

**SENTENCING  
ACADEMY**

**Fellowship Scheme 2020/21**

**Would replacing short custodial sentences with  
suspended sentence orders better protect the best  
interests of the child when sentencing a mother to  
prison?**

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# INTRODUCTION

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In England and Wales, being a “primary or sole carer for dependent children” is a mitigating factor when sentencing a primary caregiver (Sentencing Council 2019). Despite this, sentencers are not compelled by statutory legislation to consider the best interests of the child or seek any information surrounding that child. Statistically speaking, imprisoned women are much more likely to be primary carers of children than men (Corston 2007; Niven and Stewart 2005) and a body of research suggests that the effect of maternal imprisonment is extremely damaging, particularly more so than paternal imprisonment (Murray and Farrington 2008). Women are more likely to serve short custodial sentences than men (Prison Reform Trust 2019) and research indicates that short custodial sentences are counterproductive for the purpose of rehabilitation due to high recidivism rates and disruption to life. The damaging effects of a mother serving a custodial sentence, particularly a short custodial sentence, is felt by the entire family unit, as the impact continues long after a mother is released.

There are a range of custodial or non-custodial sentences that judges and magistrates can make use of when passing a sentence on a mother. Custodial options consist of imprisonment or a suspended sentence order (conditions can be attached to this, but effectively the person is serving their sentence in the community). While non-custodial sentences consist of community orders, a fine or discharge. The current sentencing policy does nothing to compel judges to give full consideration to a child’s best interests when sentencing a mother. So, with the decline in community orders over the last decade,<sup>1</sup> this paper will first consider the negative impacts of short custodial sentences on women and children. It will then analyse the current law and international attitudes to sentencing women with children. After discussing suspended sentence orders (SSOs), this paper will consider new empirical research, the findings of which support the proposal that a new approach to sentencing should be introduced.

## WOMEN IN PRISON

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Women constitute only five per cent of the entire prison population in England and Wales (Ministry of Justice 2020, p. 5). Yet, despite such a small percentage, there are two times as

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<sup>1</sup> Her Majesty’s Prison and Probation Service, ‘Table 2.5a: Sentenced Admissions into Prison by Sentence Length, Age Group and Sex’; Ministry of Justice, ‘Table Q5.1a - Offenders Sentenced at All Courts, by Offence Group and Outcome, 12 Months Ending March 2009 to 12 Months Ending March 2019’, Overview Tables, Criminal Justice System Statistics Quarterly: March 2019, 15 August 2019.

many women currently in prison as there were in 1993<sup>2</sup> and England and Wales has one of the highest percentages of female imprisonment in Western Europe.<sup>3</sup> Women often commit less serious offences than men and because of this are statistically more likely to be serving a short prison sentence. In 2020, 72% of women entered prison for a non-violent offence,<sup>4</sup> and for prison sentences which started in 2020, 70% of these were for less than 12 months in comparison to 54% for men.<sup>5</sup> Furthermore, 24% of women were found to be in prison for their first offence compared to 14% of men.<sup>6</sup>

## Impact of short custodial sentences on women

Evidence shows that short custodial sentences are ineffective for the purpose of rehabilitation and are counterproductive due to the high rates of reoffending linked to them (Mills 2019). In 1993 only one third of women were imprisoned for less than six months (Hedderman 2012) while in 2020, the rate increased to over half (58%).<sup>7</sup> The increasing percentage of women who serve short prison sentences is particularly concerning because of gender-linked parenting obligations.<sup>8</sup>

Short custodial sentences carry a significantly higher negative impact for women than men. Women are predominantly primary carers of children (Prison Reform Trust 2019), have a much higher risk of reoffending<sup>9</sup> and once released from prison, face greater difficulty obtaining housing and employment than men (Ministry of Justice 2015). The damaging effects which follow a custodial sentence for women, more than half of whom have reported being victims of abuse,<sup>10</sup> can be long-lasting and impact every part of their life as well as their child's.

Women released from prison have greater difficulty in going back to 'normality', particularly when they have served a short custodial sentence. In comparison to 26.2% of men, only 9.4% of women released from prison sentences of less than 12 months successfully manage to obtain employment (Prison Reform Trust 2017). Similarly, it was reported that fewer than one in 20 women obtained employment six weeks after leaving prison in comparison to one in 10

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<sup>2</sup> Table 7.1, Home Office (2004) Offender Management Caseload Statistics 2003 and compared to Ministry of Justice (2020) Offender management statistics: Prison Population 2020; Ministry of Justice (2021) Population and capacity briefing for 25 June 2021 and also see Ministry of Justice (2013) Story of the prison population: 1993–2012 England and Wales.

<sup>3</sup> Table A1.20, Ministry of Justice (2019) Offender management statistics quarterly: Prison Population 2019.

<sup>4</sup> Table 2.5b, Ministry of Justice (2021) Offender management statistics quarterly, October to December 2020.

<sup>5</sup> Ministry of Justice (2020) Offender management statistics quarterly, October to December 2020.

<sup>6</sup> Table A1.20, Ministry of Justice (2019) Offender management statistics quarterly: Prison Population 2019.

