



Prison Reform Trust submission

Fraud, bribery and money laundering offences guideline consultation

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison 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's main objectives are:

- Reducing unnecessary imprisonment and promoting community solutions to crime
- Improving treatment and conditions for prisoners and their families

Supported by the Pilgrim Trust, the Prison Reform Trust is running a three year programme to reduce women's imprisonment. This response focuses on the fraud, bribery and money laundering offences guideline as it pertains to women. However, some of the concerns it raises will also apply to men. It draws on discussion at two consultation events we organised on behalf of the Sentencing Council, attended by a wide range of community organisations that work with women in the criminal justice system.¹ These events, one held at Anawim in Birmingham, and one in London, enabled the implications for women of the proposed guideline to be more fully considered. We are grateful both to the Sentencing Council and to the workshop participants for this opportunity. Many of the concerns raised by the participants centred on the vulnerability of the women they work with (some of whom had committed fraud-related offences), their experiences of domestic violence (and abusive relationships more generally) as factors in their offending, and the disproportionate impact that changes to welfare entitlements were having on such women, many of whom were already living in poverty. We share these concerns and have sought to reflect them here.

We would like to draw the Council's attention to the Prison Reform Trust briefing *Why focus on women in prison?* which is submitted as supplementary evidence to this consultation.

Overarching concerns and principles

Gender-specific sentencing: The UN Rules for the Treatment of Women Prisoners and Non-custodial Measure for Women Offenders (the Bangkok Rules) provides a framework for gender sensitive sentencing guidelines and we recommend that the Sentencing Council

¹ See Annex for a list of attendees

include a reference to these in its new guideline, noting the UK's obligation to provide "gender-specific options for...sentencing alternatives".²

*Equality impact assessment (EIA):*³ Women are generally poorer than men, receive a higher proportion of their income from benefits, and have been more badly affected by public spending cuts. This is particularly true for single parents, most of whom are mothers. Financial hardship and family responsibilities do not predispose women to criminality, indeed the overall crime figures suggest the reverse, but it does make them more vulnerable. It is striking that the Sentencing Council's EIA shows that a disproportionate number of those sentenced for welfare fraud are women, unlike for other fraud offences where the vast majority of those sentenced are men. If sentencing for welfare fraud becomes more punitive it will impact disproportionately on women and their dependents.

It is not only the sentencing framework itself that we are concerned about, but also the context in which it takes place and the influence that this has on sentencing decisions. There is a responsibility on bodies such as the Sentencing Council and the Judicial College to take steps to ensure that sentencers have a sound grasp of the extent and nature of welfare fraud and are not influenced by media distortions and ill-informed public opinion to impose disproportionate punishment. Research shows that public opinion of welfare fraud grossly overestimates its scale.⁴ We are also concerned that the move to Universal Benefit will increase the risk of some kinds of benefit fraud as more low income households get into financial difficulty, for example accumulating rent arrears when housing benefit is not paid to the landlord. Custodial sentences will rarely be a proportionate response to individual welfare fraud unless on a grand, sustained or organised scale which is not the norm. **We would like to see a more thorough, transparent and gendered assessment of the impact of the proposed new guideline, and a commitment to monitoring its impact in the next five years.**

Custody as a last resort: The Criminal Justice Act 2003 states that a custodial sentence should only be used where the offence is "so serious that neither a fine nor a community sentence can be justified".⁵ The Corston Report, and inquiry reports before and since, have stressed that custodial sentences for women must be reserved for serious and violent offenders who pose a threat to the public, and that community solutions should be the norm for non-violent offenders. Despite this, the guideline as it is currently drafted is primarily focused on custodial sentences, with little discussion of the appropriateness, or effectiveness, of alternatives when sentencing fraud offences. If sentencers are to make informed sentencing decisions, they must be provided with accurate information on

² <http://www.ohchr.org/Documents/ProfessionalInterest/BangkokRules.pdf>

³ Now referred to as Policy Equality Statements in government terms

⁴ For example <http://www.independent.co.uk/news/uk/home-news/british-public-wrong-about-nearly-everything-survey-shows-8697821.html>. There are a number of other surveys e.g. TUC

⁵ Section 152 (2), Criminal Justice Act 2003

sentence outcomes (in terms of reoffending), the relative costs of individual sentences, and national sentencing practice (to ensure they are aware where their decision-making differs from that of their colleagues nationally). The Drug Offences Definitive Guideline went some way to addressing the former of these points, by including explicit reference to the custody and community threshold, and to the use of community orders with specific requirements as alternatives to short or moderate custodial sentences. This draft guideline contains none of these safeguards.

Section 125(1) of the Coroners and Justice Act 2009 states that “*every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offenders case*” unless it is satisfied that to do so “*would be contrary to the interests of justice*”. The existing Fraud guideline (published in 2009) is less than 5 years old, and the general profile and volume of fraud offending has not changed dramatically in that period (indeed the number of offenders sentenced for benefit fraud has declined since 2008).⁶ We note that the Council’s approach has been informed by “*some evidence that current sentencing practice does not reflect the existing SGC guideline*”, and its wish “*to regularise practice*”. However, we are concerned that “*regularising the guideline*” amounts to a rounding-up of the starting points and category ranges, despite the absence of any evidence that where sentencing practices deviate from the existing guideline, they are more effective.

We recommend reordering the culpability factors, so that sentencers start by considering those which fall within lesser culpability, and satisfy themselves that the offender does not fall within this band before moving on to consider the medium and, where relevant, high culpability factors. This seems a more logical approach, and one that will help ensure custody is only used when proportionate and necessary.

