Sentencing Council

Miscellaneous amendments to sentencing guidelines

Response to consultation

March 2024

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Foreword

To ensure that guidelines are kept up-to-date the Council holds an annual consultation on miscellaneous amendments and this was the third of these consultations.

We rely on guideline users to alert us to issues that arise with guidelines and then to respond to the consultation on how we intend to resolve those issues. We are grateful to all those who do either or both of these things.

This particular consultation also covered proposed changes to guidelines to address some of the recommendations in a report we commissioned into equality and diversity in the work of the Sentencing Council. Many of those who responded to this aspect of the consultation are not regular respondents to our consultations and we welcome these perspectives.

We also consulted on some changes to the manslaughter guidelines arising from recommendations in the government commissioned Domestic Homicide Sentencing Review.

On behalf of the Sentencing Council I would like to thank all those who responded to this consultation on such a wide variety of areas of sentencing. The responses have led us to make changes to several of the proposals, the full details of which are set out in this document.

Lord Justice William Davis

Chairman, Sentencing Council

Introduction

The Sentencing Council has built up a large body of sentencing guidelines and accompanying materials that are in use in courts throughout England and Wales. Over time guidelines require updating because, for example, users have pointed out issues (often using the feedback function on all guidelines) or case law or new legislation may render aspects of guidelines out of date. The Council therefore holds an annual consultation on miscellaneous amendments to guidelines and the materials that accompany them. This was the third of these annual consultations in which the Council seeks the views of guideline users to proposals to make amendments to existing guidelines.

The consultation is available on the Council's website: www.sentencingcouncil.org.uk.

The changes consulted on relate to guidelines used in magistrates' courts and the Crown Court and can be summarised as follows:

Matters relevant primarily to magistrates' courts:

- in the Allocation and Sentencing children and young people guidelines, adding a factor relating to waiting time to the non-exhaustive list of factors to be considered when deciding whether it is in the interests of justice to send a child jointly charged with an adult to the Crown Court for trial

Matters relevant to magistrates' courts and the Crown Court:

- adding an aggravating factor relating to the supply of drugs to children to the Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another guideline

- amending the Fraud guideline to address perceptions that non-financial impact is not given sufficient weight and to cater for situations where there is no or minimal pecuniary loss

- adding breach of a stalking protection order (SPO) and breach of a domestic abuse prevention order (DAPO) to the Breach of a protective order (restraining and non-molestation orders) guideline

- amending the Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water guideline to give greater emphasis to community orders over fines

- amending or adding mitigating factors and the associated expanded explanations to address issues relating to equality and diversity in sentencing:
  - Remorse
  - Good character and/or exemplary conduct
  - Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
  - Age and/or lack of maturity
  - New factors: Difficult and/or deprived background or personal circumstances and Prospects of or in work, training or education

  - New factor: Pregnancy and maternity

Matters relevant to only to the Crown Court:

- changes to the loss of control, diminished responsibility, unlawful act and gross negligence manslaughter guidelines relating to:
  - strangulation, suffocation or asphyxiation
  - coercive or controlling behaviour

Summary of responses

There were 87 responses to the consultation. Some of the responses were from groups or organisations, and some from individuals.

Breakdown of respondents

Type of respondent	Number of responses
Academic	13
Charity or non-governmental organisation	31
Government	1
Judges	3
Legal professional	10
Local government	2
Magistrates	3
Medical professional	4
Member of the public/ unknown	12
Parliamentary or government	5
Prosecutor or police	4

Overview

The majority of responses were broadly supportive of the proposals to which they responded but there were a number of critical responses and many suggestions for changes.

Details of the responses to each issue are detailed below.

Allocation guideline

The issue

In the Allocation guideline under the heading 'Children or young people jointly charged with adults – interests of justice test' there is a non-exhaustive list of examples of factors to be considered when deciding whether it is in the interests of justice to send the child to the Crown Court for trial:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the child or young person: the younger they are, the greater the desirability that they be tried in the youth court;
- the age gap between the child or young person and the adult: a substantial gap in age militates in favour of the child or young person being tried in the youth court;
- the lack of maturity of the child or young person;
- the relative culpability of the child or young person compared with the adult and whether the alleged role played by the child or young person was minor;
- the lack of previous convictions on the part of the child or young person.

In 2020 the youth justice judicial lead gave some guidance about the relevance of delay to the interests of justice test during the pandemic.

The Council considered that this guidance remains relevant and should be encapsulated into the appropriate part of the Allocation guideline (which is also reproduced in the Sentencing children and young people guideline) in the form of an additional factor about the expected waiting time for a trial in the Crown Court:

- the likely waiting time in trying the youth in the Crown Court as compared to the youth court

Responses

The majority of respondents who commented on this proposal were fully in favour. Of those who disagreed or had reservations one felt that a child should always be tried in a youth court, one seemed to suggest that they should always be tried in an adult court and others raised more general issues about the criminal justice system.

Outcome

The Council felt that some of the objections were based on an incomplete understanding of the relevant legal framework and the relevance of the list of factors to be considered. In view of the general agreement from most respondents, the Council decided to adopt the proposed additional factor.

Supply of drugs to children

The issue

In March 2023 the Ministry of Justice asked the Council to amend existing relevant guidelines to make clear that supply of a controlled drug to a child is an aggravating factor.

In the Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another guideline there are already statutory aggravating factors that relate to under 18s:

- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.

There are also several other existing aggravating factors in the guideline that reference children but do not specifically refer to sale to children:

- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- Targeting of any premises where children or other vulnerable persons are likely to be present
- Presence of others, especially children and/or non-users

The Council agreed that there could be merit in adding a factor that explicitly addresses the sale to children in the interests of aiding public understanding of how courts apply these aggravating factors in relevant cases.

The Council consulted on adding the factor:

- Offender supplies or offers to supply a drug to a person under the age of 18

Responses

The majority of respondents who commented on this proposed new aggravating factor agreed with the proposal, though some made suggestions for clarification. Of those who entirely disagreed, one individual did so on the basis that it would further discriminate against black people. The Criminal Bar Association (CBA) were concerned that the need to evidence the age of the purchaser could lead to delays and saw no need for the change, and the Criminal Law Solicitors Association (CLSA) felt that as the list of aggravating factors is non-exhaustive there was “no need to provide another layer”.

Other respondents who agreed with the proposal noted that there was likely to be a lack of evidence as to the age of purchasers and that where such evidence existed courts would be taking it into account in any event and therefore the change would have little effect.

Several respondents made the point that selling to children should only be an aggravating factor where the offender was an adult. Their concern being that, for example, child offenders exploited by county lines gangs could be penalised by this factor. The Council

considered this issue but noted that the guideline applies only to sentencing adults, so this concern would not be an issue in practice.

Outcome

The Council decided to add the new factor as proposed in the consultation.

Fraud

The issue

The Justice Committee published a report, 'Fraud and the Justice System' in October 2022. This contained the following recommendation (at paragraph 122):

> The loss of a comparatively small amount of money can have a greater impact on one individual than the loss of a greater amount on another. The current sentencing guidelines do not recognise this and therefore overlook the emotional and psychological impact that fraud crimes can have on their victims. Sentencing guidelines should be amended to give greater consideration to the emotional and psychological harms caused by fraud crimes alongside the financial losses incurred.

The Council was also made aware of a potential difficulty in sentencing cases where there is little or no financial harm but a high level of non-financial impact on the victim.

The fraud guideline relevant to this issue is simply titled Fraud. When developing the guideline the Council took care to ensure that the effect on the victim was taken into account in sentencing and used a two-stage harm model. This was set out in detail in the consultation which proposed to address the concerns raised by:

- making some changes to the wording to give greater prominence to victim impact
- removing the example of serious detrimental effect on the victim (which may have given the impression that emotional and psychological harms are not in scope)
- adding wording relating to situations where there is little or no pecuniary loss to indicate that the court can go above category 4
- removing financial amounts from the sentence table to avoid the impression that it is only financial amounts that are considered

Responses

Around two-thirds of respondents who commented on this proposal were broadly supportive. Of those who disagreed, one felt that the guideline was working well as it is and so there was no need to change it. The CLSA felt that the proposed changes reduced certainty and that an increased focus on the effect on the victim would make sentencing arbitrary. One individual respondent opposed the changes saying that they "are simply reactionary". Another said that they were "overly complex and unnecessary", he suggested an entirely new approach "whereby the offender is given a whole life debt to be paid to the victim". One respondent did not comment on the proposals as such but proposed that the financial values in the guideline should be increased in line with inflation.

Several respondents made practical suggestions for changes to the proposals. The Law Society and an academic, both suggested that rather than deleting the example about damage to credit rating, it might be better to reinstate it and to add a reference to 'emotional or psychological harm'. Similarly the Justice Committee suggested adding the wording in brackets:

- Serious detrimental effect on the victim whether financial or otherwise (including emotional and psychological harm)

The Council agreed that this would be a helpful addition.

HM Council of District Judges (Magistrates' Courts) suggested adding "Where there is no actual or intended financial loss, or such loss in minimal, the case should initially fall into Category 5." to improve clarity. The Council noted that the guideline states that category 5 applies where financial harm is "Less than £5,000" and felt there was no ambiguity.

Other respondents including the Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Sentencing Academy suggested more radical changes to the guideline.

The Council thought that any changes made to the guideline as a result of this consultation should be limited to the issues raised by the consultation. Suggestions for more comprehensive changes will be collated and a review of the guideline will be considered when the Council's work plan is next updated

Outcome

The Council decided to make the changes proposed in the consultation with the addition of the suggestion from the Justice Committee.

Breach of a protective order guideline

The issue

The Suzy Lamplugh Trust asked the Council to consider adding breach of a stalking protection order (SPO) under section 8 of the Stalking Protection Act 2019 and breach of a domestic abuse prevention order (DAPO) under section 39 of the Domestic Abuse Act 2021 to the Breach of a protective order (restraining and non-molestation orders) guideline. This guideline currently applies to breaches of restraining orders and non-molestation orders.

The Council agreed that the factors in the breach of a protective order guideline would apply equally to breach of an SPO or DAPO and, that as all the offences have the same statutory maximum penalty (five years), the sentence levels in the guideline would also apply. The legislation creating the breach of a DAPO offence is not yet in force, but the Council consulted on adding a reference to it so that any change can be made once it is in force.

Responses

All but one of those who responded to this proposal agreed to the addition. The single dissenter stated “it should be recognised there are a huge number of spiteful malicious false allegations in this area”. The Suzy Lamplugh Trust very helpfully pointed out an error in the consultation – an SPO is a stalking **protection** order (not a stalking prevention order as stated in the consultation document).

