

# **Reducing female admissions to custody: Exploring the options at Sentencing<sup>1</sup>**

## **Abstract**

Although women represent a small minority of the prison population in all nations, it has long been a concern that custody is overused with respect to female offenders. Reducing the number of women in prison has therefore emerged as a policy priority in many Western nations, including the United Kingdom. This article evaluates a range of sentencing strategies to reduce the number of women in prison, on the grounds that their experience of the sanction is disproportionately severe. The challenge is to achieve a reduction in women's imprisonment without compromising the fundamental sentencing principles of equity and proportionality. Although no jurisdiction has launched a sentencing initiative with this specific aim, the international sentencing literature offers insight into the most effective methods by which reductions may be achieved. Informed by the principle of equal impact, which underpins gender-specific sentencing, we explore policy options in two principal domains: (i) statutory provisions to eliminate or restrict judicial discretion to imprison female offenders, and (ii) sentencing guidelines to structure judicial discretion in gender-sensitive ways. We conclude by considering the likelihood of implementing the options.

## **Keywords**

Female offenders, women and imprisonment

## **Introduction**

Over the past 20 years, the sentencing of female offenders has attracted a significant volume of scholarly commentary (e.g. Player, 2012; Gelsthorpe and Sharpe, 2015; Hedderman and Barnes, 2015). In particular, the reliance on prison as a sanction for female offenders has long been a concern in many jurisdictions. The early literature on women's imprisonment stressed the need for better prison facilities for women and highlighted the failure of the prison estate in England and Wales (and elsewhere) to provide adequate, gender-appropriate correctional institutions (e.g., Stern, 1987: 226-227). More recently, politicians, Commissions of Inquiry, advocacy groups and academics have also called for greater restraint in the use of custody for female offenders (e.g., House of Commons Justice Committee, 2015; Allen et al., 2014). Movement towards this goal received fresh impetus with the publication of two comprehensive reports examining women's imprisonment in the United Kingdom (Gerry and Harris, 2014, 2016). In 2016, the first Prime Minister's speech to focus solely on prisons set out plans for a reformed 'twenty first century' prison system and advocated alternative disposals for female offenders with dependent children (Ministry of Justice, 2016). Finally, the problem of women in prison is global in nature, as evidenced by a recent report from the Vera Institute's which deals with the 'precipitous rise in the number of women in jail' in the US (Vera Institute, 2016, p. 6).

In this article, we move beyond the Gerry and Harris reports by reviewing a range of sentencing strategies to reduce the number of women in prison. The challenge is to reduce the number of women in prison without compromising fundamental sentencing principles of equity and proportionality. Although no jurisdiction has launched a sentencing initiative with the specific aim of reducing the number of women in prison, the international sentencing literature offers insight into the methods by which such reductions may be achieved. While we discuss the pivotal role of sentencing in reducing women's imprisonment, this is not to

overlook potential solutions which precede or follow sentencing. There are clear opportunities for reform at other stages of the criminal process, particularly with respect to diversion and the exercise of prosecutorial discretion. For example, prosecutors could make greater efforts to invoke alternatives to prosecution for all but the more serious cases, or where the offender represents a substantial risk to the community. These prosecutorial diversion policies could also be more sensitive to the consequences of prosecution for dependents of individuals charged.

The article explores sentencing policy options in two principal domains: (i) statutory provisions to eliminate or restrict judicial discretion to imprison female offenders, and (ii) sentencing guidelines to structure judicial discretion in more gender-sensitive ways. We focus on these mechanisms because the link between reform and remedy is most direct in the case of statutory law or statutorily-binding guidelines.<sup>2</sup> The key to devising an appropriate and effective remedy to the problem of women's incarceration lies in understanding why a court should respond differently to female offenders as a group with a distinctive set of vulnerabilities in the criminal justice system (e.g., Home Office, 2007; Angiolini, 2012; Gelsthorpe and Morris, 2002). To affirm the significance of gender alone would be insufficient. First, however, we note the principal justifications for adopting a differential approach to the sentencing of women.

#### *Lower risk to society*

As a group, female offenders represent a lower risk to the community both qualitatively (in the sense of the seriousness of the crimes that they commit) and quantitatively (in terms of their levels of offending and likelihood of recidivism) (see Ministry of Justice, 2015; Lacey, 2003). By implication, there is less need for penal confinement.

#### *Sentence impact mitigation*

In a system that has evolved primarily to meet the needs of male offenders, female prisoners suffer disproportionate hardship as the conditions of confinement tend to be more aversive for them (Prison Reform Trust, 2015). First, women are detained in a smaller number of institutions and usually reside further from their families, friends and social networks. Second, women are significantly more likely to have sole or primary caregiving responsibilities for young children (Office for National Statistics, 2015)<sup>3</sup> and are therefore more likely to suffer from being deprived of sustained contact with their children. In Scotland, for example, it is estimated that 65% of imprisoned women are mothers (Wilson, 2015). Third, many women who are imprisoned for long periods have their right to procreate effectively negated, while for men, the implication of the same sanction is merely a suspension of that right. Fourth, women are more likely to develop mental health issues and be victims of sexual abuse while incarcerated (Home Office, 2007).

