

## **Prison Reform Trust response to the Sentencing Council Child cruelty guidelines consultation – September 2017**

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.

[www.prisonreformtrust.org.uk](http://www.prisonreformtrust.org.uk)

### **Introduction**

'Transforming Lives' is a three-year programme run by the Prison Reform Trust aimed at reducing women's imprisonment. The prison population has risen rapidly over the last two decades and the Prison Reform Trust is concerned that it continues to rise. The women's prison population has more than doubled since 1993; this year the women's prison population reached over 4,000 for the first time in almost 5 years<sup>1</sup> and in 2016 a total 8,447 women were sent to prison.<sup>2</sup>

The Sentencing Council's remit is to work within the statutory framework. However, as noted in our response to the Council's consultation on breach guidelines, the Prison Reform Trust believes the guidelines are a critical and influential aspect of the sentencing regime and more can be done to temper and restrain unnecessary use of imprisonment. It is also important that community orders, suspended sentence orders and the like are effective alternatives to imprisonment rather than alternative routes into prison, which means both that the conditions and requirements imposed should be appropriate and that the breach regime is flexible and not overly punitive.

### **Overarching issues and the context of the guideline**

The Prison Reform Trust's Transforming Lives programme seeks to:

- increase awareness of the links between women's experience of domestic abuse and their offending

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<sup>1</sup> Table 1.1, Ministry of Justice (2017) Offender management statistics quarterly: January to March 2017, London: Ministry of Justice

<sup>2</sup> Table 2.1, Ministry of Justice (2017) Offender management statistics quarterly: October to December 2016, London: Ministry of Justice

- promote non-custodial options for primary or sole carers (usually mothers of dependent children)
- strengthen the pathways into mental health and social care services for vulnerable women caught in the criminal justice system

In order to ensure fair and just sentencing for women, this response to the Sentencing Council consultation focuses on the implications for women involved in the criminal justice system. As the Council has identified more women than men are sentenced for offences of cruelty to a child; in 2016 56% of offenders sentenced for offences of cruelty to a child, 67% of offenders sentenced for offences of causing or allowing a child or vulnerable adult to die and 52% of causing or allowing a child or vulnerable adult to suffer serious physical harm were women.<sup>3</sup> It is also the case that most of the offenders are parents of the victims.

Although women make up only 5% of the total prison population, they account for a disproportionate number of self-harm incidents in prison. There has also been a disturbing rise in the number of deaths of women in prison – in 2016 there were 12 self-inflicted deaths which is highest recorded suicide rate in women’s prisons since 2004.<sup>4</sup> 53% of women in prison also reported experiencing emotional, physical or sexual abuse as a child compared to 27% of men and 57% of women report having been victims of domestic violence<sup>5</sup>.

Women are far more likely than men to be sole or primary carers of children - 90% of single parents are women.<sup>6</sup> This is reflected in the prison population; a major study found that two-thirds (66%) of imprisoned women are mothers of children under the age of 18. A third (34%) of these women had children under the age of five, and a further 40% had children aged between five and ten. About a fifth of mothers are lone parents prior to imprisonment. Only 5% of children with a mother in prison remain in the family home during their mother’s imprisonment, and only 9% are cared for by their fathers, whereas most children with an imprisoned father remain with their mother.<sup>7</sup>

Despite the Council noting that more women are sentenced for child cruelty offences, there is no equality impact identified in the consultation paper and an absence of statistics on gender in the statistical bulletin provided. We urge the Sentencing Council to undertake a gendered analysis of sentencing decisions and outcomes for these offences to ensure that an accurate profile of sentencing informs the development of this guideline, and to ensure that it does not reinforce any inadvertent bias in sentencing decisions.

