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Chapter 6

Sentencing Women: An Analysis of Recent Trends

Carol Hedderman and Rebecca Barnes

Introduction

This chapter analyses changes in the sentencing of women between 2000 and 2012. We update an earlier analysis conducted by Hedderman (2004) which sought to establish why the number of women going to prison increased so steeply between 1992 and 2000. Since 2000, there have been important changes in sentencing policies and government responses to women offenders. Media portrayals have also shifted to emphasise a ‘ladette’ culture of female drinking, anti-social behaviour and violence. This chapter reflects on the consequences of these changes and considers how the sentencing of women has changed since 2000, including the use of custody and new sentences such as suspended sentence orders. It examines how far Labour's policy of diverting women from custody during its second term of office fed through into court practice; and it assesses what has happened since the Conservative-Liberal Democrat Coalition took power.

Drawing on analyses of official statistics and on a recent interview study with a small sample of magistrates and judges, the findings indicate that whilst overall the use of custody appears to have remained fairly static, there are interesting differences between the sentencing practices of magistrates and Crown Court sentencers. Moreover, rather than witnessing significant shifts between immediate custody and non-custodial options for women, a key finding of this analysis concerns the shifting landscape within non-

custodial sentencing, particularly the increasing use of Suspended Sentence Orders, introduced in the *Criminal Justice Act 2003* as an ‘alternative to custody’, which seem instead to be used in place of other lower-tariff community orders (Stanley, 2009).

The chapter concludes by raising concerns about how this shift, combined with the restriction of judicial discretion when orders are breached, may lead non-custodial sentences to become precursors, rather than alternatives, to custody. Community-based options for dealing with women who offend have been developed in the light of evidence concerning differences in their offending-related needs and responses to punishment, especially prison (for example, Together Women project, discussed later in this chapter). It is important that sentencers, particularly magistrates, are informed of the value of such facilities and understand that using them in place of custody constitutes an appropriate, rather than an unduly favourable, response to most women who offend.

Understanding the context

In the eight years leading up to the Millennium, the number of women in prison more than doubled to reach 3,350 (Home Office, 2001a). Previous research concluded that this was because of changing criminal justice responses to women offenders rather than changes in underlying offending (Hedderman, 2004). Hedderman’s analysis found that there had been a move away from cautioning and towards sending women to court, together with a generally harsher sentencing climate. Thus, when women reached court and were convicted, even those dealt with for minor offences were much more likely to receive a custodial sentence. Most strikingly, a third of the extra women being sentenced to prison over this period were convicted of theft and handling; and the proportionate use

of custody for this group by magistrates rose more than for any other offence (Hedderman, 2004).

There are at least three reasons to think that the sentencing of women is likely to have changed since 2000. First, there have been a number of legislative changes which could be expected to have implications for the treatment of women in the criminal justice system. Second, for at least part of this period, diverting women from custody was an explicit government policy objective. This included devoting funds to develop local community-based support services for women offenders. Third, official statistics suggest that the female prison population has changed over this period. While this could be related to recall and release decisions, it may also indicate a change in sentencing behaviour. More speculatively, some media reports suggest that women's offending behaviour has also changed and that, in particular, women have become more violent. If this is true, or simply perceived to be true by sentencers, this may also affect the sentences women receive.

Legislative changes to the sentencing environment

Between 1997 and 2008, the Labour government put forward more than 50 criminal justice bills and created more than 3000 new criminal offences (Travis, 2007; Open University, 2008-9). Some of these changes have had significant implications for the sentencing of women, not least through the *Criminal Justice Act 2003* (henceforth *CJA 2003*) and the *Equality Acts* of 2006 and 2010.

The *CJA 2003* substantially revised the range of non-custodial sentences available to the courts. In particular, it introduced Suspended Sentence Orders (SSOs) which were

expected to reduce the use of purely custodial sentences. The Act also combined most other forms of community orders, which had previously all held different places on the sentencing tariff, into options which could be imposed as part of a single generic Community Order (CO) (Mair, Cross and Taylor, 2008). The *CJA 2003* also created the Sentencing Guidelines Council, the precursor to the current Sentencing Council, whose guidance was expected to discourage sentencers from imposing too many conditions as part of a CO or using SSOs instead of non-custodial options.¹ This is important as sentencers had sometimes previously been found to skip lower steps on the tariff when sentencing women (Dowds and Hedderman, 1997), therefore reducing the number of steps might be expected to exacerbate this tendency. Unfortunately, as Stanley (2009) has shown, the SSO has replaced other community sentences more often than it has replaced custody for women. This then leads to women entering custody if they fail to comply, especially as the *CJA 2003* also decreased magistrates' discretion to use non-custodial measures when dealing with breach.

The expansion of Equality legislation has also influenced the sentencing of women. While Section 95 of the *Criminal Justice Act 1991* required the government to publish information intended to help in combating discrimination on the grounds of gender, race or other 'improper grounds', the *Equality Act 2006* placed a legal duty on public bodies to actively promote gender equality and eliminate discrimination. The *Equality Act 2010* goes even further in that it requires public bodies to demonstrate compliance with that duty and to set equality objectives. This can include the use of special measures as the 2010 Act recognises that gender inequality is 'persistent, durable and institutionalised' (Fawcett Society, 2013, p.11). Its decision to review the Equality Duty suggests that the Coalition government is resiling from this position, as do the cuts it has made to the

funding of bodies responsible for ensuring that the Duty is upheld, and its statements characterising the Duty as 'red tape' (Fawcett Society, 2013). However, as discussed below, divergent understandings of gender equality mean that, for some, this requires different responses to women in recognition of their different needs. For others, achieving equality involves subjecting men and women to the same response regardless of any pre-existing differences between them.

