

only the societal costs, but also the costs to migrant communities or to BME communities?

- is there a proven need for the ‘hostile environment’ in its present form?
- how ingrained already is the culture of suspicion which almost inevitably becomes part of the outsourcing of immigration control, and can it be reversed?

Some answers may, over time, come from different sources.

The forthcoming judicial review proceedings between JCWI and the Home Secretary will explore potential breaches of both human rights and equality law and highlight the need for evaluation of the impact of the ‘right to rent’. The proposed compensation scheme for Windrush victims of the ‘hostile environment’ may provide answers to some of the questions about impact and costs to individuals, which will be further explored in any individual legal claims. Further legal challenges are likely to follow.

JCWI and Liberty are jointly calling for an

independent commission to investigate the HO and its ‘hostile environment’ policies

The authors note that, before the Windrush scandal, the Chief Inspector of Borders and Immigration was told that one major aim of the HO Interventions and Sanctions Directorate was ‘to develop their range of partners and increase the scope of sanctions to the extent that illegal migrants will come into contact with Immigration Enforcement, either directly or indirectly, each time they try to access any benefit or service...’⁴⁵

Drawing on all of the above, the authors consider that, as a matter of some urgency, good governance now calls for the ‘hostile environment’ to be objectively, openly and thoroughly evaluated through suitable government and/or external mechanisms; only with the results of such evaluation should the government even consider taking any further steps to extend or tighten the web which comprises the ‘hostile environment’.

45. *An Inspection of the ‘hostile environment’ measures relating to driving licences and bank accounts*, January to June 2016, Independent Chief Inspector of Borders and Immigration, 2016, para 7.19

The impact of sentences of imprisonment upon women

Kate Lill, barrister and Prisoner Advice Service’s women prisoners’ caseworker and Paramjit Ahluwalia, barrister, Lamb Building Chambers specialising in criminal law, examine the facts around the imprisonment of women and the impact of imposing a custodial sentence on them. They argue that women are currently gravely disadvantaged by a system largely designed by men for men. The sentencing of women needs, and deserves, a gender specific approach.

Introduction

This article addresses key themes on the impact of prison sentences on women:

- why does gender even matter when it comes to sentencing?
- how sentencing decisions impact on a woman’s experience of prison
 - IPP sentences
 - early release
 - mothers in custody.

Women are one of the most vulnerable groups in prison; they have wholly different experiences and needs to their male counterparts.

Although women may only comprise five per cent of the overall prison population, this amounts to nearly 4,000 women in prison at any given time,¹ and in fact

10 per cent of prison receptions.

Many women prisoners have been victims of crime, domestic violence and sexual abuse before imprisonment. More than 80 per cent of women prisoners in England and Wales are imprisoned for non-violent offences. The impact of imprisonment is severe in comparison to male counterparts. Women tend to be sentenced to short periods in custody with nearly two-thirds being jailed for six months or less.² But such sentences are long enough to result in them losing employment, housing and their children.

Our current penal system was originally designed for men, from the layout of prisons, to the education and training it provides, to medical care, to visits, and security procedures. Little adaptation has taken place to reflect the specific needs of women. Whilst there

1. On June 15, 2018, there were 3,867 women in prison in England and Wales.

2. <https://news.sky.com/story/more-women-to-be-spared-jail-under-new-justice-system-strategy-11386673>; May 2018

is a specific Prison Service Order (a type of rule that governs prison procedure) for Women Prisoners (PSO 4800), it only came into force in 2008, and has not been substantively updated since, despite the adoption of the Bangkok Rules³ in 2010.

Why should gender even matter when it comes to sentencing?

The Sentencing Guidelines Council currently issues offence specific guidelines and there is a definitive guideline in relation to the sentencing of children and young people.

A sentencing code is currently being proposed by the Law Commission, with the aim of providing a comprehensive source of sentencing law, simplifying complex provisions, rewriting the law in modern language and providing one single source of information.

However there is no specific guideline (or proposed guideline) in relation to women. There is no requirement for sentencers to really consider the long-term impacts upon women of imprisonment and the gender specific needs of women.

Some may ask why should that even be necessary, and why a distinct consideration of the impact of imprisonment upon women ought to be considered in sentencing decisions and policy.