As women are disproportionately primary or sole carers, and more women are sentenced under child cruelty offences, it is vital that the sentencing guidelines take sufficient account of gender differences in these cases. The guidelines should highlight to sentencers the barriers and stressors facing many mothers and impress on them the importance of incorporating these into the sentence given. Among the factors that should be considered:

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<sup>3</sup> Sentencing Council (2017) Child Cruelty Consultation, London: Sentencing Council

<sup>4</sup> Independent Advisory Panel on Deaths in Custody (IAP) [2017] Independent Advisory Panel on Deaths in Custody (IAP)

<sup>5</sup> Prison Reform Trust (2017) Prison: the facts, Bromley Briefings Summer 2017, London: Prison Reform Trust

<sup>6</sup> Table 1, ONS (2016) Families and households 2016, London: ONS

<sup>7</sup> Prison Reform Trust (2015) Sentencing of Mothers, London: Prison Reform Trust

- Single parent families are almost twice as likely to be in poverty than couple families<sup>8</sup> - safety net benefits provide less than 60% of the minimum income needed for a decent standard of living for a single parent with one child.<sup>9</sup> Given that as previously mentioned single parents are predominately women, they are most likely to take the brunt of these economic constraints.
- Because of this, mothers can struggle to make ends meet and are more likely to be in debt. With rising living costs including food, housing, heating and transport it can mean struggling to adequately feed themselves and their children, provide a decent home for them, and transport them to school.
- The employment barriers women face, particularly for single mothers - more women are in lower skilled and lower paid jobs. Because of women's unequal caring roles for dependent children and the price of childcare, they often must leave work or work part-time which means they are often on lower salaries and have less progression opportunities or have no income at all – 31% of single mothers said they would work more hours if they had good quality and accessible childcare<sup>10</sup> and 54,000 women are forced to leave their job every year after becoming a mother.<sup>11</sup>
- Mothers are primarily or solely responsible for all everyday caring duties for their children, often without a break. This can be both physically and mentally exhausting, particularly if they have multiple children, their children are younger and if there is not another parent to share the responsibility - less than 10% of single parents have shared care arrangements for their children. As well as an exhausting experience, this can be incredibly isolating.
- A combination of the exhaustion and isolation with the stress of financial demands and poor employment opportunities can put a strain on a mother's mental health. Marginalised families will lack access to support services that could help them cope. Added stress can come from the high demands placed on mothers to meet what society's expectations of motherhood.
- If they are a carer to a child with a developmental disability or learning difficulty, whilst on the one hand this is identified as an aggravating factor for the offence because the victim is particularly vulnerable, studies have shown that many mothers of children with developmental disabilities are known to experience high levels of stress, and compromised mental health.<sup>12</sup>
- Women offenders have a disproportionate history of victimisation as a child. One in four women also experience domestic violence.<sup>13</sup> The Council has identified domestic violence as a mitigating factor if it is relevant to the offence. However, where there may not have been a physically abusive relationship, the coercive nature of some relationships can restrict a women's freedom to act. Also, if the offender was previously victim of an abusive partner this should continue to be considered as relevant even where the abuse is not current, as it will likely have had long-lasting consequences on her including impacts on self-esteem and fear. Victims of domestic violence

<sup>8</sup> Table 4.14ts, Department for Work and Pensions (DWP) [2017] Households Below Average Income: 1994/95 to 2015/16, London: DWP

<sup>9</sup> Davis, A. *et al* (2014) A minimum income standard for the UK in 2014, York: Joseph Rowntree Foundation

<sup>10</sup> Huskinson, T. *et al.* (2014). Childcare and early years survey of parents 2012/13, London: Department for Education

<sup>11</sup> Fawcett Society. [Close the Gender Pay Gap](#), London: Fawcett Society

<sup>12</sup> Bourke-Taylor, H. *et al.* (2012) Predicting mental health among mothers of school-aged children with developmental disabilities. *Research in Developmental Disabilities* 33 (6), pp. 1732-1740

<sup>13</sup> ONS (2015) Crime Survey of England and Wales, 2013/14, London: ONS

have been shown to develop post-traumatic stress which includes a range of symptoms: agitation and anxiety, depression and panic attacks.<sup>14</sup> The Prison Reform Trust has invited a representative from the Sentencing Council to join us at our roundtable on abuse and offending which will provide a good opportunity to work with the Council to ensure that their history of victimisation is appropriately considered when sentencing women.

- Where drugs and alcohol are involved, whilst this has been identified as an aggravating factor, help and support from specialists with their addiction would yield greater results than using the criminal justice system which is likely to exacerbate these problems - nearly half of women report needing help with a drug problem on entry to prison yet 31% reported that it was easy to get drugs in their prison.<sup>15</sup>

Gender-informed context is necessary for equal treatment in accordance with UN Bangkok Rules (The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders).<sup>16</sup> As is also emphasised in the Judicial College's Equal Treatment Bench Book that "Fair treatment does not mean treating everyone in the same way" and cautions against both stereotyping and overlooking disadvantage.<sup>17</sup> Particularly relevant is the chapter on Gender Equality which highlights women's continuing disadvantage in many areas of public and private life. We recommend that the Sentencing Council consults with the Judicial College in order to incorporate the issues and social context highlighted in the Bench Book into the guidelines.