Recent policy changes in relation to the sentencing of women

The Labour government (1997-2010) eventually responded to the increased use of custody for women by publishing a strategy which was aimed at reducing women's involvement in crime and diverting them from prosecution and prison (Home Office, 2004a). Arguably, this policy was not very effectively implemented, except in so far as it, and the subsequent Corston Review (2007), led to the government funding the development of community-based services for women (Hedderman, 2010). These services were aimed at securing access to the help women needed in relation to problems such as substance misuse, mental health, social isolation, poverty and housing.² It was assumed that increasing the availability of such services would, in itself, lead the police and courts to eschew the use of custody for women, though there are indications that this has not happened (Jolliffe et al., 2011; Hedderman and Gunby, 2013).

Early announcements by the Coalition government's first Secretary of State for Justice, Ken Clarke, about the general ineffectiveness of prison and his decision to ring-fence the funding of women's centres, indicated that he would continue to support the policy of diverting women from the criminal justice system (Hedderman and Gunby, 2013).

However, the consequences of other criminal justice policy developments, such as the decision to adopt a 'payment by results' approach, seemed likely to undo some of the

progress made in securing good quality services for women in the community (Gelsthorpe and Hedderman, 2012). Under his replacement, Chris Grayling, the ring-fenced budget for women's services has disappeared and a much more mixed message on women is emerging. On the one hand, Grayling's 'Transforming Rehabilitation' strategy (Ministry of Justice, 2013a) acknowledges that women's offending differs from men's, and that different responses may therefore be desirable. On the other, this acknowledgement appears not to have affected the government's commissioning and implementation plans in any material respect. A weakening in the government's commitment to diverting women is also signalled by its rejection of the Justice Select Committee's recommendation to strengthen its Advisory Board on Female Offenders; and its statement that:

Whilst women have some different needs to men, the Government believes that there should be one justice system for all offenders who commit crimes. It does not agree that prison is ineffective (Ministry of Justice, 2013b, p.5).

Given these shifting policy messages about the needs of women offenders, the use and value of custody, and the support for – and then recoiling from – diversion for women, it is timely to update Hedderman's (2004) analysis of the sentencing of women between 1992-2000 by examining sentencing trends post-2000.

Data sources for this analysis

The analysis in this chapter examines changes in the sentencing of adult women (i.e. aged 21 and over) between 2000-2012, drawing mainly on official statistics in England and Wales. Younger women and girls have been excluded from the analysis because of differences in the sentencing options available for them. Annual statistics are used

because these smooth out short-term volatility and enable changes over time to be monitored. These are usually published 12 to 18 months after the period to which they relate, so the chapter covers the period to 2012 as these were the latest available at the time of writing (March 2014). Where figures are taken from several sources, this is noted, as are changes or omission in annual series.

This fresh statistical analysis is complemented by the findings of a recent small-scale interview study with 20 sentencers. The latter was conducted as part of a Home Office evaluation of the Together Women project (TWP), a government-funded, community-based initiative run at five centres in the North of England between 2007-2010 (see Hedderman and Gunby, 2013; Hedderman, Palmer and Hollin, 2008). Five semi-structured group interviews took place involving 14 magistrates from four courts and six sentencers (five judges and one recorder) were interviewed at four Crown Court centres. Interviews lasted between 40 minutes to just under an hour and a half, and all but two were recorded and transcribed.³ The interviews aimed to find out about sentencers' perceptions of women's offending, how they make decisions about the use of custody, and their views on the value of TWP and whether it offers a viable alternative to custody. The interview sample comprised experienced sentencers: all had at least five years' experience, with judges having on average 12 years, and magistrates, 15 years. Equal numbers of men and women were interviewed, and all but one were white. Given the small size of the sample, no claims can be made to its representativeness; nonetheless, the interview data help to contextualise some of the statistical findings and provide valuable insights into sentencers' priorities and practices.

Changes to the sentenced prison population

The annual prison population statistics show that the sentenced male prison population rose by 43% between 2000 and 2012 and the female population rose by 34% (Ministry of Justice, 2013c). The year-on-year changes for both men and women show that the largest increase was greatest in the early part of this period, preceding policy changes aimed at reducing the number of women going in to custody and the more widespread availability of women's community-based support services (Table 6.1).

Table 6.1 here

The size of the sentenced prison population is also determined by the length of sentences being imposed currently and in previous years, and by decisions to release and recall offenders from and to prison. Moreover, even if the number of women sent to prison over this period increased, this is not in itself a sign that sentencing has become more severe as this could be related to changes in the number and types of women coming before the courts for sentence. These possibilities will be explored in the next section.

Has the profile of women coming before the courts changed?