Evidence base: The Sentencing Council’s remit includes “*taking forward work on sentencing...through the development of a robust evidence base*”.⁷ There is currently limited data on existing sentence levels for individual fraud offences types, which has hampered its work. The paper makes clear that “*the available data on current sentencing practice...was not a reliable basis for developing the majority of the guidelines*”.⁸ There is a need for further and better data analysis before significant changes are made to the Guideline.

Children of offenders: The Bangkok Rules state that “*women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties*”,⁹ whilst the Court of Appeal,¹⁰ and, more recently the

⁶ http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Statistics_Bulletin.pdf

⁷ Sentencing Council (2013) *Fraud, Bribery and Money Laundering offences Guideline – Consultation*

⁸ P. 9, Sentencing Council (2013) *Fraud, Bribery and Money Laundering Offences Guideline Consultation*

⁹ Ibid.

¹⁰ R (on the application of P and Q) v Secretary of State for the Home Department – [2001] EWCA Civ 1151, at para 79.

sentencing judge in R v. Petherwick,¹¹ have ruled that, when sentencing a mother with a dependent child, the child's rights to respect for a private and family life¹² are engaged and a balancing exercise should be undertaken. Whilst sole or primary care responsibilities are recognised at mitigation, there is evidence to suggest courts do not always undertake this balancing exercise when sentencing a mother with dependent children.¹³ The case of Melanie Beswick, sentenced initially to nine months in prison for a first offence, despite having two dependent children, is a tragic case in point.¹⁴

We therefore recommend the Sentencing Council provide stronger guidance to the court on its duty to investigate sole or primary caring duties and take these into account at sentencing, and monitor the sentencing of offenders with dependent children.

We also recommend that the Sentencing Council consider drafting a new overarching step aimed at determining whether the offender has dependent children, whether they have sole or primary care responsibilities and how the child's rights and interests will be taken into consideration, as set out by the European Convention on Human Rights and the UN Convention on the Rights of the Child. Alternatively, it could draft this as a step to undertake where the offence has passed the community threshold and there is a realistic prospect of a custodial sentence. However the Council chooses to formulate this, it is vital that the guidelines make specific reference to the sentencing court's duty to take account of the rights and best interests of dependent children.

Benefit fraud: As the consultation document makes clear, benefit fraud accounts for less than 0.7% of the Department of Work and Pensions total expenditure on benefits, and less than 1.6% of the £73 billion that fraud is estimated to cost the UK economy, each year. Women account for more than half of those sentenced for benefit fraud, though it is not clear whether this is a reflection of their disproportionate dependence on welfare,¹⁵ the way in which welfare fraud has previously been prosecuted or the extent of benefit fraud offending by women. Given the disproportion within sentencing for this offence type, we are concerned that the sentence ranges included in this draft guideline are focused on custodial sentences at the expense of first tier and community sentences which have better outcomes and will be more appropriate in most instances.

Whilst we appreciate the new CPS charging standard for benefit and tax credit fraud falls outside the scope of this consultation, it is highly likely that a combination of the standard

¹¹ R v Petherwick – [2012] EWCA Crim 2214

¹² Under the European Convention on Human Rights and the UN Convention on the Rights of the Child

¹³ Epstein, R. (2012) Special Issue – Research Report - Mothers in prison: the sentencing of mothers and the rights of the child *Coventry Law Journal*

¹⁴ <http://www.inquest.org.uk/press-releases/press-releases-2013/inquest-into-the-death-of-melanie-beswick-hmp-send-begins-11-april>

¹⁵ Stephenson, M. & Harrison, J, (2011) *Unravelling equality? A human rights and equality impact assessment of the public spending cuts on women in Coventry* Warwick: University of Warwick

(and the fact that the decision to prosecute Section 112 offences no longer lies with the Department for Work and Pensions) and a new guideline will lead to an increase in the number of women who are prosecuted, sentenced and ultimately imprisoned for benefit fraud. **To militate against this, we recommend that the Council to revise the guideline to ensure that custody can only be used in benefit fraud cases as a last resort and where no other sentence can be justified.**

Key stats: fraud sentencing and female offenders

- Women who commit fraud and forgery offences have one of the lowest reoffending rates (7.3% compared to a 21.5% average for all offences).¹⁶ This rate has reduced from 25.4% in 2000, whilst the average number of further offences committed by females convicted of fraud and forgery offences has fallen by almost three-quarters (74.1%), a reduction which has not been matched by any other offence group.¹⁷
- In 2012, 7,908 women were sentenced across all courts for fraud and forgery related offences - 620 women (7.8%) were sentenced to custody, accounting for 8.8% of all women imprisoned under an immediate custodial sentence by the courts¹⁸
- In 2012, the average custodial sentence given to women convicted of fraud and forgery offences in the magistrates' court was 2.8 months, longer than that given to men (2.5 months).¹⁹
 - By contrast, the average sentence given to women across all the offence groups was 2.1 months, compared to 2.4 months for men
 - A greater proportion of men imprisoned for fraud and forgery offences than women were given the shortest sentences of up to and including 3 months (68% vs. 64% respectively)
 - Women imprisoned for social security offences also received, on average, longer sentences than men – 1.7 months vs. 1.5 months. In the Crown Court, the average sentence for both women and men was 3 months.
- Between 2002-2012 the average custodial sentence given to women for fraud and forgery offences across both courts nearly doubled, increasing from 6.3 to 11.2 months,

¹⁶ Table S5.22, Ministry of Justice (2012) *Statistics on women and the criminal justice system* MoJ: London

