



Level Up  
New Derwent House  
69-73 Theobalds Road  
London  
WC1X 8TA

Office of the Sentencing Council  
Room EB20  
Royal Courts of Justice  
London WC2A 2LL

20 February 2024

Dear Jessie Stanbrook,

**RE: Imposition of community and custodial sentences guideline consultation**

We write as a coalition of lawyers, academics, psychiatrists and organisations with significant interest in, and long experience working with, perinatal women in the criminal justice system.

Our consultation submission, which addresses several questions that relate to the sentencing of pregnant women and mothers, is attached.

Kind regards,

Janey Starling and Seyi Falodun-Liburdu, Co-Directors, Level Up  
Maya Sikand KC, Doughty St Chambers  
His Honour Nicholas Cooke KC, former Recorder of Cardiff and Senior Circuit Judge sitting at the Central Criminal Court  
Dr Lucy Baldwin, Durham University  
Dr Laura Abbott, University of Hertfordshire  
Dr Felicity Gerry KC, Libertas Chambers  
Dr Tulika Jha, Consultant Psychiatrist, NHS  
Deborah Coles, Executive Director, INQUEST  
Andy Keen-Downs, Chief Executive, Prison Advice and Care Trust  
Anna Herrmann, Artistic Director and Joint CEO of Clean Break



## RESPONSE TO THE IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES GUIDELINE CONSULTATION — FEBRUARY 2024

### 1. INTRODUCTION

Since the high-profile deaths of two babies in the women's prison estate in recent years (Aisha Cleary, 2019 and Brooke Powell, 2020), the Prison Ombudsman<sup>1</sup>, NHS<sup>2</sup> and Ministry of Justice<sup>3</sup> have categorised all pregnancies in prison as "high risk". It is the expert view of the Royal College of Midwives<sup>4</sup> that "prison is no place for pregnant women". The Royal College of Obstetricians and Gynaecologists has emphasised the need for non-custodial alternatives for pregnant women<sup>5</sup>.

While it is the role of courts to pass an appropriate sentence and the role of prisons to safeguard people in custody, sentencers are currently placed in an unacceptable, morally conflicted position: sentencing a pregnant woman to custody – for any length of time – means sentencing her to a high-risk pregnancy, "by virtue of the fact that she is held behind locked doors for sustained periods of time"<sup>6</sup>. In material terms, a high-risk pregnancy means the risk of preterm birth<sup>7</sup> or worse: a stillbirth with associated lifelong trauma<sup>8</sup>. Similarly, sentencing a pregnant woman to prison potentially means sentencing her child to developmental harm caused by separation<sup>9</sup>. Moreover, evidence shows the additional stress the imprisoned pregnant women feel due to their location, can have a direct impact on the developing child and result in lifelong health and wellbeing challenges.

The Sentencing Council's revisions to the Imposition guideline are critical improvements to sentencing that have the potential to bring an end to the harm that pregnant women, mothers and babies experience in the prison system. We welcome an improved sentencing framework that ensures a consistent and informed approach. It cannot be assumed that all sentencers understand the material risk and harm that custody will cause to the pregnant and postnatal women and mothers who come before them.

Through this submission, we intend to persuade the Sentencing Council to clarify and strengthen its proposals. We will address each relevant question in turn, but our three key points are as follows:

1. **Risks to a pregnant or postnatal woman should be given due consideration in all sentencing decisions, including where the custodial threshold has been passed and when considering a mandatory minimum sentence.** Custodial sentences create increased risks to all stages of a pregnancy and child development, not just birth. These risks are universal; they affect all women who come before the courts, not just those facing sentences of two years or less.