Increases in the number of girls and women arrested for violence were, initially at least, treated by the media (for example, Ford, 2009; McVeigh, 2009; Whitehead, 2009) as a sign that women are becoming more violent. However, this seems to have had at least as much to do with changes in the police response to such behaviour as changes in the behaviour itself (Hedderman, 2010). What is important in terms of current sentencing is whether the profile of women coming before the courts has changed and whether sentencers think it has changed, even if it has not.

Interviews with sentencers revealed that some believed that women's offending had become more prevalent and more serious. Magistrates who sat in courts devoted to

dealing with drug offences and traffic courts were particularly likely to think that the number of women had increased so much that they now dealt with equal numbers of men and women. Moreover, whilst sentencers generally agreed that most female offending comprised non-violent offences such as theft, benefit fraud and drug possession, many felt that women's violence, particularly under the influence of alcohol, was increasing:

J4M⁴ *I think one of the biggest areas of growth is drink-related violence by women... Um the norms of behaviour [...] seems to permit violence being used as a means of reprisal and control. And whereas 10 years ago, this was almost entirely, I think, male related. Now, very, very substantial numbers of women err fall into this category as well.*

M4F *You only have to put the TV on and watch one of these programmes...and you see them tottering around the city centres. They are so drunk they can hardly stand up and then they get themselves into trouble.*

However, as the second quote shows, sentencers' perceptions did not necessarily derive from their experiences in court, but rather from watching 'reality' television programmes, or for one female magistrate, her experience of walking through the city centre at night. These external influences on perceptions of women's offending are important because they help to shape the '*interpretive behaviour of sentencers* who draw on their own knowledge, experience and values' (Player, 2005, p.434; original emphasis). In this case they may lead sentencers to respond more severely to women offenders either because they are seen as a greater threat to public safety or because alcohol-fuelled female violence is seen as a growing menace which merits a deterrent response.

The figures in Table 6.2 suggest that sentencers who believed that the number of women coming to court for drug or driving offences had risen were mistaken. Indeed, both have actually fallen slightly. At first sight, sentencers' perceptions that women's offending is on the increase seems justified as the number of women they dealt with for violent offences increased by 1,000 between 2000-2012, and some courts may have seen greater increases in violent women offenders than others. However, this seems to have been driven by a change in government policy regarding the use of pre-court disposals rather than an increase in offending. As the Ministry of Justice explains, the proportion of cases ending in pre-court disposals fell because it:

...coincided with the replacement, in April 2008, of a target to increase offences brought to justice, with one placing more emphasis on bringing serious crime to justice. The latter target was subsequently removed in May 2010 (2012, p.51).

The result in the case of violence was that in 2007, 27% of women found guilty or cautioned for violence were dealt with by the courts, whereas by 2012 this had risen to 53.5%.⁵

Table 6.2 here

While the intention behind the revised target may have been to bring more serious cases to justice, Table 6.2 suggests that both targets may have inadvertently brought a greater number of less serious cases to court. For example, the biggest numeric change was that an additional 2,000 theft and handling cases were brought to court in 2012 and these made up two-thirds of the overall increase in convictions. Further support for this contention lies in the fact that the proportion of women offenders with no previous record

who were brought to court and convicted, rather than being cautioned, has been rising since 2006, reaching 48% in 2012, bringing it close to the male rate of 50.5%.⁶

Table 6.3 shows that the overall number of women being formally dealt with in the criminal justice system reduced by 48,660 between 2007 and 2011, but an increased proportion were prosecuted with the result that nearly 6,000 more women appeared in court during 2011 than had appeared in 2007. Meanwhile the overall number of men in the system decreased even more sharply, while the rise in the proportion being prosecuted was less dramatic. The net result was that 238,030 fewer men appeared in court in 2011 than 2007. In other words, what some sentencers perceived as a steep increase in the number of women coming to court might be characterised more accurately as a steep decline in the number of men doing so; and in both cases a change in policy (and related performance targets) seem to be the cause.

Table 6.3 here

Unfortunately it is not possible to say whether the number of women being sentenced who have previous convictions has changed since the Millennium. Although such statistics are still produced,⁷ they contain unexplained anomalies. For example, in 2002 adding up the percentages of women with different numbers of previous convictions leads to a total of 106%, whereas in 2012 it only adds to 92%.

Changes in sentencing to immediate custody: magistrates' courts vs. Crown Courts

Table 6.4 shows the proportion of adult women sentenced to custody for both summary and indictable offences ranged between two and a half to three per cent throughout the period with no clear directional trend. The proportion sentenced to custody for indictable offences alone was also stable at between 16 and 18 per cent. Of course, the fact that the

percentage use of custody remained broadly stable, while the number of women being sentenced rose, means that more women were sentenced to custody.

Table 6.4 here

However, this relatively static overall picture disguises three interesting changes at the Crown Court (Table 6.5). First, the number of women coming to the Crown Court for sentence rose by 60% between 2001 and 2011 to reach over 9,000 in 2011. Second, this seems to have been associated with a fall in the proportion of cases in which a custodial sentence was imposed. Third, the average sentence length imposed on women at the Crown Court also fell from 2003 from around two years to 20 months. Meanwhile, the number of women being sentenced by magistrates' courts fell between 2003 and 2009, although the use of custody remained stable at around 11% (with fluctuations), as did the average sentence length (two months).

