

Women in prison: is the justice system fit for purpose?

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1. Executive Summary

Felicity Gerry QC and Lyndon Harris, in partnership with Halsbury's Law Exchange, have spent the last three years researching sentencing and treatment of female offenders within the criminal justice system to determine whether there is a true and principled case for reform.

In 2014, they published the report *Women in prison: is the penal system fit for purpose?* which aimed to help further discussion to develop workable penal law and policy suggestions.

Two years on, and despite a number of significant reports from leading charities such as *The Howard League*, *Women In Prison* and the *Prison Reform Trust*, which have similarly aimed to bring about change in the way we treat women throughout the criminal justice system, it is clear that both the justice and the penal systems are still failing to address the multiple and complex needs posed by women.

This discussion paper therefore aims to bring these important issues once again to the forefront and to strengthen the other voices also trying to pave the way for true reform in this area. It sets out the key facts emanating from the research, identifies key areas where reforms could be made, and makes suggestions on how these changes might be implemented.

Building on the 2014 report, the authors concentrate on three key areas:

1. Training of judges and other actors in the criminal justice system;
2. The criminalisation of women subject to exploitation, abuse and coercion; and
3. Sentencing.

Amongst the proposals, the paper notes judicial training on gender issues, particularly the content and existence of the Bangkok Rules, does not appear to be available in the published judicial college course materials. It highlights the issue of diversity in the judiciary and therefore suggests a test could be designed to ensure key players in the criminal justice system have knowledge of the UN Rules and domestic research, including key facts and gender issues. The paper also raises the question whether the failure to implement such training should be a reportable under the CEDAW mechanisms.

It reinforces that women in prison are likely to be victims as well as offenders, more than half (53 per cent) report having emotional, physical or sexual abuse as a child. Over half the women in prison report having suffered domestic violence and one in three had suffered sexual abuse. It suggests that the incarceration of women who have committed offences when they have been subject of exploitation, abuse or coercion is unreasoned.

It further suggests that treatment of women as victims is illogical when the patterns of abusive behaviour are diverse and so widespread. It goes on therefore to propose that women should be treated as witnesses to a global violence problem that nations must try to solve. It should be possible to accept certain acts as involuntary or recognise reduced culpability, thus apply new laws to move women from the position of "suspect" to the role of "witness".

Other than the limited defence of duress, the exploitation, abuse and coercion of women is not applied as a criterion to reduce or extinguish criminal liability, the paper strongly recommends that this is an area ripe for legislative reform.

The authors propose that the absence of a sentencing guideline dealing with gender issues should be addressed. In particular, they note that primary care responsibilities should be taken into account but evidence is rarely called as it would be in a family case about the arrangements of children. The paper notes that the Sentencing Council has made advancements in this area, explicitly referencing "primary caring responsibilities" as a mitigating feature in its guidelines. However, the authors ask whether more ought to be done by the Council and ask whether courts should be provided with information concerning these issues. The Ministry of Justice estimates that between 24 per cent and 31 per cent of all female offenders have one or more child dependents and an estimated 17,240 children are separated from their primary carers (usually mothers) by imprisonment every year.

Finally, they make the case for more fiscally prudent decisions to consider that those who receive community orders rather than custodial sentences are less likely to reoffend and when they do they are less likely to commit violent crime. What's more, the average cost of to keep a female offender in prison was approximately £56,415 per annum compared to £10,000-£15000 for an intensive community order. This argument has been made by others, such as the Prison Reform Trust and the Howard League.

The authors support those groups and others in this endeavour.

The paper concludes that this argument is not about giving women lenient sentences, or sentences less than a man would receive in the same circumstances; it is about imposing the correct sentence by reference to the principles governing the sentencing system.

It is important to note one positive point since the 2014 report and that is numbers of female prisoners have fallen. However, female offenders – and their children – are still experiencing the devastating effects of short-term sentences and reports this month suggest that suicides in prison have reached “epidemic” proportions, with rates of self-harm and violence soaring to unprecedented levels.

It is time to bring about a fundamental and radical change in the way we treat women throughout the whole of the criminal justice system. As Corston identified in her 2007 report nearly a decade ago, “we require a radical new approach, treating women both holistically and individually – a woman-centred approach”.

2. Introduction

The 2014 paper

This discussion paper builds upon our first paper *Women in Prison: Is the penal system fit for purpose?*¹ That paper was presented at a forum hosted by Halsbury's Law Exchange on 11 November 2014. In the paper, we adopted what we considered to be a realistic approach to the issue of reform, accepting that some women will receive custodial sentences upon conviction. However drawing upon research conducted by various organisations including the Ministry of Justice, we noted that the inevitable conclusion to be drawn from the data was that the penal system is failing women. For example, it is clear that women prisoners are far more likely than their male counterparts to have mental health issues, to self-harm and be dependent on drugs.²

We acknowledge the commitment made by the then Minister Simon Hughes MP at the 2014 forum to address these issues and some of the efforts made by the Ministry of Justice since, including comparative statistical analysis. We note, however, that statistics on exploitation, abuse and coercion³ are not included as either reasons for non-prosecution or as mitigating factors at sentencing.⁴

Our 2014 paper was originally created with a view to a full report in 2015 on penal policy and rehabilitation for women. However, in the intervening period stakeholders published comprehensive reports and publications which address many of the issues we raised. We have set these out in our comprehensive bibliography but draw attention in particular to the work of the Prison Reform Trust in their women's programme⁵ and Bromley Prison briefings⁶, and the work of the Howard League for Penal Reform and their participation in and publication of the work of the All Party Parliamentary Group on Women in the Penal System.⁷

Since our last paper, numbers of female prisoners have fallen but most women are still experiencing the devastating effects of short term sentences.⁸ Incidents of self-harm by female prisoners also seem to be falling but many are still reporting having experienced emotional, physical or sexual abuse as a child and domestic violence.⁹ The closing of HMP Holloway prison has raised concerns that the priority is selling of valuable estate rather than providing housing, family links and alternative services.¹⁰ These issues and more mean that this paper and the linked forum are still necessary to discuss the justice system and whether it is fit for purpose for women.

1 F Gerry, L Harris, 'Women in Prison: Is the penal system fit for purpose?' Halsbury's Law Exchange (London, 2014).

2 Prison Reform Trust, *Reforming Women's Justice: Final Report of the Women's Justice Taskforce* (2011), p 11, <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women's%20Justice%20Taskforce%20Report.pdf> and Ministry of Justice, *Safety in Custody Statistics 2009*, (London, 2010).

3 Throughout this paper the phrase 'exploitation, abuse and coercion' is used as a short form for all types of gender based violence, sexual offending, harassment and other forms of criminal activity directed towards women.

4 Ministry of Justice, 'Statistics on Women and the Criminal Justice System' Infographic, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380301/infographic-women-and-the-criminal-justice-system.pdf accessed 12 October 2016. Please see Annex I.

5 The Prison Reform Trust Women's Programme website, <http://www.prisonreformtrust.org.uk/ProjectsResearch/Women> accessed 12 October 2016.

6 The Facts Bromley Prison Briefings Summer 2016, <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Summer%202016%20briefing.pdf> accessed 12 October 2016.

7 All Party Parliamentary Group on Women in the Penal System: *Report on the Inquiry into Preventing Unnecessary Criminalisation of Women*, http://howardleague.org/wp-content/uploads/2016/02/APPG_final.pdf accessed 12 October 2016.

8 The Prison Reform Trust *Prison: The Facts Bromley Prison Briefings Summer 2016*, <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Summer%202016%20briefing.pdf> accessed 12 October 2016.

9 Ibid.

10 M Mansfield, H Pittaway, 'Closing Holloway Prison will leave vulnerable women out in the cold' (Left Foot Forward, 19 April 2016), <https://leftfootforward.org/2016/04/closing-holloway-prison-will-leave-vulnerable-women-out-in-the-cold/> accessed 12 October 2016.

3. Overview

It is no secret that the size of the prison population in England and Wales is a cause for concern. In August 2016, there were 85,119 men, women and children held in the prison estate.¹¹ The top 10 worst overcrowded prisons were operating at 148 per cent to 180 per cent of certified normal accommodation. The cost to the public purse is significant, yet the key players – Parliament, government and the courts – are not taking effective action to stem the tide of increasing sentence lengths and more admissions to custody.¹² These problems concern the entire justice system affecting both the male and female prison population. While there are many lessons to be learned in relation to the sentencing and treatment of all offenders within the criminal justice system, this paper focuses on the approach of the justice system to women in the context of both offending and sentencing.

This paper adopts a multi-pronged approach to making the case for reform; we recognise that whereas some will be convinced by a theoretical argument, others will be better swayed by a more pragmatic argument. There is an overwhelming body of academic research, inquiries and reports¹³ which suggest that prison is overused as a disposal in relation to women who enter the criminal justice system. Responses to offending need to be necessary, appropriate and proportionate. Yet the current research is clear: the justice system fails to address the multiple and complex needs posed by women.

This paper is in four parts. Part I sets out the data and 'key facts' emanating from the research. In Part II we consider what appears to be driving the data and identify problems with the current system.

Part III identifies three key areas in which we suggest reforms should be made. We put forth the arguments for reform – on both a pragmatic but also theoretical basis – and raise questions for further discussion by stakeholders and interested parties:

- 1) **Understanding gender issues through training** - In our first discussion paper we made an assumption that it as an accepted principle (as with all issues of equality and diversity) that equality is about making sure people are treated fairly and have access to equality of opportunity.¹⁴ However, the rise in sentencing levels for women and the conclusions of the All Party Parliamentary Group on Women in the Penal System (that far too many women are still being brought into the criminal justice system) make it plain that this is not a accurate assumption to make. There is clearly a need to discuss the disproportionate effect of the criminal justice and penal systems in England and Wales on women as a 'gender' issue. In particular there is a need discuss to what extent police, prosecution and judicial training includes knowledge and understanding of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules').¹⁵
- 2) **Understanding the limitations of our criminal laws** - To what extent current criminal laws in England and Wales fail to address exploitation, abuse and coercion before prosecution as an issue of criminal responsibility.
- 3) **Understanding the limitations of our sentencing system** - Whether the sentencing system in England and Wales is fit for purpose having regard to the absence of a guideline to deal specifically with gender issues (at least until exploitation, abuse and coercion is gender neutral). This section also considers the cost of reoffending and rehabilitation. Having identified problems with the current system, and made arguments for reform in various areas,

Part IV makes suggestions as to how such reforms might be achieved; having identified problems with the current system, and made arguments for reform in various areas. Additionally, we make some concluding remarks and look to the future.

¹¹ The Howard League for Penal Reform: Weekly prison watch, <http://howardleague.org/prisons-information/prison-watch/> accessed 12 October 2016.

¹² Offender Management Statistics Bulletin, England and Wales: Quarterly October to December 2015 Annual January to December 2015, Ministry of Justice, London, p 5, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519437/offender-management-statistics-quarterly-bulletin-oct-dec-2015.pdf

¹³ See bibliography.

¹⁴ See F Gerry, L Harris (n 1) p 6.

¹⁵ Penal Reform International, UN Bangkok Rules, <https://www.penalreform.org/priorities/women-in-the-criminal-justice-system/bangkok-rules-2/> accessed 12 October 2016. Please see Annex II.

Part I – The data

4. Key Facts

A convenient starting point is the prison population in England and Wales. Below, we set out some general statistics as regards the prison population, thereby demonstrating the use of custody as a sanction. Against this background, specific data pertaining to women can be viewed. Unless stated, the figures below detail the total population (i.e. male and female).

In August 2016, the prison population stood at 85,119,¹⁶ 3,884 (4.5 per cent) of which were women and girls. In its most recent statistics bulletin of the projected prison population across the next five years, the Ministry of Justice predicted a small rise in the prison population towards the end of 2016, followed by a reduction to a low of 83,700 before the figure ‘rebounding’ to 84,300 in March 2021.¹⁷ These figures take account of policy which has received royal assent but has not yet been commenced and for which there is no commencement date.¹⁸

Two years ago, in August 2014, the prison population stood at 85,401¹⁹ and so the current population represents a marginal drop in prison numbers. This however has to be seen against the long term trend of rising prison numbers: between 2002 and 2012, the prison population in England and Wales grew by 14,830 or 21 percent.²⁰ While the rate of increase has slowed, the population continues to rise year on year;²¹ England and Wales currently has a rate of 146 prisoners per 100,000 of the population; 11th position in a table of 32 European countries. Against this broad picture, sits the women’s prison population: the number of women in prison has decreased slightly over the past 10 years, from 4,467 in 2005 (5.8 per cent) and 3,885 in 2015 (4.5 per cent).²² This small decline is encouraging, but must be viewed against the longer-term trend of a growing female prison population which has more than doubled in the 25 years from 1990.