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<sup>1</sup> Prisons and Probation Ombudsman, '[Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019](#)' (2021)

<sup>2</sup> NHS England, '[Service specification: National service specification for the care of women who are pregnant or post-natal in detained settings](#)' (2022)

<sup>3</sup> This was accepted by the MOJ in the Aisha Cleary Prevention of Future Deaths hearing in October 2023

<sup>4</sup> Independent, '[Calls for urgent review over number of pregnant women being sent to prison](#)' (2022)

<sup>5</sup> RCOG (2021) '[RCOG Position Statement: Maternity care for women in prison in England and Wales](#)'

<sup>6</sup> Prisons and Probation Ombudsman, '[Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019](#)' (2021)

<sup>7</sup> Ibid

<sup>8</sup> Observer, '[Pregnant women in English jails are seven times more likely to suffer stillbirth](#)' (2023)

<sup>9</sup> Minson, S. Maternal sentencing and the rights of the child, Palgrave Socio-Legal Studies (2020)

2. **Sentencers should make every effort to avoid any part of the first 1,001 days (including pregnancy and the first two years of a child's life) being spent in prison or separated from their mother.** The first 1,001 days of a child's life are a critical period that sets the foundations for their lifelong emotional and physical development<sup>10</sup>; courts must avoid an infant spending these crucial days in prison, or the harm caused by separation from their mother during this period.
3. **When sentencing pregnant women and mothers, sentencers should acknowledge the rehabilitative potential of pregnancy and motherhood.** Courts should make every effort to ensure that any sentence is compatible with a woman's health needs and childcare responsibilities (as per the UN Bangkok Rules).

The above assertions are supported by a substantial evidence base, summarised in the next section, that has established the risks custody poses to pregnancies and the harm that maternal imprisonment causes to dependent children. These points are also supported by evidence on the effectiveness of rehabilitation and community-based sentences for female offenders.

## 2. EVIDENCE

### Risks to a pregnancy and the postnatal period

Pregnancy and the postnatal year is a high-risk period concerning severe mental ill-health in women generally.<sup>11</sup> There are also major risks to physical health, including pre-eclampsia, haemorrhage and sepsis, where urgent medical attention is needed<sup>12</sup>. Prison poses inherent barriers to accessing this. The Aisha Cleary inquest conclusions underscored the prison system's inability to provide prompt emergency responses.<sup>13</sup>

There are clearly evidenced risks to women in the postnatal period, from conditions such as sepsis, thrombosis and thromboembolism, to acute mental health risks, which are linked to high numbers of deaths due to drug and alcohol use or suicide.<sup>14</sup>

Research into the experiences of pregnant women in prison has found the impact of imprisonment, including increased risks of healthcare complications and lack of access to nutrition, essential provisions and clean air, intensifies as pregnancy progresses.<sup>15</sup>

Women in custody are likely to have complex health needs, which increase the risks associated with pregnancy for both the woman and the baby:

- Pregnant women in prison are seven times more likely to suffer a stillbirth than women in the community<sup>16</sup>
- Pregnant women in prison are almost twice as likely to give birth prematurely as women in the general population, which puts both mothers and their babies at risk<sup>17</sup>
- Over one in five pregnant women in prison miss midwifery appointments, increasing the risk of premature birth, miscarriage and stillbirth<sup>18</sup>

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<sup>10</sup> Department of Health and Social Care, '[The best start for life: a vision for the 1,001 critical days](#)' (2021)

<sup>11</sup> [Baldwin, L. and Abbott, L. \(2023\) \*Pregnancy and New Motherhood in Prison\* \(pp. 93-120\). Policy Press.](#)

<sup>12</sup> MBRRACE-UK (2023) [Saving Lives. Improving Mothers' Care](#)

<sup>13</sup> Travers R (2023) [Inquest touching the death of Aisha Cleary, Mr Richard Travers](#) H.M. Senior Coroner for Surrey.

