

Prison Reform Trust response to the Sentencing Council Expanded Explanations in Sentencing Guidelines consultation – May 2019

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
- promote equality and human rights in the criminal justice system.

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Question 4: What are your views on the inclusion of the proposed additional material on fines, community orders and custodial sentences within all relevant guidelines?

We agree with the inclusion of the proposed material, subject to the revisions below in question 5.

Question 5: Do you agree that the Imposition guideline should be amended to include a link to forthcoming guidance on when to order a PSR?

We are concerned about the direction in bullet point 9 of the community orders table (Annex A, page 3) that “Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case”. As the table below highlights, there has been a dramatic shift in recent years away from the use of Standard PSRs towards oral Fast Delivery PSRs, even in the Crown Court. We are concerned that practice in the preparation of pre-sentence reports may have developed in a way that prizes speed over quality without sufficient regard to the circumstances where an unjust or inappropriate sentence may result.

We also note that there has been an overall decline in the use of PSRs of all types between 2008 and 2018. Research suggests that the falling number of PSRs may be linked to a decline in community sentencing.¹ We were particularly concerned to read in the recent HM Inspectorate of Probation report on the post-release supervision of

¹ Centre for Justice Innovation (2018) The changing use of pre-sentence reports, London: CJI

short sentenced prisoners that pre-sentence reports had been completed in less than a quarter of inspected cases.² It is imperative that the reasons for the underuse of PSRs are understood and that the Sentencing Council does not unwittingly contribute to this trend through the wording of its guidance.

We recommend that the community sentence section of the imposition guideline (Annex A, page 3) and the inclusion of the link to the guidance as a separate bullet point at the end of the section is revised. The current draft is misleading, drawing attention to circumstances where a PSR maybe unnecessary rather than placing this within the wider context of the appropriate use of PSRs when considering a community order. This is in contrast to the drafting of the imposition guidance on custodial sentences (Annex A, page 5), where the link to the guidance is more appropriately placed. Therefore, in the community sentence section of the imposition guideline, the link to the further guidance should run on as a final sentence to bullet point 9 rather than be included as a separate bullet point at the end of the section.

Liaison and diversion services

Liaison and diversion services can improve both the quality and timeliness of information available to sentencers. Therefore, specific reference should be made in these guidelines to liaison and diversion services and their role in providing the courts with detailed information about a defendant's mental health problems, learning disability, autism, substance abuse and/or communication requirements. Reports from liaison and diversion services should be integral to a PSR, or a negative return noted. Community Sentence Treatment Requirement protocol (CSTR) requires same day PSRs wherever possible to move swiftly towards sentencing and treatment.³ Where appropriate, Section 10 of the Magistrates' Court Act enables a Magistrates' Court to adjourn a case after conviction so that enquiries can be made and/or to determine the most suitable method of dealing with the offender.

Primary carers

There should a be a presumption in favour of an adjournment for the preparation of a full PSR whenever a defendant has dependent children, to enable the careful consideration both of whether custody is an appropriate and, where it is not, of the ways in which a community penalty should be tailored to improve the chances of it being completed successfully. The Ministry of Justice/HMPPS Women's Policy Framework (21.12.2018) specifies that PSRs "should represent the personal circumstances of each woman, taking into account their specific needs (such as impact on care and safeguarding issues)". This may not be possible without an adjournment. The National Probation Service has instructed in 'Pre-Sentence Reports: Interim Guidance on Report Formats' (March 2019) that: 'For those at risk of custody and who are primary / main carers with responsibilities for children/dependents, an adjournment [for a Pre-Sentence Report] is considered *mandatory* to ensure that: i) The impact of a custodial sentence on dependents is considered ii) Care plans are developed and in place with Children's Services or Adult Safeguarding Services.' The impact of maternal imprisonment can be particularly traumatic for dependent children of foreign national women.⁴

² <https://www.justiceinspectorates.gov.uk/hmiprobation/inspections/prs/>

³ <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/community-sentence-treatment-requirement-protocool.pdf>

⁴ Prison Reform Trust (2018) Still No Way Out: Foreign national women and trafficked women in the criminal justice system, London: PRT

Domestic abuse

Nearly 60% of women in prison report that they are victims of domestic abuse.⁵ The true figure is likely to be higher. There are strong links between women's experience of domestic abuse and their offending.⁶ We recommend that the Council takes the opportunity here to help ensure sentencers take account of the particular vulnerabilities of women offenders affected by domestic abuse and the potentially damaging impact of imprisonment on them and their families. The Prison Reform Trust has recommended that:⁷

- The police, prosecutors, probation services and the courts should adopt the practice of routine enquiry into women's histories of domestic abuse at each stage of the criminal justice process to ensure informed decision making; and
- PSRs should always include information about whether or not a woman's offending is linked directly or indirectly to her experience of domestic abuse.