Firstly, the statistical facts faced by our current criminal justice system in the UK (taken from Women in Prison⁴ website):

- 57% of women in custody have been victims of domestic violence
- 79% of women whom Women in Prison have assisted have reported experiencing domestic violence or sexual abuse
- 53% of women in custody have experienced emotional, physical or sexual abuse as a child
- 26% of all women in custody have no previous convictions
- 46% of women in prison report having attempted suicide at some point in their lifetime; twice the rate of men (21%) and more than seven times higher than the general population
- 30% of women have previous psychiatric admission prior to prison
- Women in custody are five times more likely to

have a mental health issue than women in the general population

- On release, around one-third of women prisoners have lost their homes and often their possessions whilst in prison
- For 85% of mothers, prison was the first time they had been separated from their children for any significant period of time.

Bangkok Rules – a tool that ought to be used far more often in sentencing decisions?

The Bangkok Rules, to which the UK is a signatory, although not binding, provide soft law which has been referred to within sentencing appeals, such as *R v NR* [2017] 1 Cr App R (S) 42.

Rules 60 and 61 are most critical and highlight that:

Appropriate resources shall be made available to devise suitable alternatives to women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services. [Rule 60]

When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds. [Rule 61]

Why do sentencing decisions even matter?

Domestic abuse – key example

To ignore the statistic that 57% of women in custody have faced domestic abuse is illogical and renders the value of rehabilitation in sentencing decisions to nil – instead, exacerbating the cycle of violence, victimisation and at the same time damaging positive efforts made within key areas of policing and legislative reform to combat domestic abuse.

Baroness Corston recognised back in 2007⁵ that

3. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders – 70 Rules which provide guidance to any person or body working in criminal justice to assist the reduction in imprisonment of women and how to meet their specific needs when imprisonment is unavoidable.

4. Women in Prison is a campaigning charity which providing services for women and supports them to avoid and exit the criminal justice system; <http://www.womeninprison.org.uk/>

5. Baroness Corston conducted a review of women in the criminal justice system in 2007. The Home Secretary commissioned this review following the tragic death of six women at HMP Styal. The Corston Report *A review of women with particular vulnerabilities in the criminal justice system* made recommendations for women-specific criminal justice reform; however many of these recommendations have not been implemented, or only partially so. <http://webarchive.nationalarchives.gov.uk/+http://www.homeoffice.gov.uk/documents/corston-report/>

'women with histories of violence and abuse are over represented in the criminal justice system and can be described as victims as well as offenders'.

The Prison Reform Trust published a report in December 2017 *There's a reason we're in trouble*⁶ which investigated the ramifications of domestic abuse as a driver to women's offending. Two key aspects came out through the report:

- There is a need for police, prosecuting authorities, probation services and the courts to adopt the practice of appropriate, routine enquiry into women's histories of domestic and sexual violence at each stage of the criminal justice process to ensure informed decision-making and proportionate responses.
- There is a lack of any effective defence for women victims/survivors of domestic abuse whose offences arise from coercion or duress as part of an abusive relationship.

Currently there is no statutory definition of domestic abuse but it is hoped this will be introduced through the Domestic Violence and Abuse Bill.⁷ The current proposed statutory definition is *'any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been intimate partners or family members regardless of gender or sexual orientation but is not limited to:*

- *psychological*
- *physical*
- *sexual*
- *economic*
- *emotional*'.

The co-existence of victimisation and offending is now better recognised (for example see impact of the statutory defence in s45 Modern Slavery Act 2015 in relation to victims of modern slavery and trafficking). However, important work in this area is needed to really have an impact on the ground.

Some of the suggested recommendations by the 2017 Prison Reform Trust report were:

- better and earlier identification of individuals within the criminal justice system who have suffered from domestic abuse
- investment into early diversion and community based solutions for women offenders affected by domestic and sexual violence, including out-of-court disposals and women's centres
- Ministry of Justice to work with local authorities

6. http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf

7. The consultation process on this Bill was completed at May 31, 2018.

and the voluntary sector to ensure women leaving custody are provided with safe accommodation, including specialist refuge accommodation.

Early interventions, increased use of diversion and out-of-court disposals and the holistic support and work of women's centres are crucial. Not only is it more cost efficient but it actually works. Working not merely in the sense of recidivism, but also in relation to the aim of seeking to identify and reduce domestic abuse.