The Government has also acknowledged the need for recalibration of criminal justice responses. This is particularly true for women, recognising that many female offenders are often vulnerable members of society. Gender-informed approaches are more effective in helping women to address the underlying issues to their offending and turn their lives around. We welcome the progress on this to date, such as recognition of coercion and exploitation reducing culpability in the new Theft Offences Guideline, and further emphasis on the need to consider primary caring responsibilities. Which we are also pleased to see included in this guideline with addition of Step Five in the sentencing process.

The Prison Reform Trust welcomed the recent judgement in *R. v Smith (Kathryn Helen)* Court of Appeal – which saw the appellant's sentence length for causing the death of a child or vulnerable adult reduced from a minimum term of 24 years to 19 years - and hope to see it reflected in the new guidelines and used as a basis of good practice for future sentencing practices of child cruelty offences. The original sentence was found to have put too much weight on aggravating factors and did not sufficiently take into consideration the mitigating factors. Lord Thomas concluded:

*"In sentencing in such cases where the parent was young and, as in the present case, young in terms of immaturity, ordinarily in the absence of unusual aggravating features accompanied by a lack of mitigating features, a minimum term in excess of 20 years would require very serious aggravating features and very careful reflection before such a sentence was imposed."*<sup>18</sup>

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<sup>14</sup> Refuge. [Effects of domestic violence on women](#), London: Refuge

<sup>15</sup> Prison Reform Trust (2016) Bromley Briefings Prison Factfile Autumn 2016, London: Prison Reform Trust

<sup>16</sup> Penal Reform International (2013) UN Bangkok Rules on Women Offenders and Prisoners, London: Penal Reform International

<sup>17</sup> Judicial College (2013) Equal Treatment Bench Book, London: Judicial College

<sup>18</sup> *R. v Smith (Kathryn Helen)* Court of Appeal [2017] EWCA Crim 1174

The Council has also not assessed whether these new guidelines will have an equality impact on low-income families or black and minority ethnic (BAME) communities. In the statistical bulletin, there is no data on the ethnic or economic breakdown of previous child cruelty convictions. The information provided above on the barriers mothers can face suggest that there will be an unequal impact not only on women but particularly on women from poorer backgrounds. This is also likely to have a disproportionate effect on BAME women; the poverty rate has been consistently lowest among White people with the percentage of Black people in poverty is double that White people and for the last five years over half of Bangladeshi people in the UK have been in poverty.<sup>19</sup> Black women are more likely to be sole parents.<sup>20</sup> We recommend further research on the ethnicity and financial background of those convicted of child cruelty offences to understand how those factors intersect with gender.

## **Section Two: Cruelty to a child and Causing or allowing a child to die or suffer serious physical harm**

### **Culpability factors**

We welcome the Council's recognition that being a victim of domestic violence can be a factor that reduces culpability for failing to protect a child from cruelty. We are also pleased to see mental disorder, learning disability and a lack of maturity as factors that can also reduce culpability.

However, we disagree with the proposed guideline under section three, that in the absence of any proven domestic violence, mental disorder or learning disability that an offender who fails to protect a child from cruelty should be classed as the same level of culpability as an offender who actually inflicts the cruelty. We also disagree with the proposed guideline under section 4, that allowing the harm/death of a child should be of the same level of culpability as actually causing it. Such guidelines are likely to disproportionately affect women. As is already the case demonstrated by the statistics provided by the Sentencing Council under the section 'Equality Impact'; the disproportion of women sentenced compared to men increases further to 67% for the offence of causing or allowing a child or vulnerable adult to die.<sup>21</sup>

There are concerns for equal and fair sentencing because:

- The culpability of committing an offence should be different to an omission.
- The wider context of the mother's circumstances in which child cruelty offences occur needs to be considered. Particular consideration must be given to factors that may prevent mothers from protecting their child from harm including coercive relationships (even where domestic violence has not been proven) and also the effect of previous abusive relationships even where not with a current/cohabiting partner. Though the relationship with the person who inflicts the abuse may not be a physically violent one, the nature of the relationship may still restrict her capacity to intervene.