¹⁷ Table A3(f), Ministry of Justice (2011) *Reoffending of adults: results from the 2009 cohort* MoJ: London

¹⁸ Table S5.1, Ministry of Justice (2013) *Criminal justice statistics quarterly – December 2012* MoJ: London

¹⁹ Table S1.3, *Ibid.*

whilst the average sentence across all offence groups reduced from 10.3 to 9.6 months.²⁰

- Fraud and forgery offences account for a greater proportion of the female, than the male, prison population. Women are more than twice as likely to be received into prison for fraud and forgery offences as men.
 - At 30th June 2013, 196 women were in prison for fraud and forgery offences, accounting for 5.4% of the total women’s prison population in England and Wales. For men the equivalent proportion was 1.9%.²¹
 - Between January-March 2013, fraud and forgery offences accounted for 4.2% of women received into prison on remand and 6% received under sentence, compared to 2% and 2.6% of men respectively.²²
- In 2012, 3,422 women were sentenced for social security offences, accounting for 53% of the total.²³ It may be that women’s over-representation in these statistics is a result of the fact that section 112 offences were previously prosecuted by Department of Work and Pensions as a fairly routine procedure. In any event, the gendered character of the data is a compelling reason to ensure that the benefit fraud guideline is structured to take account of all the factors relevant when sentencing women.

Shortcomings in the data:

Data on the amount obtained or intended to be obtained as a result of fraud offences committed by women is not available, although the consultation acknowledges that most cases fraud sentenced across both courts “*involve relatively small sums*” with the Magistrates court dealing with “*much smaller amounts*”. **We recommend the Sentencing Council undertake a more detailed and gendered analysis of the value of cases being sentenced by both courts to ensure that an accurate profile of women’s fraud offending informs the development of this guideline and to ensure there is no inadvertent bias in sentencing decisions.**

Section three: Fraud

Q1: Do you agree that a single fraud guideline is appropriate for cases of confidence fraud and banking and insurance fraud?

²⁰ Table A5.20, Sentencing Tables Dec 2012 Ministry of Justice (2013) *Criminal Justices Statistics Quarterly to December 2012* MoJ: London

²¹ Table 1.3b, Ministry of Justice (2013) *Offender management statistics quarterly January-March 2013* MoJ: London

²² Table 2.2b, *Ibid.*

²³ Where gender is known. This is likely to be an under-estimate as an additional 1,055 individuals whose gender was not specified were sentenced in 2012

We note that, “under the SGC guidelines, confidence fraud and banking and insurance fraud and obtaining credit through fraud were two distinct guidelines” with confidence fraud carrying “higher starting points and sentence ranges”. We also note that the banking and insurance guideline, with its lower level sentence ranges, “was not used as a basis for the new draft guideline”. This suggests a fundamental distinction was drawn between the two existing guidelines at the point at which they were developed in 2009. It is not clear from the consultation why the Sentencing Council is now minded that “a guideline that encompasses both...is logical and...sentence levels should be the same”.

Though we note that “sentence levels for this type of offending are broadly similar and that sentences for banking and insurance fraud and obtaining credit through fraud have been upheld by the Court of Appeal at levels higher than those indicated in the SGC guideline”, we question whether Sentencing Guidelines should be revised upwards to match sentencing practice which is out of step with a guideline developed in 2009. Statistics show that between 2002-2012, the average custodial sentence given to women for fraud and forgery offences across both courts nearly doubled (from 6.3 to 11.2 months)²⁴ whilst the average sentence across all offence groups reduced from 10.3 to 9.6 months. With this in mind, and the Government’s support for “robust community sentencing options as an alternative to the use of short custodial sentences”²⁵ for women, we would urge caution at any move that could reinforce this trend for longer custodial sentences.

Q5: Do you agree with the approach to actual and intended loss and risked loss?

Whilst we agree that risked loss is less serious than the same actual or intended loss and, on principle, support the draft guideline’s direction to the court to move these offences into a lower category of harm, in practice we are concerned that this approach could still lead to disproportionate sentencing because the overall sentence ranges are disproportionate. In addition, in instances where both a risked, and an actual, loss has occurred, the draft guideline is unclear as to which takes precedence when the court is determining the category of harm into which the offence falls. See the answer to Question 15 for further detail.

Q6: Are the financial amounts in the five categories set at appropriate levels?

The dearth of information on the “type of fraud committed or the financial amount involved” in offences sentenced under Section 1 of the Fraud Act, makes it difficult to comment on the relative appropriateness of the levels proposed. However, the consultation document is clear that “the majority of cases that are sentenced in both the magistrates’ and Crown Courts everyday involve relatively small sums” and that “Magistrates’ courts

²⁴ Table A5.20, Sentencing Tables Dec 2012 Ministry of Justice (2013) *Criminal Justices Statistics Quarterly to December 2012* MoJ: London

²⁵ Ministry of Justice (2013) *Strategic objectives for female offenders* MoJ: London

routinely deal with cases involving much smaller amounts than the lowest starting point of £10,000 in the current SGC guidelines for confidence fraud". Whilst the inclusion in the draft guideline of a new lowest starting point of £2,500 is welcome, there is merit in either a) further reducing this to £1,000 or less, or b) creating a new category 6 at stage one of the harm assessment which deals with offences where the loss caused or intended is at this lower level.

Under the current draft guideline, an offender with high culpability whose offence caused or intended to cause a loss amounting to £1,000 or less would be eligible for category 5 sentences, ranging from a high level community order to 1 year's custody, with a starting point of 26 weeks' custody. We are concerned that this category range has too high a starting point and does not give sentencers sufficient discretion where a low or mid level community order or a fine (where the offender is demonstrably able to repay) might be more appropriate.

