

## Submission to the Sentencing Council's consultation: *Miscellaneous amendments to sentencing guidelines*

### About the Howard League for Penal Reform

Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has around 7,500 members and 14,500 supporters, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from government.

### Contents of submission

We are writing in response to proposed changes in sentencing guidelines. We are responding to three proposed amendments:

1. New factor: Pregnancy and maternity
2. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
3. Age and/or lack of maturity

#### 1. Pregnancy and maternity

The Howard League supports the introduction of a new mitigating factor recognising the vulnerability of pregnant women in prison. We welcome the Sentencing Council's consideration of the research evidence which clearly sets out the increased harms of imprisonment for pregnant women (see for example, Epstein, 2020). We propose, however, that the initial amendments made are not strong enough.

The prison estate in England and Wales is experiencing acute pressure. The population currently stands at its highest ever level and is close to reaching capacity. Concerningly, weekly population updates suggest that the female estate is growing faster than the male estate; on Friday 10 November 2023, for example, the number of women in prison was up by 12 per cent on the year before, compared to an increase of 6 per cent in the male population (MoJ, 2023d). A large and rising prison population has well-documented and serious implications for the safe, effective and purposeful management of prisons. It causes overcrowding and renders accommodation indecent. Compounded by staff shortages, regimes are curtailed, therefore impacting rehabilitative work. Overcrowding fosters an increase in the pressures and strains of the prison environment, impacting on the physical and mental health and wellbeing of prisoners and staff (for further information see: Howard League 2023 and 2023a).

In this context of rising overcrowding and declining standards, it is estimated that around 600 women receive antenatal care, and at least 100 babies are born to women in prison in England and Wales each year. Around 66 per cent of female prisoners in the UK are mothers (NHS, 2022).

Prison is particularly inappropriate for women. The Ministry of Justice's (MoJ) *Female Offender Strategy Delivery Plan* acknowledges that many women in the criminal justice system pose a low or medium risk of serious harm to the public, and women often receive a custodial sentence for low-level non-violent offences (MoJ, 2023). Women in custody often have multiple and complex needs and vulnerabilities which may be exacerbated in a custodial environment (Sentencing Council, 2023 and 2023a. See also NHS, 2022; Nuffield Trust, 2019; MoJ, 2023). A custodial sentence results in the dismantling of support systems in the community, including relationships, family links, housing, medical and social care, and employment. For pregnant women, these issues are exacerbated.

As stated in the Sentencing Council's proposed amendments:

*The impact of custody on pregnant women can be harmful for both the mother and the unborn child. Pregnant women in custody are more likely to have high risk pregnancies with reduced access to specialised maternity services. There may also be difficulties accessing medical assistance and with being transported to hospital when in labour and giving birth.* (Sentencing Council, 2023)

Expert bodies recognise the inappropriateness of prison for pregnant women. The Royal College of Midwives argued that 'prison is no place for pregnant women' (The Independent, 2022). After investigating the death of a baby at HMP Bronzefield in 2019, the PPO deemed pregnancies in prison to be high risk (PPO, 2021). Factors highlighted included being locked in a cell, and the impact of previous trauma and fear brought to bear on women's engagement with healthcare services (Ibid.). The NHS deemed that all pregnancies in detained settings should be classified as high risk due to the complex needs of women in custody (NHS, 2022).

Women in prison experience disproportionately higher levels of mental health problems (with estimates as high as 80 per cent), substance misuse, suicide, and self-harm (NHS, 2022; MoJ, 2023). The risk of declining mental health rises during the postpartum period – in the population as whole, eight in ten women experience 'baby blues' and one in ten are diagnosed with postnatal depression (NCT, undated; NHS, undated). Risk factors associated with postnatal depression are prevalent among women in prison, including histories of mental health conditions, stress, and traumatic life events (NICE, 2022).

The risks of imprisonment to the physical health of mother and baby are well documented. Data obtained by the Guardian showed that women in prison are seven times more likely to suffer a stillbirth (The Guardian, 2023). Babies born to women in prison were almost twice as likely to require neonatal unit care (Ibid.). The Nuffield Trust found that over a fifth of antenatal appointments were missed by women in prison, increasing the risk of miscarriage, premature birth and stillbirth (Nuffield Trust, 2022). The high profile tragic deaths of babies Aisha Cleary in September 2019 (see PPO, 2021) and Brooke Powell in June 2020 (see PPO, 2022) highlight these health risks.

