

One Small Thing's response to the Sentencing Council consultation on miscellaneous amendments to sentencing guidelines, 2023

Response to question 17 on including a new mitigating factor: pregnancy, maternity and postnatal care.

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.
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Response Summary

One Small Thing strongly agrees with the proposal to include a specific mitigating factor and expanded explanation on pregnancy, childbirth and postnatal care. There are specific considerations that need to be taken into account for pregnant and postnatal women, particularly around healthcare for both woman and baby, that must be considered when sentencing. However, we do not support the draft version of the expanded explanation provided in this consultation in its current form. It does not adequately describe the risks associated with sentencing a pregnant or postnatal woman to custody, nor draw on the data and evidence available from experts, as well as lived experience, to communicate the impact custody has on pregnant/postnatal women and their babies.

Overall, we do not believe the expanded explanation appropriately or accurately informs sentencers on what they must consider when sentencing a pregnant or postnatal woman, nor their obligations to uphold the Equality Act 2010, under which pregnancy and maternity are a protected characteristic.

Our key suggestions are as follows.

- 1. Provide more information for sentencers on the risks associated with pregnancy in prison. Be specific, highlighting the risks for both the woman and her baby.**

It is vital that sentencers have a full understanding of the risks custody poses to pregnant women and babies. The passive language used and content in the current draft of the expanded explanation seriously understates these risks, meaning sentencers may not be accurately informed. We urge the Sentencing Council

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to be specific in the risks posed for both the woman, and her baby, so sentencers can understand what impact their decisions may have.

Please see the below points based off recent research that should inform how you communicate risk:

- **Pregnant women in prison are nearly two times more likely to experience preterm labour than women in the general population¹.** Babies born premature have a higher mortality rate than those born full term and an increased risk of disability.
- **Women in prison are seven times for 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 England².
- **Pregnant women in prison face serious barriers to accessing vital pregnancy related healthcare.** In 2017/18, 22% of pregnant prisoners missed midwifery appointments and 30% missed obstetric appointments – much higher than the proportions missed in the general population³.
- **12% of babies born to a mother in prison were nearly twice as likely to have a low birth weight⁴.**

It is disappointing to see that following the focus groups with sentencers, language around risk was even further watered down, and the passage that stated, '*Pregnant women in custody are more likely to have high risk pregnancies with reduced access to specialised maternity services...*', was taken out and changed to '*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*'.

This creates ambiguity and attributes all the risk to the 'complexity' of women in prison. It is vital that the Sentencing Council highlights that *custody itself* is instrumental in significantly increasing risk, and that because of this all pregnancies in prison are considered high risk. The NHS recognises that '*It is because of the complexities for women in detained settings that all pregnancies must be classed as high risk*⁵. In a joint report by NHS England and HMPPS in November 2023 it was reiterated that, '*Women who are in prison and pregnant are a high-risk group*⁶. Similarly, the Prisons and Probation Ombudsman considers, '*that all pregnancies in prison should be treated as high risk by virtue of the fact that the woman is locked behind a door for a significant amount of time*⁷. It is the expert view of the Royal College of Midwives⁸ that '*prison is no place for pregnant women*', and both the Royal College of Midwives and Royal College of obstetricians and Gynaecologists have emphasised the need for non-custodial alternatives for pregnant women⁹.

We urge the Sentencing Council to show joined up thinking with these other respected bodies, all of whom have expressed the view that pregnancy in prison is high risk and/or that custodial sentences should be avoided for pregnant women. Sentencers need to know that this is a view held and supported by a range of expert stakeholders, and as such this context should be highlighted to them in the expanded explanation. Sentencers must be made aware that when they sentence a pregnant person to custody, they are effectively sentencing them to a high-risk pregnancy.

