

Prison Reform Trust submission Theft offences guideline consultation

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The Prison Reform Trust's main objectives are:

- Reducing unnecessary imprisonment and promoting community solutions to crime
- Improving treatment and conditions for prisoners and their families

Supported by the Pilgrim Trust, the Prison Reform Trust is running a three year programme to reduce women's imprisonment, in light of the doubling of the women's prison population between 1995 and 2010. The many inquiries into this disturbing rise, from the Corston review in 2007 to the Justice Select Committee report of 2013, have concluded that prison is rarely a proportionate or effective response to women's offending, most of which is relatively minor and non-violent. Despite this, and the general fall in reported crime, prison numbers remain high. We also submit our [briefing on women's imprisonment](#),¹ which highlights gender differences in the characteristics of, and drivers to, offending, and presents further evidence that women are disproportionately imprisoned for relatively minor non-violent offences, disproportionately affected by imprisonment, and shows that more effective community-based sanctions could often be deployed. Finally, we submit our report [Brighter Futures – working together to reduce women's offending](#), which demonstrates that the solutions to much offending by women lie in the development of local multi-agency strategies.²

This response to the Sentencing Council consultation focuses on the implications for women offenders of the draft theft offences guideline, with particular reference to theft from a shop or stall. However, some of the concerns it raises also apply to men, many of whom have vulnerabilities and some of whom have primary care responsibilities.

We have very much appreciated the opportunity to discuss the draft guideline in two workshops we have convened with Sentencing Council staff and Council member Katharine Rainsford JP. We would also welcome an invitation to come and discuss our comments and proposals directly with the Sentencing Council in due course.

¹ *Why focus on reducing women's imprisonment?*

² Prison Reform Trust (2014) *Brighter futures – working together to reduce women's offending* London: PRT

Context

This submission takes account of the following contextual realities: the increase in poverty and inequality (and its disproportionate impact on women) and the recent rise in shoplifting offences whilst crime overall has been falling.

Women are more likely to be dependent on benefit income,³ including housing benefit, and have been particularly affected by the impact of welfare changes and sanctions.⁴ The equality impact assessment for the benefit cap, for example, explicitly states that “60% of customers who are likely to have their benefit reduced by the cap will be single females but only around 10% will be single men. Most of the single women affected are likely to be lone parents.”⁵

Meanwhile, police recorded crime statistics show that shoplifting was one of the few offences which increased (by 6% compared to a 2% reduction in total recorded crime) between 2012 and 2013.⁶ Concerns over the genesis of this rise have been raised, for example, by a number of Police and Crime Commissioners⁷ and there have been a series of disturbing media reports which have charted the increase in food thefts against an increase in the number of people who cannot afford to feed themselves and their families, and the impact of benefit cuts.

*Equality impact assessment (EIA):*⁸

As theft, and particularly theft from a shop or shoplifting, is the single largest offence group for which women are imprisoned, usually for very short periods, we expected a more detailed gender analysis to underpin an assessment of the Sentencing Council’s proposals. We were particularly disappointed that none of the data tables provided for this consultation (in Theft Offences Sentencing Data) were gender disaggregated given that some of this data is publicly available.⁹ There is no discussion of the anticipated impact of the proposals in this draft guideline on women, or on other groups such as offenders from Black and Ethnic Minority backgrounds who are over-represented in custody.

We urge the Sentencing Council to undertake a gendered analysis of sentencing decisions and outcomes for theft offences to ensure that an accurate profile of sentencing of women offenders informs the development of this guideline, and to ensure that it does not reinforce any inadvertent bias in sentencing decisions.

³ Fawcett Society (2005) *Who Benefits? A gender analysis of the UK benefits and tax credits system* London: Fawcett Society

⁴ Fawcett Society (2012) *The impact of austerity on women* London: Fawcett Society

⁵ Department for Work and Pensions (2012) *Benefit cap: Equality impact assessment* London: DWP

⁶ Table A4, www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2013/rft-appendix-tables.xls

⁷ www.theguardian.com/uk-news/2014/apr/25/shoplifting-increase-overall-crime-figures-fall-england-wales

⁸ Now referred to as Policy Equality Statements in government terms

⁹ See Criminal justice system outcomes 2009-2013 table, Ministry of Justice (2014) *Criminal Justice Statistics quarterly – December 2013* London: Ministry of Justice

We would like to see a more thorough, transparent and gendered assessment of the impact of the proposed new guideline, and a commitment to monitoring its impact in the next five years, especially in the magistrates' court.

Key statistics: sentencing of women for theft offences¹⁰

- Theft and handling offences accounted for the single largest group of women received into prison under sentence (40% - for men the proportion was 22%).¹¹ More women were received into prison under an immediate custodial sentence for theft and handling than for the offences of violence against the person, robbery, sexual, burglary, fraud and forgery, drug and motoring combined.¹²
- At 31st March 2014, there were 525 sentenced women in prison for theft and handling offences – an 11% increase on the previous year, compared to a 1% reduction for sentenced males in prison.¹³
- In 2013, 28% of women's remands into custody were for theft and handling offences (compared to 15% of male remand receptions), and in the year to 31st March 2014, the number of women in prison on remand for these offences increased by 75% (67 to 117).
- In 2013, 23,115 females were sentenced for theft offences, 79% of whom (18,328) were sentenced for theft from a shop (shoplifting).
- Between 2009-2013 the number of females sentenced for theft from a shop decreased by 4% whilst the number sentenced to custody increased by 17% - this pattern was also observed amongst males sentenced.
- Theft from a shop accounted for more than a third (35%) of all custodial sentences given to women, most receiving sentences of three months or less – the average sentence length was 1.9 months.
- More than three quarters (77%) of sentenced female offenders received into prison for theft and handling offences in 2013 were serving the shortest sentences (6 months or less).