The pertinent question is then whether or not this decline in numbers, after the peak of almost 4,500 in 2005 represents a new era in which the system as a collective is making a concerted effort to reduce the number of women in prison; or whether the decline merely represents a fluctuation in numbers which for seven or eight years have hovered just above or below the 4,000 mark. That remains to be seen, however as we detail in the remainder of this paper, the evidence is that the current justice system is still failing women. The potential reforms outlined in this paper offer steps in the right direction to a system which treats women offenders more appropriately.

¹⁶ The Howard League for Penal Reform: Weekly prison watch, <http://howardleague.org/prisons-information/prison-watch/> accessed 12 October 2016.

¹⁷ Prison Population Projections 2016 – 2021 England and Wales, Ministry of Justice Statistics Bulletin, (London, 25 August 2016), p 4.

¹⁸ As is widely known in sentencing, Parliament legislates and enactments receive Royal Assent without any intention of certain provisions being commenced. The Criminal Justice Act 2003 provides a perfect example of provisions which were enacted but have never – and in reality will never – be commenced. In fact the 2003 Act includes provisions which were enacted and have since been repealed without ever having been in force. Accounting only for law in force may well be a better basis on which to produce projected prison numbers.

¹⁹ Weekly Prison Watch August 2014, The Howard League for Penal Reform, http://www.howardleague.org/august_2014/ accessed 29 August 2014.

²⁰ Prison Reform Trust, *Bromley Briefings Prison Factfile Autumn 2013*, <http://www.prisonreformtrust.org.uk/portals/0/documents/prisonthefacts.pdf>

²¹ House of Commons, Prison Population Statistics: Briefing Paper SN/SG/04334, House of Commons Library, (London, 4 July 2016), Appendix Table 1a.

²² Ministry of Justice, Prison Population Projections 2016 – 2021, England and Wales, Ministry of Justice Statistics Bulletin (London, 25 August 2016), p 4.

Against that background of high prison numbers, we set out key facts publicised by Women's Breakout, an umbrella organisation that which exists to shape national and local approaches to working with women who present with vulnerabilities and are in contact with, or at risk of becoming involved in, the Criminal Justice System.

What does work for women in the CJS?

- A series of inquiries and reports in recent decades...have all concluded that prison is rarely a necessary, appropriate or proportionate response to women who get caught up in the criminal justice system.
- The Justice Select Committee, following its inquiry into women offenders, concluded that "prison is an expensive and ineffective way of dealing with many women offenders who do not pose a significant risk of harm to public safety" and called for "a significant increase in residential alternatives to custody as well as the maintenance of the network of women's centres" seen as "more effective, and cheaper...than short custodial sentences".
- Short prison sentences are less effective than community sentences at reducing reoffending. People serving prison sentences of less than 12 months had a reoffending rate seven percentage points higher than similar offenders serving a community sentence—they also committed more crimes.
- Enabling women to access support for amongst other things, housing, training, drug and alcohol addiction, benefits and debt advice can be a key turning point in breaking the cycle of offending.
- More than half of the women who have accessed Women's Community Projects provision have consistently engaged with projects for longer than 3 months.
- If alternatives to prison were to achieve an additional reduction of just 6% in reoffending, the state would recoup the investment required to achieve this in just one year. The long-run value of these benefits is in excess of £100m over 10 years.
- The new economics foundation has found that for every pound invested in support-focused alternatives to prison, £14 worth of social value is generated to women and their children, victims and society generally over 10 years.
- Of offenders supervised in the community the proportion of women is higher than for the prison population and represents 15.1% of offenders.

Women arrested

- The total number of arrests decreased by around a quarter between 2008/09 and 2012/13 (from 1.46 million to 1.07 million), with a decrease of around a quarter for males and a third for females. The greater decline in the number of arrests of females meant that females accounted for a decreasing proportion of all arrests over the five year period, with a year on year decrease from 16.9% in 2008/09 to 15.1% in 2012/13.

Women in court

- Less than half of women remanded by magistrates' courts and subsequently found guilty are given a prison sentence.
- The rise in the female prison population can partly be explained by an increase in the severity of sentences. In 1996, 10% of women sentenced for an indictable offence were sent to prison; in 2014, 16% were.
- In 1993 only a third of women entering custody were sentenced to six months or less. (The Bromley Briefing Prison Fact File (Summer 2014), Prison Reform Trust)

Women in custody (prison doesn't work)

- On 17 June 2016 there were 3,861 women in prison in England and Wales. 8,818 women entered prison in 2015. 45% of them first entered prison on remand.
- The number of women in prison nearly trebled between 1993 and 2005. Numbers have started slowly to reduce, but there are still 1,900 more women in prison today than there were twenty years ago.
- 2,137 women entered custody between January and March 2015, 7% fewer than the previous year.
- On 30 June 2015 there were 742 women in prison serving a sentence for theft and handling offences—an increase of 5% on the previous year.

- Most women entering prison serve very short sentences. 61% of sentenced women entering prison in 2015 were serving six months or less. In 1993 only a third of women entering custody were sentenced to six months or less.
- Women released from prison are more likely to reoffend, and reoffend earlier, than those serving community sentences.
- Only 12% of employers surveyed said that they had employed somebody with a criminal record in the past three years. One in five employers said they either did or were likely to exclude them from the recruitment process.
- 48% of women leaving prison are reconvicted within one year. For women who have served more than 11 previous custodial sentences, the reoffending rate rises to 77%.
- 626 women are currently in prison on remand—accounting for 16% of the female prison population.
- The number of women entering prison on remand awaiting trial is falling. 3,489 women were sent to custody ahead of their trial in 2014—a drop of more than a quarter since 2009.
- Women are held on average, 60 miles away from their home or court address. At HMP Send women's prison the average is 76 miles; at Askham Grange the average distance from home is 78 miles; for Drake Hall it is 83 miles; and East Sutton Park 91 miles. At Low Newton a third of the women were over 100 miles from their homes. In Eastwood Park prison, where many of the women sent to prison by courts in Wales are sent, 20% of women are over 150 miles from home.
- Fewer than one in 10 women entering employment on release.
- Women are more likely to successfully complete their community sentence or licence period on release than men—95% of women compared with 76% of men.
- 33% of women in prison are aged 40 and over.
- During one year more than 11,000 women are imprisoned and almost 18,000 children are separated from their mothers.
- The average cost of a women's prison place is £56,415 per annum. By contrast, an intensive community order costs in the region of £10,000 – £15,000.
- Over half of women entering custody do so on remand. These women spend on average six weeks in prison and six out of ten of them do not then go on to receive a custodial sentence.
- Women represent 5% of the overall prison population. (Women in prison (August 2012), Prison Reform Trust)
- Women released from custody having served a sentence of less than 12 months are more likely to reoffend than those who received a community order; in 2008 the difference in proven reoffending rates was 8.3%.

ROTL (Release on Temporary Licence) – The number of days women were released on temporary licence was 1005 per 100 prisoners, 42.3% higher than for men with 706 days released per 100 prisoners.

Safety in custody statistics

- Women accounted for 23% of all incidents of self-harm in 2015 despite representing just 5% of the total prison population. This has fallen sharply since 2011 when women accounted for over a third of all incidents.
- Self-harm rates are highest in the younger age groups and decrease with age. Prisoners aged 20 and under accounted for 18.8% of self-harm incidents (where age is known), whilst accounting for only 8.5% of the average prison population.

The 'crimes'

- Most women entering prison under sentence (85%) have committed a non-violent offence. 42% entered custody under sentence in 2015 for theft and handling stolen goods.
- More women were sent to prison to serve a sentence for theft and handling than for violence against the person, robbery, sexual offences, burglary, fraud and forgery, drugs, and motoring offences combined.
- 26% of women in prison have no previous convictions – more than double the figure for men (12%).
- 66% of women and 38% of men in prison report committing offences in order to get money to buy drugs.

- A survey of prisoners found that nearly half of all women (48%), compared to just over one-fifth of men (22%), reported having committed offences to support someone else's drug use.
- 15% of women in prison are serving sentences for drug offences.
- A Cabinet Office study found that 28% of women's crimes were financially motivated, compared to 20% of men's.
- Theft offences accounted for nearly half of (49%) of all custodial sentences given to women. Most received sentences of three months or less.
- Between 2009–2014 the number of women sentenced for theft offences decreased by 6% whilst the number sentenced to custody increased by 20%.

Women who offend are often victims

Many women have multiple and therefore more complex problems related to their offending, high rates of poly-drug use and poor mental health. Many women in custody have themselves been victims of serious crime and sustained abuse.

Needs

Abuse

- 46% of women in prison report having suffered a history of domestic abuse.
- Over half (56%) of women surveyed said they had witnessed violence between their parents/carers when they were children compared to four in 10 men (41%).
- 53% of women in prison reported having experienced emotional, physical or sexual abuse as a child, compared to 27% of men.

Education system

- Nearly 40% of women in prison left school before the age of 16 years, almost one in 10 were aged 13 or younger. 30% of women were permanently excluded from school. (The Bromley Briefing Prison Fact File (December 2007), Prison Reform Trust)

Accommodation

- 31% of women in prison report having spent time in local authority care. This compares to 24% of men.
- 15% of newly sentenced prisoners reported being homeless before custody—9% were sleeping rough.
- 37% of prisoners said they needed help with their accommodation on release—only 22% reported getting it.
- One in five people (20%) said they had no accommodation to go to on release—15% reported being homeless shortly after release.
- A Prisons Inspectorate survey found that 38% of women in prison did not have accommodation arranged on release. (HM Inspectorate of Prisons and HM Inspectorate of Probation (2001) *Through the Prison Gate*, London: Home Office)
- Around one-third of women prisoners lose their homes, and often their possessions, whilst in prison. (Wedderburn, D. (2000) *Justice for Women: The Need for Reform*, London: Prison Reform Trust)

Substance abuse

- 52% of women surveyed said that they had used heroin, crack, or cocaine powder in the four weeks prior to custody, compared to 40% of men. However, practitioners report that women may hide or underplay substance misuse through fear of losing their children.
- Substance abuse treatment programmes, particularly when delivered in prison, can reduce women's offending. However the number of women starting and completing substance misuse programmes fell by 92% and 89% respectively between 2009–10 and 2014–15.

- More than half (59%) of women in prison who drank in the four weeks before custody thought they had a problem with alcohol. 52% thought their drinking was out of control, and 41% wished they could stop.
- Considerably higher proportions of women than men said they had a problem with alcohol (30% against 19%) on arrival into prison.
- Reconviction rates more than double for prisoners who reported using drugs in the four weeks before custody compared with prisoners who had never used drugs (62% vs. 30%).

Health

- Women entering prison often have very poor physical, psychological and social health—worse than those within the general population who have the poorest health.
- 25% of women in prison reported symptoms indicative of psychosis. The rate among the general public is about 4%.
- 26% of women said they had received treatment for a mental health problem in the year before custody.
- 49% of women prisoners in a Ministry of Justice study were assessed as suffering from anxiety and depression, compared to 19% of the female population in the UK.
- 46% of women prisoners surveyed reported having attempted suicide at some point in their lives. This compares with 7% of women in the general population.

Family life/children

- Between 13–19% of women in prison are estimated to have one or more dependent children.
- 40% of prisoners said that support from their family, and 36% said that seeing their children, would help them stop reoffending in the future.
- Women (51%) were more likely than men (39%) to say that getting support from their family would help them.
- Only half of the women who had lived, or were in contact with, their children prior to imprisonment had received a visit since going to prison.
- One Home Office study showed that for 85% of mothers, prison was the first time they had been separated from their children for any significant length of period. It also showed that 65% of mothers in prison were serving their first custodial sentence. (Home Office Research Study 162 (1997), *Imprisoned Women and Mothers*, Home Office, London)
- Over half (54%) of prisoners interviewed had children under the age of 18 when they entered prison. The vast majority felt they had let their family down (82%).
- 15% of prisoners stated that they needed help with problems related to family or children—8% required a lot of help. Women (27%) were more likely than men (13%) to report being in need of help with a problem concerning family or children.
- 61% of women interviewed at HMP Styal had partners; however a third of these partners were currently also in prison. The same study showed that children had been taken away from 70% of the mothers, and that the remainder were with family.
- It is estimated that more than 17,240 children were separated from their mother in 2010 by imprisonment.
- Between April 2005 and December 2008, 382 children were born to women prisoners. This is a rate of almost two births a week in England and Wales. However, information on the number of women who have given birth in prison is no longer collected centrally.
- The average number of women in prison with babies on a Mother and Baby Unit from June 2010 to May 2012 was 49.
- Women with babies in prison may be unable to claim benefits they're entitled to for their children.
- All women's prisons inspected in 2014–15 had been allocated funding to recruit at least one family support worker "who provided excellent broad-based and individual support".
- When women are sentenced to custody it has a profound impact on family life, just 5% of children stay in their own homes when their mother goes to prison.