The guidance should therefore make clear that whenever a woman defendant is before them, sentencers should make enquiries about whether she has experience of domestic abuse and whether this may be an underlying factor in her offending. Some women may be coerced into offending in distinct ways, including trafficked women, foreign nationals and those from minority ethnic and religious groups, as well as women with learning disabilities who are particularly vulnerable to abuse.⁸

Foreign national women

PSRs can be particularly important for foreign national women, who have long been recognised as facing particular disadvantages in the criminal justice system⁹ and who are over-represented in prison.¹⁰ Many are inherently vulnerable within the criminal justice system due to language and cultural barriers and report feeling disempowered and confused. Their difficulty is compounded by the interaction of criminal justice and immigration proceedings and the National Referral Mechanism process for those who are victims of trafficking.¹¹ Foreign national women who are victims of domestic abuse are particularly vulnerable and lacking in support.¹² There is a continuing failure to identify and avoid prosecuting victims of trafficking and modern slavery¹³ and the sentencing guidance should highlight the need for sentencers to ensure they are well informed about how to recognise where this may be an underlying factor in the defendant's offence. The Equal Treatment Bench Book, which contains sections on modern slavery, intercultural communication for those speaking English as a second language and effective use of interpreters, is a welcome resource and there should be a link to this in the sentencing guidance.

⁵ Ministry of Justice (2018) Female Offender Strategy, London: MoJ

⁶ Prison Reform Trust (2017) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT

⁷ Ibid

⁸ See: Ibid; Muslim Hands (2018) (In)visibility. Female. Muslim. Imprisoned, London: Muslim Hands; and Prison Reform Trust (2019) Out of the Shadows: Women with learning disabilities in contact with or on the edges of the criminal justice system, London: PRT

⁹ Corston, J. (2007) The Corston Report: A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System, London: Home Office

¹⁰ Prison Reform Trust (2018) Still No Way Out: Foreign national women and trafficked women in the criminal justice system, London: PRT

¹¹ Ibid

¹² See for example: Amnesty International press release, 'Domestic abuse bill risks failing migrant women', 21 January 2019: <https://www.amnesty.org.uk/press-releases/uk-domestic-abuse-bill-risks-failing-migrant-women>

¹³ Prison Reform Trust (2018) Still No Way Out: Foreign national women and trafficked women in the criminal justice system, London: PRT; HM Inspectorate of the Crown Prosecution Service (2017) The CPS Response to the Modern Slavery Act 2015, London: HMICPS; HM Inspectorate of Constabulary and Fire & Rescue Services (2017) Stolen freedom: the policing response to modern slavery and human trafficking, London: HMICFRS

Foreign national women in prison are more likely than British women to belong to a minority ethnic group.¹⁴ Disparities in the treatment of, and outcomes for, minority ethnic women in the criminal justice system can only be overcome using a gendered approach and it is therefore essential that sentencers ensure they have a good understanding of the specific needs of minority ethnic women coming before them.¹⁵

Young adults (aged 18–25)

We recommend that the Council takes this opportunity to place within the guidelines an expectation that the court should take the offender's maturity into account, and for offenders aged from 18-25 should be assisted in doing so by always requiring a PSR for any offender aged 18-25, which in turn contains a mandatory maturity assessment. An assessment of maturity is relevant both to the tailoring of the sentence to the particular individual and, in "cusp" cases, an absence of maturity should be considered a relevant vulnerability militating against custody.

Table A4.24: Court reports prepared by the Probation Service by type of report and court, 2008 to 2018⁽¹⁾, England and Wales

[Contents](#)

	2008	2009	2010	2011	2012 ⁽¹⁾	2013	2014	2015	2016	2017	2018
All court reports ⁽²⁾	215,373	216,854	211,494	203,680	192,728	163,799	141,932	159,278	148,296	129,642	113,228
Standard PSR ⁽³⁾	134,519	113,508	93,334	77,257	61,174	42,959	33,753	25,750	9,596	4,739	3,705
Fast Delivery PSR written	56,046	68,956	78,370	79,042	77,204	74,423	69,020	82,527	62,977	49,415	43,322
Fast Delivery PSR oral	24,808	34,390	39,790	47,381	54,350	46,417	39,159	51,001	75,723	75,488	66,201
Magistrates' courts	159,562	156,659	147,564	142,547	135,205	121,447	104,076	114,397	110,163	95,907	83,711
Standard PSR ⁽³⁾	82,798	63,533	48,538	39,869	31,101	24,481	18,708	12,637	3,492	1,109	854
Fast Delivery PSR written	52,461	59,759	61,024	57,506	52,246	52,174	47,584	53,339	38,887	28,575	24,213
Fast Delivery PSR oral	24,303	33,367	38,002	45,172	51,858	44,792	37,784	48,421	67,784	66,223	58,644
Crown Court	55,811	60,195	63,930	61,133	57,523	42,352	37,856	44,881	38,133	33,735	29,517
Standard PSR ⁽³⁾	51,721	49,975	44,796	37,388	30,073	18,478	15,045	13,113	6,104	3,630	2,851
Fast Delivery PSR written	3,585	9,197	17,346	21,536	24,958	22,249	21,436	29,188	24,090	20,840	19,109
Fast Delivery PSR oral	505	1,023	1,788	2,209	2,492	1,625	1,375	2,580	7,939	9,265	7,557