Q9: Do you agree with the proposed aggravating factors? If not, please specify which you would add or remove and why.

We note the inclusion of *offences committed across borders* as a new aggravating factor, and the explanatory text which states that "*in some cases, the offence being committed across borders is a deliberate feature of the offence in an attempt to evade detection and prosecution*". If the intention is to enable the court to acknowledge such deliberate actions as an aggravating factor, we suggest amending the text so this is clear, reading as follows: *Offences committed across borders where this is a deliberate feature in an attempt to evade detection and prosecution.*

Q11: Do you agree with the proposed mitigating factors? If not, please specify which you would add or remove and why.

We agree with the proposed mitigating factors as they stand, but recommend inclusion of a further factor or factors that take account of the role that others can play in an individual's offending behaviour. It is well-established that relationship problems feature strongly in women's pathways into crime, that women are vulnerable to exploitation by men and that coercion by men can form a route into criminal activity for some women.²⁶ Research suggests nearly half of women prisoners have committed offences to support someone else's drug use²⁷ and, anecdotally at least, we are aware of cases involving women convicted of fraud offences whose offending was directed by coercive partners/spouses who had accumulated significant gambling debts.

²⁶ See, for, example chapter two: Men and women; equal outcomes require different approaches – the need for a distinct approach in *The Corston Report* London: Home office

²⁷ Light, M. et al (2013) *Gender differences in substance misuse and mental health amongst prisoners* London: MoJ

The link between domestic violence and duress in respect of abused women coerced into committing offences has been well-documented,²⁸ as has the prevalence of victimisation amongst the female offending population.²⁹ Given the complex dynamics of domestically abusive relationships, sentencing for offences occurring in this context should include consideration of this as a standalone factor reflecting personal mitigation.

To ensure the court is alert to the specific drivers of some women’s offending, we recommend the inclusion of a factor which recognises the role that coercion or duress can play in offending, whether organised in nature (for example where the offence is directed by an individual or group) or not (as a result of a partner/spousal pressure). Whilst this is included in the list of Culpability C factors, the Court may decide the balance of characteristics places the offender in Culpability A or B. Involvement due to coercion, intimidation or exploitation should therefore be available as a mitigating factor where this has not been taken into account at step 1. The wording included in the Drug Offences Definitive Guideline could be adopted here.

In addition, we would like to see the Sentencing Council strengthen the factor relating to sole or primary caring duties, to ensure that the sentencing court undertakes the balancing exercise it is required to by law, as set out in a 2001 Court of Appeal judgement³⁰ and more recently, in *R v Petherwick*.³¹ See the discussion in the overview for further information.

A new framework to allow courts to defer sentencing for restorative justice where both the offender and victim consent³² has the capacity to make a significant difference to victim participation and place the victim at the heart of sentencing decisions. Where the offender has participated in a restorative justice intervention organised with the victim’s express consent, the court should be able to take account of this, and any reparative outcomes agreed as part of this process, at mitigation.

Q12: Please give your views on the proposed sentence levels for these offences.

Whilst we appreciate the emphasis given to the impact of fraud offences on victims and the findings of the NatCen research on online fraud, the lack of discussion within the guideline about sentence effectiveness and outcomes represents a missed opportunity. In particular we would like to see a much clearer steer on non-custodial sentencing options as there is evidence that these can be more effective, especially for women.³³

²⁸ Loveless J., *Domestic Violence, coercion and duress*, Criminal Law Review 2010, Crim L.R 93

²⁹ Corston, J. (2007) *The Corston Report* London: Home Office

³⁰ *R (on the application of P and Q) v Secretary of State for the Home Department* – [2001] EWCA Civ 1151, at para 79.

³¹ *R v Petherwick* – [2012] EWCA Crim 2214

³² Schedule 16, Crime and Courts Act 2013

³³ <http://www.nuffieldfoundation.org/news/evaluation-womens-community-services-wcss>

We welcomed the statement of intent in the Drug Offences Definitive Guideline recognising that “a community order...can be a proper alternative to a short or moderate length custodial sentence”.³⁴ No such recognition of the value, and effectiveness, of community sentences features in this draft guideline, or indeed in any of the guidelines within this consultation and question this omission. Reoffending data shows that women given community sentences are less likely to reoffend and, where they do reoffend, commit fewer further offences than women given custodial sentences. Community sentences outperform custodial sentences of less than 12 months by 6.3% for women offenders³⁵ and enable them to take control of their lives, care for their children and address the causes of their offending. There is a substantial body of evidence demonstrating the effectiveness (both in terms of reoffending and cost) of community sentences which are delivered through women-only spaces such as women’s centres³⁶ with some reporting reoffending rates of less than 1%.³⁷ Such centres act as multi-agency hubs, bringing together statutory and voluntary services, including health, housing, debt advice, and substance misuse, as well as delivering women-only unpaid work placements and other formal requirements of community sentences. With significant public support for the availability of such services in every community³⁸ the guideline should reflect the use of community orders in appropriate circumstances. To that end, we would welcome the following insertion at step two of this, and each subsequent, guideline:

A community order with a relevant requirement/s as set out under the Criminal Justice Act 2003 is a proper alternative to a short or moderate length custodial sentence.