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<sup>19</sup> DWP (2017) Households Below Average Income, London: DWP

<sup>20</sup> Prison Reform Trust (2017) Counted Out: Black, Asian and minority ethnic women in the criminal justice system, London: Prison Reform Trust

<sup>21</sup> Sentencing Council (2017) Child Cruelty Consultation, London: Sentencing Council

- For a person to be convicted of causing or allowing a child to die or suffer serious physical harm, they must be a member of the same household as the child. However, women are more likely to be primary carers and live in the same household as the child and have frequent contact with them than the father meaning they are more likely to be captured under this offence than vice versa. A father who does not live in the same household as the child appears to automatically then have less of a responsibility for protecting their child from suffering serious harm and are less likely to face prosecution under this offence.
- Under the proposed new offence, the prosecution would not need to prove whether the offender is guilty of causing or allowing the child's harm or death – only that someone in the household caused it but not specifically who. This raises significant concerns about a mother's right to fair trial and her presumption of innocence which every person should be entitled to.

### **Harm factors**

Under section three: cruelty to a child, in the most serious category of harm, category 1, the Council has included illnesses contracted due to unsanitary surroundings. This is likely to disproportionately affect poorer families. Unsanitary conditions need to be understood in the context of increasing poverty and economic marginalisation, particularly for single mothers. Recent cutbacks in welfare and social housing, as well as benefit and tax reforms has lowered the standard of living for many poor families. More than one million children in England live in bad housing – trapped in homes that are dilapidated, damp or dangerous.<sup>22</sup> We do not agree that it is appropriate for a parent to be punished or criminalised for unsanitary conditions that may not even be within their control. A criminal justice response that does not solve the root cause of the problem and we appreciate requires a response beyond the remit of this consultation. The responsibility for cases involving unsanitary conditions should lie with the local authority and other support agencies to provide housing and financial support as well as potentially any mental health care or education about self-care and hygiene in order to improve the living conditions for children and their guardians and prevent further illness.

Further under section three, category 3 of the harm assessment covers cases where there has been little or no harm (psychological or physical). If there is no harm done to the child, a criminal sanction is an inappropriate response. Whilst the offender's actions may have had the potential to cause harm, in the first instance intervention should be from social services and other support agencies to provide parenting support and necessary interventions to prevent escalation whilst monitoring to ensure the child's safety. Criminalisation of a parent can cause real harm to a child and is more likely to exacerbate problems and therefore should be treated as a last resort.

### **Sentence levels**

Short sentences (of 12 months or less) are an ineffective means of dealing with criminal offences. Short prison sentences disrupt community and family ties, making contact difficult to maintain particularly for women who are held so much further away from their homes, as well as disrupting employment and causing future difficulty with

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<sup>22</sup> Shelter (2006) *Chance of a lifetime: The impact of bad housing on children's lives*, London: Shelter

housing, leaving a lasting detrimental impact disproportionate to the offence. They also have a poor record of rehabilitation (particularly in the penal system's current crisis situation). 61% of women serving custodial sentences of less than 12 months reoffend within one year of prison.<sup>23</sup>

Community solutions are proven to be more effective at preventing reoffending than short custodial sentences. People serving community sentences have a far lower reoffending rate but despite this, the number of community sentences for women has fallen by nearly half in the last decade.<sup>24</sup> Short sentences and community orders should not be considered to be within the same range as short sentences as they can have a far more damaging impact disproportionate to the offence.

With that said, when a community order is issued it must come with appropriate conditions that the offender is able to realistically meet and with activities relevant to their offence that are likely to reduce reoffending and improve the circumstances that led to the offence for example parenting support. Particularly where an offender is a primary or sole carer, it must be viable that to meet their conditions whilst simultaneously meeting the caring duties (and potential employment as well) so they do not get recalled unnecessarily and pulled further into the criminal justice system negating the original purpose of issuing a community order over a custodial one in the first place.

### **Mitigating and aggravating Factors**

We would like to take this chance to remind the Sentencing Council to take a gender sensitive approach to mitigating and aggravating factors and fully consider a mother's circumstances, as discussed above, when deciding the appropriate sentence.

