

## **Sentencing Council**

### **Assault Guidelines Consultation**

#### **Women's Justice Taskforce submission**

The Women's Justice Taskforce welcomes the opportunity to respond to the Sentencing Council's Assault Guidelines Consultation. The Taskforce was established by the Prison Reform Trust, supported by the Bromley Trust, to make sure that women in the criminal justice system are a priority for government, and to map out the means by which ministers, officials and local government can build on the Corston blueprint for reform. No one can be satisfied by the continued high and damaging use of custody for women, comparatively few of whom have committed serious or violent offences.

Despite the policy changes prompted by the Prison Reform Trust's independent review of women's imprisonment, chaired by Professor Dorothy Wedderburn, the impetus provided by the Fawcett Commission, and the considerable impact of the government-commissioned wide-ranging review chaired by Baroness Jean Corston, it is still all too easy for vulnerable women - 5% of the prison population and approximately one third of those on probation - to slide off the agenda and return to being a neglected minority. The Taskforce hopes to show how this can be avoided by creating the right structure and authoritative drivers for reform.

The Taskforce is chaired by Fiona Cannon, Diversity and Inclusion Director, Lloyds Banking Group. Its members include Antonia Bance, Corston Independent Funders Coalition; Lisa Buckingham, Editor, Financial Mail on Sunday; Wendy Cranmer, Resettlement worker, Toynbee Hall, and former prisoner; Mitch Egan, Former Director of Offender Management North East; Clare Jones, Chair, Women's Centres Forum and Joint Chief Exec, WomenCentre, Calderdale & Kirklees; Stephen Otter, Chief Constable Devon and Cornwall and ACPO lead on EDHR; Neil Sherlock, Partner, Public and Regulatory Affairs, KPMG; Sarah Veale, Head of Equality & Employment Rights, TUC; Angus Cameron, London Probation mental health lead; Fiona Hodgson, President, Conservative Women's Association; Malcolm Richardson,<sup>1</sup> Deputy Chairman Elect, Magistrates Association; and Olga Heaven, Director, Hibiscus.

The Women's Justice Taskforce notes, and welcomes, the Sentencing Council's important focus on mental illness as a mitigating factor given the psychiatric morbidity of female offenders and the high numbers of women prisoners who suffer from poor mental health, often as a result of their experience of prolonged domestic violence or sexual abuse. Although the Taskforce does not intend to make a full submission to the Assault Guidelines consultation, we would like to draw your attention to mitigating factors that ought to be considered by sentencers when deciding on a custodial or non-custodial sentence for women offenders, as it relates to question 4 of the consultation.

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<sup>1</sup> Malcolm Richardson has derogated from being a party to the Women Justice Taskforce's submission to the Sentencing Council's assault guidelines consultation because, as a member of the Magistrates Association, he is already a party to its submission.

#### **Q4. Do you think there are any other aggravating and mitigating factors that should be included at step 2 of the process?**

Mitigating factors should include:

##### *Primary responsibility for the care of children or other dependants*

Prison can have a devastating impact on the children and dependants of offenders - a factor that sentencers legally must take into consideration when deciding to impose a custodial sentence. A number of legal rulings have underlined the duty of sentencers under the Human Rights Act to take account of the impact of imposing a custodial sentence on the children of offenders. Guidance issued by the Home Office and former Sentencing Advisory Panel also state that primary responsibility for the care of children and dependants should be a strong factor inclining the court against imposing a custodial sentence (see below).

The guidance issued by the Sentencing Council should make “primary responsibility for the care of children or other dependants” a mitigating factor at step two of the process to clarify for sentencers their legal duty and bring together the existing guidance in this area. The terms of the guidance – primary responsibility, children and dependants – would need to be carefully defined. Although we have not provided such a definition here, there are precedents in social care legislation which could be adopted.

