



**UNODC**

United Nations Office on Drugs and Crime

Toolkit on

# **GENDER-RESPONSIVE non-custodial measures**



CRIMINAL JUSTICE HANDBOOK SERIES



This publication has been prepared in collaboration  
with the Thailand Institute of Justice.

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UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **Toolkit on Gender-Responsive Non-Custodial Measures**

CRIMINAL JUSTICE HANDBOOK SERIES



UNITED NATIONS  
Vienna, 2020

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.



## Acknowledgements

This toolkit has been prepared for the United Nations Office on Drugs and Crime (UNODC) by Sabrina Mahtani, a human rights lawyer and penal reform expert.

A first draft of the toolkit was reviewed and discussed during an expert meeting held in Bangkok from 2 to 4 September 2019. UNODC wishes to acknowledge the valuable suggestions and contributions of the following experts who participated in the expert meeting: Rana Akoum, Bayan Saleh Ali, Shane Bryans, Doreen Buettner (UN Women), Panotporn Chalodhorn, Nathee Chitsawang, Chontit Chuenurah, Fernanda Dorantes, Bianca dos Santos Waks, Rachel Duran Ruelo, Marta Holgado, Ratchada Jayagupta, Sommanat Juaseekoon, Matti Tapani Joutsen, Debbie Kilroy, Gloria Lai, Klaudia Lozyk, Marlo Malagar, Fiona Mwale, Clement Okech, Kim Pate, Varamon Ramangkura, Sugunya Rattananakin, Patsalin Reephrom, Cherol Ringane, Carmen Rodriguez-Medel Nieto, Wanchai Roujanavong, Patcharin Rui-on, Phiset Sa-ardyen, Assanee Sangkhanate and Neelam Sarkaria.

UNODC also wishes to acknowledge the support and contribution provided by the following individuals who contributed insights and best practice examples: Charmaine Archer (Human Rights Program, Harvard Law School), Lilian Artz (University of Cape Town), Tomris Atabay, Joanna Baker, Claire Cain (Women in Prison), Tsira Chanturia (Penal Reform International), Jenny Earle (Prison Reform Trust), Sasha Gear (Just Detention), Omar Khan, Jane Kuria (Faraja), Miriam Goodman (Justice Home), Gloria Lai (International Drug Policy Consortium), Dr Haim Mell (Israel National Antidrug Authority), Simitie Laval, Lynette Mabote (AIDS and Rights Alliance for Southern Africa), Victor Mhango, Olivia Rope (Penal Reform International), Luna Santoas, Gauri Sharma (Delhi University), Enocent Silwamba (Prison Fellowship), Eileen Skinnider (Associate, International Centre for Criminal Law Reform and Criminal Justice Policy), Gaye Sow (Institute for Human Rights and Development in Africa), Lisa Vetten, Harriet Wistrich (Justice for Women), Rebecca Wood (AdvocAid) and Colette Youngers (The Washington Office on Latin America).

The following UNODC staff contributed to the development of this toolkit: Claudia Baroni, Anika Holterhof, Muriel Jourdan-Ethivignot, Valerie Lebaux, Jee Aei Lee, Takeshi Matsumoto, Karen Peters and Sven Pfeiffer.

UNODC gratefully acknowledges the funding provided by the Thailand Institute of Justice (TIJ) for the development of the toolkit on Gender-Responsive Non-Custodial Measures.



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# Introduction

## Purpose of the toolkit

Women are the fastest growing prison population across the world. As further outlined in this toolkit, poverty, discrimination, violence and punitive legal responses are some of the key underlying causes behind the increase in female imprisonment. The harmful and negative impact of imprisonment on women, their families and communities has been widely documented.

Since the adoption of the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),<sup>1</sup> which complements the United Nations Standard Minimum Rules on Non-custodial Measures (the Tokyo Rules)<sup>2</sup> and the United Nations Standard Minimum Rules on the Treatment of Prisoners (the Nelson Mandela Rules),<sup>3</sup> there has been increased attention dedicated to the gender-responsive treatment of women in prison. This toolkit seeks to provide support and guidance on taking steps to ensure that women in contact with the law are not detained or imprisoned unnecessarily and that detention is used as a measure of last resort. The starting point for this toolkit is to take the least interventionist approach possible, acknowledging that in certain situations contact with the criminal justice system can be harmful to women.

The Sustainable Development Goals, in particular SDG 5 (achieve gender equality and empower all girls) and SDG 16.3 (equal access to justice for all) and the overarching objective of “leave no one behind”, will not be attained unless there is a transformative approach to the way that the criminal justice system responds to women and girls.

This toolkit is designed to build on existing international instruments and resources,<sup>4</sup> as well as regional and international best practices, in order to provide guidance on applying non-custodial measures to women in contact with the law as well as on gender-sensitive application of criminal laws, policies and procedures.

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<sup>1</sup> General Assembly resolution 65/229, annex, adopted on 21 December 2010.

<sup>2</sup> General Assembly resolution 45/110, annex, adopted on 14 December 1990.

<sup>3</sup> General Assembly resolution 70/175, annex, adopted on 17 December 2015.

<sup>4</sup> Tokyo Rules; Bangkok Rules; Nelson Mandela Rules; UNODC, *Handbook on Women and Imprisonment: 2nd edition* (2014) and UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007).

This toolkit is aimed at providing guidance to judges and prosecutors as well as other professionals working with women in the criminal justice system, such as defence lawyers, probation officers, health professionals and civil society organizations.

This toolkit has also been designed to assist policymakers when considering how best to consider and develop non-custodial measures, reduce imprisonment, enable the criminal justice system to recognize and implement existing gender norms and address roles and inequalities. Policymakers play an important role in ensuring that justice sector professionals have the legislation and rules available to implement other measures than detention or imprisonment and to take a gender-responsive approach.

Additionally, the toolkit provides insight for the media to better understand why non-custodial measures and a gender-responsive approach are important to consider and implement when responding to women in contact with the law:

## Overview of the toolkit

The toolkit is divided into the following components:

- The **Introduction** sets out the rationale, purpose and scope of the toolkit and defines key concepts.
- **Part 1** identifies the particular needs of women in contact with the law and explains the main driving factors behind women's imprisonment. It considers the harmful impacts of imprisonment on women and why non-custodial measures as alternatives to pretrial detention and imprisonment are important and should be prioritized. It also suggests general measures to be taken to ensure a more gender-sensitive approach by the criminal justice system in order to adopt specific responses to the particular needs of women.
- **Part 2** covers non-custodial measures for women in contact with the law. It gives an overview of international and regional standards and then provides suggested guidance on implementing non-custodial measures and examples of best practice at various stages of the criminal justice system: pretrial, the trial and sentencing stage and the post-sentencing stage.
- **Part 3** covers special categories of women where additional considerations should be taken into account to ensure gender-sensitive application of criminal laws, procedures and practices as well as implementation of non-custodial measures. These include women who are survivors of gender-based violence, foreign national women who may be survivors of trafficking and exploitation, and women arrested for drug offences.

The toolkit includes a list of additional relevant resources as well as examples of self-assessment and training exercises.

At the outset of this toolkit, it should be acknowledged that currently there is an existing important debate concerning the use of language. This toolkit endeavours to use language that is not stigmatizing while using terminology that is pertinent to the criminal justice system.

## How to use this toolkit

This toolkit can be used as a reference resource by reading the publication in its entirety or specific sections.

The toolkit is also designed for use in trainings and capacity-building initiatives of relevant officials.

The toolkit acknowledges that each country will have different starting points and challenges. The case studies list good practice examples. The self-assessment exercises are designed to reflect on the gaps in one's country and to put forward recommendations to policymakers and leaders within the justice sector. The toolkit also makes suggestions on adopting a gender-responsive approach which can be incorporated within existing frameworks.

## Methodology

This toolkit is based on a desk review of existing international, regional and national standards, documentation and publications, as well as interviews with experts working with women in contact with the law and some formerly incarcerated women. The toolkit was also reviewed and discussed during an expert meeting held in Bangkok (Thailand) on 2-4 September 2019. Experts further commented on a revised draft in December 2019.

This toolkit does not focus on girls in contact with the law and reference should be made to specialist instruments and publications which focus on children.<sup>5</sup> It also does not focus on women who identify as lesbian, bisexual, transsexual or intersex and reference should be made to relevant standards, documents and materials.<sup>6</sup>

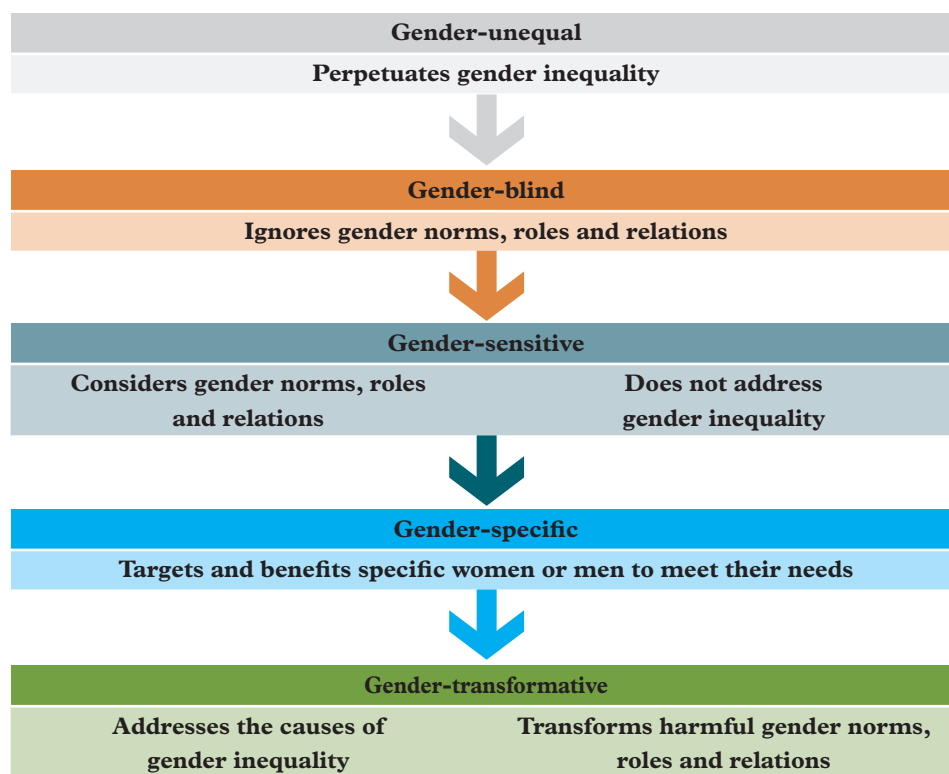
## What are gender-sensitive and gender-responsive approaches?

According to one definition, gender-sensitive measures merely consider and raise awareness on gender norms, roles and inequalities, whereas gender-responsive measures also include action to actively address them.<sup>7</sup> This toolkit aims to help criminal justice practitioners to become more gender-responsive and move from gender-unequal or gender-blind approaches to approaches that recognize, address and ultimately transform the gender norms, roles and inequalities that lead to discrimination against women in contact with the law.

<sup>5</sup>United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 69/194, annex, adopted on 18 December 2014; Penal Reform International (PRI), *Protecting Children's Rights in Criminal Justice Systems* (2013).

<sup>6</sup>UNODC, *Handbook on Prisoners with Special Needs* (2009).

<sup>7</sup>World Health Organization (WHO), *Integrating Gender into HIV/AIDS Programmes in the Health Sector: Tool to Improve Responsiveness to Women's Needs* (2009).

Figure I. Gender Responsive Assessment Scale<sup>8</sup>

### KEY CONCEPTS

**Gender** refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context and time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.<sup>a</sup>

**Gender equality** refers to the equal rights, responsibilities and opportunities of women and men and implies that the interests, needs and priorities of both women and men are taken into consideration. Gender equality does not mean we always treat men and women the same. It means acknowledging and embracing the differences between men and women in society and recognizing that justice lies in providing appropriate differential treatment to achieve equal opportunities for all.<sup>b</sup>

<sup>8</sup>Adapted from WHO Gender Responsive Assessment Scale: *Criteria for Assessing Programmes and Policies*.

**Discrimination against women** is defined as “any distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.<sup>c</sup>

**Intersectional discrimination** is a term that reflects the fact that individuals may be subjected to multiple and compounding forms of discrimination, on the grounds related to various specificities of identity or circumstance. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.<sup>d</sup>

**Gender-based violence against women and girls (GBVAWG)**<sup>e</sup> is violence directed towards, or disproportionately affecting women because of their gender or sex. This term makes explicit the gendered causes and impacts of the violence. Such violence takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty. GBVAWG can be defined differently under national laws.

Using a **gender perspective** is required to achieve gender equality, which entails considering the differential impact on women and men with the aim to ensure that both benefit equally and are not disproportionately affected by criminal laws, policies and procedures.<sup>f</sup>

<sup>a</sup> UNODC, *Criminal Justice Toolkit* (2009).

<sup>b</sup> UNODC, *Guidance Note for UNODC Staff: Gender Mainstreaming in the work of UNODC* (2013).

<sup>c</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, United Nations, *Treaty Series*, vol. 1249.

<sup>d</sup> CEDAW Committee, General Recommendation No. 28, para. 18.

<sup>e</sup> CEDAW Committee, General Recommendation No. 35, para. 9.

<sup>f</sup> UNODC, Global e-Learning, Course Catalogue, “Gender Issues: Alternatives to Imprisonment for Women Offenders” (Nr. 23.2), <https://www.unodc.org/elearning/en/courses/course-catalogue.html>.



# 1. Identifying the needs of women in contact with the law

## KEY MESSAGES

- Globally, female imprisonment is increasing at a higher rate than the imprisonment of men. Some of the key factors behind this increase include the punitive responses to women with substance use disorders or women involved in minor drug offences, as well as the targeting by criminal laws of behaviors related to sexuality and reproduction. This increase reflects the specific vulnerability of women with regard to poverty, gender-based discrimination and violence, as well as health needs.
- Women often face discrimination within the legal system. Specific groups of women, such as indigenous and minority women or sex workers, face additional and intersecting forms of discrimination.
- Imprisonment has a negative impact on women in terms of safety, the consequences for their dependents, a deterioration on their mental health and stigma, also due to the lack of gender-specific facilities and the lack of gender-specific rehabilitation programmes for women.
- It is important for policymakers and criminal justice professionals to understand the main drivers leading to women's imprisonment and the harmful impact of women's imprisonment in their countries.
- Non-custodial measures can reduce the social and economic cost of imprisonment and help to reduce the prison population and rates of recidivism. Non-custodial measures can help address women's specific needs and foster their reintegration process. The community is better served by community-based interventions which address the underlying causes of women coming into contact with the law.
- It is important that non-custodial measures are gender responsive. Many non-custodial measures and sanctions overlook the typical characteristics, roles and backgrounds of women in contact with the law and that they can be implemented in a way which causes further harm to women or imposes a different form of harm or control by the State.
- Policymakers should increase the allocation of resources dedicated to community-based alternatives to imprisonment and to organizations working to address underlying causes of women coming into contact with the law so there is an increased focus on prevention.



## 1.1 What are the driving factors behind women's imprisonment?<sup>9</sup>

Although women make up a minority of the global prison population (around 7 per cent), the number of women imprisoned is increasing at a higher rate than that of men. The number of women and girls in prison worldwide has increased by some 53 per cent since about 2000, when the total was estimated at approximately 466,000. The worldwide male prison population has increased by around 20 per cent since 2000.<sup>10</sup> A higher proportion of women than men are in prison for drug-related offences. 35 per cent of women globally are imprisoned for drug-related offences compared to 19 per cent of men.<sup>11</sup> In a number of countries, a high proportion of the female prison population are held in pretrial detention.<sup>12</sup>

The main factors that lead to women's imprisonment include:

- **Discrimination:** Women from ethnic minority backgrounds and indigenous communities are disproportionately impacted by the criminal justice system and face significant disadvantages in the criminal justice system due to the intersections of gender and race because of structural racism.<sup>13</sup> For women from minority groups, the inequalities and discrimination are exacerbated due to their typically multiple needs from their socioeconomic marginalization in most societies and the consequences of discrimination. In some countries, women from racial and ethnic minority groups represent over 50 per cent of the prison population.<sup>14</sup> The disproportionate incarceration rates of women from certain ethnic and minority groups is highlighted by the Special Rapporteur on violence against women.<sup>15</sup>
- **Poverty:** In many countries, most women in contact with the law come from disadvantaged socioeconomic backgrounds, are unemployed, have minimal education and dependent children. They often commit crimes related to poverty such as theft of food items and other essential items to meet family needs, rather than violent crimes.
- **Drug-related offences:** Many women in contact with the law commit low-level drug offences, often as a result of manipulation, coercion or conditions of vulnerability such

<sup>9</sup>Report of the Special Rapporteur on violence against women, its causes and consequences, "Pathways to, conditions and consequences of incarceration for women" (A/68/340); Background paper, "Workshop 1: Role of the United Nations standards and norms in crime prevention and criminal justice in support of effective, fair, humane and accountable criminal justice systems: experiences and lessons learned in meeting the unique needs of women and children, in particular the treatment and social reintegration of offenders" (A/CONF.222/10), Thirteenth United Nations Congress on Crime Prevention and Criminal Justice; UNODC, *Training Curriculum on Women and Imprisonment*, Version 1.0 (2015); UNODC, *Handbook on Women and Imprisonment*: 2nd edition (2014) and PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2015).

<sup>10</sup>World Prison Brief, World Female Imprisonment List 4th ed. (2017).

<sup>11</sup>UNODC, *World Drug Report 2018, Women and Drugs: Drug use, drug supply and their consequences*, p. 9.

<sup>12</sup>Council of Europe, *Annual Penal Statistics (SPACE)*, 2016.

<sup>13</sup>Australian Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017). Prison Reform Trust, *Counted Out: Black, Asian and minority ethnic women in the criminal justice system* (2017). See also, *Women in Prison, "Double disadvantage": The experiences of Black, Asian and Minority Ethnic women in the criminal justice system* (2017).

<sup>14</sup>For example, in the United Kingdom, Black, Asian and Minority Ethnic women comprise 11.9 per cent of the women's population in England and Wales, but 20 per cent of the women's prison population. Ministry of Justice analysis shows that black women are about 25 per cent more likely than white women to be sentenced to custody at crown court. (*Women in Prison, Key Facts*). In Brazil, 62 per cent of incarcerated women are black. (Connectas, Brazil has the fourth highest number of incarcerated women in the world (2018)). In the United States, black or lesbian or bisexual women are disproportionately subject to incarceration. (Prison Policy Initiative, *Women's Mass Incarceration: The Whole Pie* (2019)).

<sup>15</sup>Special Rapporteur on violence against women its causes and consequences, Mission to the United Kingdom of Great Britain and Northern Ireland (A/HRC/29/27/Add.2).

as poverty or violence. Many have substance abuse problems themselves or have been used as drug couriers in exchange for small amounts of money. A higher proportion of women than men are in prison for drug-related offences, and harsh, punitive criminal justice responses are behind the increasing rate of female imprisonment in many regions, such as Latin America and South East Asia.<sup>16</sup> In countries like Brazil, Costa Rica, Peru and the Bolivarian Republic of Venezuela, more than 60 per cent of women in prison are reported to be incarcerated for a drug offence. In the Philippines and Thailand, this proportion reaches 53 per cent and 82 per cent respectively.<sup>17</sup>

- **Gender-based violence against women:** Women are also disproportionately affected by domestic violence and others forms of violence than men. In some cases, this can lead women to commit violent offences against their partners, family members, or other persons who are subjecting them to physical, sexual or other forms of abuse.<sup>18</sup> There is a strong link between gender-based violence against women and women's incarceration, whether prior to, during or after incarceration.<sup>19</sup> A history of violence can also be an underlying factor for drug-related offences or other minor offences.
- **Trafficking in persons:** In many countries, women who are trafficked are arrested for offences such as prostitution, fraud, theft or false documents, most often due to coercion or exploitation.<sup>20</sup>
- **Criminalization of sexuality and reproduction:** Some countries criminalize abortion. In other countries, a range of laws and policies relating to public order or "morality" are used to indirectly police and punish sexual and reproductive choices or gender expression.<sup>21</sup> For example, laws punishing sex work target those who have few other options and increase stigma and discrimination.
- **Mental health:** Women who are admitted to prison tend to have higher rates of mental health issues and substance abuse problems than their male counterparts, often as a result of previous domestic violence, physical and sexual abuse.<sup>22</sup>

<sup>16</sup> UNODC, World Drug Report 2018, *Women and Drugs: Drug use, drug supply and their consequences*, p. 9.

<sup>17</sup> International Drug Policy Consortium (IDPC), *Women, Incarceration and Drug Policy in Indonesia: Promoting Humane and Effective Responses* (2019).

<sup>18</sup> PRI, and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?* (2016).

<sup>19</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, "Pathways to, conditions and consequences of incarceration for women" (A/68/340), p. 4.

<sup>20</sup> Prison Reform Trust, *Too many foreign national and trafficked women face inappropriate imprisonment* (2018).

<sup>21</sup> Amnesty International, *What does it mean when sexuality and reproduction are criminalized?* (2018).

<sup>22</sup> WHO, Regional Office for Europe, *Health in Prisons* (2007). See also, Moloney, van den Bergh, and Moller, "Women in prison: the central issues of gender characteristics and trauma history", *Public Health*, Vol. 6, No. 126 (2009).

## 1.2 How do women face discrimination in the criminal justice system?

**Legislation and/or its implementation:** Provisions that appear to be gender-neutral can be discriminatory if in practice charges are brought only or predominantly against women. For example, “moral crimes”, such as adultery, extramarital sex, sexual misconduct, running away, violations of dress codes or prostitution,<sup>23</sup> tend to penalize women exclusively or disproportionately even if they are formulated in a gender-neutral way and can lead to punishment and imprisonment of survivors of rape or other forms of violence.<sup>24</sup> Discrimination of women also occurs where abortion is illegal or legal only in limited circumstances. The criminalization of abortion raises issues of proof (difficulty of distinguishing abortion from miscarriage) and often leads to multiple women being targeted by the criminal justice system for a single abortion (helper, sister, mother, neighbour). Women who are sex workers, including victims of trafficking, also face imprisonment in numerous countries for offences such as prostitution. In some countries, women are criminalized for witchcraft or accusations of witchcraft.<sup>25</sup>

In August 2019, a 21-year-old woman in **El Salvador**, whose baby was found dead in the toilet where she gave birth, was cleared of murder during a retrial. She was initially accused of abortion but the charge was changed to one of aggravated homicide with prosecutors arguing she had hidden her pregnancy and not sought antenatal care. In July 2017, the judge ruled that Ms Hernández knew she was pregnant and found her guilty. She was sentenced to 30 years in prison. Following an appeal, in February 2019, El Salvador’s Supreme Court annulled the 2017 conviction citing absence of evidence and ordered a retrial with a new judge.