<sup>7</sup> Table A2.7, Ministry of Justice (2021) Offender management statistics: Prison receptions 2020.

<sup>8</sup> From census data it appears to still be the case that the majority of primary carers of dependent children in England and Wales are women.

<sup>9</sup> In 2017, 70.7% of women serving short sentences reoffended (Ministry of Justice (2018) Female Offender Strategy) whilst comparatively, the reoffending rate for suspended sentences and community orders was 33% (Ministry of Justice, Proven Reoffending Statistics Quarterly Bulletin, July 2017 to September 2017).

<sup>10</sup> Research shows that women have higher histories of suffering from abuse, mental health conditions and battling substance addictions – see Booth et al. (2018).

men.<sup>11</sup> This is just one of the many obstacles a woman with dependent children will have to face after serving a short sentence and one of the many contributing factors to high recidivism rates for women serving short sentences. The general rate for reconviction within one year of release for women is 48%, however, for women serving sentences of less than 12 months this rate increases significantly to 61%.<sup>12</sup> Over 70% of women who have served a sentence of less than 12 months have reoffended (Ministry of Justice 2018, p. 3).

Another contributing factor to higher recidivism rates and effects on dependent children is the lack of accommodation for women released from prison. A 2002 report showed that female prisoners face barriers upon release as one-third of women lose their “homes and possessions whilst in prison” (Social Exclusion Unit 2002). Additionally, a recent survey found that there is a lack of support for women released from prison as 48% had no housing upon release, 45% had no address and 14% had a temporary address (Independent Monitoring Board 2020). It was discovered that between March 2020 to 2021, more than one in six women released from prison were homeless, and nearly one in 20 were sleeping rough.<sup>13</sup> The lack of housing significantly increases the risk of reoffending as well as preventing women from obtaining benefits, employment and being able to care for their children (Prison Reform Trust 2018). As a result of the lack of accommodation, parental separation is often made much longer than necessary (Prison Reform Trust 2018) thus having an even greater impact on mothers and their children.

Very little has been done to change the long-lasting impacts of short custodial sentences for women and further research suggests that short prison sentences are extremely damaging for women, but even more so for women who have dependent children (Baldwin and Epstein 2017).

### Effects of maternal imprisonment on dependent children

Concerns have been raised in Parliament about the lack of consistent data collection regarding the number of children women have when entering the prison system (Joint Committee on Human Rights 2021). A study by the Ministry of Justice’s Surveying Prisoner Crime Reduction (SPCR) sampled 1,435 prisoners serving a sentence between one month to four years in 2005-2006 and found that around 59% of female prisoners are mothers with an average of two children each.<sup>14</sup> The Howard League for Penal Reform estimated that at least 17,240

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<sup>11</sup> Table 11, Ministry of Justice (2020) Community Performance Quarterly, update to March 2020, Employment Circumstance table (April 2018 to March 2020).

<sup>12</sup> Table 6.07, 6.09, Ministry of Justice (2016) *Women and the Criminal Justice System 2015*.

<sup>13</sup> Table 11, Ministry of Justice (2020) Community Performance Quarterly, update to March 2020, Employment Circumstance table (April 2018 to March 2020).

<sup>14</sup> Hansard HC Deb (16 July 2012), c548W.

children were affected by maternal imprisonment in 2010 (Wilks-Wiffen 2011) and it is only reasonable to assume that since data is not collected consistently, this number is not a true reflection of the number of children affected by maternal imprisonment.

There is a wealth of research showing how maternal imprisonment has a negative impact upon dependent children (Murray and Farrington 2008). Harriet Harman, MP and Chair of the Joint Committee on Human Rights, recently stated that “a young child’s separation from its mother when she’s sent to prison risks lifelong damage” (Joint Committee on Human Rights 2021). Studies have found that there is a clear link between maternal imprisonment and disruptions to a child’s life (Mignon and Ransford 2012). These disruptions have been found to be greater in comparison to when a father is imprisoned and can often lead to additional risks of trauma and long-term effects (Kruttschnitt 2010). Having a mother in prison can have a detrimental impact on a child’s upbringing as maternal imprisonment can directly affect a child’s housing, education, health, and wellbeing (Minson 2017; 2019).

When a mother is sent to prison, around 95% of children are forced to move home, meaning only five per cent children will remain in their family home (Corston 2007). Statistics tell us that nine per cent of children will be cared for by their father, 25% of children will be cared for by grandmothers, 29% by other family members or friends and 12% are placed into the care system (Corston 2007). This demonstrates the disruptions children face as a result of maternal imprisonment.

Children who experience maternal separation are at risk of facing stigmatisation from peers due to feelings of shame (Prison Reform Trust 2018), this stigma can worsen a child’s mental health and eventually lead to social isolation. Concerning too, is the risk of intergenerational offending due to maternal imprisonment (Williams et al. 2012). Research indicates that children who experience maternal imprisonment are at a higher risk of entering the criminal justice system themselves later in life (Murray and Farrington 2008). And for those children who are unable to access support, they have a higher risk of offending as a result of their mother’s imprisonment (Dallaire 2007). As there is a clear lack of data on how many children are affected, it seems likely that many children are left alone to suffer the damaging effects of maternal imprisonment.

