

One Small Thing's Response to The Sentencing Council's Consultation on revisions to the Imposition of Community and Custodial Sentences Guideline

February 2024

About One Small Thing

One Small Thing's vision is a justice system that can recognise, understand, and respond to trauma. Our mission is to redesign the justice system for women and their children.

We want a compassionate system that recognises the vicious cycle of trauma and disadvantage at the root of justice involvement and allows people to recover from trauma and thrive. Our core focus is on women and their children because of the additional discrimination and disadvantage they face.

How:

- Redesign the way the justice system responds to women and their children in a way that can be replicated and scaled nationally.
- Educate people within the justice system on the impact of trauma, and draw on our knowledge and expertise to help build capacity within organisations.
- Influence politicians and policy makers to encourage culture change across the justice system and the people who work within it.

Response Summary

We welcome the opportunity to respond to the Sentencing Council's consultation on revisions to the imposition of community and custodial sentences guideline. We are encouraged by some of the revisions, particularly around pre-sentence reports, and the inclusion of a specific section relating to women. We are also pleased to see the Council emphasize that community sentences can fulfil all the purposes of sentencing, and highlighting that short custodial sentences are not as effective at reducing reoffending than community sentences. We see these revisions as a positive step in the right direction and hope this will lead to less women being unnecessarily imprisoned when they could be safely supported in the community.

Pregnancy is not considered anywhere in the current guideline, and so it is encouraging to see the council include this in their revisions. We do not believe prison can ever be a safe environment for pregnant and post-natal women, and their babies. Although we would like the revised guidelines to go further in this respect, we hope that by now asking sentencers to consider pregnant women and their babies, the foundations will be laid to push for an end to the practice of imprisoning pregnant women.

Full Response

6. Do you have any comments on the unified thresholds section?

One Small Thing broadly welcomes the Council's revisions to the thresholds section, providing greater clarity by bringing all relevant guidance into one place, including clearer guidelines around how or how much the seriousness of the offence must be aggravated due to previous convictions. As the Council rightly points out in their revised guidance, previous convictions might indicate an underlying problem that could be addressed more effectively through a community order, and in most circumstances should not be the basis for increasing the severity of a sentence where the current offence does not warrant it.

This is an important distinction that we hope would ultimately result in less women being unnecessarily imprisoned for short sentences. For women, multiple convictions can be linked to substance use, poverty, mental health, homelessness and being victim of male violence and abuse, and it is therefore right that they are not further criminalised because of the number of previous convictions they may have. According to data collected by the Prison Reform Trust, 83% of women who have served more than 11 previous custodial sentences are reconvicted within one year of leaving prison¹.

'The reason I think that community sentences have dropped could be due to most female offenders on small sentences for low level offences have usually been seen at the magistrates court numerous times before. It is then deemed that the person will not change or stop offending so prison seems the only option. In my experience whilst in custody, it was the same women returning time after time which is where the term 'revolving door' comes from.' Lilly Lewis, Women's Involvement Advisor at One Small Thing

Whilst reducing the use of unnecessary custody, and increasing community-based options is important, it is not helpful to view community options as 'soft' or preferable when in fact no further action should be considered. As the Sentencing Council highlights elsewhere in the guidelines, community sentences can fulfil all the purposes of sentencing and can indeed be highly punitive. We are therefore pleased to see the Council urge sentencers to consider all available disposals even where the threshold for community orders has been passed. Although this sentiment is in the current guidelines, we hope that by making this section clearer, and this point more prominent, that sentencers consider disposals more often. However, it is important to highlight that many women will also struggle to pay fines, often for the same reasons that they are involved in the justice system to begin with, as laid out in the Council's new section 'Female Offenders'.

¹ Bromley Briefings Prison Factfile January 2023, Prison Reform Trust, Page 38

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We therefore suggest the Council remove, *'A Band D fine may be an appropriate alternative to a community order in some cases and can achieve the purposes of sentencing'*, as the previous sentence already makes the point that a fine could be used, and this repetition could reinforce the idea that a fine should be used instead of a discharge.