Lack of data on the financial value of goods stolen

Data on the average value of items stolen by women sentenced for theft offences is not available. However, the consultation paper states that *"92% of theft offences are sentenced*

¹⁰ Unless otherwise stated, all data is taken from Criminal justice system outcomes 2009-2013 table, Ministry of Justice (2014) *Criminal Justice Statistics quarterly – December 2013* London: MoJ available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/311455/cjs-outcomes-by-offence-2009-2013.xls

¹¹ Table A2.2b, Ministry of Justice (2014) *Offender Management annual tables 2013* London: MoJ

¹² Ibid.

¹³ Table 1.2b, Ministry of Justice (2014) *Offender Management Quarterly Statistics October-December 2013* London: MoJ

*in magistrates courts, involving relatively small amounts” and that “one of the issues for sentencers dealing with theft offences is that the low value of items stolen and the unsophisticated nature of an individual offence would not ordinarily pass the custody threshold”.*¹⁴ Whilst not necessarily indicative of the value of goods stolen, we note that the average court compensation order imposed on women for shoplifting in 2013 was £67 (down from £70 in 2009), whilst the average fine (9,987 females received fines) was £86.¹⁵

Recent research from the British Retail Consortium put the average value of customer theft in 2012-13 at £177 per offender (up from £109 in 2011-12), but recognised that *“organised crime gangs systematically targeting higher value items is a factor driving up the average cost of customer theft.”*¹⁶

The introduction of the new summary-only offence of low value shoplifting (£200 or less)¹⁷ will enable easier identification of the proportion of shoplifting offences that fall within this category, though research conducted by the Sentencing Advisory Panel in 2006 suggests that 90% of theft offences heard within magistrates courts do.¹⁸

Input from women’s community organisations

This consultation response draws on discussion at two consultation events we organised on behalf of the Sentencing Council, attended by a wide range of community organisations that work with women in the criminal justice system.¹⁹ These events, one held at Anawim women’s centre in Birmingham, and the second at the offices of Leigh Day solicitors in London, enabled the implications for women of the proposed guideline to be more fully considered. We are grateful both to the Sentencing Council and to the workshop participants for this opportunity. The concerns raised by the participants centred on the vulnerability of the women they work with (many of whom are involved with sex work), their experiences of domestic violence (and abusive relationships more generally) as factors in their offending, and the links between financial distress, often as a result of benefit sanctions, and shoplifting-related offences. We share these concerns and have sought to reflect them here. It was also felt by many participants that the Sentencing Guidelines should do more to raise the awareness of judges and magistrates to gender differences and inequality and ensure that they are alert to these when considering the appropriate disposal for an individual before the court.

Previous submission to the Sentencing Council

¹⁴ Pg. 10

¹⁵ See Criminal justice system outcomes 2009-2013 table, Ministry of Justice (2014) *Criminal Justice Statistics quarterly – December 2013* London: Ministry of Justice

¹⁶ British Retail Consortium (2014) *Retail Crime Survey 2013* London: BRC

¹⁷ Section 176, Anti-Social Behaviour, Crime and Policing Act 2014

¹⁸ Hansard HC, 11 July 2013 c471

¹⁹ www.publications.parliament.uk/pa/cm201314/cmpublic/antisocialbehaviour/130711/am/130711s01.htm

¹⁹ See Annex for a list of attendees

In October 2013, the Prison Reform Trust made a [submission](#) to the draft fraud, bribery and money laundering offences guideline consultation. A number of the recommendations made then have direct relevance to the draft guideline on theft offences and have been re-stated here.

Overarching concerns and principles

Gender-specific sentencing:

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measure for Women Offenders (the Bangkok Rules) provide a framework for gender sensitive sentencing guidelines. The report of the UN Special Rapporteur on violence against women following her official visit to the UK, which included visits to women's prisons, included this finding:

*"it is crucial to develop gender-specific sentencing alternatives and to recognize women's histories of victimization when making decisions about incarceration. Most women in prison do not present a threat to society and the consequences of their incarceration includes enormous personal, economic and social costs. Creativity in sentencing could lead to more orders of a non-custodial nature."*²⁰

We recommend the Sentencing Council include a reference to the Bangkok Rules in its new guideline, noting the UK's obligation to provide "gender-specific options for...sentencing alternatives".²¹

Children of offenders:

The Bangkok Rules state that "women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties",²² whilst the Court of Appeal,²³ and, more recently court of appeal judges in *R v. Petherwick*,²⁴ have ruled that, when sentencing a mother with a dependent child, the child's rights to respect for a private and family life²⁵ are engaged and a balancing exercise should be undertaken. Following the Court of Appeal decision in *R v Mills*²⁶ the Guidelines do recognise sole or primary care responsibilities at mitigation, however there is evidence to suggest courts do not always undertake this balancing exercise when sentencing a mother with dependent children.²⁷ The case of Melanie Beswick, sentenced initially to nine months

²⁰ UN Special Rapporteur on Violence Against Women, Ms Rashida Manjoo, London, 15 April 2014. Her full report will be considered by the UN Human Rights Council in June 2015.

²¹ www.ohchr.org/Documents/ProfessionalInterest/BangkokRules.pdf

²² Ibid.

²³ *R (on the application of P and Q) v Secretary of State for the Home Department* – [2001] EWCA Civ 1151, at para 79.

²⁴ *R v Petherwick* – [2012] EWCA Crim 2214

²⁵ Under the European Convention on Human Rights and the UN Convention on the Rights of the Child

²⁶ *R v Mills* [2002] EWCA Crim 26

²⁷ See Epstein, R. (2012) Special Issue – Research Report - Mothers in prison: the sentencing of mothers and the rights of the child *Coventry Law Journal* and Minson, S. (2014) *Mitigating motherhood – a study of the impact of motherhood on sentencing decision in England and Wales* London: Howard League

in prison for a first offence, despite having two dependent children, is a tragic case in point.²⁸ More children are affected every year by the imprisonment of a parent than by divorce,²⁹ making it incumbent on courts to ensure that a custodial sentence is only imposed on a primary carer where there is no suitable alternative.