#### *Third party impact of incarceration*

There is compelling evidence from a range of disciplinary perspectives that parental incarceration impairs the psychological well-being and life prospects of young children and that these impacts are exacerbated when the incarcerated parent is the mother, at least in contemporary British society where childcare is predominantly maternal (see Minson, 2015; Murray and Farrington, 2008; Dallaire et al., 2015). On this ground alone, female offenders should be spared prison or sentenced to shorter periods of custody.

In short, there are many women for whom imprisonment constitutes disproportionately severe punishment (Allen et al. 2014; House of Commons Justice Committee, 2013 and 2015; Player, 2005) and there is a case to be made for a more gender-sensitive approach to sentencing.<sup>4</sup> We explore these justifications, however, recognising that women are by no means a homogenous group and that there are invariably other cultural, social and economic factors that are highly pertinent to their experience of penal confinement

(see, e.g. National Offender Management Service Women and Equalities Group, 2012). Any sentencing strategy should eschew stereotypical images of womanhood and be sensitive to the complex and varied needs exhibited by female offenders in modern society (Ministry of Justice, 2013).

### **Overview of article**

This article explores a range of plausible sentencing strategies, noting their relative strengths and recommending those that seem most promising. In so doing, it aims to prompt further (and more critical) reflection on the issue. Part I explores the principle of equal impact, which underpins gender-specific sentencing. Part II summarises recent empirical trends in the use of custody for female offenders in England and Wales. This material provides insight into the magnitude of the problem and points to the specific offences that might reasonably be targeted in an attempt to reduce the number of female admissions to prison. Part III reviews a range of proposals to reduce the number of female offenders committed to immediate custody or committed to custody following breach of a suspended sentence order or community order. Part IV draws some conclusions about the likelihood of implementing the options.

### **I: Sentencing women and the principle of equal impact**

On the basis that there are various disproportionate effects of imprisonment for women, a reduction in, or replacement of, a prison sentence may be justified in order to achieve equality of impact (see Player, 2012; Ashworth, 2015). The sentencing principle of equal impact – derived from the principle of equality before the law – is grounded in the notion of substantive equality (where equitable outcomes are achieved by accounting for individual differences) rather than formal equality (where everyone is treated alike in a literal sense: an approach that tends to entrench gender disadvantage; see e.g., Commission on Women and the Criminal Justice System, 2009; Hudson, 2002; Lacey, 2003). In practice, the principle

requires that sentences be calibrated to create an equal penal impact on offenders with differing 'resources and sensitivities' (Ashworth, 2015).

If equality of treatment necessitates equality of impact, the question arises as to which personal or individual factors might reasonably be taken into account in determining equal impact. Player's (2012) research provides insight into the principle by examining the implications of equality legislation for the treatment of women at sentencing (specifically, the Gender Equality Duty introduced under the Equality Acts 2006 and 2010). Since April 2007, the Gender Equality Duty has placed a legal requirement on all public bodies, including criminal justice agencies, to have 'due regard' for the need to (i) eliminate unlawful discrimination on the grounds of sex and (ii) promote equality of opportunity between men and women. Due regard is comprised of two linked elements: *proportionality* and *relevance*. The weight that sentencers give to gender equality should be proportionate to its relevance at sentencing (see further Equal Opportunities Commission, 2006).

The implications of the Gender Equality Duty for sentencing policy are significant. Specifically, the Duty could facilitate legislative or guideline changes in favour of substantive rather than formal equality, thus providing one means of reducing the imprisonment of women. As we go on to show, there is scope to develop a new sentencing framework on these grounds, especially given the explicit commitment of the Ministry of Justice to 'move beyond minimal compliance' with the Duty (Player, 2012). Ashworth (2015) notes a lack of clarity as to whether the Duty requires sentencers to avoid discrimination only in relation to their own decisions or whether it encourages a broader approach that aims to offset inequalities emanating from other social institutions, policies and practices. This lack of clarity is reiterated in a governmental review of the Duty, which noted the difficulties in distinguishing the requirements of the Duty from broader 'equality work' (Government Equalities Office, 2013).

Player's discussion is more closely aligned with Ashworth's broader interpretation of the Gender Equality Duty. She notes that while its principal aim is the 'equitable allocation' of sentences to men and women, equality at sentencing cannot be achieved by focusing exclusively on this issue (Player, 2012). Player argues that the duty requires sentencers to become part of a broader process of social justice in which they subscribe to the notion of a 'deserved sentence' for women offenders. From a practical point of view, this would require sentencers to (i) address women's individual needs as well as any underlying social harms and (ii) eschew an approach to sentencing that is dominated by retributive concepts of desert. From a jurisprudential point of view, sentencers would develop an awareness of the rules and values that enable or constrain particular sentencing outcomes and become more sensitive to the social context in which individual sentences are served (Player, 2012).