Source: BBC News, “El Salvador: Evelyn Hernández cleared over baby’s death”, 20 August 2019, <https://www.bbc.com/news/world-latin-america-49368632>.

**Vulnerability to pretrial detention:** Many women, particularly those in situations of vulnerability and who are economically disadvantaged, cannot afford bail or the services of a lawyer and are therefore likely to be detained before trial. Eligibility criteria for being able to benefit from free legal aid that are based on financial estimates can further discriminate against women if they are based on family/household income, to which women may not have access. In many countries, there are a higher number of women in pretrial detention than those serving sentences.<sup>26</sup> Many women in contact with the law have limited education and are less aware of their legal rights, increasing the likelihood of prolonged periods of detention.

Given that most legal systems are complex, access to non-custodial alternatives also often depends on legal representatives putting forward respective motions, such as for bail, diversion, restorative justice or mediation.<sup>27</sup> Lack of access to legal advice and representation faced by women in contact with the law in many countries therefore has a significant impact on the probability of their detention and imprisonment.

<sup>23</sup> A study in Texas between 1977 and 2010 found that women were disproportionately arrested for prostitution and that women were more likely to receive a jail sentence for involvement in prostitution than men were. In contrast, male arrestees for prostitution were more likely to receive probation sentences and/or fines. Pfeffer et al, “Gendered Outcomes in Prostitution Arrests in Houston, Texas”, *Crime & Delinquency* (2017).

<sup>24</sup> Human Rights Watch, *World Report 2012: Afghanistan* (2012), which details how girls are convicted and imprisoned for crimes that usually involve flight from unlawful forced marriage or domestic violence.

<sup>25</sup> Help Age International, *Using the law to tackle accusations of witchcraft: HelpAge International’s position* (2011).

<sup>26</sup> The Washington Office on Latin America (WOLA), *Pretrial Detention In Latin America: The Disproportionate Impact On Women Deprived Of Liberty For Drug Offenses* (2019).

<sup>27</sup> AdvocAid, *Women, Debt and Detention* (2012), p. 13.

In **Latin America** a significant percentage of women deprived of liberty are in pretrial detention. For instance, in Guatemala in 2017, there were more women in pretrial detention (1,112) than women who had been sentenced (966). Similarly, in Argentina, the Plurinational State of Bolivia, Ecuador, Guatemala, Mexico, Panama, Paraguay, and Uruguay more than half of incarcerated women had not been sentenced, with many languishing in pretrial detention for several years. One of the leading causes of the rise of pretrial detention rates is its mandatory use for drug offences.<sup>a</sup>

A research report into women incarcerated for drug offences in **Indonesia** in 2017 found that 42 per cent who participated in the study were not assisted by a lawyer in all stages of the proceedings against them.<sup>b</sup>

A report on the background of women prisoners in **Thailand** in 2014 found that 45 per cent of women said that they did not have a lawyer during their trial.<sup>c</sup>

<sup>a</sup> The Washington Office on Latin America (WOLA), *Pretrial Detention In Latin America: The Disproportionate Impact On Women Deprived Of Liberty For Drug Offenses* (2019).

<sup>b</sup> IDPC, *Women, Incarceration and Drug Policy in Indonesia: Promoting Humane and Effective Responses* (2019).

<sup>c</sup> Thailand Institute of Justice, *Women prisoners and the Implementation of the Bangkok Rules in Thailand* (2014).

**Gender stereotypes and biases:** Women who are seen to be violating entrenched norms of gender behaviour may face challenges such as their statements being considered less credible or face a heavier burden of proof than men and therefore may be sentenced more harshly. Research into women sentenced to death highlighted that women tend to receive lesser sentences than men when perceived as victims who conform with their assigned roles in society, for example, the “caring mother”, the “naïve girl”, or the “hysterical woman”. In contrast, women tend to receive harsher sentences when perceived as deviating from those roles, for example, the “femme fatale”, the “child murderer”, or the “witch”.<sup>28</sup> It should be noted that several studies, mainly in the United States, have questioned whether there is a link between gender and harsher sentencing, but further in-depth research is needed in a wider range of jurisdictions.<sup>29</sup>

<sup>28</sup> The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (2018).

<sup>29</sup> Some studies in the United States found that women receive more lenient sentences than their male counterparts. See, for example, Doerner and Demuth, “Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?”, *Criminal Justice Policy Review* (2012); and Butcher, Park, and Morrison Piehl, “Comparing Apples to Oranges: Differences in Women’s and Men’s Incarceration and Sentencing Outcomes”, *Journal of Labor Economics*, Vol. 35, No. S1 (2017), pp. 201-234.

### The Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia (2016)

This Declaration aims to provide assistance for judges in the understanding and application of gender equality and non-discrimination principles. The Guidance aims, in part, to assist justice sector professionals in the identification of situations where same and/or differentiated treatment can lead to discrimination against women, and in contributing to a judicial system that guarantees women's access to justice. It highlights a number of common stereotypes that judges should be careful to avoid, including such myths as 'good women are sexually chaste', 'being alone at night or wearing certain clothes make women responsible for being attacked', 'testimonial evidence provided by women who are sexually active may be suspect when assessing 'consent' in sexual offence cases' and 'lack of evidence of physical harm in sexual offence cases means consent was given'.

Source: International Commission of Jurists, *The Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia* (2016).

## 1.3 How does imprisonment impact upon women?

Although pretrial detention and imprisonment can have negative consequences regardless of gender, their consequences are particularly adverse for women. A high percentage of women are first-time offenders and are imprisoned for non-violent offences, and their imprisonment may not help but hinder their reintegration into society.<sup>30</sup>

- **Safety:** In many countries, women prisoners are disproportionately more affected by sexual abuse, harassment and humiliation than men. They are at particular risk of rape, sexual assault, exploitation and humiliation by male fellow prisoners and prison staff.

*"The continuum of violence during and after incarceration is a reality for many women globally".*  
– United Nations Special Rapporteur on Violence against Women.

Source: Report of the Special Rapporteur on violence against women, its causes and consequences, "Pathways to, conditions and consequences of incarceration for women" (A/68/340), p. 4.

- **Impact on care-taking role:** In most countries, women are the sole or primary caretaker for children or other dependents. The vast majority of women in prison are mothers.<sup>31</sup> Imprisonment can have a traumatic impact on children who are separated from their mothers due to imprisonment, which can lead to emotional and developmental problems.

<sup>30</sup> Deschenes, Owen and Crow, "Recidivism among female prisoners: Secondary analysis of the 1994 BJS Recidivism Data Set", *National Criminal Justice Reference Service* (2007).

<sup>31</sup> In the South Caucasus, 78 per cent of the women prisoners surveyed were mothers (PRI, *Who are women prisoners? Survey results from Armenia and Georgia* (2013) pp. 13-14). In Jordan, three-quarters of women in judicial detention had children, 78 per cent of them under 18 years (PRI, *Who are women prisoners? Survey results from Jordan and Tunisia* (2014), p.11). In South Africa, the percentage of mothers in the sample surveyed was 75 per cent, and 45 per cent of them had their first child between the ages of 16 and 20 years (Artz, Hoffman-Wanderer and Moul, *Hard Time(s): Women's Pathways to Crime and Incarceration* (2012), p. vi, 11 and 35).

- **Children imprisoned with their mother:** In 2017, it was estimated that at least 19,000 children world-wide were co-residing with their primary caregiver in prison.<sup>32</sup> The conditions in detention inevitably impact the children living in prison with their parent, both in terms of overall conditions as well as due to the lack of infrastructure suitable for children. Most countries have policies for a specific age until which babies and children can live in prison with their parent, which often results in separation. This creates emotional stress for both the parent and the child and raises questions about alternative child-care arrangements.<sup>33</sup>
- **Pregnant women:** Pregnant women often do not receive adequate prenatal and post-natal care during detention or imprisonment due to lack of prison resources and staff.
- **Lack of facilities:** The large majority of existing prisons were designed for men and many prisons do not meet the specific needs for women.<sup>34</sup> Women make up a small percentage of the prison population and often there is a lack of resources to build dedicated women's prisons. This results in many women being imprisoned in annexes of male prisons, which can pose security risks and mean that their gender-specific needs are not catered for. Due to lack of resources and low prioritization, women's prisons may not sufficiently cater to gender-specific health needs, such as sexual and reproductive health treatment or suitable rehabilitation services. Due to limited facilities, women may be held at a higher security facility or unit than necessary, with correspondingly more restrictions and less access to rehabilitation programmes. The low number of women's prisons means that woman may be imprisoned far from their families, contributing to isolation and making family visits challenging.
- **Mental health:** Women who are admitted to prison are more likely than men to suffer from mental health problems.<sup>35</sup> Mental health issues can be both the cause and consequence of imprisonment, sometimes further exacerbated by overcrowding, inadequate health-care services, and abuse. Moreover, family breakups and feelings of failure in their parental responsibilities have been found to cause women particular stress and feelings of guilt and anxiety. In part, this emanates from the fact that due to societal gender roles women have a higher sense of guilt for not fulfilling their roles as mothers when detained and therefore suffer more from the separation from their children.<sup>36</sup>
- **Suicide and self-harm:** Research has shown a higher risk of women prisoners harming themselves or attempting suicide in comparison to male prisoners.<sup>37</sup> A key factor is the higher levels of mental health problems and substance dependency experienced by women in contact with the law. It can also be attributed to the harmful impact of isolation due to the distances of women's prisons from their family and community.<sup>38</sup>

<sup>32</sup>United Nations Global Study on Children Deprived of their Liberty, (A/74/136).

<sup>33</sup>Quaker United Nations Office, *The impact of parental imprisonment on children*, Women in Prison and Children of Imprisoned Mothers Series (2007).

<sup>34</sup>See further, Maiello and Carter, ““Minus the urinals and painted pink”? What should a women's prison look like?”, 9 December 2015.

<sup>35</sup>UNODC, *Handbook on Women and Imprisonment: 2nd edition* (2014), p. 9.

<sup>36</sup>PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2015).

<sup>37</sup>WHO, Regional Office for Europe, *Health in Prisons* (2007).

<sup>38</sup>PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2015).



In **Kyrgyzstan**, over a quarter of women prisoners surveyed had attempted suicide and 29 per cent had harmed themselves at some point in their life.<sup>a</sup> In Tunisia, 40 per cent of the women surveyed had either harmed themselves and/or attempted suicide.<sup>b</sup> An **Australian** report argues that in contrast to male prisoners, who express anger and frustration by engaging in physical violence or initiating riots, women are more likely to turn to self-harm.<sup>c</sup>

<sup>a</sup> PRI, Kazakhstan and Kyrgyzstan (2014), p. 18.

<sup>b</sup> PRI, Jordan and Tunisia (2014), p. 28.

<sup>c</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, "Pathways to, conditions and consequences of incarceration for women" (A/68/340), footnote 119, p. 21.

- **Stigma:** Incarcerated women face various challenges upon release, such as loss of housing, challenges finding employment, and poor health. Stigma associated with arrest can mean that women lose jobs while detained, even if they are not sentenced. Women are more likely to suffer discrimination upon release due to social stigma. They may be rejected by their families or lose their parental rights.<sup>39</sup>

## 1.4 Why is it important to consider non-custodial measures for women?

Effective use of non-custodial measures can reduce the substantial social and economic cost of imprisonment, in particular pretrial detention,<sup>40</sup> as well as reoffending and help to reduce the prison population in the long term by providing greater opportunities for rehabilitation and social reintegration. Incarceration, in turn, can lead to further contact by women with the criminal justice system and can impact a woman's earning abilities or housing. The community is better served by community-based interventions which address the underlying causes of women coming into contact with the law, such as drug or mental health treatment.<sup>41</sup>

In the **United Kingdom**, 70.7 per cent of adult women in custody between April to June 2016 following a short custodial sentence of less than 12 months reoffended within a year. There is persuasive evidence that short custodial sentences are less effective in reducing reoffending than community orders.

Source: Ministry of Justice of the United Kingdom, *Female Offender Strategy*, p. 3.

However, non-custodial measures are rarely designed for or geared towards women. This means that many non-custodial measures and sanctions overlook the typical characteristics, roles and backgrounds of women in contact with the law and they can be implemented in a way which causes further harm to women or imposes a different form of harm or control by the State. The next chapter looks at how to promote gender equality in the implementation of non-custodial measures.

<sup>39</sup> PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2015).

<sup>40</sup> Open Society Foundations, *The Socio-Economic Impact of Pre-Trial Detention* (2011).

<sup>41</sup> Bazelon and Krinsky, "There's a Wave of New Prosecutors. And They Mean Justice", *New York Times*, 11 December 2018.



## 1.5 Gender-responsive application of criminal laws and procedures

Professionals working in the justice sector, such as judges, prosecutors and defence lawyers, should apply key features of the legal system in a more gender-responsive manner. The following general options and suggestions should be taken into account:

- Work with other agencies and civil society groups to collect and share data on issues such as the numbers of women in pretrial detention, in order to ensure a transparent and accountable system and track diversion and community programmes to collect evidence of their effectiveness.
- Adopt performance standards aimed at reducing incarceration such as achieving a decrease in pretrial detention or recidivism, rather than focusing on the number of convictions.
- Set up a system for defence lawyers to appeal to a senior prosecutor if they deem that a charge or plea is unfair.
- Conduct mandatory training for professionals working in the justice sector on gender-responsive application of criminal law, in particular making sure they are familiar with provisions of the Bangkok Rules. Training should also look at understanding the underlying causes of women coming into contact with the law.<sup>42</sup>
- Identify “champions” within the justice sector who can help to encourage and disseminate a more gender-responsive approach.
- Take into account a woman’s child care responsibilities throughout the entire court process, such as when setting court dates or other justice-related appointments.
- Lobby for the repeal of discriminatory laws and engage policymakers on necessary areas of law reform.
- Meet with formerly incarcerated women and visit women’s detention centres and prisons to gain their perspectives about implementation of the criminal justice system, as well as regularly meet with organizations working with women in contact with the law to gain their perspectives and input.
- Increase the allocation of resources dedicated to community-based alternatives to imprisonment and to organizations working to address underlying causes of women coming into contact with the law so there is an increased focus on prevention.
- Provide a range of options for solving the most common causes of women coming into contact with the criminal justice system, such as educational and training programmes to increase their chances of employment and reduce their socio-economic vulnerability.

<sup>42</sup> UNODC and PRI have developed several useful online training courses. See UNODC, Global e-learning, Course Catalogue, “Gender Issues: Alternatives to Imprisonment for Women Offenders” (Nr. 23.2), <https://www.unodc.org/elearning/en/courses/course-catalogue.html>; and PRI, “Women in Detention: putting the Bangkok Rules into practice (e-course)”, e-learning (18 December 2018) and Workbook (2017).

- Recognize that commonly used terms such as “convict”, “ex-convict”, “felon”, “offender” and “inmate” are dehumanizing. They reduce people to their criminal status and perpetuate the stigma of criminal convictions, promoting negative stereotypes that inhibit reform and impede rehabilitation and re-entry. Use respectful phrases that convey information about criminal status without dehumanizing such as “incarcerated person” or “formerly incarcerated person”.<sup>43</sup>

## 1.6 Self-assessment exercise

1. What are:
  - a. the main factors behind women’s imprisonment in your country?
  - b. the underlying causes behind women’s imprisonment in your country?
2. How does imprisonment negatively impact women in your country?
3. What steps can be taken to aid your criminal justice system to be more gender-responsive?

## 1.7 Training exercise

**Case Study:** Aminatta was arrested for prostitution and loitering. She has no previous criminal record. She has a 6-month-old baby and says she has not been sleeping well for several weeks and constantly cries. Her boyfriend is drug-dependent and she says that he is emotionally and physical abusive at times. She is a foreign national woman and moved to Moganda a year ago. The main female prison is two hours away in the capital city, but there is a smaller prison attached to the male prison in the town where she was arrested. It does not have many rehabilitation facilities and has a shortage of female prison staff.

1. What are the main factors that may have led to Aminatta coming into contact with the law?
2. How could imprisonment negatively impact Aminatta and her child?
3. How could Aminatta face discrimination in the criminal legal system?

<sup>43</sup>Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

## 2. Ensuring gender equality in the use and application of non-custodial measures

### KEY MESSAGES:

- Policymakers and justice sector professionals should incorporate the provisions contained in the Tokyo Rules, Bangkok Rules and Nelson Mandela Rules into domestic law and practice, ensuring that gender-responsive non-custodial measures can be easily and fully implemented.
- For minor charges where the woman in contact with the law does not pose a serious or dangerous threat to safety and society, alternatives to prosecution such as case dismissal, depenalization/decriminalization, gender-responsive diversion and treatment programmes, restorative justice and other related alternatives should be considered by police and prosecutors, while keeping in mind upholding respect for the law and the rights of victims.
- Police, prosecutors and judges have the responsibility to ensure that those who appear before them who cannot afford a lawyer are provided with access to legal aid.
- Pretrial detention should be used as a means of last resort and non-custodial measures should be considered at every stage of the criminal process.
- Alternatives to pretrial detention, such as bail, should be considered for application as a matter of course regardless of the nature of the offence. Gender-specific criteria should be considered when making decisions.
- Gender-specific mitigating factors should be considered during sentencing and mandatory sentences eliminated.
- It is important to provide judicial authorities with relevant information about women in contact with the law (e.g. caring responsibilities, history of victimization or mental health care needs etc.) to enable informed sentencing decisions. This should also include an assessment of probable impact on children of women's detention and arrangements for child care in the absence of the carer. This information can be provided by the probation service or social service before sentencing (e.g. through social inquiry reports). In countries with resource limitations, courts can take the responsibility to inquire into a woman's background during the trial process. Prison officers, university clinics and paralegals can also support the court with providing background information for sentencing.
- Non-custodial sentences should be considered in all cases for women in contact with the law and should be implemented whenever appropriate and possible, e.g. a suspended sentence, deferred sentence, community service or community sentence treatment order.

The least interventionist non-custodial sentence should be imposed taking into account a woman's individual circumstances. Non-custodial sentences should be preferred for pregnant women or women with dependent children. Custodial sentences should be considered only: where the offence was serious and violent, where the woman represents a continuing danger and after taking into account the best interests of the child or children.

- Many women cannot pay fines due to poverty and marginalization, particularly women from ethnic minority backgrounds. Other non-custodial sentences should be explored first or the fine set as low as possible, taking into account the background and circumstances of the woman in contact with the law. Women should not be imprisoned because they cannot pay their fines or fees and prosecutors and judges should not issue arrest warrants for non-payment.
- It is important to make sure that non-custodial measures do not widen the net of criminal justice control over women. Baseline research, continuous monitoring and evaluation of such measures is crucial to detect and avoid possible net-widening effects.
- Feedback mechanisms need to be created and sustained to better inform stakeholders, in particular obtaining the views of women in contact with the law who have participated in non-custodial measures. It is important to raise public awareness of the benefits of non-custodial measures so as to reduce stigma faced by women who participate in such measures and to encourage professionals in the justice sector to have confidence in their use.
- If a woman has been sentenced, any form of release from an institution to a non-custodial programme or measure should be considered at the earliest possible stage. For example, various forms of early conditional release (parole) or work, community work or education release.
- Prosecutors, judges and probation services should consider the reasons for women's non-compliance with non-custodial sentences, including by consulting with women's groups and women in contact with the law in order to gain understanding of the challenges faced rather than automatically responding with punitive measures. They should also create realistic performance measures that consider the multitude of barriers that survivors of abuse face.

## 2.1 Overview of International Standards

Current international instruments and standards provide clear and useful guidance for the gender-responsive application of non-custodial measures for women entangled within criminal justice systems at any stage.<sup>44</sup> The **Tokyo Rules** were adopted by the United Nations in 1990 to provide guidance for the reduction of the utilization of imprisonment internationally. In 2010, the **Bangkok Rules** were adopted by the General Assembly to supplement these rules by providing a gender-specific lens. Along with additional regional standards,<sup>45</sup> these international standards provide a blueprint for justice sector professionals to employ a gender-responsive approach to the application of non-custodial measures, reducing the numbers of women imprisoned.

<sup>44</sup> UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007).

<sup>45</sup> See Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Person Deprived of Liberty in the Americas* (2008), Principle III(4); De Vos, Gilbert and Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at the European level* (2014); African Commission on Human and Peoples' Rights, *Guidelines on the conditions of arrest, police custody, and pretrial detention in Africa (Luanda Guidelines)*, 12 May 2014; African Commission on Human and Peoples' Rights, *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* (2002) and African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of The Africa Charter on the Rights and Welfare of the Child: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" (2013).

International law and regional standards require the equality of men and women.<sup>46</sup> In achieving equality, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires that substantive equality be sought. Measures to address the gender-specific needs and vulnerabilities of men and women or efforts to diminish or eliminate conditions which cause or help to perpetuate discrimination are an essential part of ensuring equal treatment. CEDAW explicitly envisages measures that entail differentiation of treatment between women and men but are not considered as discrimination. Treating men and women the same may actually lead to or perpetuate discrimination against women.<sup>47</sup> As indicated in Rule 1 of the Bangkok Rules, measures that take into account gender-specific needs of women should not be considered discriminatory<sup>48</sup> but rather allow prosecutors and judges to ensure that women have equal access to justice and the equal protection of the law by taking account of the gendered aspect of their involvement with the criminal justice process.<sup>49</sup> For example, the African Commission on Human and Peoples' Rights has requested that States develop measures for women throughout the criminal legal process.<sup>50</sup>

Principle 3 of the **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Systems**<sup>51</sup> states that “anyone detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process”, and Principle 10 strengthens the importance of equity in access to legal aid, including for women.<sup>52</sup> Women in many countries face structural and cultural barriers to access legal aid. However, particularly early access to legal aid upon arrest or in the police station can play a significant role in whether a woman remains in pretrial detention or is imprisoned.

