



Prison Reform Trust submission to the Sentencing Council's draft sexual offences guideline

The Prison Reform Trust 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's main objectives are:

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

The Prison Reform Trust, supported by the Pilgrim Trust, has launched a three year strategy to reduce the imprisonment of women in the UK, which builds on the work of the Women's Justice Taskforce.¹ The focus of this strategy is on the disproportionate numbers of women who are imprisoned for low-level non-violent offending, but we are also concerned that the specific factors affecting more serious offending by women should be recognised at all stages of the criminal justice process, including sentencing.

We welcome the opportunity to respond to these draft guidelines. As well as publishing guidelines, the Sentencing Council has an important role to play in public education. The term 'sexual offence' spans a broad range of different crimes of widely differing magnitudes, yet often the focus in public debate tends to be on those at the most serious end of the scale. The use of, and duration on, the sex offender register is itself overdue for review.

We believe that the Sentencing Council could use its unique position to educate people, and start a rational debate about how we respond to people who have committed sexual offences, what constitutes a proportionate sentence, and/or effective treatment, in the community or custody and how best to supervise and support people on completion of a sentence.

We are submitting a thematic response to the consultation, rather than responding to each individual question. We hope in this way to comment usefully on and raise questions about the guidelines. The Prison Reform Trust bases its view on experience and research. However we are not specialists in work with sex offenders or in conducting research programmes in this sphere. Our charity helped to secure the introduction of sex offender treatment programmes in prisons.

¹ Prison Reform Trust (2011) *Reforming Women's Justice*, London: PRT
For information about the current programme to reduce women's imprisonment see www.prisonreformtrust.org.uk/women

We have chosen to divide our response into four main sections:

- Mental health and learning disability
- Section Ten: Offences committed by offenders under the age of 18
- Coercion and exploitation
- Sex offender treatment programmes

Mental health and learning disability

The Prison Reform Trust welcomes the inclusion of “mental disorder or learning disability, where linked to the commission of the offence” as a mitigating factor within the sentencing process. We recognise the sensitivity and difficulties concerning mitigation in sexual offences, and believe that it is appropriate for both mental health and learning disability to be fully taken into consideration as part of sentencing, and that people receive the necessary treatment and support.

Conditions included in the term ‘mental disorder’ should be listed within sentencing guidelines. The severity of mental illness can range from mild to severe, and clarification is needed on when conditions should be considered as a mitigating factor.

A description of the term ‘learning disability’ is required, especially as the terms ‘learning disability’ and ‘learning difficulty’ are frequently confused. It is recommended that the WHO definition is used and a simple explanation is given noting the difference between learning disability and difficulty.²

We question the use of the term ‘learning difficulties’, which is used twice in the guidelines (pages 38 and 43). Is the term being used to mean learning disabilities? If it is then the same terminology should be used throughout, i.e. ‘learning disabilities’. However, if the term is being used to mean ‘learning difficulties’, the term should be defined within the guidelines.

Other conditions such as autism spectrum disorder should be included within the guidelines.

We would also welcome further clarification on the point at which a mental disorder can be used as a mitigating factor, and that this should be made clear within sentencing guidelines.

We welcome the inclusion of mental disorder and learning disability as mitigating factors. However, there remains a significant gap between the number of people with such conditions and the number whose condition is recognised prior to sentencing. As Lord Bradley’s report showed, many people with mental health needs or learning disabilities are not identified during their journey from arrest through to conviction. The disproportionate prevalence of mental health problems among women in prison, and the need for a gender-sensitive approach to diagnosis and treatment has been well-documented.³ The success of these guidelines, in providing mitigation for

² World Health Organisation (1996) *ICD-10 Guide for mental retardation* WHO: Geneva

³ See for example the Corston Report, Home Office, 2007

vulnerable defendants, will be dependent on the quality of screening and assessment undertaken by the evolving national liaison and diversion services⁴ and timely access to these services.

Section Ten: Offences committed by offenders under the age of 18

Sexual activity with a child, Sexual Offences Act 2003 – section 13 (with reference to section 9) and Causing or inciting a child to engage in sexual activity, section 13 (with reference to section 10)

We are concerned that the guideline in its current form takes insufficient account of consensual sexual activity between teenagers. Whilst the consultation document does refer to CPS guidance on prosecuting Section 13 offences (which states that “*consensual sexual activity between, for example, a 14 or 15 year old and a teenage partner would not normally require criminal proceedings*”) we are concerned that this implies that cases involving section 13 offences which do come before the court have not met this test. Notwithstanding concerns that CPS guidance on prosecuting youth is not always adhered to, we would like to see recognition of the role which consensual sexual experimentation plays in teenage relationships and greater flexibility built in to the guideline to allow sentencers to deal with such behaviour without recourse to the most intensive court orders.

