

January 2011

## **Prison Reform Trust response to the Sentencing Council's professional consultation on the draft guideline on assault**

### **Prison Reform Trust**

The Prison Reform Trust (PRT), established in 1981, is a registered charity that works to create a just, humane and effective penal system. PRT aims to improve prison regimes and conditions, defend and promote prisoners' human rights, address the needs of prisoners' families, and promote alternatives to custody. PRT's activities include applied research, advice and information, education, parliamentary lobbying and the provision of the secretariat to the All Party Parliamentary Penal Affairs Group.

### **Introduction**

PRT is pleased to respond to the Sentencing Council's consultation on the draft assault guideline. PRT welcomes the creation of the Sentencing Council, whose functions are similar to those recommended in its publication *Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*<sup>1</sup>. That report called for the creation of a body to:

- Achieve greater consistency and stability in sentencing practice, thereby preventing any further upward drift in sentencing severity; and
- Reduce the politicisation of sentencing policy and practice, by acting as an institutional buffer between the political process and penal practice.

It envisaged three functions for a newly established Sentencing Commission:

- Providing guidance to sentencers leading to greater consistency in sentencing without restricting judicial independence;
- Gathering and providing information and statistics for monitoring, planning and policy development; and
- Community engagement, to inform and consult with the public.

PRT welcomes the publication of a resource assessment alongside this draft guideline. Such assessments are important in planning for the future number of prison places required, and for the provision of probation and youth justice services. PRT hopes that the Sentencing Council will also monitor the impact of guidelines on resources across the criminal justice system.

### **Response to the consultation questions**

#### **Question 1**

*Do you agree that the proposed structure of the draft guideline incorporating an individually tailored sentencing process for each offence is the right approach?*

PRT is pleased that the guidelines are written in plain English and that starting points have been adopted which are applicable to all defendants in all cases. This allows the court to establish the starting point and then to take into consideration further aggravating and mitigating factors and previous convictions to adjust the sentence within the offence range. An individually tailored sentencing process for each offence is the right approach, providing greater clarity for the defendant and the public.

### **Question 2**

*Do you agree that compensation and ancillary orders should not be included in the new assault guideline or any future offence specific guidelines?*

It would be helpful to the public if relevant aspects of the guidance on compensation orders and ancillary orders were included in offence specific guidelines. This could be done either within the substantive guideline or as an appendix.

### **Question 3**

*Do you agree with the Council's recommendation that there should be three offence categories for all assault offences? If not, how many would be appropriate?*

Yes, having four categories would risk elevating harm to be of greater importance than culpability.

### **Question 4**

*Are there any other factors determining harm and culpability that should be taken into account at step 1 of the decision making process?*

In 2009 the Prison Reform Trust published a report *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*<sup>ii</sup>. The findings and recommendations of that report are of relevance to all sentencing guidelines. In particular:

- Learning disability should be explicitly referred to alongside 'mental illness or disability' in table 3.
- Learning disabilities, learning difficulties and mental illness should be defined and examples should be given of how this might affect culpability.
- Premeditation is likely to be informed by an ability to think through the consequences of a particular course of action. This will usually be reduced for a person with learning disabilities and difficulties.
- Suggestions of excessive self defence would need to be carefully considered for someone with learning disabilities. Such a person may not be able to weigh the particular threat s/he faces as accurately as others, nor be able to calculate what proportionate force in the circumstances is.

PRT would also ask that the guideline recognises youth/lack of maturity or age at step 1. There is growing evidence, both social and cognitive, that young adults (aged 18-24) constitute a distinct age group and that young adulthood is a distinct stage in life, with young adults in trouble with the law having specific needs that may make them more vulnerable than older offenders and many exhibiting immaturity that may be related to their offending. Research into brain development has identified a range of developmental changes that continue through the young adult age range. Particularly relevant is the finding that young adults potentially face greater difficulties in controlling behaviour, are more prone to risky behaviour and are less able to plan for the future. As one researcher states: "the human brain continues to mature until at least the age of twenty-five, particularly in the areas of judgment, reasoning, and impulse control."<sup>iii</sup> Clearly, this may be related to the commission of the sorts of unpremeditated, violent offences that are

covered by this guideline. Moreover, as has been argued by the Transition to Adulthood Alliance - of which PRT is a member - young adults are the most likely group to desist from crime and interventions should be tailored to facilitate this<sup>iv</sup>. The T2A document *International Norms and Practices*, which can also be found on their website, shows that in Germany a form of maturity assessment is used to determine whether an offender's personality and life circumstances mean that, at the time of the commission of the offence, their 'moral and psychological development was that of a juvenile'.

