

Prison Reform Trust response to The Sentencing Council consultation on immigration offences – June 2024

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promoting equality and human rights in the criminal justice system.

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Questions

- 1. What is your name?**
- 2. What is your email address?**
- 3. Are you answering as an individual? If so, are you happy for your name to be included in the consultation response document?**

N/A

- 4. If you are answering on behalf of an organisation, group or bench, please provide the name of the organisation, group or bench.**

Prison Reform Trust

Section One: Facilitation

PRT shares the view of Vicky Taylor et al in their expert evidence to this consultation that, “in their current form, the guidelines do not adequately reflect situations where individuals are charged in circumstances of mutual assistance, e.g. people who themselves are seeking asylum in the UK who are charged after being captured with

their hand on the tiller of a dinghy crossing the Channel.” We refer the Council to their detailed evidence on this section.

In addition, we would make the following points in relation to the consultation questions:

5. Do you have any comments on the proposed culpability factors?

We welcome the inclusion of “involved due to coercion or pressure” as a factor in assessing lower culpability. However, it is important to recognise that apparent involvement at a higher level of culpability may also be a result of coercion or pressure, which may be less apparent.

In practice, therefore, it will be important to establish how sentences should carry out the balancing exercise when assessing the appropriate level of culpability. If, for instance, someone is found to have been pressured or coerced into offending, there should be a presumption that this factor places them in the lower level of culpability, even when there are other factors which might place them in a higher level.

6. Do you have any comments on the proposed harm factors?

No comment.

7. Do you have any comments on the proposed sentence levels?

We are concerned by the increase of the maximum penalty for this offence to life imprisonment – a sentence usually reserved for murder and which should only ever be imposed for the most serious of offences. We are further concerned by the potential impact of increasing the maximum sentence for the length of sentences imposed for less serious offences in this category. We therefore welcome the Council’s intention to maintain current sentencing practice for less serious offences. The impact of the guideline on sentencing practice will need careful monitoring and evaluation to ensure this intention is realised.

We welcome the expandable “custodial sentences” section which provides further guidance on suspended sentences. It is important that suspended sentences are used effectively and are not imposed as more severe forms of community orders. This is especially important given 15% of those sentenced for s.25 offences in 2022 were given a suspended sentence.

8. Do you have any comments on the proposed aggravating and mitigating factors?

Good character and/or exemplary conduct

As we have highlighted in our response to previous consultations from the Council, we are concerned with the inclusion of “good character and/or exemplary conduct”

as a mitigating factor. How the sentencer may establish what counts as “good character and/or exemplary conduct” is unclear and little detail is provided. This is particularly difficult in short hearings with little preparation. Without clear guidance, there is a danger that this becomes overly subjective and determined by the sentencer’s own pre-existing prejudices and preconceptions. Consequently, this factor could have disproportionate impacts on particular protected characteristics especially race, disability and age, as well as those from more disadvantaged backgrounds.

We are particularly concerned of the inclusion of “charitable works” in the expanded explanation for the mitigating factor of “good character and/or exemplary conduct”. The Council recently consulted on similar wording as part of the review into miscellaneous amendments. It chose to remove this wording in favour of:

“Positive character and/or exemplary conduct (regardless of previous convictions)”.¹

For the sake of consistency across guidelines, we would recommend the Council amends the wording in this factor in line with the above. We would then recommend the Council consult more widely on this, including with individuals who are not sentencers to clarify what could fall within scope of demonstrating a “good character and/or exemplary conduct”. This could then include a non-exhaustive list. One example which could be a part of this non-exhaustive list demonstrating good character is “progress made”. This would be particularly relevant for people with multiple previous convictions who, for example, may be before the court again, but have been doing their best and making good progress up to their current court appearance.

Remorse

We are pleased to see the inclusion of “lack of remorse should never be treated as an aggravating factor”. We are also pleased to see in the expanded explanation that “remorse can present itself in many different ways”.