¹ Nuffield Trust, Inequality on the inside Using hospital data to understand the key health care issues for women in prison, July 2022

² Figures obtained through freedom of information requests sent to 11 NHS trusts serving women's prisons in England, reported in the Guardian

³ Nuffield Trust, Inequality on the inside Using hospital data to understand the key health care issues for women in prison, July 2022

⁴ Figures obtained through freedom of information requests sent to 11 NHS trusts serving women's prisons in England, reported in the Guardian

⁵ 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)

⁶ A review of health and social care in women's prisons, NHS England & HM Prison and Probation Service, 23 November 2023

⁷ PPO Ombudsman Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019

⁸ Independent, Calls for urgent review over number of pregnant women being sent to prison (2022)

⁹ RCOG (2021) RCOG Position Statement: Maternity care for women in prison in England and Wales

2. Engage with available evidence and research from experts and share your evidence sources with sentencers.

It is concerning to read that during focus groups, sentencers (who are not in general experts on pregnancy), questioned the evidence behind assertions around risk for pregnant women in prison. It is not unreasonable for sentencers to need to know their decisions are backed up by robust evidence. It makes it even more vital that the Sentencing Council provides the evidence base around risk and cites its sources for this data – something that is lacking in the expanded explanation in its current form.

Fortunately, there is not a lack of research and evidence on the experiences of pregnancy in prison, and the impact this can have for women and babies (as described under point 1). We urge the sentencing council to use this research to produce evidence-based guidance, and clearly reference the sources so sentencers can know their decision-making is in line with current expert opinion. Key pieces of research and evidence are included in the references in this document.

As well as engaging with research, it is also vital that these guidelines are informed by those with lived experience of pregnancy/birth/the postnatal period in the justice system. One Small Thing has produced a podcast series on motherhood in the justice system, with experts in the field and with those with lived experience of the justice system, excerpts of which have already been used by the Women's Directorate in resources for sentencers. Episodes 3 and 4 explore the research around pregnancy in prison with Dr Laura Abbott, Dr Miranda Davies and 'Suzy' who has lived experience of pregnancy in prison¹⁰. We encourage the Sentencing Council to seek out the views of women with lived experience of pregnancy in prison¹¹. Through our work at Hope Street, One Small Thing's residential community for justice involved women and their children, we have heard accounts from women who themselves have experienced what much of the published research corroborates.

'We hear from women who were pregnant in custody that there is a lack of safety and welfare checks being completed, even when overdue in pregnancy. One woman described issues such as a heart condition during pregnancy being noted down, but then not being sent for treatment or any specialist health support for this.'
Team member at Hope Street

3. Provide information around health care needs, risk and impact of custody specifically for postnatal women.

The proposed changes still do not cover postnatal care. 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 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.¹²

¹⁰ Please visit the series here: www.onesmallthing.org.uk/justice-podcast-motherhood-in-the-justice-system.

¹¹ For examples in the media of women's lived experience of pregnancy, birth and the postnatal period in prison: Channel 4:

<https://www.channel4.com/news/a-mothers-fight-for-justice-after-baby-dies-in-prison>

inews: <https://inews.co.uk/inews-lifestyle/the-guilt-i-feel-for-having-my-son-in-that-environment-is-unreal-what-its-like-to-give-birth-in-prison-2729284>

New Economics Foundation; <https://neweconomics.org/2023/10/pregnant-in-prison>

¹² Women's experiences of breastfeeding in prisons, Abbott and Scott (2017)

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It is important to highlight that places on MBUs are limited and nearly 30% of applications are refused¹³ – meaning that sentencing a pregnant woman to custody can also lead to her ultimately being separated from her newborn baby if she cannot get a space on an MBU. This has a devastating impact on mental health during the postnatal period and beyond, compounded by physical health needs being neglected in relation to post-birth care. This could include birth injuries, or not supporting woman to express milk, therefore leading to mastitis.

‘We have heard accounts of women who have given birth in custody and had those babies removed – with some unable to even hold their child following birth in custody. We have supported women with children all under permanent adoption who are not permitted to receive anything about or from them. Many women have experienced extreme domestic abuse and describe how these traumas drive their substance use. One woman has had four babies taken from her in custody, which again resulted in substance use as a coping mechanism.’ Team member at Hope Street, One Small Thing residential community for justice involved women and their children

4. Address concerns around pre-sentence reports, and give sentencers clear guidelines they can use in the absence of a pre-sentence report.

We know courts are over 10 times more likely to impose a community sentence if a pre-sentence assessment has been conducted¹⁴, however practice around pre-sentence reports is patchy, and the use of community sentences has been falling over a number of years. For women, many of whom are primary carers for children, pre-sentence reports that include information about community options are especially vital. Considering that only 5% of children remain in their family home when their mother goes to prison¹⁵, 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 – this need is reflected in the Farmer Review recommendations.