- Parental imprisonment approximately trebles the risk for antisocial or delinquent behaviour by their children.
- More than double the number of children are affected by parental imprisonment than divorce in the family. Approximately 200,000 children in England and Wales had a parent in prison at some point in 2009.
- Children with a parent in prison are three times more likely to have mental health problems or to engage in anti-social behaviour than their peers. (Children of Offenders Review, (June 2007), Ministry of Justice)
- It is estimated that 4 out of 10 young women in prison are mothers.
- Maintaining contact with children is made more difficult by the distance that many prisoners are held from their home area. This is particularly acute for women given the limited number of women's prisons.

Foreign national women

- There are 81 different nationalities amongst the foreign national women in prison, with the majority from Romania, Poland, Republic of Ireland, Jamaica, and Nigeria.
- One in ten foreign national women serving a sentence in prison are there for fraud and forgery offences (usually possession of false documents), and nearly one in three (31%) are there as a result of drugs offences.
- Currently 13% of women in prison are foreign nationals—some of whom are known to have been coerced or trafficked into offending.

Finance

- Almost three-quarters of prisoners surveyed said finance, benefits and debt were a very significant need on release—second only to accommodation.

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Part II - Potential problems

5. Drivers behind the data

In this section we give an overview of three main drivers of the figures identified in section 5: the sentencing regime, arrangements for rehabilitation and the execution of sentences, and of course, politics

5.1 The sentencing regime

The current sentencing regime does not differentiate between men and women; there are no women-only sentencing disposals; moreover there no sentencing provisions which are explicitly targeted at women offenders. However, it has long been accepted that age justifies different treatment as between adults and juveniles, and juveniles and children. Accordingly, the sentencing regime changes when an offender crosses a relevant age threshold. This is on the basis that in youthfulness there is a presumed reduction in culpability as compared with an adult. The youth justice system therefore operates in a very different way from the system applicable to those aged 18 or over. While it is correct to note that the system allows sufficient judicial discretion so as to allow a sentencing court to make a reduction in sentence (sentence quantum or type) for any factor(s) it considers are appropriate, the system lacks formal guidance as to how to deal with such issues. In relation to women therefore, the question arises as to whether there ought to be formal recognition of the numerous and complex issues women in the criminal justice system can face.

A major source of criticism in the current regime concerns the general principles. Criminal Justice Act 2003 s 142 provides various 'purposes of sentencing':

1. *Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—*
 - a) *the punishment of offenders,*
 - b) *the reduction of crime (including its reduction by deterrence),*
 - c) *the reform and rehabilitation of offenders,*
 - d) *the protection of the public, and*
 - e) *the making of reparation by offenders to persons affected by their offences.*

Ashworth regards this provision as "the worst of pick and mix sentencing"; with no primary rationale, he considers this to be a veritable invitation to inconsistency as sentencers are permitted (or even encouraged) to pursue their own penal philosophies.²³ As such, it would appear that there is a lack of consistency in the approach to sentencing. Where it can be shown that women offenders are less likely to recidivate, we raise the question as to whether it is necessary and desirable for Parliament to give a clearer steer on the pursuit of rehabilitation as opposed to punishment as an aim of sentencing. It seems clear that Parliament should provide greater guidance to the courts on how to apply the different aims of sentencing to individual cases.

Additionally, there is no sentencing guideline for female offenders dealing with issues more often experienced by female offenders than their male counterparts. Issues such as mental health problems or being the victim of violence or coercion. The Sentencing Council and its predecessor the Sentencing Guidelines Council, draws no distinction between male and female offenders, and makes no reference to any differences between them for the purposes of sentencing. It does undertake equality impact assessments for individual offences.²⁴ However, only to the extent that current offence-based guidelines acknowledge issues more likely to be present in a case involving a female offender. They are gender-neutral and are merely factors at Stage Two in the sentencing guidelines process, a stage which is unstructured and features little to no guidance as to how to identify and apply such factors.

²³ A Ashworth, *Sentencing and Criminal Justice* (6th ed. CUP 2015), p. 8.

²⁴ Sentencing Council, *Drug Offences Definitive Guideline*, https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_offences_-_Equality_Impact_Assessment.pdf accessed 12 October 2016.

5.2 Prison law and the execution of sentences

In relation to the execution of a sentence, formerly there were no provisions placing an emphasis on the different needs presented by female offenders. Such was left to Prison Service Orders or Instructions (PSOs/PSIs) (as to which see below). However, in 2014, the Offender Rehabilitation Act 2014 s 10 inserted the following provision into the Offender Management Act 2007:

(6A) The Secretary of State must ensure that arrangements under subsection (2) or (5) for the supervision or rehabilitation of persons convicted of offences—

(a) state that the Secretary of State has, in making the arrangements, complied with the duty under section 149 of the Equality Act 2010 (public sector equality duty) as it relates to female offenders, and

(b) identify anything in the arrangements that is intended to meet the particular needs of female offenders.

This provides the Secretary of State with powers to make arrangements for probation provision herself or with a third party. The Secretary of State must ensure that contracts providing for the supervision or rehabilitation of offenders state that the Secretary of State has complied with the public sector equality duty in section 149 of the Equality Act 2010. This relates to female offenders and identifies anything in the arrangements that is intended to meet the particular needs of female offenders.²⁵ While this is a welcome acknowledgement of issues pertaining to women in the criminal justice system, the apparent absence of the exercise of this power to make real change is underwhelming. Of course, if it is being used, it is an individual rather than systemic response.

HM Prison Service issues documents (formerly Prison Service Orders – PSOs, now Prison Service Instructions – PSIs) setting out rules, regulations and guidelines by which prisons are run. They constitute mandatory instructions to prisons and prison staff. The purpose of PSO 4800 – entitled ‘Female prisoners’; was “to provide regimes and conditions for female prisoners that meet their needs”. However, the resource assessment noted that “most of these standards are ‘best practice’ already in many establishments but it is recognised that it will not be possible to implement all standards immediately because of resource pressures”.²⁶ The aim of the PSO is to ensure that “female prisoners are held in conditions and within regimes that meet their gender specific needs and which facilitate their successful resettlement”.²⁷

Prior to April 2008, there was no specific PSO concerning the way in which female offenders were treated, save for PSO 4801 issued in 2000 in relation to mother and baby units in prison.²⁸ PSO 4800 sets out across almost 60 pages the standards which prisons must adhere to²⁹, including that “female prisoners should be held as close to their home and family as possible unless they are intending to resettle in a different are”. While this has improved matters, certainly for London prisoners there is still some way to go before this target is met.

There are 12 women’s prisons in England. These are:

Askham Grange, North Yorkshire; Bronzefield, Surrey; Downview, Surrey; DrakeHall, Staffordshire; East Sutton Park, Kent; Eastwood Park, Gloucestershire; Foston Hall, Derbyshire; Low Newton, County Durham; New Hall, West Yorkshire; Peterborough, Cambridgeshire; Send, Surrey; Styal, Cheshire.³⁰

A report for Women in Prison published in 2015 noted that the Chief Inspector of Prisons, Nick Harwick considered that structural problems with the women’s custodial estate remained “almost untouched” despite efforts to address many issues raised in the Corston report.³¹

²⁵ Explanatory Note to Offender Rehabilitation Act 2014.

²⁶ ‘Women Prisoners’, Prison Service Order No 4800, Issued 28/04/08, p 2, <http://www.justice.gov.uk/offenders/psos> accessed 14 October 2016.

²⁷ Ibid.

²⁸ PSO 4801 was cancelled and replaced by PSI 54/2011 on 01/10/2011, which was itself cancelled and replaced by PSI 49/2014 on 23/12/2014.

²⁹ Subject to the resource impact caveat outlined above.

³⁰ Ministry of Justice, ‘Women prisoners’ (13 July 2016), <https://www.justice.gov.uk/offenders/types-of-offender/women> accessed 12 October 2016.

³¹ N Hardwick, ‘Women in prison: Corston Five years on’, Lecture, University of Sussex (29 February 2012), <http://www.justiceinspectorates.gov.uk/prisons/wp-content/uploads/sites/4/2014/02/women-in-prison.pdf> accessed 13 October 2016, cited in C Cain & J Clark, State of the Estate, 2nd Edition, ‘Women in Prison’s report on the women’s custodial estate’, (Women in Prison, 2015), <http://www.womeninprison.org.uk/perch/resources/sote-2015.pdf> accessed 13 October 2016.

5.3 Politics

There has been a growing appetite among politicians over recent years to address the needs of female offenders. A paper published by the Ministry of Justice in 2013 explicitly recognised “...arguments made by a range of respondents [to the consultation exercise] that female offenders differ significantly from their male counterparts and that they often exhibit more complex needs”.³² The Ministerial foreword to that paper placed emphasis on the need to invest to ensure that the treatment of offenders resulted in a reduction in reoffending rates, stating that the need to break the cycle of crime was central to the new strategy. The paper also set out plans to extend rehabilitation to more offenders and to create continuity between custody and community. This was set against a backdrop of spending cuts made to the department and the reassurance that although the plans outlined were to take effect in the future, the government had not overlooked its duty to protect the public in the present. The paper described itself as a “step change” in the way offenders were to be rehabilitated, leading to year on year reductions in reoffending. We emphasise that our paper is directed towards the legal issues but draw attention to the importance that politicians do not ignore the overwhelming evidence that incarceration for women offenders, particularly on short sentences, is ineffective, expensive and socially devastating.

³² Ministry of Justice, ‘Transforming Rehabilitation: A Strategy for Reform’, (London 2013), Cm 8619, <https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf> accessed 13 October 2016. cf F Gerry, L Harris (n 1) p 6.

Part III – Potential reforms

In this part we set out four areas where we consider reforms could be made to tackle the problems identified in the 2014 paper and earlier parts of this paper. The areas in question are:

- 1) Gender issues and mandatory training;
- 2) Limitations of the criminal law;
- 3) The sentencing regime; and
- 4) Rehabilitation.

6. Understanding gender issues through training

In our first discussion paper we made an assumption that it is an accepted principle that equality is about making sure people are treated fairly and have access to equal opportunity.³³ However the All Party Parliamentary Group on Women in the Penal System concluded that the rise in sentencing levels for women means that far too many women are still being brought into the criminal justice system thus making it plain that this is not a proper assumption to make. There is clearly a need to discuss the disproportionate effect of the criminal justice system in England and Wales on women as a gender issue. In particular to what extent police, prosecution and judicial training includes knowledge and understanding of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules')³⁴ and the 2012 NOMS guide to working with women offenders.³⁵

Traditional common law legal philosophy focused on positivist rule making and purposive interpretation. More recently we have added human rights concepts and questions of proportionality. Women's rights are Human rights. Human Rights are basic, fundamental rights that all people are entitled to simply by virtue of being a human being, such as the rights to liberty and life. They are universal – meaning they belong to each person regardless of their nationality, place of residence, sex, sexual orientation or gender identity, nationality, race and ethnicity, religion, language or other status. Human rights are based on core principles, including: universality, equality, non-discrimination, and are set out and guaranteed by law, such as in international treaties.³⁶ Key human rights texts include:

- Universal Declaration of Human Rights (UDHR)
- European Convention on Human Rights (ECHR)
- Charter of Fundamental Rights of the European Union
- Revised European Social Charter
- UN Convention on the Rights of Persons with Disabilities (CRPD)
- UN Convention on the Rights of the Child (CRC)
- UN Convention on the Elimination Discrimination Against Women (CEDAW)
- UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

³³ See F Gerry, L Harris (n 1) p 6.

³⁴ See (n 15).

³⁵ Ministry of Justice: NOMS Women and Equalities Group, 'A Distinct Approach: A guide to working with women offenders' (London, March 2012), <https://www.justice.gov.uk/downloads/publications/noms/2012/guide-working-with-women-offenders.pdf> accessed 13 October 2016.