However, here, we would recommend explicitly referencing people with neurodiverse conditions, who may not express remorse in a way that the sentencer would typically expect. These groups may find it difficult to give a clear narrative in court and may behave inappropriately during proceedings such as smiling or laughing when asked a question or given instructions.² It is therefore important that this is taken into consideration. For example, the sentence could be amended to:

“Remorse can present itself in many different ways, A simple assertion of the fact may be insufficient, and the offender’s demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, 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, **not understanding what the word or concept of**

¹ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Miscellaneous-amendments-2023-24-Consultation-Response-website.pdf>

² Talbot, J. & McConnell, P. (2017). *Mental health, autism and learning disabilities in the criminal courts: Information for magistrates, district judges and court staff*. Second Edition, revised and updated by the Prison Reform Trust. p.26

remorse means, or the presence of neurodivergent conditions, including autism, learning disabilities and psychosocial disabilities, etc.”

Furthermore, it will be important for the guidelines to assist sentencers in gaining a sound understanding of cultural differences in how remorse is understood or expressed. Again, this should not become an aggravating factor if the person being sentenced is not presenting as remorseful in a way the sentencer would typically expect.

Age and/or lack of maturity

We are pleased to see that the Council recognises the important role that both age and maturity play in the commission of an offence. We particularly welcome the age range of 18-25 in expanded explanation.

Offender co-operated with investigation, made early admission and/or voluntarily reported offending

We welcome the inclusion of “offender co-operated with investigation, made early admissions and and/or voluntarily reported offending” as a mitigating factor. However, for some, there may be barriers to achieving this. For example, language or communication barriers which prevent them from fully understanding and so cooperating with the investigation. Or, for example, those whose offending is linked to coercion may be too afraid to cooperate fully or voluntarily report the offending. Therefore, it is important to ensure that lack of cooperation with the investigation, early admission or voluntarily reporting of the offending does not become an aggravating factor if relevant mitigating factors are also involved.

To support this, there should be clear links to the Equal Treatment Bench Book, which flag intercultural communication for those speaking English as a second language, as well as effective use of interpreters, and, where necessary, intermediaries for people with communication needs.

Section Two: Knowingly enters the United Kingdom without leave/ Knowingly arrives in the United Kingdom without valid entry clearance

PRT shares the concerns raised by Vicky Taylor et al in their detailed evidence on this section and refer the Council to their response. We would also make the following points in relation to the consultation questions:

9. Do you have any comments on the proposed culpability factors?

Sophisticated planning by the offender beyond that which is inherent in the offence

We have concerns around the lack of clarity in this factor. It is unclear what “sophisticated planning” means, or how a sentencer would establish this fact. This may lead to subjectivity and so inconsistency in sentencing practices. We are also unsure why sophisticated planning would indicate higher level of culpability.

The way the culpability levels are laid out means that in practice there will be a difficult balancing exercise for the sentencer. For example, balancing a case where the person being sentenced “has made previous attempts to unlawfully enter or arrive in the UK including by use of a false document” (high culpability) but has also “fled persecution or serious danger” (lower culpability). If the person is fleeing, they may have made multiple attempts to enter the UK.

We also welcome inclusion of “involved due to coercion or pressure” in lower culpability.

10. Do you have any comments on the proposed harm factors?

No comment.

11. Do you have any comments on the proposed sentence levels?

Whilst we welcome the inclusion of a community order option in lower level of culpability and harm, we have concerns about these new offences and the statutory maximum sentence of four years laid down by the NABA. We would refer the Council to the expert evidence from Vicky Taylor et al on this section. In particular paragraphs 12-16.

12. Do you have any comments on the proposed aggravating and mitigating factors?

We would draw the Council’s attention to our answers for question eight above on the mitigating factors of:

- “good character and/or exemplary conduct”
- “offender co-operated with the investigation”
- “remorse”

Our concerns are the same for this offence, and we would suggest the same amendments in this section.

We agree with Vicky Taylor et al that it would be pertinent for the Council to make a distinction between entry and arrival in approaches to sentencing. As the evidence explains, “While the NABA has quashed the distinction for the purpose of charge/conviction, we suggest it is relevant for sentencing exercises. Presenting oneself at port to claim asylum without any attempt to circumvent immigration controls and/or claiming asylum at the first possible opportunity (by for example deception or clandestine landing) represents a mitigating circumstance. This situation, we suggest, should attract a non-custodial sentence, with a starting point of conditional discharge”.