# INTERNATIONAL LEGAL PRINCIPLES

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Numerous international legal principles support the argument that domestic criminal courts in all countries should take full consideration to a child's best interests when a parent faces criminal proceedings. The Human Rights Act 1998 alongside the United Nations Convention on the Rights of the Child 1989 recognised that a child's "best interests" should be considered throughout any criminal justice proceeding which could result in separation from a parent. Additionally, the European Convention on Human Rights<sup>15</sup> provides further foundations to support the argument that a child has a 'right' to family life and suggests that the family unit should be a key consideration when sentencing a parent.

The UN Bangkok Rules in 2010<sup>16</sup> recommended that suspended or deferred sentences are preferable for women with dependent children "based on an assessment of the best interests of a child".<sup>17</sup> More recently in 2018, the Council of Europe made similar recommendations to reinforce that member states (including England and Wales) should consider "the rights and needs of their children and the potential impact on them" when sentencing a parent to prison (Council of Europe 2018).

However, despite these international principles, and domestic reports in England and Wales (Corston Report and Farmer Review), a legal principle is yet to be established and made enforceable in England and Wales, which compels a sentencing court to consider the best interests of the child in the context of criminal sentencing.

Looking at countries such as South Africa, Italy, and France we can see that common law principles and statutory legislation have been established to ensure that the best interests of the child are taken into consideration when sentencing a parent.

## International attitudes to sentencing women with dependent children

### *South Africa*

A landmark criminal case which looked at sentencing a mother with children was in South Africa's Constitutional Court in 2007. The case of *S v M*<sup>18</sup> concerned the conviction of a single mother of three children for multiple counts of fraud and the mother received a prison sentence of four years. However, the Court allowed the appeal on the grounds that not enough

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<sup>15</sup> Article 8 the right to family life.

<sup>16</sup> United Nations Rules for The Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (known as the Bangkok Rules).

<sup>17</sup> Ibid, rule 2.

<sup>18</sup> *S v M* (CCT 53/06) [2007] ZACC 18.

consideration was given to the impacts on her children because of her role as a primary caregiver. The original sentence was replaced with a suspended sentence (akin to our suspended sentence) for the term of the original sentence combined with a correctional supervision order for three years and restitution.<sup>19</sup> The Court stated:

*“The purpose of emphasising the duty of the sentencing court to acknowledge the interest of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”<sup>20</sup>*

It was held in *S v M*, that courts should take into full consideration the effects a sentence will have on dependent children and where possible, seek to impose a non-custodial sentence to ensure that the best interest of children are protected.

When looking further at the significance of this case, Skelton and Mansfield-Barry (2015) found that since the ruling, 17 judgments in South African courts have adopted the approach set out by *S v M* and even when a custodial sentence was necessary, appropriate measures were taken to ensure alternative care was organised for the children in question.

Although this case took place in South Africa, its implications are significant as it demonstrates that the rights of a child can be properly considered when sentencing parents. The decision considered the consequential effects of imprisonment on the family unit and a right under the African Charter on the Rights and Welfare of the Child, 1999 that is similar to the Article 8 right to family life. In 2012 the UN Human Rights Council implemented a decree which called for all states to accentuate non-custodial sentences when sentencing primary caregivers in an effort to protect the child’s best interests.

### *Italy and France*

In Italy, a Memorandum of Understanding between the Ministry of Justice and National Ombudsman for Childhood and Adolescence and Bambinisenasbarre ONLUS was drafted (Memorandum of Understanding 2014). This document essentially guides sentencers to take into consideration how imprisonment of a parent would affect a child and what would be in their best interest. For example, Article 1 asks sentencers to reflect on what sentencing measures takes into account the child’s best interests when sentencing a parent.

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<sup>19</sup> [2007] ZACC 18 at para. 77.

<sup>20</sup> [2007] ZACC 18 at para. 35.

Additionally, on 30 March 2011, Italy approved law n.2568, which was subsequently implemented in 2014 (Committee on the Rights of the Child 2011). This legislation states that pregnant women or mothers with children below the age of six should not be held in custody (unless there are exceptional circumstances). Instead of being held in prison, women can be detained in their own home or protected institutions.

Similarly, in France, Article 145-5<sup>21</sup> states that when a defendant has declared that they have exclusive parental responsibility of a child under 16, a court must take into consideration the circumstances surrounding the child before a decision is made on pre-trial detention.

The purpose of these laws is to safeguard the best interests of the child by enabling women with children to avoid pre-trial detention and/or imprisonment as much as possible. In comparison, in England and Wales, although common law principles have been established, they are non-binding. Therefore, sentencers are not obliged or compelled by statute to consider the best interests of a child in the criminal context.