<sup>14</sup> Ibid

<sup>15</sup> Abbott, L et al (2024) [Institutional thoughtlessness and the incarcerated pregnancy](#), Criminology and Criminal Justice

<sup>16</sup> Observer, [Pregnant women in English jails are seven times more likely to suffer stillbirth](#) (2023)

<sup>17</sup> Ibid

<sup>18</sup> Nuffield Trust, [Ill-equipped prisons and lack of health care access leave pregnant prisoners and their children at significant risk](#) (2022)

- One in ten pregnant women in prison give birth in-cell or on the way to hospital<sup>19</sup>
- Pregnant women in prison are at greater risk of perinatal mental health difficulties, with the NHS finding that entry into custody is particularly distressing for pregnant women and mothers separated from their children<sup>20</sup>

### **Harm to children and the first 1,001 days of development**

Sentencers should be aware of the postnatal period (up to 24 months after birth) and the longer-term harm that maternal imprisonment and the risk of separation causes to the child, which is highly likely to long outlast the length of a mother's custodial sentence. This harm applies to all children whose mothers are sentenced to custody, but is particularly acute for babies in the first 1,001 days of brain development.<sup>21</sup>

- Criminal justice proceedings and imprisonment are highly distressing environments for pregnant women.<sup>22</sup> 82% of women in prison report that they have mental health problems<sup>23</sup>. Antenatal stress is proven to increase levels of the hormone cortisol in the mother's body, which, when it crosses the placenta, can affect the health of the baby, brain development, emotional attachment and early parenting interactions.<sup>24 & 19</sup>
- Perinatal mental disorders are associated with increased risk of psychological and developmental disturbances in children.<sup>25</sup>
- The psychological distress caused by the prison environment is evidenced by the record high self-harm statistics in women's prison. Self-harm by women in prison hit a record high of 20,248 incidents last year, marking a 65% increase between June 2022 and 2023 alone.<sup>26</sup>
- The first 1,001 days of a child's life are a critical period that sets the foundations for their lifelong emotional, psychological and physical development.<sup>27</sup>
- Many women who give birth during their time in prison, or who enter prison during the postnatal period, will be separated temporarily or permanently from their baby, interrupting breastfeeding and risking significant trauma in a time at which the mother-baby attachment is shown to be crucial in supporting long-term development.<sup>28</sup>
- As many as 19 out of 20 children are forced to leave their home when their mother goes to prison. Although the figure needs updating, approximately 14% of children go directly into care.<sup>29</sup>
- The imprisonment of a household member is one of ten adverse childhood experiences (ACEs) known to risk significant negative impact on children's long-term health and wellbeing, their school attainment, and later life experiences.<sup>30</sup>

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<sup>19</sup> Nuffield Trust (2022), [Pregnancy and childbirth in prison: what do we know?](#)

<sup>20</sup> NHS England (2023), [A review of health and social care in women's prisons](#)

<sup>21</sup> O'Malley, S., Baldwin, L. and Abbott, L., 2021. Ch 6 Starting life in prison. Parental Imprisonment and Children's Rights, p.23.

<sup>22</sup> Abbott, L et al (2020) Pregnancy and childbirth in English prisons: institutional ignominy and the pains of imprisonment, *Sociology of Health & Illness* Vol. 42 No. 3 2020 ISSN 0141-9889, pp. 660–675

<sup>23</sup> Prison Reform Trust, [Bromley Briefings Prison Factfile: February 2024](#) (2024)

<sup>24</sup> Gerhardt, S. (2003) *Why love matters: how affection shapes a baby's brain*. Hove, East Sussex: Brunner-Routledge.

<sup>25</sup> Stein A, Pearson RM, Goodman SH, Rapa E, Rahman A, McCallum M, Howard LM, Pariante CM. Effects of perinatal mental disorders on the fetus and child. *Lancet*. 2014 Nov 15;384(9956):1800-19.

<sup>26</sup> Prison Reform Trust, [Bromley Briefings Prison Factfile: February 2024](#) (2024)

<sup>27</sup> Department of Health and Social Care, ['The best start for life: a vision for the 1,001 critical days'](#) (2021)

<sup>28</sup> Abbott, L., Scott, T. and Thomas, H.,. Compulsory separation of women prisoners from their babies following childbirth: Uncertainty, loss and disenfranchised grief. *Sociology of Health & Illness*, 45(5), pp.971-988 (2023)

<sup>29</sup> Home Office [The Corston Report: A review of women with vulnerabilities in the criminal justice system](#) (2007)

<sup>30</sup> Felitti, V., Anda, R., Nordenberg, D., Williamson, D., Spitz, A., Edwards, V., Koss, M. and Marks, J.

Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study, *American Journal of Preventive Medicine* 14(4) 245-258 (1998)

- Separation for both parent and child is traumatic and can have long term effects.<sup>31</sup>

Furthermore, the UN Convention on the Rights of the Child states that children should be protected from any form of discrimination or punishment based on their parents' status or activities and that the best interests of the child should be the primary consideration in actions concerning children by courts (Articles 2 and 3, UN General Assembly 1989).

### **The benefits of non-custodial and rehabilitative sentences for pregnant and post-natal women**

The Ministry of Justice Female Offender Strategy identifies that “custody is particularly damaging for women” and that many female offenders could be more successfully supported in the community, where reoffending outcomes are better<sup>32</sup>. The most recently available figures show that 76% of women in prison are serving a sentence of less than two years<sup>33</sup>. Research evidence<sup>34</sup> has revealed the harmful impact that custodial periods of even a few short weeks have on mothers and children. Similarly, research has demonstrated that women released from prison, especially those serving short sentences, are more likely to reoffend, and reoffend sooner, than those serving community sentences.<sup>35</sup>

A report from His Majesty's Inspectorate of Probation has found that community women's centres, which help women to build the capacity to address their issues, rather than just addressing offending behaviour, are a far more cost-effective response than custody and are proven to reduce reoffending.<sup>36</sup>

Pregnancy has been recognised as a unique window of opportunity to work proactively with families and lays the foundations for a child's future physical, emotional, social and cognitive development<sup>37</sup>. The rehabilitative potential of pregnancy has been acknowledged by sentencing judges in the cases of *R v Charlton [2021] EWCA Crim 2006, 2 Cr App R (S) 18*<sup>38</sup> and, most recently, *R v Basseragh [2024] EWCA Crim 20*: “Pregnancy will not only provide strong personal mitigation but might also tend to improve the prospect of rehabilitation”<sup>39</sup>.

Furthermore, pregnancy and motherhood may increase the magnitude of punishment. Mothers are negatively impacted in particular by imprisonment, with research showing their mothering practices being limited by incarceration, which diminishes their maternal identity and self-esteem, with long-lasting negative impact that endures after release<sup>40</sup>. Imprisonment impacts on mothers' ability and willingness to engage in rehabilitation as well as their wellbeing and relationships with children and caregivers, and increases their risk of self-harm and/or suicide.<sup>41</sup>

## **3. CONSULTATION RESPONSE**

In light of the above, this consultation response will address the following questions:

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<sup>31</sup> Minson, S. *Maternal sentencing and the rights of the child*. Palgrave Socio-Legal Studies (2020)

<sup>32</sup> Ministry of Justice '[Female Offender Strategy](#)' (2018)

<sup>33</sup> Prison Reform Trust, [Bromley Briefings Prison Factfile](#) (2023)

<sup>34</sup> Baldwin, L & Epstein, R. Short but Not Sweet. A Study exploring the impact of short custodial sentences on mothers and their children

<sup>35</sup> Hedderman, C. and Jolliffe, D. The Impact of Prison for Women on the Edge: Paying the Price for Wrong Decisions, *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice*. 10, 152–178 (2015)

<sup>36</sup> HM Inspectorate of Probation, [The evidence: women](#)

<sup>37</sup> All Party Parliamentary Group (APPG) '[First Steps 1001 Critical Days. Building Great Britains: Conception to age 2](#)' (2015)

<sup>38</sup> [Charlton, R. v \[2021\] EWCA Crim 2006 \(21 December 2021\)](#)

<sup>39</sup> [Bassaragh, R. v \[2024\] EWCA Crim 20 \(25 January 2024\)](#)