³⁶ Taken in part from MDAC training manual on rights of children with mental disabilities. Yet to be published.

These texts set out which human rights are meant to be guaranteed. They also place obligations upon states (this means governments, parliaments and judiciary in each country) to respect, protect and fulfil human rights. Legal theory and activism has exposed the reality that the treatment of women in criminal justice flows from principles based in legal traditions which produce manifest unfairness.³⁷ These traditions affect the effective implementation of international human rights agreements. Failure to implement international agreements continues to profoundly inhibit the empowerment of women and girls. In the context of criminal justice systems, this is a challenge to the nature and operation of law and its context. This paper attempts briefly to highlight gender inequalities in the operation of criminal justice.

Decades have been spent lobbying for changes in criminal justice systems to tackle violence against women and girls at a domestic and international level. The consequence is that developments have arrived in a piecemeal way. The problem lies, at least in part, in the fact that it was impossible to change traditional structures from within because there were so few women in a position of power, particularly in the law. The one area where there may be rising agreement is the need to tackle violence against women and girls. Addressing issues of criminal justice, sentencing and training can lead to a credible set of commitments designed to make real promises to solve problems citizens expect to see solved. This includes an understanding around concepts of witness and perpetrator, when the individual is a woman, to work out effective and logical responses in relation to women and criminal justice. Currently, the dominant discourse in all types of criminal justice systems, whatever their theoretical roots, is victimisation and punishment. Socially there are health and economic consequences. Systems must avoid the victimisation, shaming and over-criminalisation of women. This can and should be seen not merely through the slow implementation of human rights principles by domestic legislative and policy responses but through the training of police, lawyers and the judiciary. We are not suggesting this is not already being done; merely that it is not done in a sufficiently comprehensive way to improve the system and does not appear to be sufficiently well monitored.

Possibilities include compulsory continuing professional development for investigators, legal practitioners and the judiciary. Aside from the absence of clear guidance on gender based issues in the sentencing guidelines, it is notable that judicial training on gender issues, particularly the content of the Bangkok Rules does not appear to be available in the published judicial college course materials, nor do judges routinely call for evidence of the key facts in their local area as part of a sentencing exercise. See annex II for the UN short guide to the Bangkok Rules.³⁸

It is not difficult to design a test to ensure knowledge of the U.N. Rules and domestic research, including an understanding of key facts and gender issues. Given the lack of diversity³⁹ in the judiciary, questions could be raised as to whether the failure to implement such training could be a reportable issue under the CEDAW mechanisms.

We therefore raise the following questions:

- i. Should there be mandatory training on gender issues for all decision-makers in the criminal justice system?
- ii. Is the failure to implement such training a reportable issue under the CEDAW mechanisms?
- iii. What monitoring of judges and Magistrates' knowledge of local services and prison conditions for women should there be and should this include a requirement for them to hear evidence in specific cases?

³⁷ F Gerry, 'The Future of women in international law; Transnational processes in court. Book chapter, forthcoming.

³⁸ UK Aid and Penal Reform International, 'Toolbox on the UN Bangkok Rules: UN Bangkok Rules on women offenders and prisoners Short guide', <https://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf> accessed 13 October 2016.

³⁹ Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2016', <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016> accessed 13 October 2016.

7. Understanding the limitations of our criminal laws

In our second discussion question we ask to what extent current criminal laws in England and Wales fail to address exploitation, abuse and coercion before prosecution and before assigning criminal responsibility.

Women generally appear in criminal justice systems in three main respects; as victims, as suspects and as actors (lawyers and/or judges). We have highlighted the lack of diversity in the judiciary and the need for training above. Here we deal with victims and suspects.

7.1 Victims

Women in prison are highly likely to be victims as well as offenders. More than half (53 per cent) report having experienced emotional, physical or sexual abuse as a child.⁴⁰ Historically women were not seen giving evidence as victims because of judicially articulated rules around presumed ownership, servitude, marital duty and unreliability. In the English tradition women were 'held' in much the same way as land.⁴¹ There was little or no freedom of choice.

More recently there has been recognition of sexual violence, gender based violence, forced marriage, slavery and human trafficking, to name a few. However, the progress we have seen for women is from violated property into victimhood.⁴² The treatment of women as victims is illogical when the patterns of abusive behaviour are so diverse and widespread. It makes much more sense to treat women as witnesses to a global violence problem that nations must try to solve. Not merely by imprisonment of perpetrators but by systemic change.

7.2 Suspects

Most offenders are men and most of the more serious offences are committed by men and yet the imprisonment of women has increased over the last 20 years.⁴³

Prison Reform Trust: Transforming Lives: Reducing Women's Imprisonment 2015 - 2018

About 13,500 women are sent to prison in the UK every year, twice as many as twenty years ago, many on remand or to serve short sentences for non-violent crimes, often for a first offence. Although women are less than 5% of those in prison, they account for over 25% of self-harm incidents, an indication of the traumatic impact of imprisonment on many.

Women's offending is commonly linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt. Over half the women in prison report having suffered domestic violence and one in three has experienced sexual abuse. Many of them have dependent children – an estimated 17,240 children are separated from their mothers by imprisonment every year.

⁴⁰ Prison Reform Trust, Welcome to the Women's Programme, Prison Reform Trust, <http://www.prisonreformtrust.org.uk/ProjectsResearch/Women> accessed 13 October 2016.

⁴¹ Public conveyances of land echoed the public declarations of marriage: 'I liver this to you in the name of seisin of the described land' and 'to have and to hold to you and your heirs forever', R Storry Deans, 'The student's legal history online' (Stevens. 1913), p 6.

⁴² V E Munro, 'The Ashgate Research Companion to Feminist Legal Theory' (Routledge 2013).

⁴³ Prison Reform Trust 'Transforming Lives: Reducing Women's Imprisonment 2015 – 2018' <http://www.prisonreformtrust.org.uk/ProjectsResearch/Women/TransformingLives> accessed 13 October 2016.

The incarceration of women who have multiple issues, which penal institutions rarely treat and often compound, is clearly evidenced by all the research in our bibliography.⁴⁴ The Sentencing Council has investigated the treatment of transnational drug mules and the trend in imprisoning women drug offenders appears to be downward.⁴⁵ Efforts to combat human trafficking have been visible but the protection of victims remains limited, even with agreed international instruments and some modern legislation. Figures for the number of trafficked women referred to the National Referral Mechanism in the UK are still low.⁴⁶ The incarceration of women who have committed offences when they have been the subject of exploitation, abuse or coercion is, in our view, illogical.

This does not just apply to human trafficking. It extends to the prosecution of victims of abuse who commit other crimes. Criminal Law provides for a reduction of murder to manslaughter in limited circumstances where the offender is a victim of abuse but there is no such justification in other types of cases. Viewed practically it should be possible to accept certain acts as involuntary or recognise reduced culpability, thus apply new criminal laws to move women from the position of 'suspect' to the role of 'witness'.

It is notable here that domestic violence researchers have argued for a reconceptualization of domestic violence. This reconceptualization recognises the enduring pattern of behaviour by the dominant partners that use coercive control, intimidation, fear-inducing threats, and episodic physical and sexual assaults; to control another's behaviour, relationships with other people, and independent action in the world.⁴⁷ The dynamics of coercion are more visible in the context of trafficking but the drivers are the same in a domestic context; it's about power. The response is therefore not just a question of prosecutorial discretion but a systemic approach to reducing the number of women who come before the courts. It allows for restorative practices, diversion and deferred prosecution agreements and fundamentally harnesses the power of women to identify their abusers and expose organised criminals. There is more to it than that though: statistics in particular regarding mental health care in prison are shocking.⁴⁸

10 per cent of men and 30 per cent of women have had a previous psychiatric admission before they entered prison. A more recent study found that 25 per cent of women and 15 per cent of men in prison reported symptoms indicative of psychosis. The rate among the general public is about 4 per cent. 26 per cent of women and 16 per cent of men said they had received treatment for a mental health problem in the year before custody. 49 per cent of women and 23 per cent of male prisoners in a Ministry of Justice study were assessed as suffering from anxiety and depression. 16 per cent of the general UK population (12 per cent of men and 19 per cent of women) are estimated to be suffering from different types of anxiety and depression. 46 per cent of women prisoners reported having attempted suicide at some point in their lives. This is more than twice the rate of male prisoners (21 per cent) and higher than the general UK population amongst whom around 6 per cent report having ever attempted suicide.

If such mental impairment is routine, it tends to suggest that there needs to be a new approach to criminal responsibility altogether. If the basic issue is that a crime is only a crime if it is serious enough for the State to punish then punishing people who are mentally ill (especially if they are mentally ill as a result of abuse) is contrary to the very principles of criminal law.

⁴⁴ See, for example, F Gerry, 'Women in prison in Australia' (National Judicial College of Australia 2016); F Gerry, L Harris, 'Women in Prison: Is the penal system fit for purpose?' Halsbury's Law Exchange (London 2014).

⁴⁵ Sentencing Council, 'Drug 'mules': twelve case studies' (March 2011), https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf accessed 13 October 2016.

⁴⁶ National Crime Agency, 'Human Trafficking: National Referral Mechanism Statistics – January to March 2015' (29 July 2015), <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/711-human-trafficking-national-referral-mechanism-statistics-january-to-march-2016/file> accessed 14 October 2016.

⁴⁷ T Lindhorst, J L Edleson, 'Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention' (Northeastern University Press 2012).

⁴⁸ Prison Reform Trust, 'Mental Health Care in Prisons', <http://www.prisonreformtrust.org.uk/projectsresearch/mentalhealth> accessed 14 October 2016.

It is notable from the Ministry of Justice infographic (see footnote 4 and annex I) that women are disproportionately victims of domestic violence and men are disproportionately perpetrators of sexual offences. This has been accepted in only two ways in England and Wales in substantive criminal law: First to reduce murder to manslaughter where a woman kills a violent partner having suffered a mental impairment which amounts to diminished responsibility.⁴⁹ Secondly, as a complete defence to certain offences, pursuant to the Modern Slavery Act 2015.⁵⁰ In other cases, exploitation, abuse and coercion is generally dealt with as mitigation at sentencing, reflecting a reduction in culpability as opposed to effecting a reduction in criminal liability. Following the successful prosecution of Vicky Pryce⁵¹ the somewhat anachronistic common law defence of marital coercion was removed rather than extended to all relationships.⁵² This removed a protection for victims of abuse who offend in the presence of their husband in favour of an issue over driving penalty points.⁵³ More recent legislation on offences of controlling or coercive behaviour under the Serious Crime Act 2015 have not included a similar defence.⁵⁴ The Statutory Guidance Framework indicates that “This offence is constituted by behaviour on the part of the perpetrator which takes place “repeatedly or continuously”. The victim and alleged perpetrator must be “personally connected” at the time the behaviour takes place. The behaviour must have had a “serious effect” on the victim, meaning that it has caused the victim to fear violence will be used against them on “at least two occasions”, or it has had a “substantial adverse effect on the victims’ day to day activities”. The alleged perpetrator must have known that their behaviour would have a serious effect on the victim, or the behaviour must have been such that he or she “ought to have known” it would have that effect.

It seems to us that these are clear criteria which ought to be applied both at the sentencing stage as specific mitigating factors in determining the appropriate disposal and also on the issue of criminal liability on decisions to prosecute. CPS guidelines are ambiguous on this topic. It might be considered as part of seriousness undefined at that stage (we assume on the basis of what might happen on sentencing) but, other than diverting human trafficking victims or the limited defence of duress, the exploitation, abuse and coercion of women is not applied as a criterion to reduce or extinguish criminal liability. We suggest that this is an area where there is a need for legislative reform. These are the issues to be discussed:

- i. Should we prosecute women who are victims of exploitation, abuse and coercion at all?
- ii. Should CPS guidance on prosecution of any offence include consideration of credible evidence of exploitation, abuse and coercion as a factor militating against prosecution?
- iii. Should the criminal law be reformed to provide justifications, excuses and/or defences in all crime where there is evidence of exploitation, abuse and coercion?

⁴⁹ Coroners and Justice Act 2009, s 52.

⁵⁰ Modern Slavery Act 2015, s 45.

⁵¹ J Rozenberg, ‘Defence of marital coercion used by Vicky Pryce to be abolished’, The Guardian (17 January 2014), <https://www.theguardian.com/law/2014/jan/17/defence-marital-coercion-vicky-pryce-abolished> accessed 14 October 2016.