¹⁴ Prison Reform Trust (2018) Still No Way Out: Foreign national women and trafficked women in the criminal justice system, London: PRT

¹⁵ Lammy, D. (2017) The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the criminal justice system, London: MoJ; PRT (2017) Counted Out: Black, Asian and minority ethnic women in the criminal justice system, London: PRT; Cox, J. and Sacks-Jones, K. (2017) Double Disadvantage: The experiences of Black, Asian and minority ethnic women in the criminal justice system, London: Agenda and Women in Prison

Question 6: What are your views on the inclusion of the proposed expanded explanations for these statutory aggravating factors? Do your views relate to any particular offence(s)?

SA1. Previous convictions

This statutory aggravating factor runs counter to the evidence on desistance and what works to reduce reoffending. Given that criminal convictions are not a straightforward or pure reflection of offending behaviour, there is a risk of compounding existing racial bias in the criminal justice system.¹⁶ Therefore, we support the inclusion of much of the material in this expanded explanation, and the extent to which it seeks to mitigate the damaging consequences of this factor, particularly the potential for up tariffing from community to custodial penalties. Research published by the Ministry of Justice in 2018¹⁷ shows that it is precisely those cases where the defendant seems forever to be before the court – for whom this statutory aggravating factor is most likely to apply – that the futility of resorting to custody is most marked. The research reveals that:

- For the most prolific offenders, a short period in custody makes the odds of re-offending 36% higher than a community penalty.
- If that person also has significant psychiatric problems, those odds are increased to 67%.

With the migration of the guidelines online, there is an opportunity to link to supporting evidence to assist sentencers in interpreting the directions and the reasons behind them. Therefore, we recommend that this section includes a link to the Ministry of Justice research on the effectiveness of community orders and short sentences

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf

In considering this factor, it is vital that sentencers are fully informed of any underlying issues which may be contributing to the individual's offending behaviour. Therefore, we recommend that this factor is cross referenced to relevant mitigating factors, including M13 (age and/or lack of maturity) and M16 (mental disorder or learning disability). Specific reference should be made in this section to Liaison and Diversion services and their role in providing the courts with detailed information about a defendant's mental health problems, learning disability, autism, substance abuse and/or communication requirements. In addition, we recommend the following changes to point 5:

5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary **or appropriate**.

¹⁶ Lammy, D. (2017) The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the criminal justice system, London: MoJ; PRT (2017) Counted Out: Black, Asian and minority ethnic women in the criminal justice system, London: PRT; Cox, J. and Sacks-Jones, K. (2017) Double Disadvantage: The experiences of Black, Asian and minority ethnic women in the criminal justice system, London: Agenda and Women in Prison

¹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf

Question 7: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A1, A2 and A3? Do your views relate to any particular offence(s)?

A1. Commission of the offence while under the influence of alcohol or drugs

These bullet points are misleading and give cause for concern. The relationship between substance misuse and mental ill health is more complex than this statement suggests. There is clear evidence that misuse of drugs and alcohol is often related to poor mental health. The use of the words 'voluntary' and 'voluntarily' fail to take into account that individuals with mental health problems or learning disabilities can find it hard to access medical advice and maintain contact with mental health services. NHS England has said that:

*"...people with a learning disability and/or autism who come into contact with the criminal justice system, or those at risk of such contact, often 'fall through the gaps' of existing provision; [are] often excluded from mainstream mental health or forensic services because of their learning disability and/or autism, and excluded from learning disability services because they are considered too able or too high risk, or because they have autism but do not have a learning disability."*¹⁸

Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently, individuals may self-medicate by using drugs and alcohol. Many local areas have a reduced availability of and long waiting lists for drug and alcohol services (due to significant public health funding cuts, for which offenders should not be penalised), especially for people with co-occurring mental health problems and/or learning disabilities. Unless these social realities are recognized, sentencing decisions are bound to have unintended unfair consequences on vulnerable and disadvantaged individuals.

A2. Offence was committed as part of a group

The clause 'offending is part of an organised criminal network' fails to specify whether such alleged membership must be tested in court. Otherwise, being named on a police list (e.g. gangs matrix) would be sufficient to activate this factor. The London gangs matrix presents strong evidence of being racist in its implementation¹⁹ and—just as important—there is no system by which people who have been placed on the list can clear their names. Hence, even if someone has no gang involvement, being named on the list would make them liable to this factor.