We recommend the Sentencing Council provide stronger guidance to the court on its duty to investigate an offender's sole or primary caring duties and to take these into account at sentencing, particularly the consequences for the children should s/he be imprisoned. The fact that a mother is likely to be imprisoned further from her home due to there being fewer women's prisons should also be considered.³⁰

We recommend that the Sentencing Council consider drafting a new overarching step aimed at determining whether the offender has dependent children, whether they have sole or primary care responsibilities and how the child's rights and interests will be taken into consideration, as set out by the European Convention on Human Rights and the UN Convention on the Rights of the Child as well as by a number of UK court judgements.

Alternatively, this could be a step to undertake where the offence has passed the community threshold and there is a real prospect of a custodial sentence. However the Council chooses to formulate this, it is vital that the guidelines make specific reference to the sentencing court's duty to take account of the rights and best interests of dependent children.

We recommend that the Sentencing Council monitor and evaluate the sentencing of offenders with dependent children in both Magistrates and Crown courts.

Giving voice to victims:

We are concerned that the draft guideline's approach to giving voice to victims during sentencing is focused on the introduction of a new test of harm caused and scope for harsher penalties than recommended in the existing guideline. We agree that the voice of the victim, explaining the impact that an offence has had on their lives, can be a powerful motivator for offenders to turn their lives around and stop offending. However, we are not aware of any evidence linking harsher sentences with increased victim satisfaction or improved offender outcomes. Indeed, opinion polling with victims of crime has shown that two-thirds do not believe prison works to reduce non-violent offences such as shoplifting, with victims' over-riding concern being to prevent crime and reoffending.³¹ This approach seems out of step with Government's vision for victims in the criminal justice system, which

²⁸ <http://www.inquest.org.uk/press-releases/press-releases-2013/inquest-into-the-death-of-melanie-beswick-hmp-send-begins-11-april>

²⁹ See Ministry of Justice (2012) *Prisoners' childhood and family backgrounds* London: MoJ and Office for National Statistics (2011) *Divorces in England and Wales 2009* Fareham: ONS

³⁰ A point made by Lord Woolf, then LCJ, in *R v Mills*

³¹ 'Crime victims say jail doesn't work', SmartJustice August 2006

is focused on providing “access to restorative justice...for all victims at all stages of the criminal justice process, so that...they can opt-in at a time that is right for them”.³²

Theft offences, specifically those involving theft from a shop or stall, are well suited to restorative justice (RJ) interventions which bring consenting victims and offenders together, in carefully mediated circumstances, with the purpose of agreeing reparative activities. Restorative justice expressly “offers victims an opportunity to be heard and have a say in the resolution of offences...It can provide a means of closure and enable the victim to move on.”³³

Under the Crime and Courts Act 2013, sentencers now have the option to defer sentencing to allow restorative justice to take place.³⁴ Ministry of Justice guidance states that “RJ activity may be suitable irrespective of the type of sentence under consideration and is not limited to cases close to the community sentence or custodial threshold”. As the guidance makes clear, a report on RJ activity undertaken and a Victim Impact Statement, if provided, are mechanisms for “enable[ing] the court to hear victim’s views”.³⁵

We recommend including a new paragraph within the guideline at Step Two to highlight the validity of deferring sentencing for restorative justice.

Deferring sentence:

More broadly, we believe there is a strong case for including reference to the court’s power under Section 1 of the Powers of the Criminal Courts (Sentencing) Act 2000, to defer sentence. Deferment is a tool enabling “the court to have regard to the offender’s conduct after conviction or any changes in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court”.

Deferring sentence can be particularly appropriate in the case of a non-violent female offender whose previous convictions and/or sentencing history may place them at greater risk of a custodial sentence, regardless of the relatively minor nature of the offence/s for which she is now before the court. Specified activity requirements for women, delivered in many areas by women’s centres working with probation staff and a range of health and addiction services, provide opportunities for women to engage with the gender-specific supervision and support services that will help them stay out of trouble.

We recommend including a new paragraph within the guideline at Step Two to highlight the validity of deferring sentencing to allow the offender to demonstrate their capacity to engage with specific requirements of the court’s choosing.

³² Hansard HL, 30 Oct 2012 c518

³³ Ministry of Justice (2014) *Pre sentence restorative justice (RJ)* London: MoJ

³⁴ Section 1ZA, Powers of the Criminal Courts (Sentencing) Act 2000

³⁵ Ministry of Justice (2014) *Pre-sentence restorative justice (RJ)* London: MoJ available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/312426/pre-sentence-restorative-justice.pdf

Ranges and starting points:

We note that “the ranges and starting points in the draft guideline have been proposed based on statistical data collected by the Ministry of Justice and from the Crown Court” and that due to “the lack of data available from the magistrates’ courts...there is a lack of data concerning the financial values of thefts sentenced in these courts”. The Sentencing Council acknowledges that “98% of thefts from shops are heard in magistrates’ courts”, and conducted observational research involving 43 cases in magistrates’ courts. However, the “ranges and starting points have been proposed on the basis of current guidelines (where applicable) reported cases, press reports and data gathered”, suggesting reliance on sources such as the Crown Court Sentencing Survey which will not be representative of the majority of theft from a shop offences.

We recommend the Sentencing Council develop a robust mechanism for systematically capturing sentencing information from magistrates’ courts to a scale which is representative of sentencing throughput. A gendered analysis of the information collected should be undertaken so as to ensure that women, who are more likely to be sentenced in the magistrates’ court,³⁶ are not disadvantaged by sentencing guidelines which reflect sentencing patterns for men.

