

Prison Reform Trust response to The Sentencing Council consultation on miscellaneous amendments to sentencing guidelines

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.

www.prisonreformtrust.org.uk/

Questions

1. What is your name?

Emily Evison on behalf of Prison Reform Trust

2. What is your email address?

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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

Allocation guideline

5. Do you agree with the proposed change to the Allocation and Sentencing children and young people guidelines? If not, please provide alternative suggestions.

No comment

Supply of drugs to children

- 6. Do you agree with the proposed additional aggravating factor in the Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another guideline? If not, please provide any alternative suggestions.**

No comment

Fraud

- 7. Do you agree with the proposed changes to the Fraud guideline? If not, please provide any alternative suggestions.**

No comment

Breach of a protective order guideline

- 8. Do you agree with the proposed addition of breach of a stalking prevention order and (once it is in force) breach of a domestic abuse prevention order to the breach of a protective order guideline? If not, please provide any alternative suggestions.**

No comment

Environmental guideline for individuals

- 9. Do you agree with the proposed amendments to the environmental offences guideline? If not, please provide any alternative suggestions.**
- 10. Do you have any views on the likely impact of the proposed changes on sentence outcomes?**

No comment

Mitigating factors and expanded explanations

Remorse

- 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.**

We are pleased to see the continued inclusion that a “lack of remorse should never be treated as an aggravating factor”.

We are also pleased to see the inclusion of learning disabilities, communication difficulties and cultural differences to the non-exhaustive list of why an offender’s demeanour may be misleading, and how remorse can present itself in many ways. However, in keeping with terminology used by NHS England (Health and Justice) and the Ministry of Justice/HMPPS,

we would recommend including the term 'neurodiversity', for example amending the sentence to "neurodiversity, including autistic people, people with learning disabilities and difficulties, and people with psychosocial disabilities". 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.¹ It is therefore important that this is taken into consideration.

Good character and/or exemplary conduct

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 welcome the removal of "charitable works" from the wording of the factor, and the change in reference to previous convictions in the expanded explanation for the mitigating factor of good character.

However, we continue to be concerned about the lack of clarity in the test for establishing a perpetrator's character. The test is unclear, and no detail is provided. Without clearer guidance, there is a danger that the test of good character and/or exemplary conduct becomes overly subjective and determined by the sentencer's own pre-existing prejudices and preconceptions. As a consequence, this factor could have disproportionate impacts on particular protected characteristics including race and age, as well as those from more disadvantaged social economic backgrounds.

We recommend the Council consult more widely, including individuals who are not sentencers and clarify what could fall within scope of demonstrating a "good character and/or exemplary conduct". This should include a non-exhaustive list.

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

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 this addition as it acknowledges that people may want to take steps to address addictions but are unable to do so because of a lack of services and support in the community. This is not the fault of the individual. Overcoming addiction can be a difficult and complex process. For example, people may self-medicate because they find it hard to access services, and dependence can hide underlying mental health conditions or disorders. Determination and/or steps taken to address addiction or offending behaviour should be recognised, even when those efforts have not been successful.

We would also suggest amending the expanded explanation to include gambling. There are clear links between problem gambling and crime.² This includes high incidences of people

¹ 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

² The Commission on Crime and Gambling Related Harms. (2023). *The Commission on Crime and Gambling Related Harms: Final Report*. Howard League for Penal Reform. <https://howardleague.org/wp->

committing crimes to fund gambling. The more prolonged the gambling, the more likely a crime will be committed to fund it. We would suggest amending the expanded explanation to read as follows (additions in red):

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.

Please note, the term “problem gambling” is used to describe recognised mental health disorder, as referenced by the Commission on Crime and Gambling Related Harms.³

Age and/or lack of maturity

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 welcome the further research commissioned by the Council and are very pleased to see that the Council clearly recognises the important roles that both age and maturity have in the commission of an offence.

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 book.

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

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.

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 system⁴, 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.⁵

[content/uploads/2023/04/Final-report_Commission-on-Crime-and-Gambling-Related-Harms_Howard-League-for-Penal-Reform_26-April-2023.pdf](https://www.howardleague.org/wp-content/uploads/2023/04/Final-report_Commission-on-Crime-and-Gambling-Related-Harms_Howard-League-for-Penal-Reform_26-April-2023.pdf)

³ See: https://www.howardleague.org/wp-content/uploads/2023/04/Final-report_Commission-on-Crime-and-Gambling-Related-Harms_Howard-League-for-Penal-Reform_26-April-2023.pdf

⁴ ICP (2021) Is it a crime to be poor? Briefing Paper <https://crimetobepoor.files.wordpress.com/2021/01/is-it-a-crime-to-be-poor-briefing-paper2-2.pdf>

⁵ Prison Reform Trust (2021) Bromley Briefings Prison Factfile: Winter 2021, London: PRT

Whilst we welcome the inclusion of difficulties relating to misuse of drugs and alcohol as a mitigating factor, the existence of “being voluntarily intoxicated” as an aggravating factor highlights a contradiction at the heart of the Council’s approach on this issue.