With respect to the proposed sentence levels included in Table 1 and Table 2, we are concerned that the starting points at the lower end of the harm categories are overly-focused on custodial sentences, when research shows that these sentences are the least effective in terms of reoffending.³⁹ For example, we do not believe a 26 week custodial sentence is an appropriate starting point for an offence which has resulted in an actual or intended loss of £2,500, even where the level of culpability is high, not least because the cost of imprisoning a woman for this period (assuming she were automatically released mid-way through the sentence) would be more than £14,000.⁴⁰ By contrast, a 12 month Community Order costs £2,800.⁴¹

³⁴ Sentencing Council (2012) Drug Offences Definitive Guideline p. 5

³⁵ Table B1, Ministry of Justice (2013) *Compendium of reoffending statistics and analysis* MoJ: London

³⁶ Radcliffe, P. & Hunter, G. (2013) *The development and impact of community services for women offenders; an evaluation* Nuffield: London

³⁷ <http://www.swmprobation.gov.uk/2012/12/18/womens-centres-reduce-reoffending/>

³⁸ ICM Opinion Poll for the Corston Coalition, (26-28 November 2010). Sample of 1000 adults 18+ in GB, by telephone omnibus

³⁹ Prison Reform Trust (2012) Bromley Briefings Prison Factfile – November 2012 PRT: London

⁴⁰ The average annual cost of a women’s prison place is £56,415.

⁴¹ new economics foundation (2012) *Women’s community services: A wise commission* London: nef

We would also question whether a fine is appropriate in instances where the offender was a) not motivated by personal gain and b) where financial difficulties were a factor in their offence. We note that the Category ranges for offences falling within category 5 culpability B and C (both Section 1 Fraud Act and Section 17 Theft Act) do not include Conditional Discharges as a sentencing option. Statistics show that more than 1,500 women (approximately 1 in 4 of all those sentenced for fraud or forgery offences in the magistrates court) were given a Conditional Discharge in 2012.⁴² **We recommend expanding these Category ranges to include Conditional Discharges so that the guideline reflects existing sentencing practice at this lower end, and encourages probation staff to make recommendations for this order where appropriate.** Including a conditional discharge in the category ranges would also give sentencers greater flexibility when sentencing individuals whose offending was less serious and where there were legitimate concerns that a fine would not be appropriate or risked pushing the offender (and her family) into financial difficulties (for example, where the offender is low-waged or dependent on benefits). In cases where a fine could be imposed the option to commute this into specified hours unpaid community work should be included.

Q14: Under the existing SGC guidelines the likely sentence for scenario A (single fraudulent transaction confidence fraud involving targeting of a vulnerable victim, loss of less than £20,000) would be medium community to 26 weeks custody. Do you consider the proposed sentence range is appropriate?

The proposed sentence range of 26 weeks' to 2 years' custody is significantly harsher than the existing guideline based on the inclusion of the two-stage assessment of harm caused to the victim at step one. Whilst we support the Council in its view that "*victim impact should be an integral component of the harm assessment*", and note the findings of the Council's research, we do not support the marked increase in sentence ranges, instead of a more nuanced balancing of offence impact with other factors, including sentence effectiveness. A 2006 ICM poll of 1,000 victims of crime found that two-thirds did not believe imprisonment reduced non-violent crime,⁴³ whilst a more recent YouGov poll amongst the general public revealed strong support for public health measures to tackle women's offending.⁴⁴ Data shows that women serving community orders are more likely to complete the order successfully and less likely to have it terminated early for further offending or for failing to comply with requirements.⁴⁵ We fear that more women may be imprisoned for longer for fraud offences as a result of the proposed guideline despite

⁴² Table S1.1A, Volume 1 – Magistrates' Courts; Ministry of Justice (2013) Criminal Justice Quarterly-December 2012

⁴³ 'Crime victims say jail doesn't work' SmartJustice August 2006

⁴⁴ <http://www.prisonreformtrust.org.uk/ProjectsResearch/Women>

⁴⁵ Table S5.33, Ministry of Justice (2012) *Statistics on women and the criminal justice system* MoJ: London

evidence that punishment in the community is more successful, less expensive and acceptable to public opinion.

Fraud and forgery offences committed by women have one of the lowest reoffending rates of all the offence types (7.3% compared to a 21.5% average for all offences).⁴⁶ This rate has reduced from 25.4%, with the average number of further offences committed by females convicted of fraud and forgery offences falling by 74.1%, since 2000.⁴⁷ This suggests that a combination of being caught and convicted and penalties within the existing sentencing framework have a significant deterrent effect on female offenders.

Q15: In scenario B, the risked loss moves the offence down a harm category. Does this lead to a proportionate sentence?

A sentence of between 26 weeks and two years custody is not proportionate to the offence outlined in scenario B. Indeed, it is not clear why, for the purposes of sentencing this scenario, it is the risked loss (£250,000) rather than actual loss (£5,000) that is used to determine which category of harm the offence falls within, particularly when at no point was it G's intention to defraud the lender. In such cases where the risked loss is significantly greater than any actual loss, the inclusion of a relevant aggravating factor to be taken into account at step two when the sentence starting point is calculated would result in a more proportionate sentence. In the case of G, this would have meant culpability B with harm of £5,000, falling into category 4. The sentence under the draft guideline would therefore be in the range of a medium level community order to one year's custody. In the absence of other aggravating factors, we would expect this case to be sentenced at the lower end of this range.

Section six: Benefit fraud

Q29: Do you agree with the proposed approach to the assessment of culpability?

We recommend reordering the culpability factors, so that sentencers have to start by considering those which fall within lesser culpability, and satisfy themselves that the offender does not fall within this band before moving on to consider the medium and, where relevant, high culpability factors.