In some countries, “preventive detention” is applied to survivors of trafficking, rape or other forms of violence. Non-custodial measures of protection (such as shelters) should be offered which are managed by independent bodies, non-governmental organizations or other community services. Any measure involving custody to protect a woman must be:

- temporary
- only applied when necessary and expressly requested by the woman concerned
- supervised by judicial or other competent authorities
- discontinued when the woman wants it to stop<sup>53</sup>

<sup>46</sup> Universal Declaration of Human Rights, General Assembly resolution 217 A (II), adopted on 10 December 1948.

<sup>47</sup> CEDAW Committee, General Recommendation No. 25, para. 26.

<sup>48</sup> See further Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Person Deprived of Liberty in the Americas* (3-14 March 2008), Principle II.

<sup>49</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 8. For further information, see African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child, “Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage”, comment 40 (2017).

<sup>50</sup> African Commission on Human and Peoples' Rights, *Guidelines on the conditions of arrest, police custody, and pretrial detention in Africa (Luanda Guidelines)* (2014).

<sup>51</sup> General Assembly resolution 67/187, annex, adopted on 20 December 2012.

<sup>52</sup> General Assembly resolution 67/187, annex, adopted on 20 December 2012.

<sup>53</sup> Rule 59, Bangkok Rules.

**Table. Selected relevant international standards for criminal justice professionals and their key elements**

<b>NON-DISCRIMINATION</b>
<p><b>United Nations Universal Declaration of Human Rights (1948)</b> Declares the equal treatment of men and women as a human right.</p> <p><b>African Charter on Human and Peoples' Rights (Banjul Charter, 1981)</b> Requires the protection of women and children and establishes the family as the basis of society.</p> <p><b>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)</b> Described as an international bill of rights for women. There are three foundational principles of the CEDAW Convention: non-discrimination, substantive equality and state obligation.</p>
<b>ACCESS TO JUSTICE</b>
<p><b>Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)</b> Covers principles dealing with victims of crime, access to justice and fair treatment, restitution, compensation, assistance, and victims of abuse of power.</p> <p><b>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)</b> Sets out principles and practical guidelines for the provision of legal aid to those in contact with the criminal justice system, including introducing a gender perspective to legal aid in order to ensure gender equality.</p>
<b>WOMEN IN CONTACT WITH THE LAW</b>
<p><b>United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (1990)</b> Sets standards for the reduction of the utilization of imprisonment internationally.</p> <p><b>United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2010)</b> Sets standards for the treatment of women prisoners and the application of non-custodial measures set forth in the Tokyo Rules through a gendered lens.</p> <p><b>United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) (2015)</b> Sets standards for the treatment of incarcerated people, including that the focus of imprisonment should be on the rehabilitation and reintegration of the person.</p> <p><b>Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Person Deprived of Liberty in the Americas</b> Sets standards regarding the treatment of those deprived of liberty due to involvement in criminal justice system, psychiatric hospitals, or in any other manner.</p> <p><b>African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody, and Pre-Trial Detention in Africa (Luanda Guidelines)</b> Set standards aiming at improving the treatment of persons subject to arrest, police custody and pretrial detention in Africa.</p> <p><b>African Commission on Human and Peoples' Rights "Principles on the Declassification and Decriminalization of Petty Offences in Africa"</b> Sets standards to assess petty offences to prevent marginalization of people based on social status.</p>

**Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa**

Sets principle of protecting women held in detention and the right of women from marginalized communities to be treated with dignity.

**Parliamentary Assembly of the Council of Europe, "Mothers and babies in prison" (Recommendation 1469, 2000)**

States that custody for women with children and pregnant women should be a last resort.

**African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of the Africa Charter on the Rights and Welfare of the Child: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" (2013)**

States that non-custodial sentences should always first be considered when sentencing primary care-givers and the importance of an individualized, informed and qualitative approach.

**RESPONSES TO GENDER-BASED VIOLENCE AGAINST WOMEN AND REMEDIES FOR VICTIMS****United Nations Declaration on the Elimination of Violence against Women (1993)**

Defines violence against women and sets out range and manifestations of violence against women (VAW).

**Beijing Declaration and Platform for Action (1995)**

Expands the definition of violence against women to violations of rights of women in situations of armed conflict and recognized the particular vulnerabilities of certain groups of women.

**Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)****Committee General Recommendation No. 35 on gender-based violence against women (2017)**

Frames VAW within the overall context of discrimination; expands definition to include specific acts of violence against women that can amount to torture or cruel, inhuman or degrading treatment.

**United Nations updated Model Strategy and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (2010)**

Sets out guiding principles for all criminal justice responses (including victim-centred; perpetrator accountability) and calls on States to criminalize and prohibit all forms of violence against women. Also includes strategies to improve investigations, evidentiary rules, court room procedures, and victim's rights.

**Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children**

Aims at preventing and combating human trafficking, protecting and assisting victims, and promoting cooperation among State Parties.

## 2.2 Pre-charge stage and pretrial stage

Policymakers and justice sector professionals should incorporate the provisions contained in the Tokyo Rules, Bangkok Rules and Nelson Mandela Rules into domestic law and practice, ensuring that gender-responsive non-custodial measures can be easily and fully implemented.<sup>54</sup>

<sup>54</sup> Rule 57, Bangkok Rules. See also Parliamentary Assembly of the Council of Europe, "Promoting alternatives to imprisonment", Resolution 1938 (2013), Article 6.



Gender-specific non-custodial measures should be considered for women from the outset of any criminal legal involvement. When determining whether to apply non-custodial measures, judges and prosecutors should assess a set of established criteria<sup>55</sup> which would apply to decisions in order to be in compliance with Tokyo Rules 3.2 and Rule 57 of the Bangkok Rules. Additionally, according to Rule 5.1 of the Tokyo Rules, prosecutors should exercise their discretion and decline to pursue criminal charges against women if “they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims”. These aims are aligned with the Nelson Mandela Rules which state that the “purposes of a sentence of imprisonment or similar measures deprivative of a person’s liberty are primarily to protect society against crime and to reduce recidivism”.<sup>56</sup> In addition to these factors, judges and prosecutors should consider “the rehabilitative needs of the offender, the protection of society and the interests of the victim” in accordance with Rule 8.1 of the Tokyo Rules.

**Tokyo Rules, Rule 3.2:** The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality and background of the offender, the purposes of sentencing, and the rights of victims.

**Bangkok Rules, Rule 57:** The provisions of the Tokyo Rules shall guide the development and implementation of appropriate responses to women offenders. Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States’ legal systems, taking account of the history of victimization of many women offenders and their caretaking role.

In line with Tokyo Rule 6.1, which indicates that pretrial detention “shall be used as a means of last resort in criminal proceedings” and considering that separating women from their families and communities has serious collateral consequences, non-custodial measures should be considered at every stage of the criminal process.

- **Alternatives to prosecution:** For minor charges where the woman defendant does not pose a serious or dangerous threat to safety and society, alternatives to prosecution such as case dismissal, gender-responsive diversion and treatment programmes and other related alternatives should be considered by police and prosecutors, while keeping in mind upholding respect for the law and the rights of victims.<sup>57</sup> At each stage of the process, steps should be taken to ensure that the least restrictive measure is applied to the woman in contact with the law, taking into account the outlined factors.
- **Alternatives to pretrial detention:** Alternatives to pretrial detention, (such as bail, house arrest or supervised release) should be applied as a matter of course regardless of the nature of the offence. Judges and prosecutors should consider gender-specific criteria that may justify the exceptional use of detention (such as flight risk, intimidation of victims etc.).<sup>58</sup>

These measures are discussed further in the sections below.

<sup>55</sup> Depending on the jurisdiction, these criteria may be contained in law or other legislative instruments or in regulations or policy documents developed by the prosecution service or other parts of the judiciary. The general introduction, definition and application of non-custodial measures should be prescribed by law (Tokyo Rule 3.1).

<sup>56</sup> Rule 4, Nelson Mandela Rules.

<sup>57</sup> Rule 5, Tokyo Rules.

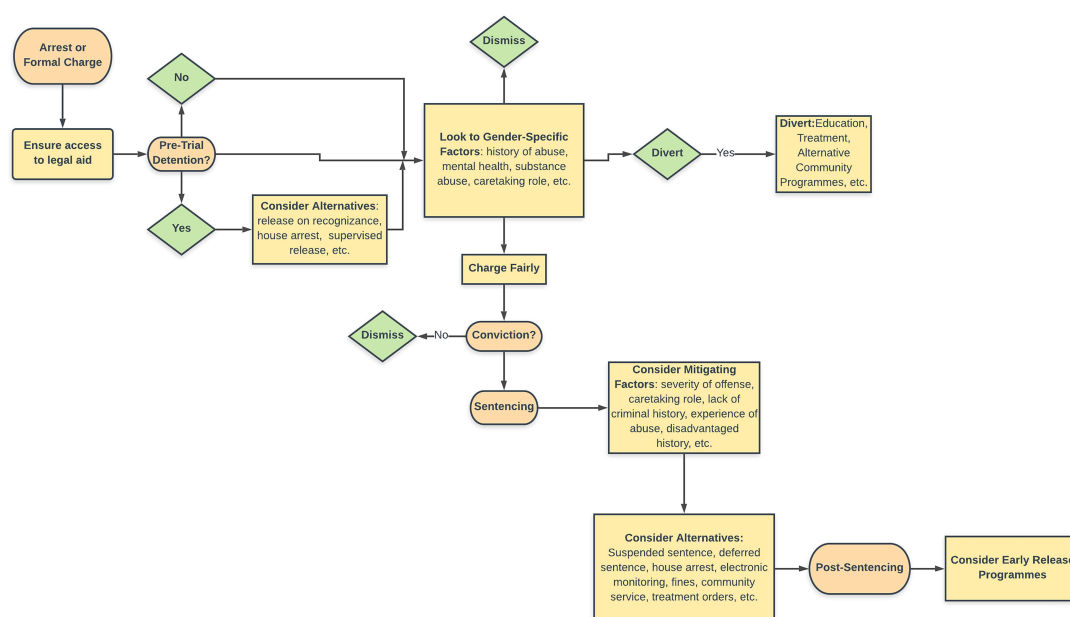
<sup>58</sup> UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2013) and Amnesty International, *Fair Trial Manual*, 2<sup>nd</sup> Edition (2014).

**Tokyo Rules, Rule 2.3:** In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pretrial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way that consistent sentencing remains possible.

**Bangkok Rules, Rule 58:** Taking into account the provisions of rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible.

**Bangkok Rules, Rule 62:** The provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes.

**Figure II. Flow chart on implementing non-custodial measures at the various stages of the criminal justice process**



### 2.2.1. Decriminalization/depenalization

Petty offences (such as loitering, hawking, public drunkenness and failure to pay debts) often can be vaguely defined and receive disproportionate sanctions. They often discriminate against women and are associated with poverty, mental illness and homelessness. Prosecution of these offences often leads to prison overcrowding<sup>59</sup> and is a disproportionate response to non-violent conduct. The decriminalization of such offences would thus have a significant impact on women.

<sup>59</sup> Ehlers, ““Rogues” and “Vagabonds” No More: Ending Africa’s Imperial Legacy of Absurd Petty Offenses”, Open Society Foundations, 3 February 2017. See further, Petty Offences Project, “Petty Offenses in Africa”.

The **African Commission on Human and Peoples' Rights** adopted the "Principles on the Declassification and Decriminalization of Petty Offences in Africa" on 25 October 2018. The Principles establish standards against which petty offences should be assessed and promote measures that can be taken by State Parties to ensure that such laws do not target persons based on their social origin, social status or fortune by criminalizing life-sustaining activities.<sup>a</sup>

In 2019, the State of Victoria in **Australia** announced it would decriminalize public drunkenness after an aboriginal woman died in custody. The Government announced it would replace the offence with a health-based approach that will "promote therapeutic and culturally safe pathways to assist alcohol-affected people in public places".<sup>b</sup>

In January 2017, the High Court of **Malawi** in *Mayeso Gwanda v The State* declared the "rogue and vagabond" offences unconstitutional, and therefore arrests made under this offence are unlawful.<sup>c</sup>

<sup>a</sup> African Commission on Human and Peoples' Rights, Principles on the Decriminalisation of Petty Offences in Africa (2017).

<sup>b</sup> The *Guardian*, "Victoria abolishes public drunkenness as a crime ahead of death in custody inquest", 22 August 2019.

<sup>c</sup> Constitutional Cause No.5 of 2015, [2017] MWHC 23 (10 January 2017).

Many women are incarcerated for minor drug-related offences. A number of countries have initiated or adopted legal reforms to decriminalize minor offences, such as personal consumption, as well as possession and cultivation for personal consumption of drugs, and adopted policies to refer drug users to community-based treatment and social services or impose administrative fines or caution on them. These approaches are possible within the framework of the international drug control conventions, which promote health-centred and human rights-compliant responses to drug use and drug use disorders. The unnecessary use of imprisonment for minor drug-related offences is ineffective in reducing recidivism, aggravates social, economic and health issues of those involved as well as of their families and communities. It also overburdens criminal justice systems, preventing them from efficiently addressing more serious crime.<sup>60</sup>



See further below, section 2.2.4 on Diversion and section 3.4 on Women arrested for drug offences.

In 2001, **Portugal** decriminalized low-level possession of all psychoactive drugs, allowing for their acquisition, possession, and use. Under Law 30/2000, these previous crimes became administrative violations. A person stopped with less than 10 days' worth of drugs is referred to a Commission for the Dissuasion of Drug Addiction (Comissão para a Dissuasão da Toxicodependência) – an administrative body established in each of Portugal's regions and composed of three professionals including a legal expert, a social worker, and a doctor. Each Commission is supported by a technical team of health and social experts. By 2010, the number of convictions for drug trafficking fell by 40 per cent and the number of persons incarcerated for trafficking had been reduced by 50 per cent.<sup>a</sup> Decriminalization led to a reduction in prison overcrowding – with the proportion of drug offenders in prison dropping from 44 per cent in 1999 to 19.6 per cent in 2013. The policy also enabled law enforcement authorities to target violent, high-level traffickers and organized crime groups, instead of focusing on users and low-level dealers.

<sup>60</sup> United Nations System Coordination Task Team on the Implementation of the United Nations System Common Position on Drug-related Matters, *What we have learned over the last ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters* (2019).

The weakness of the model was its lack of gender-tailored services. Recommendations to strengthen this include establishing specific harm reduction and treatment services exclusively targeting women, having opening hours for women only, including childcare provision, incorporating sexual and reproductive health interventions and providing social support for women and mothers.<sup>b</sup>

<sup>a</sup> Laqueur, "Uses and Abuses of Drug Decriminalization in Portugal", *Law and Social Inquiry* (2014).

<sup>b</sup> IDPC, *Gender And Drug Policy: Exploring Innovative Approaches To Drug Policy And Incarceration: The Portuguese Model For Decriminalizing Drug Use*.

### 2.2.2. Early access to legal aid

Many women have to rely on legal aid lawyers, as they cannot afford to pay for a private lawyer. One of the main findings of the 2016 UNDP/UNODC Global Study on Legal Aid was that globally across all development levels, lack of confidence in the quality of services was one of the strongest challenges faced by poor and vulnerable groups in accessing services.<sup>61</sup> Ensuring that gender-sensitive legal aid services are available and women are aware of how to access them is one measure countries can take to ensure quality of services.<sup>62</sup> In particular, the following measures should be considered:

- Police, prosecutors and judges have the responsibility to ensure that those who appear before them who cannot afford a lawyer are provided with access to legal aid. Criminal justice practitioners should have a pre-prepared list of legal aid service providers (based on the delivery model in their country that can include providers such as public defender offices, government legal aid bodies, civil society organizations, bar associations and university legal aid clinics).
- In countries with limited resources or where there are insufficient numbers of lawyers, community-based paralegals can increase access to justice by providing legal advice services particularly to reach marginalized groups.<sup>63</sup>
- Regular visits of police stations and prisons by lawyers or paralegals can ensure that women are offered legal advice as soon as possible upon arrest.
- Bar associations, individual legal aid providers – lawyers providing legal aid services including those who work for civil society organizations (CSOs) – should have the appropriate experience and knowledge to provide adequate legal advice and should be well informed of women's special needs, and where possible, female lawyers or female paralegals should be available to provide legal aid services.<sup>64</sup>
- Supporting legal education programmes aimed at women helps women to know their fundamental rights and how to enforce them, such as not signing a confession they do not understand, should they be unable to access timely legal advice.

<sup>61</sup> UNODC and UNDP, *Global Study on Legal Aid, Global Report* (2016).

<sup>62</sup> UNODC, *Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes – Practical Guidance and Promising Practices* (2019), pp. 63-70.

<sup>63</sup> Open Society Justice Initiative, *Community-Based Paralegals: A Practitioner's Guide* (2010).

<sup>64</sup> Guideline 9, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

In **Australia**, in Queensland, the organization Sisters Inside, a civil society organization lead by a formerly incarcerated woman, goes into the police station daily to meet with all women and girls taken into custody. Workers ensure that detained women and girls' human rights are being met, including ensuring they have access to legal representation when they first appear in court. Workers proactively address potential barriers to bail for each women or girl, including arranging post-release accommodation and advocating for them in court. Workers also support participants to meet the conditions of their bail (e.g. such as transporting them to report to police or arranging ongoing accommodation) and, if they wish, assist them to address the often multiple and compounding causes of their criminalization (e.g. poverty or homelessness). These programmes also have a gender-transformative effect through education of police. Since the inception of the youth programme, the number of girls and young women (disproportionately First Nations girls) detained by police has decreased significantly, with police increasingly preferring non-custodial measures such as warnings or immediate police bail.<sup>a</sup>

In **Indonesia**, LBH Masyarakat provides free legal services for people who use drugs and empowers people who use drugs to provide community legal assistance, including as trained paralegals. LBH Masyarakat works closely with paralegal workers and the communities or family members of people who use drugs to gather witnesses, prepare legal defence arguments, and collect supporting evidence including psychiatric or medical assessments that show a history of dependence and treatment needs. Their legal assistance includes representation in support of a client's diversion at any stage from police investigation to the court hearing. Although police are permitted to divert a case away from prosecution under existing regulations, they are often not willing to divert people who use drugs towards treatment options (which they are also authorized to do since drug use remains criminalized under the drug law). Judges are also able to exercise their discretion in favour of diversion, including upon receiving expert witness testimony and other supporting evidence.<sup>b</sup> Another organization in Indonesia, Action for Justice Indonesia, similarly provides free legal advice to women arrested for drug offences and helps to divert them away from prosecution to treatment options.

In the **Philippines**, the Humanitarian Legal Assistance Foundation (HLAF) conducts paralegal training for incarcerated women so they can aid fellow incarcerated women with their cases by assisting them to write their affidavits and follow up on their court trial schedules through the jail officers.<sup>c</sup>

In **Sierra Leone**, AdvocAid's paralegals monitor detention facilities to provide legal advice to incarcerated women, support bail applications, or offer mediation in minor disputes.<sup>d</sup> Staff lawyers provide legal representation to women charged in court. AdvocAid also developed Police Case, a legal education TV and radio series focusing on women in contact with the law to increase awareness of rights.

<sup>a</sup> <https://sistersinside.com.au/>

<sup>b</sup> IDPC, *A Public Health Approach to Drug Use in Asia: Principles and Practices for Decriminalization* (2016).

<sup>c</sup> Friedrich Naumann Foundation, "Law as shield, lipstick as armour", 15 August 2018.

<sup>d</sup> AdvocAid, "Police Case", website and video, December 2018.

### 2.2.3. Mental health needs

Many women who enter the criminal justice system have a history of mental health issues.<sup>65</sup> They are less likely to make bail and are often released into the community without a support plan, as a result of which they often find themselves back in contact with the criminal justice system.<sup>66</sup> It is important to provide the necessary support to promote mental wellbeing and

<sup>65</sup> UNODC, *Handbook on Women and Imprisonment: 2nd edition* (2014), pp. 8-10.

<sup>66</sup> Iglehart, "Decriminalizing Mental Illness—The Miami Model", *New England Journal of Medicine*, Vol. 374 (2016), pp. 1701-03.

respond to mental health needs rather than respond with a punitive response.<sup>67</sup> In this regard, the following measures should be considered:

- Support crisis-intervention training of law enforcement to de-escalate situations involving individuals with mental health needs and reduce the likelihood of use of force or arrest as a response. Negative experiences during arrest can impact people's mental health. Women are especially vulnerable immediately after their arrest and during admission to prison.
- When possible, divert individuals who have mental health needs to community-based services instead of making an arrest that can lead to incarceration rather than support. Screen cases before charging to identify individuals in need of mental health services and support and liaise with appropriate health professionals and experts.



(See also section 2.2.4 on Diversion and section 2.3.2.5 on Community Sentence Treatment Orders.)

- Recognize that a person can have a mental health condition but experience good mental health. This could be because they are managing their condition well and/or receiving adequate medical or social support. Another person could experience poor mental health but have no diagnosis. This could be because they are going through a particularly difficult time in their life. It is not unusual for people to have more than one mental health condition at any given time, and symptoms often overlap. Minor mental health conditions can develop into more serious ones.
- Avoid interpreting mental health needs as risk factors, because this often leads to a higher than necessary security classification (or imprisonment because of 'risk').
- Women with severe mental health disabilities and/or health conditions should not be detained in prison but transferred to suitable mental health facilities.<sup>68</sup>
- Train line law enforcement officers, prosecutors and staff on the impact of mental illness and trauma. Poor mental health among women in prison can often be associated with experiences of abuse, trauma or neglect. Many of these experiences are overlapping.
- At various stages of the criminal justice process, employ and listen to individuals who have experienced mental illness as advisers, trainers, and peer support professionals.
- Bring together relevant agencies to collaborate on data-sharing, developing exit ramps from the criminal justice system, and filling gaps in community services and support.<sup>69</sup>

#### 2.2.4. Diversion

Well-designed programmes that divert people from prison, or from the criminal justice system entirely, can save resources and reduce reoffending. These programmes keep people in the community instead of being incarcerated. When diversion precedes charging, participants can stay out of the criminal justice system entirely. After charging or conviction, diversion similarly

<sup>67</sup>PRI, International Guide on the Mental Health Needs of Women in Prison (to be published in 2020).