Table 6.5 here

Magistrates' use of custody for women has also been fairly stable at the individual offence level. However, again, the Crown Court figures show some interesting changes. As Table 6.6 shows, whilst sentencing to immediate custody increased for certain offences (for example, criminal damage and burglary) between 2000 and 2012, for other offences it either remained stable or declined. The starkest change is that 32% of women convicted of drugs offences were sentenced to immediate custody in 2012, compared to 55% in 2000.

Table 6.6 here

The two most likely explanations for this pattern are, first, that judges are responding more actively to the call to divert women from custody; and second, that some of the cases which were previously dealt with by magistrates are now being sentenced in the Crown Court. In the latter situation, because these cases are less serious than those the

Crown Court usually deals with, they are not being sentenced to custody.⁸ Unfortunately, direct information about whether this has changed over time is not available. However, this may explain why, for example, the Crown Courts' use of custody for theft and handling has fallen.

The interview data add further context to these statistics by indicating some differences between magistrates' and Crown Court sentencers' use of custody. When asked how frequently they saw women who were at risk of immediate custody, magistrates tended to regard this as extremely rare, citing sentencing guidelines which encouraged them to avoid custody and favour non-custodial alternatives. Whilst sentencing trends vary between courts, with recently published figures indicating stark geographical disparities in the use of custody (Howard League, 2013), the message conveyed by the (albeit small) sample of magistrates is that in the current policy climate, sentencing anyone to custody is extremely rare, as illustrated by the following dialogue:

M5F *Particularly now, ten years ago we sent more people to prison. Now we send so few people to prison that it really is the end of the road.*

M4F *Yes we did. When I first came on the bench we sent some, but it's got gradually less and less. And now it's rare. Now you've really got to think about it.*

Yet this message contrasts with the statistics presented above (Table 6.5) which indicate that the use of custodial sentences by magistrates has remained fairly static. Moreover, when magistrates recounted instances where they had sentenced women to custody, this was often as a result of breach of community or suspended sentence orders, as opposed to the original offence. Commonly, magistrates used such phrases as having 'run out of

road' or using custody as a 'last resort' or 'if all else fails', as the following quote indicates:

M5F *We have a procedure when sentencing and you work through the procedure and, when you've tried everything else ad nauseam, there comes a point where there is no alternative. You're not thinking of anything other than there is no other road. I don't think you are thinking 'Is it punishment?', 'Is it protection of the public?', you're thinking 'I have no choice in this'.*

Hence, where custody is imposed by magistrates, it appears that this is frequently for offences which would not reach the custody threshold in their own right, but rather as the perceived 'only' option in situations of non-compliance.⁹ Unfortunately, published sentencing statistics do not include the level of detail needed to investigate this further. Although prison reception figures might provide some insight into this, the detailed breakdown is not available for more recent years. It is interesting to note the Ministry of Justice's comment, however, in the last year this breakdown was available, that 'Legislative and policy changes have...increased the likelihood of offenders being imprisoned for breach of non-custodial sentences' (2010, p.4). They also noted that breaches of a court order accounted for 53 per cent of 'other offences' and that 'the number of sentenced prison receptions for 'other offences' increased by 70 per cent from 12,900 in 1999 to 21,900 in 2009' (2010, p. 52).

In contrast to magistrates, judges seemed keener to avoid sentencing women or men to immediate custody, even though they routinely deal with more serious cases than magistrates. Typically, they spoke of custody being reserved for crimes which were so

serious that no other punishment would be appropriate and/or where custody served the purpose of public protection. Most noted that while sentencing guidelines had to be adhered to, these left room for discretion and wherever possible they used this, particularly to avoid short prison sentences. For example:

J2M *I don't like sending people to prison. If there is any way around it, you do it. Prison is punishment. I don't think it rehabilitates. I don't think they've got the resources. And if its punishment and keeping people out of circulation, there is a reason for that.*

J5M....*the chances of it doing any good are so limited that really the custodial sentence is there to protect the public, by putting somebody who is dangerous out of public contact, for as long as possible. Which means that short term sentences really are a waste of time, for the most part.*

Conversely, most of the magistrates interviewed felt overly restricted by what they referred to as 'sentencing guidelines' (although what they actually described were often statutory provisions). A key example of this can be found in the contrasting responses to the question of whether sentencers would use the Together Women Programme (TWP) – a non-mandatory, community-based diversion – as an alternative to custody. Whilst magistrates welcomed TWP as a supplement to community orders, both its non-statutory status and the rigidity of the custody threshold (at that time) were both regarded as barriers to using TWP as an alternative to custody. In contrast, judges were generally more open to using TWP as an alternative to custody, as the following response to the question of whether the judge in question had ever used TWP in this way demonstrates:

J6M *Many times. Oh yeah, it's often been....I am very loathe to send women into custody. Because I believe there is very little positive that comes out of a woman going to prison unless, as I've said already, they're in that category of people where they, frankly, are a danger to themselves or to others.*

Similar views were expressed by the small sample of judges in Mair et al. 's (2008) study of sentencers' views on the newly-introduced community sentences. In the final part of this analysis, non-custodial options will be examined more closely to assess how sentencers have used the available options and to critically examine the suitability of existing non-custodial options for women.