At present the starting point for an offence of sexual activity involving penetration which took place between two consenting teenagers would be a 4 month detention and training order. Given that custody should be a last resort for children, and that, as the draft guideline acknowledges, “*a four month starting point, being the shortest period allowed under law, may be problematic for several reasons, including what can be achieved...in that length of time*”⁵ we recommend a starting point of a Youth Rehabilitation Order for Category 1 Culpability B offences, with a category range of a Referral Order to 12 months detention and training order.

We understand the rationale for including membership of a group or gang during commission of the offence as a culpability factor in list A. However, we would caution against its inclusion without a more nuanced discussion of the circumstances in which such offences might occur. Where, for example, the offender has been victimised themselves, or has been coerced into involvement using threats of violence or intimidation, this should be recognised.

Q93 Do you agree that the starting point should not be based on the age of the offender?

It is not clear how sentencing courts can establish accurately the culpability arising from an offence without taking account of the age of the offender, as age is integral to each of the culpability factors outlined. Indeed, the CPS has recently moved

⁴ There is a government commitment for national liaison and diversion services in all police custody suites and criminal courts by 2014. It is recommended that the SGC liaise with the NLDDN on this matter.

⁵ Sexual Offences Guideline Consultation pp.145

towards including the concept of maturity in guidance on assessing culpability.⁶ For this reason we think the age of the offender should be taken into account at step one.

Q94. Do you agree with the aggravating and mitigating factors proposed at step two for these offences?

With respect to the inclusion of “*failure to comply with current court orders*” in the list of aggravating factors, the consultation document states that this factor (as well as others) has its roots in guidance on domestic violence. We question whether it is appropriate to include this in the guideline for under-18s. Certainly failure to comply with current orders, where those orders relate to criminal behaviour unrelated to the offence for which the child is appearing in court, and where the offence refers to consensual sexual activity, should not be taken into account at step two. If this factor is to be included, we would welcome differentiation between non-compliance a result of technical breach, for instance for failing to turn up to appointments, versus breach as a result of a further offence. We would also welcome greater recognition of individual factors (such as physical and emotional concerns or those relating to the family or home environment⁷) which might impact on a child’s capacity to comply. This would be congruent with the recent publication of the Criminal Justice Joint Inspection (CJJI) thematic report, which painted a “*clear picture...of young men who had multiple and complex needs in addition to their sexual offending.*”⁸

We are concerned that the inclusion in the list of aggravating factors of “*failure to respond to previous warnings about his/her behaviour*” is open to interpretation – for instance, whom should the warnings have come from, and when? If the warnings related to behaviour which was not unlawful should this be included as an aggravating factor? Where warnings relate to sexual activity which has taken place within the confines of a consensual relationship between two children of the same or a similar age, should these hold the same weight as warnings regarding non-consensual sexual activity between, for instance, a 13 year old and a 17 year old? Given that statutory agencies have been criticised for missing opportunities for early intervention and for failing to share information⁹, we would welcome greater clarity as to how, and what instances, failure to respond to warnings can be interpreted as an aggravating factor.

With respect to the inclusion of a new mitigating factor relating to previous good character and/ or exemplary conduct, we challenge the assumption that “*the child...may still be developing in terms of maturity and character*”. Research suggests “*maturity can be understood as a developmental concept, including the categories of physical, intellectual, emotional and social development.*”¹⁰ Given that a child will still be developing in these categories, we recommend revising the explanatory wording to make this clear.

⁶ <http://www.t2a.org.uk/cps-confirm-maturity-to-be-factor-in-maturity/>

⁷ Criminal Justice Joint Inspection (2013) *Examining multi-agency responses to children and young people who sexually offend* CJJI: London

⁸ Ibid.

⁹ Ibid.