More broadly, we note that the Council’s approach aims “to regularise practice rather than to alter it substantially”. However, the introduction of a series of mechanisms to revise starting points upwards (and outside the category in relevant cases) amounts to a rounding-up of the starting points and category ranges, despite the absence of any evidence that more punitive sentences have better outcomes, or that sentencers are having to sentence outside the existing guideline to take proper account of harm caused and previous convictions.

We recommend the Council revisit the evidence collated on existing sentencing practice and ensure it is not inflating sentencing tariffs. This is particularly important at a time of rising prison populations and prison over-crowding, factors that sentencers can legitimately take into account.³⁷

Custody as a last resort:

The Criminal Justice Act 2003 states that a custodial sentence should only be used where the offence is “so serious that neither a fine nor a community sentence can be justified”.³⁸ The Corston Report, and inquiry reports before and since, have stressed that custodial sentences for women must be reserved for serious and violent offenders who pose a threat to the public, and that community solutions should be the norm for non-violent offenders.

³⁶ In 2013, 97% of all females were sentenced in magistrates’ courts, compared to 90% of all males, see table A5.2, Ministry of Justice (2014) *Criminal Justice Statistics December 2013 – Sentencing Tables* London: MoJ

³⁷ See for example comment of Lord Woolf in *R v Mills*

³⁸ Section 152 (2), Criminal Justice Act 2003

Despite this, the guideline as it is currently drafted is focused on introducing new mechanisms for adjusting sentences upwards (including outside the category range), with little discussion of the appropriateness, or effectiveness, of alternative penalties for theft offences. If sentencers are to make informed sentencing decisions, they must be provided with accurate information on sentence outcomes (in terms of reoffending), the relative costs of individual sentences, and national sentencing practice (to ensure they are aware where their decision-making differs from that of their colleagues nationally). The Drug Offences Definitive Guideline includes explicit reference to the custody and community threshold, and to the use of community orders with specific requirements as alternatives to short or moderate custodial sentences.

This Theft draft guideline contains none of these safeguards, despite the very real risk that use of short custodial sentences for female offenders will increase when the Offender Rehabilitation Act 2014 commences. This introduces a 12 month statutory supervision period on release for all those serving less than a year in custody³⁹. As a result, some sentencers may be even more inclined to view short spells in custody as a gateway to the support and supervision services in the community that women need.⁴⁰ There is a further risk that more women will end up in custody for breach for failing to comply with the terms of the long, mandatory supervision period.⁴¹

We have a further concern regarding the impact of the Offender Rehabilitation Act 2014 on proportionate sentencing. The consultation paper notes that the new statutory supervision period for short sentenced prisoners will “change the nature of short custodial sentences by increasing the focus on rehabilitation”.⁴² However, the draft guideline does not consider raising the custody threshold in light of this significant change to the statutory framework. A two month custodial sentence for theft from a shop⁴³ handed down after commencement of Section 2 of the Offender Rehabilitation Act 2014, with 12 months post-release mandatory supervision will be a significantly different, more onerous, penalty than a short sentence is now. The short sentenced offender will have to comply with a 12 month period of supervision, and will be at risk of being returned to custody for up to 14 days, ordered to pay a fine, or given an additional supervision order if they breach. The proportionality of the sentence ranges in this draft guideline do not seem to recognise and reflect this major statutory change.

³⁹ Section 2, Offender Rehabilitation Act 2014

⁴⁰ www.prisonreformtrust.org.uk/Portals/0/Documents/Transforming%20Rehabilitation%20Women%20FINAL.pdf

⁴¹ www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20Reform%20Trust%20Briefing%20Offender%20Rehabilitation%20Bill%20HoC%202nd%20Reading%2011Nov13.pdf

⁴² Pg. 11

⁴³ The average custodial sentence length in 2013 for this offence - Criminal justice system outcomes 2009-2013 table, Ministry of Justice (2014) *Criminal Justice Statistics quarterly – December 2013* London: MoJ

As the Prison Reform Trust's submission on the *Transforming Rehabilitation* reforms makes clear,⁴⁴ the automatic imposition of post-custody supervision will disproportionately affect women as short sentences make up a greater proportion of all custodial sentences given to women than to men.⁴⁵ Although the Offender Rehabilitation Act does refer to women-specific interventions,⁴⁶ there remains a risk that women will be made subject to supervisory requirements which have been designed and are delivered with male offenders in mind, particularly in a time of austerity when many women's services are struggling to survive.⁴⁷ We therefore question the Council's retention of short custodial sentences within the ranges in this draft guideline (offering "respite to victims" should not be a justification for custody) **and recommend the Council take time to consider how implementation of the Offender Rehabilitation Act 2014 will impact on this, and subsequent guidelines.**

The introduction of measures which have the effect of shortening the road to custody – whether those are the mechanisms in this guideline allowing movement up within, or outside, the category range, or the changes to statutory supervision on release which risk making short custodial sentences a more attractive prospect - will impact disproportionately on women. We are concerned that magistrates sentencing women interpret previous custodial sentences as evidence that a community sentence is not appropriate and 'only a custodial sentence is justified'. Research has also shown that some magistrates view custody as inevitable because of the offender's previous offending and sentencing history rather than because of the seriousness of the offence.⁴⁸ Taken together with the approach to previous, relevant convictions recommended in this draft guideline, such measures risk locking women into a cycle of short custodial sentences, when the evidence suggests the solutions to their offending lie in treatment for drug and alcohol addiction, protection from domestic abuse and coercive relationships and provision of safe, secure housing in the community.⁴⁹ This calls for "guidance which provides magistrates with a clearer idea of how different combinations of conditions may relate to each other in tariff terms may help to reintroduce additional steps on the sentencing ladder for women and thus delay the decision to impose a short custodial sentence."⁵⁰