We are also pleased to see the inclusion of pregnant women in this section. *'Imprisonment should not be imposed where there would be an impact on dependants, including on unborn children where the offender is pregnant, which would make a custodial sentence disproportionate to achieving the purposes of sentencing.'* We suggest the Council removes the term 'unborn child' and includes 'an offender's pregnancy' instead. 'Pregnancy' encompasses both the pregnant woman and unborn child and includes the risk posed to the woman.

To supplement this, we urge the council to include a standalone point highlighting the risk to the pregnant woman herself, which would also make a custodial sentence disproportionate. All pregnancies in prison are to be considered high risk as women face significant barriers accessing vital pregnancy related healthcare. We encourage the Council to link here to the mitigating factor of pregnancy, maternity and postnatal care that has recently been consulted on.

It is also important to highlight that when mothers go to prison, there is nearly always an impact on dependent children. 95% of children do not stay in their family home when their mother goes to prison, meaning they may be placed with multiple carers, be separated from siblings, and have to move school². Similarly, it has been recognised by multiple bodies such as NHS England³, HMPPS⁴, the Prisons and Probation Ombudsman⁵, and the Royal College of Midwives⁶, that prison is inappropriate for pregnant women, and that all pregnancies in prison are to be considered high risk. Considering this, it could be argued that sentencing mothers and pregnant women to custody will always impact dependants, and therefore will nearly always be disproportionate to achieving the purposes of sentencing.

Sentencers should be made aware of these facts and at this point be linked to the mitigating factors on primary carers and on pregnancy, maternity and postnatal care that has recently been consulted on.

Question 7: Do you have any comments on the first part of the pre-sentence report section, before the list of cohorts?

² 'What about me? The impact on children when mothers are involved in the criminal justice system', Sarah Beresford, 2018, Page 6

³ NHS England (2022) Service specification National service specification for the care of women who are pregnant or post-natal in detained settings (prisons, immigration removal centres, children and young people settings)

⁴ A review of health and social care in women's prisons, NHS England & HM Prison and Probation Service, 23 November 2023

⁵ PPO Ombudsman Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019

⁶ Independent, Calls for urgent review over number of pregnant women being sent to prison (2022)

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Considering the decline in Pre-Sentence Reports (PSRs)⁷, we are pleased to see the Sentencing Council propose a more unified and comprehensive set of guidelines around PSRs. For women, PSRs are especially vital and can play a significant role in their future outcomes. Many women who come into contact with the justice system have experienced significant trauma and are often victims of more serious crimes than the ones they are accused of.

Women are also significantly more likely to be the primary carer of their children. Considering that only 5% of children remain in their family home when their mother goes to prison⁸, it is vital that those sentencing women are able to have a detailed picture of their circumstances, and what impact different sentencing options will have on their lives and those that depend on them. We believe this is best done by providing a comprehensive written PSR, rather than a fast delivery or oral report. It has been reported that courts are over 10 times more likely to impose a community sentence if a pre-sentence assessment has been conducted⁹.

We also agree with the Council, that there are very few instances where a PSR wouldn't be necessary. However, as we have highlighted in question 6, many women will struggle to pay fines, and whilst a PSR may not be necessary, there still needs to be an awareness of their circumstances and their realistic ability to pay a fine. For example, living with domestic abuse, being un/under-employed, poverty, substance use, and homelessness will all affect someone's ability to pay a fine and risks them being drawn further into the justice system for non-payment.

Our other area of concern relates more to the application of the revised guidelines around PSRs, rather than their intention (which we are overall supportive of). The current guideline already highlights the need for a PSR for both community and custodial sentences, however we know that PSRs have been in decline. The revised guidelines provide more clarity by highlighting when a PSR won't be necessary, however it's likely other external factors, such as low capacity in probation, are playing a big role in their decline. We hope the revisions lead to everyone who needs a PSR getting one, however we are concerned that the systems responsible for this are not equipped to apply the guidelines in full. There is a need for substantial investment in community services and Probation, which the Sentencing Council can play a role in calling for, alongside the launch of this new guidance. Probation teams need to work closely with specialist women's services such as Women's Centres to accurately and sensitively capture a woman's circumstances in a trauma-informed way. There should also be investment in training for Probation teams and sentencers on having an intersectional approach to understanding women's needs and circumstances, as outlined in the Double Disadvantage Action Plan¹⁰.