¹⁰ <http://www.t2a.org.uk/wp-content/uploads/2011/09/Birmingham-University-Maturity-final-literature-review-report.pdf>

With relation to the inclusion of age/and or lack of maturity as a mitigating factor, we question how this would be determined in the absence of a maturity test. The explanatory notes state that this “*would usually operate along a sliding scale providing greater mitigation to a 12 year old of average maturity than for a 17 year old with average maturity*”, yet gives no detail on how “*average maturity*” might be linked to age nor to how sentencers should assess it.

As highlighted by the Criminal Justice Joint Inspection thematic report, “*children and young people with learning difficulties are over-represented in those who display sexually harmful behaviour*” despite “*previously unidentified underlying disorders*” often going unnoticed.¹¹ We therefore support the inclusion of “*mental disorder or learning disability, where linked to the commission of the offence*” in the list of mitigating factors, but would welcome clarification over which conditions are included in the term ‘mental disorder’ and which definition of learning disability (we would recommend that adopted by the World Health Organisation¹²) is to apply. In addition, given concerns over the identification and assessment of children with impairments and difficulties,¹³ and the fact that “*no validated assessment tools exist for working with children and young people with learning, speech, language or communication issues*”¹⁴, information on how learning disabilities can affect a child’s behaviour, their capacity to engage with both the court process¹⁵, and, most importantly, court orders or particular requirements (for instance curfews), as well as the availability of adapted offending behaviour courses in the community and in custody should be provided for sentencers as part of their training.

Engaging in sexual activity in the presence of a child, Sexual Offences Act 2003 – section 13 (with reference to section 11); and Causing a child to watch a sexual act, Sexual Offences Act 2003 – Section 13 (with reference to section 12)

We agree that instances where children exchange and show pictures of themselves or children of the same age to other similarly aged children, should not be in the same category as an adult showing a child indecent pictures of other children. Such behaviour amongst children and teenagers is best challenged by schools and through the provision of education on healthy relationships, rather than through the criminal justice system.

¹¹ Criminal Justice Joint Inspection (2013) *Examining multi-agency responses to children and young people who sexually offend* CJI: London

¹² World Health Organisation (1996) *ICD-10 Guide for mental retardation* WHO: Geneva

¹³ Talbot, J. (2010) *Seen and Heard: supporting vulnerable children in the youth justice system* PRT: London

¹⁴ Criminal Justice Joint Inspection (2013) *Examining multi-agency responses to children and young people who sexually offend* CJI: London

¹⁵ Talbot, T. (2012) *Fair access to justice: support for vulnerable defendants in the criminal courts* PRT: London

Coercion and exploitation

Coercion as a mitigating factor for sexual offences

The Home Office recognises that a history of abuse contributes to the risk of offending, along with mental illness, drug dependence and self-harm¹⁶. The relationship between domestic violence and duress in respect of abused women coerced into committing offences has been well-documented.¹⁷ The point has been made that because of the difficulties of translating the medical language of “learned helplessness, passivity and paralysis” into the legal discourse of duress or coercion, the effects of abusive, violent and coercive relationships on women’s behaviour are more amenable to consideration by way of mitigation.¹⁸ This is not to excuse women sex offenders or suggest that they will all have been exposed to the kind of violence, grooming or exploitation that would reduce their culpability. However, we believe there is sufficient basis for the Sentencing Council to consider including the effects of abusive, violent and coercive relationships on an offender as a potential mitigating factor in sentencing.

Exploitation offences – trafficking

We welcome the proposals for sentencing of human traffickers, noting that at present there appear to be more victims of trafficking than traffickers in prison. The research presented at the Prison Reform Trust’s recent roundtable on the number of foreign national women prisoners who are trafficked into offending but not identified as victims by police, prosecutors or courts, drew attention to this problem.¹⁹ That research points out that according to the International Labour Organisation, the criminal profits from human trafficking are estimated to exceed \$31 billion.²⁰ It also highlighted the increased vulnerability of women who do not speak English, and those with children. The aggravating factors set out on p.90 at Question 46 include ‘deliberate isolation of prostitute’ and ‘threat of harm to prostitute’s family’ which are capable of accommodating these but we suggest that the exploitation of language barriers is an aggravating factor that is worth highlighting as it exacerbates the victim’s difficulty in seeking help.

Sex offender treatment programmes

We are aware that the Sentencing Council does not have a remit regarding provision of reducing reoffending work in prison. However, we feel it is important that sentencers have an accurate picture of provision in prisons when sentencing. We note the five purposes of sentence, punishment, reduction in crime, reform and rehabilitation, public protection and reparation to victims.