Some of those who agreed with the proposal felt that more should be done. For example:

> [G]iven the high rate of reoffending for stalking … we strongly advocate that all sentences for stalking, whether under 12 months or not, should be custodial and not include community service, fines or other alternatives. We are also concerned that only 35% of breaches of a stalking protection order were given an immediate custodial sentence in 2022. The Sentencing Council’s breach of protective order guidance states ‘Community orders can fulfil all the purposes of sentencing. In particular, they can have the effect of restricting the offender’s liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.’ However, we believe that referring stalking perpetrators onto community service programmes as an alternative to a prison sentence, deprioritises and does not reflect the severity of the crime, neither does it consider the impact on the victim. We are concerned that even when protective orders are put in place to manage the risk to victims these are often breached, with many perpetrators continuing to stalk their victims in person and online, further endangering their safety. **Suzy Lamplugh Trust**

The Council felt that the wider issues raised should be considered separately – as part of the evaluations of the stalking and harassment and breach guidelines.

Outcome

The Council decided to make the changes consulted on subject to correcting the name of the order.

Environmental guideline for individuals

The issue

The Council received representations from those concerned with prosecuting fly-tipping offences asserting that financial penalties imposed by courts using the Environmental offences guideline for sentencing individuals are insufficient to deter offending.

One aspect of the guideline that the Council was asked to consider was whether greater use could be made of community orders. The Council agreed that the extent to which the guideline steers sentencers away from community sentences in favour of fines should be reconsidered. The emphasis on fines was a deliberate policy at the time that the guideline was introduced, on the grounds that this type of offending is often financially motivated (including the desire to avoid the costs of operating within the law).

The Council consulted on amending the guideline to give greater emphasis to community orders over fines.

Responses

The majority of responses to this proposal were generally supportive but there were some notable exceptions and others who wanted the changes to go further.

For example, in support:

In cases where we do not pursue POCA many individuals sentenced for environmental offences will still have made a direct financial gain from their offending or have avoided the legitimate costs of operating such as the cost of the lawful disposal of waste, permit fees, site infrastructure etc., or both. The removal of financial benefit from individuals in the sentencing process is often thwarted by the inability to accurately calculate financial gain given that such calculations are limited only to the parameters of charges brought even though there is evidence of a wider offending pattern. Moreover, the imposition of means tested fines alone inevitably leads to lower financial penalties which do not adequately reflect the seriousness of the offending, nor the gains made from it. Such penalties do not therefore have a sufficient deterrent effect.

We agree that the current guideline is weighted too heavily in favour of the imposition of a fine rather than a CO for individuals. This can lead to the unsatisfactory outcome where too great a disparity occurs between some better off offenders being sentenced to a fine (which can often be paid off quickly, or over a much longer period at a low rate the offender is deemed able to afford) and those with less resource facing a more onerous punishment in the form of a CO. **The Environment Agency**

In opposition to the proposals:

Fly-tipping is often a premeditated and financially motivated crime which requires a stronger not weaker deterrent which no doubt a community sentence would be perceived to be by offenders and organised crime gangs. …

By removing financial penalties the proposal fails to penalise offenders in a manner proportionate to the economic gain derived from their illegal activities.

Organised crime gangs are a major contributor to large-scale fly-tipping. These groups are solely motivated by significant financial gains and the absence of stringent financial penalties may embolden these gangs leading to an escalation in fly-tipping. **UK Environmental Law Association**

The Council noted that contrary to what was suggested by the UK Environmental Law Association the proposal was not to remove financial penalties, and the proposed wording states (emphasis added):

- Where the community order threshold has been passed, a fine may still be the most appropriate disposal. Where confiscation is not applied for, **consider**, if wishing **to remove any economic benefit** derived through the commission of the offence, **combining a fine with a community order**.

The Hertfordshire Fly Tipping Group, whose representations led to the proposals, agreed with the change, but had concerns:

The FTG is concerned with respect to the strong inference in the consultation paper that fly tipping incidents would have to be serious in order to warrant a potential community sentence. The Sentencing Council is asked to consider that the majority of fly tipping incidents dealt with by local authorities are at the lower end of offending scale. Therefore in practice, if this approach is taken by the courts, then it is possible the proposed changes will have little impact and therefore little deterrent against future offending.

In addition the FTG urges further consideration of the following points which warrant Sentencing Council consideration of additional changes to the guideline.

- As summarised in the consultation paper the Guideline requires the courts to consider any claim for compensation (for example to cover clean-up costs) and confiscation and to ensure that any financial penalty should remove any economic benefit the offender has derived through the commission of the offence including avoided costs, operating savings and any gain made as a direct result of the offence.
- However, what is unclear from the above and what needs to be made specific in any future revision of the guideline is that the courts should also look to reflect costs incurred by local authorities with respect to enforcement and clean up activity linked to the fly tipping in question. The FTG recommends this becomes a default consideration along with the other factors already listed.
- Secondly, the proposed amendments do nothing to address the disconnect between the FPN regime originally introduced in 2016 and court processes when it comes to setting fines in response to successful prosecutions for fly tipping. The Sentencing Council is asked to consider that from a local authority enforcement perspective FPNs and court fines are considered part of the same enforcement ‘system’.

A lawyer specialising in the area of waste management made the following comments:

The chief complaint about the quantum of financial penalties cannot be blamed on the guidelines but the presentation of cases to court and the lack of understanding about how to use the guidelines. In a fly-tipping case, there is an economic benefit but step 5 is

simply skipped over. When it comes to calculating a fine, there is infrequently any enquiry into the finances of the offender and consequently, the fine is based on a likely undervalue of the relevant weekly income. Rather than an amendment to the guideline, what is needed to proper training to ensure they are used effectively in practice.

Whilst I can see why the sentencing council might propose a band F fine for a deliberate category 3 offence with a community based penalty given the deliberate nature of the offending, in my opinion it should be a medium level community order to reflect the minor impact on the environment rather than a high community order. If it is a particularly serious offence, the sentencer still has the option to move up the range to a custody sentence. A community based penalty is too high a starting point for deliberate category 4 offence which is an offence involving no environmental harm but simply risk of harm particularly when you bear in mind that a fixed penalty is available for fly-tipping, which is likely to be a deliberate category 3 offence, up to £1,000. To give latitude to the sentencer, it would be better to include in the top range a medium level community based penalty in addition to a band E fine.

On this last point – the Council noted that what was proposed by the change was not technically an increase in the starting point for a category 3 offence, but substituting a community order for an equivalent level of fine. Adjusting the level of the community order from high to medium would require a downward adjustment of all the other sentences in category 3 and 4 which was not the purpose of the changes and could undermine any deterrent effect of sentences for these offences.

The consultation asked a question about the likely impact of the proposed changes and several respondents expressed concern about the additional workload that would be placed on the probation service by an increase in community orders. Others felt that the changes would make very little difference and that fines would still be imposed in most cases. Others noted that the effects were hard to estimate and that sentencing should be monitored to assess the impact.

Outcome

The Council decided to make the changes consulted on and to arrange a meeting with interested parties to set out the legal framework within which sentencing and sentencing guidelines operate and to explain the reasons for decisions made.

The impact of the changes on sentence outcomes will be monitored.

Mitigating factors and expanded explanations

Background

In 2021, the Council commissioned the University of Hertfordshire to conduct research into and report on Equality and diversity in the work of the Sentencing Council. The research aimed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups, and to make recommendations for how to mitigate these disparities, if possible. In light of the findings and the recommendations in the research report (the 'UH report'), the Council published a response in January 2023 setting out the steps being taken which include reviewing the use and application of aggravating and mitigating factors and expanded explanations in sentencing guidelines. In the response the Council undertook to consult on some changes and additions and to conduct research into how these changes might work in practice. A report on this research has now been published.

All offence specific sentencing guidelines contain a non-exhaustive list of aggravating and mitigating factors that may increase or decrease the sentence imposed. Since 2018 the Council has provided expanded explanations for all the common aggravating and mitigating factors in guidelines which are accessed by clicking on the factor.

Remorse

The issue

The UH report recommended that the Council should "Extend the expanded explanation for 'remorse', and include 'learning disability, communication difficulties and cultural differences' as influential factors in the evaluation of remorse". The Council tested these potential changes with judges and magistrates and consulted on a revised expanded explanation, as follows:

> **Remorse**
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> Lack of remorse should never be treated as an aggravating factor.
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to for example:
> - nervousness
> - a lack of understanding of the system
> - learning disabilities
> - communication difficulties
> - cultural differences
> - a belief that they have been or will be discriminated against
> - peer pressure to behave in a certain way because of others present

- a lack of maturity etc.

If a PSR has been prepared it will provide valuable assistance in this regard.

The explanation differs from that currently in use, in that the examples of what may affect an offender's demeanour (which are currently in a paragraph) were put into a bulleted list and the third, fourth and fifth bullet points were added. Additionally (and inadvertently) in the final sentence the current wording 'it may provide' was changed to 'it will provide'.

Responses

Over half of respondents who commented on this proposal were generally in favour and some suggested areas for improvement. Around 10 respondents were firmly opposed to the proposals. The main area of disagreement (including among some who were broadly supportive) was in relation to 'cultural differences'.

The proposed expanded definition includes "cultural differences" as a factor which allegedly might mean the offender's demeanour in court could be misleading.

I do not know what "cultural differences" actually mean in this context and why they are relevant. I note that sentencers who were asked their opinion raised the exact same points and the Council should reflect on these concerns and remove this. **Philip Davies MP**

The issue of remorse is subjective, and often open to misinterpretation by the author of a pre sentence report, Currently, remorse is dealt with by way of guilty pleas, co-operation with the probation services during the preparation of the report, and the actions of the defendant. Speculation as regards cultural and other factors makes a proper analysis impossible. **Criminal Law Solicitors Association**

We agree with the additional factors listed and welcome the research that underpins these changes. However, given the question that has been raised in the research regarding the term 'cultural differences' we hope that there will be follow up research that may address how this term is used in practice. **Sentencing Academy**

The Drive Partnership agrees strongly with the addition of learning disabilities and communication difficulties to the expanded explanation for the mitigating factor of remorse. It is important that these factors are considered in the process of sentencing and an inability to articulate and/or present in a certain way does not disproportionately affect sentencing. Many perpetrators of domestic abuse are highly deceitful and able to manipulate professionals, including within the criminal justice system. We would like to see language barriers included under the point of "communication difficulties" to ensure that individuals for whom English is not their first language are not considered to be less remorseful.