The changing landscape of non-custodial sentencing

As noted earlier, one of the changes in the *CJA 2003* involved condensing several components of community sentences into a single generic Community Order (CO). Simultaneously, the suspended sentence order (SSO) was introduced; although classified as a custodial sentence, it is discussed in this section as the presumption is that it is served in the community unless the offender fails to comply or re-offends. It is pertinent to consider, first, whether changes to the availability of non-custodial sentences, and growing recognition that short prison sentences are damaging to those who serve them and do not protect the public (Magistrates Association, 2010), have resulted in a changes in the use of custody; and, second, how sentencers make decisions about appropriate non-custodial sentences.

Table 6.7 shows that while the overall use of custodial sentences has changed very little, there has been a change *within* non-custodial sentencing, with a dramatic reduction in the

use of fines for men and women. Sentencers may have been discouraged from imposing fines on women because of the acute levels of economic disadvantage and financial responsibility which many women offenders face. However, whilst well-intended, avoiding fines can push sentencing upwards by skipping that first stage of sentencing (Dowds and Hedderman, 1997; Player, 2005; Malloch and McIvor, 2011). Moreover, where sentencers felt that the woman required active intervention, up-tariffing was sometimes a temptation. Sometimes this temptation was recognised and resisted, as the following exchange illustrates:

M1M *Sometimes you get a shoplifter and sometimes you look at her, and the guidelines is a fine, but you think 'I really would like to do something different for this individual'.*

M2F *But you'd need considerably more information to do that and, if it was a normal theft, you wouldn't hear any background. You'd hear it's Ms Bloggs and she went to Morrison's and stole a can of beans, you'd think 'conditional discharge'.*

However, in another case, the magistrate justified sentencing a shoplifter to a CO by saying, '[S]he didn't really reach the threshold to make a community order but somehow we wangled it'. This decision reportedly led to positive outcomes for the woman concerned, who accessed valuable support from TWP while she was on the CO. However, whilst these magistrates' desires to offer more supportive and constructive responses to offenders are well-intended, they are problematic for several reasons. First, while the intention may be to help, it comes at the cost of creating, or adding to, a criminal record which is both stigmatising and likely to add to a woman's disadvantage. Second, such an approach can backfire if offenders' (typically chaotic) lives mean that they are unable to comply with the conditions of the order and may then face custody for breach. Third, skipping out earlier steps in the sentencing tariff means that women have

less distance to travel before 'running out of road' if they reoffend and, again, finding themselves at risk of custody (Hedderman and Gelsthorpe, 1997; Player, 2005).

Table 6.7 here

The figures in Table 6.7 also seem to confirm Stanley's (2009) contention that the introduction of SSOs in the *CJA 2003* has largely replaced non-custodial sentences rather than custodial ones for women and for men. However, this overall pattern masks differences in sentencing behaviour between the two court levels. At the magistrates' court (Table 6.8), the overall pattern is one of SSOs rising as fines decline, with custody rates remaining stable (though with some annual fluctuation). Combined with the tougher breach requirements of the *CJA 2003* and the attitudes magistrates expressed about those with previous offences running out of road, this challenges the idea that non-custodial sentences are a diversion from, or alternative to, custody in the Magistrates' courts.

Table 6.8 and Table 6.9 here

At the Crown Court (Table 6.9), the increasing use of SSOs seems to be associated with a steep reduction in the use of COs but also, as intended, in the use of immediate custody. Some judges, though, clearly had reservations about using SSOs because of the possible repercussions when such orders are breached. For one, this particularly applied to women:

J6M *Rare that I would give a woman a suspended sentence order....I can't really think of the sorts of cases where I would do that...because if a suspended sentence is linked to something like a drug rehabilitation requirement, I just think that's....it's almost setting people up to fail, often.*

Echoing these concerns, and given that around one in ten COs and SSOs are terminated for breach each year (Ministry of Justice, 2013c) and that breach can lead to a custodial sentence being activated, especially for SSOs, the notion of *diversion* from custody is highly conditional and often short-lived. Consequently, many offenders will be imprisoned because of breach, even when a custodial sentence was not initially deemed to be proportionate to the offence(s) committed. Whilst this is an issue for men too, the complex needs profiles of women offenders means that the likelihood of them breaching an order is heightened by the social, economic and psychological vulnerabilities and care responsibilities which are commonplace within this offending population (Malloch and McIvor, 2011). One judge for example explained one woman's complete non-compliance with a SSO:

J4M *It was because....as a result of the woman's personality, um and experiences of being the victim of serious abuse, with drug and, I think, alcohol problems, and a chaotic um lifestyle. She simply did not have the resources, err in terms of her personality, to commit herself to do this. That's not a criticism of the recommendation. It was worth trying. But she, with the benefit of hindsight, simply um breached um in a wholesale way.*

In contrast to multiple accounts of non-compliance with COs and SSOs, alongside the recognition by most that prison is counter-productive for women, all participants were overwhelmingly positive about the availability of the holistic, woman-specific and flexible nature of TWP centres. The informality, availability of childcare and emphasis on the centres being a woman-only 'safe space' were all hailed as being key to the success of TWP. However, whilst recognising that men's and women's different needs are important to the design of effective interventions, there were different stances regarding what constitutes equality in sentencing – namely, treating women *differently* in

an attempt to better respond to their needs, or treating women *the same* as men in order to ensure parity (Carlen, 2002a; Hudson, 2002; Easton and Piper, 2008; Player, 2012).