We welcome the recognition in the expanded explanation that offending by an individual as part of a group may indicate lower culpability when that involvement is as a result of coercion, intimidation or exploitation. However, the explanation does not go far enough to ensure that people subject to coercion, intimidation or exploitation are not inappropriately considered under this factor. Individuals whose offending is a result of coercion, intimidation or exploitation are afforded specific protection under provisions of the Modern Slavery Act. Furthermore, the UK has obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially to women and children (United Nations 2000).²⁰ Therefore, we

¹⁸ NHS England (2017) Transforming Care: Model Service Specifications. Leeds: NHS England

¹⁹ See Amnesty International <https://www.amnesty.org.uk/london-trident-gangs-matrix-metropolitan-police>

²⁰ UNHCR (2002) Recommended Principle and Guidelines on Human Rights and Human Trafficking: Guideline 2 Paragraph 5. "Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons."

recommend that this factor is cross referred to mitigating factor M8 (involvement through coercion, intimidation or exploitation) and that guidance is provided to sentencers on factors which may suggest that an offender has been subject to coercion, intimidation or exploitation. When the latter is considered then these issues should be addressed in a PSR.

Question 10: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A10, A11 and A12? Do your views relate to any particular offence(s)?

A10. Victim was providing a public service or performing a public duty at the time of the offence

Greater clarification is needed in this aggravating factor regarding the meaning of “a public duty” or “performing a public service”. Indeed, there is inconsistency of terminology within the expanded explanation, which refers to “public facing roles”. The latter could potentially apply to a wide range of occupations, including for instance commercial shop and sales assistants. While such roles may be considered socially and economically valuable, they would not normally be described as constituting a public service or duty, as these terms tend to apply to roles in the public sector. This lack of clarity in the guideline is likely to lead to inconsistency in the application of this factor, and its use in a wider range of circumstances than intended.

A12. Offence committed in the presence of other(s) (especially children)

We refer you to pp.16-17 of PRT’s response to the Government’s Domestic Abuse Bill where we note the risks involved in creating a statutory aggravating factor regarding the impact on children.²¹ The *Sentencing Council Overarching Principles: Domestic Abuse* does include as an aggravating factor ‘Impact on Children’ and we would be interested in whether there has been any research about what effect this is having on sentencing.

The guidance could be improved to alert sentencers to the potential impact of reliance on this aggravating factor in cases involving women with dependent children who are accused of domestic abuse offences, and who, in the context of a controlling relationship, may be using reactive violence against a primary aggressor. In such instances, sentencers should use their discretion to take into account all the circumstances of the case in order to avoid unjust outcomes, including the imposition of prison sentences in cases which would not otherwise have merited this.

Where the offence has been committed by a parent, especially a primary carer, the impacts on any children affected should be considered in the Pre- Sentence Report, as discussed elsewhere.

²¹

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/Domestic%20Abuse%20Bill%20PRT%20consultation%20response.pdf>

Question 11: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A13, A14 and A15? Do your views relate to any particular offence(s)?

A14. Blame wrongly placed on others

We welcome the inclusion of reference to the mitigating factor of age and lack of maturity in the expanded explanation for this aggravating factor. However, a reference to the mitigating factor M16 mental disorder or learning disability should also be included. People with a learning disability or autism may be disproportionately liable to consideration under this aggravating factor. People with a learning disability may be acquiescent and suggestible. When under pressure, they may try to appease people. This can make them vulnerable to coercion and giving false information to authorities. Furthermore, people with autism may have difficulty in recognising and understanding the feelings and emotions of others. This may mean they act in ways which could be seen as inappropriate or even callous.²² Therefore, we recommend that this explanation is amended to take account of these protected characteristics.

Question 12: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A16, A17 and A18? Do your views relate to any particular offence(s)?

A16. Offence committed on licence or post sentence supervision or while subject to court order(s)

We are concerned about the decision to include post-sentence supervision as part of this aggravating factor. Successive reports by HM Inspectorate of Probation, the Criminal Justice Joint Inspectorate, the National Audit Office, the Public Accounts Committee and the Justice Committee have highlighted concerns about the effectiveness of the government's Transforming Rehabilitation programme and the fairness and proportionality of the decision to extend mandatory post-sentence supervision to people sentenced to less than 12 months. In response to these concerns, the government has shortened current contracts with community rehabilitation companies (CRCs) and issued a public consultation on the future of probation provision. The consultation included questions on the fairness and proportionality of post sentence supervision. While the government has yet to publish its response to this consultation, it has confirmed its intention to bring the majority of offender management back into the public sector. We believe it would be premature for the Council to issue guidance in this area when the future direction of government policy is unclear.

HM Inspectorate of Probation has recently published a report on the impact of the extension of post release supervision to short sentenced prisoners.²³ It concludes that post-release supervision has had no discernible impact on reoffending but has led to "an expensive merry-go-round" of people being repeatedly released, breached and recalled to custody. Recall rates have increased significantly since the introduction of the measures. For men recall rates have increased by 29%, while for women they have risen by 166%. This has occurred without any tangible gains in rehabilitative outcomes, which have remained stubbornly high, with nearly two-thirds (64 per cent) of short-term prisoners going on to reoffend. The HMI Probation report

²² For further information on the impact of these conditions see <http://www.mhldcc.org.uk/>

²³ <https://www.justiceinspectorates.gov.uk/hmiprobation/inspections/prs/>

on enforcement and recall²⁴ raises additional concerns regarding the quality of probation work undertaken by the CRCs with low and medium risk offenders. The report found that that enforcement of court sentences by CRCs is poor; inspectors found that staff did not see offenders often enough and that this lack of meaningful engagement led to poor decisions in managing breaches of the orders.