The Drive Partnership would urge caution with the inclusion of "cultural differences" within the expanded explanation. Whilst we strongly appreciate the intention behind this change, we would encourage further thinking about the phrasing to ensure that the emphasis rests on those responsible for sentencing being aware of their potential unconscious bias

towards those from different cultures, rather than cultural differences being a reason and/or justification for not expressing remorse. Cultural differences are often cited to minimise and justify abusive behaviour by both perpetrators and professionals who work with them, and we are cautious of this being applied in sentencing. **The Drive Partnership**

We agree with the inclusion of learning disabilities and communication barriers but are concerned by the lack of detail and consideration regarding the inclusion of cultural differences. This requires more clarity in order to be useful and understood.
End Violence Against Women

Restore Justice questions the point of cultural differences in the same way as in the consultation and quoted above. The relevance of cultural differences in remorse presents too much ambiguity. The Council admits the limitations of the research, and difficulties to define this further, which we consider as significant factors in not adding this particular factor to the expanded explanation list for remorse.

We strongly disagree with adding ‘cultural differences’ to the expanded explanation for the mitigating factor of remorse, or making it a ‘relevant’ factor at all. The alternative suggestion is that ‘cultural differences’ are not to be considered as relevant. **Restore Justice**

Others raised fundamental issues relating to the consideration of remorse

This is the only mitigating factor which has no evidential basis at all, both in its current form and with the expanded explanation. It remains vague and open to interpretation. …

The expanded explanation now adds a whole new breadth of interpretation that allows a court to speculate that the defendant might have said sorry, were it not for a comprehensive list of factors which bring the potential to encompass the vast majority of defendants. It becomes difficult to envisage a finding other than that any defendant is potentially incapable rather than unwilling to express any form of remorse. Members of the bench may disagree in the speculation about each individual - would they if they could, or not?

This mitigating factor is vastly over-used on absolutely no real evidence at all. Sentence is already reduced for those who admit their offence to the police, and with credit for guilty plea in court. This is factual and evidenced. Very occasionally there is something extra - making the call to the police, giving first aid, writing a letter of apology, fixing the fence - something!

A suggestion to either remove 'remorse' as it stands altogether, or leave it there but add 'EVIDENCE of' to exercise the minds of the judiciary. The need to ask 'Why are we reducing the sentence even further for this defendant? What did they actually DO?
Individual

The reduction for remorse must be earned and it must be demonstrated. The sentence could topple from custody to community on this factor. It has to be substantiated. …

What did this offender do to demonstrate remorse to the victim, whether an individual or the general public? How can the sentencer be convinced that there is true remorse? What is the evidence of action after the offence took place? For example, they are offering to pay compensation and they have saved it up in the meantime to pay some or all of it immediately, or they present a letter to the court to pass to the victim (monitoring as to whether that actually happens or not!). **Faster Fairer Justice**

Offenders can express remorse in a variety of different ways, including verbally via partial or full apologies and non-verbally through, for example, tears, downward eye gaze, or hanging their head low. Implementing remorse as a mitigating factor already involves asking sentencers to do something that psychological research suggests is very difficult, i.e., evaluating the veracity of a stranger's statement in the absence of an opportunity to carry out detailed questioning. In addition, the proposed amendment would require sentencers to bear in mind that they may be misreading the offender's signals, which may be purposively deceptive. Research suggests that people find it difficult to accurately judge non-verbal cues to deception, and particularly so when these are expressed by someone from a different culture. Consequently, the Council is proposing to make the sentencer's task even more difficult than it is at present. …

Recent research on Crown Court sentencing suggests that written apologies are common practice in the courts and that sentencers may have diverse attitudes regarding their value for assessing remorse. Therefore, it might be helpful to include specific wording somewhere giving the example of a written apology to the victim and stating the Council's position on the value of such evidence. **Dr Ian K. Belton and Professor Mandeep Dhami**

Concerns about how remorse is demonstrated and taken into account were also expressed by those with lived experience of the criminal justice system:

Members outlined concern over mis-intended consequences coming from the way some individuals might express remorse and felt that this was potentially problematic if used in sentencing which has been echoed in our neurodiversity forum which is a factor that is prevalent in the revolving door group Members worried that defendants with learning difficulties would be disadvantaged.

Another explained that she had been assumed to be unremorseful in Court but that this was because of the emotional state she was in at the time. "When I was sentenced, they accused me of not showing remorse, but I was in a state of shock. I didn't really feel anything. It didn't mean I wasn't remorseful because I was just in this state. But that's because I was also suffering with really bad mental health because of the crime as well. But they don't ever take that into consideration, it was just, 'oh she's not showing any remorse at all.'"

Members discussed to what level remorse should be considered in sentencing. There were mixed feelings about this. Some identified that remorse is not indicative of whether a person is ready to start rehabilitation and that it is difficult to assess the validity of displayed remorse. One offered this analysis:

"It is important to note that remorse is not always a reliable indicator of rehabilitation potential. Some persons may express remorse simply because they believe it will help

them get a lighter sentence. Others may be genuinely remorseful but may still reoffend due to factors such as addiction or mental health problems."

Others continued this theme, pointing out what looks like contrition can be more about self-pity. "You can't simply walk into court and say that you're sorry, or, you know, because a certain amount of that will be feeling sorry for oneself as opposed to genuinely remorseful for the crime that's been committed." **Revolving Doors**

Dr Laura Janes made suggestions for clarification and additions to the expanded explanation to include a reference to mental disorder and age.

Outcome

The Council noted that in practice the weight attached to the mitigating factor of remorse will be most significant where there is some evidence of the extent of the remorse in the ways suggested by respondents, some of which may engage other mitigating factors. However, the Council considered that there may be situations where it is appropriate for a court to take remorse into account where an offender has not provided evidence.

The Council did not consider it appropriate to remove remorse as a factor firstly, because it was not what was consulted on and secondly, because remorse does play a part in sentencing, not least because a genuine expression of remorse may provide some solace to victims in certain circumstances. The Council agreed to consider future opportunities to consider remorse and the impact on sentences.

The Council was persuaded by the responses that it would be preferable to remove 'cultural differences' from the list and add a reminder to consider the issues covered by the Equal Treatment Bench Book.

Taking all of the responses into account, the Council decided to adopt the following wording:

> **Remorse**
>
> The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).
>
> **Lack of remorse should never be treated as an aggravating factor.**
>
> Remorse can present itself in many ways. A simple assertion of the fact may be insufficient.
>
> The court should be aware that the offender's demeanour in court or the way they articulate their feelings of remorse may be affected by, for example:
>
> - nervousness
> - a lack of understanding of the system
> - mental disorder
> - learning disabilities
> - communication difficulties (including where English is not their first language)
> - a belief that they have been or will be discriminated against

- peer pressure to behave in a certain way because of others present
- age and/or a lack of maturity etc.

If a PSR has been prepared it may provide valuable assistance in this regard.

Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Good character and/or exemplary conduct

The issue

The UH report recommended that the Council should *"*Consider providing more inclusive examples of 'good character and/or exemplary conduct', alongside existing examples". In response, the Council said that it would remove the example currently given (of charitable work) and include the factor in the review of the expanded explanations in order to ascertain how sentencers are applying and interpreting it.

Research interviews with sentencers, suggested that the title of this factor caused some confusion as in some cases 'good character' was equated with having no previous convictions, although these are separate factors in guidelines. If a sentencer reads the expanded explanation they will see that the "factor may apply whether or not the offender has previous convictions", but if they think it does not apply, they are unlikely to click on the explanation. The Council therefore consulted on changing the wording of the mitigating factor itself and the accompanying explanation to:

Positive character and/or exemplary conduct (regardless of previous convictions)

- This factor may apply whether or not the offender has previous convictions.
- Evidence that an offender has demonstrated positive good character may reduce the sentence.
- **However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their positive character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

Responses

Most respondents who commented on this proposal were supportive of the change, a few felt the change was unnecessary and some raised concerns:

It is hard to separate character from previous convictions. We find it difficult to see how a person who has previous criminal convictions (unless of the lowest type of motoring offences, such as parking or speeding, etc.) could be said to be of good character or exemplary conduct almost by definition.

The change suggested is better than the current text but does not for us solve this dilemma. For the author, “Positive character and/or exemplary conduct (regardless of previous convictions)” creates a significant difficulty and is highly self-contradictory. Exactly what positive character traits or exemplary conduct demonstrated should be taken into account as a mitigating factor, if the defendant is known to have a criminal record? We agree with some of the research views that here more guidance on what is being referred to would be very helpful for sentencers. Such character traits or exemplary conduct would need to be compelling and not self-serving. **West London Magistrates Bench**

NECG members questioned what criteria decides if someone has ‘good character’ and found the concept to be unclear, subjective, and possibly informed by stigma, labelling and prejudice.

There was consensus that, as with remorse, issues such as learning disabilities, neurodiversity, acquired brain injury, trauma, addiction, mental health crisis, domestic violence, or any combination of these can make it impossible to communicate or show good character. Furthermore, the NECG emphasised that judging ’good character’ was especially problematic in terms of race.

Whilst attempts to address addiction and self-improvement can be viewed positively the inability to achieve this should not be viewed negatively (‘bad character’). There are many factors within the system preventing people from accessing support – often linked to income and circumstances. It is also apparent that different processes can make it harder to evidence remorse or good character, such as an adjourned case allowing more time. It can also be more difficult for people on remand.

The NECG believe that instead of an assessment of ‘character’ the focus should be on understanding the circumstances, context and mitigating factors behind the crime. **National Experts Citizen’s Group** (A group for people facing multiple disadvantage)

We agree with the recommendation to include examples of what constitutes good character. The need for examples is supported by the apparent lack of consensus amongst sentencers concerning what this mitigating factor means in practice. As the consultation document notes: “Although there was a suggestion that more examples of conduct that may demonstrate good character would be useful, sentencers that were asked about this found it difficult to suggest what these might be.” If the Council were to decide to explore including examples, it would make sense to look at the kind of evidence of good character that is typically presented in court, namely, in the testimonials provided by friends, family, and community members. These testimonials deal with a broad range of character-related issues including public service but also matters such as trustworthiness and reliability as a worker or partner, caring responsibilities, and status within the community – what otherwise could be described as ‘everyday good character’. The challenge here is that there may be substantial difference of opinion amongst sentencers regarding the weight that should be given to such testimonials, as suggested by the findings from Belton’s (2018) interviews with Crown Court sentencers. **Dr Ian K. Belton and Professor Mandeep Dhami**

Outcome

In the light of the responses, the Council decide to remove the words ‘good character’ from the expanded explanation. Despite the thoughtful responses that urged the Council to provide examples, the Council was still unable to identify suitably inclusive examples. The suggestions such as testimonials are likely to favour a middle class offender. The Council also felt that the exceptions to when the factor is likely to apply should be made clearer.