Despite some lack of clarity regarding its precise aims and scope and the view expressed by the Justice Committee that the Gender Equality Duty has not yet achieved the 'desired impact' (House of Commons Justice Committee, 2013), in our view, the Duty, as well as the broader 'equality work' it promotes, provides one possible means by which to justify the development of a new sentencing framework which aspires to greater restraint in the use of custody for women. The Duty – and its appeal to substantive rather than formal equality – finds practical expression in several of the sentencing proposals we go on to discuss. But there are other approaches which do not rely on the Gender Equality Duty. These solutions are of a more general nature and we review sentencing proposals which circumvent concerns about substantive rather than formal gender equality entirely and seek instead to mitigate punishment on the grounds of particular characteristics found disproportionately amongst the population of women prisoners (but also amongst male prisoners).

## **II: Recent trends in the use of custody for female offenders in England and Wales**

In 2014, approximately 20,000 female offenders were sentenced to a period of immediate imprisonment in England and Wales (Ministry of Justice, 2014) and almost 12,000 more were sentenced to a suspended sentence order. Alongside England and Wales, Scotland has one of the highest female prison populations in Northern Europe. The latest (2015) figures show that Scotland has an average daily female prison population of 404: 318 sentenced women, 85 women on remand (untried or awaiting sentence) and 1 woman awaiting deportation (Wilson, 2015). The number of women imprisoned in both jurisdictions is increasing at a faster rate than their male counterparts, despite no apparent increase in the seriousness of their offending. This has been attributed in part to the use of short custodial sentences, particularly for women with mental health problems (Wilson, 2015).

It has always been the case that women represent a small minority of the sentenced population. In 2015, women accounted for 4.5% of the total prison population in England and Wales and 5% of the total prison population in Scotland (Allen and Dempsey, 2016). However, for certain offences, women account for significant numbers of sentenced cases. Table 1 illustrates the variability in the percentage of female offenders for a range of offence categories in England and Wales. As can be seen, women accounted for over one quarter of offenders sentenced for shoplifting. Many of these cases will result in a term of custody, either immediate or suspended. Thus, in 2014, approximately one-third of offenders convicted of theft received a sentence of custody or a suspended sentence order (Sentencing Council, 2015). Theft accounts for a high volume of cases. Almost 100,000 offenders were sentenced for a theft offence: approximately 10% of all sentenced cases.

The most likely explanation for the nontrivial custody rate for a low seriousness offence such as shoplifting concerns the offender's prior convictions. Table 2 shows that approximately 90% of female offenders sentenced for shoplifting had previous convictions or cautions.<sup>5</sup> In contrast, only 16% of women convicted of criminal damage or common assault



had relevant prior convictions or cautions (see Table 2). Most of the female offenders deemed to have crossed the custodial threshold therefore do so by virtue of their criminal histories; in this way, the aggravating factor of prior convictions constitutes a direct cause of imprisonment for female offenders. For this reason, introducing greater constraints upon the aggravating effect of previous convictions would reduce the use of custody for all offenders of both sexes but would have a greater impact on reducing the use of custody for female offenders. We shall return to these findings in discussing remedial options.

Tables 3 and 4 summarise trends in the use of custody for female offenders convicted of theft offences and sentenced in the magistrates' courts and the Crown Court. Both tables document an increase in the number of admissions over the decade, up 11% in the lower courts and 8% in the Crown court. The tables also reveal the shift in the use of different disposals, with a striking increase in the use of suspended sentence orders and a concomitant decline in the use of community orders. This is true in both levels of court. For the purposes of this article, the most important conclusions to draw from the sentencing data are that the use of custody or suspended sentence orders for women is increasing, not declining, and that remedial efforts to reduce the number of women in custody should focus on the theft offences. In 2014, over 6,000 women were sentenced to immediate or suspended sentences of imprisonment for this category of offending.

*Tables 1, 2, 3, 4 here*

### **III: Proposals to reduce the use of custody**

#### *Statutory provisions to restrict the use of custody*

Parliament could take an important step towards addressing the problem, and strengthening the custodial threshold is an obvious reform initiative. This provision has been the subject of academic critique (e.g., Padfield, 2011; Ashworth, 2013). S. 152(2) of the Criminal Justice Act 2003 states that:

‘The court must not pass a custodial sentence unless it is of the opinion that the offence... was so serious that neither a fine alone nor a community sentence can be justified for the offence.’

Two possibilities suggest themselves. One would make it more difficult to impose custody by including an additional second pre-requisite, while the second highlights the relevance of third party impact in cases of defendants with young children. The statutory provision could be amended to authorise the imposition of custody only when the offender has been convicted of an offence for which no other sentence can be justified *and* where the offender poses a serious threat to the community.<sup>6</sup> A provision of this kind would create a two-stage test for the imposition of custody, one which recognised a threshold of crime seriousness and one of offender risk; the court would be prevented from imposing a term of custody unless *both* thresholds had been crossed. This approach would reflect the dual character of sentencing which incorporates both retributive and preventive rationales. Although applicable to all offenders, such a provision would primarily benefit women, who are less likely – on the basis of the offence of conviction, their criminal history and other factors – to represent a serious threat to community safety.