⁵² Section 47 of the Criminal Justice Act 1925 was repealed by s 177 of the Anti-social Behaviour, Crime and Policing Act 2014.

⁵³ In addition to our bibliography, see: F Gerry, Protecting the vulnerable CL&J Weekly, 23rd February 2013 and F Gerry, Women, Entrapment and Waiving Privilege CL&J Weekly, 3rd June 2016.

⁵⁴ Home Office, ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework’ (December 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf accessed 14 October 2016.

8. Understanding the limitations of the sentencing regime

Thirdly, we discuss whether the sentencing system in England and Wales is fit for purpose, having regard to the absence of a guidelines to deal specifically with gender issues (at least until exploitation, abuse and coercion is non-existent or gender neutral). We have divided this issue into three parts, namely the consideration of (1) the absence of a guideline dealing with gender issues; (2) the need for more principled sentencing; and (3) the need to make more fiscally prudent decisions.

8.1 Sentencing guidelines

It is notable that exploitation, abuse and coercion is not included as a mitigating factor in the Ministry of Justice infographic nor is it included as a specific mitigating factor in an assessment of seriousness in the Sentencing Council's definitive guideline on seriousness.⁵⁵ It may be taken into account as personal mitigation but only if it is raised by pre-sentence reports or advocacy and then provision will only be made if the sentencer considers it should be taken into account as a matter that 'in the opinion of the court, [is] relevant in mitigation of sentence'.⁵⁶ That such matters are being taken into account may be reflected because women tend to receive shorter sentences than men or it may be that men receive longer sentences due to recidivist conduct. The practical reality is that we don't know because it is not a specifically mitigating factor. The consequence is that the fact that women in prison have multiple needs tends to suggest we are routinely sending victims to prison. It remains unusual for a woman to appear before the courts but if the approach to equality is to impose the same sentence for men and women, is this because the sentencing guidelines do not allow sufficient discretion where the woman is or may be a victim of coercive control?

The Ministry of Justice estimate that between 24 per cent and 31 per cent of all female offenders have one or more child dependents.⁵⁷ Sentencing guidelines do suggest that primary care responsibilities should be taken into account but evidence is rarely called as it would be in a family case about the arrangements for children. The work of the Prison Reform Trust has highlighted the profound effects of our inflexible system on women and children.⁵⁸

Here we raise the question as to what form the appropriate response to this issue should take. One option would be the creation of a gender-neutral guideline dealing with the issues identified in the research referred to earlier in this paper. An alternative would be to explicitly reference these issues into the Council's offence-based guidelines. A further alternative would be to provide sentencing courts with information concerning these issues, backed by research, so as to give the court a firm factual basis on which to take such matters into account when sentencing women. It seems remarkable that so much less is produced to a criminal court on the removal of a parent than it would in a family court.

8.2 More principled sentencing

An alternative argument surrounds principles of sentencing. The sentencing system of England and Wales is a hybrid system centered around the principle of desert based proportionality. This is to a limited extent modified by utilitarian considerations such as rehabilitation, deterrence and risk.

This argument has three, linked, propositions: (i) that the assessment of culpability of the offender under the proportionality test is currently not applied accurately in relation to female offenders; (ii) that the vagueness of the proportionality principle should result in fewer short custodial sentences; and (iii) that the proportionality test in theory permits a departure from offence seriousness which is not frequently seen in practice.

⁵⁵ Sentencing Guidelines Council, 'Overarching Principles: Seriousness Guideline', (December 2004), http://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf accessed 14 October 2016.

⁵⁶ Criminal Justice Act 2003, s 166(1).

⁵⁷ Ministry of Justice, 'Female offenders and child dependents', (London, 08 October 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465916/female-offenders-child-dependents-statistics.pdf accessed 14 October 2016.

⁵⁸ S Minson, R Nadin, J Earle, 'Sentencing of mothers: Improving the sentencing process and outcomes for female with dependent children', Prison Reform Trust, (London, 2015), p 12.

i) Culpability of female offenders

At its very crudest, proportionality requires that the punishment fit the crime.⁵⁹ It is widely accepted that in relation to proportionality based models, fairness has a key role, however the precise relationship is to a degree disputed. Leading American sentencing scholar Michael Tonry considers that “desert often serves as a proxy concept for fairness as desert implies a comprehensive approach to setting sentencing standards that can be then applied consistently or inconsistently.” (1996, p.184)⁶⁰. Alternate views come from big hitters such as Ashworth and von Hirsch who consider that the principles of proportionality comprises fairness in that by adopting a proportionality based approach “there should be an emphasis on fairness” (2005, para.14). However one reconciles the relationship between fairness and proportionality, it is clear that a system predicated upon proportionality gives fairness a central role in sentencing. Accordingly, this argument cannot be about giving female offenders lenient sentences, or sentences less than a man would receive in the same circumstances; the proportionality principle prohibits this. In fact, this argument is about imposing (as much as is possible) the “correct” sentence by reference to the principles governing the sentencing system.

The Criminal Justice Act 2003 makes clear that proportionality entails the assessment of the harm and culpability present in the offence. The Sentencing Guidelines Council identified four levels of culpability for this purpose: (a) intention to cause harm; (b) recklessness as to whether harm is caused; (c) knowledge of risk of harm but absence of intention to cause harm; and (d) negligence. The guideline entirely understandably focuses attention upon the offence (narrowly defined) but it is clear that proportionality and offence seriousness encompass more than simply an assessment of offence-based factors.

Against this general background, we turn to the complex and diverse needs experienced by women in the criminal justice system as they are relevant to the issue of culpability, as discussed in Part I.

A Prison Reform Trust paper expressed concern about the inconsistent application of sentencing principles, noting that there was concern about non-discrimination in sentencing and a wish to avoid ‘gendered decisions’.⁶¹ However, such an approach (however inadvertent) risks breaching the principle of individualised sentencing – a concept closely related to proportionality that requires a sentence be tailored to the specific offender.

Further, the issue surrounding equality of treatment; where often sentences as between men and women are compared with one another, fails to appreciate legally relevant differences that often exist between them. Where a woman and a man commit the same offence, imposing the same sentence upon them might in fact be a breach of proportionality if the impact of a prison sentence upon a woman offender is properly understood and taken into account.

There is settled case law that states that it is legitimate (and necessary) to make a reduction in sentence length to account for the fact that a sentence of imprisonment will be more onerous on a person of old age or ill-health, than someone of fine health in their youth. In *R. v S*⁶² the court said that a sentencing court should arrive at an appropriate sentence commensurate with the seriousness of the offences having regard to the age, infirmities and circumstances of the offender.⁶³ Similarly, sentencers make a reduction in sentence when sentencing a youth. The guideline states:

*“In addition to the distinctive range of penalties available for youths, there is an expectation that, generally, a young person will be dealt with less severely than an adult offender, although this distinction diminishes as the offender approaches age 18 (subject to an assessment of maturity and criminal sophistication). In part, this is because young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused and because a young person is likely to be less able to resist temptation, especially where peer pressure is exerted.”*⁶⁴

⁵⁹ M Bagaric, ‘Current Issues in Criminal Justice’, Vol.12 No.2, Institute of Criminology, University of Sydney, (Sydney, 2000), p 143.

⁶⁰ Michael Tonry, *Sentencing Matters* (1986).

⁶¹ See S Minson, R Nadin, J Earle, (n 58).

⁶² [1998] 1 Cr. App. R. (S.) 261.

⁶³ *R. v Anderson* [1999] 1 Cr. App. R. (S.) 273 and *R. v Fontes* [2005] EWCA Crim 2103; [2006] 1 Cr. App. R. (S.) 76, are other examples of where such a discount has been made.

⁶⁴ *Overarching Principles – Youths Definitive Guideline*, Sentencing Guidelines Council, Sentencing Guidelines Council, (London), p 6.

ii) *The vagueness of the proportionality principle*

Criminal Justice Act 2003 s 153 requires that the length of a sentence of imprisonment is determined by an assessment of offence seriousness. This focus on seriousness is replicated across the sentencing regime, in particular in the provisions concerning how a sentencing court is to determine the type of sentence to impose.⁶⁵ Additionally, the length of sentence to be imposed must be of the shortest length commensurate with the seriousness of the offence.⁶⁶

There has however been strong criticism of the way in which proportionality is interpreted and applied in practice. Bagaric stated:

*"Adoption of the principle has not facilitated uniform sanctions for like offences because it is poorly defined and understood. There is consensus only in abstract. The principle is so nebulous that it would be misleading to assert that it provides a meaningful guide to sentencers."*⁶⁷

and:

*"First, there is no true appreciation of what factors are relevant to the seriousness of an offence. It has been suggested that this is gauged solely by reference to the amount of unhappiness caused by the offence. Secondly, there is no principled method for ascertaining the severity of punishment."*⁶⁸

The courts may not agree however. When Ashworth (then editor of the Criminal Law Review) criticised an earlier incarnation of the so-called custody threshold (which employed the offence seriousness test), he was rebuked by the Court of Appeal:

In the May 1985 number of the Criminal Law Review under the heading, "A duty unfulfilled," the editor said this: "Ever since the section came into force, there has been a manifest need for guidance on the considerations which may or may not bring a case within one of the grounds specified in section 1(4). On several occasions the Court of Appeal has failed even to consider the relevance of section 1(4) in a case to which it clearly applies..." The learned editor then set out a number of such cases. He may not appreciate that this Court and other courts can recognise an elephant when they see one, but may not find it necessary to define it.

The elephant in the room here is, in our view, the assumption by a largely male judiciary that they know how to sentence women.

In any event, the court has since not sought to define offence seriousness or indeed provide any assistance as to its application in particular cases. Is this concept not capable of being defined or is it simply that it is so obvious so as not to require definition? The latter cannot be the case when considered in light of the wealth of academic writing on the subject in addition to numerous appeals against sentence in which the courts have to consider the issue of whether or not the sentencer 'got it wrong'. The lack of a definition renders the principle vague and difficult to apply. We suggest, at the very least, that seriousness of conduct and seriousness of fault (*mens rea*) should be judged separately (as they are separate elements of an offence) before personal mitigation of the woman and the effect on her family.

⁶⁵ For example the test to apply when considering whether or not an offence has crossed the custody threshold, or whether or not an offence warrants a community order, is the test of offence seriousness.

⁶⁶ Criminal Justice Act 2003, s 153.

⁶⁷ M Bagaric, Current Issues in Criminal Justice, Vol.12 No.2, Institute of Criminology, University of Sydney, (Sydney, 2000), p 143.

⁶⁸ Ibid.

This absence of clarity, in conjunction with the principle of parsimony (that the sentence must be for the shortest term commensurate with the seriousness of the offence) leads to the inevitable conclusion that some offenders (both male and female) who receive short sentences of custody should in fact receive sentences of a non-custodial nature. Where it is not possible with any precision to state a single correct sentence, the court must identify (at least in theory) a range of sentences which would be 'proportionate'.⁶⁹ In doing so it must be accepted that the initial sentence which the court considers to be appropriate would fall in the middle of that range.⁷⁰ Accordingly, the court should make a reduction on the basis that must impose the sentence at the bottom of the range in accordance with s 153 and the principle of parsimony. Therefore, it follows that some of those sentenced to immediate custody in cases where the court has considered that the offence "just" crosses the custody threshold ought to have received a non-custodial sentence.

This argument suggests a need for greater emphasis on the application of s 153 and for a court to more closely consider the duty to impose the least severe sentence. Additionally, this may affect a greater proportion of women than men; in 2014, 58 per cent of sentenced women entering prison were serving six months or less.⁷¹

iii) *Crossing back beneath the custody threshold*

As is well documented, the purposes of sentencing contained in Criminal Justice Act 2003 s 142 contain a list of rationales for determining sentence, yet Parliament saw fit not to set a primary rationale (as it had done so in the 1991 Act) instead opting for what Ashworth described as the "worst of pick and mix sentencing"⁷² permitting (or even requiring) a sentencer to follow his or her own penal philosophy. As such, whereas one judge may choose to imprison on the basis that a deterrent sentence is required, another may choose to suspend that sentence in order to pursue rehabilitative aims of sentencing. This however is constricted by the principle of proportionality.