The Council therefore decided to revise the factor and expanded explanation to read:

> **Positive character and/or exemplary conduct (regardless of previous convictions)**
>
> Evidence that an offender has demonstrated a positive side to their character may reduce the sentence.
>
> This factor may apply whether or not the offender has previous convictions.
>
> **However**:
> - This factor is less likely to be relevant where the offending is very serious
> - Where an offender has used their positive character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

The issue

The UH report noted concerns raised by civil society organisations that sentencers may not always take into account offenders’ efforts to access help, especially when it has been delayed for reasons outside of their control. The Council therefore agreed to consult on amending the expanded explanation that accompanies the mitigating factor of ‘Determination and/or demonstration of steps taken to address addiction or offending behaviour’ to make it clearer that the factor should be applied where support has been sought but not received by adding the words in brackets:

> **Determination and/or demonstration of steps having been taken to address addiction or offending behaviour**
>
> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where support has been sought but not yet received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.
>
> Similarly, a commitment to address other underlying issues that may influence the offender’s behaviour (including where support has been sought but not yet received) may justify the imposition of a sentence that focusses on rehabilitation.
>
> The court will be assisted by a PSR in making this assessment.

Responses

Most of those who responded to this question were supportive of the proposed addition. Three disagreed on the basis that it would encourage unsubstantiated and/or insincere claims of having sought help and one disagreed with the concept of mitigation on this ground entirely. Of those that were broadly in support, some suggested making it clear that the factor applies only when the reasons for the support not having been received are outside the offender's control and others stressed the need for evidence of support having been sought.

From the perspective of those with lived experience of the criminal justice system, the National Expert Citizen's Group expressed a counterview:

The group felt that it was difficult for those in addiction to show their potential or demonstrate commitment to change, due to the nature of addiction.

'What I have experienced from addiction I don't think you can judge people character while during addiction but if they are putting effort into reforming themselves but maybe fall off the wagon then the character reference should be done by those people who have worked with them. But if they have proved they have changed over a period this should be considered. And I think that all the above should be taken into account and should add to the good character. People in addiction can have up and downs and slips but this doesn't mean they are a bad person.'

At the Women's Forum, there was consensus that often, women in the criminal justice system have experience of trauma, which, makes it difficult for them to take any steps to alter their behaviour. This is particularly acute as there is a lack of trauma informed support available:

'Most women have had years of trauma; the courts are seeing the same women over and over again. They need more safe, rehabilitative spaces to deal with the trauma, otherwise it will not reduce the crime.'

There was also concern about women being afraid to share their problems because of fear of consequences in relation to their children.

'There is a lot of fear around having your children taken away and presenting as if you don't need help in case they decide you can't cope and remove your children'.

There were suggestions from the Howard League for Penal Reform and from the Prison Reform Trust to explicitly refer to gambling addiction as part of the explanation.

The Drive Partnership ("who have extensive frontline experience and knowledge working with a range of domestic abuse perpetrators across different risk and harm levels and from a range of different communities") responded from the "point of view of behaviour change interventions for domestic abuse perpetrators" and expressed concerns about the "the potential for highly manipulative and articulate domestic abuse perpetrators being able to use [the mitigating factor] to their advantage".

Outcome

The Council considered these helpful responses and noted that a court will only ever be able to take mitigation into account if the relevant information is provided. It was not felt

necessary to refer explicitly to problem gambling as the wording “other underlying issues” provided for it.

The Council felt it would be helpful to spell out that that the factor applies only when the reasons for the support not having been received are outside the offender’s control and decided to reword the expanded explanation as follows:

> **Determination and/or demonstration of steps having been taken to address addiction or offending behaviour**
>
> Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue (including where the offender has actively sought support but, for reasons outside their control, it has not been received) may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.
>
> Similarly, a commitment to address other underlying issues that may influence the offender’s behaviour (including where the offender has actively sought support but, for reasons outside their control, it has not been received) may justify the imposition of a sentence that focusses on rehabilitation.
>
> The court will be assisted by a PSR in making this assessment.

Age and/or lack of maturity

The issue

In response to the recommendation in the UH report: “Consider ways in which more guidance can be issued for sentencing young adults to improve consistency and precision in sentence reduction for young adults”, the Council agreed to consider the need for this as part of the expanded explanations research. In some of the scenarios we tested with judges and magistrates in research interviews, the offender was a young adult. The mitigating factor was frequently applied where the offender was 19 years old. However, in scenario versions where the offender was 22 years old, there was more variation in whether or not it was applied as a mitigating factor.

The content of the expanded explanation raised no issues in research but the Council considered that recognition of this factor by sentencers might be improved if a reference to the age range to which it typically applies were included in the factor itself and so consulted on changing the factor to:

- **Age and/or lack of maturity (typically applicable to offenders aged 18-25)**

Responses

Two-thirds of respondents who commented on this change supported the proposal, with many of them making additional suggestions. Those that opposed the change did so either because they felt it was unnecessary or because they were opposed to the concept of young adults being treated more leniently.

Whilst lack of maturity may be relevant in very young offenders, it is hard to see how highlighting this for every offence for those up to the age of 25 can be justified in this way.

I am not sure there is anything you cannot do legally at the age of 25 so it is hard to reconcile this with being given special dispensation in court and making magistrates and judges consider the age of up to 25 as being relevant.

A serving police officer aged 25 claiming a lack of maturity if convicted of an offence would clearly be a nonsense. It would be equally ridiculous for a magistrate to do the same if they were convicted of an offence.

Seeing as this will apply to so many offenders, serious offenders may benefit – including sexual and violent offenders. This will naturally be a concern to the public and I do not support this either. **Philip Davies MP**

We think that the proposed change to include 'age and/or lack of maturity' factor into the sentencing guidelines for 18- to 25-year-olds is discriminatory, biased, and unfair.

People become adults from 18 years of age and as adults assume responsibilities and privileges that come with reaching such a milestone. They can vote, they can already drive, work and pay taxes, they can have sexual relationships, marry, and have children. Immaturity and 18-25 age bracket cannot be separate, distinctive and significant mitigating factors in the criminal justice system and in the sentencing rule book to pursue leniency and sentence reduction.

Most of those who commit crimes know perfectly well what they are doing. If someone has particular learning, psychological or psychiatric issues, these are assessed within the criminal justice process and acknowledged by sentencers. Purely considering any 18 to 25-year-old offender as neurologically under-developed, less able to evaluate their actions or limit their impulsivity and risk taking is absolutely laughable.

We strongly disagree with this proposed change to the age and/or lack of maturity factor to serve as a mitigating factor in sentencing and be applied by the sentencers. There is no alternative suggestion other than omitting this as a factor. **Restore Justice**

Among those who supported the proposal, some made specific suggestions for changes to the text of the factor:

We welcome the inclusion of the age range in the amended factor. However, we would suggest adding "inclusive" to the age range, so it is absolutely clear that it includes those aged 25. So, it would read as follows (additions **in bold**):

"age and/or lack of maturity (typically applicable to offenders aged 18-25 **inclusive**)"

It will be important for the Council to continue to monitor the impact of this change. We also recommend that this section of the guidance cross-refers to the equal treatment bench book. **The Prison Reform Trust**

We agree that age and/or lack of maturity is an important factor for sentencers to consider. Given that there is a wide range of defendants for whom age and maturity are not in

correlation, we wonder whether it is preferable to say something like [suggested additions shown in **bold**]:

- Age and/or lack of maturity (typically **but not exclusively** applicable to offenders aged 18-25); or
- Age and/or lack of maturity (**often most prevalent in, but not limited to**, offenders aged 18-25).

Crown Prosecution Service

Others made specific suggestions for changes to the expanded explanation.

We also welcome the proposal to specify the age range within the mitigating factor which provides helpful clarity about its intended application. We propose that this is strengthened by adding 'inclusive' after the 25 to ensure that it extends up to the age of 26 in practice. We hope that this will be sufficient to improve the extent to which this factor is used in sentencing young adults and note that we have previously proposed that young adults would otherwise benefit from a separate guideline. It is important that the Council continues to monitor the impact of guidelines on young adults to ensure that as much weight is given in sentencing to the protected characteristic of age, as it is for race and gender. Finally, we note that our previous proposal to clarify factors related to atypical brain development was only partially adopted and we suggest that an additional amendment is made to the extended explanation in the paragraph "Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development" so that it reads as follows [suggested additions in **bold**]:

Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse, may affect development. **It can also be affected by neuro-developmental disorders and acquired brain injury.**

We would like to see a note be added to cross-refer to the relevant guideline i.e.

The 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline' may also be of relevance. **Transition to Adulthood (T2A)**

It may be that given the errors apparent in the sentencing of children in R v ZA, it would be useful if this expanded explanation could flag the need for sentencers to refer first and foremost to the children's guideline when sentencing any person who has committed an offence when under the age of 18. In addition, this guidance should also point to the fact that the children's guidance will not necessarily cease to be relevant where a young adult offends (see Balogun [2018] EWCA Crim 2933).

Further, many young adults are care experienced but have been passed over or not provided with appropriate support that they are entitled to as a matter of law. If they have been in care at any point, they are more likely to have experienced trauma, rejection and criminalisation that would not have occurred to a child in the family home.

It is also the case that young adults from minoritised backgrounds often experience accumulated disadvantage that needs to be factored into sentencing and the guideline does not presently reflect this. It may be that cross referencing to the guidance on difficult

or deprived backgrounds may be appropriate here, both in respect of care experienced young people and those from minoritised backgrounds. **Dr Laura Janes**

She proposed adding the following wording at the beginning of the expanded explanation:

> Where a person has committed the offence under the age of 18, regard should be had to the overarching guideline for children and young people. That guideline may also be relevant to offending by young adults.

She also proposed adding the wording in bold below:

> Where the offender is **care experienced** or a care leaver the court should enquire as to **both the impact of their experience in care and** any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support.

Others who supported the proposal made more general or wide-ranging suggestions:

We believe that more work needs to be done in this area, although this is outside the scope of this consultation and may also be outside of the scope of the Council's remit. The precipitous transition from being sentenced in the Youth Court and the Adult court, we believe, can result in some young adults being sentenced in an inappropriate way. We recognise, however, to resolve this may require legislation. **Legal Committee of HM Council of District Judges (Magistrates' Courts)**

We support this proposed change but it does highlight the potential complexity when dealing with the sentencing of young adults that may be better dealt with through a specific guideline for offenders of this age rather than an expanded explanation. **Sentencing Academy**

Yes, we support this change. We do however encourage the Council and sentencers to also consider intersectional gender dynamics which should be read alongside any guidance relating to age and/or maturity.

We know that young women and girls have specific needs relating to adverse childhood experiences, particularly in relation to domestic abuse. The London Blueprint recognises that young girls are more likely to have had experienced sexual violence and intimate partner violence and to have mental health concerns, which are all risk factors in increasing the likelihood of contact with the criminal justice system.