Also, when considering failure to comply with current court orders, offences committed whilst on licence, and failure to respond to warnings as aggravating factors, sentencers need to be aware of the context of those orders/warnings. How viable were they in the first place? Most women are sole or primary carers, were they able to meet the demands of their orders whilst also meeting their duties as sole/primary carers? There has consistently been a high number of women recalled to prison over the past year.<sup>25</sup>

### **Additional step five – sentencing parents**

We welcome the inclusion of this additional step to consider the impact of sentencing a parent on children. We are pleased to see that the judgement in R v Petherick has been reflected in the guideline. Every child has a right to family life and by extension a relationship with their mother wherever possible. Any decision that will affect this right should not be done so lightly and should be in the best interests of the child and only after careful consideration of the effect this will have on them.

It is vitally important that sentencers carefully consider the impact on children of sentencing their parents, particularly their mother. As referred to above, only a

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<sup>23</sup> Prison Reform Trust (2016) Bromley Briefings Factfile Autumn 2016, London: Prison Reform Trust

<sup>24</sup> Prison Reform Trust (2017) Prison: the facts, Bromley Briefings Summer 2017, London: Prison Reform Trust

<sup>25</sup> Table 1.1, Ministry of Justice (2017) Offender management statistics quarterly: January to March 2017, London: Ministry of Justice

minority of children whose mothers are sentenced to prison will remain in the family home whereas if a father is imprisoned, many children will remain with their mother.

Imprisonment of a mother has far reaching consequences for her family. Prisoners' families experience financial, housing, emotional and health problems and increased stigmatisation (particularly for children) as a result of the decision to imprison. For example, one third of women lose their home and possessions whilst in prison.<sup>26</sup> Imprisonment also has a lasting impact on women's capacity to find employment. In 2011-2012 less than one in ten (8.7%) women had a successful employment outcome on release, compared to 27.3 % of men.<sup>27</sup> This has long-lasting impacts on a mother and her family's ability to recover from imprisonment and increases the likelihood of economic deprivation and marginalisation of both her and her children.

As well as punishing the mother, their imprisonment can be disproportionately punitive for the punishment effect it has on their children. Maternal imprisonment has also been linked to detrimental effects on a child's mental and emotional well-being; including poorer school-performance and an increased likelihood of anti-social behaviour. When not necessary for the safety of their children and society, wherever possible imprisonment of mothers should be avoided.

### **Case study A**

In such a case, the defendant would fall into the lowest sentencing range and we believe the defendant should be issued with a conditional discharge.

The case is the lowest category of harm (category 3) as there was no physical, psychological or developmental harm caused to the children.

The mitigating factors relevant to this case are; the defendant is the sole carer for two dependent children, he has no previous convictions, he was remorseful, evidence was provided of his good character and social services are also satisfied that he is an adequate parent, he pleaded guilty at the first opportunity and was co-operative with the investigation.

There do not appear to be any aggravating factors to consider.

More harm would be done by sentencing him to either a custodial or community sentence. If given a custodial sentence this would be disproportionately punitive as it would further punish his children as well as the offender. As the sole carer, it is likely his children would be put into care or live with another relative causing disruption to their lives. Also as a single parent who works, which is the cause of his offence in the first place, setting 'rehabilitative' activities for his community order would be counter-productive as he would be unlikely to realistically meet them without putting further strain on his ability to both care for his children effectively and work. The offender is remorseful for his actions and was distressed when his children were removed from his care and is otherwise considered a capable father. Further intervention from the criminal justice system would provide no further purpose and likely cause more harm to both the children and the father's ability to parent effectively.

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<sup>26</sup> Prison Reform Trust (2015) Sentencing of Mothers, London: Prison Reform Trust

<sup>27</sup> *ibid*



## **Case study B**

The culpability of the defendant would fall into category C (the lowest category) because the defendant was a victim of domestic violence and frightened of her partner. She was also just 18 years old and psychiatry reports were produced that suggest a lack of maturity. The level of harm in this case would fall into the highest category (category 1) because the child died from the injuries he sustained. This would put the case into the sentence range 1-4 years, with a starting point of 2 years.

In addition to her young age and her victimisation, additional mitigating factors include that she had no previous convictions and evidence was provided of her good character.