<sup>68</sup>Rule 109, Nelson Mandela Rules.

<sup>69</sup>Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

provides an alternative to incarceration.<sup>70</sup> Diversion is particularly important for women in contact with the law, as depriving women with caretaking responsibilities of their liberty can have a harmful impact on their children. Policymakers should ensure that gender-responsive laws on diversion are adopted and properly implemented.

Police and prosecutors can play a significant role in enabling use of diversion and decreasing women's incarceration. Experts (such as health care professionals or community service professionals) should be consulted to determine the most suitable diversion option taking into account the particular circumstances and needs of the individual woman.

There are **several diversion options** for women who do not pose a risk to the public which include:

- an absolute or conditional discharge
- verbal sanctions
- an arbitrated settlement
- restitution to the victim or a compensation order
- a community service order
- restorative justice processes
- gender-appropriate treatment programmes
- referral to community support services

Key principles to consider include the following:

- Minimum intervention and proportionality: if a case should be dismissed outright, it should not be routed to diversion instead.
- Informed consent: when diversion entails an obligation on the woman in contact with the law, it is fundamental to obtain her consent, based on the presumption of innocence. Informed consent is important also for other reasons, in particular in cases of diversion to treatment interventions and in cases of violence in which mediation or restorative justice programmes may be detrimental unless adequate safeguards and risk management procedures are in place.
- Do not require defendants to admit guilt as a condition for participation, if an admission is not needed to promote the goals of the programme.<sup>71</sup>
- It is important to ensure that the programme matches the risk and needs of the individual. For example, women who are lower risk should be placed in a lighter touch programme (or no programme at all).
- Responses to non-compliance should be proportionate and in line with the principle

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<sup>70</sup> Ibid.

<sup>71</sup> Many diversion programmes require and depend upon the offender admitting guilt to at least some of the charges they are facing. The specific requirements for guilty pleas vary, with some drug courts requiring guilty pleas to all or the majority of charges. Some, or all, charges that may otherwise have been contested then form part of the individual's official offence history. The requirement to plead guilty in order to qualify for diversion can lead to a fundamental aberration of justice whereby the offender who does not plead guilty faces not only a possibly more onerous path but a perception by a range of criminal justice decision makers that they are 'recalcitrant' or 'uncooperative'. Roberts and Indermaur, "Timely Intervention or Trapping Minnows? The Potential for a Range of Net-Widening Effects in Australian Drug Diversion Initiatives", *Psychiatry, Psychology and Law*, Vol. 13, No. 2 (2006), pp. 220-231 at 226.



of minimum intervention. More intrusive or even punitive measures (such as electronic monitoring and periods of imprisonment) should be used on an exceptional basis and only where this is necessary for public safety.

- Women with drug treatment needs should be diverted to, and supported in accessing, gender-responsive, trauma-informed, women-only programmes in the community.<sup>72</sup> A study conducted by UNODC found that comprehensive programming that acknowledges gender differences, provides women-only services and gives attention to pre-natal and childcare, parenting skills, relationships, mental health problems and practical needs could improve treatment outcomes.<sup>73</sup> Proportionate responses to non-compliance should take into account the challenging nature of the drug use recovery process and relapse should be treated as part of the recovery process rather than being punished.<sup>74</sup>
- Compulsory drug treatment or rehabilitation in detention should never be enforced.<sup>75</sup>

**Australia:** For 3 years, the Queensland Government established a diversionary court for people charged with minor offences who also faced homelessness and substance abuse and/or mental health issues. Participants were offered an alternative 'penalty' of support from a non-government organization. Sisters Inside offered support to any woman appearing before this court. Workers ensured each woman had access to income, housing and assistance navigating health services and any other services needed to meet her complex, interrelated needs. Most of the participants had an existing criminal history, and most were Aboriginal women. Yet, over a 3-year period, 239 of the 240 women involved with the programme had a reduced rate of offending, and 96 per cent of participants were diverted from prison.<sup>a</sup>

**Costa Rica:** In 2014 a programme was launched through the Public Defender's Office which works to divert vulnerable women away from the criminal justice system and offer them services such as counselling, drug treatment, and job training. The needs of each woman are determined by a caseworker and a tailored action plan is developed for each client. The goals of the programme are to reduce recidivism and help women regain their rights and dignity.<sup>b</sup>

**United Kingdom:** Women Support Centres assist women who have committed low-level crimes with early intervention and helps to divert them from custody into relevant treatment programmes.<sup>c</sup> Anawim Women's Centre supports the police with community resolutions and conditional cautions for women in contact with the law.<sup>d</sup> A Ministry of Justice study found that the one year reoffending rate for 597 women receiving support provided by Women's Centres in England was 30 per cent compared with 35 per cent for a group of similar women who did not receive such support.<sup>e</sup>

**United States:** In 2011, Seattle pioneered a widely replicated pre-charge drug diversion programme, called the "Law Enforcement Assisted Diversion" (LEAD). The police can direct people arrested for low-level drug offences to community-based treatment and other services instead of prosecution. The individual meets with a case worker who can refer them to individual tailored services. As women who use drugs are more often arrested for prostitution, this offence was made qualifying for the diversion programme as well.<sup>f</sup> LEAD participants were 58 per cent less likely to be arrested for

<sup>72</sup> Rule 62, Bangkok Rules.

<sup>73</sup> UNODC, *Drug Abuse Treatment Toolkit, Substance Abuse Treatment and Care for Women: Case Studies and Lessons Learned* (2004).

<sup>74</sup> UNODC and WHO, *Treatment and care for people with drug use disorders in contact with the criminal justice system - Alternatives to Conviction or Punishment* (2018).

<sup>75</sup> IDPC, *10 Years of Drug Policy In Asia: How Far Have We Come? A Civil Society Shadow Report*, (2019); UNODC, *A Transitional Framework towards Voluntary Community-based Treatment and Services for People Who Use Drugs* (2015); ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, WHO and UNAIDS, *Joint Statement: Compulsory drug detention and rehabilitation centres* (2012).

another offence, compared to others who were criminally charged. Individuals were also more likely to find employment and housing. In 2018, the Seattle Prosecuting Attorney's Office stopped prosecuting possession of less than a gram of heroin, cocaine, or methamphetamine.<sup>9</sup>

<sup>a</sup> <https://sistersinside.com.au/>

<sup>b</sup> WOLA, *Gender and Drug Policy: Exploring Innovative Approaches to Drug Policy Incarceration*, <https://www.wola.org/gender-drug-policy-exploring-global-innovative-approaches-drug-policy-incarceration/>.

<sup>c</sup> Women in Prison, Women's Support Centers (2017).

<sup>d</sup> [http://anawim.co.uk/early\\_interventions.html](http://anawim.co.uk/early_interventions.html)

<sup>e</sup> Ministry of Justice, *Re-Offending Analysis – Women's Centres throughout England* (2015).

<sup>f</sup> Green, "LEAD program for low-level drug criminals sees success", *Seattle Times*, 8 April 2015. See also, WOLA, *Gender and Drug Policy: Exploring Innovative Approaches to Drug Policy Incarceration*, <https://www.wola.org/gender-drug-policy-exploring-global-innovative-approaches-drug-policy-incarceration/>.

<sup>g</sup> Collins, Lonczak and Clifasefi, "Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes", *Evaluation and Program Planning*, Vol. 64 (2017), pp. 49–56.

### 2.2.5. Restorative justice

Restorative justice is an approach to crime that offers offenders, victims and the community an alternative pathway to justice. It is based on the recognition that criminal behaviour is not only a violation of the law, but also that crime causes fundamental harm to individuals, communities and society as a whole. Through a participative and flexible process, restorative justice promotes the safe participation of victims in resolving the situation and offers offenders a chance to make themselves accountable to those whom they have harmed.<sup>76</sup>

In a restorative process, the victim and the offender, and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.<sup>77</sup> Common characteristics of restorative justice programmes include:

- A focus on the harm caused by criminal behaviour
- Voluntary participation by those most affected by the harm, including the victim, the perpetrator and, in some processes and practices, their supporters or family members, members of a community of interest, and appropriate professionals
- Preparation of the parties and facilitation of the process by trained restorative practitioners
- Dialogue between the parties to arrive at a mutual understanding of what happened and its consequences and an agreement on what should be done
- Outcomes of the restorative process vary and may include an expression of remorse and acknowledgement of responsibility by the perpetrator and a commitment to do some reparative action for the victim or for the community
- An offer of support to the victim to aid recovery and to the perpetrator to aid reintegration and desistance from further acts of harm<sup>78</sup>

<sup>76</sup> UNODC, *Handbook on Restorative Justice Programmes*, 2<sup>nd</sup> Edition (to be published in 2020).

<sup>77</sup> United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Economic and Social Council resolution 2002/12, annex, adopted on 24 July 2002.

<sup>78</sup> UNODC, *Handbook on Restorative Justice Programmes*, 2<sup>nd</sup> Edition (to be published in 2020).

Restorative justice practices can be part of the conventional criminal justice process or an alternative to it. Research shows that crime victims often do not feel that prosecution and sentencing serve them well.<sup>79</sup> Despite the reality that they are often the most impacted by the crime, the conventional criminal justice system gives little to no opportunity for victims or community members to be heard or participate in the resolution of the crime. Restorative justice is an avenue to access to justice for victims by giving an opportunity to all those affected by the crime to take part in addressing and repairing the harm caused by the crime.

Restorative justice programmes can take place at any stage in the criminal justice process, either before entering a guilty plea, after a guilty plea, before sentencing, at sentencing and post-sentencing. These models include:

- Victim-offender mediation
- Family group conferences
- Community conferences
- Circles

These programmes also have a consistent track record of achieving lower rates of recidivism than conventional penalties, including for serious offences.<sup>80</sup>

When implementing restorative justice programmes, it is important that the following procedural safeguards<sup>81</sup> are established and followed either in law, regulations or policy:

- Consent of both the person in contact with the law and the victim is required and they must both be able to withdraw such consent at any time during the process.
- Restorative justice processes should only be used where there is sufficient evidence.
- Participation of a person in contact with the law is not evidence of guilt.
- Agreements should be voluntary and reasonable.
- The safety of the parties must be considered in referring a case to and in conducting a restorative justice process.
- Discussions in restorative processes that are not conducted in public should be confidential.
- The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements.
- Where no agreement is reached between the parties, the failure to reach an agreement alone shall not be used against the person in contact with the law in subsequent criminal justice proceedings.
- Failure to implement an agreement made in the course of a restorative justice process (other than a judicial decision or judgement) should not be used as justification for a more severe sentence in subsequent criminal proceedings.

<sup>79</sup>Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*.

<sup>80</sup>Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

<sup>81</sup>United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

Polymakers and justice sector professionals should ensure that the national guidelines on restorative justice programmes are adopted in line with relevant international standards and norms.<sup>82</sup>

For cases involving gender-based violence, such as intimate partner violence or sexual violence, the use of restorative justice remains controversial. In addition to concerns of safety for victims, revictimization and secondary victimization,<sup>83</sup> there are also concerns about how using restorative justice in gender-based violence cases, particularly as a form of diversion from or an alternative to the criminal justice process, may trivialize violent crimes and turn them into private matter rather than a public denunciation through a conventional criminal justice process. On the other hand, there are studies that suggest victims of gender-based violence were more satisfied after a restorative justice process than a conventional criminal justice process<sup>84</sup> and felt more empowered.<sup>85</sup> Conventional criminal justice processes indeed often disregard victims' fundamental needs such as the need to understand offenders motivations and future intentions, as well as the need to ensure that offenders are not incapacitated in compensating and financially supporting victims or victims' families. Judges must, however, exercise extreme caution when considering whether to use restorative justice programmes in gender-based violence cases, and ensure that the rights and needs of victims and offenders are respected. It is important to reiterate that when a restorative justice process is to be used, it must always be based on free and voluntary consent of both parties. Compulsory or forced alternative dispute resolution processes, including mediation and conciliation are explicitly and strictly prohibited under international standards.<sup>86</sup>

It is important that restorative justice programmes have strong referral mechanisms and partnerships with other social services. A study by the Restorative Justice Council in England and Wales found that restorative justice practices were particularly effective for women arrested for shoplifting offences. However, due to the complex factors behind women's offending, the study also recommended that restorative justice programmes have partnerships so that women can be referred to appropriate services, such as mental health services, to address the underlying causes of them coming into contact with the law. A gender-responsive approach is important when implementing these programmes. Examples of such a gender-responsive approach are questioning the rationale of gendered judgments and allowing additional time for case preparation work, given the importance of relationship building when working with women.<sup>87</sup>

<sup>82</sup>Including the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, annex, adopted on 29 November 1985; Tokyo Rules; Bangkok Rules; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly resolution 40/33, annex, adopted on 29 November 1985; and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), General Assembly 45/112, annex, adopted on 14 December 1990.

<sup>83</sup>Commission on the Status of Women, *Agreed conclusions on the elimination and prevention of all forms of violence against women* (E/2013/27), paragraph 34 (g). See further, UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014).

<sup>84</sup>Ministry of Justice of New Zealand, *Restorative Justice Survey* (2018).

<sup>85</sup>Marsh and Wager, "Restorative Justice in Cases of Sexual Violence: Exploring the views of the public and survivors", *Probation Journal*, Vol. 62, No. 4 (2015), pp.4 336-356. Koss, Wilgus, and Williamsen, "Campus Sexual Misconduct: Restorative justice approaches to enhance compliance with Title IX guidance", *Trauma, Violence, and Abuse*, Vol. 15, No. 3 (2014), pp. 242-257.

<sup>86</sup>In 2013, in its Agreed Conclusions adopted at its 57<sup>th</sup> session, the Commission on the Status of Women, urged Member States to "...take the necessary legislative and/or other measures to prohibit compulsory and forced alternative dispute resolution processes, including forced mediation and conciliation, in relation to all forms of violence against women and girls..." (E/2013/27, paragraph 34(g)). Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) prohibits the mandatory use of alternative dispute resolution processes, including mediation and conciliation. For more information on international normative guidance on the use of restorative justice processes in the context of violence against women, see UNODC, *Handbook on Restorative Justice Programmes*, 2<sup>nd</sup> Edition (to be published in 2020).

<sup>87</sup>Restorative Justice Council, *Making Restorative Justice Work for Women Who Have Offended: A Restorative Justice Council research report* (2016).

**United States:** Common Justice is an alternative-to-incarceration programme in New York for violent felonies such as assault and robbery. Potential cases must be approved by the Brooklyn or Bronx District Attorneys. Victims and defendants must agree to participate. A trained facilitator helps the parties address the impacts of the crime, their resulting needs, and for the responsible party, his or her obligations. Together, the parties agree on possible remedies, including restitution, community service and commitments to attend school or work. Responsible parties also complete a 12 to 15 month violence intervention programme. Programme staff monitor the responsible party's adherence to the agreements and participation in the violence intervention programme, and those who complete the programme successfully do not serve the jail or prison sentences that they would face otherwise.

Source: Common Justice, *Common Justice Model*.

### 2.2.6. Charging fairly

Depending on the jurisdiction, prosecutors and law enforcement officials have an important role in determining whether and which charges to bring against someone suspected of having committed a criminal offence. The following measures should be considered to ensure that charging decisions are gender-responsive:

- Prosecutors should screen cases rigorously and early to determine if evidence supports all elements of the offence so that weak cases can be declined or dismissed. Screening should be the job of experienced prosecutors who look at the accusation and evidence before charges are filed. Prosecutors should not initiate or continue prosecution, or should make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.<sup>88</sup>
- The maximum possible charge should not be filed as a matter of course. Office-wide policies making clear that charges should reflect the facts and circumstances of each case, having a gender-responsive approach and be designed to achieve a just result, should be adopted.
- Prosecutors and law enforcement officials should not threaten to increase the charge or seek a more severe sentence in order to obtain a guilty plea.
- In some countries, plea-bargaining is common practice. Some research indicates that women are less likely to have access to plea-bargaining due to their role in crimes.<sup>89</sup> Trial waiver systems must ensure that procedural rights are safeguarded. For example, a plea offer should not be made if the prosecutor cannot prove the charge beyond a reasonable doubt. Plea offers should not be conditioned on the waiver of a defendant's right to seek pretrial release or discovery, or to litigate constitutional violations.<sup>90</sup>
- Support legislative reform efforts aiming to reduce sentence lengths (particularly life imprisonment without parole)<sup>91</sup> and to eliminate mandatory sentences and related provisions, such as so-called three-strike laws.<sup>92</sup>

<sup>88</sup> UNODC, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide, Criminal Justice Handbook Series* (2014).

<sup>89</sup> See, for example, Grubb, *Plea Bargaining and Gender*, (2019).

<sup>90</sup> Fair Trials, *The Disappearing Trial Report: A global study into the spread and growth in trial waiver systems* (2017).

<sup>91</sup> PRI and University of Nottingham, *Life Imprisonment: A Policy Briefing* (2018).

<sup>92</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018). See also Rule 61, Bangkok Rules.

**United States:** In 2018, the Philadelphia District Attorney instructed the prosecutors in his office to make plea offers below the bottom end of the Pennsylvania sentencing guidelines for most crimes. When a prosecutor thinks that an offer at the bottom end would be too low, he or she must seek a supervisor's approval to go higher. When the sentencing guidelines call for a sentence of two years or less, Krasner instructed prosecutors generally to seek probation or another alternative to incarceration.

Source: District Attorney Larry Krasner, "New Policies Announced February 15, 2018", Memorandum to Assistant District Attorneys, District Attorney's Office, Philadelphia, PA, 13 March 2018.

### 2.2.7. Alternatives to pretrial detention

Because of the severe and often irreversible negative effects of pretrial detention, international law requires that it should be the exception rather than the rule. Pretrial detention should be a measure of last resort in criminal proceedings in compliance with the presumption of innocence and the right to liberty.<sup>93</sup> Pretrial detention is only legitimate where there is a reasonable suspicion of the person having committed the offence, and where detention is necessary and proportionate to prevent them from absconding, committing another offence, or interfering with the course of justice during pending procedures.<sup>94</sup>

In most jurisdictions, a set of criteria has been established in law or jurisprudence that must be considered in order to justify the exceptional use of detention. Policymakers and/or professionals in the justice sector should put in place legal limits for the use of pretrial detention as an exception and promote use of non-custodial measures.

Whenever possible, alternatives should be utilized for women in contact with the law. An intersectional approach should be employed in the establishment, implementation and monitoring of measures aimed at reducing pretrial detention, including training with a gendered perspective.<sup>95</sup> Gendered factors should be considered, such as a woman's background, community and family ties, caretaking responsibilities, as well as the severity of the crime and the danger presented to the community. It is important not to separate a woman from her family or community without due consideration of her background.<sup>96</sup> Most women in contact with the law do not necessarily pose a risk to society and their imprisonment may hinder social reintegration.

Special attention should be given to pregnant women and those with dependents (children, older adults and persons with disabilities) and they should be prioritized in decisions concerning non-custodial measures. Special attention should also be given to the situation of female heads of household who are the sole breadwinner for their family members so that the sanction is compatible with holding a remunerated job. In particular, pretrial detention should only be considered:

- when the woman represents a continuing danger

<sup>93</sup>Rule 6.1, Tokyo Rules.

<sup>94</sup>PRI, *Factsheet: Pre-Trial Detention* (2013).

<sup>95</sup>WOLA, *Pretrial Detention In Latin America: The Disproportionate Impact On Women Deprived Of Liberty For Drug Offenses* (June 2019).

<sup>96</sup>Rule 58, Bangkok Rules.



- after taking into account the best interests of the child and after ensuring that appropriate provision has been made for such children.<sup>97</sup> Childcare responsibilities may be an indication that women in contact with the law are unlikely to abscond and that pretrial detention is therefore less likely to be necessary.<sup>98</sup>

#### Best Interests of the Child

The authorities should take into account the best interest of a child who may be affected when making decisions at all stages of the criminal justice process including arrest, pretrial measures, trial and sentencing, imprisonment, release and reintegration into the family and community.

**Rule 49 of the Bangkok Rules** clearly indicates that decisions to allow children to stay with their mothers in prison shall be based on the best interest of the children and that children in prison with their mothers shall never be treated as prisoners.

**The African Committee of Experts on the Rights and Welfare of the Child** recommends the following:<sup>a</sup>

- The authorities should actively consider applying alternatives to pretrial detention and to sentences of imprisonment when offenders are parents or primary caregivers of children. Taking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned.
- A decision for a child to live in prison with his/her mother or primary caregiver must be subject to judicial review. Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with mother/caregiver and the existence of quality alternatives available to the family.
- Contact between imprisoned parents/caregivers and children must be facilitated where it is in a child's best interest.

<sup>a</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *A Short Guide to General Comment No. 1 on Children of Incarcerated and Imprisoned Parents and Primary Caregivers* (2014).

#### 2.2.7.1. Bail

Many women cannot afford to pay cash bail as they come from low socio-economic backgrounds and/or have been abandoned by their families and so lack this support.<sup>99</sup> There is a need to move towards ending cash bail which effectively punishes indigent women and contributes to prison overcrowding. Alternatives to monetary bail should be considered such as:

- order to appear in court on a specified day
- order to remain at a specific address
- order to report on a daily or periodic basis to the court, police or other authority
- a prohibition to engage in particular conduct

<sup>97</sup>Rule 64, Bangkok Rules.

<sup>98</sup>African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No.1 on Article 30 of The Africa Charter on the Rights and Welfare of the Child: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"* (2013).

<sup>99</sup>Prison Policy Initiative, *Women's Mass Incarceration: The Whole Pie* (2017); PRI, *Community service and probation for women: A study in Kenya* (2016).



- order to sign a daily log book or exchange text messages
- order to leave or enter specified places or districts, or to meet specified persons
- order to surrender passports or other identification papers
- supervision by an agency appointed by the court<sup>100</sup>
- referral to community support services where appropriate, such as income or housing support

In **Pakistan** many women were found to be detained for long periods, even for minor offences, as they had been abandoned by their families and were unable to afford bail.