We urge the Council to reconsider its approach to short custodial sentences and recommend inserting the following at step two of the guideline:

⁴⁴ www.prisonreformtrust.org.uk/Portals/0/Documents/Transforming%20Rehabilitation%20Women%20FINAL.pdf

⁴⁵ In 2013, 77% of all custodial sentences given to women were less than 12 months, compared to 63% of those given to men

⁴⁶ Section 10, Offender Rehabilitation Act 2014

⁴⁷ Clinks (2014) *Run ragged – the current experience of projects providing community based female offender support services* London: Clinks

⁴⁸ Hough, M. Jacobson, J. and Millie, A. (2003) *The decision to imprison: sentencing and the prison population* London: PRT

⁴⁹ Prison Reform Trust (2014) *Why focus on reducing women's imprisonment?* London: PRT

⁵⁰ Hedderman & Gunby, 'Diverting women from custody: the importance of understanding the sentencers' perspective' *Probation Journal* 60(4) 425 -438. 2013

A community order with a relevant requirement/s as set out under the Criminal Justice Act 2003 is a proper alternative to a short or moderate length custodial sentence.

We also recommend, as we did in relation to the draft Fraud Guideline, re-ordering the culpability factors, so that sentencers start by considering those which fall within lesser culpability, and satisfy themselves that the offender does not fall within this band before moving on to consider the medium and, where relevant, high culpability factors. This seems a more logical approach, and one that will help ensure custody is only used when proportionate and necessary.

Consideration for remand time:

We note that the draft guidelines do not make reference, at Step Eight, to consideration for time spent on remand, as per section 240 of the Criminal Justice Act 2003. Notwithstanding strictures on the use of custodial remand introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in 2013 females were received into prison on remand for theft and handling offences on 1,598 occasions, accounting for 28% of all remand receptions that year, compared to 15% of all male remand receptions.⁵¹ Indeed, more females were received into prison **on remand** for theft and handling offences than for the offences of violence against the person, sexual offences and burglary combined. As theft and handling offences are a significant driver to women's imprisonment, and a spell in prison on remand can send a powerful message to the sentencing court, it is important that the guideline for theft offences makes explicit reference to remand time to ensure sentencers take this into consideration when sentencing.

We recommend amending the wording at Step Eight, as per the [Drug Offences Definitive Guideline](#), as follows:

Sentencers should take into consideration any remand time served in relation to the final sentence at this final step. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.

Theft from a shop or stall

Q1: Do you agree with the proposed factors within these 3 categories?

Offender accompanied by a child who is involved in, aware of, or used to facilitate the offence

In the current guideline, involving a child is an additional aggravating factor. We are concerned that taking this into account at Step One in determining culpability, as proposed, is likely to have a disproportionate impact on women, as they are more likely to be primary

⁵¹ Table A2.2A, Ministry of Justice (2014) *Offender management annual tables* 2013 London: MoJ

carers and be accompanied by a child.⁵² In addition, the factor as currently worded risks propelling women with children (particularly children who are in a pram or pushchair) into the High Culpability category, where hitherto the presence of their children has had no or limited bearing on the commission of the offence. We suggest removing this factor from Step One and reinserting it as an aggravating factor at Step Two. The phrasing of this factor in the existing guideline states that “the mere presence of a child does not make the offence more serious”. **This wording should be retained in the new guideline.**

Where an offender has intentionally or deliberately used a child to facilitate an offence, for example forcing a child to steal an item on their behalf or to act as a look-out, and this marks the offence out as “the most serious type of offending committed within this offence” the culpability factor Involvement of others through coercion, intimidation or exploitation would apply.

We welcome the inclusion of the factor Not motivated by personal gain at Category C – Lesser culpability, in light of evidence that much of women’s offending is prompted by their relationships, and often linked to financial hardship and responsibility for children. However we believe an additional factor is needed. During the London consultation event, we heard examples of migrant women with no recourse to public funds resorting to stealing food to feed themselves and their children. We are also aware of media reports that first time food thefts committed by women are increasing in many areas,⁵³ often driven by changes to benefit entitlements and the use of sanctions.⁵⁴ **Therefore, we recommend including the following additional factor in this category which takes account of offences committed in the context of exceptional financial circumstances or destitution:**

Motivated by exceptional financial circumstances

Finally, we are pleased to note that mental disorder/learning disability where linked to the offence are recognised at culpability C. We understand that shoplifting ‘offences’ are sometimes unwittingly committed by elderly and vulnerable individuals with progressive, cognitive impairments such as dementia.⁵⁵ Going shopping without paying for goods is an activity recognised by health and social care professionals who work with elderly people, as well as people with early onset dementia, those with mental health needs or learning disabilities. Whilst we assume that in such circumstances decisions to prosecute will not be in the public interest, this may not always be taken to be the case. Without wishing to be prescriptive, **we would welcome clarification from the Council that an offence committed under such circumstances would fall within the scope of this low culpability factor.**

⁵² www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20womens%20imprisonment.pdf

⁵³ www.bbc.co.uk/news/uk-england-kent-27516941

⁵⁴ www.theguardian.com/uk-news/2014/jan/23/rise-female-shoplifters-benefit-cuts-police

⁵⁵ <http://www.dementiatoday.com/frontotemporal-dementia/>

Q2: Do you think the financial amounts in the three categories are set at levels which will assist sentencers? If not, please suggest alternatives and reasons why you believe these will provide greater assistance.