PRT therefore believes that it would be appropriate to consider youth/lack of maturity or age, where it is linked to the commission of an offence, as a factor indicating lower culpability. This would recognise the vulnerability of young adults, and would encourage sentencers to impose appropriate disposals that are more likely to recognise and address their complex set of needs. If it was considered by a sentencer that youth or lack of maturity was present but not linked to the commission of the offence, it should still be considered as a mitigating factor at step 2.

#### **Question 5**

*Do you agree with the revised approach to premeditation as an aggravating or mitigating factor proposed to be included in the new assault guideline?*

Premeditation is an important feature in many cases, but it is also a complex concept. Without some degree of guidance the sentence may not calibrate the degree of premeditation accurately. Guidelines could include length of time, time to reflect or continuous confrontation and the extent of planning, in particular with regard to the consequences of the actions planned. Someone with learning disabilities or mental health problems may not have the capacity to think through the consequences of their actions and consequently their culpability is less.

There is some degree of mitigation that applies here, which requires consideration of the particular offender's thought processes leading up to the offence, especially for those with learning disabilities. This depends on someone's capacity to use rational thinking to overcome emotions, find perspective and brush off provocation and confrontation. All of which may be something that a person with a learning disability may be less capable of.

In some cases premeditation may be a mitigating factor where, for example, the offender has endured a long period of domestic violence.

#### **Question 6**

*Do you agree that consideration for mental illness should be included at step 1 of the process and/or do you think that it should be built into the guideline in any other way?*

Mental illness, together with learning disabilities and learning difficulties should be built into the guideline at step 1 of the process and at step 2 as a mitigating factor. This is not double counting. It is perfectly possible that aspects of a person's condition could be seen to have reduced their culpability, while at the same time reflecting personal mitigation that should result in a sentence that is lower than the starting point. For example it may be clear from reports to the court that the mental health of an offender with a severe learning disability would deteriorate rapidly in prison, making it a greater than commensurate punishment and increasing the likelihood of offences on release.

PRT's Bromley Briefings Prison Factfile<sup>v</sup> shows that: high numbers of people in prison suffer from two or more diagnosable mental health problems; and, 7% of male and 14% of female sentenced prisoners have a psychotic disorder. Another PRT study, the first from the No One Knows programme<sup>vi</sup>, has found that 20-30% of offenders have learning

disabilities or difficulties that interfere with their ability to cope with the criminal justice system; 7% have an IQ of less than 70 and a further 25% have an IQ of less than 80. It is clear from these statistics that current arrangements for identifying and taking proper account of mental health and learning disabilities are far from satisfactory. Sentencing guidelines should be an important element, alongside a national network of diversion schemes attached to courts and police custody suites and improved training for sentencers and others working in the criminal justice system, in reforms to address this pervasive problem.

There is also the question as to whether the concept of mercy is to be accommodated in step 3 of the guideline. This might be relevant in extreme cases of mental or physical health or disability, or for instance in certain cases where the offender is a carer and the damage to the person being cared for would be severe. Currently it is not clear whether mercy is to be considered at stage 3.

#### **Question 7**

*Do you agree with the level of guidance and the extent of discretion that is proposed in step 1 for determining the offence category?*

Guidance must work against ‘postcode’ sentencing’. It will be important to monitor the implementation of the guideline to ensure for instance that interpretation of ‘injury which is serious in the context of the offence’ is properly and consistently applied.

#### **Question 8**

*Do you agree that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered?*

PRT agrees that starting points and category ranges should be applicable to all offenders, not just first time offenders. This is important in order to avoid ‘double-counting’ of previous convictions, which is a statutory aggravating factor and, according to the design of the draft guideline, should be taken into account at step 2. It also helps to inform public opinion if the starting point applies to a more typical range of cases than the first time offender who pleaded not guilty and has been convicted after a trial.

#### **Question 9**

*Do you agree that starting points should be set out in the assault guideline?*

PRT believes that starting points are an important feature of the assault guideline both for clarity and consistency. We agree with the Sentencing Council that the inclusion of starting points in the guideline is likely to promote greater consistency of sentencing and, as such, is a key way of ensuring that offenders are sentenced fairly and proportionately as well as helping to enable the Council to fulfil its statutory duty, under section 120(11) of the *Coroners and Justice Act 2009*, “to have regard to ... the need to promote consistency in sentencing”.