Source: Law and Justice Commission of Pakistan, "Releasing the Female Accused on Bail", Issue 48 (2012).

A number of general measures can also be taken to enable women to access bail, including the following:

- Policymakers should consider removing the obligation to impose pretrial detention for any type of offence, ensuring that pretrial detention decisions are not based on the offence that is alleged to have been committed, but are decided on a case-by-case basis.
- As a condition for seeking pretrial detention, judges should require prosecutors and prosecutorial authorities to show before the competent court that detention is a measure of last resort.
- Where legal representation is not realistic owing to lack of publicly funded lawyers, judges should make the necessary enquiries themselves during bail hearings.<sup>101</sup>
- Civil society organizations can also play a key role and should be supported. In countries with resource constraints, the use of paralegals to assist with bail applications has helped decrease pretrial detention.<sup>102</sup>

**United States:** A study of people in local jails unable to post bail bonds showed that African-American women had the lowest incomes before incarceration and white men the highest incomes before incarceration of the different race/ethnic groups. Most African-American men, African-American women and Hispanic women detained for failure to pay a bail bond were living below the poverty line before incarceration.<sup>a</sup>

Washington, DC became one of the first places in the United States to rely less on monetary bail, increasing the use of release on recognizance. As of 2017, almost all defendants are released either on their own recognizance or with some non-monetary conditions, and they maintain an 87 per cent appearance rate.<sup>b</sup>

<sup>a</sup> Rabuy and Kopf, "Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time", 10 May 2016.

<sup>b</sup> Stevenson and Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, Faculty Scholarship (2017), at p. 7.

<sup>100</sup> UNODC, Global e-learning, Course Catalogue, "Gender Issues: Alternatives to Imprisonment for Women Offenders" (Nr. 23.2), <https://www.unodc.org/elearning/en/courses/course-catalogue.html>.

<sup>101</sup> It should be noted that in accordance with Guideline 5, (g), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, "States should introduce measures ...to ensure that unrepresented suspects and the accused understand their rights. This may include, but is not limited to, requiring judges and prosecutors to explain their rights to them in clear and plain language".

<sup>102</sup> See the experience of Malawi, Open Society Foundations, *Improving Pretrial Justice: The roles of lawyers and paralegals* (2012).

- Where there are no alternatives to monetary bail, alternative methods of payment, such as debit and credit card payments or unsecured bonds, and support non-profit bail funds, should be supported.<sup>103</sup>

**United States:** In October 2018, the non-governmental organization, Robert F. Kennedy Human Rights, posted US\$1.2 billion to bail out 105 women and teenagers from Rikers Island prison as part of a national campaign to demonstrate that cash bail discriminates against the poor and minorities. Of the 90 who have since had scheduled court appearances, only two failed to show up, according to the group.

Source: Mayes, “105 New York City Inmates Freed in Bail Reform Experiment”, *New York Times*, 20 November 2018.

- Standard bail obligations cannot always be met by women for a variety of reasons. For example, they may not be allowed to leave home without being accompanied by a man or transport to the respective police station may not be affordable or feasible. In addition, reporting times could jeopardize caretaking responsibilities, for example conflicting with times at which caregivers need to pick up their children from school, or may hinder their ability to earn an income through a remunerated job.<sup>104</sup> Judges and prosecutors should take these factors into account and should establish bail obligations that take into account a woman’s specific circumstances, in collaboration with the woman, defence lawyer/paralegal or civil society organization.

**Cambodia’s** Ministry of Justice guidelines provide that if a woman is pregnant or has children and no suitable alternative care arrangements are available, pretrial detention should not be imposed unless absolutely necessary.<sup>a</sup>

**Sierra Leone:** Bail Regulations passed in 2017 require that the court considers an alternative to detention in the case of a defendant who is a primary caregiver, or a pregnant or lactating mother. In those cases, the court can only resort to detention taking into account the nature and circumstances of the offence and the risk that the defendant poses. In all cases, where a person is granted bail but has no suitable surety, the court is obliged to fix bail conditions that are reasonable and proportionate to the relevant offence and to take into account the individual circumstances and the defendant.<sup>b</sup>

<sup>a</sup> Nowak, *The United Nations Global Study on Children Deprived of their Liberty* (2019).

<sup>b</sup> Sierra Leone Rules of the Court Committee, Bail and Sentencing Guidelines (2017), article 7.

- Pretrial services that help people remember to return to court (for example, notification by phone or text) should be supported.<sup>105</sup> If a defendant has a record of failing to appear in court, consider seeking weekly calls or check-in appointments rather than cash bail or detention.<sup>106</sup>

<sup>103</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

<sup>104</sup> PRI, *Women in criminal justice systems: the added value of the UN Bangkok Rules* (2015).

<sup>105</sup> Notification systems that use phone calls and texts have achieved high success rates for court appearances. See Plaintiffs’ Summary of Other Jurisdictions, *O’Donnell v. Harris County*, No H-16-1414, 2017 WL 1542457 (S D T X April 28, 2018). Multnomah County in Oregon started using automated reminders for court appearances and reported a drop in no-shows of more than 30 per cent and savings of more than \$1 5 million in fiscal year 2007. O’Keefe, “Court Appearance Notification System: 2007 Analysis Highlights”, *Multnomah County Local Public Safety Coordinating Council* (2007).

<sup>106</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

- Do not seek pretrial detention because a defendant missed a court date if she subsequently reports to court, in application of the principle of minimum intervention and deprivation of liberty as a last resort, in line with the Tokyo Rules.<sup>107</sup>

**United States:** In 2011, Kentucky passed a law requiring judges to release from pretrial detention all individuals considered low and moderate-risk for reoffending or flight.

Since then, the number of people arrested while out on release has declined every year: in 2015, the rate was only 10 per cent.<sup>a</sup> Following this success, the Kentucky Supreme Court instituted automatic pretrial release for most non-violent defendants (excluding those accused of sex offences) below a certain risk threshold.

In July 2015, New York city officials announced a plan that would authorize judges in matters involving low-level offences to impose options such as signing a daily logbook, receiving drug treatment, and even exchanging text messages, as alternatives to paying a bail. The aim of the plan was to eliminate pretrial detention, allowing people who cannot meet a bail payment to continue working and living with their families, and to reduce the number of prisoners at the Rikers Island prison complex, known for its overcrowding.<sup>b</sup>

<sup>a</sup> Kentucky Justice & Public Safety Cabinet Criminal Justice Council, 2015 HB463 Implementation Report (2015), p. 3.

<sup>b</sup> WOLA, *Women, Drug Policies and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean* (undated).

- Judges should be required to outline and fully explain the reasoning behind their decision if they refuse bail.
- Women imprisoned on remand should be provided with legal advice and support to appeal a court or police decision refuse bail.

In **Australia**, approximately one third of all incarcerated women are held in pretrial detention. Sisters Inside has a programme to support prisoners held in pretrial detention to appeal against bail refusal to the highest court in Queensland. Workers meet with newly imprisoned women in prisons throughout Queensland and assess their eligibility for Supreme Court Bail. Eligible women are supported to make an application to the court. Sisters Inside workers are available in court to provide advocacy and support, assist the woman to make arrangements to apply for bail (e.g. housing) and offer support following release. This has the gender-transformative effect of educating the judiciary about the repeated, inappropriate refusal of bail to women charged with minor, non-violent offences. Over the past 3 years, 100 per cent of women supported through the programme have been granted bail.

Source: <https://sistersinside.com.au/>

#### 2.2.7.2. House arrest

In some countries, house arrest has been used as an alternative to pretrial detention, particularly for pregnant women or women with dependent children. House arrest can be ordered in a woman's home or the home of another person – particularly relevant to foreign national women

<sup>107</sup> Rules 2.6 and 14, Tokyo Rules. See further, Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

– without surveillance or with surveillance as ordered by the judge. In order to ensure that this measure responds to the gender-specific needs of women, the following should be considered:

- Conditions imposed should respect the rights of the woman in contact with the law and her family and should not prevent their ability to earn a living or fulfil family responsibilities. There must be sufficient access to shelter, food and medication while under house arrest and the woman should be linked with community organizations able to support her. Safety checks should be put in place to ensure the woman will not be subject to violence or abuse by a partner or family member while under house arrest.
- House arrest should not be used as a substitute for incarceration and the least interventionist non-custodial measure should be imposed taking into account a woman's individual circumstances.

**Brazil:** In February 2018, the Brazilian Federal Supreme Court ruled that pregnant women and mothers of children aged 12 and under may be placed in house arrest instead of in pretrial detention. However, there have been challenges implementing the ruling including the lack of access to legal aid for incarcerated women which has resulted in an impediment for women to fully benefit from this ruling.<sup>a</sup>

**China:** Women who are nursing a child can be released pretrial in conjunction with non-custodial measures such as residential surveillance.<sup>b</sup>

<sup>a</sup> Human Rights Watch, "Pregnant Women Will No Longer Await Trial in Brazilian Jails: Supreme Court Ruling a Victory for Law Reform in Brazil", 23 February 2018.

<sup>b</sup> PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2015).

### 2.2.7.3. Supervised release

Supervised release is an innovative alternative to pretrial detention used in some countries.

**United States:** The "Manhattan Supervised Release" programme, implemented in 2013 in New York City, provides an alternative to pretrial detention and allows selected individuals to continue working and living at home with their families as they await their trial. The programme has greatly reduced the number of people in situations of economic vulnerability held in pretrial detention, and programme participants are also less likely to be sentenced to imprisonment.

Source: WOLA, *Women, Drug Policies and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean* (undated).

## 2.3 Trial and sentencing stage

Fair trial rights, in line with international law, should be upheld throughout the trial and sentencing stage. For example, the right to legal representation, the right to a professional interpreter and right to be tried without undue delay.<sup>108</sup>

<sup>108</sup> Article 14, (c), (d) and (f), International Covenant on Civil and Political Rights. See also Amnesty International, *Fair Trial Manual*, 2nd Edition (2014).

- It is important that judges give appropriate consideration to mitigating factors when determining what is an appropriate sentence to apply to a woman in contact with the law, taking into account the typical pathways that lead to women's imprisonment and the particular negative impact that incarceration has on women, outlined in section 3 above. These mitigating factors allow judicial authorities to consider a history of systematic abuse and incidents of coercion or manipulation. Many jurisdictions allow judges to take into account at least some mitigating factors in relation to women. However, effective application may also require policy intervention and more specific guidance and training for judges and other justice sector professionals. For example, sentencing guidelines or guidance on the preparation of social inquiry reports could be adopted or revised to take into account women's background, circumstances and vulnerabilities.

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

According to **Rule 8.2 of the Tokyo Rules**, non-custodial sentences (alternatives to imprisonment) can include measures such as:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment; and
- (m) Some combination of the measures listed above.

When applicable, restorative justice programmes, in line with the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, should be used for cases involving women in contact with the law.

When sentencing a woman in contact with the law, particular concern should be paid to her role as a caregiver, regarding both if she is currently pregnant or is the caregiver of a dependent child. Avoiding the imprisonment of caretaking women is generally in the best interest of the children and the wider community. The African Charter on the Rights and Welfare of the Child states that “no child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child”.<sup>109</sup> Any imprisonment of a woman currently serving a caregiving role should be determined to be in the best interest of the child.<sup>110</sup>

<sup>109</sup> Organization of the African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 19.

<sup>110</sup> See further, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *A Short Guide to General Comment No. 1 on Children of Incarcerated and Imprisoned Parents and Primary Caregivers* (2014).

Given the strong importance of caregiving for the family and community, regional standards also highlight the importance of non-custodial measures for women.<sup>111</sup> The Inter-American Commission has stated that “priority should be given to non-custodial measures that would allow [pregnant women and women with dependent children] to provide for their dependents”.<sup>112</sup> The African Charter on the Rights and Welfare of the Child provides that non-custodial measures should be considered first, that alternatives to imprisonment should be developed and promoted, and “special alternative institutions” should be developed for women who are mothers.<sup>113</sup> Finally, the Parliamentary Assembly of the Council of Europe stated that “custody for pregnant women and mothers of young children should only ever be used as a last resort for those women convicted of the most serious offences and who represent a danger to the community”.<sup>114</sup>

**Bangkok Rules, Rule 63:** Decisions regarding early conditional release (parole) shall favourably take into account women prisoners’ caretaking responsibilities, as well as their specific social reintegration needs.

**Bangkok Rules, Rule 64:** Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

**Tokyo Rules, Rule 9:**

9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.

9.2 Post-sentencing dispositions may include:

- (a) Furlough and half-way houses
- (b) Work or education release
- (c) Various forms of parole
- (d) Remission
- (e) Pardon

9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.

9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

Guidance on implementing these measures and best practice examples are listed in the following sections.

<sup>111</sup>Organization of African Unity, *African Charter on Human and Peoples’ Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/57/3 rev. 5, 21 I.L.M. 58 (1982), Article 18, (“The family shall be the natural unit and basis of society” and “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”).

<sup>112</sup>The Inter-American Commission on Human Rights, “Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas”, 3 July 2017.

<sup>113</sup>Organization of the African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 30; See also African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003, Article 14.

<sup>114</sup>Parliamentary Assembly of the Council of Europe, “Mothers and babies in prison”, Resolution 1469 (2000), Article 5.3.

### 2.3.1. Gender-specific mitigating factors

It is important that judges give appropriate consideration to gender-specific mitigation factors during sentencing and these should be put forward by defence lawyers. These should include:

- severity of the offence
- the woman's caretaking responsibilities and typical background
- lack of criminal history
- experience of physical or sexual violence/abuse<sup>115</sup>
- history of systematic abuse and incidents of coercion or manipulation
- background of extreme disadvantage, such as poverty or discrimination<sup>116</sup>
- mental health care needs
- drug use disorders and gendered factors that may have contributed to drug use such as gender-based violence and childhood trauma<sup>117</sup>

 See further section 5.4 on Women arrested for drug offences.

To make informed sentencing decisions, judicial authorities require information about women in contact with the law and their individual backgrounds. It is thus important to ensure that the probation service or social service provide judicial authorities before sentencing with relevant information, such as the woman's caring responsibilities, history of victimization or mental health care needs. In some jurisdictions, this can be achieved through social inquiry reports. Another key piece of information is an assessment of the probable impact on children of women's detention and arrangements for child care in the absence of the mother.<sup>118</sup>

In countries with resource limitations, courts may themselves be able to inquire into a woman's background during the trial process. Prison officers, university clinics and paralegals can also support the court with providing background information for sentencing.

#### Guidelines for social investigations and pre-sentence reports

##### **Purpose**

- Appraise the background, personality and conduct of the person in contact with the law in the light of the offence committed and reasons for commission of the offence
- Identify the criminogenic factors at play (the person's risk and needs factors)
- Evaluate the seriousness of the offence and the impact on victims in order to determine a proportionate sanction
- Identify the likely impact of a sentence on any dependents (children or any other dependent members of the (extended) family)

<sup>115</sup> UNODC, *Information note for criminal justice practitioners on non-custodial measures for women offenders* (2015).

<sup>116</sup> Commentary to Rule 61 of the Bangkok Rules. See UNODC, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, page 45.

<sup>117</sup> UNODC, *World Drug Report 2018, Women and Drugs: Drug use, drug supply and their consequences*.

<sup>118</sup> PRI, *Resources for implementing a gender-sensitive approach to non-custodial sentences* (2017).



- Engage families, employers, partnership organizations and significant others in the community about the person. Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitation
- Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitation
- Gain knowledge of the culture and resources available in the local communities
- Propose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence guidelines for social investigations and pre-sentence reports

#### ***Sources of data and information***

- Court file
- The person in contact with the law
- Relatives
- Neighbours and opinion leaders
- Teachers
- Employer
- Victim/Complainant
- Remand institutions

#### ***Considerations during the assessment interview***

- The interviews should be carried out in a convenient place that provides the interviewee with room to speak freely and in confidence. Women in contact with the law who may have experienced violence need to be interviewed in a safe, non-threatening environment.
- The probation officer should introduce themselves and explain the purpose of the interview.
- The officer should not ask questions in a complicated way and should check whether the woman in contact with the law understands the questions.
- The process of assessment should not negatively affect the woman in contact with the law or expose her to public stigmatization.
- In certain circumstances, it may be necessary to offer women in contact with the law the option of being interviewed by a female officer and/or of being interviewed in a women-only environment.
- When interviewing family members, the officer must be alert to the possibility of a background of abuse within the family against the woman in contact with the law. Because of the stigma of such abuse, a woman in contact with the law may not reveal such a background immediately, particularly in cases of sexual abuse.
- The officer should prepare and organize questions for each interview giving regard to areas of interest and issues documented beforehand. Open questions should be used to elicit more comprehensive answers.
- The officer should ensure that adequate time is allocated for each interview giving regard to the number of cases to be interviewed and the depth to be covered.
- Ensure that the questions are objective and insightful, and concentrate on central/thematic issues and probable needs and risk areas while avoiding peripheral issues

- The officer should ensure that the questions are sensitively worded in a manner that protects the woman in contact with the law from psychological distress.
- Always ensure neutrality, be non-judgmental, and avoid biases based on sex, religion, social class, age etc. Take cognizance of the age of the woman in contact with the law and respect the elderly.
- The officer must take time to analyse the generated information and effectively interpret the findings using professional expertise, experience and insight.

Source: PRI and Kenya Probation and Aftercare Service, *Guidelines for Social Investigations and Pre-Sentence Reports* (2017).

Policymakers and justice sector professionals should support legislative reform to reduce sentence lengths and eliminate mandatory sentences and related provisions, in line with the recommendations included above for prosecutors on charging fairly (section 4.2.6). The Bangkok Rules (Rule 61) call specifically for provisions to allow judges to take account of the circumstances of the offence committed, as well as the caring responsibilities of the women involved, in decision-making and call on Member States to consider removing mandatory sentencing policies in order for the judicial authorities to be in the position to use their discretion during sentencing.<sup>119</sup> The United Nations Human Rights Committee has expressed specific concern that mandatory sentencing can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the International Covenant on Civil and Political Rights.<sup>120</sup>

**Armenia:** Gender-specific mitigation circumstances include caring for a child under 14 years old or being pregnant at the time of sentencing.<sup>121</sup>

**Thailand:** In 2013, judges agreed to implement the Bangkok Rules during sentencing, by taking into account the particular circumstances of women.<sup>122</sup>

### 2.3.2. Non-custodial sentences

General guidelines on ensuring that non-custodial measures at the sentencing stage are gender-responsive include the following:

- Non-custodial sentences<sup>123</sup> should be considered in all cases for women in contact with the law and should be implemented whenever appropriate and possible, taking care not to separate them from their families and communities.
- Non-custodial sentences should be preferred for pregnant women or women with dependent children. Custodial sentences should be considered only:

<sup>119</sup> Commentary to Rule 61 of the Bangkok Rules. See UNODC, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, page 45.

<sup>120</sup> United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Australia*, 7 May 2009, CCPR/C/AUS/CO/5; and Cunneen, “Contemporary Comments: Mandatory Sentencing and Human Rights”, *Current Issues in Criminal Justice*, Vol. 13, No. 3 (2002).

<sup>121</sup> Criminal Code of the Republic of Armenia, available at <[www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng](http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng)>.

<sup>122</sup> Piyanut Tumnuksetchai, “Bangkok Rules for Women Convicts”, *The Nation*, 23 March 2013.

<sup>123</sup> Rule 8.2, Tokyo Rules, lists various non-custodial sentences as alternatives to imprisonment.

- where the offence was serious and violent
- where the woman represents a continuing danger
- after taking into account the best interests of the child or children.<sup>124</sup>
- Women with mental health issues or substance abuse addictions should be referred to gender-responsive, trauma-informed, women-only treatment programmes in the community rather than be imprisoned, in order to address their needs and the reasons behind them coming into contact with the law.

**Israel** has developed women-only drug treatment programmes as it recognizes that a gender-specific response must be taken with regard to drug treatment. Data showed that the percentage of women seeking treatment for drug dependencies in Israel is lower than that of men. Fewer women continue treatment or succeed in finishing it. Data also showed that women with drug dependencies have different characteristics and needs than men. Approximately 90 per cent of women with serious drug-use disorders have experienced sexual trauma and many suffer from mental health issues. Furthermore, there is more social stigma towards women with drug dependencies than men.

The women-only treatment centres house around 12 to 18 women in residential treatment programmes for around a year and aim to build a supportive community. The women-only staff promote a holistic treatment plan focusing on self-esteem, post-traumatic stress disorder, caretaking responsibilities etc. The centres are located in the city centres so that women can make use of the community's social and medical services.

*Source:* Information submitted by Dr Haim Mell (Israel National Anti-Drug Authority), April – May 2019. See also, Schori, Sapir and Lawental, "Long-term residential substance abuse treatment for women: lessons learned from Israel", *Substance Abuse and Rehabilitation*, Vol. 3, Suppl. 1 (2012), pp. 71–81.

### 2.3.2.1. Fines

Many women cannot pay fines due to poverty and marginalization, particularly women from ethnic minority backgrounds. Gender-based violence against women is a strong factor contributing to indigence, and prosecutors and judges should take these factors into account and in particular should avoid imposing fines on women who have a background of abuse. Other non-custodial sentences should be explored first or the fine set as low as possible, taking into account the background and circumstances of the woman in contact with the law. In particular, the following specific measures should be considered:

- Advocate for assessing fees and fines on a sliding scale, based on income and assets, taking into account debts and financial obligations such as child support, health care costs, rent and living costs. This model has been successfully implemented in countries around the world.<sup>125</sup> This could be achieved by the day-fine system, in which fines are calculated by assessing the seriousness of the offence and the income of the woman in contact with the law.<sup>126</sup>

<sup>124</sup> Rule 64, Bangkok Rules. See further section 4.1 of this toolkit.

<sup>125</sup> United States Department of Justice, Bureau of Justice Assistance, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction* (1996).

<sup>126</sup> UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2013), p. 16.