Advance research indicated that 48% of survey participants agreed that previous relationships were a factor in their offending; the same research found that 73% of respondents began their first committed relationship before the age of 16. For young women in contact with the criminal justice system, their age and experiences of abuse are highly likely to intersect and have an impact on their behaviour. It is therefore essential that sentencers are informed and regularly trained on gender dynamics and the impacts of trauma. **Advance**

It is important to ensure sentencers use an intersectional approach when considering age and maturity, giving proper consideration to gender and race and the different factors that can be relevant for young women and girls and for Black, minoritised and migrant young people, including Black, minoritised and migrant young women and girls. This must include consideration of the impact of care experience and how this intersects with gender, race and migrant status.

63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship. …

Recent research confirmed that care-experienced children are disproportionately likely to have youth justice involvement compared to those without care experience, with some groups of 'ethnic minority' children being even more likely to have youth justice involvement. A significantly higher proportion of care-experienced children in this study received a custodial sentence compared to non-care-experienced children. Custodial sentences were twice as common among Black and 'mixed ethnicity' care-experienced children compared to white care-experienced children.

The over-representation of care-experienced children in the criminal justice system particularly affects girls: care-experienced girls are more likely to receive both non-custodial and custodial sentences than girls without care experience, with the rates of immediate custodial sentences being 25 times higher for girls who have spent time in care.
Centre for Women's Justice

Outcome

The Council considered all these points carefully. The principle of taking into account the immaturity of young adults in sentencing is established in caselaw and is based on evidence of neurological development and evidence that criminal behaviour reduces with maturity. The Council saw no reason to remove of dilute this factor.

Many of the suggestions for changes went far beyond the scope of matters consulted on and the Council decided to consider those points as part of its ongoing work on equality and diversity.

The Council agreed that further changes should be made to the wording of the factor to clarify that the age range 18-25 was a guide only. The Council also considered the limited suggestions for changes to the wording of the expanded explanation put forward by Dr Laura Janes to be helpful and decided to adopt the following wording:

> **Age and/or lack of maturity (which may be applicable to offenders aged 18-25)**
>
> Where a person has committed the offence under the age of 18, regard should be had to the overarching guideline for sentencing children and young people. That guideline may also be relevant to offending by young adults.
>
> Age and/or lack of maturity can affect:
>
> - the offender's responsibility for the offence and
> - the effect of the sentence on the offender
>
> Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

Where the offender is care experienced or a care leaver the court should enquire as to both the impact of their experience in care and any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but applying the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the Probation Service should address these issues in a PSR.

New factors: Difficult and/or deprived background or personal circumstances and Prospects of or in work, training or education

The issue

In response to the recommendation in the UH report: "Consider including 'difficult/deprived backgrounds', 'in work or training' and 'loss of job or reputation' in the mitigation lists of theft and robbery guidelines" the Council undertook to test potential new mitigating factors and associated expanded explanations across all offence specific guidelines.

Two proposed new factors and expanded explanations: 'Difficult and/or deprived background or personal circumstances' and 'Prospects of or in work, training or education' were discussed with groups of judges and magistrates. The views on introducing these factors were predominantly negative or neutral from judges and magistrates, though there were also some positive comments for both factors. A frequent comment was that the factors were not necessary as sentencers would take them into account anyway.

The Council considered that these two factors should be considered as a pair to address concerns that some offenders would be discriminated against by one or other of them. The Council felt that the assertion that sentencers are taking them into account anyway is not necessarily an argument for not including them. Firstly, because if most sentencers are already considering these matters, the presence of the factors and the expanded explanations will help to ensure that the factors are applied in a consistent and appropriate way. Secondly, in the interests of transparency and fairness (particularly for unrepresented offenders), it is important that guidelines include factors that are routinely taken into account.

The Council therefore consulted on adding the following:

> **Difficult and/or deprived background or personal circumstances**
>
> The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:
>
> - the offender's responsibility for the offence and/or
> - the effect of the sentence on the offender.
>
> Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:
>
> - experience of discrimination
> - negative experiences of authority
> - early experience of loss, neglect or abuse
> - early experience of offending by family members
> - experience of having been a looked after child (in care)
> - negative influences from peers
> - difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)
> - low educational attainment
> - insecure housing
> - mental health difficulties

- poverty
- direct or indirect victim of domestic abuse

There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The Equal Treatment Bench Book contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline may also be of relevance.

Prospects of or in work, training or education

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.

Where an offender is in, or has a realistic prospect of starting, work, education or training this may indicate a willingness to rehabilitate and desist from future offending.

Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending.

The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

The absence of work, training or education should never be treated as an aggravating factor.

The court may ask for evidence of employment, training etc or the prospects of such, but should bear in mind any reasonable practical difficulties an offender may have in providing this.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less (if any) weight.

Responses

Around two-thirds of respondents who commented on these proposed additions broadly agreed with the proposals though several of those had suggestions for changes. Of those who disagreed, several had strong objections particularly to the ‘Difficult and/or deprived background or personal circumstances’ factor.

Some objected on the grounds that many people come from a poor or deprived background and do not offend. Others noted that these matters are already taken into account and the court is best placed to assess mitigation without the guidelines being over-prescriptive:

This is an incomplete and potentially misleading attempt to identify the 'nth' degree of mitigation known as 'any other mitigation'. The court is capable of identifying endless additional factors in relation to the particular individual and the particular offence - let the

court do that. This list cannot possibly be digested for reference on every sentence and much of it is totally irrelevant to some offences but could be wrongly brought into play. The other danger is that defendants who exhibit the flip sides could be unfairly disadvantaged - those who are not poor, those who live in secure housing, those who have the security of family life. These matters should all be left for the application of judicial discretion within the excellent training of the Equal Treatment Bench Book - the book is much bigger than this list and PSRs may address as necessary with evidence. **Individual**

Sentencing decisions must be based on all of the personal factors of the individual offender. This expansion carries the danger of limiting the personal factors towards a limited set of unfortunate circumstances which may or may not have any effect at all on the offence. Additionally, it has the danger of presenting as a full list of personal factors. The exact opposites of the factors can equally be causes of offending behavior e.g. the educated, rich, intelligent, middle class offender may be far more naive and vulnerable in relation to some offending behavior.

Let the bench determine the relevance of personal factors for each offender and their offence. We're in the realms of psychology to assess this simply as a listed prompt. **Faster, Fairer Justice**

Many people have gone through any or all of the above and/or many other adverse circumstances and disadvantages, however those perceived disadvantages should never be considered either as a reason for offending or as a predisposition to offending, nor should they be considered [by the Council and sentencers] as mitigating factors. This would be biased and prejudiced in itself. There are many people who haven't gone down the criminal route but have experienced difficult circumstances or faced multiple disadvantages at some point in their lives or throughout their lives and have overcome those difficulties and disadvantages whilst being law-abiding good citizens. So why should any such disadvantages define an offender?

We strongly disagree that the proposed changes related to difficult and/or deprived background or personal circumstances should form new mitigating factors. We do not propose an alternative. **Restore Justice**

We believe this is generally extremely patronising – not least to law-abiding working-class communities. Often it is actually those who come from the poorest communities who will be the victims of the crimes in these cases.

Low educational attainment and poverty are not excuses to commit crimes. Other examples are very subjective – for example, citing experience of discrimination could, on the one hand, apply to everyone in some way or another. If it is not supposed to apply to everyone, how would a sentencer truly know if someone had experienced discrimination and why and to what extent this should have a bearing on their sentence?

We object very strongly to this new mitigating factor being included and note that we are not alone as it seems that, according to your consultation document, only a minority of judges and magistrates shared positive views when asked to comment on the proposed change in focus group discussions. **Blue Collar Conservatives**

I do not agree that having a difficult or deprived background makes you less culpable for committing an offence – such as robbery with all the violence that entails and the fear caused to the victim. However, I am at even more of a loss to understand why this mitigation is being suggested for all offences.

I also do not think that "experience of discrimination" or "negative experiences of authority" (if they can even be verified or quantified) should have any bearing whatsoever on sentencing. Neither should having been in care/having low educational attainment etc.

I object very strongly to this whole section as a mitigating factor for any offence never mind all offences. **Philip Davies MP**

These last two responses were echoed in the response from the Lord Chancellor who stated:

As regards the 'difficult and/or deprived' factor, the Government is clear that many of the examples of difficulty or deprivation that have been set out in the consultation, such as low educational attainment and poverty, ought not to be relied upon as excuses to commit crimes. Presupposing that relatively low income for example (or indeed other deprivation) indicates a propensity to commit crime risks appearing patronising at best, or inaccurate at worst. Moreover, many in society, including no doubt judges and MPs, will have encountered young people from modest educational or financial backgrounds who have shown scrupulous integrity and a commitment to leading a law-abiding life.

It is also important to note that victims of many types of crime, including violent crime, are often themselves from most deprived communities. The factor is highly subjective and many of the examples, including 'negative experiences of authority' and 'deprived background' could potentially have a very broad application. It is unclear from the factor how evidence of a deprived background could be established and what the bearing should be on the sentence. I note that similar concerns were raised by the judicial focus group, including that the factor could potentially cover the majority of those sentenced and that the link to mitigation is unclear.

The Lord Chancellor went on to say:

That said, I want to emphasise my support for ensuring that custody is used as a last resort. I consider that there may be scope for further exploration by the Council as to whether mitigating factors, which are more narrowly focussed, may be appropriate. As currently presented in the consultation, these factors are too broad in terms of the circumstances they include and the type of offending they could apply to.

The Sentencing Academy made a slightly different point:

Given the lukewarm reception that this amendment received in the focus groups we would suggest caution before proceeding with its introduction – particularly, as noted, that it will cover a large number of offenders who fall to be sentenced. Whilst these factors may be of greater relevance the first time an offender appears before the court, most of these factors are static and it is questionable as to whether they should provide mitigation every time that an offender is sentenced.

Those who supported the proposal for the 'Difficult and/or deprived background or personal circumstances' put counter arguments:

It has to be right that all circumstances relevant to the offender should be taken into account. Whilst poverty and social deprivation do not of their own accord increase criminal behaviour, the impact upon a defendant should not be overlooked. **Criminal Law Solicitors Association**

Whilst it is true that this factor may apply to very many defendants, this does not in the author's view, make it any less worthy of consideration as mitigation. As with all mitigating factors, it is up to the sentencers to assess how this may be considered mitigation for the particular offence/offender and what weight should be placed on it when considering sentence. This new factor should be included.

The bullet list of disadvantages to look out for is very helpful.