⁷ Centre for Justice Innovation (2018) The changing use of pre-sentence reports, London: CJI, page 8

⁸ What about me? The impact on children when mothers are involved in the criminal justice system', Sarah Beresford, 2018, Page 6

⁹ Centre for Justice Innovation (2018) The changing use of pre-sentence reports, London: CJI, page 1

¹⁰ <https://www.agendaalliance.org/documents/1/Double-Disadvantage-Action-Plan.pdf>

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A useful resource for the guidance to reference is the Women's Services Map, managed by the National Women's Justice Coalition, so sentencers can have a greater understanding of local specialist provision¹¹.

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 agree with the specific cohorts included and are particularly encouraged to see women and pregnant women included. The Farmer review for Women recommends that written PSRs be made mandatory for all women before a custodial sentence is passed¹². We would like to see this reflected in the guidelines, rather than women and pregnant women being considered on a discretionary basis. PSR's not only inform sentencing type but can highlight where requirements will be unfeasible or overly disruptive for women due to their circumstances such as childcare responsibilities.

9. Do you have any comments on second part of the PSR section, specifically on the court giving an indication to Probation, adjournments and on committal?

We welcome the council's revised guidance on adjournments. As highlighted in our answer to question 7, we are concerned that a lack of capacity in Probation could be a barrier to delivering PSRs for all who need them. Considering the constraints on Probation, allowing more forewarning and time to prepare, even requiring an adjournment, is positive. However, we believe that additional resources will be needed to support Probation to deliver the amount of PSRs needed.

11. Do you have any comments on the Purposes and Effectiveness of Sentencing section?

One Small Thing views the Council's new section of the purposes and effectiveness of sentencing as a positive addition. We are particularly encouraged by the Council's assertion that both community and custodial sentences can achieve all the purposes of sentencing. We hope that this will encourage sentencers to not view custody as the default for punishment. Too often we see women given a custodial sentence, when she could have been safely supported in the community.

We are also pleased to see the Council using evidence to show that non-custodial sentences can reduce the risk of reoffending. We encourage the Council to cite

¹¹ <https://www.womensservicesmap.com/>

¹² The Importance of Strengthening Female Offenders' Family and other Relationships to Prevent Reoffending and Reduce Intergenerational Crime by Lord Farmer. Page 52

which research they are relying on here, so that sentencers can see where the evidence that may be forming their opinions comes from. We also urge the Council to take an intersectional approach as outlined in the Double Disadvantage Action Plan¹³ and monitor the impact and effectiveness of these guidelines on various groups of women including young women, pregnant or postnatal women, Black, Asian, minoritised and migrant women as well as those who are care experienced.

13. Do you have any comments on the new section on female offenders?

The section refers to the ‘different’ impact of the justice system on women, it is important that the nature of the difference is clearly articulated, emphasising that it is a ‘different and disproportionate’ impact in some areas, such as separation from dependent children.

It is positive that women and their distinct needs are being specifically mentioned alongside the need for them to receive pre-sentence reports. We would suggest several additions to the description included on the needs of women in the justice system.

We would suggest that instead of mentioning financial issues and the common experience of domestic abuse, the guidelines should also specifically highlight the direct causal link. Women’s involvement in the justice system is often as the direct result of domestic abuse or coercive control – this can include being coerced by an abusive partner into financial crimes such as fraud. It also includes women being in abusive relationships being criminalised under Joint Enterprise Laws.¹⁴

We support the proposal to add further detail to the question of whether custody is avoidable for pregnant women. In our [response](#) to the *Sentencing Council consultation on miscellaneous amendments to sentencing guidelines, 2023* we highlighted that the language used in the sentence ‘*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*’ creates ambiguity and attributes the risk to the ‘complexity’ of women in prison. It is vital that the Sentencing Council places the emphasis on *custody itself* being instrumental in significantly increasing risk. As outlined further in our response to Question 19, all references to pregnancy should also include the post-natal period, extending up to 24 months after birth.