<sup>40</sup> Baldwin, L [Motherhood Challenged: Exploring the persisting impact of maternal imprisonment on maternal identity and role](#) (2021) Baldwin, L (2023) [Motherhood in and After Prison](#)

<sup>41</sup> *Ibid*

**Question 8: Cohorts**

**Question 11: Purposes and effectiveness of sentencing**

**Question 12: Young adult offenders**

**Question 13: Female offenders**

**Question 16: Requirements**

**Question 17: Rehabilitative requirements**

**Question 19: Imposition of custodial sentences**

**Question 20: Table of factors**

**Question 23: Flowchart**

**Question 24: Resource assessment and impact**

**Question 8: Do you agree with the general inclusion of, and specific cohorts included, in the list of cohorts in the pre-sentence report section?**

We are pleased to see women, pregnant offenders and primary carers included in the list of cohorts where a pre-sentence report is particularly important. As we have previously suggested, in our submissions in regard to a new mitigating factor for pregnancy, pre-sentence reports should be a mandatory requirement before sentencing any pregnant woman or mother. If a comprehensive pre-sentence report is not available, sentencing should be adjourned until one is available. We also recommend, alongside Prison Reform Trust, that ‘care experienced’ people are included in the list of cohorts, given that 31% of women in prison experienced the care system as a child<sup>42</sup> and the inquest into Aisha Cleary’s death at HMP Bronzefield was found to be a result of intersecting failures between both the care and prison system<sup>43</sup>.

We also support the recommendations from Prison Reform Trust that this list of cohorts is non-exhaustive, to be reflecting in the following wording:

*Below is a non-exhaustive list of when a pre-sentence report may be particularly important. This includes if the offender is:*

**Question 11: Do you have any comments on the Purposes and Effectiveness of Sentencing section?**

We welcome the Sentencing Council’s approach in following the evidence on reoffending and encourage the Council to include specific direction for sentencers to consider the particular rehabilitative potential of pregnancy and motherhood, in line with aforementioned evidence and case law.

**Question 12: Do you have any comments on the new section on young adult offenders?**

We are pleased to see concern of the ‘adultification’ of children and we urge the Council to acknowledge, in line with the evidence, that Black children are at particular risk of this. While our submission focuses on pregnant women and mothers, we recognise that all Black children and young people, including boys, are viewed as more adult-like and ‘less innocent’ than white children, which means they are vulnerable to increased punishment and decreased protection<sup>44</sup>. Ministry of Justice data has found Black girls are almost twice as likely to be arrested as white girls<sup>45</sup>.

**Question 13: Do you have any comments on the new section on female offenders?**

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<sup>42</sup> Prison Reform Trust, [Bromley Briefings Prison Factfile: February 2024](#) (2024)

<sup>43</sup> Travers R (2023) [Inquest touching the death of Aisha Cleary, Mr Richard Travers](#) H.M. Senior Coroner for Surrey.

<sup>44</sup> CommunityCare, [‘Where are the Black girls in our CSA services, studies and statistics?’](#) (2019)

<sup>45</sup> Ministry of Justice, [Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales](#) (2016)

We welcome new measures on sentencing pregnant women. We suggest the references to pregnancy in this section are amended in alignment with recommendations from Birth Companions, which reinforce the HMPPS policy framework for pregnant and postnatal women, to include the first 1,001 days period from pregnancy until a child's second birthday<sup>46</sup>. We therefore propose all references to pregnancy are amended to:

*'pregnancy and the postnatal period, extending up to 24 months after birth'.*

### **Consideration of risks to a pregnancy**

Sentencers must be aware that the health risks women face in prison are present throughout pregnancy and the postnatal period, and not limited to birth. We are aware that this guideline will interact with the new mitigating factor for pregnancy, maternity and the postnatal period, and therefore suggest this paragraph is strengthened in line with our amendments to a similar paragraph for the proposed new mitigating factor:

*The impact of custody on a woman who is pregnant is very likely to cause significant harm to the physical and mental health of both the mother and the child. Prison is a high-risk environment for pregnant women. It poses inherent barriers to accessing medical assistance and specialist maternity care and causes harm to dependent children.*