We note that *"the factors are identical to...the fraud guideline other than the deletion of factors that relate to...number of victims...and vulnerable victims"* but question the omission of the *Limited awareness or understanding* culpability factor which features in the draft Fraud guideline. This should be reinstated.

⁴⁶ Table S5.22, Ibid.

⁴⁷ Table A3(f), Ministry of Justice (2013) *Reoffending of adults: results from the 2009 cohort* MoJ: London

With respect to involvement through coercion, intimidation or exploitation, we would welcome clarification as to whether this includes circumstances in which the offence was not part of a group activity, but rather the offender was involved by virtue of coercion, intimidation or exploitation taking place within the confines of a domestic relationship.

Finally, we recommend the inclusion of an additional factor denoting lesser culpability where the offender was motivated by exceptional family circumstances, for example where they have dependent children and/or are a single parent and there is evidence of financial hardship experienced through no fault of their own (see for instance the case study included at Scenario G). In light of ongoing changes to the benefits system (including the move towards Universal Credit,⁴⁸ the introduction of the under-occupation penalty and the increasing use of sanctions⁴⁹ that can cut off most/all of a person's income for a significant period), it is likely that the number of individuals and families who are dependent on benefits and experiencing financial difficulties will increase. We have seen the use of food banks increase exponentially as families already living in poverty contend with cost of living rises. This is not an excuse for committing benefit fraud, but in our view, where the offender can demonstrate that the offence was commissioned within the context of severe financial hardship and concern for their family, it is fair to take this into account at step one.

Q32: Are the financial ranges set at the appropriate level?

Whilst we note the inclusion of *legitimate entitlement to other benefits* at mitigation, we propose that account should be taken of the sum value of benefits that could have been claimed when determining the category of harm. In Scenario G, for example, the "*offender claimed £30,000 to which she was not entitled over two years, but could have legitimately claimed £20,000 in other benefits if she had notified the change.*" In these circumstances, there is a strong case for arguing that the amount which could legitimately have been obtained should be subtracted from the actual amount obtained, as the net sum reflects the true harm caused by the offence.

With respect to the financial ranges, it is not clear why there is such a disparity between the starting points in Categories 2 and 3. Given that, as the consultation states, "*it is unlikely that many benefit frauds will exceed the amount in category 1*" (less than £100,000) we recommend retaining the minimum and maximum amounts (£0-100,000) whilst creating a fifth category, to ensure a more even distribution of ranges and that starting points and sentence levels accurately reflect the amounts obtained.

In determining the starting point we recommend that the Guideline should include explicit reference to the consideration which should be given to both the custody and community threshold where appropriate, as does the Drug Offences Definitive Guideline. Given that

⁴⁸ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmworpen/576/57602.htm>

⁴⁹ http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_office-20130618b.htm

custody is the punishment of last resort, and should only be used where the offence is “so serious that neither a fine nor a community sentence can be justified”,⁵⁰ the court should be required to undertake a similar exercise when sentencing for fraud, bribery and money laundering offences. The following should therefore be inserted into each of the guidelines which comprise this consultation:

For appropriate ranges, consider the custody threshold as follows:

- Has the custody threshold been passed
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

As has been noted in response to Question 12, sentencing statistics show that first tier orders (absolute discharges, conditional discharges and fines) account for a significant proportion of all sentences handed down by the courts for fraud and forgery related offences and this is particularly true of social security offences. In 2012, 51% of women sentenced for social security offences by the magistrates’ court, and more than 1 in 6 of those sentenced in the Crown Court, were given a first tier order.⁵¹ Given that a significant number of all cases of social security offences which come before the court are judged not to meet the threshold for a community sentence, the following should also be inserted within the Benefit Fraud guideline.

For appropriate ranges, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

Q33: Do you agree with the proposed aggravating factors?

We note the inclusion of a new factor – *Length of time over which the offence was committed* - and query whether this should apply in cases involving claims which were originally legitimate and/or where it cannot be proven that information on, for example, a change of circumstances was deliberately withheld. The Crown Prosecution Service (CPS) charging standard for benefit and tax credit fraud cases states that the standard to be

⁵⁰ Section 152.2, Criminal Justice Act 2003

⁵¹ Table S1.1A, Volume 1 - Magistrates’ Court and Table S2.1A, Volume 2 - Crown Court; Ministry of Justice (2013) Criminal Justice Quarterly - December 2012

applied when charging offences under Section 112 of the Social Security Administration Act 1992 is that the defendant acted “knowingly”, and that “implied knowledge for the summary offences includes actual subjective knowledge proven by evidence *but it may also include “wilful blindness”*” (emphasis added).⁵² In cases where an offence has been committed over a significant period of time but *subjective* knowledge cannot be proven to the court, let alone deliberate intention to defraud, we question whether this factor should apply. An offence may continue because of a woman’s uncertainty about, for example, a relationship continuing and if subsequently prosecuted for failing to declare that a partner has moved in, it may not be fair to count the over-claim from the time he first moved in. Many women may not wish to be compelled into financial dependence on a man especially in light of evidence that abusive relationships are exacerbated by financial vulnerability.⁵³ We are concerned that the inclusion of *Failure to respond to previous warnings about behaviour* in the list of aggravating factors is too vaguely worded - for instance, who should the warnings have come from, and when? If the warnings related to behaviour which was not unlawful, or were based on hearsay should this be included as an aggravating factor? Are misplaced warnings (and sanctions) relating to legitimate benefit claims included? With the introduction of a new regime leading to an increase in the number of claimants being sanctioned, we would be particularly concerned if an individual’s benefit entitlement history were taken into consideration as part of this factor, particularly in light of evidence from the Public Accounts Committee that sanctions regimes risk “*unfairly penalising the most vulnerable claimants and are applied inconsistently.*”⁵⁴ We would welcome clarification on this point.