There is a lack of evidence of a direct link between menopause and increased ‘criminal behaviour’ and therefore we would suggest not framing it as such. This section would be better phrased to increase awareness of the emotional and health needs women may have, that are not well met if a custodial sentence is given, for example changing the wording to ‘*Women (typically aged 45 to 55) may*

¹³ <https://www.agendaalliance.org/documents/1/Double-Disadvantage-Action-Plan.pdf>

¹⁴ See Clarke and Chadwick, Manchester Metropolitan University, 2020:

<https://www.crimeandjustice.org.uk/news/2020-11-25/new-report-joint-enterprise-and-criminalisation-women> and Hulley, *The Howard Journal of Crime and Justice*, 2021: <https://onlinelibrary.wiley.com/doi/full/10.1111/hojo.12445>

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*suffer from the symptoms of perimenopause or menopause, which can affect physical and mental health in ways not well addressed in custody*¹⁵

17. Do you agree with the new approach to rehabilitative requirements in the Community Order Levels section?

We welcome the Council's new language around considering the needs of those being sentenced, and that the individuals' circumstances should be the focus of the 'rehabilitative' requirements, not the seriousness of the offence. This makes it all the more vital that a thorough PSR has been completed.

We are also encouraged to see the Council ask sentencers to consider whether, because of the needs identified, a punitive requirement may be unjust. Considering both punitive and rehabilitative requirements of a community sentences are mandatory, it is perhaps unhelpful to think of some elements as being punitive and the rest 'non-punitive'. None of the components are a choice and to an extent all of them require some deprivation of liberty. For women, this binary distinction of what is punitive and what is 'non-punitive' may not be an effective methodology for sentencing, considering their life experiences.

Many women involved in the justice system are victims of crimes more serious than the ones they are accused of, and often have deep experience of trauma and multiple unmet needs. Over 60% of women in prison report having experienced domestic abuse, and in the seminal Corston Report coercion by men was recognised as a route into criminal activity for women. As such, what might be deemed a rehabilitative component may be experienced as punishment, especially if the crime itself was committed out of coercion or under duress.

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

We support the inclusion of pregnant women and dependants within the Imposition of Custodial Sentences section. Again, we ask the Council to remove the term 'unborn child' and use 'a pregnancy' instead (please refer to our answer to question 6). We agree that '*Courts should avoid the possibility of an offender giving birth in prison*' and would recommend expanding the section- it's not just the moment of birth that should be considered high risk in prison, it is the whole pregnancy and postnatal period that should be avoided.

As we highlighted in our response to the *Sentencing Council consultation on miscellaneous amendments to sentencing guidelines, 2023*, it is vital that sentencers understand the impact that sentencing a pregnant woman to custody can have on her after she has given birth. The post-natal period is an extremely

¹⁵ Van Hout, M. C., Srisuwan, L., & Plugge, E. (2022). A human rights assessment of menopausal women's access to age- and gender-sensitive nondiscriminatory health care in prison. *Menopause*, 29(11), 1338-1348. <https://doi.org/10.1097/GME.0000000000002065>

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vulnerable time for most women, with the risk of post-natal depression compounded if they are in a custodial environment, even if they have managed to get a space on a mother and baby unit (MBU). The lack of support around breastfeeding is also a key issue.¹⁶ We support the charity Birth Companion's calls to extend to the guidance to the postnatal period, specified as being up to 24 months after birth, as well as their proposed text for the new mitigating factor on pregnancy.

We also support We Level Up's proposal that the Sentencing Council should implement guidelines that enable sentencers to confidently factor in pregnancy, early motherhood and a child's development in all cases, including those who pass the custody threshold, not just for women facing sentences of less than two years. This section should be amended in light of 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 years¹⁷.

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¹⁶ Women's experiences of breastfeeding in prisons, Abbott and Scott (2017)

¹⁷ [Bassaragh, R. v \[2024\] EWCA Crim 20 \(25 January 2024\)](#)