In **England**, it was found that decision makers were reluctant to fine women and instead issued more severe community penalties. As a result, in the event of a subsequent conviction, such women could be given even more severe sentences because a step had been skipped on the sentencing ladder.<sup>127</sup>

- Support reasonable payment plans and oppose requiring people to return to court again and again because of incomplete payments. Advocate against excessive late fees, payment plan fees, collection fees and interest payments.
- Support defence motions to reduce or waive fines and fees based on indigency.<sup>128</sup>
- Women should not be imprisoned because they cannot pay their fines or fees and prosecutors and judges should eliminate the use of arrest warrants for non-payment. Women should not be criminalized for indigence and judges should take into account the role that gender-based violence contributes to indigence and the disproportionate impact that this can have on women from ethnic minorities.

**Australia:** One in every three women who enter prison in Western Australia do so for unpaid fines. Between 2008 and 2013, the number of women locked up for fine default increased by close to 600 per cent<sup>a</sup> In August 2014 an Aboriginal woman died in police custody after being locked up for unpaid fines. She was in a violent relationship with her partner at the time of her arrest. Civil society organizations have advocated for law reform in Western Australia and argued that fines should not be imposed on women living in poverty. Failing this, a system of fines proportional to income would be more just.<sup>b</sup>

<sup>a</sup> <https://www.hrlc.org.au/news/time-for-the-western-australian-government-to-scrap-its-policy-of-locking-people-up-for-unpaid-fines>

<sup>b</sup> Human Rights Law Centre, "Time for the Western Australian Government to scrap its policy of locking people up for unpaid fines" 23 May 2016.

### 2.3.2.2. *Suspended sentences (with or without supervision)*

- A suspended sentence usually consists in the court pronouncing a sentence of imprisonment but suspending its implementation for a specific period during which the defendant has to follow certain conditions. If the conditions are followed, then the pending imprisonment can be avoided. However, the conviction will be registered in the person's criminal record. Suspended sentences have been successfully used for pregnant women or women with dependent children.

In **Georgia**, legislation allows for a suspension of the sentence for a pregnant woman up until a year after the pregnancy.<sup>a</sup>

**South Africa:** In *M v State 2007* the South African Constitutional Court suspended the imprisonment of a mother and sole caregiver of three minor children, as the Court considered the negative effects of the mother's imprisonment on the children, such as loss of home and community, disruption in school routines and transportation and potential separation from siblings. The Court stressed the importance of taking into account the best interest of her children during proceedings that could have an impact on their lives.<sup>b</sup>

<sup>a</sup> PRI, "Submission to Committee on the Rights of the Child Day of General Discussion", 30 September 2011.

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

<sup>127</sup> Baroness Jean Corston, *The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System* (2007), p. 18.

<sup>128</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

It is important to ensure that women are not ‘set up for failure’ through conditions or supervision requirements that are beyond their means, such as reporting (for women who cannot afford transport) or community service (for women with caring/education/training responsibilities). Supervision increases the likelihood that women who are otherwise at low risk of reoffending will end up incarcerated for technical violations that have little to do with public safety.<sup>129</sup> Research in the United States has shown that the majority of violations occur within the first year, suggesting that supervision beyond that point serves little to no rehabilitative purpose. Some states in the United States have shortened their supervision periods with no increase in crime or recidivism.<sup>130</sup> Any supervision order should take into account the woman’s circumstances and background, such as her caretaking and employment responsibilities.

Prosecutors and judges should advocate with parole and probation departments for the use of graduated sanctions for violations.<sup>131</sup> This means starting with mild sanctions (such as community service) and only if necessary moving to moderate sanctions (day reporting centres, intensive supervision etc) or more serious ones (ankle bracelets and brief prison stays). Prosecutors and judges should not advocate sending people back to prison for technical violations of their supervision.<sup>132</sup>

### 2.3.2.3. *Deferred sentence*

A deferred sentence is where the court postpones sentencing until the end of the deferral period. It may also include specific requirements, whether supervised or unsupervised. The case may be dismissed if the defendant meets all the requirements. A deferred sentence is preferable to a suspended sentence as it means that a woman in contact with the law can avoid having a conviction in their criminal record, which may aid employment prospects.

In **England and Wales**, deferring a sentence to allow for restorative justice or to enable an individual to demonstrate engagement with a specific requirement set by the court has been found to be a valid and useful sentencing option.<sup>a</sup>

Deferred sentences are particularly useful for women with dependent children and several countries successfully employ them.

In **Algeria**, as of 2005, a prison sentence can be postponed if the convicted person is a parent of a minor child and the other parent is also incarcerated. Additionally, the execution of a prison sentence can be postponed if a woman is pregnant or has a child that is less than 24 months old.<sup>b</sup>

In **Armenia**, the Criminal Code provides for the postponement or exemption from punishment of pregnant women or women with children under three years of age, except in the case of those sentenced for longer than five years for serious crimes.<sup>c</sup>

<sup>129</sup> UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2013), p. 125.

<sup>130</sup> Schiraldi and Jacobson, “When Less is More”, Marshall Project, 28 August 2017.

<sup>131</sup> Rule 14, Tokyo Rules.

<sup>132</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).

In **Kazakhstan**, a woman's period of incarceration can be postponed if she is pregnant or has children under 14 years of age.<sup>d</sup>

In the **Russian Federation** the execution of a sentence may be postponed and then reduced or cancelled for pregnant women or women who have children under 14 years of age with the exception of those sentenced for longer than five years for serious crimes.

In **Viet Nam** under Criminal Code 2015, Articles 67 – 68, a woman's sentence can be postponed if she is pregnant or has a young child until her child reaches three years of age. If the woman is the sole income earner in the family and imprisonment will cause the family to face extreme hardship, the sentence may be deferred for up to one year unless committing an offence against national security or an extremely serious crime.<sup>e</sup>

<sup>a</sup> Prison Reform Trust, *Sentencing of Mothers: Improving the sentencing process and outcomes for women with dependent children* (2015).

<sup>b</sup> Library of Congress, "Laws on Children Residing with Parents in Prison", last updated 2015.

<sup>c</sup> PRI and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)*, (2013).

<sup>d</sup> PRI, *Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan* (2014).

<sup>e</sup> Nowak, *The United Nations Global Study on Children Deprived of their Liberty* (2019).

#### 2.3.2.4. Home detention

Home detention is used as a non-custodial sentence, particularly for pregnant women or those with dependent children. Home detention can be at the woman's home or the home of another person – of relevance to foreign national women who may not have a residence in the country. However, as poverty is a driving factor behind women's imprisonment, many women may not have a suitable fixed abode.

In **Argentina**, the Penal Code 2009 allows for mothers with children under 5 years of age or with caring responsibilities for persons with disabilities to serve their sentences at home under house arrest. This led to a significant reduction of the number of mothers with children in prison.

Source: PRI, *Women in criminal justice systems and the added value of the UN Bangkok Rules* (2014).

Provisions imposed should take into account a woman's caring and income earning obligations as well as medical needs. For example, a woman may need to pick her children up from school or attend to an emergency after curfew hours. There must be sufficient access to shelter, food and medication while under home detention and the woman should be linked with community organizations able to support her. Safety checks should be put in place to ensure that a woman will not face violence or abuse by a partner or family member during the home detention sentence.

Home detention should not be used as a substitute for incarceration and is not a model solution. The least interventionist non-custodial sentence should be imposed taking into account a woman's individual circumstances.

In **Canada**, a woman, named Kimberly Rogers, who was eight months pregnant died while serving a six months sentence in home detention in 2002. She had pleaded guilty to defrauding the Ontario Works programme (she had collected welfare while receiving student loans to cover her studies in the social services programme at Cambrian College). She received a strict sentence and was only allowed to leave her house for three hours a week. A restitution order also required her to pay back the excess amount she had received. Her guilty plea also triggered a newly enacted section of the Ontario Works Act, which banned her from receiving welfare for three months. This left her with no income -- at a time when she was prohibited from leaving her house to work or look for work. Along with the ban on welfare benefits, she lost her drug card and could no longer afford the medications prescribed for her migraines, insomnia, anxiety and depression. (A civil society organization later helped to get this reinstated).

On 31 May 2001, as part of a constitutional challenge, a judge temporarily lifted the ban, reasoning that the act of forcing a pregnant woman into destitution would harm both Ms. Rogers and the public at large. Ms. Rogers began to receive benefits again. But because she had to repay welfare, her debt was deducted off each monthly cheque, reducing \$520 to \$468. Her rent cost \$450 a month, leaving \$18 a month for food and other expenses. She committed suicide by overdose.

Source: *The Globe and Mail*, "We've learned little from Kimberly Rogers death", 9 August 2002.

### 2.3.2.5. Community sentence treatment orders

Gender-responsive, trauma-informed, women-only treatment programmes in the community are a preferred alternative to imprisonment for women with mental health needs, substance abuse or those who have suffered trauma and abuse. Policymakers should ensure there is investment in such programmes. Important considerations when applying these sentences include:

- Making sure to obtain the informed consent of the woman and that treatment is on a voluntary basis.
- Do not require women in contact with the law to admit guilt as a condition for participation if an admission is not needed to promote the goals of the programme.
- It is important to ensure that the programme matches the risk and needs of the individual. Depenalization or the least interventionist non-custodial measure should be considered first. If a programme is advised, women who are lower risk should be placed in a lighter touch programme.
- Community programmes should be preferred where possible and appropriate, since residential treatment programmes can be challenging for women with caretaking responsibilities and can be triggering for survivors of violence or coercion.<sup>133</sup>
- Take into consideration a woman's caretaking and income-earning obligations when setting requirements, and do not require a woman to be part of programming every day unless absolutely necessary. For example, if possible, weekly meetings with a case worker should not have to be held at the programme's office but could depend on where is easiest for the woman (such as at her house or a place near her home).<sup>134</sup>
- Justice sector professionals should consult with community service treatment centres to have a better understanding of the issues that women face when going through such programmes. For example, understanding that relapse is part of the recovery process, that behaviour change takes time, and that women may still be in coercive situations.

<sup>133</sup>Interview with Miriam Goodman, Clinical Director of the Women's Prison Association's Justice Home by Sabrina Mahtani on 14 December 2018.

<sup>134</sup>Ibid.



- More intrusive or even punitive responses to non-compliance (such as electronic monitoring and periods of imprisonment) should be used as an exception and a last resort and be imposed only if they serve public safety.

**England:** In Northamptonshire, there is a specific community service for women that includes mental health treatment alongside holistic support, through a 'Women's Centre'. The Centre gives support not only on mental health but also on physical health, education, financial stability, relationships, employment and vocational training, and provides programmes to empower women to be more resilient.

The programme seeks to reduce reoffending by addressing the root causes of offending, along with reducing the harmful effect of short-term prison sentences. It is based on the fact that many people in contact with the law, particularly women, have experienced years of trauma and abuse for which they have received little support, and have poor experiences of health and wider social care issues.

Therefore, by addressing their mental health, substance misuse and associated social issues effectively through part of their community service, women in contact with the law are more likely to engage in treatment and less likely to reoffend. On the day of their sentencing, women are screened to see if they are eligible for the programme.

If this screening indicates that the woman in contact with the law is likely to benefit from mental health treatment (or drug or alcohol treatment), a more detailed assessment is carried out by an assistant psychologist, who decides if the woman is eligible and seeks her consent to participate, after sharing information about how the programme works. Mental health treatment – as part of the community sentence – is then recommended as a sentencing option to the magistrate or judge through a pre-sentencing report prepared by the probation services.

This simplified assessment process, which typically takes only a couple of hours, allows courts to seek views and assessments from a broader range of appropriately trained mental health professionals, resulting in quicker assessments and reducing unnecessary psychiatric court report costs. It also enables sentencing judges to give access to effective individualized mental health (or other) treatment as part of a community sentence.<sup>a</sup>

**United States:** "Justice Home" is an alternative to incarceration programme based in New York City that focuses exclusively on women. Instead of going to prison, selected women can remain at home with their family and get individualized support from a case worker to access drug treatment, mental health services, and parenting and life skills classes. Many formerly incarcerated women work at the programme which assist with peer to peer support. The programme does not focus on the number of offences or types of charges a woman is facing but, after doing a detailed assessment, on whether the programme will be able to assist with a woman's particular needs. Women who are outside or currently in pretrial detention are eligible for the programme. Once a woman has completed the programme, she can plead to a lesser plea or for a dismissal. In addition to being significantly less expensive than incarceration, preliminary results of Justice Home have shown that it has greatly reduced recidivism rates.<sup>b</sup>

<sup>a</sup> PRI, "A community sentence for women with mental health needs", 1 November 2018.

<sup>b</sup> Interview with Miriam Goodman, Clinical Director of the Women's Prison Association's Justice Home by Sabrina Mahtani on 14 December 2018. See also, WOLA, *Gender and Drug Policy: Exploring innovative approaches to drug police incarceration* (2017).

### 2.3.2.6. Community service orders

Community service orders can reduce prison overcrowding and support rehabilitation and aid society. A gender-responsive approach is important when considering such orders. Factors to take into account include:

- Placements should be allocated as close as possible to the woman's home to reduce transportation costs.
- Placements should take into account childcare obligations, take into account a woman's individual skills and avoid gender stereotypes (e.g. not be limited to cooking/cleaning).
- It is key to also incorporate skills building and other support programmes, such as counselling, to aid reintegration.
- Safety should also be ensured.<sup>135</sup>

**Bahrain** introduced a new Alternative Penalties and Procedures law in 2017 which authorizes courts to issue penalties other than imprisonment, such as community service, rehabilitation programmes and paying to repair damage caused by unlawful acts.<sup>a</sup>

**Kenya:** A successful gender-sensitive community service pilot project was implemented by Penal Reform International in 2017.<sup>b</sup> It took into account research into the context for women in contact in law with the country so that the project could be based on evidence-based recommendations. Induction clinics were created for probation officers which covered the Bangkok Rules and gender issues when supervising women in contact with the law. Results of the project included:<sup>c</sup>

- improved relationships between women in contact with the law and probation officers, since probation officers had a greater understanding of the pathways for women coming into contact with the criminal justice system
- improved pre-sentence reports (which also benefited men in contact with the law)
- increase in probation officers recommending non-custodial sentences
- gender-sensitive supervision of community sanctions

**South Africa:** In December 2018, Acting High Court Judge, Daniel Thulare, rendered a decision that defendants in the Western Cape sentenced to less than 24 months imprisonment would be given community service rather than prison sentences in order to reduce prison overcrowding and support rehabilitation.<sup>d</sup>

<sup>a</sup> Gulf News, "Alternative penalty law for Bahrain convicts", 29 April 2019.

<sup>b</sup> PRI, *Resources for implementing a gender-sensitive approach to non-custodial sentences* (2017). See also PRI and The Kenya Probation and Aftercare Service, *Gender Sensitive Community Service and Probation: Model for Reform* (2017).

<sup>c</sup> PRI and The Kenya Probation and Aftercare Service, *Gender Sensitive Community Service and Probation: Model for Reform* (2017).

<sup>d</sup> Cape Argus, 7 December 2018.

### 2.3.3. Considerations when imposing non-custodial sentences

#### 2.3.3.1. Create incentives for application

There is a need for measures to encourage courts to adopt non-custodial sentences, such as mandating judges to explain why they are not imposing such sentences as alternatives to imprisonment. Another strategy to support this is enabling women to appeal their sentence to a higher court on the basis that non-custodial sentences were not adequately considered.

<sup>135</sup> PRI, *Resources for implementing a gender-sensitive approach to non-custodial sentences* (2017). See also PRI and The Kenya Probation and Aftercare Service, *Gender Sensitive Community Service and Probation: Model for Reform* (2017).

### 2.3.3.2. Create feedback mechanisms

Feedback mechanisms need to be created and sustained to better inform stakeholders, in particular obtaining the views of women in contact with the law who have participated in non-custodial measures.<sup>136</sup> It is important to raise public awareness of the benefits of non-custodial measures so as to reduce stigma faced by women who participate in such measures and to encourage professionals in the justice sector to have confidence in their use.

### 2.3.3.3. Avoid net-widening

It is important to make sure that non-custodial sentences do not widen the net of criminal justice control over women through administrative sanctions.<sup>137</sup> There is a risk that these sanctions may be imposed instead as additional penalties in cases where imprisonment would not have been seriously considered in the first instance, thus widening the net of social control under the jurisdiction of the criminal justice system. A related concern is the specific and differential impact that such net-widening effects might have on women and on men.

The following steps can be taken to prevent net-widening in a gender-responsive way and in line with the principle of minimum intervention:

- The development and application of non-custodial measures should be based on sex-disaggregated baseline data, closely monitored and systematically evaluated and reviewed, using gender-sensitive approaches.<sup>138</sup>
- Diversion from the criminal justice system should be preferred over a non-custodial measure.
- Courts should ensure that non-custodial measures, if imposed, are alternatives to imprisonment rather than supplementary sanctions.<sup>139</sup> To reduce the risk of net-widening it is recommended that the court first decides a term of imprisonment for an offence which carries a prison sentence, following the usual criteria for sentencing, and then, in stage two, decides whether the length of sentence and other circumstances of the offence would justify the imprisonment to be replaced by an alternative.<sup>140</sup>

### 2.3.4. Considerations when imposing prison sentences

In cases where non-custodial sentencing options are not possible, a number of factors should be considered with a view to making gender-responsive decisions:

- Custodial sentences should be considered only where the offence is serious or violent and the woman represents a continuing danger. The least restrictive measure that is possible or appropriate should be given.

<sup>136</sup> PRI, *10 lessons on improving alternatives to prison in East Africa* (2016).

<sup>137</sup> UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2013).

<sup>138</sup> Cfr. Rules 2(4), 20 and 21, Tokyo Rules and Rules 67 and 69, Bangkok Rules.

<sup>139</sup> UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007). See also Schwartz, "A 'New' Female Offender or Increasing Social Control of Women's Behavior? Cross-National Evidence", *Feminist Studies*, Vol. 39, No. 3 (2013), pp. 790-821.

<sup>140</sup> UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2013), p. 113.

- Any life sentence imposed should be proportionate, always associated with the possibility of parole and minimum terms should not be excessive, so that release can be considered at the appropriate time.<sup>141</sup>

The gendered impact of life imprisonment should be considered. A study in the **United Kingdom** found that life-sentenced women had fewer support networks than their male equivalents. The study found that nearly six times as many life-sentenced women 'reported self-injury or attempted suicide since their conviction' as their male counterparts.<sup>a</sup>

Eight countries (**Albania, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation and Uzbekistan**) prohibit the life imprisonment of women. Furthermore, **Armenia, Bulgaria, Tajikistan and Ukraine** prohibit the imposition of life imprisonment on women who were pregnant when they committed the offence or at the time of sentencing.<sup>b</sup>

<sup>a</sup> 89 per cent compared to 15 per cent, see Crewe, Hulley and Wright, "The Gendered Pains of Life Imprisonment", *British Journal of Criminology*, Vol. 57 (2017), pp. 1359–1378, 1365.

<sup>b</sup> PRI and University of Nottingham, *Life Imprisonment: A Policy Briefing* (2018).

- The best interests of the child or children should be taken into account and provision made for the care of such children.<sup>142</sup>

## 2.4 Post-sentencing stage

### 2.4.1. Provisions for early release

Any form of release from an institution to a non-custodial programme or measure should be considered at the earliest possible stage. Such measures could include:

- halfway houses
- work, community work or education release
- various forms of early conditional (parole)
- remission
- pardon
- re-entry programmes<sup>143</sup>

Early conditional release means the early release of incarcerated women under individualized post-release conditions. It can be mandatory after a minimum sentence has been served, or discretionary, after a certain portion of the sentence has been served. Early conditional release can support the reintegration of incarcerated persons. Women should be informed of their right to early conditional release at the beginning of their sentence and when they become eligible to apply and should be provided with an opportunity to participate.

<sup>141</sup> PRI and University of Nottingham, *Life Imprisonment: A Policy Briefing* (2018).

<sup>142</sup> Rule 64, Bangkok Rules.

<sup>143</sup> Rule 9, Tokyo Rules.

**Considerations for early conditional release of women prisoners (in line with Rule 63 of the Bangkok Rules):**

- The harmful impact of imprisonment on women
- Favourably consider information about a woman's caretaking responsibilities and need for family contact
- The best interests of any children, whether living with their mother in prison or outside
- The woman's specific social reintegration needs

Specific measures are required to support and protect women after their release from prison in order to reduce victimization, stigmatization, abandonment by their families and other obstacles to their social reintegration. Women should be linked to community support services to support them following release from prison. Particular care should be provided to women at risk of violence and various stakeholders (such as NGOs and probation services) should be involved in ensuring ongoing support services to these women.

In **Australia**, Sisters Inside offers a holistic programme for women when they are released from prison, enabling them to connect to community support services, housing and build community with other women with lived experience of prison.

In the **Russian Federation**, in 2007 a Social Rehabilitation Centre for Women and Girls was established to serve both women post-incarceration and women who have received non-custodial measures. These centres run a range of re-entry services such as legal advice, counselling, job seeking, and computer literacy training.<sup>a</sup>

In the **United Kingdom** incarcerated women have been referred to mental health treatment programmes run by Women's Centres to prepare for release.<sup>b</sup>

In the **United States**, in Pennsylvania, the Women's Re-entry Assessment & Programming Initiative uses gender-responsive services to reduce recidivism and encourage a positive re-entry.<sup>c</sup> In New York City, the Justice-Involved Supportive Housing offers permanent supportive housing for individuals who have a history of cycling through the criminal justice system and is an evidence-driven model that has been shown to lead to fewer returns to prison, with a 40 per cent reduction in days spent in jail and a 38 per cent reduction in prison admissions over two years; and to improved health outcomes, with a 55 per cent reduction in days in a psychiatric hospital over two years. While housed, programme participants receive continuous support from a case manager who is able to recommend and connect tenants to crisis interventions, financial management resources, public benefits, substance abuse counselling and treatment, medication management, and a range of other services for daily living skills.<sup>d</sup>

<sup>a</sup> PRI, *Neglected Needs: Girls in the Criminal Justice System* (2017).

<sup>b</sup> Women in Prison, "Case Studies", 2017.

<sup>c</sup> Chester County, Pennsylvania Courts, "WRAP Program", 19 December 2018.

<sup>d</sup> NYC - Health, "Mayor's Office of Criminal Justice, Department of Health Announce Successful Rollout of "Justice-involved Supportive Housing" Program Stabilizing Individuals Who Frequently Cycle Through Jail and Shelter", 19 December 2018.