Section 152(2) is qualified in subsection 3, which notes that ‘nothing in subsection (2) prevents a court from passing a custodial sentence if the offender fails to express his willingness to comply with a requirement proposed for inclusion in a community order and if he fails to comply with an order relating to pre-sentence drug testing.’ Since it has chosen to introduce considerations beyond the single dimension of crime seriousness, Parliament could also consider adding additional circumstances for courts to weigh when contemplating the imposition of custody or a suspended sentence order. For example, it could legislate a ‘third party impact’ provision to the effect that a custodial term must not normally be imposed where the sentence would create particular hardship for the offender’s children or

significantly impair their life course development. Alternative formulations might create an explicit duty on the court in this respect:

‘When determining whether to impose a term of immediate custody on an offender caring for young children or vulnerable dependents the court must consider the interests of those children or dependents.’

### *Restricting the role of prior convictions*

The relationship between gender, prior convictions and the use of custody is telling. As noted, many women enter prison as a result of their previous rather than current offending. This finding provokes some reflection on the role of prior convictions at sentencing. According to s. 152 of the Criminal Justice Act 2003, a court must take previous convictions into account at sentencing unless it would be unreasonable to do so. Previous convictions play a similar role in sentencing regimes around the common law world (see Roberts, 2008), but how much influence should they have on sentencing outcomes? Western nations generally apply a proportionality-based sentencing model. This ensures that the severity of the sentence corresponds to the seriousness of the crime and the offender’s culpability. Prior offending does not affect the seriousness of the current offence and there is little consensus among retributive scholars regarding the question of whether previous crimes enhance culpability for the latest crime.<sup>7</sup>

In our view, while prior convictions constitute a legitimate and statutorily-recognised aggravating factor, they may carry too much weight under current arrangements, with consequences for offenders with the most extensive criminal histories. With respect to theft and handling offences, this means female offenders. One potential reform would prevent prior convictions from propelling an offender across the custody threshold, if the current offence is insufficiently serious to justify immediate imprisonment. Under a reformulated model, previous convictions could lengthen the period of custody, the onerousness of a

community order or the amount of a fine, but could not justify imprisonment, except in exceptional circumstances.<sup>8</sup> In short, prior convictions would normally affect only the quantum but not the nature of the punishment imposed.

### *Sentence impact assessments*

Most jurisdictions now provide crime victims with the opportunity to depose victim impact statements for the purposes of sentencing (Roberts, 2012). Although most victim input regimes prohibit victims from making sentence recommendations, these statements may influence both the nature and quantum of punishment imposed, in the event that they contain information relevant to the sentencing decision. In addition, on occasion, the victim's impact statement may serve to inhibit the imposition of custody, if imprisoning the offender would create disproportionate hardship for vulnerable third parties such as the victim's children (see Ashworth, 2015: 442-444). Might the VIS serve as a model for a *sentence* impact statement relating to another set of third parties: the children of the offender?

There may be scope to replicate the US approach. The US federal sentencing guidelines are now advisory rather than mandatory in nature. Until they lost their binding authority, courts were able to depart from the guidelines range by citing 'family ties' as a ground for departure (Andersen, 2015). However, in order to do so, the case had to be extraordinary and 'family tie' departures from the guidelines were rare. A few US jurisdictions now complete a 'Family Impact Assessment' prior to sentencing (hereafter FIA). This inquiry assesses the likely consequences for the family if the offender is committed to custody. These assessments reflect the recognition that sentencing 'creates collateral damage that affects millions of Americans' (Andersen, 2015: 1529; Krupat, 2007).

A 'Family Impact Assessment' would build upon a traditional pre-sentence report's analysis of the suitability of the offender for various disposals. The assessment would

highlight the childcare arrangements necessary in the event that the offender was imprisoned, and the consequences for the life chances of all affected individuals. Although at present advocates may raise the interests of the defendant's children in sentencing submissions, the advantage of a family impact assessment would be that it would not be part of an adversarial submission and would be prepared instead by an independent professional. In addition, it would ensure that the interests of children would be systematically placed before a sentencing court. In the event that the assessment raised serious concerns about the adverse impact of a custodial sentence on the defendant's children, the court would be compelled to consider an alternative to imprisonment. The existence of the independent impact assessment would provide additional justification if a noncustodial sentence was ultimately imposed in a case where the custody threshold had clearly been passed. This may address any concerns expressed by victims or by advocates on behalf of the community. In order to ensure fairness of application, the FIA should be introduced at sentencing and considered by the sentencing authority rather than some other administrative body.

#### *Gender as a factor in risk scales*

A variation on this approach would involve incorporating gender directly within the determination of whether custody is appropriate. This occurs in several US states by means of empirically-based risk assessment scales. Each offender is assigned a risk of re-offending score and gender sometimes plays a direct role in the calculation. For example, in Pennsylvania, whether an offender is imprisoned or sentenced to an alternative disposal is determined in part by their score on a risk of reoffending scale. The scale ascribes points to reflect factors associated with a higher probability of offending, including demographic factors. Male offenders and younger adult offenders are assigned higher points than women and older adults (Pennsylvania Commission on Sentencing, 2013). If the offender's score exceeds a given threshold, custody is inevitable. Since eligibility for a non-custodial sentence

is not dependent on these factors alone, gender affects the likelihood of incarceration, but only as one of several factors. One advantage of this approach is that it places gender within a risk-reduction framework and the empirically-based justification is self-evident (however, on openness and opposition to gender as a risk factor, see Schrich and Monahan, 2016). On the other hand, many scholars have raised normative objections to this kind of approach (e.g., Tonry, 2014). Incorporating gender directly into a risk scale or risk calculus is unlikely to happen in European jurisdictions where risk assessment instruments are less prevalent.

