

Clinks response to the Sentencing Councils' Theft Offences Guideline Consultation

About Clinks

Clinks is the national infrastructure organisation supporting voluntary sector organisations working with offenders and their families. Our aim is to ensure the sector and those with whom it works, are informed and engaged in order to transform the lives of offenders and their communities. We do this by providing specialist information and support, with a particular focus on smaller voluntary sector organisations, to inform them about changes in policy and commissioning, and to help them build effective partnerships and provide innovative services that respond directly to the needs of their users.

We are a membership organisation with over 500 members including the sector's largest providers as well as its smallest, and our wider national network reaches 4,000 voluntary sector contacts. Overall, through our weekly e-bulletin Light Lunch and our social media activity, we are in contact with up to 10,000 individuals and agencies with an interest in the Criminal Justice System (CJS) and the role of the voluntary sector in the resettlement and rehabilitation of offenders.

About this response

Clinks welcomes the opportunity to respond to this consultation by the Sentencing Council. However, comments and recommendations should not be viewed as a definitive account of our members' views, as Clinks has been unable to facilitate an extensive consultation with our members.

The response does however draw upon a previous consultation process for a task and finish group paper on behalf of the Ministry of Justice Reducing Reoffending Third Sector Advisory Group (RR3) on women and girls in the Criminal Justice System (CJS)¹ and Clinks' ongoing research into the current experience of projects providing community based female offender services. A total of nine projects were interviewed twice for the research, with the main findings from the first interviews published in February, 2014.² The second round of interviews took place in autumn and winter 2013 and will inform the final report, due to be published in the summer of 2014.

Clinks has included reference to these two papers as we have focused this consultation response on women, where appropriate, as the sentencing guidelines for theft offences are likely to have a disproportionate impact on them. As demonstrated by Ministry of Justice statistics, theft and handling stolen goods was the most common indictable offence group for which offenders were sentenced at all courts between 2007 and 2011. This represents 33% of all males sentenced for indictable offences during this time but 52% of all females sentenced.³ There is evidence to suggest that women are also being disproportionately affected by the current economic

¹RR3 Task and Finish Group (2012) Breaking the Cycle of Women's Offending: A system redesign, Online: http://www.clinks.org/sites/default/files/null/RR3%20Paper%20on%20Women_1.pdf (accessed 25th June, 2014)

² Clinks (2014) *Run Ragged: The current experience of projects providing community based female offender support services*, Online: <http://www.clinks.org/sites/default/files/basic/files-downloads/Run%20Ragged%20Interim%20Report%20February%202014.pdf> (accessed 25th June, 2014).

³ Ministry of Justice (2012) *Statistics on Women and the Criminal Justice System 2011: A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220081/statistics-women-cjs-2011-v2.pdf (accessed 25th June, 2014)

situation.⁴ This is supported by Clinks' research into the current experience of projects providing community-based offender services. One of the main findings outlined in the interim report for this research, *Run Ragged* is that "there is an emergent crisis amongst service users, as a result of current austerity measures, most significantly welfare changes; including rising debt, an inability to purchase food, increased anxiety, self-harm and depression."⁵

Although women are a minority group in the CJS, their distinct needs need to be recognised and addressed, in order to support them to desist from crime, ultimately leading to a reduction in female reoffending rates.

We have not attempted to answer all the questions in the consultation, but have focused on the questions most relevant to Clinks members and their service users. It has been made clear when an answer is relevant to multiple questions.

Q1-Do you agree with the proposed factors for theft from a shop or stall within these 3 categories? If not, please tell us why.

Clinks broadly supports the assessment of culpability proposed for theft from a shop or stall, as well as the assessment for the other theft offences in the consultation. However, Clinks would support the Criminal Justice Alliance (CJA) recommendation that *Age/and or lack of maturity where it affects the responsibility of the offender* currently included as a mitigating factor should be used as a factor to assess culpability.

The Transition to Adult Alliance (T2A), of which Clinks is a member, outlines that although physical, intellectual, emotional and social maturity develop during adolescence for most people, in others emotional and social maturation may not occur until they reach their mid-twenties.⁶ Taking maturity into account when assessing culpability is likely to have the greatest impact on young adults, who are defined by T2A as being aged between 16-24, and can ensure they receive the most appropriate response to their offence. It also helps ensure that young adults can be diverted to services, including those from voluntary sector providers that are able to respond to their needs and assist them with developing their personal and social resources.

As we highlighted in a previous consultation response to the Sentencing Council, it is also important to note that young adults are the group most likely to "grow out" of crime.⁷ This is however, heavily dependent on them receiving the right support or intervention, at the right time, and one that is able to respond to their distinct needs. If a young person receives the wrong intervention, this can slow the desistance process down and extend the amount of time they are involved in the CJS⁸. We would therefore flag the need for sentencers to engage with the local landscape of interventions available, and ask to what extent this guideline could raise this need.