¹⁶ See for example HM Government, *A Call to End Violence against Women and Girls*, Action Plan 2013

¹⁷ Loveless J., *Domestic Violence, coercion and duress*, Criminal Law Review 2010, Crim L.R 93

¹⁸ Ibid.

¹⁹ Hales, L. and Gelsthorpe, L, *The Criminalisation of Migrant Women*, Institute of Criminology, University of Cambridge, 2012. See also

http://www.insidetime.org/articleview.asp?a=1422&c=no_way_out

²⁰ Ibid, p.10

For instance the council is considering how to respond to the rise in sexual offences via the internet and using new technologies. There are currently no treatment programmes for internet offending running in prison.

We note that the guidelines mentioned the range of accredited sex offender treatment programmes provided by NOMS (page 11). These programmes can reduce the risk of further offending and increase understanding of the impact of the offence on the victim. However, it is worth noting that provision of these courses is very limited and also currently under review.

Availability of courses

There are currently around 11,000 people in prison who have been convicted of a sexual offence. There are a range of interventions that could potentially help reduce risk of further sexual offending. In terms of those specifically designed to meet the treatment needs of sexual offenders, however, availability of courses is scarce, for instance the SOTP Healthy Sexual Functioning course, which is for high risk sex offenders runs in six prisons.

The figures for completions of an accredited Sex Offender Treatment Programme are low. In the past 3 years the figures for completed courses are 2008-9, **1,114** 2009-10 **1,133** and 2010-11 **1,142**. These figures are only for completions of a course and therefore it is possible that they include prisoners who have completed two courses. In July last year SOTP courses were available in 21 prisons although people convicted of sex offences can be held in 120 prisons. This means that someone convicted of a sex offence has a one in six chance of being held in a prison where they can complete a programme.

Not everyone will be eligible for the sex offender treatment programmes and low risk prisoners may be assessed as not needing to do a programme. There are no published figures of how many people have been assessed as suitable and are waiting for a place on a course. However, Prison Reform Trust's advice service is often contacted by people waiting to be assessed for a course or for a place on a course. It is not uncommon to hear of waiting lists of 18 months for places on SOTP courses. This has been the subject of a number of legal challenges, where prisoners have taken successful cases about the failure of the Prison Service to provide courses and the impact this has had on their indefinite detention.

The offending behaviour programmes in prison are currently under review. NOMS are trying to ensure that the finite resources are used more effectively. Commissioners decide which programme they run by looking at the prisoners located in their area. It has recently been decided that generally treatment programme for sexual offending will not be available for low risk prisoners but moved to medium and above risk prisoners. It is therefore unclear how many courses will be available in the future but the provision is likely to decrease.

In the community CirclesUK provides support to people who have committed sexual offences with the aim of rehabilitating and reintegrating them back into society. This close supervision of the 'core member', together with the support of statutory agencies, can help to reduce the feelings of isolation and emotional loneliness which can lead to an increased risk of reoffending. We believe that this approach allows

people to take a greater sense of responsibility and reduce their level of risk in a safe and supportive way, and would like to see this model extended to more people who have committed sexual offences.

Specific concerns about provision

Internet based offending

The I-SOTP (Internet Sex Offender Treatment Programme) does not take place in prison at the moment, despite increased number of people given custodial sentences for internet based offending. The course is only available in the community and many probation areas run this course as part of community sentences.

Women

At the moment, there is no standardised treatment for women convicted of a sexual offence and no group work in prison. In July 2012, there were 83 women in prison who had been convicted of a sex offence. Although NOMS are currently developing work with women convicted of sexual offences, this is not yet finalised. The framework that is being developed will provide staff with guidance on how to assess manage and develop treatment plans for women. There will be a Practitioner Manual that can be used by trained staff who will download the material as needed. It will be suitable for people on a community sentence or in prison. The failure to provide Sex Offender Treatment Programmes for women impacts on parole decisions and on sentencers' ability to make community orders and is certainly unfavourable treatment of women.

Adapted courses

There are two courses for people with social or learning difficulties. These are aimed at men not traditionally considered as learning disabled who function at a slightly higher level. (note, these are not suitable for people with a severe learning disability). In July 2012, these courses were running in 10 prisons. There is one pilot course for people with a more severe learning disability running at the moment.