#### **Question 10**

*Are there other additional aggravating and mitigating factors that should be included at step 2 of the decision making process?*

It is important for there to be guidance on the principles of personal mitigation. This was argued in *Mitigation: the role of personal factors in sentencing*<sup>vii</sup>, published by PRT in 2007. The researchers concluded that the significance of mitigation in sentencing was not

recognised by policy. While there has been a distinct improvement in attention paid to personal mitigation, the report merits further consideration by the Sentencing Council. The analysis following observation of sentencing and interviews with judges showed that there are at least four types of factor that sentencers take into account in personal mitigation:

- Those that indicate reduced culpability, such as youth or mental health problems, pressing need, previous good character and exceptional disadvantage
- Those that indicate limited risk of further offending - relating to remorse and attempts to make reparation, the offender's background and circumstances, or steps taken towards rehabilitation
- Those that indicate particular sensibility to punishment, such as the strain of prosecution, the loss of reputation and standing or the fact that the offender is unusually poorly equipped to handle a prison sentence
- Factors that call for clemency, such as the victim's support for the offender, family responsibilities and the 'collateral damage' that imprisonment would inflict on relatives, or other social contribution made by the offender.

The draft guideline for instance fails to pay attention to primary responsibility for the care of children or other dependants among the mitigating factors. In 2001 a Home Office report, *Making Punishment Work*,<sup>viii</sup> stated "The proposed new guidelines should look for consistency of approach, rather than uniform outcomes, and recognise justifiable disparity, for example in cases where the offender has young dependent children". Paragraph 149 of the Sentencing Advisory Panel advice to the Sentencing Guidelines Council, *Overarching Principles of Sentencing*, reads: "Accordingly, the Panel has concluded that the fact that an offender has primary responsibility for the care of young children or other dependents should be a strong factor inclining the court against imposing a custodial sentence, unless the seriousness of the offence makes it unavoidable, on the basis that the effect on the children or other dependants can be strongly negative". As stated in response to question 6, in extreme cases this could be accommodated at step 3 if the concept of mercy were to be included there. For all other cases it should be included as a consideration for mitigation at step 2.

At present the draft guideline does not make any provision for sentencers to look at the impact of a sentence on individuals other than the offender when sentencing, particularly in cases where the offender is a parent or carer. The imprisonment of a parent is particularly damaging, with children of prisoners having about three times the risk of developing mental health problems compared to their peers and experiencing higher levels of social disadvantage, yet about 160,000 children a year have a parent sent to custody and 7% of all children will see a parent imprisoned during their school years.<sup>ix</sup> The recognition of caring responsibilities as a mitigating factor would be of particular relevance to female offenders. 66% of women prisoners are mothers with dependent children under 18.<sup>x</sup> At least one third of women offenders are lone parents prior to being imprisoned, and it is estimated that 17,700 children each year are separated from their mothers due to imprisonment. Just 5% of the children of women offenders remain in their own home once their mother has been sentenced.<sup>xi</sup> The effect of a custodial sentence on a female offender who is the sole carer for her children can, therefore, be severe, not only for her but also for her children. PRT therefore recommends that the Sentencing Council includes personal obligations to others as a potential mitigating factor to be considered in sentencing. This would enable sentencers to consider the impact on an offender's dependants when weighing-up the available sentence options.

As is stated in the response to question 6, mental illness and learning disability and learning difficulty should certainly be included in step 2 as well as step 1. This does not constitute double counting. There are further complications that are worthy of

consideration. To express remorse, one has to understand the concept and be able to articulate to a relatively high degree. Without support, this will be difficult for certain people including those with learning disabilities, borderline learning disabilities, communication difficulties and people on the autistic spectrum.

A further factor that should be seen as reducing seriousness or reflecting personal mitigation at step 2 is where public services have failed to deliver to anything like the required standard. For example, if a person is waiting for a lengthy period for treatment for drug or alcohol dependence or mental health problems, or access to learning disability services.