⁴ New Economics Foundation (2013) *Surviving Austerity: Local voices and local action in England's poorest neighbourhoods*, Online: <http://www.barrowcadbury.org.uk/wp-content/uploads/2013/08/Surviving-Austerity.pdf> (accessed 25th June, 2014).

⁵ Clinks (2014) *Run Ragged: The current experience of projects providing community based female offender support services*, Online: <http://www.clinks.org/sites/default/files/basic/files-downloads/Run%20Ragged%20Interim%20Report%20February%202014.pdf> (accessed 25th June, 2014).

⁶ Transition to Adulthood Alliance (2013) *Taking account of maturity: A guide for probation practitioners*, Online: http://www.t2a.org.uk/wp-content/uploads/2013/07/T2A-Maturity-Guide_online1.pdf [last accessed 30/09/2013].

⁷ Clinks (2013) *Clinks response to the Sentencing Council's Fraud, Bribery and Money Laundering Offences Guidelines Consultation*, <http://www.clinks.org/sites/default/files/basic/files-downloads/Clinks%20Response%20-%20Sentencing%20Council%20Guidelines%20-%20October%202013.pdf> (accessed 25th June 2014).

⁸ Transition to Adulthood Alliance website: <http://www.t2a.org.uk/>

Not motivated by personal gain

Clinks supports the inclusion of *not motivated by personal gain* as a factor indicating lesser culpability. As outlined in a recent Clinks briefing, it is well established that “most women who enter the CJS have committed acquisitive crimes and that many have experienced long-term poverty and debt.”⁹ This is supported by a Joint Inspectorate report that states women’s offending is typified by crimes including shoplifting and breach of trust such as theft from an employer. These offences can be driven by a woman’s need to support her family, with the National Offender Management Service stating that women “may perceive theft ...as a means of survival.”¹⁰

Clinks raised these issues in our response to the Sentencing Council’s Fraud, Bribery and Money Laundering Offences Guideline Consultation and are pleased to see that in response, the Sentencing Council “does recognise that it is important to differentiate between benefit frauds that have been committed in order to fund lavish lifestyle choices and where the offender is in difficult financial circumstances.”¹¹ To address this issue, *proceeds of fraud funded lavish lifestyles* has been included as an aggravating factor for benefit fraud. Clinks is pleased the Sentencing Council have differentiated between the two issues and would recommend a similar approach be taken in this guideline, although we would recommend that *not motivated by personal gain* remains a factor indicating lesser culpability.

Coercion

Clinks welcomes the inclusion of “coercion” as a factor that indicates lesser culpability. However, in line with our response to the Sentencing Council’s Fraud, Bribery and Money Laundering Offences Guidelines Consultation, we would recommend that the wording is altered to become “coercion, including coercive control.” This would allow for sentencers to take account of coercion that takes place in the context of domestic violence. “Coercive control” was introduced in the inter-departmental government definition of domestic violence in 2012 and is designed to reflect instances where physical violence is rare or absent but indicates behaviour that has caused the victim’s social, financial and behavioural autonomy to break down.¹²

Mental disorder/learning disability

Clinks supports having *mental disorder/ learning disability where linked to the commission of the offence* as a factor that can determine lesser culpability. This is an important factor to consider and Clinks is concerned that it is not included in the guidelines as a factor used to assess an offender’s culpability for the other theft offences, including general theft, abstracting electricity, making off without a payment, handling stolen goods and going equipped for theft or burglary. We would recommend that it is included as a factor to determine lesser culpability for each of the theft offences in the consultation document.

⁹ Clinks (2014) *Clinks briefing about the nature of the relationship between debt and women’s offending*, Online: http://www.clinks.org/sites/default/files/basic/files-downloads/Members%20Briefing%20-Relationship%20between%20debt%20and%20female%20offendingFINAL_0.pdf (accessed 25th June, 2014)

¹⁰ National Offender Management Service (2012:35) *A distinct approach: A guide to working with women offenders*, Online: <http://www.justice.gov.uk/downloads/publications/noms/2012/guide-working-with-women-offenders.pdf> [last accessed 02.10.2013]

¹¹ Sentencing Council (2014) *Fraud, bribery and money laundering: corporate offenders- Response to consultation*, Online: http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Response_to_Consultation_%28web%29.pdf (accessed 25th June, 2014)

¹² Home Office (2013) *Information for Local Areas on the change to the definition of Domestic Violence and Abuse*, Online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142701/guide-on-definition-of-dv.pdf (accessed 25th June, 2014).

Q2- Do you think the financial amounts in the three categories are set at levels which will assist sentencers? If not, please suggest alternatives and reasons why you believe these will provide greater assistance.

Clinks is unable to comment on whether the financial amounts proposed in the consultation document are appropriate, due to a lack of available statistical information. As such, Clinks recommends that more detailed statistics are published, to allow for this assessment to take place.