The counter-argument can be made that these circumstances apply to very many people who do not commit crimes, so why should they be considered to potentially reduce any sentence? The facts of the individual offence and offender will always be the deciding factors here as to what weight (if any) is given to this factor. **West London Magistrates Bench**

I strongly support the change proposed for the following reasons.

Sentencers are, with few exceptions, drawn from those who have been able to make a success of life and who have been born into an environment with many opportunities. Those who are sentenced usually do not fall into either of those categories.

… The fact that some sentencers might give weight to such things anyway is fallacious, as the Sentencing Council points out.

The need to address this issue is now acute.

Social mobility (as opposed to inclusivity) has been in retreat in recent decades. … A pronounced people like us culture has developed in the full time judiciary and the number and geographical distribution of magistrates' courts has been greatly reduced. Both of these phenomena have, despite efforts to increase inclusivity, lowered the level of exposure to and familiarity with the factors listed in the bullet points in the Sentencing Council's identification of the issue on the part of sentencers.

… I accept the point that the factors identified in the bullet points are common features of those sentenced. The truth of that observation is consistent with the existence of a sentencing system which disproportionately punishes and fails to deflect from crime or rehabilitate those who factors beyond their control have predisposed to criminality.

Although I am a supporter of guidelines for sentencing, one of their unintended consequences has been that there is a de-humanising of, and a lack of subjectivity in the sentencing process. This effect is reflected in the objection recorded from some sentencers in the research groups referred to "….that these issues were not mitigation in the sense that they make the offence less serious". Objectively that is true, but sentencing,

if it is to be effective in reducing offending and maintaining confidence, especially in the communities most affected by crime and from which most of those sentenced come, needs to be focussed on offenders. Guidelines need to emphasise this more. A failure in that respect leads to an increased prison population, damage to social cohesion (and essential co-operation with the police) an adverse effect on families and the next generation and no worthwhile benefit in crime reduction.

… The chances of ending up in prison if you have been in care are so high as to constitute a scandal, and a scandal that the sentencing system has failed to address. **Retired Circuit Judge**

It is understandable that some sentencers in the reference group felt that these factors could apply to virtually every offender they sentence and were therefore not very helpful.

However, they are matters that are routinely and legitimately raised in mitigation and ought to be considered. It is therefore right that they are included in the guidelines. **The Law Society**

We welcome the inclusion of the proposed new mitigating factor and associated expanded explanation “difficult and/or deprived background or personal circumstances”. Many people involved in the criminal justice system will have experienced multiple disadvantage, which relates to their offending behaviour. People from lower socio-economic groups are often over-represented in the criminal justice system , and individuals released from prison are often released with debts which have built up during their sentence, adding to the problems they face on release. **The Prison Reform Trust**

We support the intent of the proposed new mitigating factor of difficult and/or deprived background or personal circumstances, and its associated expanded explanation. For the reasons set out in the Consultation Paper, we consider that setting out a non-exhaustive list of factors to consider helps to ensure consistency, transparency and fairness. As is to be expected, our clients all have experience of at least one, and usually many, of the listed factors. The factors usually have direct relevance to their offending behaviour. **APPEAL’s Women’s Justice Initiative**

Some members felt that the circumstances of the individual and the state they were living in was often due to systemic issues and that this needed consideration within sentencing, particularly within the context of those impacted by multiple disadvantages.

Members were also clear that offending does not happen in a vacuum and so personal circumstances at the time an offence occurred needed consideration.

There was also consensus that age, previous experience of the care system and experience of abuse and neurodiversity needed to be considered.

Members were also eager that sentencers were able to have understanding of causal factors of offending – and could find sentences most likely to help the person sentenced to address the causes of their offending.

Members particularly felt experiences of trauma needed to be considered in sentencing. **Revolving Doors**

The Committee recognises that, in practice, these factors are already taken into account by the courts. We support the inclusion of the new mitigating factors and recognise that they will promote consistency of sentencing and support making sentencing more transparent to the public. **Justice Committee**

Suggestions for changes to the proposals included:

- Adding a references to relevant sections of the Equal Treatment Bench Book
- Changing 'the court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background etc…'. to say 'the court may be assisted…', instead of 'will' – as there are occasions where the information regarding difficult and/or deprived background or personal circumstances could be obtained from other sources, without the need for a pre-sentence report
- In relation to 'negative influences from peers' expanding it to say '(may be particularly relevant to offenders aged 18-25 or where there is a lack of maturity or particular vulnerability)'
- Adding 'and family members' to 'negative influences from peers'
- Changing the wording relating to having been in care ('experience of having been a looked after child (in care)' to cover those who are care experienced more widely, so that it reads 'experience of having been in care or in contact with social services as a child'
- Alternatively, 'experience of being a child in care (looked after child)'
- Adding a reference to coercive or controlling behaviour to 'direct or indirect victim of domestic abuse'
- Adding 'experience of trauma (including a history of sexual exploitation)'

Several respondents commented on a particular bullet point:

- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)

The Legal Committee of HM Council of District Judges (Magistrates' Courts) put forward two views from its members:

One view expressed was to agree with this factor being included. However, those in favour of that view suggest the actual wording of the aggravating feature that is in the existing guidelines be used, namely 'but note commission of an offence whilst under the influence of alcohol or drugs is an aggravating feature' rather than 'being voluntarily intoxicated at the time of the offence is an aggravating feature'.

Another view expressed was that the inclusion of this factor leaves the Guidelines open to an appearance of internal inconsistency and may be confusing to sentencers and others. Moreover, that view continues, whilst early exposure to misuse of drugs and alcohol may be regarded as a mitigating factor, the words chosen namely "difficulties relating to the misuse of drugs and/or alcohol" are too vague and broad. They do not reflect sufficiently either the element of choice that may be involved in such difficulties arising & continuing, nor the fact that such drug misuse likely involved engagement in criminal behaviour. There will be multiple circumstances where it would be inappropriate to treat such 'difficulties' as matters of mitigation.

The Prison Reform Trust challenged the reference to "being voluntarily intoxicated" stating that it suggests that people have agency over their addiction.

We would urge the Council to reconsider the wording of this point, to avoid contradiction and to give more weight to taking into account difficulties relating to the misuse of drugs and/or alcohol

The Criminal Sub-Committee of HM Council of Circuit Judges noted:

We continue to have concerns as to the confusion that arises by the inclusion of "difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)". This has the potential for unnecessary confusion.

We question the extent to which the misuse of alcohol and/or drugs should be regarded as a matter of general mitigation. Many offences of violence are committed by those who have developed problematic use/abuse of alcohol and/or drugs. How should the sentencing exercise operate when saying "your offence is aggravated by the fact that you were drunk at the time but mitigated by the fact that you have been drinking to excess for so long that you now have a problem".?

In relation to the proposed factor of 'Prospects of or in work, training or education', those that objected to the factor or had reservations suggested that it is unnecessary (as courts take it into account anyway), is difficult to evidence or is discriminatory.

The prospects of work, training or education may be an important factor which sentencers consider during the sentencing exercise. We are concerned that there is a possible lack of clarity about how this could amount to mitigation/reduction in seriousness merely by the fact that an offender is in work, training or education.

Similarly, it may tend to discriminate against those who are not, or cannot be, in work, training or education. **CPS**

Whilst we generally agree with the suggested amendment, we consider that it should be tempered with a warning to the effect that the court should have in mind that there are many people who appear before them who are unable to work for various reasons and the court must ensure that this group is not in any way discriminated against when considering this additional mitigating feature. **Legal Committee of HM Council of District Judges (Magistrates' Courts)**

[I]t is well known that employment is closely interwoven with desistance. We encourage the Council to consider that when a custodial sentence is imposed, sizeable barriers to finding work upon release are created, and so a cycle of unemployment, poverty, and criminalisation either begins or is perpetuated. Where work is then secured, it would be preferable to impose a suspended or community sentence, to avoid sending someone back to square one in their job search upon release.

As with the majority of cases of women's offending, their rehabilitation needs are much better met in the community anyway, with a prison sentence creating a gap in someone's CV, and separation from family and community networks.

We suggest the Council considers voluntary work, apprenticeships and education/training with the same weight as paid work, as all are purposeful activities associated with desistance. We do identify with the concern stated about those groups who are unable to work, as this might well discriminate, so urge an intersectional and pragmatic approach.

It is also worth considering the longer-term impacts of a criminal conviction on someone's employability prospects, and so convictions which become spent sooner (eg. non-custodial sentences) are beneficial in terms of someone's chances of finding meaningful employment later in life. Our own research shows a great deal of employer prejudice towards people with convictions, so the weight of a criminal record to disclose hampers someone's chances of finding employment later in life (which disproportionately impacts women, as they are more likely to build careers in sectors which require Enhanced DBS checks). When sentencing takes place, it is worth considering the impact this has on subsequent years of someone's life and career, and the barriers to employment and desistance that is created.

These barriers to employment are even more significant for women and people of marginalised genders, Black and racially minoritised communities. This should be considered in sentencing, as a criminal record is often one of many factors which prevent people from finding work, holding down a job, and progressing in a career. **Working Chance**

We support this proposed change in principle, but suggest one amendment to the expanded explanation, to add "The absence of work, training or education should never be treated as an aggravating factor, **especially where childcare responsibilities, disability, or other matters make participation in work, training or education more challenging**."

Being a sole or primary caregiver for dependents is already a standalone mitigating factor, but we consider this addition would clarify the position. Practical ability to work or be in education or training varies between people and their situations, and a commitment to rehabilitation can be demonstrated in different ways. **APPEAL's Women's Justice Initiative**

Outcome

The Council noted that the aggravating factor of 'Commission of offence whilst under the influence of alcohol or drugs' (which appears in almost all guidelines) has the following expanded explanation:

> The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
>
> This applies regardless of whether the offender is under the influence of legal or illegal substance(s).
>
> In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.
>
> An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

The Council acknowledged that the issue is a complex one: as the Council of Circuit Judges say, the court may be balancing the aggravating factor of having committed the offence under the influence of drugs or alcohol with the mitigating factor of having a problem with substance abuse. The Council considered that in practice, the court will have to consider what weight, if any, to attribute to each of these factors.

The Council felt that some of the broader objections raised may have overlooked the fact that the explanation for the 'Difficult and/or deprived background or personal circumstances' factor talks in terms of: 'such factors **may** be relevant'; 'multiple disadvantages which may have a bearing on their offending' and 'Such disadvantages include but are not limited to'. The Council felt that the wording strikes a balance between drawing sentencers' attention to the potentially relevant considerations without being over prescriptive.

The Council considered that the wording of the expanded explanation for the 'Prospects of or in work, training or education' factor does cover most of the points raised by respondents even if not in as much detail as they suggest. In practice, the factor will be considered alongside other relevant factors and it may be unhelpful to make the explanation much longer by adding further details or cross-referencing to other factors.