It is important to develop or strengthen gender-responsive provisions for early release. The lack of programmes and rehabilitation opportunities for women hampers their chances to benefit from such programmes.

## 2.5 Implementation of various non-custodial sentences

### 2.5.1. Electronic monitoring

Electronic monitoring is a means of supervising the implementation of different non-custodial measures that is often used, particularly for women with dependent children. It is used throughout the different stages of the criminal justice process and not just limited to the sentencing stage.

In **Armenia**, pregnant women who are caretakers for children under the age of three years can be given a non-custodial measure as an alternative to incarceration, such as early conditional release, substitution, deferral, etc. If these conditions apply, the Probation Service of Armenia will monitor the exempted person via electronic monitoring as well as visits.

Source: Organization for Security and Co-operation in Europe (OSCE) Office in Yerevan, *Creating a Probation Service in the Republic of Armenia: Issues and Peculiarities*.

Electronic monitoring should be used sparingly and only where other less intrusive non-custodial measures have been considered. When electronic monitoring is used, gender-responsive considerations need to be applied or else electronic monitoring can be harmful and detrimental. The setting of conditions and review of any breaches usually fail to take into account any gender-specific factors for women's cases. The curfew hours that are imposed as part of an electronic monitoring-focused condition can be inflexible and therefore set women up to fail, where they are caring for young children or other adults. Conditions imposed should take into consideration the woman's specific circumstances, including child caring and income-earning obligations. Electronic monitoring has been more effective where combined with other support provisions in the community. Probation officers or electronic monitoring companies should be given discretion so that minor breaches are not automatically and frequently passed onto the courts. The cost of electronic monitoring should not be passed on to the person in conflict with the law.

One study from the **United Kingdom** observed that "...even though some explanations provided by female offenders for non-compliance are likely to be viewed as acceptable by a court, private Electronic Monitoring companies have little discretion when deciding whether to formally breach offenders. The use of discretion is limited to deciding whether or not to take action following a violation and whether the reasons put forward by tagged individuals are acceptable..."<sup>a</sup> The breach is therefore passed onto the courts for a decision.

In the **United States**, in 2011 the National Institute of Justice surveyed 5,000 people on electronic monitors and found that 22 per cent said they had been fired or asked to leave a job because of the device.<sup>b</sup>

<sup>a</sup> Holdsworth and Hucklesbury, "Designed for men, but also worn by women", *Criminal Justice Matters*, Vol. 95 (2014).

<sup>b</sup> ProPublica, "Digital Jail: How Electronic Monitoring Drives Defendants Into Debt", 3 July 2019.

There are various ethical considerations to consider. In some cases, electronic monitoring can result in feelings of stress, stigma and shame for the monitored person, and can sometimes negatively affect their family or co-habitants. Electronic monitoring can increase “net-widening” whereby individuals who would not be sanctioned otherwise are monitored by electronic monitoring.<sup>144</sup>

### 2.5.2. Non-compliance

Prosecutors, judges and probation services should consider the reasons for women’s non-compliance with non-custodial sentences, including by consulting with women’s groups and women in contact with the law in order to gain understanding of the challenges faced rather than automatically responding with punitive measures. They should also create realistic performance measures that consider the multitude of barriers that survivors of abuse face.

Graduated sanctions should be used in the case of non-compliance with requirements within various non-custodial sentences.<sup>145</sup> This means starting with mild sanctions (such as community service) and only if necessary moving to moderate sanctions (day reporting centres, intensive supervision etc) or even more serious sanctions (ankle bracelets and brief prison stays). Prosecutors and judges should not advocate sending people back to prison for technical violations of these measures.<sup>146</sup>

More intrusive or even punitive responses to non-compliance (such as electronic monitoring and periods of imprisonment) should remain a measure of last resort and imposed only if they serve the purpose of rehabilitation or public safety.

<sup>144</sup> Scottish Government, “Electronic monitoring: uses, challenges and successes”, 17 April 2019.

<sup>145</sup> Rule 14, Tokyo Rules.

<sup>146</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).



## 2.6 Self-assessment exercise

1. In your jurisdiction, what are the main obstacles to the use of non-custodial sentences for women in contact with the law? Consider the different actors in the criminal justice system, for example, the judiciary, prosecution, probation, etc.
2. What non-custodial sentences could be used in your jurisdiction to respond to the needs of women in contact with the law? Consider what measures could be taken within the existing legal framework and what would need legislative and/or structural reform.

## 2.7 Training exercise

**Case Study 1:** Sarah is 30 years old and has two children, a boy who is 5 years old and a girl who is 2 years old. She has been arrested after shoplifting a mobile phone. She is a single parent and works part time three afternoons a week in a bakery when the children are in day care. She lives in rented accommodation and her family live in another town about four hours drive away. She turned up 30 minutes late for the court hearing.

*The case comes before your court.*

1. What considerations will you take into account when considering bail and alternatives to pretrial detention?
2. What decision did you reach and why?

**Case Study 2:**<sup>147</sup> Mrs M is 35 years old and a single mother of three boys, aged 8, 12 and 16. She has been convicted of 40 counts of credit card fraud, committed while under a suspended sentence for similar offences. The family lives in an area affected by gang violence and drugs. Mrs M has already spent four months in prison, one month while awaiting trial before being granted bail and three months serving her sentence before being released on bail. The delay in finalizing the matter provided her with the opportunity to demonstrate her capacity to develop business activities and increase her income.

*The case comes before your court.*

1. What gender-responsive mitigating factors should you consider?
2. What non-custodial sentences should you consider?<sup>148</sup>

**Case Study 3:** The group should split into two and both consider the case study below. One group will consider that Lai is a woman and another group that Lai is a man.

Lai, a foreign national, was arrested for prostitution and loitering. Lai was referred to a community-based programme but has breached conditions twice (failing to turn up for counselling classes) and was re-arrested for prostitution.

*The case comes before your court.*

1. What factors will you take into account when considering non-compliance?
2. What measures will you impose, if any, and why?

<sup>147</sup> Case study taken from Prison Reform International, “Women in Detention: putting the Bangkok Rules into practice (e-course)”, e-learning (18 December 2018).

<sup>148</sup> This case study is based on the case of *S v M* (CCT 53/06) [2007] ZACC 18. Read the verdict to see how your decision compared with that of the Constitutional Court of South Africa. In particular consider paragraphs 18 and 35 of the judgment.



### 3. Special categories of women

#### KEY MESSAGES:

- Gender-based violence is a key pathway to women's imprisonment. Police, prosecutors, judges and defence lawyers should consider a woman's background and take this into account. For example, gender-based violence against women is a key cause of indigence and may lead to property-related offences, unpaid fines or prostitution-related offences. Police, prosecutors and judges must take care to ensure that survivors of violence are not subjected to further harm through arrest, imprisonment and the use of non-custodial sentences as outlined above.
- International standards urge States to provide that courts can take into account, during the prosecution and sentencing, claims of self-defence by women who are survivors of violence. There is a need to reform legislation and/or sentencing guidelines and to train professionals in the justice system to ensure that histories of abuse are considered in relevant cases, including by codifying gender-specific defences and/or mitigating factors and removing mandatory sentences.
- Policymakers need to examine their laws and policies with regard to foreign national women in contact with the law in order to ensure they are not discriminated against, that they have access to justice services and access to non-custodial measures and are assisted with resettlement or transfer.
- Law enforcement officers and justice sector professionals should take measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers. A trafficked person should not be prosecuted for trafficking-related offences, for example, holding false passports or working without authorization, or prosecuted for prostitution.
- There has been a marked increase in women imprisoned for drug offences, particularly in Latin America and South East Asia. Women imprisoned for drug-related offences tend to perform low-level but high-risk tasks, such as small-scale dealing or growing or smuggling drugs and they are seldom major players in the drug trade. Women often commit drug offences due to drug dependency, situations of manipulation and coercion and/or poverty.
- Governments should review their laws, sentencing guidelines and practices for drug offences to evaluate their compliance with existing standards of proportionality. Proportionate sentencing frameworks should distinguish between the type of drugs and the scale of the illicit activity, as well as the role and motivation of the women in conflict with the law.

- There have been several recent reforms, namely in Latin America, to address the vulnerability (and over-incarceration) of women for drug offences which have included preferring non-custodial sentences, offering sentence reductions for low-level drug offences and gender-responsive amnesties and pardons for low-level drug offences.
- Gender-specific, trauma-informed, women-only treatment programmes should be prioritized in cases where the woman suffers from drug dependency. Compulsory drug treatment or rehabilitation in detention should never be enforced.

### 3.1 Overview

This section focuses on particular groups of women who have additional needs and face multiple layers of discrimination. Therefore, particular considerations and approaches should be taken into order to ensure the gender-responsive application of criminal laws and procedures as well as the application of non-custodial measures.

### 3.2 Women who are survivors of gender-based violence

#### 3.2.1 Gender-based violence as a key pathway to women's imprisonment

Gender-based violence is a key pathway to women's imprisonment. Police, prosecutors, judges and defence lawyers should consider a woman's background and take this into account. For example, gender-based violence against women is a key cause of indigence and may lead to property-related offences, unpaid fines or prostitution-related offences. Police, prosecutors and judges must take care to ensure that survivors of violence are not subjected to further harm through arrest, imprisonment and the use of non-custodial sentences as outlined above.

#### 3.2.2 Survivors of gender-based violence charged with serious crimes

The number of women imprisoned for serious offences, such as murder or manslaughter, is small. However, a significant portion of women who are arrested for violent offences have a background of gender-based violence and are sentenced for the killing of abusive family members in response to systemic abuse.<sup>149</sup>

With few exceptions, criminal justice systems fail women in such cases by ignoring their trauma and the dynamics of intimate-partner violence. Survivors who are arrested and charged after an intimate-partner violence incident are far less likely to report violence again and more likely to remain in a dangerous situation. Women who report to the police may also trigger a criminal investigation into their own behaviour in some countries that have criminalized prostitution or adultery.<sup>150</sup> In many jurisdictions, existing defences (more tailored to male experiences) have

<sup>149</sup> Commentary to Rule 61. See UNODC, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, page 45.

<sup>150</sup> UNODC, *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls* (2019), p.127.

proved ill-adapted to the situation of a woman who is a survivor of intimate-partner violence and who wounds or kills a family member.<sup>151</sup>

Even where helpful precedents exist, in most jurisdictions the absence of a specific legislative (or quasi-legislative) basis for dealing with a history of abuse raises the risk that evidence of abuse is considered or treated inconsistently between cases, particularly in legal systems which do not operate on the basis of the doctrine of precedent.

Many judicial actors, particularly defence lawyers, do not have sufficient understanding about the impacts of violence on women and resort to stereotypes. For example, they may judge women for not speaking about the abuse they have suffered, for staying in a violent relationship or for appearing outwardly happy (which contrasts with the idea that they are being controlled or abused).<sup>152</sup>

In line with international standards, the removal of mandatory sentences should be considered in order to allow for gender-specific defences and mitigating factors to be considered. In particular, legislative frameworks should enable prosecutors and courts to take into account, during the prosecution and sentencing, claims of self-defence by women who are survivors of violence, particularly in cases of “battered woman syndrome”.<sup>153</sup>

**Belize:** In July 2010, Lavern Longworth threw kerosene and a candle over her husband, David White, at their home in Belize City. Longworth said she feared attack from her abusive husband, who was high on drugs at the time. White died from his burns in hospital two weeks later. Longworth was initially convicted of White’s murder and was sentenced to life imprisonment in 2012. In 2014, the Court of Appeal accepted fresh evidence from British psychiatrist, Dr Gillian Mezey, that Longworth suffered from “battered woman syndrome” at the time of the offence and so could not be held completely responsible for her actions. Her life sentence for murder was overturned and replaced with eight years’ imprisonment for manslaughter. Longworth has now been released, after being granted parole. This was the first case in Belize where a court accepted “battered woman syndrome” as a defence to murder.<sup>a</sup>

The Supreme Court of **Canada** accepted “battered woman syndrome” as a defence. The court recognized the following as central elements of domestic violence in a criminal law context: the imbalance of power “wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other”; the dependency and lowered self-esteem of the less powerful person; the periodic, intermittent nature of the associated abuse; the clear power differential between battered women and batterers that combine with the intermittent nature of physical and psychological abuse to produce cumulative consequences.<sup>b</sup>

<sup>a</sup> Death Penalty Project, “Battered Woman who killed her husband released from prison in Belize”, 2017.

<sup>b</sup> Supreme Court of Canada, *R. v. Lavallée*, File No. 21022, Judgment, 3 May 1990.

<sup>151</sup> PRI and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?* (2016).

<sup>152</sup> Interview with Harriet Wistrich, Centre for Women’s Justice, May 2019 and Lisa Vetten, May 2019.

<sup>153</sup> Provision 15(k) of the updated Model Strategies and Practical Measures on the Elimination of Violence against Women and Girls in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 65/228, annex, adopted on 21 December 2010. See also UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners* (2015) and Commentary to Rule 61, Bangkok Rules, which calls for provisions for judges to be able to take into account the circumstances of an offence and also a woman’s caretaking responsibilities. It also calls on States to remove mandatory sentencing provisions so that judges can exercise discretion when sentencing. UNODC, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, page 45.

Two main psychological phenomena have been recognized in the context of violence against women: a) **“battered woman syndrome”**, describing the psychological mindset and emotional state of female survivors of abuse, which explains why women often stay in abusive relationships;<sup>154</sup> and b) the **“slow burn reaction”**, where women in a situation of abuse tend to not react instantly to the abuse, partly for psychological reasons but also because of the physical mismatch between the abuser and the survivor, which makes an imminent response seem futile or even more dangerous to the survivor.<sup>155</sup> The United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women and Girls in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly in December 2010, urge Member States to ensure that “...claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, are taken into account in investigations, prosecutions and in sentences against them”.<sup>156</sup>

It should be noted that there has been some controversy about the use in courts of the term ‘battered woman syndrome’ and that such a term can sometimes be imprecise and misleading. There have been moves in some jurisdictions (such as New Zealand) to refer instead to “expert evidence on domestic violence”.

There is a need to reform legislation and/or sentencing guidelines and to train professionals in the justice system to ensure that histories of abuse are considered in relevant cases, including by codifying gender-specific defences and/or mitigating factors.

### POSITIVE STEPS

In **Australia**, some jurisdictions legislative amendments have been made to the criminal law to facilitate more lenient treatment of women who commit violent crimes against their abusers. Some States have introduced new defences specifically available to survivors of abuse (Queensland) and others have amended existing defences so that they are better adapted to dealing with survivors of abuse (Victoria).<sup>a</sup>

In **England and Wales**, the defence of provocation was replaced with the partial defence of “loss of control” in homicide cases in 2010 to address the existing gender-based discrimination against women in such cases. The defence of provocation largely failed to accommodate the desperate experiences of women who have killed a long-term abusive male partner. On the other hand, the defence too readily accommodated the contexts within which jealous and controlling men killed women who were leaving them or had committed infidelity. While the 2010 reforms have made some gains in improving the law’s response to the different contexts within which men and women kill, further review and reform is needed to ensure that the leniency previously afforded at the conviction stage is not merely transferred to sentencing. Research shows that English judges have continued to view sexual infidelity evidence as having the potential to constitute grave provocation and justify a significantly lower term of imprisonment.<sup>b</sup>

<sup>154</sup> Walker, *The Battered Woman Syndrome*, 2<sup>nd</sup> Edition (2001).

<sup>155</sup> PRI and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?* (2016).

<sup>156</sup> The updated Model Strategies and Practical Measures on the Elimination of Violence against Women and Girls in the Field of Crime Prevention and Criminal Justice indicate that “battered woman syndrome” is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support (provision 15 (k)).

In the **United States**, California State law provides that, for violent felonies committed before 29 August 1996, a prisoner may bring a writ of habeas corpus on the basis that expert testimony related to intimate partner battering and its effects was not received in evidence at the trial court proceedings. The incarcerated person must prove that this evidence is of such substance that, had it been received, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that the result of the proceedings would have been different.<sup>c</sup> This remedy is subject to the discretion of the courts to consider the merits of the petition.<sup>d</sup>

<sup>a</sup> PRI and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?* (2016).

<sup>b</sup> The Conversation, "Five years after the end of provocation, jealous male killers still receive leniency", 2 June 2015.

<sup>c</sup> California Penal Code § 1473.5 (West 2014).

<sup>d</sup> PRI and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?* (2016).

There have also been steps to better recognize the impact of controlling or coercive behaviours on women rather than just physical violence. In 2015, England and Wales introduced a new offence of controlling or coercive behaviour in an intimate or family relationship,<sup>157</sup> defined as follows:

- **Coercive behaviour** is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim; and
- **Controlling behaviour** is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Prosecutors and judges must also take this into account and if controlling or coercive behaviour was a factor in a woman coming into contact with the law.

#### **England and Wales: Murder conviction of woman overturned due to coercive control**

Sally Challen killed her husband using a hammer in 2010 and was jailed for life for murder in 2011. She admitted murder but said she has been controlled and humiliated by him for 40 years. The prosecution portrayed her as a jealous wife who suspected infidelity.

In February 2019, the Court of Appeal quashed her conviction and ordered a retrial in light of evidence of her mental disorder by a consultant forensic psychiatrist that was not available at her trial.

Source: *The Guardian*, "Sally Challen wins appeal against conviction for murdering husband", 28 February 2019.

In cases where the woman in contact with the law is a survivor of gender-based violence, criminal justice professionals need to ensure that they have all relevant information, including the social context in which the defendant experienced the gender-based violence. In particular, prosecutors should take this into account when considering what charge to proffer and consider proffering a lower charge and/or non-custodial measures. As mentioned above, probation service or social service may be able to provide judicial authorities before sentencing with relevant information on

<sup>157</sup> Crown Prosecution Service, *Guidance on Controlling or Coercive Behaviour*. See further Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007).



the woman's caring history of victimization, for example, through social inquiry reports. Prison officers, university clinics and paralegals can also support the court with background information.

Where the defendant has experienced a history of domestic or intimate partner violence, it is crucial to fully understand each person's use of violence within the context of their relationship. In cases of dual arrest, judges should require that the prosecutor provides evidence that one party is the predominant aggressor. The evidence judges should be looking for to determine which party was the predominate aggressor and who was the victim or whether the violence by the defendant in this case was coercive or resistance violence include the following:

- Look beyond the current case and get information about the complainant's and defendant's entire relationship.
- What has been the pattern of abuse and violence throughout the relationship?
- Is the defendant the one who holds the balance of power in the relationship? For example, who is in control of the finances? Who has dominated the relationship?
- Who controls decision-making, such as choice of friends, decisions about clothing and appearances, decisions about types and frequency of sex, etc.?
- Who initiated the violence at the outset?
- Is there evidence of coercion and control in the relationship?<sup>158</sup>
- Was the violence out of fear, anger or due to coercive control?<sup>159</sup>
- Courts should allow relevant expert testimony, such as testimony on the mental state of the defendant at the time of commission of the offence as well as on patterns of abuse and social agency framework to contextualize gender differences in physical stature and other characteristics to confront the realities of domestic abuse.<sup>160</sup>

#### United States: Project SAFE

African-American women account for approximately 12 per cent of the women population in United States but make up 38 per cent of the population of incarcerated women and are incarcerated at almost double the rate of white women. Incarcerated women also experience extreme rates of domestic and sexual violence, 77 per cent and 86 per cent respectively. Similarly, four in ten black women have experienced domestic violence throughout their lifetime.

Project SAFE, a project by the Center for Court Innovation, Center for Court Innovation, Black Women's Blueprint, the National Black Women's Justice Institute, and Rev. Dr. Cheryl Dudley of the American Baptist Churches of Metropolitan New York, addresses the intersections of trauma, race, gender, and sexuality by acknowledging the needs of black women engaged in the justice system, through enhanced trauma-informed responses and practices.

Source: Center for Court Innovation, "Project SAFE works to improve the services offered to criminalized black women who are survivors of intimate partner violence and sexual assault".

Based on the evidence (and gender-specific sentencing considerations outlined above), judges should consider imposing non-custodial sentences instead of imprisonment and in particular seek to allow for linkage to services to support survivors of gender-based violence.

<sup>158</sup> Crown Prosecution Service, *Guidance on Controlling or Coercive Behaviour*.

<sup>159</sup> UNODC, *Handbook on effective prosecution responses to violence against women and girls* (2014).

<sup>160</sup> Doyle, "Gender Inequality in the Law: Deficiencies of Battered Woman Syndrome and a New Solution to Closing the Gender Gap in Self-Defense Law", *CMC Senior Theses*, Paper 149 (2011).

In **Uganda** judges have navigated legal barriers to sentencing women who are defendants but victims at the same time. In Uganda, many judges have taken to using non-custodial sentences even in cases where women are charged with murder, as long as there is proof that they were survivors of violence. In a case where a daughter was charged with murdering her father and the evidence revealed that the father raped her from childhood until adulthood, sired children with her and infected her with HIV, the judge sentenced her to time served.<sup>a</sup> In a case where a teenager was charged with murdering her husband and it was found that he had continuously beat her, infected her with HIV, and committed adultery with her sister, the judge stated that the woman needed rehabilitation as opposed to a custodial sentence. She gave her about 210 hours of community service.<sup>b</sup>

<sup>a</sup> Uganda v NA, MSK-CR-AA-132/2013, High Court of Uganda at Masaka.

<sup>b</sup> Uganda v Lydia Draru Alais Atim, High Court of Uganda at Kampala, Criminal Session Case No. 0404 of 2010. See further Commonwealth Secretariat, *Judicial Bench Book on Violence against Women in Commonwealth East Africa* (2017).

### 3.2.3 Parole

Gender-based violence should also be taken into account during parole hearings of incarcerated women, and more training should be provided for judicial actors on the dynamics and impact of such violence. Failure to admit remorse should not be a barrier to parole in the cases of survivors of gender-based violence.