Custodial sentencing

Despite the above, women are still receiving custodial sentences. It is noteworthy that the Justice Secretary David Gauke has highlighted concerns in an interview with Sky News on May 27th this year:

A lot of female offenders, for example, are themselves victims of crime, quite a high proportion are victims of domestic abuse themselves ... a lot of them are non-violent, a lot of them [have] complex mental health issues we need to address ... I think there is a very good point in saying that of the 4,000 or so female offenders who are in custody, how many of them can be dealt with through other means? ... Non-custodial sentences [and] ... more support in the community rather than within prisons is something we have to look at.

Perhaps the shift sought is in understanding the impact of specific types of sentences upon women and how they affect their every day life – from all agencies within the criminal justice system.

Sentences of Imprisonment for Public Protection (IPP)

Despite their abolition in 2012, many women are still in prison serving IPP sentences and some are many years over their term.⁸ It is not uncommon for a woman to have received a low minimum term (e.g. 18 months) to find herself ten years over her minimum term still languishing in prison. This is clearly not what was intended by either the sentencing judge or parliament – which eventually abolished the sentence because of its inherent unfairness – but the disconnect between the courts, prisons and the Parole Board has resulted in a system in dire disrepair.

The resources needed to help a woman 'reduce her risk' are gravely limited within prison. Women are therefore left with little support to help them progress

8. Women sentenced to an IPP were given a minimum tariff (term) which is the number of years they must spend in prison before they are eligible to be considered for release. The Parole Board will only direct an individual's release if they are satisfied that their detention is no longer necessary for the protection of the public.

through their sentence and ultimately be released from custody. Even when the Parole Board accept that a woman's risk can be managed in the community, release is being delayed, or in some cases prevented, due to the lack of adequate available housing required by women with specific needs. This very issue was considered only last year by the Supreme Court in the case of *R (on the application of Coll) v Secretary of State for Justice* [2017] UKSC 40.

Even when women are released they are subject to a very long licence which could ultimately run indefinitely⁹, constraining them significantly in living their lives post release. Women can be recalled to prison for even minor breaches of their licence conditions. With a standard condition to '*be of good behaviour and not behave in a way which undermines the purpose of the licence period*', it is relatively easy to slip up. Women could ultimately remain in prison forever following their recall, as the Parole Board are even more risk adverse once a woman has been tested in the community and deemed to have 'failed'.

The Parole Board recognise the urgent need to view IPP prisoners differently and make efforts to assist them to progress through their sentence, and aimed to have the majority of IPP prisoners safely released by the end of 2017. This has not happened, and this approach has yet to be adopted routinely by panel members.

Early release

Home Detention Curfew (HDC), most commonly known as tag, is the way in which women serving shorter sentences can be released into the community early. Women serving sentences of less than four years qualify for HDC, although there are numerous exemptions. This procedure is not widely known by the sentencing courts, and numerous women are finding themselves ineligible for early release simply because they are serving one day more than the law allows (a determinate sentence of four years). A sentence of three years and 364 days could mean an extra 135 days in the community, providing a woman with vital time to re-engage with community life, including housing and family ties.

Mothers in custody

About two-thirds of women in prison are mothers of children under the age of 18. It is estimated that 17,000 children a year are directly affected by their mothers being imprisoned, and only 1,000 of them remain in their family home after their mothers have

been sentenced. Not only does this separation have a negative impact on the maternal/child relationship, it can permeate every area of the children's lives and, for some, it has long lasting effects. The impact of maternal imprisonment is far more severe than the impact of a father being sent to prison.

Gender based approach

Sentencing a woman with children to a custodial term for a first offence of a non-violent nature calls out for a distinct and gender based approach.

Although the sentencing courts may believe it is easy to maintain contact with children when in prison, this is far from the reality. With only 12 women's prisons across England and Wales, mothers can be imprisoned hundreds of miles away from their children, making visits near impossible. It is possible to be granted temporary release from prison purely to maintain and develop a parenting bond, however Childcare Resettlement Licences¹⁰ are routinely being denied or misapplied to women who qualify.