The consultation states that theft from a shop or stall encompasses a “broad spectrum of offending behaviour, ranging from unsophisticated, opportunistic offences, often committed by those with drug or alcohol addictions, to highly planned, organised thefts from shops by groups of professional offenders”, but that “98% of thefts from shops are heard in magistrates courts...which deal with offences at the lower end of the scale of financial loss”. As highlighted previously, the BRC estimates the average value of goods stolen in 2012-13 at £177 per offender,⁵⁶ whilst it is expected that 90% of shop theft offences heard in the magistrates’ court will fall within the scope of the new offence of low value shoplifting (£200).⁵⁷

In light of this, it is clear that the three categories of loss set out at Harm A are unrepresentative of the bulk of theft offences which occur at the lower end of the scale, and will overwhelmingly fall within Category 3.

We recommend introducing a new Category 4 to give sentencers sufficient flexibility at Step One to reflect accurately the degree of loss that has occurred. This is particularly important in light of the new two-stage assessment of harm which sees sentencers taking account of “additional harm caused to the victim” and gives flexibility for “upward adjustment of the starting point within the range or...outside the range”. In cases involving very low financial losses (£100 or less) a short custodial sentence with a mandatory 12 month period of supervision in the community,⁵⁸ will surely neither be appropriate nor proportionate.

Q3: Is the wording at Harm B clear? Is it clear how the additional harm should be considered?

We do not agree with the Sentencing Council’s proposed approach as set out at Harm B. The new assessment at Harm B is a significant move away from the existing guideline and contrary to the Council’s stated aim to “regularise practice rather than...alter it substantially”, because it will inevitably lead to up-tariffing in cases where ‘detrimental effect’ can be shown. In addition, such an approach is not in line with the purposes of sentencing set out in statute, which states that courts must have regard to: a) punishment of offenders, b) reduction of crime, c) reform and rehabilitation of offenders, d) protection

⁵⁶ British Retail Consortium (2014) *Retail Crime Survey 2013* London: BRC

⁵⁷ Hansard HC, 11 July 2013 c471

www.publications.parliament.uk/pa/cm201314/cmpublic/antisocialbehaviour/130711/am/130711s01.htm

⁵⁸ Section 2, Offender Rehabilitation Act 2014

of the public, and e) making of reparation by offenders to persons affected by their offences.⁵⁹

It is not clear from the information provided in the consultation how additional harm is to be quantified. Whilst on the one hand the consultation states that “additional harm can **only** be demonstrated by a ‘detrimental effect on the victims’”, it goes on to state “the examples that may illustrate this detrimental effect are not exhaustive...and the court may consider other examples, so long as they demonstrate a detrimental effect of the offence on the victim”. We do not agree, for instance, that “the inconvenience caused by having to cancel and replace bank cards” demonstrates additional harm and warrants “upward adjustment of the starting point within or outside the range”. Without a tighter definition of the Council’s interpretation of what constitutes detrimental effect we fear that most cases of theft covered by this Guideline will be included.

Being a victim of crime is by its very nature emotionally distressing and practically inconvenient. Theft from a shop or stall will inevitably involve some loss of business or damage to property. This can be more appropriately taken into account at Step Six when the court considers confiscation, compensation and ancillary orders. Indeed, the draft guideline states “where the offence has resulted in loss or damage the court must consider whether to make a compensation order”. Ministry of Justice data shows that one in five (21%) women sentenced for theft from a shop in 2013 were subject to compensation orders (see above for average amounts).⁶⁰ This suggests courts are already passing the costs of loss or damage caused by their offending behaviour on to women offenders in appropriate cases. If the Council retains the additional assessment of harm at Step One, the wording at Step Six should be revised to protect against double counting. **We recommend removing Harm B from the guideline. However, if it retained, we urge the Council to draft an exhaustive list of examples of detrimental effect which better capture the degree of ‘harm’ it is seeking to reflect in sentencing.**

Q4: Do you agree with the proposed approach to the treatment of previous convictions?

We do not agree that giving scope to adjust sentences upwards, including outside the category range, is the right approach to dealing with previous convictions and are unclear as to why the Council has included it when ‘previous convictions, having regard to nature...relevance....and time elapsed’ is already a statutory aggravating factor which all sentencers must take into consideration. In addition, the draft guideline acknowledges that “this offence is frequently committed by those with underlying drug problems as a way of financing their drug habit” and that “the treatment of underlying addiction has the

⁵⁹ Section 142, Criminal Justice Act 2003

⁶⁰ See Criminal justice system outcomes 2009-2013 table, Ministry of Justice (2014) *Criminal Justice Statistics quarterly – December 2013* London: Ministry of Justice

possibility of removing the need to offend”. The proposed approach to previous convictions will not help to address the causes of offending or prevent further offences of a similar nature.

As the guideline points out, persistent and sometimes prolific low-level shoplifting is often driven by drug and alcohol addiction, mental ill-health, housing problems/ homelessness and debt. The British Retail Consortium found that about 65% of shoplifters arrested test positive for drugs or say they steal to support their habit.⁶¹ We are concerned that the draft guideline will lead to harsher penalties for an offender appearing before the court with ‘recent, relevant convictions’ and will repeat and compound the failure of previous sentences to address the underlying causes of their crimes. This is particularly true of custodial penalties, which have the worst reconviction rates of all the sentences available to the court.⁶² Yet as HM Chief Inspector of Prisons, Nick Hardwick, has highlighted, women’s prisons are full of “repeat offenders, trapped in a cycle of deprivation, disadvantage, drug abuse and crime that the prison system is conspicuously failing to break.”⁶³

The Guideline should encourage the use of intensive community interventions which take a multi-agency approach to addressing offending behaviour. Many women’s community centres, for example, have an impressive track record of working with women involved in persistent, low level offending and delivering low reconviction rates,⁶⁴ whilst shoplifting-specific programmes which aim to facilitate engagement with social care interventions have proven to reduce persistent offending.⁶⁵

The proposed treatment of previous convictions is neither necessary justified nor helpful.
We recommend its removal from the guideline.

Q5: Do you agree with the proposed aggravating factors?

See answer to question 6.