## LAW, POLICY AND PRACTICE

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### Policy

The Female Offender strategy in 2018 stated that the Government would be “looking at what more can be done” to highlight that “short custodial sentences should be viewed as a last resort” for women (Ministry of Justice 2018). In 2019, the Farmer Review made several recommendations to mitigate the damaging effects of maternal imprisonment for women and their children. However, there are still many mothers sentenced to short custodial terms and few recommendations have been implemented.

Furthermore, in 2020 the Government’s white paper, *A Smarter Approach to Sentencing*, focused on achieving better rehabilitation outcomes for ‘low level’ offenders, which statistically speaking describes most women in prison. Yet the paper failed to recognise the shortcomings posed by short custodial sentences for women.

Following an inquiry in May 2021, the Joint Committee on Human Rights reported that not enough is being done to protect the rights of dependent children and their mothers. Several

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<sup>21</sup> Article 145-5 of France’s Code of Criminal Procedure.

recommendations were made, like those made in the Farmer Review, and while extremely important, we are yet to see them put into place by the Government.

### Principles established by case law

When a criminal court in England and Wales sentences a mother with a dependent child, the Article 8 right to family life is engaged and this needs to be balanced against the gravity of the offence. This was stated in 2001 in *R (P and Q)*<sup>22</sup> where Lord Phillips stated that the court must be able to justify the separation of a mother from her child.<sup>23</sup> Since *R (P and Q)*, case law has developed to reinforce the notion that the separation of mother and child is serious and therefore a compelling justification should be made when sentencing a mother to prison. In the case of *ZH (Tanzania)*,<sup>24</sup> it was further established that the welfare of the child in question when separating a child from their parent should be at the “forefront of the judge’s mind”.<sup>25</sup>

The Court of Appeal in *Mills*<sup>26</sup> considered the “effect on children” when a judge sentenced a woman of good character who pled guilty to two offences of obtaining services by deception to prison. The appellant was the sole carer of two children and had no previous convictions. Even though the pre-sentence report recommended a community sentence, she was sentenced to eight months’ imprisonment concurrent on each charge. The Court of Appeal determined that imprisonment was not appropriate and therefore quashed the sentences of imprisonment and imposed a community order. Despite stating that it was important to contemplate the “effect” of children, the Court however did not refer to a child’s Article 8 rights or best interests.

In *Arinze*,<sup>27</sup> the Court of Appeal stated that it was a recognised principle that where someone has caring responsibilities for “young children” they should only be given a custodial sentence “if that is absolutely necessary” and for the “shortest term” possible. The case of *Bishop*<sup>28</sup> established that the Court had a duty to ensure it received all appropriate and relevant information about any dependent children before passing a sentence. This was reinforced in the case of *R (on the application of Aldous) v Dartford Magistrates’ Court*<sup>29</sup> where it was stated that when the imposition of a custodial sentence on a parent will directly affect a dependent

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<sup>22</sup> *R (P&Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 paras. 78 and 87.

<sup>23</sup> *R (P&Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 at para. 79.

<sup>24</sup> *ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department* [2011] UKSC4.

<sup>25</sup> [2011] UKSC4 at paras. 25 and 26.

<sup>26</sup> *R v Mills* [2002] 2 Cr App R (S) 229.

<sup>27</sup> *R v Evelyn Arinze* [2010] EWCA Crim 1638.

<sup>28</sup> *R v Bishop* [2011] EWCA Crim 1446.

<sup>29</sup> [2011] EWHC 1919 (Admin).

child and the court does not have the information required to assess that effect, it is the duty of the court to “make enquiries so that it is properly informed”.<sup>30</sup>

Moreover, in the case of *Petherick*<sup>31</sup> it was affirmed that a dependent child’s best interests are a “distinct consideration to which full weight should be given”,<sup>32</sup> and that when a case is on the cusp of a custodial or non-custodial or suspended sentence, a dependent child can tip the scales to make what would seem a proportionate sentence, disproportionate instead.<sup>33</sup> In 2017, the Court held in *R v Modhwadia*<sup>34</sup> that when a parent of dependent children is being sentenced to a custodial sentence, it may be appropriate to suspend that sentence.

Based on these principles which have been established by case law in English courts, it would be reasonable to assume that sentencers (judges and magistrates) should take full consideration of the consequences of maternal imprisonment and weigh up these consequences against the best interests of the child. Yet, despite this, a study by Minson (2014) revealed that judges do not consistently apply these principles. When sentencing mothers with dependents, mitigation is not applied consistently, as “many judges do not deem primary caregiving to be important enough” which clearly displays the inconsistencies in sentencers views when sentencing primary carers (Minson et al. 2015). These reports evidence that the current sentencing policy does nothing to compel judges to consider the best interests of a child when sentencing.

## Practice

In the Family Court, a child’s best interests are at the forefront of everything, especially when a court considers parental separation. This is governed by Section 1 of the Children Act 1989 and legislation ensures that those interests are protected. In contrast, however, the criminal court all too often separates mothers from their children when passing custodial sentences, without consideration of the child’s best interests, as there is currently no statutory obligation for the court to consider the best interests of the child.