We are particularly concerned that the inclusion of post-sentence supervision as part of this aggravating factor will have a disproportionate impact on women. Since the introduction of post-sentence supervision, as highlighted above, the number of women recalled to prison has risen rapidly. During the same period, social networks of support have collapsed, leaving responsible officers unable to resolve problems of unstable housing, debt, abusive relationships, drug dependency, and mental health needs. The Prison Reform Trust has conducted a small-scale study of recall which gathered the perspectives of 24 women who had been recalled to prison.²⁵ The study found:

- Almost a third (7/24) reported needing help with the combination of mental health needs, drug misuse and domestic violence
- 19 women identified housing as the most important thing prisons must do to prepare people for release and 10 had been homeless at some point
- 22 women disclosed being in risky situations while at liberty, including homelessness and domestic abuse; six were assaulted
- 11 said they had been recalled for failing to keep in touch with their probation officer ('responsible officer').

The women said that their responsible (probation) officers were unable to support them in dealing with the social challenges they faced on release, particularly regarding housing. The threat of recall accentuated the fault lines in supervision relationships that were already fragile, inhibiting women from confiding in their supervisors about their difficulties. The serious breakdown in communication and trust contributed to their recall.

More generally, we are concerned that this aggravating factor and the accompanying explanation do not take sufficient account of the mitigating circumstances which may contribute to offending on licence, during post-sentence supervision or while subject to a court order. We have the following comments on the expanded explanation for this factor:

- **An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.** There is no corresponding obligation in statute and the logic is unclear. All citizens are under the same obligation to obey the law – you can't be under more or less of an obligation. Furthermore, the wording of the explanation fails to recognise that desistance is a joint venture, and that the probation service or other supervising agencies also have an obligation to assist the person to desist from crime. The wording here places all the responsibility firmly with the person under supervision. No account is taken of the contribution of the failures of rehabilitation services to reduce the likelihood of reoffending – failures which have been well documented in successive inspectorate

²⁴ <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2018/02/Enforcement-and-Recall-report.pdf>

²⁵ http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/Broken_Trust_printlo.pdf

reports.²⁶ Relevant factors include a failure to provide housing, lack of training and employment opportunities, missed appointments cancelled by offending managers, or a failure to provide continuity of mental health or social care and treatment for drug or alcohol addictions.

- **The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration.** Greater clarity is needed here on how compliance with licence or order conditions should be taken into account. Lack of compliance may suggest that conditions are inappropriate to the circumstances or characteristics of the offender. For instance, childcare responsibilities may mean an individual is unable to meet appointments at certain times. In addition, people with a learning disability may find it difficult to understand the conditions attached to a licence or court order.
- **Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step six).** Here it should be borne in mind that a return to custody is likely often to represent a far more punitive consequence than the behaviour would warrant in any other circumstance. Again, impacts on dependent children of a parent/primary carer being returned to custody can be particularly harsh.²⁷

A17. Offence committed in custody

We are concerned that this aggravating factor and the accompanying explanation do not take sufficient account of the mitigating circumstances which may contribute to offending in custody. Offences committed in custody may result in part from poor treatment, from a failure on the prison's part to provide adequate protection for the defendant's personal safety, or from the unique stress inherent in incarceration. Therefore, the wider context of the treatment and conditions in prison which may have contributed to offending by an individual need to be taken into account in mitigation.

The latest Ministry of Justice safety in custody statistics²⁸ reveal that assault incidents increased to 34,223, a record high level in 2018. It is well recognised that a key factor behind the decline in standards of safety in prisons in England and Wales in recent years has been the steep cuts in prison service staffing and resources since 2010. Between 2010–11 and 2014–15, HM Prisons and Probation Service (HMPPS) reduced its budget by nearly a quarter.²⁹ A prison service “benchmarking” efficiency programme contributed to a 25% cut in frontline operational staff between 2010–2017³⁰ over a period where the prison population remained more or less stable. Richard Heaton, Permanent Secretary at the Ministry of Justice, told the Public Accounts Committee in 2017 that the reduction in staff numbers “has been detrimental to security, stability and good order in prisons”.³¹

²⁶ See for instance <https://www.justiceinspectors.gov.uk/cjii/wp-content/uploads/sites/2/2017/06/Through-the-Gate-phase-2-report.pdf>

²⁷ See for instance <http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf>

²⁸ Safety in custody statistics quarterly update to March 2019, Ministry of Justice. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797074/safety-custody-bulletin-q4-2018.pdf

²⁹ National Offender Management Service (2016) Annual Report and Accounts 2015–16, London: The Stationery Office

³⁰ Table 3, Ministry of Justice (2018) HM Prison and Probation Service workforce statistics: March 2018, London: Ministry of Justice

³¹ House of Commons Public Accounts Committee (2017) Mental health in prisons, Oral evidence session: 23 October, London: HM Stationery Office

Question 13: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A19, A20, A21 and A22? Do your views relate to any particular offence(s)?