PRT welcomes the inclusion of 'youth/lack of maturity or age' as a mitigating factor at step 2. As stated above, PRT is of the view that it should also be included at step 1, as a factor indicating lower culpability. It would be helpful for sentencers to receive training on lack of maturity, as well as on learning disabilities and difficulties and mental health problems, in order to aid their understanding and recognition. The Sentencing Council has an important role to play in ensuring that such training is made available to sentencers as part of its work to ensure the successful implementation of this guideline.

**Question 11**

*Do you agree that the court should take account of an assault offence covered by section 29 having been racially or religiously aggravated, and increase the severity of the sentence accordingly, only after having reached an initial sentence for the offence?*

Yes, but PRT would like to see all equalities included, for example against people with disabilities - so-called 'hate crime' for people with learning disabilities.

**Question 12**

*Do you agree with the Council's proposed change to include lack of maturity and/or is there any further role for the guideline to play in addressing the specific issues of offenders aged 18-24?*

As stated above, PRT welcomes the inclusion of youth/lack of maturity or age as mitigating factor at step 2. As we also state above, PRT feels that it should also be recognised at step 1, as a factor indicating lower culpability. Additionally, PRT believes that training for sentencers will be essential, to enable them to recognise lack of maturity and developmental delay, and understand this as a factor indicating lower culpability, or reflecting personal mitigation. The Sentencing Council should consider how this training could be delivered as part of the implementation of the final guideline.

*Overarching Principles - Sentencing Youths*, referred to on page 22 is useful, but it falls down greatly in not being underpinned by any routine, systematic procedure to identify when child or adult defendants have particular impairments or difficulties. Pre sentence reports often fail to include this information for the same reason. Continued failure to address this problem will mean that our prisons remain populated by vulnerable people, for whom treatment and facilities in the community would be more humane and would lead to better outcomes.

**Question 13**

*Do you agree with the eight-step proposed decision making process?*

As argued above PRT would like to see the concept of mercy included at step 3.

The eight-step decision making process proposed in the draft guideline is clear and logical, and PRT agrees with it. At step 7 there should be a duty placed on the court to ensure that the offender understands the sentence being passed. The question ‘do you understand?’ - answer ‘yes’, is not good enough.

PRT supports the placing of consideration of dangerousness as a later step in the sentencing process. PRT has particular concerns about the indeterminate sentence of imprisonment for public protection (IPP), including the steady number of offenders continuing to receive these sentences, the sluggish release rate for those prisoners serving IPPs. As our recent report *Unjust Deserts* shows, just 4% of all prisoners who have completed their tariffs had been released<sup>xii</sup>. The report welcomed the role given to the Sentencing Council to carry out independent assessments of the impact of any legislative proposals for sentencing reform. Had such an assessment of the IPP sentence been conducted in relation to either its introduction in the Criminal Justice Act 2003, or when the sentence was substantially amended by the Criminal Justice and Immigration Act 2008, PRT believes that many of its catastrophic consequences would have been avoided.

#### **Question 14**

*Do you think that the range for category 3 GBH (section 20) cases should include custody at its upper limit or recommend only non-custodial disposals?*

PRT takes the view that only non-custodial disposals should be made available to the courts for category 3 GBH (section 20) offences. Short prison sentences are ineffective in preventing reoffending and a demanding community order can provide proportionate punishment for this level of offence, as well as tackling drug or alcohol use where appropriate. The same logic should enable adjustments to the proposed offence ranges for other offences within the guideline to maintain proportionality.

#### **Question 15**

*Do you agree that the starting point for common assault should be a community order?*

PRT agrees that the starting point for category 1 and 2 common assault should be a community order, and that the starting point for category 3 common assault should be a fine. We believe that both the starting points proposed in the guideline for common assault, and the category ranges outlined, meet the demands of fairness and proportionality. Additionally, as set out in the resource assessment, the new guideline on common assault would lead to an estimated 1,000 and 2,800 fewer custodial sentences annually, and this is to be welcomed. Custodial sentences result in high rates of reoffending, and have a damaging impact on prisoners, their families and communities. They are, moreover, costly: the resource assessment estimates that the common assault guideline would result in a saving to the prison service of between £4 million and £10 million a year.

#### **Question 16**

*Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?*

As stated above, PRT takes the view that that for category 3 GBH (section 20) only non-custodial disposals should be recommended.