The only aggravating factor to consider is that the defendant noticed bruising on her child prior to the incident which resulted in his death, and although she confronted her partner about it (though he denied causing it), there is no mention of her seeking further outside assistance, medical or otherwise. However, this should be considered within the context of an abusive relationship. Her partner had been physically violent to her and there are text messages attesting to the fact that she was scared of him. There are many barriers that prevent women from being able to leave abusive relationships or seek help, including (but not limited to); isolation, fear, threats, physical danger, shame or a lack of financial means. These potential barriers combined with her 'naivety' about the reality of the abuse, mean she lacked the maturity and knowledge to 'foresee' what a 'reasonable' person might and what actions and resources were available to her to prevent escalation of the abuse and ultimately the child's death. This then reduces the weight that should be given to her not seeking assistance as an aggravating factor.

Although her sentence would fall into the sentence range 1-4 years, given the history of abuse and her age, she should be given the lowest possible sentence within that range and a conditional discharge. Sentencing the defendant to immediate imprisonment would serve no purpose.

## **Failing to protect a girl from the risk of female genital mutilation**

### **Context**

The reasons why some women may allow or fail to protect a girl from female genital mutilation (FGM) can be complex. Some communities have a long history of practicing FGM and some members of the community claim it is an important part of their culture that should continue in order to protect their cultural identity. The continued practice of FGM is also rooted in old, traditional perceptions of gender and beliefs about what a women's role should be. For some, FGM is a rite of passage into womanhood and even a condition of marriage stemming from misguided beliefs that it protects a women's 'purity' and prevents 'deviant' sexual behaviour and infidelity. To women and girls of communities where girls are expected to have FGM, it can become the social norm and as such unquestioned by them. There can also be huge amounts of pressure from their community and family members to ensure their daughters have FGM. The social pressure to conform and the fear of being rejected by the community can make it feel like there is no other choice, making it very difficult for women and girls to challenge these traditions and the mentality behind FGM.<sup>28</sup> Speaking out within communities affected by FGM can still carry risks, and requires

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<sup>28</sup> World Health Organisation (WHO) [2017] Female Genital Mutilation: Fact sheet

sensitivity, safeguards and a long-term approach not an automatic assumption that women in communities affected by FGM should be able to protect a girl from it on their own without more wholistic support. Effective intervention requires integrated support that involves the whole community, local authorities, health professionals, and specialised support organisations.

Women who are more likely to be caught under this offence are also more likely to be foreign nationals. The collaborative Female Genital Mutilation Initiative that ran from 2010 to 2016, found that it was often the case that 'newly arrived communities' (refugees and asylum seekers; individuals, in particular women, who arrive through spousal visas; recent European migrants whose country of origin is an FGM-affected country) had limited or no knowledge of UK legislation on FGM, limited awareness of support services available, possible language barriers and sometimes had stronger support for FGM. Some Community Based Organisations also found similar needs among isolated communities which had limited community networks.<sup>29</sup> Newly arrived communities are very transient and mobile, particularly those being dispersed.<sup>30</sup> Constant relocation can disrupt interventions making it more difficult to work with communities to prevent FGM, provide individuals with the necessary support and ensure they are fully informed of the legal, physical and psychological consequences of FGM.

Foreign national women are over-represented in the women's prison population.<sup>31</sup> The experience of the criminal justice process and prison can be incredibly traumatising and damaging for foreign national women. For fair and just sentencing, the guidelines need to ensure that when sentencing foreign national women, sentencers have a full, accurate and culturally informed account of the offence and the circumstances leading up to it. They also need to ensure that they consider the extra disadvantage foreign national women and minority ethnic women can face in the criminal justice system, their specific needs and experience of prison, and the often disproportionately punishing effect prison can have on them:

- Most foreign national women in prison are first time offenders<sup>32</sup> and so they find themselves caught up in a system of which they have very little knowledge, even for those who have lived in the UK for several years and have some familiarity with British culture. The process is shocking and confusing to them and has been described like trying to navigate a maze.<sup>33</sup>
- Being unfamiliar with the criminal justice system in the UK – the proceedings and the people involved - it can be difficult to know who to trust. Especially if they have experienced or witnessed abuse by those in authority in their country of origin, foreign national women are more likely to be wary of authority in the UK and even their solicitors.<sup>34</sup>
- Culture also has a strong influence on their perceptions of themselves and what they should and should not say in a public setting. This also impacts on what they disclose in critical interviews with police, immigration and the courts.
- The problems foreign national women experience in the court process and the prison system can be exacerbated by potential language barriers.