*Women in custody are likely to have complex health needs, including a need for specialist trauma services, which will increase the risks associated with pregnancy for both her and the child.*

The above suggestions take account of the evidence showing the harm prison causes to pregnant women and their children. We also reiterate our recommendation submitted in relation to the new mitigating factor for pregnancy that sentencing cannot go ahead until a comprehensive pre-sentence report (PSR) has been obtained by the court. Considerations for sentencers must include:

- the established high-risk nature of pregnancy and childbirth in custody and the harm custody causes to pregnant and postnatal women and their dependants, including by separation;
- the medical needs of the pregnant woman, including her mental health needs;
- that access to a place in a prison Mother & Baby Unit is not automatic, and the upper age limit is two years;
- the best interests of the child (including the fact that it is universally recognised that separation in the first two years can cause significant, irreversible harm to both mother and child);
- the impact of a sentence on siblings and sibling relationships;
- the effect of the sentence on the physical and mental health of the woman and;
- the effect of the sentence on the child once born.

### **Proportionality: pregnant and postnatal women and mothers of dependent children**

We are glad to see the recognition that women who come before the courts are more likely to be primary carers than men and that maternal imprisonment has serious, adverse and long-lasting consequences for both mothers and their children.

It is positive, and welcome, that sentencers are given clear direction to avoid the possibility of an in-prison birth. We recommend the Council expands the scope of this clause to include pregnancy and the postnatal period. This is important for several reasons: the increased risk of premature birth

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<sup>46</sup> HMPPS, [Pregnancy, MBUs and maternal separation in women's prisons Policy Framework](#) (2021)

that pregnant women in prison face<sup>47</sup> means calculations on when birth will happen are impractical. Furthermore, without this clarification, an unintended consequence of the originally proposed paragraph could be that courts defer sentencing until after birth, increasing a mother's risk of separation from her infant. Additionally, this could have a consequence of causing anxiety and stress to remain at elevated levels during the pregnancy.

We therefore suggest the following amendments in red:

*A custodial sentence will become disproportionate to achieving the purposes of sentencing where there would be an impact on an offender's pregnancy or dependent children. Courts should make every effort to avoid an offender spending pregnancy, birth or the postnatal period (up to 24 months after birth) in prison and, where relevant, consider pregnancy and the postnatal period as contributing to 'exceptional circumstances' strongly gravitating against imprisonment.*

While inclusion of the 'unborn child' is an important consideration, this term does not address the impact on and risk to the offender herself. As declared by the prison ombudsman, a woman's pregnancy is immediately made high-risk once a woman is placed in a custodial environment<sup>48</sup>. In its current form, the Council's proposed inclusion of 'unborn child' does not give due weight to the impact of a high-risk pregnancy on the mother. A preterm birth, stillbirth with associated trauma, or any kind of emergency birth can have a significant physical and psychological impact on a woman. We therefore suggest replacing 'unborn child' with 'an offender's pregnancy'.

Furthermore, while our submission seeks to emphasise the acute harm caused to developing infants by maternal separation, this harm does not disappear once a child reaches their second birthday. The long-term emotional, psychological and social damage caused to children when the maternal bond is ruptured by her imprisonment must be given full and informed consideration by sentencers<sup>49</sup>.

Based on the extensive evidence available, we suggest that the default position for sentencers should be that custodial sentences are disproportionate when it comes to sentencing pregnant and postnatal women and mothers of dependent children. There should therefore be a duty on the sentencer to give specific reasons and justify their sentencing decision in the light of this evidence.

Reasons for all sentences of pregnant or postnatal women should address the following:

- 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;
- how a community or suspended sentence has been actively considered and investigated, and why this is considered appropriate or not.