### *Special statutory recognition of female offenders*

Parliament could legislate recognition of the special circumstances of female offenders. An analogy may be drawn between female offenders and different categories of defendant in other jurisdictions. Legislatures in Australia, Canada and New Zealand have attempted to reduce the number of Aboriginal admissions to custody by means of statutory directions to courts. For example, s. 718(2)(e) of the Criminal Code of Canada states that: ‘all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*’ [emphasis added]. New Zealand adopts a similar approach to the problem in s. 8(i) of the Sentencing Act 2002. An analogous provision for female offenders in England and Wales might read: ‘All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of female offenders.’

Two objections to this strategy to reduce female admissions to custody are apparent: one normative, the other practical. First, the provision does not articulate or justify *why* female offenders should be diverted from custody to community, assuming that the seriousness threshold has been passed. Such a provision may also be perceived to create a

discriminatory form of sentencing. This was certainly the case with the Aboriginal sentencing reference in Canada. Until the Supreme Court affirmed that s. 718.2(e) was an appropriate remedy for a pressing problem,<sup>9</sup> this section attracted considerable adverse academic and media commentary.<sup>10</sup> Relatedly, it is worth noting that several academics and practitioners have strongly objected to this strategy – namely, the explicit incorporation of sexual or gender difference into statutory provisions, whether substantiated or not – preferring to advocate, on feminist grounds, straightforward gender neutrality at sentencing (e.g. Nicolson and Bibbings, 2000).

The second objection is that the language of these indigenous sentencing provisions is far from forceful and the experience with a relatively mild injunction is that the impact on judicial practice is likely to be correspondingly modest. And so it has proved in Canada: although the provision was proclaimed into law in 1996, no discernible impact on aboriginal admissions to custody has been observed, even after two guideline judgments from the Supreme Court affirmed the purpose and propriety of the provision (see Roberts and Melchers, 2003). For reasons that are still not fully understood, the provision has failed to modify judicial behaviour and aboriginal admissions to prison remain disproportionately high.

#### *Amending the Sentencing guidelines*

Guidelines represent another principal means by which to reduce the use of custody for female offenders. Across the US, the most common means by which to achieve policy objectives such as reducing racial sentencing differentials or changing the nature of the prison population has been through presumptively-binding guidelines. For example, in the late 1970s, Minnesota introduced binding sentencing guidelines to address a striking racial disproportionality in the state prison population (see Frase, 2005). Under the guidelines, race was explicitly proscribed as a sentencing factor and the result was a rapid change in

sentencing practices resulting in a more racially-balanced prison estate. This example illustrates the impact that guidelines can have on trial court practices.

In England and Wales, the Sentencing Council (hereafter Council) is responsible for issuing definitive sentencing guidelines. Courts have a statutory duty to ‘follow any sentencing guideline which is relevant to the offender’s case... unless the court is satisfied that it would be contrary to the interests of justice to do so.’<sup>11</sup> The guidelines thus have the potential to modify sentencing practices, for example, by reducing the use of custody for female offenders. The Council’s offence-specific guidelines divide offences into categories of seriousness and then assign a sentence range to each category (see Roberts and Rafferty, 2011; Sentencing Council, 2012). Amending the category ranges would therefore affect the sentences imposed by courts. Moreover, since the guidelines are issued and amended by the Council without requiring legislative assent,<sup>12</sup> changes to the guideline recommendations would have an expeditious effect on judicial behaviour, requiring only the statutory public consultation exercise. This much is clear; what is less apparent is whether there is any statutory foundation for Council to modify its guidelines (or create new guidelines) in order to achieve a specific policy objective such as reducing the use of custody for particular categories of offenders. As a primarily judicial body, Council avoids questions of sentencing policy. To date, with few exceptions, all the Council guidelines have reflected rather than refracted current sentencing practices (see Roberts and Ashworth, 2016). The guidelines have been constructed not to change judicial behaviour but rather to promote a more consistent application of existing sentencing factors and ranges.

That said, the guidelines could be modified to promote gender-sensitive sentencing in several ways. Most radically, the Council could issue parallel, gender-specific guidelines for all offence categories. If the current guidelines were issued in dual forms they would (presumably) have shorter starting point prison sentences and sentence ranges that



incorporate custody to a lesser degree. This solution is clearly problematic on normative grounds. Gender alone is normatively empty as a sentencing factor and only becomes relevant when it is linked to legally-relevant factors such as risk of reoffending, sole or primary caregiver status, equality of impact or some other legitimate consideration at sentencing. Creating separate sentencing guidelines (with different sentencing ranges and starting points) may violate the principle of equality at sentencing.<sup>13</sup> It would be preferable for the guidelines to highlight the factors that distinguish female offenders. These relate primarily to the risk to the community, the conditions of confinement and caregiving responsibilities. In this regard, we endorse Piper's call for the development of sentencing principles based on the impact of personal factors on the individual's experience of punishment (Piper, 2007: 150).