Q6: Do you agree with the treatment of prevalence as an aggravating factor?

No. Treating prevalence as an aggravating factor would be unjust, as it would make the individual being sentenced accountable for the crimes of others, and ineffective, as it assumes that deterrent sentencing works both for the individual being sentenced, and the

⁶¹ www.theguardian.com/society/2006/nov/01/drugsandalcohol.crime

⁶² Prison Reform Trust (2014) *Prison: the facts Bromley Briefings Summer 2014* London: PRT

⁶³ www.independent.co.uk/news/uk/crime/mothers--prison-the-alternatives-8160836.html

⁶⁴ Prison Reform Trust (2014) *Why focus on reducing women’s imprisonment?* London: PRT

⁶⁵ See for example the Brighton Shoplifting Project, Brighton and Hove DAAT (2005) Shoplifting project Interim annual report 2004-5

wider community.⁶⁶ Such an approach also risks increasing the likelihood of ‘postcode sentencing’ because courts in different locales will interpret “exceptional local circumstances” in different ways. This is contrary to the Council’s stated aim for the revised guideline to “regularise practice” and improve consistency in sentencing. The guideline states “it is **essential** [emphasis added] that the court...is satisfied that there is a compelling need to treat the offence more seriously than elsewhere” yet provides no guidance on how courts are to evidence this, what the benchmarks might be, nor how this discretion will be monitored. In our experience, the lack of national scrutiny of local sentencing practices and outcomes means that individual sentencers and sentencing courts are largely ignorant of how their sentencing compares to other areas, though as we know from discussions with the Magistrates’ Association, many would appreciate more feedback.

The proposal represents a dramatic reversal of the existing guideline, which clearly states that “the sentence on an individual offender should not be increased to reflect the harm caused to retailers in general by the totality of this type of offending.” We would welcome a greater emphasis on reparation within the guideline in recognition of the role that reparative activities, such as unpaid work or restorative justice, can play in repairing the harm caused by an offence to the wider community. **We recommend removing prevalence from the list of aggravating factors.**

Q7: Are there any mitigating factors which are not listed here which you think should be?

To ensure the court is alert to the specific drivers of some women’s offending, and, indeed, offending by some vulnerable men, we recommend the inclusion of a factor which recognises the role that coercion or duress can play in offending, whether organised (for example where the offence is directed by an individual or group) or not (for example as a result of a partner/spousal pressure). Whilst this is included in the list of Culpability C factors, the Court may decide the balance of characteristics places the offender in Culpability A or B. **Involvement due to coercion, intimidation or exploitation should therefore be available as a mitigating factor where this has not been taken into account at Step One.**

We also consider there are sound reasons to include reference to financial hardship. **We welcome the inclusion of the following factor in the new [Fraud, Bribery and Money Laundering Offences Definitive Guideline](#) and recommend its inclusion here because there will be significant overlap between the financial drivers to benefit fraud and theft from a shop or stall:**

Offender experiencing significant financial hardship or pressure at time [theft] was committed due to exceptional circumstances

⁶⁶See the 2001 Halliday Report, *Making punishments work – report of a review of the sentencing framework for England and Wales*

In recognition of evidence that women's offending is more likely to be prompted by financial concerns (for example, a need to support their children)⁶⁷ or committed on behalf of others,⁶⁸ and in light of emerging evidence of an increase in the number of women "stealing to eat"⁶⁹ **we recommend including 'Not motivated by personal gain' as a mitigating factor where this has not been taken into account when determining culpability at Step One, and the threshold for exceptional circumstances (see above) has not been met.**

In addition to these supplementary factors, we suggest the following amendments to existing factors.

The journey towards desistance is complex and not accurately captured by a binary measure of offending /not offending. For many women whose offending behaviour is caught up in a broader web of victimisation, addiction and disadvantage, it may be unrealistic to expect their offending to cease overnight and punishment should reflect this. Practitioners working with women offenders in the community, who attended our consultation events, were positive about the potential for women-specific community interventions to address the complex drivers to women's offending and work towards reducing their involvement in the criminal justice system and the harm which causes. For some women, increasing the length of time for which they are able to comply with community orders will be a significant achievement, whilst for others, longer periods spent out of prison will be testament to their efforts to tackle addictions, leave abusive relationships and change their behaviour. **To reflect distance travelled where an individual has reduced the frequency or severity of their offending, we therefore recommend amending the factor relating to offending history as follows:**

No previous convictions or no relevant/recent convictions or reduction in offending behaviour.

We agree that remorse should be a mitigating factor. However, individuals who are not in a position to make voluntary reparation to victims should not be disadvantaged at mitigation as a result of their financial situation. **We recommend replicating the wording adopted by the new [Fraud guideline](#) by removing the reference to voluntary reparation to the victim as evidence of remorse.**

To encourage sentencers to take full and proper account of the needs of any dependent children when sentencing all those with primary care responsibilities, **we recommend**

⁶⁷ Prison Reform Trust (2014) *Why focus on reducing women's imprisonment?* London: PRT

⁶⁸ See SPCR survey which found that 49% of women in prison had committed offences to support others' drug use, compared to 22% of men

⁶⁹ www.theguardian.com/society/2013/jan/25/stealing-to-eat-cases-rise

revising the factor relating to sole or primary caring responsibilities to include the following explicit reference:

Sole or primary carer for dependent relatives including children

Q8 & 9: Do you consider that the sentence passed in scenario A is proportionate? Specifically do you consider that a short custodial sentence in such a case is appropriate? If you do not agree please say what sentence should be passed and why.

We do not believe a short custodial sentence is appropriate for the offence detailed in this scenario.