A19. Offence committed in a domestic context

It makes sense to link to the Domestic Abuse Definitive Guideline. However, this is also an opportunity to highlight the gendered character of domestic abuse and coercive, controlling behaviour, the extent to which it can be a hidden driver of women's offending (including domestic violence offences with which they are themselves inappropriately charged), as well as the toll it takes on the lives of so many women and children.³² It is disappointing that the Definitive Guideline does not do this. See also our comments under question 5 above. It would be helpful to provide a link here to the information on domestic abuse in the Chapter on Gender in the Equal Treatment Bench Book <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2019.pdf>

Question 14: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M1, M2 and M3? Do your views relate to any particular offence(s)?

M3. Remorse

We welcome the clear direction included in this explanation that lack of remorse should never be treated as an aggravating factor. However, given the common misunderstandings that arise in relation to this factor, we recommend that additional guidance should be included under this section. In particular:

- a. People with certain disabilities, such as autism, may find it hard to both understand and express remorse.
- b. People with learning disabilities are unlikely to have come across the word before and may not understand what it means. Alternative phrasing should be included in the guidance. For example, during interviews with prison staff concerning prisoners with learning disabilities, one head of healthcare said: "[The prisoner] told me he couldn't understand why he had come to prison. He said, "when the judge asked me if I was remorseful, I said 'no', and then he told me I was coming here." This young man had not heard that word before. He also said that he didn't have much idea about what was going on in court and didn't understand what people were saying, although he knew they were talking about him. These sorts of conversations are not uncommon here."

Question 16: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M6, M7, M8 and M9? Do your views relate to any particular offence(s)?

M8. Involved through coercion, intimidation or exploitation

We support the inclusion of the expanded explanation of this factor, and suggest this would benefit from a link to the relevant sections of the Equal Treatment Bench Book

³² Prison Reform Trust (2017) There's a reason we're in trouble: Domestic Abuse as a Driver to Women's Offending, London: PRT

on domestic abuse and coercion, and trafficking and modern slavery.³³ See also our comments under question 5 above.

In relation to people with learning disabilities, additional guidance should be included under this section:

- a. People with learning disabilities may be suggestible – ready to accept and act on suggestions by others. Many people with learning disabilities experience social isolation and loneliness and, as a result, may be coerced, intimidated or exploited by so-called friends. Mate crime is when a perpetrator befriends a vulnerable person with the intention of then exploiting the person financially, physically, sexually or by asking them to carry out certain acts on their behalf, which may be criminal. For example, ‘looking after’ illegal drugs and stolen goods, shoplifting and acts of violence.

Question 18: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M13 and M14? Do your views relate to any particular offence(s)?

M13. Age and/or lack of maturity

We welcome the inclusion of age and / or lack of maturity at step two and the detailed information about this factor. The detail as to what age and/or lack of maturity may mean for young adults is especially welcome. In relation to PSRs, the guidance should be strengthened so that a PSR including an assessment of maturity is always required for any offender aged 18-25 when considering a custodial or community sentence. An assessment of maturity is relevant both to the tailoring of the sentence to the particular individual and, in "cusp" cases an absence of maturity should be considered a relevant vulnerability militating against custody.

M14. Sole or primary carer for dependent relatives

We strongly support the inclusion of an expanded explanation for this mitigating factor. We suggest a change to the wording so that it starts with a reminder that where the offender is known or suspected to have sole or primary care responsibilities the court *must* request a PSR; where the offender is a woman the court should be aware that it is particularly likely she has primary care responsibilities, and that there may be barriers to her disclosing this.³⁴ We also suggest amending the third sentence to say “Where a custodial sentence is unavoidable, consideration of the impact on dependants may result in suspending the sentence, and/or be relevant to the length imposed...”.

Lord Farmer’s ‘follow on review’ of children affected by having a mother in the criminal justice system, commissioned as part of the government’s Female Offender Strategy, is due to report imminently and its findings and recommendations will be highly relevant. Meanwhile it would certainly be helpful to provide a link here to the information resource on *Safeguarding children when sentencing mothers*, produced by Dr Shona Minson with the support and guidance of a number of legal and judicial bodies.³⁵ It is available through the Judicial College website.

³³ See also Prison Reform Trust (2018) *Still No Way Out: Foreign national women and trafficked women in the criminal justice system*, London: PRT

³⁴ PRT report *What About Me?*

³⁵ <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/507>

Question 19: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M15, M16 and M17? Do your views relate to any particular offence(s)?

