

Reducing Women's Imprisonment: an unlikely prospect

Elaine Player considers the prospects for achieving a reduction in the numbers of women sent to prison in the light of the new approach to sentencing and proposed new custodial sentences.

The unprecedented growth of the female prison population of England and Wales appears to be due primarily to tougher sentencing practice in both the magistrates' and Crown courts (Gelsthorpe and Morris 2002; Hough *et al* 2003). Although magistrates and judges have disputed their role in driving up prison numbers, asserting that they only ever use prison as a 'last resort' (Hough *et al* 2003), there is a widely shared view within the Home Office and elsewhere that the population of women in prison is unacceptably high. The need to reduce the numbers of women in prison, particularly those serving short sentences, was one of the key responses to *The Government's Strategy for Women Offenders* (Home Office 2001:p.11), acknowledged by the Home Secretary in his foreword (p.1) and subsequently identified as a priority area for change in the Women's Offending Reduction Programme. (The Women's Offending Reduction Programme aims to develop integrated policies, programmes and spending partnerships across government departments to facilitate a 'joined up' approach to reducing women's offending.)

As in other areas of criminal justice, however, government policy sends contradictory messages and, in consequence, the reduction of women's imprisonment is an unlikely prospect. The first, and most obvious contradiction in relation to the strategy for women is the decision to expand the female estate by commissioning two new women's prisons. The second is the time bomb of the sentencing reforms contained in the *Criminal Justice Bill* 2003, which, if triggered without safeguards are likely to lead to further rises in imprisonment, particularly for women. Two features of particular concern are: the new approach to sentencing, which abandons a primary rationale and allows previous convictions to aggravate sentence severity; and the proliferation of custodial opportunities presented to the courts.

The new approach

Under the present legislation sentencers are expected to give priority to the retributive principle of 'just-deserts', ensuring that the severity of the sentence is proportionate to the seriousness of the crime. The new legislation will require the courts to have regard to a range of sentencing objectives: the punishment of offenders, crime reduction, public protection and victim reparation. Although the

White Paper has emphasised that consistency in sentencing is to remain a fundamental priority (Home Office 2002, para.5.14), exactly how the courts are to balance these potentially conflicting objectives is not clarified and appears to be left either to individual discretion or to future guidance by the new Sentencing Guidelines Council.

The risks that this poses to female defendants arise out of what is known about the ways in which the courts utilise constructions of gender in their sentencing decisions. Hedderman and Gelsthorpe (1997) revealed how, in contrast to men, female offenders are typically perceived by magistrates as 'troubled' rather than 'troublesome' and that, in response to this, their sentences reflect concern for women's welfare rather than an adherence to principles of proportionality. One consequence of this is that many women are propelled up-tariff to a community penalty, and, in the event of re-offending, exhaust their non-custodial 'chances' sooner, becoming eligible for imprisonment earlier in their offending career than if they had started further down-tariff. This risk has been exacerbated further by the proposal to increase sentence severity for repeat offending.

New custodial sentences

The new custodial sentences proposed in the *Criminal Justice Bill* 2003 will replace existing sentences of less than twelve months, which have been universally criticised for failing to offer any significant contribution to crime reduction or public protection (Halliday, 2001). Because three quarters of women prisoners receive sentences within this range, the new sentencing powers will impact substantially on the female prison population. Yet there are good reasons to believe that their effect will not be reductive. Despite reasserting the principle of proportionality, the Bill singularly fails to apply an effective brake to the present trend of imprisonment and risks its acceleration by failing to inhibit net-widening.