Yet concerns about differences in sentencing decisions can overlook the critical issue of whether a 'menu' of community sentences originally designed to respond to male offenders – as some interview participants themselves noted – affords equality to women. As Corston (2007, p.50) suggested 'more is needed by way of alternative sanctions and disposals, which are gender specific and in which sentencers can have confidence'. Key questions requiring further investigation are first, how suitable existing community sentences are for women; second, how sentencers decide which requirements to impose on women; and third, whether gender shapes these decisions. For example, sentencers' recognition of women's multiple and complex needs and vulnerabilities – as evidenced in the interview study – may lead to well-intended decisions to offer as much 'help' as possible either by prolonging an order or by including multiple components within the order. Unfortunately, as Carlen (2002b, p.202) noted over a decade ago, when women fail to comply there is a severe risk of 'carceral clawback'. Thus an apparently welfarist approach may jeopardise equality and proportionality, particularly where women are not physically or psychologically ready to accept the mandated support, and are subsequently penalised for their non-compliance by an even more onerous order, or a custodial sentence.

A further consideration is that some of the components of COs have been deemed less suitable for women offenders; for example, concerns have been raised about curfews posing risks to women in abusive relationships as well as interfering with their care commitments (Ministry of Justice, 2011)¹⁰. Unpaid work may also be considered unfeasible

due to women's care commitments and patchy provision of women-only opportunities which may become even more scarce under a payment by results regime (Gelsthrope and Hedderman, 2012). Therefore, as with up-tariffing, the perceived unsuitability of certain components of community sentences shortens the road to custody by reducing the options available to sentencers.

Conclusions

The statistical analysis presented in this chapter has identified important changes in the sentencing of women, whilst the qualitative data from interviews with sentencers have offered deeper insights into how they make decisions about sentencing women. The key findings are as follows:

- Whilst the number of women (and men) entering the criminal justice system declined between 2007-2011, policy changes have led to fewer pre-court disposals and increased prosecutions for less serious offences. The combined effect of 6,000 more women appearing in court and 230,000 fewer men is likely to be (mis)perceived by sentencers as a sign that women's offending is on the increase.
- Following an unprecedented rise in the prison population in the 1990s, the overall use of custody has been stable since the Millennium. This is because most women are sentenced by magistrates for relatively minor offences and magistrates' use of immediate custody has remained fairly static. However, although judges deal with intrinsically more serious offences, there has been a marked drop in the extent to which they sentence women to immediate custody.

- The above finding contradicts the perceptions of interviewed magistrates, where the use of custody was described as having reduced substantially and being an inevitable 'last resort' after exhausting all other options.
- Greater changes have been witnessed within non-custodial sentencing the use of SSOs, introduced by the *CJA 2003*, has increased at both the magistrates court and at the Crown Court. However, at the magistrates' court, the SSO has largely replaced other community orders, whereas at the Crown Court it has also had the intended effect reducing the use of custodial sentences.

Replacing community sentences with SSOs is a worrying development, as breach is likely to lead to imprisonment, even when the original offences does not merit such a sentence.

These findings show that the sentencing of women takes place amid shifting and contradictory policy messages, legislation and media representations. On the one hand, sentencers have been alerted to the need to avoid short custodial sentences, both from a resourcing perspective and through recognition of the accentuated and often disproportionate consequences of imprisonment for women. On the other hand, sentencers' perceptions of women's offending as being on an upward trajectory, with images of young women being 'out of control' and mirroring men in their use of alcohol and violence, potentially justify harsher sentencing as a deterrent. Further still, whilst growing sensitivity to how women's vulnerabilities shape their offending have highlighted the limitations of criminalising women, some sentencers still see treating men and women identically as fulfilling their gender equality duty. Meanwhile, others respond with well-intended yet problematic overuse of the criminal justice system, up-

tariffing to give women some 'help' rather than a discharge or a fine, or overloading women on COs in order to address their complex needs.

Alongside these competing messages, the application of new legislation - particularly the *CJA 2003* - has seen an overhaul in sentencing, with three principal issues for this discussion being the condensing of various levels of community sentence into one general CO, the introduction and popularity with sentencers of SSOs, and the more stringent and less flexible procedures for managing breaches of COs and SSOs. This latter issue means that while the use of COs and SSOs ostensibly demonstrate a commitment to diversion from immediate custody, these sentences can become a 'back door' into custody for those who fail to comply. Comprehensive, recent statistics on how many women enter custody due to breach are not readily available. However, further investigation is needed into the gender-specific barriers which may make women's successful completion of COs and SSOs less likely and consequently raise concerns about equality and proportionality when custody is imposed for breaching the conditions of an order for an offence which does not pass the custody threshold. Differences between how women are sentenced in the magistrates' and Crown courts are also important as this and other previous studies have shown. Judges' more critical attitudes towards the use of custody for women suggest that they have been more influenced by campaigns to reduce the use of custody – in particular, short prison sentences – for women, and moreover, through their different case mix, have a different view of what constitutes 'seriousness' compared to magistrates. Whereas judges are more likely to see seriousness as intrinsic to the act committed, for magistrates, persistence in offending and non-compliance with orders tend to signify seriousness.