However, the Sentencing Guidelines Council's Overarching Principles – Seriousness Definitive Guideline states:

*"passing the custody threshold does not mean that a custodial sentence should be deemed inevitable, and custody can still be avoided in the light of personal mitigation or where there is a suitable intervention in the community which provides sufficient restriction (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime. For example, a prolific offender who currently could expect a short custodial sentence (which, in advance of custody plus, would have no provision for supervision on release) might more appropriately receive a suitable community sentence."*⁷³

This is repeated (more concisely) in some of the offence based guidelines⁷⁴ and places emphasis upon consequentialist considerations.⁷⁵ Where an application of the proportionality principle indicates a custodial sentence is appropriate, the prospect of rehabilitation may justify the imposition of a non-custodial sentence. The Sexual Offences guidelines in fact state that this applies to a short or moderate length custodial term; while no definition of short or moderate is given, it permits courts to place greater emphasis upon the other purposes of sentencing.

⁶⁹ This is evidenced by the way the CACD approaches appeals against sentence. They regularly state that a sentence was not manifestly excessive without confirming that the sentence in question was in fact the sentence that they would have imposed had they been performing the sentencing exercise afresh. Similarly, the court has said it does not "tinker" with sentences, thereby reinforcing the notion of a range of sentences which are 'not wrong'. The court in *R. v Murgatroyd* [2016] EWCA Crim 868 (PQBD) said at [10]: "...it is important not to tinker with sentences which are not so excessive as to be wrong in principle or manifestly excessive..."

⁷⁰ To proceed on any other basis would surely be illogical; when sentencing, the court imposes a sentence which it considers is most appropriate. Because sentencing is a human process requiring the computation of many different and often competing factors, there will never be absolute uniformity of sentence, even in the fictional scenario where multiple judges are asked to sentence in the same case. Therefore, within the range of permissible sentences (with which an appellate court would not interfere), sentences at the extremes may be objectively seen as lenient or harsh, but in the view of the sentencer, appropriate, and therefore falling in the middle of range. If a sentencer intentionally imposed a lenient sentence at the bottom of the range, he or she must consider that sentence to be appropriate and justified, and therefore they cannot actually consider the sentence to be lenient.

⁷¹ Ministry of Justice (2015) 'Offender management statistics, Prison receptions' (London 2014) as cited in Prison Reform Trust, 'Bromley Briefings Prison Factfile' (Autumn 2015), Table A2.1, <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Factfile%20Autumn%202015.pdf> accessed 14 October 2016.

⁷² A Ashworth, *Sentencing and Criminal Justice* (6th ed. CUP 2015), p 82.

⁷³ Sentencing Guidelines Council's Overarching Principles – Seriousness Definitive Guideline, Sentencing Guidelines Council, Sentencing Guidelines Council, (London), p 8.

⁷⁴ See e.g. Sexual Offences Definitive Guideline, Sentencing Council of England and Wales, Sentencing Council (London), p 14.

⁷⁵ See also Criminal Justice Act 2003, s 166.

This however exposes a problem in practice; where a court finds an offender to be dangerous⁷⁶ the operation of the principle of proportionality is subject to utilitarian concerns of risk and crime prevention. This enables the court to impose a sentence in excess of the proportionate sentence (e.g. a life sentence where the minimum term is set by reference to offence seriousness, but the sentence permits the state to imprison the offender indefinitely) justified on non-retributive grounds.

However, far less frequently do sentencers explicitly state that although proportionality requires a custodial sentence, on consequentialist grounds a non-custodial sentence will be imposed. There is more than one explanation for this, but one would be that the power to do so is underused and/or not well known.

This argument supports a greater emphasis on the purposes of sentencing set out in s 142 and of the court's power to impose the appropriate sentence, not just a sentence focused on punishment as if desert is the only consideration for a sentencing court in England and Wales.

Additionally, this is likely to affect female offenders more significantly than men. Where women are less likely to reoffend, more likely to complete a community order, and so this may be a more inviting course for a sentencer to take in the case of a woman offender than a man offender.

8.3 Reoffending and rehabilitation

As set out above, women are much less likely to reoffend if proper services are available. The work of Clare McGregor in Styal prison supports this.⁷⁷ Our view is that there is a need to improve services but also for courts to hear evidence about available services at sentencing hearings.

It is no secret that the cost of criminal justice is extensive. The cost of imprisoning a male offender for a period of 12 months is routinely compared with the cost of sending a pupil to Eton College for a single academic year by the press.⁷⁸ In fact, in 2014 the Ministry of Justice reported that the average cost to keep a female offender in prison was approximately £56,415 per annum. By contrast, an intensive community order cost between £10,000–£15,000.⁷⁹ The reoffending rate for women is 19 per cent whereas the figure is 29 per cent for men (figures include all convictions and cautions).⁸⁰ In 2011, the Ministry of Justice consulted on the use of more effective community sentences. The Prison Reform Trust noted that the community sentence was “outperforming” short custodial sentences and Ministry of Justice data showed that the community sentence was 8.3 per cent more effective in reducing re-offending rates.⁸¹ The reconviction rate for those sentenced to community orders was lower than those sentenced to custodial sentences for similar offences (3.6 per cent below predicted rates as opposed to 3.1 per cent below—a statistically significant difference).⁸² The National Offender Management Service (NOMS) considered community sentences that were sufficiently challenging to the offender to be a more positive and usually cheaper alternative to the much more expensive use of imprisonment for very short periods.⁸³ For many women, we suggest that personal intervention can be more challenging than unpaid work and arrest should be seen as primarily an opportunity for intervention rather than punishment.

⁷⁶ That is, he or she poses a significant risk of serious harm by the commission of serious offences to members of the public, see Criminal Justice Act 2003, ss 224–229.

⁷⁷ Coaching Inside and Out, <https://coachinginsideandout.org.uk/> accessed 14 October 2016.

⁷⁸ For example see: The Telegraph, ‘N Clegg, Prison costs more than going to Eton’ (20 May 2013), <http://www.telegraph.co.uk/news/uknews/law-and-order/10068495/Nick-Clegg-Prison-costs-more-than-going-to-Eton.html> accessed 14 October 2016.

⁷⁹ House of Commons Justice Committee, *Female offenders: after the Corston Report: Second Report of 2013–2014*, evidence p 123, <http://www.parliament.uk/documents/commons-committees/Justice/Female-offenders.pdf> accessed 14 October 2016.

⁸⁰ Ibid, p 59–60.

⁸¹ Prison Reform Trust, ‘Response to Ministry of Justice consultation, Punishment and reform: effective community sentences’ (2011), p 1 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/effective%20community%20sentences.pdf> accessed 14 October 2016

⁸² House of Commons Committee of Public Accounts, ‘The supervision of community orders in England and Wales: Forty-eighth Report of Session 2007–08’, HC 508, (London, 15 July 2008), p 3, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubacc/508/508.pdf> accessed 14 October 2016

⁸³ Ibid, p 13.

We regard this argument as simple and effective and is directed to the more pragmatic reader who is less concerned about the underlying principles of penal policy. This argument concerns the cost to the State of imprisoning women and the relative effectiveness of alternative disposals. From our bibliography, it can be demonstrated that female offenders:

- (i) are less likely to reoffend;
- (ii) when they do, they are less likely to commit violent crime;
- (iii) that one custodial sentence costs the same as many, many community orders; and
- (iv) community orders are at least as effective at preventing reoffending if not more so.

Where it can be shown that to effectively raise the custody threshold for women, requiring the greater use of non-custodial disposals, would not produce an increase in reoffending rates (and in fact might result in a reduction in reoffending) and as a direct result cost savings could be made in relation to the use of imprisonment as a sanction, the financial argument is extremely persuasive. A counter to this might be that such an approach places finances above the need to punish, and that in our presently highly punitive society, such an approach is untenable. This is of course a matter of degree. Non-custodial sentences can be highly onerous (indeed even more onerous than a short custodial sentence).⁸⁴ In 2012, the government amended the legislation regarding community orders to require that there be at least one “punitive” requirement attached to each order.⁸⁵ The press release accompanying the change stated that it would put “punishment back into community sentencing” and would “restore public confidence”.⁸⁶ A similar approach could be adopted to assuage concerns in relation to ‘soft sentencing’.

This argument is purely pragmatic; for those who will not be convinced by the reasoning set out at (i) and (ii) above. However, this too is a theoretically sound proposition, defensible by invoking non-retributive proportionality theory; Frase describes “alternative means proportionality” which might render a sentence disproportionately severe where a less costly or burdensome sentence would achieve the same goals.⁸⁷ Applying this to female offenders, the case for less costly measures such as non-custodial sentences, which it can be demonstrated would achieve the same goals of crime prevention and rehabilitation (or better) are difficult to resist.

The issue therefore is to determine the best way to achieve such an aim in a principled and consistent way. This might be achieved through guidance, by raising the ‘custody threshold’, or by placing a greater emphasis on consequentialist theory, justifying a focus on rehabilitation over punishment in certain cases. There are numerous ways in which the emphasis in sentencing could be placed on rehabilitation and the greater use of - cheaper - alternatives to custody could be realised. Here we invite discussion as to how to achieve that aim and consider the following questions.⁸⁸

- i. Should sentences for women of 4 years or less be community based?
- ii. Should ‘seriousness’ of an offence be separated in relation to conduct and fault?
- iii. Should credible evidence of exploitation, abuse and coercion be a specific mitigating factor?
- iv. Should caring responsibilities and the effect of a sentence on children be a specific sentencing factor requiring family court/services intervention?
- v. Should sentencing guidelines contain specific offender based factors, including gender based factors?

⁸⁴ N Padfield, Time to bury the custody threshold [2011] Crim. L.R. 593.

⁸⁵ Criminal Justice Act 2003 s 177(2A) as amended by Crime and Courts Act 2013 Sch 16, para 2, in force 11 December 2013.

⁸⁶ Ministry of Justice and The Rt Hon Chris Grayling MP, Press Release, ‘Community sentences to deliver proper punishment’, (London, 23 October 2012), <https://www.gov.uk/government/news/community-sentences-to-deliver-proper-punishment> accessed 14 October 2016.

⁸⁷ R S Frase, Theories of proportionality and desert, in J Petersilia, K R Reitz, (eds) The Oxford Handbook of Sentencing and Corrections, (New York, 2012) OUP, p 138.

⁸⁸ The rehabilitation of offenders is a huge topic which is dealt with in large proportions of our bibliography but this discussion paper is necessarily limited to our primary topics.

Part IV – Concluding remarks

9. Proposed reforms

This paper has collated numerous research findings and made arguments for reform in what we regard as key areas for change in the treatment of women in the criminal justice system. We have suggested a need to reform: (a) training and education for those involved in the criminal justice system, including judges, police and practitioners; (b) criminal liability generally to take account of exploitation, abuse and coercion (c) sentencing law and sentencing guidelines; and (d) the custody threshold and the use of non-immediate custodial sentences.

Against that background, we have asked the following questions:

1. Should there be mandatory training on gender issues for all decision-makers in the criminal justice system?
2. Is the failure to implement such training a reportable issue under the CEDAW mechanisms?
3. What monitoring of judges and Magistrates' knowledge of local services and prison conditions for women should there be and should this include a requirement for them to hear evidence in specific cases?
4. Should we prosecute women who are victims of exploitation, abuse and coercion at all?
5. Should CPS guidance on prosecution of any offence include consideration of credible evidence of exploitation, abuse and coercion as a factor militating against prosecution?
6. Should the criminal law be reformed to provide justifications, excuses and/or defences in all crime where there is evidence of exploitation, abuse and coercion?
7. Should sentences for women of 4 years or less be community based?
8. Should 'seriousness' of an offence be separated in relation to conduct and fault?
9. Should credible evidence of exploitation, abuse and coercion be a specific mitigating factor?
10. Should caring responsibilities and the effect of a sentence on children be a specific sentencing factor requiring family court / services intervention?
11. Should sentencing guidelines contain specific offender based factors, including gender based factors?

There is an absence of collective responsibility as between the pillars of government. The legislature is failing to address the effects of exploitation, abuse and coercion. Prosecution decisions are limited by dated concepts of responsibility. Courts impose sentences based on a limited sentencing regime and an adherence to non-gendered approaches. The government amends existing legislation and enacts new legislation but this is often underpinned by populist policies in pursuit of favourable headlines and public support, rather than principled and evidence-based policy. The Sentencing Council are in a position to have an impact – and have done so in the context of drug offending involving those under pressure, coercion, intimidation and where they are the sole or primary carer for dependent relatives.⁸⁹ This small but crucial recognition is a start of so much more that needs to be done.

⁸⁹ See Drug Offences Definitive Guideline, Sentencing Council, (London, 2012).