We also share the concern raised by Vicky Taylor et al regarding the aggravating factor ‘previous failed application for asylum’. As their evidence explains, “it is not the place of criminal courts to make an assessment on someone’s asylum claim. A

previous failed attempt does not prevent a new successful application. A ‘well founded fear of persecution’ can shift over time depending on political and personal circumstances. The aggravating factor could mean that someone who previously claimed asylum from Afghanistan decades ago, was rejected, but has subsequently in 2024 fled from the Taliban, would get a higher sentence for doing so.”

Section Three: Breach of Deportation Order

13. Do you have any comments on the proposed culpability factors?

We are pleased to see “involved due to coercion or pressure” as a factor indicating lower culpability. In this particular offence, it will be especially important for sentencers to recognise that even where there is apparent involvement at a higher level of culpability, the presence of coercion or pressure may still warrant them being assessed at the lower level of culpability. For example, in cases where the individual has breached the order shortly after its imposition (high culpability) but have been involved due to coercion or pressure (lower culpability), the presumption should be that they are assessed overall as in the lower level of culpability.

14. Do you have any comments on the proposed harm factors?

No comment.

15. Do you have any comments on the proposed sentence levels?

The Nationality and Borders Act 2022 (NABA), as the Council points out, hugely increased the maximum sentence for breach of a deportation order from six months to five years imprisonment. However, increasing in the maximum penalty ought not to effect practice at the lower end of seriousness unless it was parliament’s explicit intention to increase sentence levels across the board. The maximum penalty should only ever be imposed in the most serious of cases. Therefore, it will be important to monitor sentencing trends after the imposition of the guideline to ensure no long-term unintended consequences, including up tariffing.

We are concerned that the current draft guideline gives no option for a community sentence. We would recommend a community sentence option at the lower level of harm and culpability, as an alternative sentencing option to a short prison sentence.

16. Do you have any comments on the proposed aggravating and mitigating factors?

We would draw the Council’s attention to our answers for question eight above on the mitigating factors of:

- “good character and/or exemplary conduct”
- “offender co-operated with the investigation”
- “remorse”

Our concerns are the same for this offence, and we would suggest the same amendments in this section.

Section Four: Deception

17. Do you have any comments on the proposed culpability factors?

We welcome the inclusion of “involved due to coercion or pressure” as a factor in assessing a lower level of culpability.

We also welcome “offender’s responsibility substantially reduced by mental disorder or learning disability” as a factor in assessing lower level of culpability. However, we would suggest including reference to autism and/or neurodivergence too.

As we have suggested on previous questions on culpability factors, it will be important to establish how sentencers carry out the careful balancing exercise when assessing the appropriate level of culpability. If, for example, someone is found to have a mental disorder or learning disability, there should be a presumption that this factor places them in the lower level of culpability, even when there are other factors which might place them in a higher level.

18. Do you have any comments on the proposed harm factors?

No comment.

19. Do you have any comments on the proposed sentence levels?

We welcome the inclusion of community orders and fines at the lower levels of culpability and harm.

20. Do you have any comments on the proposed aggravating and mitigating factors?

We would draw the Council’s attention to our answers for question eight above on the mitigating factors of:

- “good character and/or exemplary conduct”
- “offender co-operated with the investigation”
- “remorse”

Our concerns are the same for this offence, and we would suggest the same amendments in this section.

Section Five: Possession of False Identity Documents etc with Improper Intention

21. Do you have any comments on the proposed culpability factors?

We think the current wording of the lower culpability factor of “possession of one or two false documents for own use” is overly arbitrary. We would argue here that the distinction in assessing which level of culpability is more about whether the person being sentenced has these document for their own use, or whether they plan to distribute the documents for “commercial scale criminal activity”. Therefore, we would suggest amending the wording to:

“Possession of **a small number of** false documents for own use”.

We also welcome reference to “involved due to coercion or pressure” as a lower culpability factor.

22. Do you have any comments on the proposed harm factors?

We are concerned that, in the current draft of the guideline, evading immigration control is a more serious harm factor than committing criminal activity. This does not make logical sense. Committing criminal activity is far more likely to result in real harm to victims as opposed to evading immigration control. Therefore, we suggest the factors should be the other way around. So should read as follows:

Category 1: **Document used or intended for use to assist criminal activity (other than described in category 3)**

Category 2: **Document(s) used or intended for use to evade immigration controls**

23. Do you have any comments on the proposed sentence levels?

We welcome inclusion of community order options at the lowest level of culpability and harm. However, we would suggest that high-level community order options with relevant conditions attached could be utilised in cases of higher culpability, and would recommend that these are included as an option within the sentencing range.