Q34: Do you agree with the proposed mitigating factors? If not, please specify which you would add or remove and why.

Research suggests that women’s offending is more likely to be driven by financial considerations than men’s, with more than a third of mothers in custody attributing their offending to a need to support their children, and single mothers being more likely to cite a lack of money as the cause of their offending than those who are married.⁵⁵ We agree that remorse should be a mitigating factor. However, individuals who are not in a position to make voluntary repayments should not be disadvantaged at mitigation as a result of their financial situation. **We recommend revising the wording of this factor to make it clear that voluntary repayment is not the only acceptable or legitimate sign of remorse, and is not a necessary condition for this mitigation factor.**

⁵² [http://www.cps.gov.uk/legal/v to z/welfare rural and health cases/](http://www.cps.gov.uk/legal/v%20to%20z/welfare_rural_and_health_cases/)

⁵³ Kelly, S. (2011) *The truth about cohabitation* Edinburgh: UoE

⁵⁴ House of Commons Committee of Public Accounts (2013) *Department for Work and Pensions: Responding to change in jobcentres* London: TSO

⁵⁵ Prison Reform Trust (2013) *Why focus on women in prison?* London: PRT

With rates of mental disorders such as depression and anxiety significantly higher amongst women in the criminal justice system than those in the general population, we welcome the inclusion of *Mental disorder or learning disability* in the list of mitigating factors. Some women with a mental disorder or learning disability may not have a formal diagnosis, whilst others may not disclose a diagnosis to their probation officer or defence solicitor for fear of being stigmatised or that this will count against them in court. Whilst the issue of sentencer training falls outside the scope of this consultation, it nonetheless provides an opportunity to call for better training and information for magistrates and judges on the identification and assessment of individuals with such difficulties, and the need to ensure that requirements attached to orders are appropriate and do not set the individual up to fail. In addition, sentencers should be reminded of their options with respect to the use of adjournments or intermediaries, or requests for further information or formal assessments, where appropriate.⁵⁶

As outlined in response to Question 11 (Fraud guideline), there are a number of omissions in the list of factors which should be addressed, including the absence of a factor or factors taking account of the role that coercion or control can play in women's offending (both of which are recognised as facets of domestic violence and abuse in the new cross-government definition),⁵⁷ and of involvement in reparative activities undertaken as part of efforts to make amends (particularly where the offender has shown remorse but is not in a position to make voluntary repayments).

Finally, we reiterate our earlier call on the Sentencing Council to strengthen the factor relating to sole or primary caring duties, to ensure that the sentencing court undertakes the balancing exercise it is required to by law, as specified by a 2001 Court of Appeal judgement⁵⁸ and more recently, in *R v Petherwick*.⁵⁹ Given that a significant proportion of women sentenced for benefit fraud will be mothers (with many having sole caring responsibilities) it is particularly important that the court is aware of an offender's family circumstances, the potential impacts of a sentence on any dependent children, and of its obligations under domestic and international legislation. See the discussion in the overview for further information.

Q35: Please provide your views on the inclusion of 'offender experiencing significant financial hardship or pressure at time fraud was committed due to exceptional circumstances' as a mitigating factor.

⁵⁶ McConnell, P. & Talbot, J. (2013) *Mental health and learning disabilities in the criminal courts: information for magistrates, district judges and court staff* London: PRT

⁵⁷ <https://www.gov.uk/domestic-violence-and-abuse>

⁵⁸ *R (on the application of P and Q) v Secretary of State for the Home Department* – [2001] EWCA Civ 1151, at para 79.

⁵⁹ *R v Petherwick* – [2012] EWCA Crim 2214

We support the inclusion of a factor recognising significant financial hardship or pressure as mitigation but question the need to qualify this with the phrase ‘exceptional circumstances’.

Whilst data on the financial circumstances of women sentenced for benefit fraud is not available, we suspect that many (particularly those whose offending falls at the lower end of the harm categories) would be able to evidence significant financial hardship or pressure at the time at which the offence was committed, and for some, this will have been the dominant factor in their offending.⁶⁰ More than half of offenders sentenced for benefit fraud are female (54%), compared to 6% for customs and excise offences, 10% for possessing, making or supplying articles offences, 17% for money laundering offences and 26% for section 1 fraud act offences.⁶¹ That the gender profile of benefit fraud sentencing is so different to the other offences covered by this consultation is perhaps indicative of the fragility of many women’s financial situation, whether as a result of parenting responsibilities, limited opportunities for well-paid secure employment that fits with childcare responsibilities, and the disproportionate impact of government welfare cuts.⁶²

If the intention is to recognise the impact that financial stress can have on an individual’s behaviour, it may be counter-productive to require that this was a result of ‘exceptional circumstances’ such as debt accrued following a bereavement (an example provided in the consultation) or due to changes to the way in which benefits are paid out, official error, job loss or overpayment. **Although we appreciate that the wording may be designed to capture the circumstances where ‘the straw broke the camel’s back’ rather than provide mitigation for hardship in every case, we recommend revising the wording of this factor to give it broader application.**

Q36: Would adjustment for aggravating and mitigating factors in the above scenarios lead to proportionate sentences?