As stated in our previous consultation response to the Sentencing Council, Clinks recommends that these financial ranges are reviewed no less than annually to reflect inflation.

Q4- Do you agree with the proposed approach to the treatment of previous convictions across all offences? If you do not agree, please tell us why.

Clinks is concerned that the use of previous convictions to justify an upward adjustment should not be automatic. The desistance process is highly individualised and will involve an offender lapsing and relapsing before they stop offending altogether.¹³ As such, an offender on the journey to achieving desistance can nevertheless have many previous convictions.

For some offenders, receiving a custodial sentence is ineffective and could disrupt the desistance process. Clinks therefore recommends that sentencers are steered by the specific needs and circumstances of the offender in each case and ensure they are informed about what community interventions, including those delivered by voluntary sector providers, are available in their locality.

Q6- Do you agree with the principle of treating prevalence as an aggravating factor? If not, please tell us how else you think this issue could be reflected within the guideline.

Clinks supports the CJA recommendation that prevalence should not be taken into account as an aggravating factor by sentencers. If hot-spot areas are causing concern, this should be addressed by the police and those statutory agencies with a responsibility for community safety, ideally working in conjunction with voluntary sector organisations with this remit. It should not be considered a matter for sentencers, as this could lead to disproportionate sentencing decisions, as well as perverse incentives for offenders operating in different areas.

Q7- Are there any other mitigating factors which are not listed here which you think should be? Please tell us any others you think should be included and why.

Clinks would like to suggest an amendment to the mitigating factor *remorse, particularly where evidenced by voluntary repatriation to the victim*. In support of our previous consultation response, it is important to note that an offender may not have the funds to voluntarily repay the victim, especially if they are experiencing financial hardship and have used the proceeds of theft offences to pay for rent, debts or even food. Clinks was pleased to see that the Sentencing Council adapted this mitigating factor, in line with our and others suggestions, within the sentencing guidelines for Fraud, Bribery and Money Laundering offences by removing *particularly where evidenced by voluntary repayment*. This therefore leaves *remorse* as a stand-alone mitigating factor, which we recommend is also adopted in the sentencing guidelines for theft offences.

¹³ Clinks (2013) *Introducing Desistance: A Guide for Voluntary, Community and Social Enterprise (VCSE) Sector Organisations that work with offenders and their families*, <http://www.clinks.org/sites/default/files/basic/files-downloads/Introducing%20Desistance%20-%20August%202013.pdf> (accessed 23rd June, 2014).

Clinks' recent research has demonstrated that there is an "emergent crisis amongst service users" within female offender community projects due to welfare changes. Projects in the research also highlighted that they were increasingly using emergency funds to buy food and pay bills for their clients to ensure they are kept "afloat." In light of this, Clinks recommends that *Offender experiencing significant financial hardship or pressure at time the offence was committed due to exceptional circumstances* should be included as a mitigating factor. This would also help to ensure consistency across the sentencing guidelines.

Q8- Do you consider that the sentence passed in Scenario A is proportionate? Specifically do you consider that a short custodial sentence in such as a case is appropriate?

Q9- If you don't agree please say what sentence should be passed and why.

Clinks does not feel able to decide, in the case of Scenario A, whether the proposed sentence is proportionate. We do not have enough information about the motivation or the needs of D, such as a mental health issue or substance addiction, or know what community interventions might be available to address these. This example demonstrates our concern in terms of having *persistent relevant offending* as an aggravating factor that can justify an upward adjustment to a sentence. Please see our answer to question 4.

Q11- Do you think the mechanisms to move upwards from the starting point, including outside a category for previous convictions or for additional harm offer flexibility to sentencers? Are they clearly explained within the guideline?

Enabling sentencers to move upward from a starting point, including outside a category for previous convictions does allow flexibility. However, Clinks is concerned that this could lead the passing of sentences that are disproportionate to the crime committed. Please see our answer to question 4 for more details.

Q18 Do you consider the mechanisms to move upwards from the starting point, including outside a category range due to the level of previous convictions/ additional harm caused to the victim, and prevalence leads to a proportionate sentence in Scenario C?

Again, Clinks does not feel able to comment definitely on this sentence without further information about P. However, we feel that the use of prevalence to adjust the starting point upwards is inappropriate, for the reasons given above. Please see our response to questions 4 and 6 for more detail.

Additional comments

The statistical information published to accompany the consultation document and inform responses is useful. However, Clinks would like to add an additional recommendation that more detailed statistical information is made publically available. It would be helpful if this was broken down to present information relating to groups with protected characteristics including women and people from Black, Asian and Minority Ethnic (BAME) communities.¹⁴ Presenting statistical information in this way would mean that patterns of offending and sentencing could be determined, which can then inform the most appropriate response to theft offences.

¹⁴ Protected characteristics are defined in the Equality Act 2010 as including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.



supporting voluntary organisations that
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