#### *Highlighting personal mitigation within existing guidelines*

The offence-specific guidelines could highlight the sources of personal mitigation that are particularly relevant to female offenders. An offender's caregiver status is a good example. Under the Council's current guidelines, the only reference to carer status or childcare in the offence-specific guidelines is the factor 'sole or primary carer for dependent relatives' which appears at Step Two of the guidelines methodology (e.g. Sentencing Council, 2011). Having been located at Step Two, this factor has significantly less impact than the Step One factors: the former determine which of three quite divergent sentence ranges is appropriate. Step Two factors only affect the final sentence within the category-specific offence range. In this sense, this circumstance is regarded as a secondary factor relating to personal mitigation.

In addition, the factor as currently formulated in the guidelines fails to highlight another justification for a lesser or noncustodial sanction, namely, the interests of the offender's children. When the offender has young children, the need to consider alternatives

to imprisonment is twofold: the parent suffers separation from her children and the penal confinement of the mother may carry adverse consequences for the children, particularly if they are subsequently taken into state care (see Minson, 2015; Murray and Farrington, 2008; Dallaire et al., 2015; Hanlon et al., 2005; Huebner and Gustafson, 2007). This latter consideration should not simply be left to advocates to raise in their submissions; sentencing guidelines offer the opportunity to ensure that courts are always aware of the potential consequences of sentencing on third parties. Highlighting this consideration within the guidelines would strengthen advocates' submissions.

The current 'generic' approach to recognising a gender-sensitive circumstance could therefore be strengthened. For example, under the heading of 'personal mitigation,' the guideline could state that the 'offender is primary caregiver for dependents and, in particular, young children for whom parental separation can have serious adverse consequences.' Stronger language along these lines may focus sentencers' attention on the issue of childcare, and provide a salutary reminder to courts of the impact that custody can have upon children of the prisoner. In addition, as Gerry and Harris (2016, p. 21) argue, the mitigating factors contained in the guidelines could be expanded to include 'abuse and coercion' as a factor for courts to consider in mitigation.

Alternatively, the Council could consider issuing a separate guideline for the sentencing of offenders with sole or primary care duties.<sup>14</sup> A generic guideline of this kind would (i) highlight the adverse effect of incarcerating the carer of dependents, particularly children; (ii) identify specific disposals which are more appropriate to sentencing such cases and (iii) suggest ways in which the principle of parity in sentencing may be achieved, so that any alternative to custody carries the same penal value as the term of custody which would have been imposed absent the dependents. This third element of guidance is critical. If a court imposes a suspended sentence order instead of a six-month term of immediate custody, the

conditions imposed – and possibly the duration of the operational period – need to be such as to ensure some rough equivalence of a six-month sentence (three months of which would be served in the community). There is now a substantial literature on the development of penal equivalents. In other jurisdictions the sentencing guidelines authority devises these equivalents and then issues them to courts. In this way, a court can be confident that the use of an alternative to, say a three- month prison sentence carries the same penal weight as the term of custody it replaces.

It has been argued that the current guidelines constrain personal mitigation to a greater degree than in the pre-guidelines era (see Cooper, 2013). If this is the case, one remedy would lie in creating an additional step in the existing methodology, where courts would consider issues relating to personal mitigation. This would mean, for example, that under the format of the guidelines a new step would be created – Step 3 – where, having decided the provisional sentence by taking into account all factors relevant to the offence, a court would then reduce the sentence to the appropriate degree to reflect personal mitigation, including gender-related issues such as caregiver status. Alternatively, the Council could also offer sentencers greater guidance by means of a ‘stand-alone’ guideline for mitigation. The New Zealand Law Commission’s guidelines offer a useful model in this regard (New Zealand Law Commission, 2006).

#### *Authorising gender-based departures from the guidelines*

Courts in England and Wales enjoy considerable discretion within the definitive guidelines. The statutory requirement upon courts is to impose a sentence within the total guideline range, rather than the more restrictive category range (see discussion in Ashworth, 2015). In addition, courts may ‘depart’ from any relevant guideline if it would be contrary to the interests of justice to follow the guideline.<sup>15</sup> Yet the guidelines offer no guidance as to when

courts should sentence outside the guideline range. Although the Court of Appeal has heard appeals involving this issue, it has not provided general guidance about departure sentences in the same way that it has issued guidance regarding the significance of exceptional circumstances in the context of mandatory sentences. The invocation of departure represents another opportunity for courts to limit the use of custody for female offenders.

This approach has been adopted with some success in other jurisdictions. For example, in the state of Minnesota, when sentencing an offender convicted of intra-familial sexual abuse a court may impose a stayed prison sentence if it finds that this would be ‘in the best interests of the complainant or the family unit.’ (Minnesota Statutes 2015, s. 609.344, 3(a); see also Arditti, 2012). Similarly, a number of US guidelines identify ‘parental status’ as a ground for imposing a sentence outside the presumptive guideline sentence range. In England and Wales, parental status, perhaps particularly or exclusively when the children are young,<sup>16</sup> could be identified as a legitimate ground for imposing a sentence outside the total offence range. This would require courts to embrace a wider interpretation of the ‘interests of justice’ which to date has been constructed more narrowly to encompass circumstances relating almost exclusively to the offence or the offender.