The Council noted that evidence suggests that courts often do take both of these factors into account and that the two factors should be considered as a pair.

The Council therefore decided to make a few amendments to the wording consulted on and to add the new factors and their expanded explanations to all offence specific guidelines for adult offenders.

> **Difficult and/or deprived background or personal circumstances**
>
> The court may be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:
>
> - the offender's responsibility for the offence and/or
> - the effect of the sentence on the offender.

Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:

- experience of discrimination
- negative experiences of authority
- early experience of loss, neglect or abuse
- early experience of offending by family members
- being care experienced or a care leaver
- negative influences from peers
- difficulties relating to the misuse of drugs and/or alcohol (but note: being voluntarily intoxicated at the time of the offence is an aggravating factor)
- low educational attainment
- insecure housing
- mental health difficulties
- poverty
- direct or indirect victim of domestic abuse

There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The Equal Treatment Bench Book contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline may also be of relevance.

Prospects of or in work, training or education

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.

Where an offender is in, or has a realistic prospect of starting, work, education or training this may indicate a willingness to rehabilitate and desist from future offending.

Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending.

The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

The absence of work, training or education should never be treated as an aggravating factor.

The court may ask for evidence of employment, training etc or the prospects of such, but should bear in mind any reasonable practical difficulties an offender may have in providing this.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less (if any) weight.

New factor: Pregnancy and maternity

The issue

The UH report recommended that the Council should: “Specify pregnancy and maternity as a discrete phase where medical conditions are referred to in the guidelines”. In response, the Council proposed to remove the reference to pregnancy from the factor of ‘Sole or primary carer for dependant relative(s)’ and to create a new mitigating factor and consult on that new factor and the associated expanded explanation.

We drafted a factor and expanded explanation and invited views on this change in research with judges and magistrates. Views from participants in focus group discussions were predominantly neutral or negative. A prominent view was that the factor was unnecessary as courts would always take this into account and others expressing concern about the content of the expanded explanation. However, there were some positive comments about how clearly it set out the increased risks associated with giving birth in prison and the impact of custody on pregnant women

The Council was aware of several reports published in recent years that indicate that there have been issues with the care of pregnant women and their children in prison and the Council has received representations from campaign groups on this issue. Taking into account the comments raised in the research, the Council proposed adding the following factor and expanded explanation to all offence specific guidelines (except those where the offender is an organisation):

> **Pregnancy, childbirth and post-natal care**
>
> When considering a custodial or community sentence for a pregnant offender the Probation Service should be asked to address the issues below in a pre-sentence report.
>
> When sentencing an offender who is pregnant relevant considerations may include:
>
> - any effect of the sentence on the physical and mental health of the offender and
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant can be harmful for both the offender and the child.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.
>
> For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

Responses

The vast majority of responses to this proposal were supportive, though many made suggestions for changes or additions to the text consulted on. There were just six responses that opposed adding this as a discrete factor. Most did so on the grounds that it would be abused by women who would use pregnancy as an excuse to avoid prison. One also claimed that the factor was discriminatory as it only applies to women and was counter to equality. One respondent made an interesting point about the statistics from the perspective of a health professional:

No. Do the statistics consider alternative reasons for those poorer outcomes (eg preterm birth) e.g. isn't it likely that those women may have comorbidities such as drug and alcohol misuse for example and these directly impact stillbirth rates, prematurity, birth defects etc. Therefore, not all being directly contributed to being held on remand or in prison.

Increasing mitigation, has the potential to create a precedent that women keep an otherwise unwanted baby to have a more favourable sentence. Furthermore, may be the reason not to have an abortion creating a perpetuating cycle of ACEs with a baby born into poor condition.

I feel it would be more beneficial to put in place better health measures for women held on remand and for women in prison including regular access to onsite maternity care, appropriate access to supplementation, mental health support and rehabilitation against whatever offenders are in for.

Those held on remand are usually for serious crimes for which it is appropriate that they are held, pregnant or otherwise.

The Council noted this in the context of the consensus view among most respondents who cited evidence of poor outcomes for pregnant women in prison compared to the general population, such as:

- A study published in 2020 found that 22% of pregnant prisoners missed midwife appointments, compared with 14% in the general population, and that 30% missed obstetric appointments, compared with 17% in the general population.
- Pregnant women in prison are almost twice as likely to give birth prematurely as women in the general population, which puts both the mothers and their babies at risk
- Women in prison are seven times more likely to suffer a stillbirth than those in the general population, according to figures obtained through freedom of information requests sent to 11 NHS trusts serving women’s prisons in England.

Leigh Day

There were several suggestions that were common to many of the responses:

- It should be made clear what is meant by ‘post-natal’ the consensus being that this is period of 12 months from birth
- There should be a strengthening of the importance of a PSR for pregnant or post-natal offenders
- The text should contain more information on the health risks to mothers and babies in prison
- The text should contain more information about the wider consequences of imprisonment on both mother and child including the impact of separation

- The text should refer to suspended sentences
- It should state that pregnancy and the post-natal period should be considered an 'exceptional circumstance' not to impose a mandatory minimum sentence
- Where an immediate custodial sentence is imposed, the reasons for sentence should be required to address:
  - that increased pregnancy risks are an intrinsic consequence of the imposition of a custodial sentence on a pregnant woman
  - that custody poses inherent barriers to accessing medical assistance and specialist maternity care, causes trauma to pregnant and postnatal women in particular and has an adverse impact on a child's development
  - the medical needs of a pregnant or postnatal woman and her child, including her mental health needs
  - the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant harm to both mother and child);
  - the effect of the sentence on the physical and mental health of the woman
  - the effect of the sentence on the child once born
  - the fact that prisons are overcrowded
  - why a community or suspended sentence is not appropriate

These issues were argued in the detailed responses from Level Up ("a coalition of lawyers, academics, psychiatrists and organisations with significant interest in, and long experience working with, perinatal women in the criminal justice system") and by Birth Companions ("a women's charity dedicated to tackling inequalities and disadvantage during pregnancy, birth and early motherhood") which contained responses from women with lived experience of imprisonment while pregnant or post-natal. One or both of these responses were endorsed by several other respondents (including Working Chance, the Prison Reform Trust, No Births Behind Bars, Deborah Hunt Clinical Nurse Specialist, Laura Janes, the Howard League, Maternity Action, Centre for Women's Justice, Support Not Separation, Radical Therapist Network, End Violence Against Women Coalition).

Some respondents made wider points relating to the use of remand for pregnant offenders or other matters outside the Council's remit.

Outcome

The Council considered that although health outcomes for the cohort of pregnant women who appear before the courts for sentence could be lower than that of the general population even without custody, there was still a compelling case for courts to consider the needs of both offender and child at the point of sentence.

The Council noted that several respondents had suggested that the text should specifically refer to suspended sentences. A suspended sentence is a custodial sentence and guidelines do not refer to suspended sentences, aside from the Imposition guideline which gives guidance on when a custodial sentence may be suspended. This is to ensure that courts do not consider a suspended sentence without first being clear that the custody threshold has been passed and that custody is inevitable.

The Council gave consideration to the proposal by several respondents that pregnancy and the post-natal period should be considered an 'exceptional circumstance' not to impose a mandatory minimum sentence. The Council noted the recent decision of the

Court of Appeal in the case of R v Bassaragh [2024] EWCA Crim 20 and considered that while in many cases pregnancy would be a relevant factor, it will not always amount to an exceptional circumstance not to impose a mandatory minimum term. Sentencing guidelines for offences that carry a minimum term set out the criteria for considering whether exceptional circumstances apply which make it clear that courts should to look at all of the circumstances of the case taken together and a single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The Council therefore decided it was not necessary or helpful to include any reference to exceptional circumstances in this expanded explanation.

Taking account of the responses and suggestions received, the Council agreed that some changes to the language in the expanded explanation and some additional information would be appropriate.

The Council therefore decided to adopt the following:

> **Pregnancy, childbirth and post-natal care**
>
> When considering a custodial or community sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report. If a suitable pre-sentence report is not available, sentencing should normally be adjourned until one is available.
>
> When sentencing a pregnant or postnatal woman, relevant considerations may include:
>
> - the medical needs of the offender including her mental health needs
> - any effect of the sentence on the physical and mental health of the offender
> - any effect of the sentence on the child
>
> The impact of custody on an offender who is pregnant or postnatal can be harmful for both the offender and the child including by separation, especially in the first two years of life.
>
> Access to a place in a prison Mother & Baby Unit is not automatic and when available, the court may wish to enquire for how long the place will be available.
>
> Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child. The NHS classifies all pregnancies in prison as high risk.
>
> There may be difficulties accessing medical assistance or specialist maternity services in custody.
>
> This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. See also the Imposition of community and custodial sentences guideline.
>
> For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

Where immediate custody is unavoidable, all of the factors above may be relevant to the length of the sentence.

The court should address the issues above when giving reasons for the sentence.

Manslaughter

Background

The Domestic Homicide Sentencing Review (the Review) was published in March and made several recommendations directed to the Sentencing Council. The Council has published a separate response document giving a detailed response to each of these recommendations. We consulted on making changes to manslaughter guidelines in response to recommendations 11, 12 and 13.

Strangulation, suffocation or asphyxiation

The issue

The Council proposed adding an aggravating factor relating to strangulation, suffocation or asphyxiation to the loss of control and diminished responsibility guidelines as set out in Recommendations 11 and 12.

Recommendation 11

We recommend that in cases of **manslaughter by way of diminished responsibility** consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor.

Recommendation 12

We recommend that in **manslaughter by way of loss of control**, consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor.

The Council also considered adding a similar factor to the unlawful act or gross negligence manslaughter guidelines. The Council noted that it was likely that in most cases of unlawful act manslaughter that the use of strangulation would engage the high culpability factor of 'Death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender' and would therefore not be double counted as an aggravating factor at step two.

The consultation document stated that the main argument for adding an aggravating factor relating to strangulation was that it would indicate to lay readers of the guidelines that this is taken seriously, rather than to influence sentence levels, though it would ensure that the seriousness of strangulation was not overlooked in the sentencing exercise. It would also be consistent with the assault guidelines which have 'Strangulation/ suffocation/ asphyxiation' as a high culpability factor alongside 'Use of a highly dangerous weapon or weapon equivalent'.

The Council was conscious of the danger of unintended consequences if changes are made to guidelines without a clear need for such changes. However, it was acknowledged that as the guidelines all currently have the 'Offence involved use of a weapon' aggravating factor it would be logical and consistent to add a factor relating to strangulation.