Three new sentences are proposed, Custody Plus, Custody Minus and Intermittent Custody, all of which share two common features: the permitted lengths of the sentences and the division of the sentence into two parts, the custodial period and the licence period. Custody Plus ranges from 28 weeks up to 51 weeks and the period spent in the community on licence is subject to conditions tailored to address the recipient's offending behaviour. Breach of the conditions renders the individual liable to recall to custody. In order for offenders to have enough time to engage in meaningful

programmes the minimum licence period will be 26 weeks, rising to a maximum of 49 weeks. Time in custody will range from two to 13 weeks, which, in principle, could reduce the length of sentences, as under the present arrangements half the sentence is normally served before release. However, any such reduction may be undermined by women returning to custody for breaching their licence and by the removal of early release under the Home Detention Curfew, which has enabled many women to be allowed home prior to the halfway point of their sentence. But the reductive potential of Custody Plus is most obviously jeopardised by the risk that the courts will use this sentence more often than existing short sentences. The appeal of the double value of the 'Plus' element will free the courts from having to choose between the punishment of a short prison sentence and the rehabilitative potential of a community penalty, as both will soon be available in one sentence.

Custody Minus has the same features as Custody Plus except the period of imprisonment is suspended for a period of between 6 months and two years. Offenders will only be required to serve the custodial period if they breach the requirements of their licence or re-offend during the period of suspension. If the courts use this sentence to displace immediate imprisonment, it will have an important reductive impact on the numbers of women in prison. However, there is a counter danger that without clearly specified controls, Custody Minus will displace community penalties by providing a more rigorous mechanism that can extend beyond expiry of the licence and thereby test a person's resolve to refrain from offending over a longer term. Although the White Paper described this sentence as a 'last chance' to avoid imprisonment, (Home Office 2002, para. 5.30) there is no presumption in either the White Paper or the Bill that a period of Custody Minus should normally precede a sentence of Custody Plus.

Intermittent Custody requires the custodial part of the sentence to be served on an intermittent basis, such as at week-ends, rather than as a continuous term, and was described in the White Paper as being particularly suitable for some women offenders who have children (Home Office 2002, para.5.34). The obvious appeal is that it has the potential to limit some of the most destructive consequences of imprisonment for women, namely lengthy separation from their children and the prospect of very young children starting life in prison. It is possible that the courts will use this sentence to displace existing short sentences, but there is also a risk that more women will be given a taste of weekend imprisonment as a convenient addition to the community sentences they would otherwise receive.

If the Government's strategy for women offenders is to be achieved some conditions must be attached to the new custodial powers. It cannot

be assumed that the risks outlined above will not materialise, particularly in the present sentencing climate that favours the growth of imprisonment and the growth of community penalties. The Women's Offending Reduction Programme is so far silent on the safeguards that need to be introduced to inhibit the expansionist potential of the new sentences. As a minimum response, the up-tariffing of women offenders has to be addressed as a specific gender issue. The timidity of the government to set a minimum threshold to custody in sentencing policy is one factor that allows sentencing practice to indirectly and unintentionally drive-up the imprisonment of women. As a start, the relationship between each of the new sentences needs to be clarified and their use made subject to limiting conditions. Custody Minus should normally precede a sentence of Custody Plus or Intermittent Custody, and the period of suspension should not be disproportionately extensive in relation to the period of supervision under licence. In order to inhibit the unintended social costs of imprisonment, all short sentences of less than a year should normally be served as Intermittent Custody unless there are specific and compelling grounds of public safety to resort to Custody Plus.

Elaine Player is Reader in Criminology and Criminal Justice, School of Law, King's College, London.

References

- Gelsthorpe, L. and Morris, A. (2002) 'Women's Imprisonment in England and Wales: A Penal Paradox', *Criminal Justice* 2(3) 277-301.
- Halliday, J. (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*. London: Home Office.
- Hedderman, C. & Gelsthorpe, L. (1997) *Understanding the Sentencing of Women*, Home Office Research Study No. 170. London: Home Office.
- Home Office (2002) *Justice for All* (White Paper). London: HMSO.
- Home Office (2001) *The Government's Strategy for Women Offenders: Consultation Report*. London: Home Office.
- Hough, M., Jacobsen, J. and Millie, A. (2003) *The Decision to Imprison: Sentencing and the Prison Population*. London: Prison Reform Trust.