victims can be better assessed”, as the Wade Review seeks.<sup>31</sup>

32. These changes are necessary to not only “reflect up-to-date terminology”, and to “have a positive impact on public confidence in the

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<sup>28</sup> Wade Review at [5.4].

<sup>29</sup> Consultation Paper at 30.

<sup>30</sup> Guidelines for Manslaughter by reason of diminished responsibility, Unlawful act manslaughter, and Gross negligence manslaughter.

<sup>31</sup> Wade Review at [5.3.5].

criminal justice system”,<sup>32</sup> but also to effect concrete change in the sentencing process. We must actively prompt sentencers to consider the complex issue of coercive or controlling behaviour, the varied impacts of which are only recently starting to be recognised and understood, in order to obtain more just outcomes for victims of domestic abuse.

## **Conclusion**

33. Overall, we support the intent of many of the Sentencing Council’s proposals to amend the mitigating factors in sentencing guidelines. We commend the Council for its efforts to ensure sentencing reflects the complicated lives that many if not most offenders face. We make the suggestions outlined above to further that goal and, in particular, to improve outcomes for those, like our clients, who are involved in the criminal justice system largely because of abuse, trauma, disability and poverty.

END

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<sup>32</sup> Consultation Paper at 38.