Maternal imprisonment also causes longer-term harm to the health and development of the unborn baby and other children. The stress of criminal justice proceedings can

affect the baby's development (Gerhardt, 2003). By its nature, imprisonment will result in temporary or permanent separation of babies from their mothers, impacting crucial developmental and bonding opportunities such as breastfeeding and skin-to-skin contact (Abbott et al, 2023). Parental imprisonment is a recognised Adverse Childhood Experience (ACE) and the traumatic and long-lasting effects of the separation of parents and children are well-documented (Minson, 2020). This also applies to existing children that women may have.

The Howard League supports Level Up's amendments to the Sentencing Council's proposed changes as follows, shown in red (Level Up, 2023):

*When considering a custodial, community or **suspended** 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 comprehensive pre-sentence report addressing the below issues is not available, sentencing should be adjourned until one is available.*

*When sentencing an offender who is pregnant relevant considerations 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 and her unborn child, including her mental health needs;*
- *that access to a place in a prison Mother and 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 effect of the sentence on the physical and mental health of the woman and;*
- *the effect of the sentence on the child once born.*

*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.*

*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.*

*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. **It is also relevant***

*where a suspended sentence is being considered, as custody will result in significant harmful impact to the pregnant woman and child, either due to separation or because of the custodial environment. See also the Imposition of community and custodial sentences guideline.*

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

## **2. Determination and/or demonstration of steps having been taken to address addiction or offending behaviour**

The Howard League supports the Sentencing Council's proposed amendment to consider determination and/or demonstration of steps having been taken to address addiction or offending behaviour. However, we note that gambling addiction is omitted.

Gambling addiction is defined as a behavioural addiction (DSM-V American Psychiatric Association, 2013). A problematic relationship with gambling can exist on a spectrum ranging from recreational activity to addiction. Thus, in addition to addiction, gambling harm can also occur. Gambling harm is described as 'varied and diffuse' (Langham et al, 2016), extending beyond addiction to wider, negative, consequences in all aspects of life (immediate and longer-term impacts on finances, relationships, emotional/ psychological wellbeing, health, culture, employment, education and criminal activity). In fact, the widespread impact of gambling harms is increasingly being recognised as a public health issue (The Lancet, 2021; Public Health England, 2021).

Through the Commission on Crime and Gambling Related Harms (2019-2023), the Howard League collated extensive evidence exploring the previously poorly understood relationship between gambling addiction and harm, and crime. The Commission made a raft of policy recommendations to improve the criminal justice system's awareness of and response to gambling harm and addiction in its final report (Commission on Crime and Gambling Related Harm, 2023). You can find out more about the Commission's work here: <https://howardleague.org/commission-on-crime-and-problem-gambling/>.

The Commission was concerned with crime as a recognised gambling related harm, and the direct relationship between gambling addiction (also termed problem, pathological, or disordered gambling) and resultant criminal activity. It was concerned with the ways in which broader gambling harms can link to and impact on the criminal justice system. The Commission explored the ways in which gambling harms might exist as both a causal, contributing, and/or contextual factor to criminal activity. Despite some examples of good practice, the Commission identified an overarching lack of awareness and understanding of the nature and relationship between crime, gambling harms, and addiction across the criminal justice system (Commission on Crime and Gambling Related Harms, 2021).

Research conducted with sentencers showed that just under half of the magistrates surveyed noted that gambling addiction had been raised in the courtroom (Page, 2021). Research has further demonstrated that gambling-related harms are likely to feature in a much wider range of offences and may well be hidden (Churcher, 2022). These may well not become apparent during court proceedings, partly due to a lack of awareness by legal professionals, probation officers advising the court and sentencers (Page, 2021). The Commission found that there is scope for far greater consideration of the nature of gambling-related harms, including gambling disorder, in criminal court processes and within existing sentencing options, in contrast with approaches towards drug and alcohol-related crime which are already better recognised.

Regarding sentencing, the Commission recommended that:

- The Ministry of Justice should pilot and evaluate the use of existing sentencing options for gambling-related crime to examine their benefits and assess whether the existing legislation is sufficient to recognise and support gambling-related harms.
- The Sentencing Council should consider what improvements could be made to sentencing guidelines to ensure that gambling disorder is appropriately dealt with by the courts, including on culpability (and related mitigation), mental disorders, and in relation to appropriate sentencing options.
- The Judicial College should consider revising the Equal Treatment Benchbook to ensure that it is reflective of differential experiences of gambling disorder, alongside its current consideration of drug and alcohol use (Commission on Crime and Gambling Related Harms, 2023).