Acknowledgements

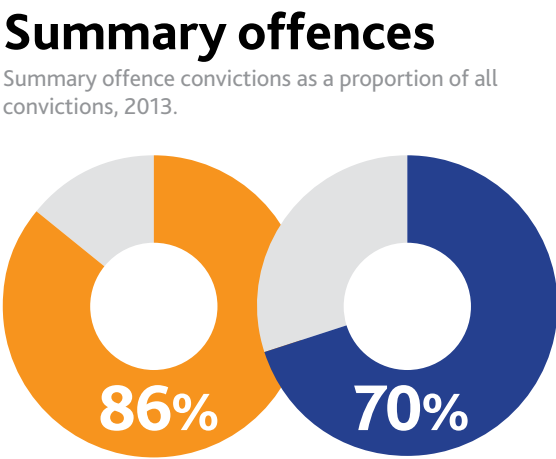
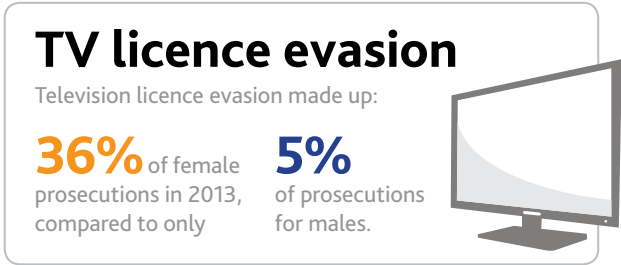
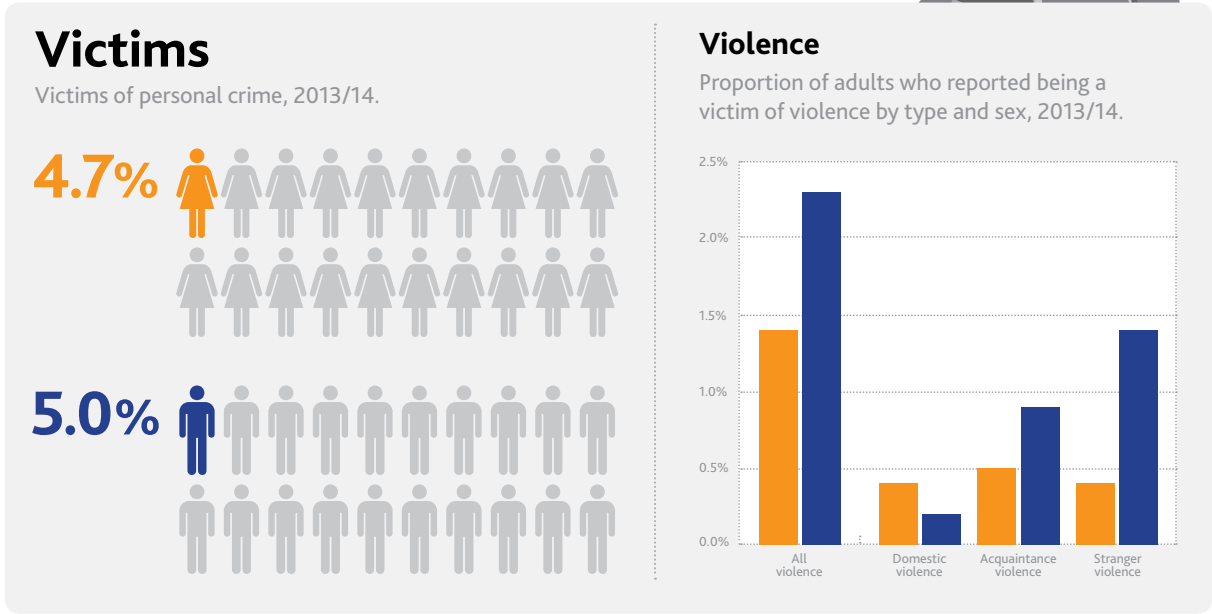
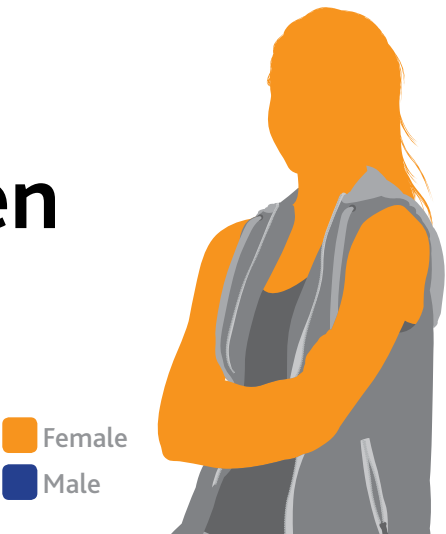
We would like to thank the team at Halsbury's Law Exchange and LexisNexis who have made this paper possible. Special thanks go to Christian Fleck, Managing Director at LexisNexis UK, who, after the previous paper and panel discussion in 2014 seemed particularly interested in the topic of women in prison and lent his support to this second paper and panel discussion. As a business, LexisNexis has seen the value in Halsbury's Law Exchange and the important issues it raises and brings to the fore. We therefore thank LexisNexis for its support and commitment to promoting wider debate surrounding important issues facing our justice system in the 21st Century.

We would also like to thank Anjali Palmer and her colleagues who edited and designed the paper. Ciara O'Neill deserves a special mention for her hard work on collating the research and producing the bibliography. Ciara has been involved in this project since the very beginning and her support and hard work throughout has made a significant contribution to both papers. We thank Ciara for her commitment to the project and for her support.

We would also like to thank Richard Allison, Nina Packman, and Paul Taylor at LexisNexis for helping to collate the research materials.

Finally, we would like to thank Sarah Plaka. Without Sarah this paper would not have been produced and there would be no panel discussion surrounding the paper. Sarah's hard work in bringing people together and making things happen have enabled us to produce two papers on an important topic of which we are proud. Sarah's vision for Halsbury's Law Exchange is ambitious, but that ambition is matched by her enthusiasm for her work and her ability to make projects such as the Halsbury's Law Exchange Women in Prison project a success. We express our gratitude to her for her unwavering support and positive attitude.

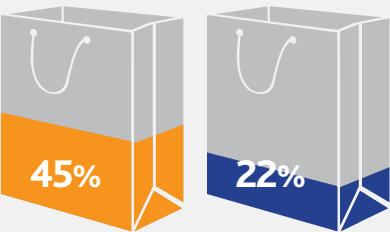
Statistics on Women and the Criminal Justice System



Indictable offences

Shoplifting

Shoplifting convictions as a proportion of all indictable convictions, 2013.



Theft, dishonesty and fraud offences, Crown Court, 2013

Mitigating Factors

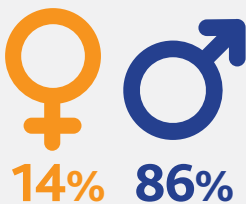
- 1 Genuine remorse
♀ 42% ♂ 26%
- 2 Age
♀ 31% ♂ 22%
- 3 Main carer/has caring responsibilities
♀ 30% ♂ 9%
- 4 Offence out of character
♀ 28% ♂ 17%
- 5 Physical or mental illness
♀ 16% ♂ 7%

Aggravating Factors

- 1 Pre-planning or pre-meditation
♀ 26% ♂ 33%
- 2 High level of gain
♀ 20% ♂ 15%
- 3 High value of the property to the victim (including sentimental value)
♀ 11% ♂ 16%
- 4 Targeting of vulnerable victims
♀ 11% ♂ 9%
- 5 Member of group or gangs
♀ 10% ♂ 20%

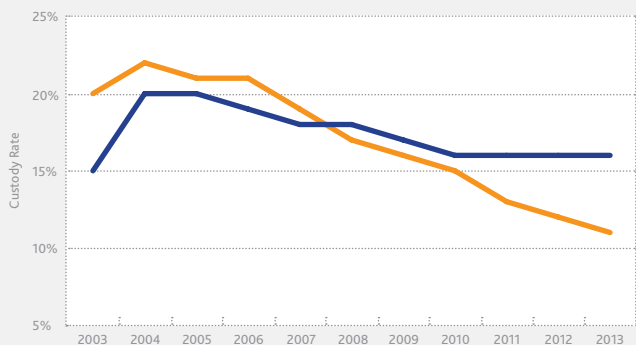
Convictions for indictable offences, 2013

14% of convictions for indictable offences were for females.



Drug offences

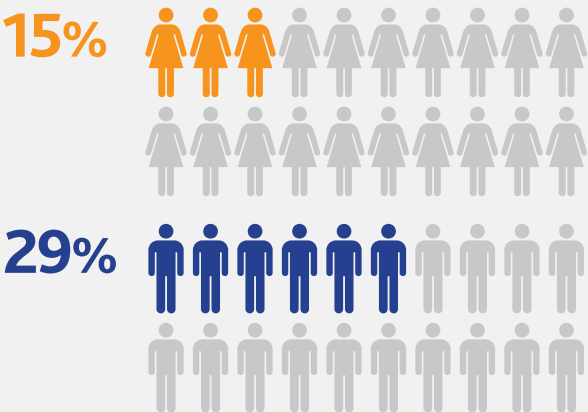
Custody rate for indictable drug offences, 2013.



The fall in the custody rate for females was partly due to a decrease in convictions for the importation of class A drugs.

Immediate custody

Proportion of offenders sentenced to custody (for indictable offences), 2013.



Average custodial sentence length, indictable offences, 2013.

9.9 months

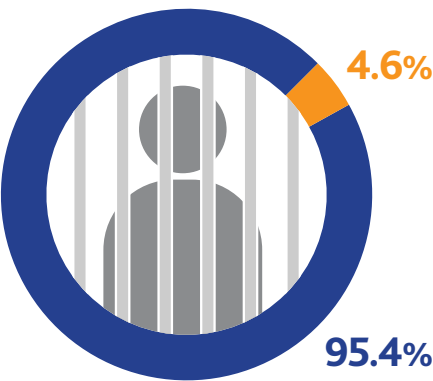


18.8 months

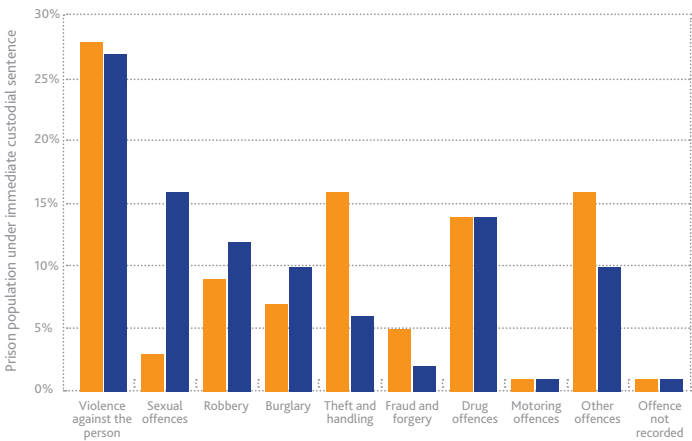


Prison

Prison population proportions by sex, 30 June 2014.

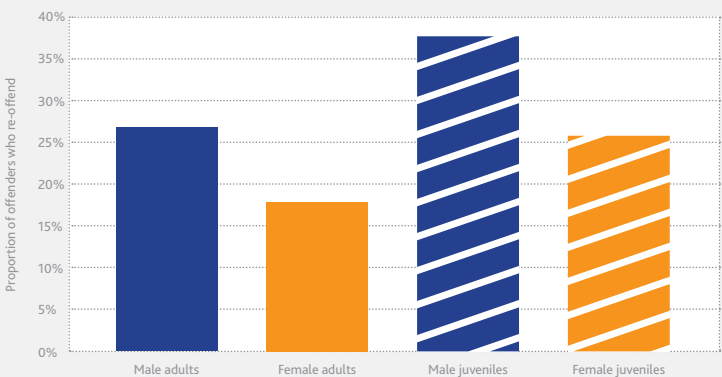


Offence group profile of prison population under immediate custodial sentence, 30 June 2014.



Proven re-offending

Proven re-offending rates by sex and adult/juvenile, 2012.



Self-harm in custody

In 2013, just under three quarters of self-harm incidents in prisons were committed by males.