Below we outline:

- The impact of custody on children and families
- Sentencing: the duty of sentencers
- Relevant guidance

#### **The impact of custody on families and children**

It is estimated that there are 160,000 children with a parent in prison each year. This is around two and a half times the number of children in care, and over six times the number of children on the Child Protection Register. Based on the projected prison population growth, this group could rise to around 200,000 within the next five years.<sup>2</sup>

In 2006, more children were affected by the imprisonment of a parent than by divorce in the family.<sup>3</sup> During their time at school 7% of children experience their father’s imprisonment.<sup>4</sup> Home Office research has found that 66% of women and 59% of men in prison have dependent children under 18. Of those women, 34% had children under five, a further 40% children aged from 5 to 10.<sup>5</sup> Each year it is

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<sup>2</sup> Ministry of Justice and Department for Children, Schools and Families, Children of Offenders Review, June 2007

<sup>3</sup> Action for Prisoners’ Families, CLINKS, Prison Advice and Care Trust, Prison Reform Trust (2007), The children and families of prisoners: recommendations for government, London: Prison Reform Trust

<sup>4</sup> Department for Education and Skills (2003) Every Child Matters, London: Stationary Office

<sup>5</sup> Home Office Research Study 208, and Hansard, HC, 28 April 2003

estimated that more than 17,700 children are separated from their mother by imprisonment.

Over half (54%) of prisoners interviewed for the *Surveying Prisoner Crime Reduction* study had children under the age of 18 at the time they entered prison. About two fifths of these respondents reported being single (43%). About three quarters of the whole sample (74%) strongly agreed or agreed that they were close to their family. The vast majority felt that they have let their family down by being sent to prison (82%).<sup>6</sup>

Only 9% of children whose mothers are in prison are cared for by their fathers in their mothers' absence.<sup>7</sup> At least a third of mothers are lone parents before imprisonment.<sup>8</sup> Black and ethnic minority women are particularly likely to be single mothers, as more than half of black African and black Caribbean families in the UK are headed by a lone parent, compared with less than a quarter of white families and just over a tenth of Asian families.<sup>9</sup> 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.<sup>10</sup>

An ICM public opinion poll, commissioned by SmartJustice in March 2007, found that, of 1,006 respondents across the UK, 73% thought that mothers of young children should not be sent to prison for non-violent crime.<sup>11</sup> Imprisoning mothers for non-violent offences has a damaging impact on children and carries a cost to the state of more than £17 million over a 10 year period.<sup>12</sup> The main social cost incurred by the children of imprisoned mothers – and by the state in relation to these children – results from the increased likelihood of their becoming 'NEET' (Not in Education, Employment or Training).<sup>13</sup> Additional savings can be made with non-custodial sentences because of the reduced likelihood of children becoming problem drug users, or becoming involved in crime, if their mothers are spared imprisonment.<sup>14</sup>

Based on the evidence above amending the guidelines as proposed is consistent with the factors the Sentencing Council must have regard to in drawing up its guidelines:

- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending

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<sup>6</sup> Ministry of Justice (2010) Compendium of reoffending statistics

<sup>7</sup> Baroness Corston (2006) *A Review of Women with Particular Vulnerabilities in the Criminal Justice System*, London: Home Office

<sup>8</sup> Social Exclusion Unit (2002) *Reducing reoffending by ex-prisoners*, London: Social Exclusion Unit

<sup>9</sup> HM Chief Inspector of Prisons (2009) *Race relations in prisons: responding to adult women from black and minority ethnic backgrounds*, London: The Stationary Office

<sup>10</sup> Social Exclusion Unit (2002) *Reducing reoffending by ex-prisoners*, London: Social Exclusion Unit

<sup>11</sup> Smart Justice (2007) *Public say:: stop locking up so many women*, London: Prison Reform Trust

<sup>12</sup> New Economics Foundation (2008) *Unlocking Value: How we all benefit from investing in alternatives to prison for women offenders*, London: NEF

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

## **Sentencing: The duty of sentencers**

There have been two important judicial pronouncements on the balancing exercise which has to be conducted when a woman who is the carer of dependent children is convicted of an imprisonable criminal offence – weighing the article 8 rights of the parent and child and the seriousness of the offence.<sup>15</sup>

**R (on the application of P and Q) v. Secretary of State for the Home Department [2001] EWCA Civ 1151** (see: [www.bailii.org/ew/cases/EWCA/Civ/2001/1151.html](http://www.bailii.org/ew/cases/EWCA/Civ/2001/1151.html))

Lord Phillips, Master of the Rolls (at para.79) stated: “It goes without saying that since October 2, 2000 sentencing courts have been public authorities within the meaning of s.6 of the Human Rights Act. If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by s.6(1) to carry out the balancing exercise identified by Hale LJ in *In Re W & B (Children)* at para.54, especially at subpara.(iii) ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under s.6(1), ask for more. It will no longer be permissible, if it ever was, for a court to choose a custodial sentence merely because the mother’s want of means and her commitments to her children appear to make a fine or community sentence inappropriate, if the seriousness of the offence does not itself warrant a custodial sentence. In such circumstances it must ensure that the relevant statutory authorities and/or voluntary organisations provide a viable properly packaged solution designed to ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children.”