‘The sentencing Council need to set out a guideline that says, every time a court has an adult before them, who is a primary carer of dependent children, they must get a pre sentence report, they must consider the welfare of those children as a factor in their sentencing exercise, that’s what we need, it would take half a page, and it would transform the lives of these children.’ Shona Minson, Barrister and Criminologist, on our JUSTICE Podcast¹⁶

Pre-sentence reports are not being effectively used for women with children, and we are concerned that this will also continue to be a gap for the sentencing of pregnant women. Practice needs to improve across the UK in terms of pre-sentence reports for women, but regardless of this, the sentencing guidance needs to be clear that pregnant women should not be sentenced to custody, whether sentencers have received a detailed pre-sentence report or not.

5. Provide guidance to sentencers on alternatives to custody.

¹³ Bromley Briefings Prison Factfile January 2023, Prison Reform Trust 2023

¹⁴ Centre for Justice Innovation (2018) The changing use of pre-sentence reports, London: CJI

¹⁵ What about me? The impact on children when mothers are involved in the criminal justice system, Prison Report Trust, 2018

¹⁶ <https://play.acast.com/s/justice/in-conversation-withdr-shona-minson>

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The majority of women in prison have committed non-violent crimes, theft being the most common offence¹⁷, and could be safely supported in the community. Over half of women receive custodial sentences for 6 months or less¹⁸. For pregnant women this short time in custody can come at an extremely high cost – a high risk pregnancy, increased chance of still birth, increased chance of preterm labour, and separation from their newborn baby. The sentencing council needs to provide guidelines for sentencers on what alternatives exist for women in the community, empowering them to divert women away from unnecessary custody.

In July 2023 One Small Thing opened Hope Street, a residential community in Hampshire supporting women in the justice system and their children. Hope Street offers a community alternative for women, designed to allow children to remain with their mothers in a safe home environment with tailored and ongoing support. Hope Street aims to be a community-based alternative to women receiving short custodial sentences, being unnecessarily imprisoned on remand or released to homelessness, and a safe place for women to carry out their community sentence and keep their children with them. In the short time Hope Street has been open, we have supported women who have been pregnant in prison and had babies removed in prison, and have shown what a community based approach for these women can look like. Alternatives to custody for pregnant women and those with children, such as Hope Street, currently aren't being made use of enough by sentencers.

We encourage the sentencing council to share information with sentencers about the resources available for women in the community, of which Hope Street is just one example. Please explore the recently launched Women's Services Map, produced by the National Women's Justice Coalition¹⁹, of which One Small Thing is a member. This is the UK's first directory of services for women in contact with the criminal justice system:

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

Conclusion

Through this consultation, the sentencing council has an opportunity to hear from a wide variety of expert individuals and organisations, and take away meaningful and actionable recommendations. As well as being signatories to the No Birth Behind Bars campaign to end imprisonment for pregnant women²⁰, One Small Thing has consulted with others in our sector such as Birth Companions and Level Up, on the key recommendations needed in this new mitigating factor, many of which are reflected in our response such as the need to accurately describe risk, to engage with available evidence, and the need to provide information about the postnatal period. We strongly support the revisions suggested by both Birth Companions and Level Up in their responses and hope to see these adopted by the Sentencing Council going forward. It is vital that pregnant women are diverted away from unnecessary custody for the health and safety of both themselves and their baby. As Lilly Lewis, One Small Thing's Women's Involvement Advisor who has experience of prison herself, describes:

'Pregnant women shouldn't be sentenced to prison other than the most exceptional circumstances. Sending pregnant women to prison for low level offences is failing both mother and the unborn child. Being in prison has such a negative impact on your mental health and this only increases when you are pregnant - not only

¹⁷ Bromley Briefings Prison Factfile January 2023, Prison Reform Trust 2023

¹⁸ ibid

¹⁹ <https://wearenwj.org.uk/>

²⁰ <https://www.welevelup.org/active-campaigns/pregnancy-in-prison/>

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are you protecting yourself but also your unborn child. Being in prison has a negative impact on not just mental health, but also your physical health with poor nutrition and confined spaces with no fresh air.'

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