24. Do you have any comments on the proposed aggravating and mitigating factors?

We would draw the Council’s attention to our answers for question eight above on the mitigating factors of:

- “good character and/or exemplary conduct”
- “offender co-operated with the investigation”
- “remorse”

Our concerns are the same for this offence, and we would suggest the same amendments in this section, to ensure consistency across the guidelines.

Section Six: Possession of False Identity Documents etc Without Reasonable Excuse

25. Do you have any comments on the proposed culpability factors?

We are concerned the Council has not included “involved due to coercion or pressure” as a factor in indicating lower culpability as it has for other offences throughout the guideline. We would strongly recommend this be added, to ensure consistency across all sections in the guidelines.

Do you have any comments on the proposed harm factors?

We are concerned that the current draft of categories of harm does not make logical sense. We would question why driving without a proper licence is category two, whilst entering a country with false documentation is category one. We would argue that driving without a proper licence could potentially put more people in danger of harm, than entering a country illegally with false documentation.

26. Do you have any comments on the proposed sentence levels?

No comment.

27. Do you have any comments on the proposed aggravating and mitigating factors?

We would draw the Council’s attention to our answers for question eight above on the mitigating factors of:

- “good character and/or exemplary conduct”
- “offender co-operated with the investigation”
- “remorse”

Our concerns are the same for this offence, and we would suggest the same amendments in this section, to ensure consistency across the guidelines.

Section Seven: Ancillary Orders

28. Do you have any comments on the proposed wording at step 6?

No comment.

Section Eight: Equality and diversity

29. Are there any aspects of the draft guidelines that you feel may cause or increase disparity in sentencing?

No comment.

30. Are there any existing disparities in sentencing of the offences covered in this guideline that you are aware of, which the draft guideline could and should address?

No comment.

31. Are there any other matters relating to equality and diversity that you consider we ought to be aware of and/or that we could and should address in the guideline?

We are concerned that victims of Modern Slavery are not always effectively identified at the earliest opportunity. It is important to ensure appropriate training and guidance for sentencers to help support them recognise potential victims of modern slavery. There should be clear links to the Equal Treatment Bench Book throughout, with the guideline highlighting the relevant sections on Modern Slavery.

We are also concerned that the ethnicity of the majority of offenders was not known. For the Council to have a proper grasp of how the guidelines are likely to affect those from minority ethnic groups, there needs to be much better and more consistent data collection, as recommended by the Lammy Review.³

We are also concerned that the age of those being sentenced is not adequately accounted for. We would again refer the Council to paragraphs 28-24 in the expert evidence from Vicky Taylor et al which relates to this.

Many people who come into contact with the criminal justice system experience psychosocial disabilities and/or neurodivergence. It is therefore important that, where appropriate, reports by liaison and diversion (L&D) services are made available to sentencers and the necessary adjustments or 'special measures' are made during all court proceedings. This is also relevant, and should apply to interactions with the police, including the requirement for there to be an Appropriate Adult present.

32. Do you have any other comments on the proposed guidelines that have not been covered elsewhere?

We are concerned with the continued use of the word "offender" in the draft guidelines. The use of this term is widely recognised as stigmatising and dehumanising and other agencies have made moves away from the term. The probation service, for example, has moved away from the term "offender" to more "descriptive, neutral person-centred language", including "person on probation".⁴ Therefore, we would strongly recommend the Council considers changing references

³ Lammy, D. (2017). The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System.

<https://assets.publishing.service.gov.uk/media/5a82009040f0b62305b91f49/lammy-review-final-report.pdf>

⁴ See:

<https://static1.squarespace.com/static/5ec3ce97a1716758c54691b7/t/60d9c35377db0f12778bd351/1624884051251/Language+policy.pdf>

to “offender” in the guidance. We would suggest the new wording could be “**person being sentenced**”.

Prison Reform Trust
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