In England and Wales, there is a legal presumption that imprisonment is to be used for the most serious offences where an alternative cannot be justified.<sup>35</sup> Where custody needs to be considered the sentencing guidelines help sentencers to assess what an appropriate sentence would be in each case and contemplate all relevant factors surrounding the offence and

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<sup>30</sup> [2011] EWHC 1919 (Admin) at para. 16.

<sup>31</sup> *R v Petherick* [2012] EWCA Crim 2214.

<sup>32</sup> [2012] EWCA Crim 2214 at para. 19.

<sup>33</sup> [2012] EWCA Crim 2214 at para. 22.

<sup>34</sup> [2017] EWCA Crim 501.

<sup>35</sup> Section 230 of the Sentencing Code.

offender. Mitigating factors allow sentencers to take into consideration an individual's personal circumstances and may give reasons as to why that individual should not be imprisoned.

At present, the sentencing guidelines in England and Wales state that being the "sole or primary carer for dependent relatives" can be a mitigating factor for the purpose of sentencing (Sentencing Council 2019). Moreover, the Sentencing Council's Definitive Guideline on the Imposition of Community and Custodial Sentences clearly states that where someone is on the cusp of a custodial sentence, "imprisonment should not be imposed where there would be an impact on dependents which would make a custodial sentence disproportionate to achieving the aims of sentencing" (Sentencing Council 2016). And that where a custodial sentence is necessary, "strong personal mitigation, a realistic prospect of rehabilitation or custody resulting to significant harm on others can suggest that it is appropriate to suspend the sentence (Sentencing Council 2016).

The Equal Treatment Bench Book is a tool which provides further guidance to sentencers (judges and magistrates) on how to implement the Equality Act 2010 when sentencing (Judicial College 2021). This book refers to the Sentencing Council's recommendations that judges should be aware of the adverse effects a custodial sentence has on a child when imprisoning a child's parent or carer (Judicial College 2021, p. 189). It also identifies that most primary caregivers of children are women and recognises the impact imprisonment has on both the child and mother (Judicial College 2021, p. 189).

Further, despite the international legal principles, mitigating factors, and principles established by case law, in practice, the courts tend to show reluctance to suspend a sentence when passing a sentence on a mother. In *McClue*,<sup>36</sup> a mother who had committed fraud was sentenced by the Crown Court to 18 months' imprisonment. She appealed this sentence, and the Court of Appeal took into consideration the fact that she had a seven-year-old daughter and cared for her sister's four-year-old child since birth as her sister suffered from schizophrenia. The court stated that in considering the effect on the two children, they recognised that "the fear of separation" was "devastating for them" and went on to explain how the mitigating factors are "powerful". The court allowed the appeal on those grounds and reduced the sentence to eight months.

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<sup>36</sup> *R v McClue* [2010] EWCA Crim 311.

# SUSPENDED SENTENCE ORDERS

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Considering the above, where a short custodial sentence might be given, it might be more appropriate to sentence women with dependent children to a suspended sentence. A suspended sentence order (SSO) is a sentence imposed by the court when someone has been convicted of an offence whereby the punishment would typically result in imprisonment but is suspended (delayed) by the court. This allows the offender to carry out their sentence in the community. A suspended sentence is imposed when the court is satisfied that the 'custody threshold test' is passed. This test is outlined in the Sentencing Guidelines: "sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available" (Sentencing Council 2016). An SSO is a custodial sentence even though it is served in the community and if a defendant breaches a condition of their suspended sentence or commits another offence, it can result in them being sent to prison for their original sentence.

Suspended sentences were first introduced in England and Wales in the Criminal Justice Act 1967 and in 1991 the Criminal Justice Act 1991 restricted the court's use of suspended sentences for 'exceptional circumstances' only.<sup>37</sup> These restrictions lasted until the Criminal Justice Act 2003 which replaced the suspended sentence with the suspended sentence order (SSO) which could be applied to a custodial sentence of 12 months or less. In 2012, the Legal Aid, Sentencing and Punishment of Offenders Act increased the length of an immediate custodial sentence that could be suspended from 12 to 24 months and removed the condition that everyone serving an SSO must have a conditional requirement. Requirements can range from a curfew, rehabilitation activity requirement, unpaid work, residence requirement, electronic monitoring requirement and more.<sup>38</sup> Sentencers now have the option to impose a conditional requirement with a suspended sentence, but this is not mandatory.

When restrictions existed on suspended sentences, between 1991 and 2005, the volume of suspended sentences decreased drastically<sup>39</sup> and thus only accounted for a small number of sanctions imposed. Currently, suspended sentences account for three per cent of all sentences<sup>40</sup> for women and recent reports have indicated that there has been a 14-15%

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<sup>37</sup> Section 5(1) of the Criminal Justice Act 1991.

<sup>38</sup> Suspended sentence order requirements are specified in section 287 of the Sentencing Code.

<sup>39</sup> 20,000 were imposed in 1990 compared to 2500 in 1995 (Mair et al. 2008).

<sup>40</sup> Ministry of Justice (2021) Sentencing data tool, Criminal Justice System statistics quarterly: December 2020.

decrease in the use of suspended sentences since 2016<sup>41</sup> while short custodial sentences for women have remained relatively stable.