#### **Question 17**

*Do you agree with removing the distinction between a high, medium and low community order from the offence range?*

The risk in removing this distinction is that the wide range of demands that community orders can place on offenders is obscured. The simple link between the number of requirements and severity of punishment is not tenable. However, sentencers and the public need to be constantly reminded that a community order can vary widely in both its punitive, reparative and rehabilitative content. For this reason, PRT would argue that it can be helpful to retain the distinction, albeit with more flexible definitions.

### **Question 18**

*Do you think that the aggravating/mitigating factors of harm within the draft guideline sufficiently allow the court to take into account consideration of victims, or are there other ways in which victims could be considered?*

PRT takes the view that the aggravating and mitigating factors set out in the draft guideline do take into account the impact on the victim. However, the consultation document does not make any mention of Victim Personal Statements and how sentencers can use their contents to inform sentencing. Given uncertainty about the role and use of Victim Personal Statements (recent analysis by Victim Support shows that only 16% of victims both recall being offered the opportunity to give a Victim Personal Statement and felt their views were taken into account when they took up this offer<sup>xiii</sup>), it would arguably be beneficial for the Sentencing Council to examine their role in informing the sentencer about the impact of the offence on the victim.

Opportunities also ought to exist alongside the formal criminal justice process for victims to express an interest in a restorative approach. This would need to be managed professionally and in a way that did not prejudice the court procedure. In many less serious cases it might replace court proceedings and in both less serious and more serious cases it can improve victim satisfaction and reduce the likelihood of reoffending<sup>xiv</sup>. The Sentencing Council should ensure the guideline promotes such opportunities.

### **Question 19**

*Do you agree that the proposed decision making process will increase transparency and therefore public confidence in the sentencing process? Are there any other ways in which the proposed guideline could increase public understanding and confidence?*

As mentioned earlier it is important that sentences are explained in a way that the defendant, victim and the general public can understand. Where a custodial sentence is imposed, it is important that all parties fully understand what this means in terms of the length of time to be spent in prison and the means by which release is determined, together with the potential for supervision on licence following release. A public record of the sentence, with a clear explanation of its full meaning should be available.

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<sup>i</sup> Hough, M. and Jacobson, J. (2008) *Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*, London: Prison Reform Trust

<sup>ii</sup> Jacobson, J. and Talbot, J. (2009) *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*, London: Prison Reform Trust



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- <sup>iii</sup> Caulum, M. (2007) *Post-adolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults and the Corrections System*, cited in *Transition to Adulthood Alliance (2009) Universities of Crime: Young Adults, the Criminal Justice System and Social Policy* - available at <http://www.t2a.org.uk/publication-download.php?id=15>
- <sup>iv</sup> For further information see the *Transition to Adulthood Alliance's* website - <http://www.t2a.org.uk/>
- <sup>v</sup> *Prison Reform Trust, (December 2010) Bromley Briefings Prison Factfile*, London: Prison Reform Trust
- <sup>vi</sup> Loucks, N. (2007) *No One Knows: Offenders with Learning Difficulties and Learning Disabilities. Review of prevalence and associated needs*, London: Prison Reform Trust
- <sup>vii</sup> Jacobson, J. and Hough, M. (2007) *Mitigation: the role of personal factors in sentencing*, London: Prison Reform Trust
- <sup>viii</sup> Home Office, (2001) *Making Punishments Work: report of a review of the sentencing framework for England and Wales*, London: Home Office Communications Directorate
- <sup>ix</sup> Action for Prisoners' Families, CLINKS, Pact and the Prison Reform Trust (2007) *The Children and Families of Prisoners: Recommendations for Government - Parliamentary Briefing*
- <sup>x</sup> The Fawcett Society (2009) *'Women and the Criminal Justice System - the Facts'*
- <sup>xi</sup> Smee, S. (2009) *Engendering Justice - From Policy to Practice*, London: The Fawcett Society
- <sup>xii</sup> Hough, M. and Jacobson, J. (2010) *Unjust Deserts: Imprisonment for Public Protection*, London: Prison Reform Trust
- <sup>xiii</sup> p.21: Victim Support (2010) *Victims' justice? What victims and witnesses really want from sentencing*, London: Victim Support
- <sup>xiv</sup> Shapland, J et al (2004) *Implementing restorative justice schemes (Crime Reduction Programme) A report on the first year Home Office Online Report* is at: [www.homeoffice.gov.uk/rds/pdfs04/rdsolr3204.pdf](http://www.homeoffice.gov.uk/rds/pdfs04/rdsolr3204.pdf)  
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