All these strategies share the property that they would reduce the use of incarceration for female offenders by targeting a specific characteristic common to this population, rather than creating a gender-specific sentencing ‘discount.’ In other words, the proposed guidelines would transcend gender difference as far as the wording of the guidelines is concerned, while implicitly acknowledging the relevance of gender through a consideration of other legally relevant factors.

*Sentence-specific guidelines: guidance on imprisonment and suspended sentences*

To date, the Council has issued several ‘generic’ guidelines, applicable across all cases, and a series of offence-specific guidelines. Courts may also benefit from guidance regarding the use of different disposals. In 2016, the Council issued a new guideline to regulate the use of community orders, custody and suspended sentence orders (Sentencing Council, 2016). This guideline contains factors indicating when it may be appropriate to suspend a custodial sentence. One of the three such factors provided in the guideline is ‘immediate custody will result in a significant harmful impact upon others’. This new element of guidance may well have a beneficial impact on the use of suspended sentence orders for female offenders, as they will be far more likely to have dependents who will suffer a harmful impact.

Although available to courts since 1967,<sup>17</sup> the suspended sentence order (hereafter SSO) was reinvigorated when the Criminal Justice Act 2003 removed the restriction that this form of custody could be imposed only in ‘exceptional circumstances.’ The relevant sections were brought into force in 2005. The anticipated consequence of this reform was an increase in the use of SSOs, and so it has proved. Suspended sentence orders accounted for only 1% of all cases in 2004, yet fully 25% in 2013. With respect to indictable cases, the SSO rose from 1% of cases in 2004 to 12% in 2013, and the number increased from 2,143 to 35,429 (see Roberts and Irwin Rogers, 2015). The SSO is an ideal sanction for offenders convicted of a crime of such seriousness that the case has clearly passed the custodial threshold but who, for a variety of reasons (possibly relating to their personal circumstances), may suffer unduly or disproportionately in prison.<sup>18</sup> Female offenders convicted of crimes for which custody is the inevitable outcome are obvious candidates for the SSO, given that they represent a lower risk of reoffending and may have sole or primary carer responsibilities. The courts have yet to fully realise the potential of the SSO in this regard, despite the striking increase in the use of these orders in recent years. The Council’s new guideline may well increase the use of suspended sentence orders for women.

Once again, there are statutory and non-statutory reform options to promote the increased use of suspended sentence orders. Parliament could legislate a provision which stated that where a sentence of custody is imposed on an offender with young children (or who is the sole or primary carer for vulnerable dependents), the sentence should *normally* be suspended – leaving some judicial discretion to impose immediate custody in cases of exceptional gravity or where the offender poses a serious risk to the community. Parliament could also amend the suspended sentence order provisions. As noted by many scholars, the new, ‘improved’ suspended sentence regime introduced in 2003 has resulted in a dramatic increase in the use of suspended sentence orders but these cases have clearly been drawn from the community order caseload (Hedderman and Barnes, 2015). During the period 2005-2013, the percentage of cases resulting in a community order has declined significantly, while terms of immediate custody have increased. These trends suggest that courts are imposing suspended sentence orders in cases that formerly would have attracted a community order. Parliament could take the opportunity to rectify a set of provisions considered by many to be defective and, at the same time, highlight the obvious relevance of these orders to the sentencing of female offenders.

Finally, we conclude by returning to the sentencing statistics. As noted earlier, female offenders are far more frequently sentenced for low seriousness offences such as shoplifting and criminal damage (see Table 1). The consequence of this is that female offenders cluster among the group of short term prisoners. Most sentences of imprisonment are short: The latest statistics show that slightly more than half of all sentences of immediate custody were under six months. Over one third of all sentences of custody were three months or less<sup>19</sup> Another way of achieving a significant reduction in female admissions to prison would be to eliminate or greatly restrict the use of such short prison sentences.

#### **IV: Implementing the options**

All of the sentencing strategies we have proposed might be situated more broadly in a renewed debate about the practice of – and alternatives to – imprisonment: a debate which is now gaining momentum, as well as bipartisan political support, in this and other jurisdictions. There is also a substantial body of empirical research which demonstrates that there is considerable public support for alternatives to custody, particularly for less serious offences or offences involving property (see Hough and Roberts, 2012): crimes, in short, for which women are most likely to appear for sentencing. Implementing reforms would require some political will. The more radical solutions may attract a backlash and claims of differential sentencing. That said, it is necessary to recognise that in certain circumstances women and men, because of their sex or gender roles, are not in the same position. In some circumstances it may therefore be appropriate for sentencers to treat women and men differently, if that action is aimed at overcoming previous disadvantage (see, eg, Equal Opportunities Commission, 2006).