As discussed in answer to question 4, we are concerned that the proposed approach to previous convictions in this guideline will lead to more women receiving short custodial sentences for shoplifting offences on the basis of their previous convictions, rather than the seriousness of the offence for which they are now before the court. In our view, there is undue weight given to previous offending which can be counter-productive. It risks overlooking or taking proper account of changes that may have occurred in the frequency or severity of offending. This is particularly important in the context of sentencing women, because their journey to desistance is complicated by the multiple complex drivers to their offending – for example, experience of physical and sexual abuse, involvement in sex working, substance misuse, mental ill-health and financial hardship.

It is imperative that Sentencing Guidelines provide sentencers with the scope to acknowledge and reflect this journey in their decision-making, if we are not to further overcrowd our prisons with petty but persistent offenders who will not be helped by a custodial sentence. As the case of D in scenario A highlights, the proposed approach to persistent offending risks being a straitjacket for sentencers and entrenching the revolving door of custodial sentencing. Once a custodial sentence has been passed, and a further offence has been committed on release, the court is likely to consider that only a custodial sentence of longer length can be justified, as in the scenario, irrespective of whether the nature of the offending has changed. This sets a dangerous precedent given the evidence that short sentences have the highest reoffending rates. Whether or not this changes in the wake of the Offender Rehabilitation Act 2014 remains to be seen but the fact the impact assessment produced for the Act gave “a best estimate of around 13,000 offenders recalled or committed to custody” for breaching the terms of the new statutory supervision suggests forecasts are mixed.⁷⁰

Q10: Please give your views on the proposed sentence levels for this offence in Scenario B.

⁷⁰ www.parliament.uk/documents/impact-assessments/IA13-18.pdf

In our view, a 26 week custodial sentence would be a draconian sentence for an offence of theft from a shop or stall with a value of £200, rather than a just or proportionate penalty. It is not clear from the information provided why the further assessment at Harm B would justify a move from the top of the range for Category 3 – Culpability B to the top of the range for Category 2 - Culpability B.

The victim personal statement from the shop owner highlighted “that her business could not support the loss of a valuable stock item”. Surely in light of this the most appropriate sentence would be one which encouraged the offender to make reparation to the shop owner for the loss incurred. This could either take the form of a compensation order, or restorative justice (whether post-conviction pre-sentence or post-sentence as a requirement attached to a community order). Instead it is here used as a justification to move the offence either to the top of the Category 3 range or outside the range, attracting more severe penalties and doing little to address the harm caused by this offence.

We also wish to point out that an unintended consequence of the assessment at Harm B, as evidenced in scenarios A and B, could be an increase in thefts from larger stores such as supermarkets, rather than smaller shops with limited staff, because evidencing the detrimental effect on the victim required to prove additional harm at Harm B will be harder for the former.

Q11: Do you think the mechanisms to move upwards from the starting point, including outside a category for previous convictions or for additional harm, offer flexibility to sentencers? Are they clearly explained within the guidelines?

The question should not be whether these mechanisms offer sentencers flexibility to increase penalties, but whether they enable and equip sentencers to deliver proportionate and effective sentences with custody as a last resort. As we have already explained, we are not persuaded on either of these counts. We have therefore recommended clarifying the wording at Harm B, dealing with loss or damage at Step Six, and removing the option to make upward adjustments (including outside the category range) for relevant recent convictions and instead dealing with previous convictions at aggravation/mitigation.

Q12: Do you feel that the shop theft guideline gives the right level of guidance? If not, please tell us why.

As it stands, we do not believe the guideline contains adequate guidance on the scope and need for gender-specific sentencing options. We are concerned that the implications for women have not been adequately analysed or tested and fear that unless revised in the ways we have proposed they could, particularly in the current socio-economic climate, result in an increase in the number of women given custodial sentences. All the evidence

suggests that this is counter-productive for crime reduction as well as for family and community wellbeing.

Prison Reform Trust

June 2014

Annex - List of consultation event attendees

Anawim Women's Centre, Birmingham, Monday 12th May 2014

Katharine Rainsford JP (Chair), Sentencing Council member

Mandy Banks, Sentencing Council

Ruth Pope, Sentencing Council

Jenny Earle, Prison Reform Trust

Sam O'Sullivan, Prison Reform Trust

Joy Doal, Anawim

Margaret Jarman, Soroptimist

Annalise Jones, Brighter Futures

Mandy Gray, Changing Lives

Lisa Harper, Fry Housing Trust

Janine Roberts, Anawim Probation Officer

Ruth Drapkin, Magistrate

Chanel Jones, Fry Housing

Shazna Islam, Birmingham Women's Aid

Emma Helvaci, Women's Work Derby

Majella Murphy, Anawim Probation Officer

Louise Brooks, Anawim

Sarah Cresswell, Mental Health Nurse

London, Tuesday 20th May 2014

Katharine Rainsford JP (Chair), Sentencing Council member

Mandy Banks, Sentencing Council

Mary Jones, Sentencing Council

Rebecca Nadin, Prison Reform Trust

Jenny Earle, Prison Reform Trust

Sam O'Sullivan, Prison Reform Trust

Georgina Naylor, Pilgrim Trust

Mitch Egan, Women's Justice Taskforce

Anna Gaunt, Beth Centre

Helen Hird, WomenCentre

Sofia Gullberg, Women in Prison

Vicky Jones, Women@Well

Francesca Clayman, Together for Mental Wellbeing

Pippa Hockton, Street Talk

Deborah Russo, Prisoners Advice Service

Deborah Cowley, Action for Prisoners Families

Inspector Mary Alston, Intensive Offender Management, Metropolitan Police

Lucy Satchell-Day, London Probation Trust/Community Rehabilitation Company
Sarah Easey, Mayor's Office for Policing and Crime (MOPAC)
Amy Frost, Deputy Governor HMP Holloway
Rona Epstein, University of Coventry
Shona Minson, Oxford University Centre for Criminology
Anna Capstick, Durham Tees Valley Probation
Inspector Liane Green, Durham Police