Sentencers spoke very positively about gender-specific interventions such as TWP, but magistrates did not see this as an alternative to custody. This was partly because, at the time of interview, they did not think attendance could be made mandatory, although some judges described using it in this way on a number of occasions. More generally magistrates found the concept of 'alternatives to custody' inherently problematic, arguing that they never considered custody unless there was no alternative. This finding replicates that of earlier studies and is a particular point of concern for that reason.

Sentencers also had different understandings of what gender equality means in sentencing. At the heart of these debates is the question of whether equality is achieved by treating all offenders in the same way, or conversely whether pre-existing differences justify different sentencing responses. Concerns about discriminating against male offenders by treating women differently ignore the pre-existing gender differences in the causes of crime, impacts and effectiveness of different sentences, particularly regarding the ability of those sentences to address the causes of women's offending and the risk of reoffending. What emerges from this analysis is a conundrum: on the one hand, women offenders are recognised as having specific needs and vulnerabilities which current gender-neutral sentencing options cannot adequately address. On the other hand, the commitment to an understanding of equality which necessitates sameness rather than difference in sentencing means that women offenders are expected to respond to both custodial and noncustodial sentences which have predominantly not been designed with their particular needs in mind, with only minor adjustments to content. Unfortunately the latest statement of strategic policy objectives for women issued by the Government (Ministry of Justice, 2013e) reifies rather than addresses this fundamental dilemma.

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Table 6.1
The prison population under sentence 2000-2012

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Men	42,822	43,545	46,128	48,458	50,189	51,327	52,368	54,007	56,270	56,882	57,088	59,951	61,394
% change		2%	6%	5%	4%	2%	2%	3%	4%	1%	<1%	5%	2%
Women	2,336	2,524	2,877	3,112	3,091	3,153	3,185	3,009	3,164	3,088	3,098	3,112	3,136
% change		8%	14%	8%	-1%	2%	1%	-6%	5%	-2%	0	0	1%

Home Office (2004b) Table 8.6 and Ministry of Justice (2013c) Table A1.6.

Table 6.2
Number and percentage of women convicted of indictable offences

Offence	2000		2012	
	Thousands	Per cent	Thousands	Per cent
Violence	2.1	6.3	3.1	8.6
Sexual offences	0.0	0.0	0.1	0.3
Burglary	0.5	1.5	0.7	1.9
Robbery	0.2	0.6	0.3	0.8
Theft and Handling	17.8	53.1	19.8	55.2
Fraud and Forgery	4.5	13.4	4.1	11.4
Criminal damage	0.5	1.5	0.5	1.4
Drugs	3.7	11.0	3.6	10.0
Other (non-motoring)	3.9	11.6	3.7	10.3
Motoring	0.4	1.2	0.2	0.6
Total	33.5		35.9	

Home Office (2001b) Table 5.6 and Ministry of Justice (2013d) Table Q5b. Percentages may not add to 100 due to rounding.

Table 6.3
Number of out of court disposals and court proceedings by gender (all ages), 2007-2011

	Females			Males		
	Out of court	Court Proceedings	Total system	Out of court	Court Proceedings	Total system
2007	28.8%	71.2%	484,891	23.8%	76.2%	1,807,037
2008	26.7%	73.3%	463,442	23.1%	76.9%	1,644,142
2009	24.0%	76.0%	487,853	21.4%	78.6%	1,610,029
2010	20.7%	79.3%	458,832	19.0%	81.0%	1,518,022
2011	19.5%	80.5%	436,231	19.4%	80.6%	1,413,067

Ministry of Justice (2012) Table 4.01. These were the most up-to-date figures at the time of writing. Breakdowns for 2000-2006 and separate figures for different age groups are not available.

Table 6.4
The sentencing of adult women to custody, 2000-2012

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total Custody	6,337	6,546	7,228	7,413	7,491	6,898	6,540	6,522	7,124	6,913	7,199	7,562	7,015
Total Sentenced	225,914	208,111	228,763	230,222	248,043	250,127	245,008	255,231	253,514	278,395	272,775	270,437	270,641
Percent Custody	2.8%	3.1	3.2%	3.2%	3.0%	2.8%	2.7%	2.6%	2.8%	2.5%	2.6%	2.8%	2.6%
Custody – indictable	5,500	5,700	6,357	6,416	6,423	5,839	5,579	5,629	6,231	6,017	6,275	6,585	6,061
Sentenced Indictable	33,600	33,500	36,387	37,474	35,960	33,580	32,176	33,391	35,198	37,450	40,398	39,640	35,867
Percent custody	16%	17%	17%	17%	18%	17%	17%	17%	18%	16%	16%	17%	17%
Av length months	N/A	N/A	11.4	11.5	11.6	11.2	10.9	10.6	10.7	11.0	10.3	11.0	10.7

Ministry of Justice (2009) Tables 2f and 2j and Ministry of Justice (2013d) Table 5d. The notation 'N/A' in this and subsequent Tables signifies that the particular breakdown was not available and that it could not be calculated accurately, or on a comparable basis, from the information which was available.