The offences outlined in both scenarios indicate a single fraudulent transaction (not fraudulent from the outset) totalling £30,000 obtained fraudulently. Under the existing guideline for benefit fraud,⁶³ such offences would have fallen into a category attracting a sentence range of a community order-36 weeks custody, with a starting point of 12 weeks custody based on a £60,000 fraud. The guideline states that “*where the actual amount is smaller than the figure on which the starting point is based, that is likely to be one of the factors that will move the sentence within the range*”. Before aggravating or mitigating factors were taken into account, the sentences would likely have been somewhere between a community order and 6 weeks custody. In stark contrast, under the new proposed

⁶⁰ Bath, P. & Edgar, K. (2010) *Time is money – financial responsibility after prison* London: PRT

⁶¹ http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Statistics_Bulletin.pdf

⁶² <http://www.savethechildren.org.uk/2012-03/welfare-reforms-hit-poorer-working-women-pushing-250000-children-deeper-poverty>

⁶³ http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf

guideline, both scenarios would attract a starting point of 36 weeks custody before adjustment. This is a significant departure from the existing sentencing framework and one which we do not support, not least because the draft guideline provides no evidence of the need for more punitive response to fraud offences. We do not consider such a sentence proportionate.

Q38: Please give your views on the proposed sentence levels for these offences.

We reiterate the concerns raised earlier in response to Question 12. The proposed sentence levels, particularly in Table 1, are disproportionately focused on custodial sentencing options, with insufficient emphasis on community orders, despite benefit fraud being a non-violent offence, and the absence of an individual victim in most cases. The Criminal Justice Act 2003 states that a custodial sentence should only be used where the offence is “so serious that neither a fine nor a community sentence can be justified”.⁶⁴ A custodial sentence will rarely be justified in cases of benefit fraud, and is not appropriate where the value of the fraud is less than £10,000. **We recommend revising the ranges in categories 3 and 4 to reflect this.** In addition, we question the validity and appropriateness of a 3 month sentence for Section 112 offences, not least because short sentences cause maximum disruption to family, relationships, employment, and accommodation which are the factors which are most likely to prevent reoffending, so not surprisingly have the highest reoffending rates (62% compared to 51% for sentences of more than 12 months).⁶⁵ **We recommend revising the category ranges for Section 112 offences accordingly.**

The following statement should be inserted at step two, as it has been in the Drug Offences Definitive Guideline, in recognition of the appropriateness of community orders in sentencing non-violent offences, as they show better reoffending rates and allow the offender to make amends for their crime whilst looking after their children, maintaining their accommodation, continuing to work and obtaining the help they need to address the causes of their offending.

A community order with a relevant requirement/s as set out under the Criminal Justice Act 2003 is a proper alternative to a short or moderate length custodial sentence.

We also question the emphasis the tables place on fines when sentencing lower level benefit fraud offences. As discussed earlier, where there is evidence that the offence has been committed in the context of financial difficulties, a fine will not be appropriate and risks exacerbating the drivers to offending and the likelihood of failed repayments. To address this, and to ensure that the sentence levels accurately reflect existing sentencing practice, absolute and conditional discharges should be included in the category ranges and starting points at the lower end of both tables.

⁶⁴ Section 152 (2), Criminal Justice Act 2003

⁶⁵ Table A5(f) Ministry of Justice (2011) *Adult reconvictions: results from the 2009 cohort* London: MoJ

Whilst we welcome the opportunity to respond to this consultation, we do not believe the guideline, as currently drafted, provides a gender-sensitive framework for sentencing women offenders in accordance with the Bangkok Rules. The guideline's focus on custodial sentencing, at the expense of community alternatives, is not helpful. Community sentences deliver demonstrably lower reoffending rates, are cost-effective, and allow women to address the causes of their offending and make amends whilst looking after their children, maintaining housing and employment. To place undue emphasis on custodial sentences is out of step with Government,⁶⁶ and Parliament's,⁶⁷ commitment to reduce women's imprisonment.

Prison Reform Trust
October 2013

⁶⁶ Ministry of Justice (2013) *Strategic objectives for female offenders* MoJ: London

⁶⁷ House of Commons Justice Select Committee (2013) *Women offenders: after the Corston Report* London: HoC

Annex - List of consultation event attendees

Birmingham Tuesday 6th August

Anne Arnold (Chair), Sentencing Council
Michelle Crotty, Sentencing Council
Lissa Matthews, Sentencing Council
Jenny Earle, Prison Reform Trust
Ruby Moshenska, Prison Reform Trust
Joy Doal, Anawim women's centre
Natasha Ramrous, Anawim women's centre
Kilvinder Vigurs, Thames Valley Probation Trust
Jackie Russell, Women's Breakout
Rachel Halford, Women in Prison
Matina Marougka, Together for Mental Wellbeing
Lisa Boyack, Cyrenians
Charmaine Thackray, Cyrenians
Kaye Saginson, Cyrenians
Holly Taylor, Birmingham Women's Aid

London Thursday 5th September

Lissa Matthews (Chair), Sentencing Council
Ruth Pope, Sentencing Council
Catherin Mottram, Sentencing Council
Rebecca Nadin, Prison Reform Trust
Jenny Earle, Prison Reform Trust
Vivienne Hayes, Women's Resource Centre
Ellie Cumbo, Clinks
Rona Epstein, University of Coventry
Naomi Lumsdaine, Prisoners' Advice Service
Clare Laxton, Women's Aid
Elizabeth Andrews, Jagonari women's centre
Maria McNicholl, St Giles' Trust
Benjamin Burrows, Leigh Day & Co
Kate Egerton, Leigh Day & Co
Kirstie Douse, Release
Amy Frost, HMP Holloway
Mitch Egan, Women's Justice Taskforce
Karen Tipping, London Probation