Long sentences can also interfere with a pregnant or new mother's hope of being granted a place on a Mother and Baby Unit (MBU). As babies are only able to remain on a MBU for approximately 18 months, sentences of more than three years (as only half of the determinate term is served) generally preclude a woman from keeping her child in prison so they will have to be separated at some point in the future. Community disposals are clearly the most appropriate sentence for nearly all women as they allow them to maintain their maternal relationships.

Many areas of a woman's life in prison, and her release, are affected by the type or length of sentence she is serving; however with little knowledge of the system themselves, and the absence of legal aid for most areas of prison law, they are unable to navigate through the system successfully. Even when they are aware of their rights, it should be noted that women – unlike men – avoid confrontation and often avoid complaining. Many women would rather keep their head down than seek help.

Both sentencing decision-makers and policy-makers need to consider the factual reality of the consequences of sentencing practices in order for women to be treated equally and fairly within the criminal justice system. They are currently gravely disadvantaged and

9. An IPP prisoner can apply to have their licence removed after ten years.

10. If a prisoner can show s/he had sole caring responsibility for a child under 16 prior to custody and would still if not in prison, s/he is eligible to apply for temporary release under a Childcare Resettlement Licence. This enables a woman to spend time with her children in the community for a maximum of three nights every two months. The purpose of the licence is to encourage the maintenance of the parent/child tie and to help prepare the parent for the resumption of their parental duties on release.

are in need of, and deserve, a gender specific approach. Those who work with women in this area are trying their best to achieve this aim.¹¹

To go back to the words of Baroness Corston in 2007:

It is time to ‘bring about a radical change in the way

11. The Prison Reform Trust has a programme on reducing women’s imprisonment; see *Why focus on reducing women’s imprisonment* (a revised version of this briefing is planned for July 2017)

we treat women throughout the whole of the criminal justice system and this must include not just those who offend but also those at risk of offending. This will require a radical new approach, treating women both holistically and individually- a woman centered approach ... Women have been marginalized within a system largely designed by men for men for far too long ...

On June 27th, the government announced a new Female Offender Strategy under which it will shelve its plans for five new women’s community prisons and instead set up at least five women’s residential centres in a pilot scheme. See news on page 33.

861 Briefing 861

Landmark decision on workers’ rights

Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29; June 13, 2018

Implications for practitioners

The SC has dismissed Pimlico Plumber’s appeal and upheld the judgment of both the ET, the EAT and the CA, that Mr Smith (S), a plumber, is a worker within the meaning of s230(3) Employment Rights Act 1996 ERA, a worker within the meaning of Regulation 2(1) Working Time Regulations 1998 (WTR) and was ‘within employment’ for the purposes of s82(a) Equality Act 2010 (EA). S can now proceed with his claim for disability discrimination and a failure to make reasonable adjustments.

The facts and background to this case were reported in Briefing 833, July 2017. Whilst the judgment does not make any new or unexpected statement about the law, it does provide a very thorough analysis of the key principles which influence the courts in making decisions about worker status, and is recommended reading for anyone advising on, or concerned about their own, employment status.

Supreme Court

In giving the SC’s judgment Lord Wilson focused on the central question in this case, which is where do the boundaries lie between a right to substitute and the requirement of personal service for worker status? When, he asks, does a substitution become inconsistent with that status?

Lord Wilson explained that the lower courts had been entitled to find that S did provide personal service, despite an informal right for him to substitute another worker from Pimlico if he could not do a job

he was booked for. The SC accepted the analysis and findings of fact of Judge Corrigan in the ET that, in reality, the substitution, which was not provided for contractually, was akin to swapping a shift with another worker. The informal arrangements were not covered by S’s contract with P and applied only to other Pimlico plumbers who were already acceptable to the company.

Distinguishing this set of facts from those in other cases, the SC held that the limited substitution, or shift swapping, did not negate the obligation of personal service necessary for worker status.

The SC also considered whether or not the relationship between the parties was one of a client and customer and agreed with the lower courts that it was not.

Comment

This case is a paradigm example of an organisation seeking, and failing, to arrange its affairs so that the people who do the work are self-employed individuals. The analysis of the contractual position, and the findings of fact regarding how work was done and how control was exercised, satisfied all the judges who heard this case that the reality of the legal situation was that S was a worker and protected under the EA as well as the WTR.

Catherine Rayner

7 BR Chambers