## Recidivism

Although there is limited research on how offender characteristics such as gender vary when looking at re-offending rates, there is emerging evidence which strongly suggests that SSOs are more effective at reducing reoffending than short custodial sentences. Findings from academic research in Spain suggest that reoffending rates for imprisonment are higher than for those given suspended sentences (Cid 2009). Aarten et al. (2015) came to the same conclusion when looking at recidivism rates when comparing custodial and suspended sentences in the Netherlands. Research conducted by Hillier and Mews in England and Wales found a correlation between short custodial sentences and higher levels of reoffending in comparison to court orders such as SSOs and community orders (Hillier and Mews 2018). When comparing recidivism rates of those sentenced to community orders versus suspended sentences, research indicates that re-offending rates are typically lower for SSOs than community orders with requirements (Hamilton 2021).

## Rationale

The literature suggests that the main rationale for first introducing suspended sentences in 1967 was to reduce the volume of short custodial sentences being imposed (Bottoms 1981) and at its core, an SSO differs to other custodial and non-custodial sanctions as by its very nature it can threaten those serving an SSO with “future punishment for past misconduct” (O’Malley 2016). Academic research conducted in Australia has suggested that these sentences can be efficient in deterring people from future offending (Bartels 2009). Yet despite this evidence, many women with dependent children are still serving short custodial sentences in cases where a suspended sentence could have been used instead. There is a body of research demonstrating how short custodial sentences are damaging not only due to higher reoffending rates, but also due to their disruption to family, employment, and housing, particularly for mothers with dependent children (Baldwin and Epstein 2017; Murray et al. 2012). SSOs would enable women with dependent children to keep the family unit intact, carry on employment and maintain their housing/accommodation, thereby lowering their risk of reoffending but more importantly, protecting the best interests of the child.

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<sup>41</sup> Ministry of Justice (2019) Court Outcomes by Police Force Area Data Tool, Criminal Justice System statistics quarterly: December 2018 and Ministry of Justice (2021) Offender Management Statistics Bulletin, England and Wales, statistics quarterly: July-September 2020.

# RESEARCH FINDINGS

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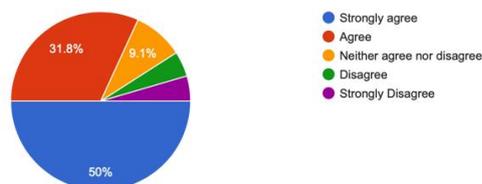
For this research, an online google form survey was created and people who work with women who are in contact with the criminal justice system (CJS) were invited to respond. This survey was sent out to several women’s centres and charities who are members of Clinks, an organisation which supports, promotes, and represents the voluntary sector of those working with people in the CJS.<sup>42</sup>

This survey was considered to be of particular interest to people who work with women who are involved in the CJS outside of a custodial setting. Women will typically engage with Women’s Centres when released from prison as well as when given a non-custodial sentence. Therefore, the participants in this survey are arguably best placed to see what effects a short custodial sentence may have on women with dependent children.

The survey ran for five weeks and consisted of 16 questions and statements, the first three questions asked participants how long they had worked with women in a CJS setting, what type of organisation they work for and asked them to specify their job role. The next 11 statements (starting from statement four) asked participants to either strongly agree, agree, neither agree nor disagree, disagree or strongly disagree. The final two questions were gender and ethnicity based. Overall, 22 responses were received, and participants were kept anonymous.

## General findings

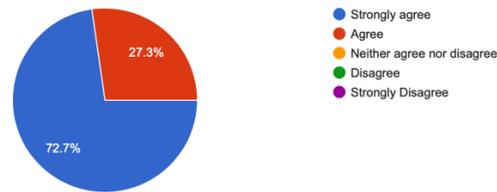
Statement 4 asked survey participants whether they agreed that sentences which consider a mother’s caring responsibilities can reduce the likelihood of reoffending. Overall, 81.8% agreed with the statement (with 50% of those strongly agreeing), 9.1% neither agreed nor disagreed, while 4.5% disagreed and 4.5% strongly disagreed.



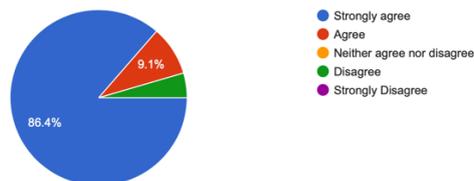
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<sup>42</sup> See <https://www.clinks.org/about>.

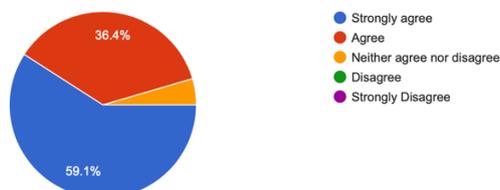
Statement 5 asked participants to give their view on whether sentencers should be obliged to consider non-custodial or suspended sentences for mothers with primary care responsibilities; 100% of participants agreed with the statement with 72.7% strongly agreeing.