In our view, the most promising option would be to strengthen the presumption against the use of custodial sentences for women. This might be achieved by amending the custody threshold provision and also adjusting the sentencing guidelines to highlight the sources of personal ‘mitigation’ that are particularly relevant to female offenders. As discussed more fully above, amongst the strongest factors inclining the court against imposing a custodial sentence include (i) primary responsibility for the care of children or other dependents and (ii) the adverse social and psychological consequences of maternal imprisonment for children. A newly created Step 3 in the existing methodology or a ‘stand-alone’ guideline for mitigation would appear to be equally plausible moves: having arrived at a provisional sentence based on factors relevant to the offence, a court would then modify the sentence accordingly in order to reflect gender-specific personal mitigating factors. Provided the language is strong and carefully defined, the revised guidelines would focus sentencers’

attention on the imprisonment of women and, in particular, the direct and collateral harms it inflicts. In this way, the revised guidelines would better position sentencers to give effect to the principle of equal impact in practice and, in so doing, promote substantively equal sentencing outcomes.

Our principal focus in this article has been on the sentencing of women in England and Wales and the imprisonment trends pertaining to this jurisdiction. However, the issue is clearly international in scope. The case for restraint in the use of custody was strengthened with the publication of the latest edition of the World Female Imprisonment List. This report reveals that there has been an approximately 50% increase in the numbers of women and girls held in penal institutions worldwide over the past 15 years (Institute for Criminal Policy Research, 2015), despite no corresponding increase in the seriousness of their offending. It is provisionally estimated that the total world prison population has increased by around 20% and so it would appear that, worldwide, the female prison population is increasing more rapidly than the male prison population (Institute for Criminal Policy Research, 2015). The public – in the United Kingdom at least – appear supportive of a solution. A survey in 2004 asked respondents to choose from a number of potential remedies to the dramatic increase in the number of women in prison over the preceding decade. There was far greater support for greater use of community sentences and other alternatives to incarceration (MORI, 2004). The problem of the high rate of female incarceration is common to many countries, with the result that the potential solutions discussed here therefore have relevance for all western jurisdictions.

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### **Notes**

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<sup>1</sup> The views expressed in this article are solely those of the authors. The authors thank the journal's reviewers for helpful comments on a previous draft.

<sup>2</sup> Limitations on space prevent us from exploring other approaches, which include judicial self-regulation in the form of practice memoranda or guideline judgments from the Court of Appeal, or the creation of specialist courts for women.

<sup>3</sup> In 2015, women accounted for 90% of single parents with dependent children, a percentage largely unchanged since data collection began in 1996 (Office for National Statistics, 2015).

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<sup>4</sup> In a recent article, Bagaric and Bagaric (2016) propose an additional justification for a gender-specific approach to sentencing, namely, that female offenders are more likely to be victims of child sexual abuse.

<sup>5</sup> The database records all prior convictions, but research derived directly from the sentencing authority has shown that courts take only some of the offender's prior convictions into account, presumably those deemed sufficiently recent and relevant as per s.143 of the Criminal Justice Act 2003 (see Roberts and Pina-Sanchez, 2014).

<sup>6</sup> 'Serious threat to the community' could be broadly construed to encompass more than the straightforward threat of violence. The standard could also take into account the presence of environmental or contextual risk factors for criminal behaviour such as those developed by Farrington and colleagues: for example, substance abuse, family conflict and antisocial peer influence, poor housing, limited employment opportunities and a record of poor performance in probation, parole or other community-based programmes (see, e.g. Farrington, Loeber and Ttofi, 2014).

<sup>7</sup> For representative views, see the essays in Roberts and von Hirsch (2010).

<sup>8</sup> Preventing courts from using prior convictions alone to commit to custody would represent a significant shift in current sentencing practice, and one likely to be met with resistance from sentencers. For this reason, it would be more reasonable to discourage committals on record alone, but allow the practice in exceptional circumstances.

<sup>9</sup> *R v Ipeelee* [2012] 1 SCR 433.

<sup>10</sup> See the papers addressing this issue in 'Colloquy on Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders' (2002) *Saskatchewan Law Review* 65(1) 1-269.

<sup>11</sup> Coroners and Justice Act 2009, s.125(1)(a).



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<sup>12</sup> Prior to issuing (or amending) a guideline, Council conducts a comprehensive public and professional consultation that includes a review by the House of Commons Justice Committee.

<sup>13</sup> Of course, separate guidelines (and statutory provisions) exist for young offenders but there is a clear categorical claim for the application of different principles, purposes, disposals and sentence ranges in the case of young offenders (see Ashworth, 2015). While all fifteen-year-olds are entitled to a different sentencing regime from adult offenders, can the same be said for female offenders?

<sup>14</sup> Defining the term ‘primary carer’ is not straightforward. Courts would need to develop some guidance on the role and responsibilities which give rise to a parent being defined as a primary caregiver.

<sup>15</sup> Coroners and Justice Act 2009.

<sup>16</sup> There is no obvious age limit or definition of what is meant by ‘young.’ This issue may best be left to judicial discretion to resolve.

<sup>17</sup> Criminal Justice Act 1967, Part II, Powers of Courts to Deal with Offenders, *Suspended Sentences*, s.39.

<sup>18</sup> The SSO is also an ideal sanction in cases where dependents would suffer significant hardship regardless of the impact of imprisonment upon the offender. However, recent research into the imposition of custody (suspended and immediate) on mothers with a dependent child found that, aside from general expressions of concern for the welfare of the child, courts tend not to refer to the European Convention on Human Rights Article 8 rights of the child, as they should, during the sentencing phase (Epstein, 2013).

<sup>19</sup> See <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-march-2016>.