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<sup>47</sup> Observer, [Pregnant women in English jails are seven times more likely to suffer stillbirth](#) (2023)

<sup>48</sup> Prisons and Probation Ombudsman, ['Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019'](#) (2021)

<sup>49</sup> Minson, S. Maternal sentencing and the rights of the child. (2020)



## **Marginalised women and their children**

We welcome the recognition that ‘women from an ethnic minority background have distinct needs from both men from an ethnic minority background, and white women, and these should be considered before the imposition of a community or custodial sentence’; however, without a statement of what these needs are, we are concerned that this consideration is too imprecise to be effective.

There are important racial disparities in relation to the risks of pregnancy and the postnatal period. Sentencers need to be made aware of these disparities so that the sentencing of pregnant women is not indirectly discriminatory. Black women are four times as likely to die in pregnancy and childbirth; Asian and mixed-race women twice as likely<sup>50</sup>. Research shows that women from Black, ethnic minority and lower socio-economic groups suffer from greater risks to their postnatal health.<sup>51</sup> Those risks include gestational diabetes mellitus, pre-eclampsia, pregnancy induced hypertension and peripartum psychiatric illness<sup>52</sup>. Sentencers should not be left to sentence pregnant women from these groups in ignorance of, or without regard to, such facts.

Sentencers should also consider that the family impact of custodial sentencing is particularly acute for Black mothers, as more than half of Black African and Black Caribbean families in the UK are headed by a lone parent, compared with less than a quarter of white families and just over a tenth of Asian families<sup>53</sup>. This is likely to increase the risk of Black children being taken into care if their mother is imprisoned.

### **Question 16: Requirements**

It is critical that a full pre-sentence report is obtained before sentencing to ensure that a sentence is compatible with a woman’s support needs and childcare responsibilities, so she can access routine healthcare and maternity appointments.

### **Question 17: Do you agree with the new approach to rehabilitative requirements in the Community Order Levels section?**

It is critical that a full pre-sentence report is obtained before sentencing to ensure that any rehabilitative requirements are compatible with a woman’s support needs and childcare responsibilities, so she can access routine healthcare and maternity appointments.

### **Question 19: Do you have any comments on the Imposition of custodial sentences section? We welcome comments both on content and format/structure.**

As mentioned above in response to Question 13, the paragraph on proportionality, and avoidance of an offender giving birth in prison, requires strengthening to include all risks and harms associated with placing a pregnant or postnatal woman in custody:

*A custodial sentence will become disproportionate to achieving the purposes of sentencing where there would be an impact on an offender’s pregnancy or dependent children. Courts should make every effort to avoid an offender spending pregnancy, birth or the postnatal period (up to 24 months after birth) in prison and, where relevant, consider pregnancy and the*

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<sup>50</sup> MBRRACE-UK, [Saving Lives, Improving Mothers’ Care](#) (2018)

<sup>51</sup> Womersley, K. Ripullone, R and Hirst, J. E. [Tackling inequality in maternal health: Beyond the postpartum.](#), (2021)

<sup>52</sup> Ibid

<sup>53</sup> Cox, J and Sacks-Jones, K, [“Double disadvantage”: The experiences of Black, Asian and Minority Ethnic women in the criminal justice system](#) (2017)

*postnatal period as contributing to 'exceptional circumstances' strongly gravitating against imprisonment.*

We welcome the recognition that 'passing the custody threshold does not mean that a custodial sentence is inevitable' and that 'custody should not be imposed where the purposes of sentencing could be achieved by a community order'. We reiterate our submission to the consultation on pregnancy as a mitigating factor, which includes references to mandatory custodial sentences:

*For offences that carry a sentence of more than two years, or a mandatory minimum custodial sentence, pregnancy and the postnatal period should be considered as an 'exceptional circumstance' strongly gravitating against imprisonment.*

*That is so because the imposition of a mandatory minimum term on a woman who is pregnant or postnatal results in a disproportionately severe sentence when compared with the imposition of such a sentence upon a person who is not affected by such considerations.*