M16. Mental disorder or learning disability

The proposed expanded explanation is helpful; however, the following revisions should be considered. Our views relate to all offences; it is important that an individual's mental health, learning disability, autism and/or other needs are taken into consideration throughout deliberations by sentencers in deciding what sentence is most appropriate to address a person's offending behaviour, treatment requirements and rehabilitation needs.

We note that the CPS is currently conducting a consultation on draft legal guidance on mental health conditions and disorders.³⁶ The Sentencing Council and CPS should ensure that the terminology and explanations they use for mental disorder and learning disability are the same.

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- a. First paragraph, first sentence: to 'suffer' a condition is increasingly viewed by many people with mental disorders and learning disabilities as outdated and may be considered insulting. An alternative word is 'experience' – '...although an individual may experience both.'
- b. First paragraph: suggest including that mental health problems can fluctuate, with individuals having good days and bad.
- c. Second paragraph, first bullet point: what is meant by 'low IQ' should be clarified as it is unlikely that sentencers will know what is 'low' and what the implications are.
- d. Sentence immediately below the bullet points: it should be noted that individuals with learning disabilities are more likely than the general population to experience mental illness; and that many people with learning disabilities also have autism.
- e. Last sentence on this page: it should be noted that individuals may not be aware they have a mental health problem or learning disabilities. Only around one-fifth of adults with learning disabilities are likely to be known to community learning disability services (Emerson et al. 2012).

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- f. Paragraph under the first points 1 and 2, starting, 'The court will be assisted...': the availability of liaison and diversion services, including screening/assessment for mental health problems, learning disabilities, autism and other needs, should be included here. Reports by liaison and diversion services inform members of the judiciary and writers of PSRs. NHS England has committed to full roll out by 2020/21.
- g. Second point 1, bullet points one and two. These bullet points are misleading and give cause for concern. The relationship between substance misuse and mental ill health is more complex than this statement suggests. There is clear evidence that misuse of drugs and alcohol is often related to poor mental health. The use of the words 'voluntary' and 'voluntarily' fail to take into

³⁶ <https://www.cps.gov.uk/consultation/public-consultation-mental-health-conditions-and-disorders-draft-legal-guidance>

account that individuals with mental health problems or learning disabilities can find it hard to access medical advice and maintain contact with mental health services. NHS England has said that:

“... people with a learning disability and/or autism who come into contact with the criminal justice system, or those at risk of such contact, often ‘fall through the gaps’ of existing provision; [are] often excluded from mainstream mental health or forensic services because of their learning disability and/or autism, and excluded from learning disability services because they are considered too able or too high risk, or because they have autism but do not have a learning disability.”³⁷

Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently, individuals may self-medicate by using drugs and alcohol. Many local areas have a reduced availability of and long waiting lists for drug and alcohol services (due to significant public health funding cuts, for which offenders should not be penalised), especially for people with co-occurring mental health problems and/or learning disabilities. Unless these social realities are recognized, sentencing decisions are bound to have unintended unfair consequences on vulnerable and disadvantaged individuals.

- h. Point 2: more explanation/guidance is needed for the second part of the sentence – ‘a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.’ The ‘harms’ of imprisonment are generally greater for prisoners with mental disorder or learning disability than they are for prisoners without such conditions; imprisonment can exacerbate pre-existing conditions and cause mental health problems where none had existed hitherto. Reasonable adjustments should be routinely made to enable offenders with disabilities (learning disabilities, autism and certain mental health problems) to effectively participate in and comply with community orders – including a clear understanding of the implications of non-compliance. Sentencers will wish to satisfy themselves that community orders comply with the Equality Act in this regard, and should seek reassurance and, where necessary, evidence from the National Probation Service or Community Rehabilitation Company. Custody should not be used as a default position in the absence of necessary adjustments to community orders for offenders with a disability.
- i. Appropriate Adults (AA): an offender with mental disorder or learning disability should have an Appropriate Adult while in police custody, including when being interviewed by police. Sentencers should be aware if the person did or did not have an AA. The absence of an AA during police interview raises questions about evidence provided by the person with a mental disorder or learning disability.
- j. Women who offend are known to have higher rates of mental illness than both the general population and men who offend, and evidence suggests that they may also experience higher rates of learning disability. It is therefore especially important that assessments by liaison and diversion services are undertaken for all women who come before the courts and reports given to sentencers at the start of the hearing.
- k. The terms ‘learning disability’ and ‘learning difficulty’ are sometimes used interchangeably, which can be confusing. It is pleasing to note that this hasn’t

³⁷ NHS England (2017) Transforming Care: Model Service Specifications. Leeds: NHS England

occurred in section M16. It might, however, be worth clarifying as it is likely that many sentencers will come across the use of erroneous terminology in their court.