The Commission identified a range of other sentencing options which could usefully be applied to crimes related to gambling within the scope of existing sentencing powers:

- Deferral of sentencing for up to six months to enable addiction or mental health treatment prior to sentencing (Powers of the Criminal Courts (Sentencing) Act, 2000).
- Use of suspended sentences as alternatives to immediate custodial sentences to enable addiction or mental health treatment.
- Use of requirements attached to community sentences or suspended sentences could be tailored to support people experiencing gambling-related harms to access treatment and support programmes. – Community Sentence Treatment Requirements (CSTRs) are currently available to address mental health needs which could be used to address gambling disorder. Rehabilitation Activity Requirements (RAR) can provide time for structured interventions designed to meet a need identified to facilitate an individual's rehabilitation.
- Inclusion of treatment within parole or post-sentence licence conditions for people under probation supervision following release from custody.

The Commission also gathered evidence relating specifically to the proposed amendment, around people's experience of access/determination in seeking treatment during criminal justice proceedings. For the Commission's research participants convicted of offences related to gambling, it was often their first engagement with the criminal justice system (Smith, 2022; Trebilcock, 2023; Brown

et al, 2023). The committal of an offence, and resultant criminal justice proceedings represented a cathartic juncture in participants' addictions, described as a 'wakeup call' (Ibid.). Participants in this cohort thus usually accessed some form of treatment while awaiting trial and/or sentencing. Lengthy periods of time released under investigation (RUI) or on bail allowed some participants to work towards recovery (Smith, 2022).

This was, however, somewhat of a double edged sword – participants made practical steps to recovery, restoration and rehabilitation over months or years, only to receive a lengthy custodial sentence. Such sentences did not take into account the steps they had taken, and in fact disrupted the practical and supportive networks required to facilitate continued recovery and rehabilitation. Delays and inconsistencies in prosecution, court hearings and sentencing served to prolong the harms experienced, and often served as a barrier to treatment and recovery (Smith, 2022; Trebilcock, 2023). Because of a lack of treatment options available within the criminal justice system and the potentially harmful nature of such environments, custodial sentences had the potential to disrupt an individual's treatment or place them in a risky environment (for a lack of treatment options in prison and probation services, see Smith, 2022. For a depiction of the harmful gambling culture in prison, see Lewis et al, 2023).

The inclusion of gambling addiction in this proposed amendment is particularly pertinent to people convicted of certain gambling related offences (namely larger white collar acquisitive crime) due the lengthy amount of time spent on bail or RUI – anywhere from six months to three years (Smith, 2022). However, the relationship between gambling harm and addiction, and a diverse range of offence types should also be noted (for further detail see: Churcher, 2022). Research conducted into police data illustrated the links between gambling and a broad range of offence types, further supporting the need for gambling to be considered in criminal justice proceedings, akin to other types of addiction.

The Howard League's argument is thus two-fold – Firstly, that sentencing guidelines should include greater general awareness of gambling, akin to the existing consideration of drug and alcohol addiction. Secondly, that the inclusion of gambling in this proposed amendment recognises the particular challenges and experiences of treatment seeking and recovery from gambling addiction whilst awaiting trial or sentencing for gambling-related offences.

We recommend the following changes to the proposed amendments. The Sentencing Council's proposed changes are shown in red, with the Howard League proposed additions in bold red:

*Where offending is driven by or closely associated with drug or alcohol abuse, **or gambling addiction** (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.*

### **3. Age and/or lack of maturity**

The Howard League welcomes the Sentencing Council's consideration of age and maturity in sentencing. We agree with the proposed amendment to the mitigating factor which clarifies the age range to which it applies, to include older young adults up to the age of 25.

However, we consider that the inclusion of age and/or lack of maturity as a mitigation factor is no substitute for separate guidance for sentencing young adults.

As part of its work with the Transition to Adulthood Alliance, the Howard League has explored the issue of sentencing young adults in depth. In 2019, we published a report on sentencing principles for young adults (Howard League, 2019). The report, which draws on Howard League participation work with young adults, sets out how formal sentencing principles for young adults aged 18 to 25, similar to the Sentencing Council guidelines that are in place for children, would assist the courts and improve sentencing outcomes. The sentencing principles were developed in consultation with an expert advisory board.

We understand that the Sentencing Council is already considering whether separate guidance is needed for young adults and the Howard League would welcome further discussion about this issue.

28/11/2023

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