The harm and risk prison causes to pregnant and postnatal women, new mothers and their babies is universal, regardless of offence. We therefore urge the Sentencing Council to implement guidelines that enable sentencers to confidently factor in pregnancy, early motherhood and a child's development in all cases, not just for women facing sentences of less than two years. The wording of this paragraph should therefore be amended in order to codify the recent Court of Appeal judgment, in which the impact of custody on the pregnant offender was taken into account to suspend a sentence, despite her having been convicted of a firearms offence that carries a mandatory sentence of five years<sup>54</sup>:

*Even where a mandatory sentence applies, pregnancy may, when taken together with other features of the case, justify a suspended sentence.*

We also suggest clear direction for sentencers highlighting the materiality of pregnancy and motherhood when sentencing decisions are taken in the context of totality.

**Question 20: Do you agree with the restructure and new factor in the table of factors indicating it may or may not be appropriate to suspend a custodial sentence?**

As above, we reiterate that sentencers must make every effort to avoid sentencing women to prison during pregnancy or the postnatal "1,001 days" period of a child's life. We therefore welcome the inclusion of a new factor for 'pregnancy and the postnatal period up to two years'.

We also suggest clarification of the 'Immediate custody will result in significant harmful impact on others' factor, by adding a phrase to specify pregnancy:

*Immediate custody will result in significant harmful impact upon others, including a pregnancy or dependants.*

**Question 23: Do you think that the flowchart aligns with the proposed new structure in the guideline, and do you have any comments on the sentencing flow chart?**

We welcome the inclusion of the question 'Would a custodial sentence have an impact on dependants, including any unborn children, that could make it disproportionate?'

However, as above, the term 'unborn child' gives no weight to the impact that custody has on the pregnant woman herself, who will immediately experience a high-risk pregnancy once placed in a prison environment. A preterm birth, stillbirth with associated trauma, or any kind of emergency birth

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<sup>54</sup> [Bassaragh, R. v \[2024\] EWCA Crim 20 \(25 January 2024\)](#)

can cause lifelong physical and psychological impact. We suggest 'pregnancy' as a therefore more accurate term, which encompasses both the pregnant woman and unborn child. We therefore suggest the following amendment:

*'Would a custodial sentence have an impact on **an offender's pregnancy** or dependants that could make it disproportionate?'*

**Question 24: Do you have any comments on the resource assessment and/or on the likely impact of the proposals on sentencing practice?**

### **Probation**

In recognition of the symbiotic relationship between the court system and the probation service, we are concerned that without a significant increase in funding for the probation service, new sentencing guidelines risk becoming unworkable in practice. As it stands, every probation service in the country is understaffed by at least 95 officers, with nearly one in five prospective probation officers quitting before they even qualify<sup>55</sup>. This is already having a material impact on courts, with sentencing being delayed for up to 12 weeks due to lack of probation resource.

Given the Sentencing Council's recognition that 'the guideline will lead to changes in the way that probation resources are required, particularly with certain groups of offenders', we urge the Sentencing Council to strategise with the Ministry of Justice to ensure that sufficient resource is provided to support the probation service to provide the timely, comprehensive PSRs that this guideline requires and, where necessary, to support pregnant women and new mothers in the community.

### **Training**

We note that the Sentencing Council have identified the risk that 'sentencers do not interpret the new guideline as intended'. We therefore suggest mandatory training for sentencers as an appropriate mitigation for such a risk. Considering the focus group response to the Sentencing Council's 2022 consultation on the introduction of pregnancy as a mitigating factor, which found 'sentencers questioned the evidence base relating to the practical impact of custody upon pregnant women and their safety', it is evident that sentencers do not always understand or adequately factor in the risks that a custodial sentence presents to the pregnant women and mothers that come before them.

In order to ensure both consistency across the courts and the safety of pregnant women, mothers and their dependant children, it is imperative that all sentencers are provided with comprehensive training to ensure that they are led by the established evidence, rather than personal opinion.

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<sup>55</sup> Huskisson, S. ['Crisis in probation service staffing sees killers and sex offenders go unmonitored'](#) (Mirror), 1 January 2024