- l. The term 'mental health condition' is increasingly seen as a more appropriate term than 'mental disorder'.
- m. The Prison Reform Trust and Rethink Mental Illness have produced an online resource that may be helpful for sentencers, 'Mental health, autism and learning disabilities in the criminal courts: information for magistrates, district judges and court staff'. It contains sections on mental health, learning disability, autism and communication: www.mhldcc.org.uk

Question 22: What are your views on the proposed changes to the information on life and extended sentences in the Burglary and Assault guidelines? Should changes be made to the wording on this topic in other guidelines?

We note that the changes in this section largely reflect the changes in legislation on dangerous offenders; in particular, the abolition of the indeterminate sentence for public protection (IPP) and introduction of the extended determinate sentence (EDS). However, what is striking is the wide range of offences which could potentially attract an EDS or life sentence. For instance, an EDS could be imposed for a domestic or non-domestic burglary which involved damage to a property, even in cases where no physical harm was caused to a victim in the commission of the offence.

Given the significant impact of life sentences and EDS on prison and parole resources, it is concerning that the resource assessment of the guidelines contains no analysis of the resource impact of this section of the guidelines. This is particularly concerning given the original failure to properly plan for and resource the IPP sentence, and the resulting and unforeseen impact this had on prison and parole resources.³⁸ While the EDS differs from the IPP by having a definite release date, it still resembles the IPP in many respects, not least in the involvement of the Parole Board in determining release, as well as having an extended period on licence. The life sentence resembles the IPP in nearly every aspect except in the provision for review of the licence period.

As the legacy of the IPP has highlighted, "dangerousness" has in practice turned out to be very difficult to define, and, as a consequence, very difficult to "treat". This has resulted in manifestly excessive and unfair detention, which in turn has made it less rather than more likely that people will reach the point where they can resettle successfully. As a result, despite its abolition in 2012, there are 2,489 people currently in prison serving an IPP sentence, who have yet to be released.³⁹ Nine in ten (2,255 people) have served their tariff period, the minimum period they must spend in custody.⁴⁰ The Parole Board has predicted that without further legislation change by 2020 there will still be around 2,000 people in prison serving an IPP sentence.⁴¹

In order to avoid the new regime of EDS and life sentences for "dangerous" offenders having similar unintended consequences, these changes require a proper impact assessment which is realistic in the way that the impact assessments for the IPP

³⁸ Jacobson, J & Hough, M (2010) Unjust deserts, London: Prison Reform Trust. Available at <http://www.prisonreformtrust.org.uk/uploads/documents/unjustdesertsfinal.pdf>

³⁹ Table 1.9a, Ministry of Justice (2019) Offender management statistics quarterly: July to September 2018

⁴⁰ Ibid. (same source)

⁴¹ <http://www.prisonreformtrust.org.uk/Portals/0/Documents/MJ%20IPP%20paper%20July%202016.pdf>

legislation was not. Otherwise, there is a risk that we simply replace the catastrophe of the IPP with a new EDS/life sentence version.

Question 25: Are there any other equality and diversity issues that the explanations should address?

As highlighted above, we believe that the following sections of the draft guidance will have disproportionate equality impacts in their current form and require revision:

- PSR guidance (Annex A, page 3) - Mental health; learning disability, women
- SA1. Previous convictions - Mental health; learning disability; young adults, BAME
- A1. Commission of the offence while under the influence of alcohol or drugs – Mental health; BAME
- A2. Offence was committed as part of a group – BAME; young adults
- A12. Offence committed in the presence of other(s) (especially children) - women
- A14. Blame wrongly placed on others – mental health; learning disability, autism
- A16. Offence committed on licence or post sentence supervision or while subject to court order(s) – mental health; learning disability; young adults; women
- M3. Remorse – learning disability, autism

The guideline should include clear links to the extensive information provided in the Equal Treatment Bench Book published by the Judicial College, which warrants much more vigorous dissemination including by the Sentencing Council <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2019.pdf>

Question 26: Are there any other comments you wish to make on the approach taken by proposed changes, or other changes that you wish the Council to consider as part of this project?

We welcome the overall intention behind the draft guidelines to improve the amount and quality of the information available to sentencers. We also acknowledge the opportunity afforded by court digitisation to improve sentencers' access to up to date and comprehensive guidelines. However, much of the success of the new guidelines will depend on how they are used in practice. Judges and magistrates will require sufficient training and guidance to enable them to understand and use the new guidelines. It will also be vital to ensure that defence and prosecution solicitors have a good knowledge and understanding of the guidance to enable them to make full use of them in presenting their cases. Furthermore, with the decline in the availability of criminal legal aid and an increasing number of defendants representing themselves in court, we are concerned about the opening up of a 'digital justice' divide, whereby only those who are able to afford legal representation are able to make full use of the available guidance and information.

Therefore, we would welcome further clarification on the level of support and training that will be given to judges and magistrates to enable them to use the new guidelines. We would also welcome information on how the new guidelines will be communicated and made available to prosecution and defence solicitors. Finally, we would welcome information on how the new guidelines will be made available to the public, including potential defendants.