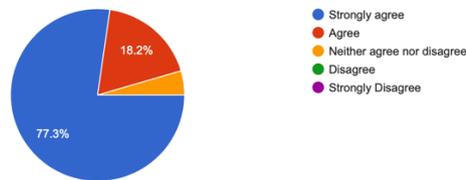
Statement 6 probed participants as to whether sentencers should be obliged to pass either a non-custodial sentence or suspended sentence for mothers with dependent children when the offence committed is non-violent and the woman is a first-time offender. Almost all respondents agreed with this statement as 95.5% agreed and only one participant (4.5%) disagreed with the statement.



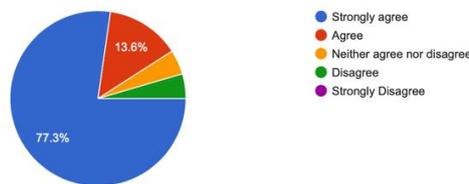
Statement 7 asked whether sentencers should be obliged to give a written reason when a custodial sentence is imposed on a mother with dependent children. No-one disagreed with the statement. A large majority (95.5%) agreed, with over half of those strongly agreeing and only one participant (4.5%) neither agreed nor disagreed.



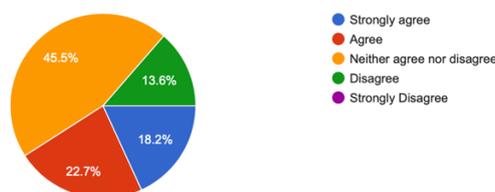
Statement 8 queried whether mothers with dependent children who are given a custodial sentence, should be able to delay starting their sentence to arrange alternative care for their children. Almost all participants (95.5%) agreed with the statement and only one participant (4.5%) neither agreed nor disagreed and no-one disagreed.



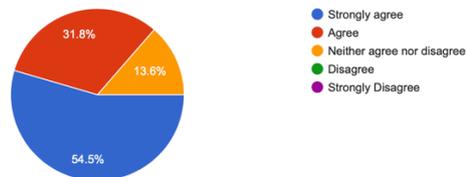
Statement 9 questioned whether replacing short custodial sentences with either a community order or suspended sentence with a rehabilitative activity requirement would reduce the likelihood of reoffending and better support mothers with dependent children. Overall, 90.9% of participants agreed with 77.3% strongly agreeing. One participant (4.5%) neither agreed nor disagreed and one participant (4.5%) disagreed with the statement.



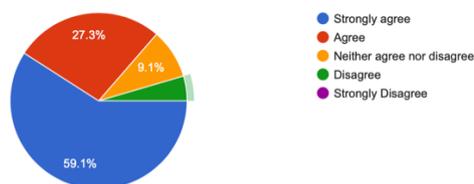
Statement 10 asked whether participants thought suspended sentences were better for mothers with children than community orders. A majority (45.5%) neither agreed or disagreed while 40.9% agreed and 13.6% disagreed with the statement.



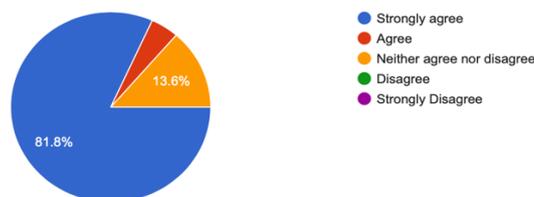
Statement 11 asked if participants agreed whether suspended sentences allow women to rehabilitate successfully within their community. The vast majority agreed (86.3%) with over half strongly agreeing to the statement. A small number (13.6%) of participants neither agreed nor disagreed.



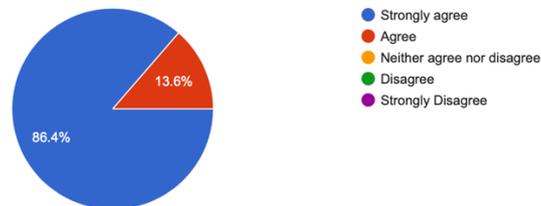
Statement 12 asked participants whether a woman with dependents who repeatedly offends (non-violent) should be given a suspended sentence with a condition of engaging with support. Overall, 86.4% of participants agreed with this statement while 9.1% neither agreed nor disagreed and 4.5% (one participant) disagreed.



Statement 13 asked whether a separate guideline on sentencing primary carers should be introduced by the Sentencing Council to give sentencers more clarity on how to consider dependent children. Overall, 86.3% agreed, with a vast majority (81.8%) strongly agreeing while 13.6% neither agreed nor disagreed.



Statement 14 asked participants to give their view on mandatory training of magistrates, probation officers and judges regarding sentencing women with dependents. As seen below, all respondents agreed with the statement, with 86.4% of participants strongly agreeing.