We would challenge the idea of “voluntary” intoxication, and the idea that people have agency over their addiction. The link between the use of alcohol and drugs and crime is already well-established.⁶ Therefore we do not agree with the Council’s assessment that the presence of alcohol or drugs is an aggravating factor. The presence of such factor is more likely to indicate a need for treatment than a justification for more severe punishment.

There may be circumstances where someone does not have addiction problems and then gets intoxicated leading them to commit an offence. However, making such an assessment would rely upon, at the very least, involvement of Liaison and Diversion services and a full Pre-Sentence Report. Sentencers should not be put in a position of having to make judgements about a person’s use of addictive substances without clinical input.

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.

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.

We welcome the introduction of “prospects of or in work, training or education” as a mitigating factor, as custody can have a significant negative impact on people’s education and employment opportunities. Timely written Pre-Sentence Reports will be key to the consideration of this mitigating factor in practice.

We are pleased also to see the Council explicitly outline that “The absence of work, training or education should never be treated as an aggravating factor” as a person should not be penalised for the absence of such opportunities, for many reasons which may be beyond their individual control.

New factor: Pregnancy and maternity

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

We welcome the inclusion of pregnancy and maternity as a new mitigating factor. We support the response given by Birth Companions and Level Up, who are experts in this area.

We were concerned about the feedback from sentencers in the discussion groups outlined in the consultation document. In particular that some sentencers “questioned the evidence behind the assertion in the expanded explanation that “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.”” It is widely recognised and accepted that all

⁶ [Policy report - Reducing drug use, reducing reoffending \(summary\).pdf \(ukdpc.org.uk\)](https://www.ukdpc.org.uk/policy-report-reducing-drug-use-reducing-reoffending-summary.pdf)

pregnancies in prison are high risk.⁷ Pregnant women in prison are seven times more likely to suffer stillbirth.⁸ Yet figures show being pregnant and in prison is becoming more common. In the year to March 2023 nearly 200 pregnant women were held in prison.⁹

We are also concerned that this mitigating factor does not cover pregnant women who are remanded to custody including those who are remanded for their own protection. One in three (34%) pregnant women in prison are being held on remand awaiting trial.¹⁰ We recommend revision of the guidelines around remand and encourage the Council to conduct a similar exercise as they have with these guidelines.

Whilst we welcome the inclusion of the factor, we strongly suggest that it be reworded in order to have the desired effect. We have suggested some amendments to the factor below 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 must 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 or postnatal relevant considerations may 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;
- 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 is very likely to cause significant harm to the physical and mental health of both the mother 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.

⁷ See NHS. (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). [Service Specification \(england.nhs.uk\)](https://www.nhs.uk/service-specifications/national-service-specification-for-the-care-of-women-who-are-pregnant-or-post-natal-in-detained-settings/) and Prisons & Probation Ombudsman. (2021). *Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019*. [F4055-19-Death-of-Baby-A-Bronzefield-26-09-2019-NC-Under-18-0.pdf](https://www.ppo.gov.uk/~/media/10000000/2021-2022/2021-2022-09-26-09-2019-NC-Under-18-0.pdf)

⁸ Summers, H. & Murray, N. (2023). *Pregnant women in English jails are seven times more likely to suffer stillbirth*. The Observer. [Pregnant women in English jails are seven times more likely to suffer stillbirth | Prisons and probation | The Guardian](https://www.theguardian.com/society/2023/oct/28/revealed-one-in-three-jailed-pregnant-women-in-england-and-wales-still-to-face-trial)

⁹ Table 11.1 and 11.2. Ministry of Justice. (2023). Annual HM Prison and Probation Service digest, April 2022 to March 2023.

¹⁰ Summers, H. & Murray. (2023). *Revealed: one in three jailed pregnant women in England and Wales still to face trial*. The Observer. <https://www.theguardian.com/society/2023/oct/28/revealed-one-in-three-jailed-pregnant-women-in-england-and-wales-still-to-face-trial>

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order **or suspended sentence** 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.

Manslaughter

Strangulation, suffocation or asphyxiation

18. Do you agree with adding the proposed aggravating factor relating to strangulation, suffocation or asphyxiation to the manslaughter guidelines? If not, please provide any alternative suggestions.

No comment.

Coercive or controlling behaviour

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.

Equalities and impact

Equalities

20. Are there any equalities issues relating to the proposals that should be addressed?

Impact

21. Do you have any comments on the likely impact of the proposals on sentencing practice?

General observations

22. Are there any other comments you wish to make on the proposals?