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<sup>29</sup> Khalifa, S. and Brown, E. (2016) Communities Tackling FGM in the UK: Best Practice Guide, London: The Tackling Female Genital Mutilation Initiative

<sup>30</sup> *ibid*

<sup>31</sup> Prison Reform Trust (2012) No Way Out, London: Prison Reform Trust

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

- Prison can already be a stressful and fearful experience, but for foreign national women worries over their immigration status and fears they will be removed from the UK (whether actually the case or perceived by them) can exacerbate the psychological strain of prison and contribute to feelings of isolation, depression and confusion.
- Women from minority ethnic groups and foreign national women report experiencing racial and/or religious discrimination in prison by both other prisoners and staff, and feeling less safe in custody, as well as having less access to support services.<sup>35</sup>
- Women from minority ethnic groups may face greater stigmatisation, shame and isolation for them and their families which has lasting impacts beyond the sentence itself.
- Foreign national women and women from communities affected by FGM are more likely than UK nationals to have a number of dependent children as they come from countries where it is the cultural norm to have a number of children.<sup>36</sup> Particularly in cases of FGM and failing to protect a girl from FGM, the father is also likely to be a co-defendant, risking that the children will be separated from both their parents. For foreign national women, there is added difficulties in arranging care for their children and maintaining contact especially if other family members are not in the UK.
- There is a high likelihood that mothers who grew up in a community affected by FGM, and then fail to protect their daughter from it were also victims of FGM themselves. As we recommend with any form of violence against women, the sentencing guidelines must take full account of a person's history of victimisation and how that links to their actions (or lack of).

Legal messages designed to tackle FGM can risk sounding too punitive and threatening.<sup>37</sup> This isolates communities and undermines attempts to build trust between communities affected by FGM and the organisations and professionals aiming to prevent it. Trust and collaboration with communities is essential for preventative strategies to work effectively. There needs to be a balance struck between strong messaging while avoiding harm to the girls, women and communities that in the end are the ones we are seeking to protect. This is especially relevant for women who were victims of FGM themselves who will be criminalised by this offence and also their dependent children – it could do greater harm to them and the community and further isolate them. Interventions for FGM should be focused on working with younger women to empower them to speak out and make decisions, enabling them to take proactive steps to prevent FGM. Where community-based preventive work of this kind is taking place, rejection of FGM has increased<sup>38</sup> and will be more effective than a punitive criminal justice response.

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<sup>35</sup> Prison Reform Trust (2017) Counted Out, London: Prison Reform Trust

<sup>36</sup> Prison Reform Trust (2012) No Way Out, London: Prison Reform Trust

<sup>37</sup> Khalifa, S. and Brown, E. (2016) Communities Tackling FGM in the UK: Best Practice Guide, London: The Tackling Female Genital Mutilation Initiative

<sup>38</sup> Options UK (2013) Tackling Female Genital Mutilation in the UK: What works in community-based prevention work, London: The Tackling Female Genital Mutilation Initiative

## **Culpability**

We believe the cultural context to be relevant when assessing the culpability of someone prosecuted for failing to protect a girl from the risk of female genital mutilation, particularly when it is the mother accused of failing to protect her daughter. As previously mentioned FGM, stems from a deep-rooted perception of gender roles. If the mother has grown up in a culture that perceives women and girls in this way and practices FGM, then these strict gendered beliefs and family dynamics will also restrict a mother's ability to protect her daughter from FGM especially if the father or community support it. Some women may have internalised these beliefs themselves which can affect the confidence they have in their own ability to intervene and stop the FGM from taking place. The pressure that can be exerted from communities and the fear of rejection can be very powerful. This can be particularly so for women who belong to a migrant community that is more isolated from larger society and may lack support networks for women who want to stop their daughter undergoing FGM.

In this context determining 'coercion, intimidation or exploitation' for the purposes of meeting the lesser culpability categories becomes a blurred boundary. Even where there may not appear to be evidence of overt coercion and intimidation, family dynamics and gender-power relations can prevent women from being able to act to prevent FGM. We cannot overestimate a person's ability to prevent FGM and without a more informed understanding of the offender's circumstances and culture, what outside observer's might see as reasonable steps and a failure to protect may not have seemed within the reach of the offender.