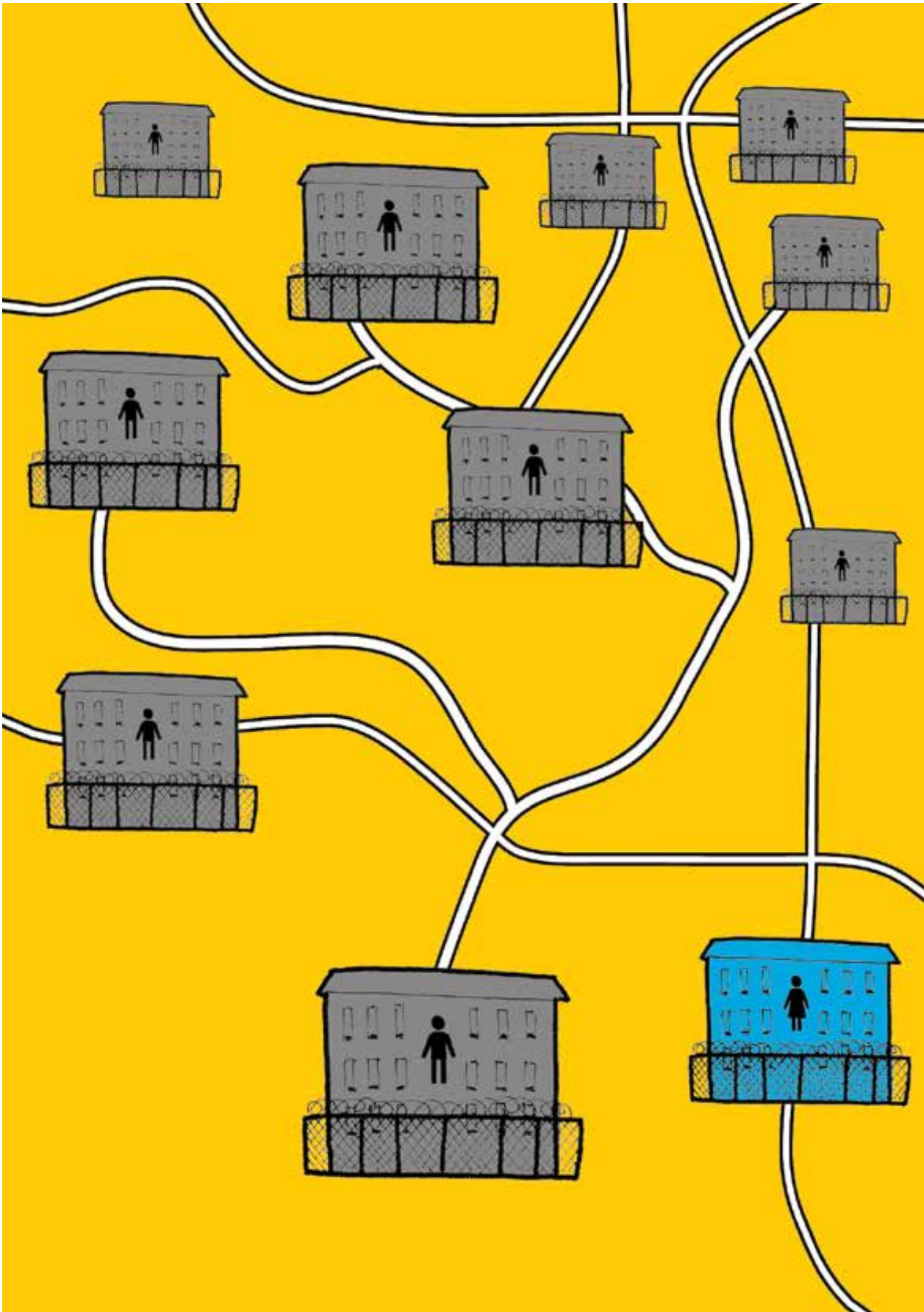
Toolbox
on the UN
Bangkok
Rules



UN Bangkok Rules on women offenders and prisoners

Short guide





The United Nations Bangkok Rules on women offenders and prisoners

Globally **more than half a million** women and girls are in prison serving a sentence following conviction, or awaiting trial and therefore to be presumed innocent. Criminal justice systems routinely overlook the specific needs of these women and girls, who represent an estimated two to nine per cent of national prison populations. The UN Bangkok Rules seek to address these needs.

The profile of women prisoners

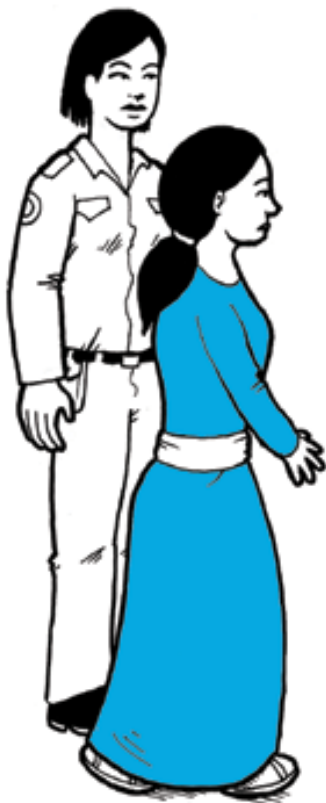
Treating women offenders in the same way as men will not achieve gender equality. The circumstances in which women commit criminal offences are different from men.

The facts

- ➡ A considerable proportion of women offenders are in prison as a direct or indirect result of multiple layers of discrimination and deprivation.
- ➡ Women mainly commit petty crimes closely linked to poverty, such as theft, fraud and minor drug related offences.
- ➡ Only a small minority of women are convicted of violent offences, and a large majority of them have been victims of violence themselves.



The Bangkok Rules



Because women and girls represent **less than a tenth** of the prison population their characteristics and needs have remained unacknowledged and largely unmet by criminal justice systems. Prisons and their regimes – from the architecture and security procedures to healthcare, family contact and training opportunities – are usually designed for men.

There was also a gap existing in international standards on addressing the needs of women in the criminal justice system. In December 2010 this gap was filled when the United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders, known as the Bangkok Rules, were adopted by the UN General Assembly (Resolution A/RES/65/229).

The Rules are crucial to protecting the rights of women offenders and prisoners, explicitly addressing the different needs that women have and the different situations they come from. The Bangkok Rules are also the first international instrument to address the needs of children in prison with their parent.

By unanimously voting for the Bangkok Rules, 193 countries who are members of the United Nations acknowledged that women in the criminal justice system do have gender-specific characteristics and needs, and agreed both to respect and meet them.



Who do the Bangkok Rules protect?

- ➡ Female prisoners who are in prison awaiting trial, and therefore presumed to be innocent, and those serving prison sentences following a conviction. The Rules also protect women in prison under so-called 'protective' custody by the state.
- ➡ Female offenders who are given a sentence other than imprisonment (non-custodial measure or sanction).
- ➡ Children of imprisoned parents accompanying their parent to prison.
- ➡ Male prisoners and offenders are also protected by some of the Rules.

For example, the central role of both parents is recognised, and accordingly some of the rules apply equally to male prisoners and to offenders who are fathers.

It is estimated that millions of children worldwide have a parent in prison and tens of thousands are living in prison with their mother.



Why are they called the Bangkok Rules?

The UN Bangkok Rules were initiated by the Government of Thailand. HRH Princess Bajrakitiyabha of Thailand played a pivotal role in the development of the Rules.

In countries such as Jordan women are imprisoned, sometimes for over a decade, on the grounds of 'protection from honour crimes'.



In England and Wales women in prison are ten times more likely to harm themselves than men in prison.



What do the Bangkok Rules say?

The 70 Rules give guidance to policy makers, legislators, sentencing authorities and prison staff to reduce unnecessary imprisonment of women, and to meet the specific needs of women who are imprisoned.

Keep women out of prison

The Bangkok Rules give guidance on gender-sensitive alternatives for both pre-trial detention and sentencing post-conviction which address the most common causes of offending. They recognise that prison is usually an ineffective, and often damaging, solution to offending by women, hindering their social reintegration and ability to live productive and law-abiding lives following release.

One example of a gender-sensitive alternative to prison is counselling services with on-site childcare facilities. This provides a solution for women offenders who are mothers, enabling them to deal with the root causes of criminal behaviour whilst continuing to care for their children.





The shackling of women during childbirth remains widespread in some countries, including in the United States.



If sent to prison...

The Bangkok Rules respond to the different needs of women and girls in prisons, providing guidance on a wide range of aspects of the prison regime – healthcare, rehabilitation programmes, the training of prison staff and visiting rights.

Provide appropriate healthcare

In addition to reproductive healthcare, gender-specific responses are needed for mental health, substance abuse and the treatment and care of other diseases. Women prisoners should have the same access to preventative healthcare, such as breast cancer screening, as offered to women in the community.

Treat women humanely

The Rules require women to be treated with humanity and with dignity. For instance the use of instruments of restraint on women during labour, during birth and immediately after birth is prohibited. There is a prohibition of solitary confinement or disciplinary segregation for pregnant women, women with infants and breast feeding mothers.



Preserve dignity during searches

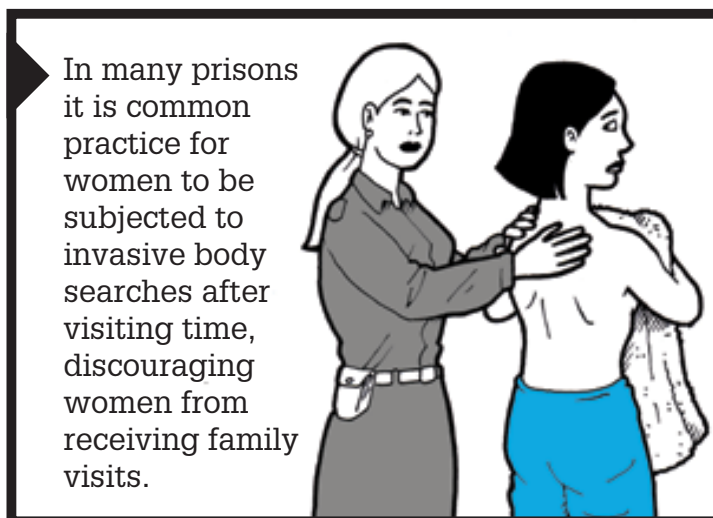
Search procedures must respect a woman's dignity. Given the risk of abuse during pat-down searches and even more so during strip or invasive body searches, they must be carried out by female staff. Alternative screening methods should be developed.

Protection from violence

Women prisoners are at particularly high risk of rape, sexual assault and humiliation in prison. They are vulnerable to all forms of sexual misconduct by prison staff and other prisoners, including improper touching during searches, and being watched when dressing, showering or using the toilet.

Provide for prisoners' children

Prison services must provide for the full range of needs of children in prison with their mothers, whether medical, physical or psychological. As these children are not prisoners, they should not be treated as such. The Rules also require special provisions to be made for mothers prior to admission, so they can organise alternative childcare for children left outside.



The Bangkok Rules supplement the existing UN Standard Minimum Rules for the Treatment of Prisoners and the Tokyo Rules on alternatives to imprisonment.

From paper to practice

The Bangkok Rules represent a vital step forward for the rights of women in prison and women offenders. Now the standards need to be put into practice.

Many actors are involved in the treatment of women offenders and prisoners. All have a role in implementing the Bangkok Rules.

Many of the Rules do not require additional resources for their implementation, but a change in awareness, attitude and practices – and in particular a committed investment in the training of prison staff, policy-makers, prison administrators and others who engage with women in the criminal justice system.



Toolbox for implementation

We have a range of practical resources to help you put the UN Bangkok Rules into practice. Please visit:

www.penalreform.org/priorities/women-in-the-criminal-justice-system/

➞ Guidance document:

A guide to each Rule, suggested measures for implementation at policy and practical level, with examples of good practice to inspire new thinking.

➞ Index of Implementation:

A comprehensive checklist for an assessment of implementation of the Rules, structured for different actors. Can be used in developing policies and strategies.

Both documents are co-published with the Thailand Institute of Justice.

➞ Online course:

A self-paced, free online course combining analysis of the Rules, interactive assessments and application of the Rules to real life situations, with a certificate issued at completion. Enrol at **penalreform-elearning.org**

➞ A guide to gender-sensitive monitoring:

A guide to help bodies monitoring places of detention incorporate a gender perspective into their work and address violence against women and girls in detention. Jointly published with the Association for the Prevention of Torture.

➞ E-bulletin:

A quarterly round-up of information on women in the criminal justice system, the Bangkok Rules and activities by PRI and others on the Rules. Sign up by emailing **info@penalreform.org**

➞ Briefings:

A PRI Briefing is available mapping concerns relating to the discrimination of women as alleged offenders in the justice system. A Briefing on Girls in Detention outlines the specific issues challenges for girls and recommendations to strengthen their protection.

Tools are available in multiple languages.

Toolbox
on the UN
Bangkok
Rules



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