Table 6.5
The use of custody for adult women sentenced for indictable offences by court venue (2000-2012)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Crown Court													
Use of custody	42%	45%	44%	41%	42%	39%	38%	37%	37%	36%	32%	36%	35%
Sentenced indictable	5722	5645	5,952	6,209	6,476	6,661	6,677	7,181	7,943	8,449	8,953	9,048	7,852
Av length months	21	24.2	24.7	25.3	24.4	22.4	21.7	20.6	20.5	20.1	20.3	20.5	21.3
Magistrates' Courts													
Use of custody	11%	12%	12%	12%	13%	12%	12%	11%	12%	10%	11%	11%	12%
Sentenced indictable	27,946	27,282	30,435	31,265	29,484	26,919	25,499	26,210	27,255	29,001	31,445	30,592	28,015
Av length months	2.3	2.3	2.3	2.3	2.2	2.2	2.1	2.1	2.0	2.0	1.9	2.0	2.0

Home Office (2002) Table 7.13, Home Office (2004b) Table 5.2, Ministry of Justice (2009) Table 2.h and Ministry of Justice (2013d) Table 5a.

Table 6.6
Proportion of adult women (over 21) convicted of indictable offences who were sentenced to immediate custody at the Crown Court

Offence	2000	2012
	% custody	% custody
Violence	33	33
Sexual offences	(67)	(73)
Burglary	53	59
Robbery	75	70
Theft and Handling	41	34
Fraud and Forgery	32	28
Criminal damage	25	43
Drugs	55	31
Other (non-motoring)	30	32
Motoring	(32)	21
Average all indictable offences	42	35

Home Office (2001b) Table 7.16 and Ministry of Justice (2013d) Table S2.1(G).

() less than 100 cases.

Table 6.7
The sentencing of adult women and men (over 21) for indictable offences, 2000-2012

	Women		Men	
Sentence	2000	2012	2000	2012
	%	%	%	%
Fine	22	15	28	19
Community Orders	33	28	24	22
Suspended Sentence	2	14	1	11
Immediate Custody	16	16	30	31
Other	27	27	17	17
Numbers	33,600	36,108	184,700	205,936

Home Office (2001b) Table 7.10 and Ministry of Justice (2013d) Tables 5c and 5d.

N.B. Hedderman (2004) separated Discharges from 'Other' sentences but the published statistics no longer provide this breakdown.

Table 6.8
Changes in magistrates' court sentencing of women (over 21) following the CJA 2003

Sentence (%)	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Fines	24	25	22	20	18	17	18	19	19	19
Community Orders	32	30	32	33	31	31	32	32	31	31
SSO	0	0	1	3	7	7	6	7	7	7
Custody	12	13	12	12	12	12	12	10	11	11
Other	32	33	33	32	33	33	32	31	32	32
Numbers	30,713	31,405	28,206	27,067	25,137	26,359	28,025	29,290	31,678	30,218

Ministry of Justice (2013d) Table Q5.d. Differences between base numbers and percentages shown in this Table and Table 5 reflect differences in the source figures.

Table 6.9
Changes in Crown court sentencing of women (over 21) following the CJA 2003

Sentence (%)	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Fines	2	2	2	2	2	1	1	1	1	1
Community Orders	41	41	40	39	28	22	23	23	25	22
SSO	6	6	7	12	25	31	32	34	33	35
Custody	43	41	41	39	37	37	37	35	33	36
Other	9	9	9	9	8	8	7	7	8	6
Numbers	5,988	6,349	6,317	6,921	6,568	7,522	8,050	8,516	9,125	8,882

Ministry of Justice (2013d) Table Q5.d. Differences between base numbers and percentages shown in this Table and Table 5 reflect differences in the source figures.

¹ The Sentencing Guidelines Council (2004) guidelines on the use of sentences introduced by the CJA(2003) were not prescriptive about the number of requirements which might be imposed but only mentions the idea of imposing 'two or more' when discussing cases on the cusp of custody. More explicit guidance is provided in relation to the use of suspended sentence, requiring 'a court to be satisfied that the custody threshold has been passed' (p.24). Since April 2010, following the implementation of the Coroners and Justice Act (2009), the courts are required to follow, rather than simply 'have regard to' the guidelines.

² See Gelsthorpe, Sharpe and Roberts (2007) for a detailed discussion of the key characteristics of effective community-based services for women

³ One judge declined to be recorded and the recording equipment failed in one of the interviews with magistrates. In both cases, detailed notes were taken and subsequently typed up.

⁴ Participant codes indicate J or M for judge or magistrate respectively, the identification number and finally, M or F for male or female.

⁵ Ministry of Justice (2008) Table 3.3 and Ministry of Justice (2013d) Table Q2.4.

⁶ Ministry of Justice (2013d) Table Q7.d.

⁷ Ministry of Justice (2013d) Table A7.2.

⁸ See Hedderman and Moxon (1992) for a study which (unusually) compared the sentencing of cases at the Crown and magistrates court having taken into account a number of mitigating and aggravating factors including offence seriousness. This found that the Crown Court often imposed sentences within the range of magistrates' sentencing powers.

⁹ Sentencers interviewed by Hough, Jacobson and Millie (2003) also suggested that magistrates were particularly likely to view custody as inevitable because of the offender's previous offending and sentencing history, rather than because of the intrinsic seriousness of the current offence.

¹⁰ Despite these concerns, it is worth noting that the Coalition's government's *Strategic Objectives for Female Offenders* policy paper suggests that curfews and tagging be used to strengthen non-custodial sentences for women offenders (Ministry of Justice, 2013e).