Furthermore, as in the case study provided by the Council, many women who may likely fall under this offence were once a victim of FGM themselves – their own victim status cannot be forgotten. FGM has been associated with a number of possible future psychological problems including depression, anxiety, post-traumatic stress disorder and low self-esteem.<sup>39</sup> They themselves may never have been given the support they needed to process their experience of having undergone FGM. The culpability of someone who fails to protect a girl from the risk of FGM and those that actively perform or seek out FGM for a girl is very different.

## **Sentence levels**

Regarding the sentence ranges, we would like to reiterate that short custodial sentences of less than 12 months are ineffective and should be avoided. Community orders and custodial sentences should not be considered as part of the same sentence range as they can have greatly differing punitive effects and short custodial sentences can have long-lasting consequences for both the offender and their family beyond what is proportionate to the offence. Where the circumstances of an offence are considered potentially appropriate for a community order, the community order should be given over a short custodial sentence.

## **Case study C**

From the information provided, in this case the culpability of the defendant (D) would likely fall into category A because after giving birth, D's midwife explained the legal and physical consequences of allowing FGM on her daughter (V) and over the

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<sup>39</sup> World Health Organisation (WHO) [2017] Female Genital Mutilation: Fact sheet

following 6 years an outreach programme visited the family three times to reiterate this. D also told the midwife at the time of her daughter's birth that she and her husband were planning on having FGM performed on her daughter once she was older and the daughter was taken on holiday where it was undertaken which implies that there was 'significant planning'. There is no mention in the case study of any other factors that would lower D's culpability to another category such as domestic violence, mental disorder, etc. However, whilst no specific acts of coercion and intimidation are mentioned, it states that D knew her husband and his parents were strongly supportive of FGM which calls into question the amount of family and community pressure D was under and how much capacity she had to protect her daughter from FGM. This something we would like to see considered in more depth future cases of failing to protect a girl from risk of FGM. The family was also only visited three times over 6 years – on average one visit every two years. Research and evaluation of community programmes designed to tackle FGM suggest more regular and continuous intervention with the community is needed for more positive results.

In terms of harm, as the Council has already highlighted, all FGM causes serious harm to girls and the victim may suffer future psychosexual issues. In this case V has recovered emotionally and will still be able to have a normal pregnancy and birth if she wishes therefore we would place the harm caused in category 2.

This would put D into the sentence range 2 – 5 years' custody with a starting point of 3 years' custody. Failing to seek medical help after her daughter's return and realising she underwent FGM would be a potential aggravating factor. However, D has no previous convictions and is the primary carer for her 6-year-old daughter and presumably sons too by the reference to V's brothers (although we don't know how many and what age). There is a lack information provided to assess D's character and co-operation with investigation to assess whether there are any other mitigating factors. Although D knew her husband and his parents were supportive of FGM when he took their daughter on holiday to visit his parents, D was not actually present for the procedure. D's status as a victim of FGM herself should also be taken into account.

V has returned to the family home and as such D should be given a suspended sentence of 2 years; as a primary carer of at least one young dependant and with the potential conviction and imprisonment of the father, the family is at risk of being broken up and the children transferred to other family members or going to care (possibly leading to the separation of the siblings as is often the case when multiple children from the same family go into care). This will cause great upheaval and be potentially harmful to the sons and could cause further harm to V in both the long and short term.

### **Equality Impact**

We anticipate this offence could have an unfair impact on mothers from migrant and isolated ethnic minority communities and foreign national women, if appropriate consideration is not given to the context of their lives and understanding of the community and cultural pressures facing them.

We recommend more culturally-informed and gender-responsive education and training for sentencers on FGM. To this we suggest consulting with an organisation who specialises in working with communities who practice FGM to gain a better understanding of their cultures and motivations to help come up with an effective integrated response that best protects girls from FGM and ensures appropriate

convictions and fair sentences and enables sentencers to understand and challenge their own unconscious biases. We recommend working in partnership with Hibiscus Initiatives, who have specialist expertise in working with marginalised Black and Minority Ethnic Foreign National and migrant offenders and detainees in custody, detention and the community