The consultation therefore proposed adding the following aggravating factor to all four manslaughter guidelines:

- Use of strangulation, suffocation or asphyxiation

Responses

The vast majority of responses to this proposal (including the Domestic Abuse Commissioner for England and Wales, the CPS, the NCA, the Justice Committee, the Law Society, Refuge, the Centre for Women's Justice and the End Violence Against Women Coalition) were supportive. Notable exceptions were the Criminal Law Solicitors Association who felt that it is "absurd" to make the means of causing the death of a person aggravating. The CBA noted that strangulation is a difficult element to prove and adding such an aggravating factor may lead to additional hearings (such as Newton hearings). They questioned "whether there is clear evidence that this proposed change is required or needed".

The Criminal Sub-Committee of HM Council of Circuit Judges agreed with the proposal "albeit with the same reservation expressed in the Consultation as to the clear necessity for this change". The Law Society noted that "the analogy with the existing aggravating factor of 'offence involving the use of a weapon' is a compelling one".

Several respondents, while agreeing to the proposal, set out their concerns about gender based violence and suggesting that wider changes are required to legislation.

Outcome

The Council decided to add the new aggravating factor as proposed in the consultation.

Coercive or controlling behaviour

The issue

The manslaughter guidelines currently have the following factors:

- History of violence or abuse towards victim by offender
  (aggravating factor in all four guidelines)
- History of significant violence or abuse towards the offender by the victim
  (mitigating factor in all guidelines except for gross negligence)

Recommendation 13 of the Review states:

We recommend that in cases of manslaughter, consideration should be given to sentencing guidelines being amended to make coercive control on the part of the perpetrator of the killing towards the victim a factor which indicates higher culpability. Further, that consideration should be given to making coercive control towards the perpetrator of the killing by the victim of the killing a factor denoting lower culpability.

The Council was conscious of the danger of making changes to guidelines without good reason. However, the Council felt that the proposed change would reflect up-to-date terminology and may have a positive impact on public confidence in the criminal justice system. The Council consulted on amending these aggravating and mitigating factors to read:

- History of violence or abuse (which may include coercive or controlling behaviour) towards the victim by the offender
- History of significant violence or abuse (which may include coercive or controlling behaviour) towards the offender by the victim

Responses

The majority of responses to this proposal (including the Justice Committee, the CPS, the Domestic Abuse Commissioner for England and Wales, the CBA, the NCA, Refuge, the Law Society) agreed with the proposals. Some made the point that the changes would have a positive impact on public confidence. Others specifically agreed with the Council's decision not to make changes to step one of the guidelines.

Some respondents opposed the changes on the grounds that they were unnecessary or that there would be difficulties in providing the necessary evidence. Three respondents were concerned that these factors would be used disproportionately against men without the need for proof. The ManKind Initiative suggested adding the word 'proven' to each factor.

Southall Black Sisters agreed with the proposals and suggested two amendments. Firstly that the word 'significant' be removed from the mitigating factor as it could be a barrier for an offender who is a victim abuse from the deceased to successfully argue mitigation. Secondly, both the aggravating and mitigating factors should explicitly state 'including honour based abuse' as this issue is also often missed.

The Centre for Women's Justice made similar points querying "the asymmetrical requirement that this abuse and coercive or controlling behaviour (CCB) must be regarded as 'significant' in cases where it is a mitigating factor, but not where it is an aggravating factor". They also propose highlighting so-called 'honour-based' abuse as both an aggravating and mitigating factor.

Appeal (a non-profit law practice who provide legal advocacy for victims of unsafe convictions and unfair sentences) supported the amendments "but suggest further policy work on the stage(s) in the sentencing process at which coercive or controlling behaviour is addressed".

Outcome

Regarding the concern raised by ManKind, the Council was satisfied that courts do not, in fact, accept assertions of domestic abuse without evidence. On the first point raised by Southall Black Sisters and the Centre for Women's Justice, the difference in wording between the aggravating and mitigating factors pre-dates the changes consulted on and was a conscious decision when developing the guidelines. The Council had not consulted on changing that approach. On the point about adding a reference to so-called honour-based killing, again this was not something that the Council had consulted on and in the context of manslaughter sentencing, the Council had no evidence that there was an issue.

These issues and the wider points raised by respondents will be explored as part of the ongoing evaluations of the manslaughter guidelines and of the Domestic abuse overarching guideline.

The Council decided to make the changes to the aggravating and mitigating factors as set out in the consultation.

Equalities and impact

Equalities

Some of the proposals consulted on were for relatively minor or technical changes which the Council felt were unlikely to have any bearing on equality issues. Others, such as the proposed changes to mitigating factors and expanded explanations were in response to recommendations relating to mitigating any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups. We sought comments on any equality issues relating to the proposals.

Reponses to the proposed changes to the manslaughter guidelines (and to a lesser extent to the Breach of a protective order guideline) revealed different concerns relating to the gendered nature of some offending.

For example, the Centre for Women's Justice raised "the need for sentencers to use a gendered and intersectional approach when making sentencing decisions, taking proper account of gender, race and migrant status, and how these intersect. This requires education about relevant factors for women and girls, including Black, minoritised and migrant women and girls."

The ManKind Initiative by contrast state:

It has become too easy to make an unsubstantiated claim of domestic abuse as a defence in a murder trial.

This is problematic at a number of levels.

Firstly, the victim cannot defend himself against the claims because he is dead.

The defence line also attempts to purposely discredit and destroy the victim's reputation which in some cases, as the charity know, has re-traumatised the families of the victim.

Secondly, it reinforces the societal stereotype around domestic abuse and coercive controlling behaviour that only females are victims and only males are perpetrators. And that if a woman is a perpetrator, it can only ever be in response to the behaviour of the male.

This is despite the fact that the latest Office for National Statistics figures show that one in three victims of domestic abuse are male, and that 18 men in 2021/22 lost their lives at the hands of their partner/ex-partner.

This narrative also ignores domestic abuse/coercive controlling behaviour in same-sex relationships. The narrative also ignores relationships where bi-directional abuse is occurring.

The Council noted that the specific points raised by the ManKind Initiative relate chiefly to defences in trials rather than to sentencing. In relation to sentencing manslaughter, the guidelines apply regardless of sex or gender and while the additional aggravating factor relating to strangulation is most likely to apply in where the offender is male and the victim

is female, the point has been made that the existing factor of use of a weapon is likely to apply to females who kill males (particularly in a domestic context).

These issues will be explored in the evaluation of the manslaughter guidelines which is ongoing.

Two respondents commented on the discriminatory nature of the pregnancy mitigating factor, in that it will apply only to women. One respondent objected to the practice of taking equality issues into account stating," Justice must be blind but in our current activist climate there is huge pressure to excuse bad and criminal behaviours by blaming others rather than offenders."

Another respondent proposed that "Every single change adopted should be continuously monitored by ethnicity to ensure these changes are applied fairly". The Law Society suggested that "the Council may wish to consider how the various factors intersect and the extent to which people with protected characteristics may face accumulated disadvantages".

The Council has an ongoing commitment to explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit. We now routinely publish sentencing breakdowns by age, sex and ethnicity alongside guidelines and consultations and are exploring what more we can do in this area in the future. There are, however, limits to the extent to which we can investigate or draw conclusions where volumes for offences are low or relevant factors are not recorded.

Impact

The Council anticipated that any impact on prison and probation resources from the majority of the changes proposed in this consultation would be minor.

As noted in the section on the environmental offence guideline several respondents expressed concern about the additional workload that would be placed on the probation service by an increase in community orders, while others felt that the changes would make very little difference and that fines would still be imposed in most cases. As suggested by some respondents, sentence outcomes will be monitored after the changes have been implemented to assess any impact.

Conclusion and next steps

As a result of the consultation the Council will make the changes set out in the sections above. The amended versions of the guidelines will be published on the Council's website (https://www.sentencingcouncil.org.uk) on 1 April 2024 and come into force on publication.

It is customary for the Council to publish new guidelines in advance of them coming into force, but as these are all modifications to existing guidelines, it has not been possible to do this (without causing unnecessary confusion by having two versions of the same guideline in existence at once). The Council has given prior notice of the changes to the Judicial College so that they can update any relevant training materials.

The consultation included a general question inviting comment on the proposals. Some respondents used this to make suggestions for future changes to guidelines. The Council welcomes these and will consider them along with other matters that have come to its attention as part of the next annual miscellaneous amendments consultation which is expected to take place in the autumn of 2024.

Consultation respondents

Advance
Amnesty UK
Appeal
Association of Child Psychotherapists
Birnberg Peirce Ltd
Birth Companions
Birthrights
Bishop of Gloucester
Bliss
Blue Collar Conservatives
British Association Perinatal Medicine
Centre for Women's Justice
City of London Police
Criminal Law Solicitors Association
Criminal Sub-Committee of HM Council of Circuit Judges
Crown Prosecution Service
Daniel Stylianou
David Hill
Domestic Abuse Commissioner for England and Wales
Doughty Street Chambers
Dr Carly Lightowlers
Dr Christine McCourt
Dr Daisy Wiggins
Dr Dominique Mylod
Dr Ian K. Belton and Professor Mandeep Dhami
Dr Juliet Wood
Dr Laura Janes
Dr Lucy Baldwin and Dr Laura Abbott
Dr Marina A. S. Daniele
Dr Rona Epstein
Eleanor Levy
End Violence Against Women Coalition
Environment Agency
Faster Fairer Justice
Gary Knight
Hertfordshire Fly Tipping Group
HM Council of District Judges (Magistrates' Courts)
Howard League for Penal Reform
Individual
Individual
Individual
Individual
Janet Carter
Justice Committee

Law Society
Level Up
Lord Chancellor and Secretary of State for Justice
M Garcia de Frutos,
Maternity Action
Medact
MOPAC Victim's Commissioner
National Crime Agency
National Experts Citizen's Forum
Nicholas Cooke KC
Nicola Vousden
No Births Behind Bars
One Small Thing
Philip Davies MP
Philip Mickelborough
Prison Reform Trust
Prison Team, Leigh Day
Prisoners' Advice Service
Professor Peter Hungerford-Welch
Radical Therapist Network
Refuge
Restore Justice
Revolving Doors
Rosie Hollinshead
Royal College of Midwives
Royal College of Obstetricians & Gynaecologists
Samantha Riggs
Sarah Smith
Southall Black Sisters
Stephen Kirk
Support Not Separation
Suzy Lamplugh Trust
The Criminal Bar Association
The Drive Partnership
The Lullaby Trust
The ManKind Initiative
The Sentencing Academy
Transition to Adulthood Alliance, Barrow Cadbury Trust
UK Environmental Law Association
Violence and Society Centre, City, University of London
We Can't Consent to This
West London Magistrates Bench
Working Chance