### Findings with commentary and recommendations

Interestingly, all participants agreed with *Statement 5* which asked whether sentencers should be obliged to consider non-custodial or suspended sentences for mothers. The use of the word ‘obliged’ here is key, as sentencers at present are not obliged by statute to consider any sentence for women with children despite case law and recommendations. Like family law, if an obligation was imposed on sentencers in the criminal context, it would ensure that a child’s best interests are protected. Furthermore, those who work with women clearly have strong views that sentencers should instead be using a non-custodial or suspended sentence for cases where a mother has committed her first ever non-violent offence, as 95.5% of participants agreed with *Statement 6*. As we already know, an overwhelming majority of women are serving short custodial sentences for a non-violence offence (predominantly theft) and many are first-time offenders, again displaying how SSOs would be more suitable than a short sentence.

Participants also largely agreed that it should be so unusual to give a custodial sentence, that sentencers should be made to give written reasons when they do (*Statement 7*). If sentencers are forced to justify the sentence passed on a mother with childcare responsibilities, it may make them think into the damaging effects of imprisonment.

Moreover, the vast majority of participants agreed with the idea that SSOs would allow women with dependent children to rehabilitate successfully within their community. Suspended sentences in place of custodial sentences would enable women to continue their life and child caring responsibilities whilst protecting the best interests of the child and family unit. As this paper has shown, short custodial sentences force mothers and their children to

suffer long-lasting consequences, as the effects tend to last much longer than the sentence served.

*Statement 13* explored how people who work with women felt about a separate guideline being introduced by the Sentencing Council which focused solely on sentencing primary carers. The fact that no-one disagreed and 86.3% agreed (with a huge majority strongly agreeing), demonstrates that perhaps there is a need for this to be implemented. A separate guideline would address any issues of uncertainty and explain that SSOs are much better suited to mothers with childcare responsibilities where the threshold of a custodial sentence has been passed. There are convincing arguments in the literature which suggest that there is a need to consider the introduction of gender-based mitigating factors to counterbalance the disproportionality women and their children face when being sentenced (Millar and Dandurand 2018). Additionally, critique of the current guideline by Roberts and Watson (2017) suggests that it does not do enough to advise sentencers of the adverse impacts of maternal imprisonment on children and reiterates that the introduction of a new guideline for primary caregivers of children should be considered.

The unanimous agreement in *Statement 14* suggests that there is an overwhelming consensus amongst those who work with women in contact with the CJS that sentencers and probation officers are not adequately trained to fully appreciate the effects of imprisoning women with dependents. This is not surprising given the current lack of funding for the criminal justice system and how inconsistent sentencing can be for women with dependents (Minson 2019). In 2017, a survey was conducted with responses from 582 magistrates; responses showed that 28% of magistrates were not satisfied that their training had sufficiently prepared them for dealing with alternative sentences to custody, implying that some sentencers feel apprehensive on when or how to use alternative sentences (du Mont and Redgrave 2017).

To move towards a more effective sentencing policy for women with dependent children, the Government should invest in specialised training for sentencers. Reports show that the budget for training magistrates fell from £72 per person to £30 per person in the years between 2009-10 and 2013-14 and concerningly it appears that this trend has only continued (House of Commons Justice Committee 2016, p. 29). This suggests that an increasing number of magistrates do not know how to consistently sentence mothers with dependents due to poor quality of training. Investing in training for magistrates is more cost effective as the average prisoner costs around £40,000 per year<sup>43</sup> and a recent report from the UK crime and justice

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<sup>43</sup> Ministry of Justice (2020) HM Prison & Probation Service Annual Report and Accounts 2019-20 Management Information Addendum.

consultancy Crest Advisory has revealed that sending a mother to prison whilst providing care for a child costs roughly £265,000 per family (Pitman and Hull 2021).

This survey, although a small sample, gave insight into the views of those who work with women in a criminal justice setting. Alongside this paper, it is argued that the evidence presented gives rise to several reforms that should be considered, the most important being the following:

- (1) A gender-based sentencing policy specifically for women with childcare responsibilities which emphasise that the best interests of the child should be taken into consideration and that prison should be a last resort.
- (2) Invest in training for magistrates and judges so that they can consider the full effects of imprisoning a mother and the damaging effects this has on children.
- (3) Establishing a data collection method to accurately record the number of dependent children affected at the earliest opportunity when their mother enters the criminal justice system.

## CONCLUSION

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Given that full consideration is given to a child's best interest in family law proceedings, it is somewhat perplexing that in the context of criminal sentencing, parental separation due to imprisonment does not afford children the same right (Minson 2019). Despite the numerous studies and reports displaying the detrimental effects maternal imprisonment has on children, sentencers are currently not compelled to consider the best interests of the child when sentencing a parent to prison. A jurisprudential shift in sentencing should reflect the numerous recommendations made that a non-custodial sentence should be imposed on mothers with dependent children. Reliance upon sentencers who adopt common law principles is not enough as far too many women are still being sentenced to short custodial sentences. Suspended sentence orders should be used in place of short custodial sentences to protect the best interests of the child where they are currently not being protected. This paper therefore calls on the Sentencing Council to revise the current sentencing guidelines in relation to primary caregivers and to introduce a gender-based guideline for mothers. This would encourage sentencers to consider all available sanctions other than imprisonment (where appropriate) to protect the best interests of the child and reinforce the principle that a sentence should be suspended if an offence has passed the custody threshold.

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