As Epstein and Russo highlight, clarification of the task confronted by a court in a case concerned with a prospective violation of a child’s article 8 rights has been provided by Hale LJ in the quite different context of interim care orders in her judgment in *Re W & B (Children)* [2001] EWCA Civ 757. After saying (at para.52) that respect for family life was fundamental to the philosophy underpinning the ECHR, and describing the different levels of interference with the right to respect for family life inherent in the different types of order a court might make, she said (at para.54): “Such an interference can only be justified under article.8.2 if three conditions are fulfilled:

- It must be, ‘in accordance with the law’. This means more than it must have a basis in domestic law; the domestic law must also be adequately accessible and formulated so that it is reasonably foreseeable; and there must be adequate and effective safeguards in that law to protect against arbitrary interference ...
- It must be in pursuit of one of the legitimate aims provided for in the article: compulsory measures of care can be justified for the protection of health or morals or for the protection of the rights of the child. The rights of a child are not confined to his Convention rights and in this context include his interests ...
- It must be ‘necessary in a democratic society’: that is to say, the reasons given for the interference must be ‘relevant and sufficient.’ It must correspond

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<sup>15</sup> Rona Epstein and Deborah Russo, ‘Women Behind Bars’, *Criminal Law and Justice Weekly*, 29 May 2010

to a 'pressing social need' and be 'proportionate' to the legitimate aim pursued ... The more serious the intervention, the more compelling must be the justification ... The most important question in most care cases is therefore whether the proposed interference with the right to respect for family life is proportionate to the need which makes it legitimate."

**R. v. Joanne Mills [2002] EWCA Crim 26** (see: <http://www.bailii.org/ew/cases/EWCA/Crim/2002/26.html>)

The Lord Chief Justice, Lord Woolf of Barnes said: "with a mother who is the sole support of two young children, as is the case here, the Judge has to bear in mind the consequences to those children if the sole carer is sent to prison".

Following these two leading cases, sentencers should:

- Be aware of their duty to acquire information on whether the defendant has young/dependent children. "If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under s.6(1), ask for more" (Lord Phillips).
- Having obtained information on any dependent children, balance the needs of any such children against the seriousness of the criminal offence when sentencing mothers who are primary carers.<sup>16</sup>

## Relevant guidance

John Halliday's review *Making Punishment Work: Report of a Review of the Sentencing Framework for England and Wales* (July 2001) made some important recommendations for how the welfare of children dependent on the offender should be taken into consideration by sentencers. The report states: "As the Court of Appeal (Criminal Division) has already recognised (in the case of Haleth, and a judgement by Watkins LJ in 1982), it should be legitimate to take into account when sentencing, the effect of different sentences on the welfare of children dependent on the offender – not to the exclusion of other factors, but as part of the picture." Furthermore, "where imprisonment could have been justified, but a non-custodial sentence would be suitable and adequate, it might be passed instead on the grounds of the harm to dependent children that would otherwise result."

Halliday also highlights the need for further guidance for sentencers on the use of discretion: "In the interests of justice not only being done, but being seen to be done, it would be helpful if these principles were published in a more accessible form, as part of a comprehensive code of guidelines governing the use of discretion."

The final advice of the Sentencing Advisory Panel to the Sentencing Guidelines Council in *Overarching Principles of Sentencing* underlines the importance of clear guidance in this area. Paragraph 149 reads: "Accordingly, the Panel has concluded that the fact that an offender has primary responsibility for the care of young children or other dependants should be a strong factor inclining the court against imposing a custodial sentence, unless the seriousness of the offence makes it unavoidable, on

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<sup>16</sup> Ibid.

the basis that the effect on the children or other dependants can be strongly negative.”

### **Conclusion**

The guidance issued by the Sentencing Council should make “primary responsibility for the care of children or other dependants” a mitigating factor at step two of the process to clarify for sentencers their legal duty and bring together the existing guidance in this area. In addition, the Council should commission research to establish whether the balancing exercise outlined above is in fact carried out by sentencers in every case where a mother who has the care of a dependent child is convicted of an offence which could attract a custodial penalty.

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