**United States:** New York city, Niki was imprisoned for killing her husband who had systematically physically and sexually abused her. She was sentenced to 15 years in prison on appeal. She completed two associate degrees and multiple rehabilitative programmes, obtained intensive trauma-informed therapy, received offers of a job and housing upon release, and achieved the best possible score on her COMPAS Evaluation – which tests one’s inclination to resort to violence, substance abuse, and/or criminal behaviour. However, she was denied parole in 2009, 2011, and 2013. Each time the parole board asserted that Niki failed to articulate remorse because of her continued assertions that she was a victim of domestic violence. In 2017, after securing pro bono legal representation, Niki was finally granted parole after more than 20 years in prison.

The Initiative for Incarcerated Survivors of Gender Violence is a collaboration among legal and social services organizations, law firms, advocacy groups, former judges, formerly incarcerated survivors, and other individuals committed to assisting survivors of gender violence currently serving prison time in New York State. The Initiative works to achieve three main goals: (i) to provide representation in matters relating to parole; (ii) to engage in advocacy to improve the justice system’s approach to parole release decisions for incarcerated survivors; and (iii) to provide education and training on issues of gender-based violence for those involved in parole and clemency decision-making.<sup>a</sup>

In California, under section 4801 of the California Penal Code, the Board of Parole Hearings is authorized to recommend a commutation of sentence or pardon for evidence of intimate partner battering and its effects, if it appears that the criminal behaviour of the convicted was the result of that victimization. For persons convicted of an offence prior to 29 August 1996, the Board of Parole hearings shall give “great weight” when reviewing the prisoner’s suitability for parole to information or evidence that, at the time of the crime, the prisoner had experienced intimate partner battering.<sup>b</sup>

<sup>a</sup> Keushkerian, “Sanctuary’s Initiative works to reform Parole Hearing Process”, Sanctuary for Families, 20 April 2018.

<sup>b</sup> California Penal Code § 4801(b) (West 2014).

### 3.2.4 Protection needs of survivors of gender-based violence

It is important for judicial actors to have training on effective criminal justice responses to women and girls who are subject to gender-based violence, since early interventions can prevent situations in which women seriously wound or kill their partners after a prolonged period of abuse.<sup>161</sup>

Important considerations should be taken into account to ensure the safety of a person (whether a man or woman) who is subject to gender-based violence and judicial actors should have an understanding of the dynamics and impact of such violence and the need to minimize risks and maximize the safety of the survivor.<sup>162</sup> Key considerations include:

- Understanding and responding to the protection needs of a survivor of violence throughout the criminal justice process.<sup>163</sup>
- The right of a victim of violence to be notified of the woman in contact with the law's release from detention or imprisonment.<sup>164</sup>
- Safety risks, including the vulnerability of victims, are to be taken into account in decisions concerning non-custodial or quasi-custodial sentences, the granting of bail, conditional release, parole or probation, especially when dealing with repeat and dangerous offenders.<sup>165</sup>
- Prohibit compulsory and forced alternative dispute resolution processes, including forced mediation and conciliation, in relation to all forms of violence against women and girls.<sup>166</sup>

## 3.3 Foreign national women

Foreign national women in contact with the law face many challenges, such as inability to access legal assistance due to language barriers, lack of access to community support networks and economic marginalization. They face isolation and mental health concerns due to separation from their families. They also find it harder to access non-custodial measures at the pretrial and sentence state as they may not be able to meet many of the requirements, such as a fixed abode in the country, and there is fear that they may abscond. Policymakers need to examine their laws and policies with regard to foreign national women in contact with the law in order to ensure they are not discriminated against, that they have access to justice services and are assisted with resettlement or transfer. In particular, key rights should be guaranteed such as:

<sup>161</sup> UNODC, *Handbook on effective prosecution responses to violence against women and girls* (2014), pp. 41-68 and UNODC, *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls* (2019).

<sup>162</sup> UNODC, *Handbook on effective prosecution responses to violence against women and girls* (2014), pp. 52-59.

<sup>163</sup> UNODC, *Handbook on effective prosecution responses to violence against women and girls* (2014), p. 52. The Handbook outlines the various types of protection needs and considerations to take into account.

<sup>164</sup> UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners* (2015), para 17(c).

<sup>165</sup> UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners* (2015), para 15(j).

<sup>166</sup> Commission on the Status of Women, Agreed conclusions on the elimination and prevention of all forms of violence against women, paragraph 34 (g) (E/2013/27).

- Right to an interpreter
- Right to have access to legal aid
- Right to consular services
- Right to contact with their families
- Right to observe religious and cultural beliefs

Further UNODC materials should be referred to which outline in substantial detail considerations to be taken into account for foreign national prisoners.<sup>167</sup> This section does not refer to asylum seekers who, under international law, should not be detained unless exceptional circumstances are present.<sup>168</sup>

Women who are trafficked often find themselves arrested for crimes such as prostitution, breaking immigration rules or crimes against public morality. Punitive approaches to low-level drug trafficking or illegal immigration contributes to the overrepresentation of foreign national women in the criminal justice system of many countries. However, many are survivors of poverty, coercion and exploitation.<sup>169</sup>

#### Relevant international standards

The United Nations Convention against Transnational Organized Crime, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

United Nations Human Rights Principles and Guidelines on Human Trafficking

Convention of the Council of Europe on Action against Trafficking in Human Beings

The Bangkok Rules and related international standards call for maximum protection for survivors of trafficking in order to avoid secondary victimization of many foreign-national women.<sup>170</sup> Key steps to take include:

- Law enforcement officers and justice sector professionals should take measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers.<sup>171</sup> A trafficked person should not be prosecuted for trafficking-related offences, such as holding false passports or working without authorization, or prosecuted for prostitution.
- Ensure foreign-national women receive legal aid and immigration advice early on and as soon as possible after their arrest.<sup>172</sup>

<sup>167</sup> UNODC, *Handbook on Prisoners with Special Needs* (2009).

<sup>168</sup> United Nations High Commissioner for Refugees (UNHCR), *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999).

<sup>169</sup> Prison Reform Trust, *Still No Way Out: Foreign national women and trafficked women in the criminal justice system* (2018).

<sup>170</sup> Rule 66, Bangkok Rules. See also UNODC *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings* (2008).

<sup>171</sup> Provision 18(k) of the updated Model Strategies and Practical Measures on the Elimination of Violence against Women and Girls in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 65/228, annex, adopted on 21 December 2010.

<sup>172</sup> Principle 10, “Equity in access to legal aid”, and Guideline 3, “Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence”, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

- Ensure interpretation services are provided.
- A trafficking survivor should be given a minimum period (e.g. at least 30 days) to recover and escape the influence of the traffickers before she must decide whether or not to cooperate with the police.
- Trafficked persons should be protected from retaliation by traffickers, before and after testifying, including by issuing resident permits and providing protection measures, such as protecting their identity.
- Defence lawyers should receive training on the specific needs of foreign-national women and on raising the issues of abuse and trafficking early on in the criminal justice process.
- Training and guidance should be developed for judges and prosecutors.

**England and Wales:** The Equal Treatment Bench Book<sup>a</sup> has sections on modern slavery and in Scotland the Lord Advocate's guidance on the non-prosecution of victims of human trafficking and exploitation<sup>b</sup> offers a model of good practice and transparency.

<sup>a</sup> Judicial College, *Equal Treatment Bench Book* (2018).

<sup>b</sup> Crown Office and Procurator Fiscal Service of Scotland's Prosecution Service, *Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation*.

- Justice sector professionals should consider the best interests of any children in their decision-making.
- Immigration policies, such as removal of people for immigration offences, should not be an automatic barrier to community-based outcomes/resolutions.<sup>173</sup>
- Foreign-national women should have the same access to community alternatives and should be supported where it is difficult for them to meet the conditions, for example where they do not have a residence. Other conditions can be imposed, such as surrendering identity documents, reporting to police or probation or supervision in the community.
- Explore innovative non-custodial sentences as alternatives to imprisonment that are specifically tailored to the needs of trafficked women.

**United States:** Many domestic and foreign-born individuals who are charged for prostitution in New York are recruited into the commercial sex work industry through force or coercion. Eleven pilot Human Trafficking Intervention Courts in the state seek to promote a just and compassionate resolution to these cases. All cases with misdemeanour prostitution or related charges that continue past arraignment are transferred to a Human Trafficking Intervention Court. Once transferred to that specialized court, defendants are evaluated by on-site staff. The court connects defendants to tailored counselling and case management services, which range from shelter and healthcare to immigration assistance, drug treatment and counselling. These counsellors/social workers also screen for indicators of trafficking. Human Trafficking Intervention Courts also link participants to education and job training programmes to help prevent their return to the commercial sex industry. A defendant's charges may be dismissed or reduced contingent upon compliance with these court-mandated services and programmes. Other features of Human Trafficking Intervention Courts include increased coordination and communication between the court, its criminal justice partners, local service providers and other stakeholders.

Source: Center for Court Innovation, *State Court Snapshot: New York State's Human Trafficking Intervention Courts*, available at: <https://cjininvolvedwomen.org/wp-content/uploads/2016/12/HTIC-1pager.pdf>.

<sup>173</sup> Prison Reform Trust, *Still No Way Out: Foreign national women and trafficked women in the criminal justice system* (2018).

### 3.4 Women arrested for drug offences<sup>174</sup>

There has been a marked increase in women imprisoned for drug offences, particularly in Latin America and South East Asia. Women imprisoned for drug-related offences tend to perform low-level but high-risk tasks such as small-scale dealing, or growing or smuggling drugs or introducing drugs in prison for male relatives, and they are seldom major players in the drug trade. Women often commit drug offences due to drug dependency, situations of manipulation and coercion and/or poverty.<sup>175</sup>

It is important to consider the entire background of the woman during all stages of the criminal justice system. This may include factors such as:

- poverty and social exclusion
- motherhood and caregiver status in relation to other dependent persons
- status as head of household
- illiteracy
- level of education
- lack of job training
- immigration status
- challenges in accessing legal aid (such as being deemed to have access to family money when in reality she cannot afford paying for a lawyer)
- experience of gender-based violence, or
- physical or mental disabilities that may have contributed to the involvement in criminal conduct<sup>176</sup>

It is also important to take into account the typical background of women who are arrested for drug offences:

- a. Overall, men are more likely than women to use cannabis, cocaine and opiates, whereas the prevalence of the non-medical use of opioids and tranquillizers is comparable between men and women, if not actually higher among women.
- b. Women are more likely than men to identify trauma and/or stressors such as relationship problems, environmental stress and family problems as causes for their initiation or continuation of substance use. One example of such emotional stressors is childhood adversity: women who experience childhood adversity are reportedly more susceptible to initiating drug use and to developing drug use disorders more rapidly than men.
- c. Increased vulnerability to a combination of mood and anxiety disorders, particularly post-traumatic stress disorder, is associated with substance use disorders among women.

<sup>174</sup>In addition, see above section 3.1 concerning drug related offences as a driving factor behind women's imprisonment and section 4.2.1 on decriminalization/depenalization and 4.2.4 on diversion

<sup>175</sup>Commentary to Rule 61. See UNODC, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, p. 45.

<sup>176</sup>IDPC Country Policy Guides highlight the backgrounds of women arrested for drug offences in Indonesia, Philippines and Thailand.

- d. While women may typically begin using substances later than men and to a lesser extent than men, once they have initiated substance use, women tend to increase their rate of consumption of alcohol, cannabis, cocaine and opioids more rapidly than men.
- e. While estimates of the extent of gender-based violence against women who use drugs are scarce, studies, for instance among clinical and community-based samples of women who use drugs in the United States, show a prevalence of gender-based violence victimization among women who use drugs that is two to five times higher than among women who do not use drugs.<sup>177</sup>

First-line law enforcement officers, prosecutors and other criminal justice staff should be properly trained on how best to respond to women with drug use, in collaboration with health care professionals.

The international drug control conventions expressly allow the provision of measures such as treatment and education as alternatives to conviction or punishment for personal consumption offences and for all other relevant offences in “appropriate cases of a minor nature”. Examples of this approach are the diversion of minor cases from the criminal justice system through the exercise of police or prosecutorial discretion, and the use of non-custodial measures as an alternative to pretrial detention or imprisonment.<sup>178</sup>

An **Australian** report on imprisonment and health found that residential drug treatment is less than half the daily cost of imprisonment, and is far more cost effective, for First Nations people. Treatment mitigates the social and family costs, health complications and failure to provide an opportunity for recovery associated with imprisonment.<sup>a</sup>

Similarly, a study in **Malaysia** found that criminalizing drug use is not as cost-effective as providing treatment for drug users. It also found that criminalization of drug use can lead to the spread of infectious diseases for those who are incarcerated and that incarcerated drug users had a poorer quality of life than those in treatment.<sup>b</sup>

<sup>a</sup> National Indigenous Drug and Alcohol Committee, *Bridges and Barriers: Addressing Indigenous incarceration and health* (2013), p. 10.

<sup>b</sup> USM, Cost of Criminalizing Drug Use in Malaysia.

Mandatory minimum or habitual offender sentences based on underlying charges for drug possession should not be sought. As mentioned above, drug use and personal consumption offences should be decriminalized in line with international law and good practices.

People who call the police in response to an overdose should not be prosecuted nor should individuals be prosecuted for homicide when they share drugs that cause an overdose when there was no specific intent to cause harm or death.<sup>179</sup>

<sup>177</sup> UNODC, World Drug Report 2018, *Women and Drugs: Drug use, drug supply, and their consequences*, pp. 11-15.

<sup>178</sup> United Nations System Coordination Task Team on the Implementation of the United Nations System Common Position on Drug-related Matters, *What we have learned over the last ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters* (2019).

<sup>179</sup> Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018).



Non-custodial sentences should be preferred, especially if the woman has dependent children.<sup>180</sup> Gender-specific, trauma-informed, women-only treatment programmes should be prioritized in cases where the woman suffers from drug dependency.<sup>181</sup> Compulsory rehabilitation in detention should never be enforced.

In **India**, a promising intervention seeking to reduce violence perpetrated by intimate partners and HIV risk among women who inject drugs – ‘Project WINGS’ (Women Initiating New Goals for Safety) – was launched by the India HIV/AIDS Alliance in May 2018. As part of the intervention, 200 women in Pune, Maharashtra, New Delhi and Imphal, Manipur will receive one-on-one psycho-educational sessions to improve their safety planning skills, and will be linked to HIV testing and treatment, sexual and reproductive health, harm reduction, legal aid and gender-based violence support services.<sup>a</sup>

In **Indonesia**, the organization PEKA relies on client-centred approaches to deliver tailored health services to meet the needs of people who use and inject drugs. Clients access all of PEKA’s services on a voluntary basis and can withdraw from the programme at any time without negative repercussions. PEKA offers both inpatient facility-based treatment, as well as community-based outreach services. Clients enrolling in treatment services can select the intensive two-month programme – involving detoxification, peer addiction counselling, psychosocial support, life skills training, relapse prevention and management as well as social and vocational activities – or the non-intensive four-month programme – involving counselling, life skills training, relapse prevention and management, as well as social and vocational activities. Women account for 14 per cent of PEKA’s total clients. Female staff and counsellors are available on site to tailor drug treatment plans to the needs of female clients. PEKA values the contributions of people who use drugs and facilitates meaningful participation of its clients in programme development, implementation and evaluation.<sup>b</sup>

<sup>a</sup> IDPC, 10 Years of Drug Policy in Asia: How Far Have We Come? A Civil Society Shadow Report, (2019).

<sup>b</sup> Harm Reduction International, *Community-based drug treatment models for people who use drugs: Six experiences on creating alternatives to compulsory detention centres in Asia* (2015).

It is important to remove any legal or practical barriers to non-custodial sentences for women arrested for drug offences. This requires a review of laws, sentencing guidelines and practices for drug offences to evaluate their compliance with existing standards of proportionality. Proportionate sentencing frameworks should distinguish between the type of drugs and the scale of the illicit activity, as well as the role and motivation of the women in conflict with the law: serious or organized traffickers; micro-traffickers (low-level dealers or smugglers); women who are dependent on drugs; and women who use drugs occasionally (or ‘recreationally’). For drug-related offences committed due to drug dependency or to meet basic economic needs, services such as treatment, education, aftercare, rehabilitation or social integration should be offered as more humane, effective and proportionate alternatives to conviction.<sup>182</sup>

In 2011, the **United Kingdom** reformed its sentencing guidelines for drug offences in an effort to ensure more proportionate penalties. Judges are now required to evaluate whether the person charged with drug related offences played a “leading”, “significant”, or “lesser” role in the drug trade, and to take into account circumstances of vulnerability and the quantities of drugs involved. The reform has led to more proportionate sentencing, particularly for women in situations of vulnerability engaged as drug couriers.<sup>a</sup>

<sup>180</sup> Rule 64, Bangkok Rules.

<sup>181</sup> Rule 62, Bangkok Rules.

<sup>182</sup> IDPC, *Drugs, crime and punishment – proportionality of sentencing for drug offences* (2012).

In 2018 **Myanmar** introduced a new National Drug Policy which references international best practices. The policy recommends a health-based approach with a focus on prevention and harm reduction, and it advocates that “structural reform is required to reduce the negative consequences associated with drug use and to promote alternatives to imprisonment for drug offenses”. The policy identifies that drug services need to be expanded to address methamphetamine use and other drug-related harms, and that community-based treatment and services for people who use drugs should be increased. It also proposes transitioning from mandatory to voluntary drug treatment systems.<sup>b</sup>

<sup>a</sup> WOLA, *Gender and Drug Policy: Exploring Innovative Approaches to Drug Policy and Incarceration* (undated).

<sup>b</sup> UNODC, WHO and UNAIDS, *HIV Prevention, Treatment, Care and Support for People Who Use Stimulant Drugs: Technical Guide* (2019).

There have been several recent reforms, namely in Latin America, to address the vulnerability (and over-incarceration) of women for drug offences which have included preferring non-custodial sentences, offering sentence reductions for low-level drug offences and gender-responsive amnesties and pardons for low-level drug offences.

In the **Plurinational State of Bolivia**, gender-responsive amnesties and pardons for low-level drug offences were introduced, which are a positive step in addressing the over-incarceration of women for drug offences, although they need to be accompanied by broader reforms.<sup>a</sup>

In **Costa Rica**, the law was amended to provide for women who were convicted of bringing drugs into prison when visiting family members. Of the 511 women incarcerated for drug offences, about 150 (approximately one in four) were serving sentences for introducing drugs inside a prison. The majority of the women detained for this type of offence were young. In addition, 95 per cent of the women reported having children and being responsible for them, without paternal support. Their incarceration created significant barriers to their familial responsibilities and their involvement in community life.

The law allowed for women living in poverty, heads of households or guardians of minor children, older adults or persons with some form of disability to be granted home arrest, supervised release, residence in a halfway house, or electronic monitoring, instead of imprisonment.<sup>b</sup> This law, referred to as “bis 77”, seems to be achieving its intended effects, resulting in the immediate release of 120 women and solving the problem of overcrowding in the women’s prison.<sup>c</sup>

The women all shared the same social and educational profile (the majority had little to no schooling), which reflected their conditions of vulnerability and poverty.

These were women coming from marginalized contexts with a dearth of education and employment opportunities, with no possibility of obtaining good jobs. The women who benefited from the reform were released from prison, and many were invited to participate in an innovative social support programme – the “Inter-Institutional Network” – which seeks to redress the human rights violations that occurred as women were processed through the criminal justice system.

This legal reform is a good example of how to introduce the principle of proportionality of sentencing for people accused of drug offences – taking into consideration gender and vulnerability factors, instead of focusing on quantities or types of substance.

In 2014 in **Ecuador** the law was amended so that persons convicted of low-level drug offences could be given reduced sentences, which could be applied retroactively. As a result, the number of women convicted in courts in Ecuador of an offence dropped from 80 per cent to 43 per cent after this amendment. While this policy was ultimately upended, this demonstrates how decriminalization of drug offences has a strong impact on women's incarceration.<sup>d</sup>

<sup>a</sup> WOLA, *Promoting Gender-Sensitive Drug Policies in Bolivia* (2018).

<sup>b</sup> Organization of American States, Secretariat for Multidimensional Security and Inter-American Drug Abuse Control Commission, *Technical Report on Alternatives to Incarceration for Drug-Related Offenses*, Technical Secretariat Working Group on Alternatives to Incarceration (2015).

<sup>c</sup> WOLA, "Criminal Record Reform in Costa Rica: A Step toward Proportionality and Improved Prospects For Women's Lives after Prison", 29 June 2017.

<sup>d</sup> WOLA, *Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean* (undated).

In accordance with relevant international treaties, the death penalty should not be applied, except for the "most serious crimes".<sup>183</sup> This is understood to mean offences such as murder and would not apply to drug offences.<sup>184</sup> In addition, death sentences should not be mandatory as this does not allow for a consideration of the particular circumstances of the offender, including gender-specific mitigating factors, and is thus arbitrary in nature.<sup>185</sup> Drug offences are the second most common crime for which women are sentenced to death, after murder, especially in the Middle East and Asia. For example, it has been reported that, as of 2018, 76 out of the 83 women on death row in Thailand were sentenced for drug offences and a significant proportion of the 143 women on death row in Malaysia have been convicted for drug trafficking.<sup>186</sup> Many of the women who have been sentenced to death for drug offences are carriers (so-called 'mules'), from foreign countries, with low socio-economic status and from ethnic minority backgrounds. These women operate at the lowest level of the drug trade yet receive the harshest punishment. Many women enter the drug trade under duress, in order to provide for and protect dependents or due to manipulation and coercion through romantic relationships. Significantly, the Penang Institute in Malaysia found that women convicted of drug trafficking have a significantly lower chance than their male counterparts of having their cases reviewed and overruled, suggesting possible gender-bias in capital appeals. Policymakers should prioritize a protective rather than punitive approach to women who are coerced into the drug trade.<sup>187</sup>

**Malawi** provides an example of how lawyers can play a vital role in highlighting the gendered experiences of women facing the death sentence. In May 2007, the High Court of Malawi found the mandatory death penalty unconstitutional, granting judges the discretion to apply the death penalty in the case of murder only after consideration of "the manner in which the murder was committed, the means used to commit the offence, the personal circumstance of the victim, the personal circumstances of the accused and what might have motivated the commission of the crime." All four women who had been sentenced to death received individualized sentencing hearings in which, for the first time, lawyers presented to the court evidence of their indigence, history of abuse, mental illness, rehabilitation and other mitigating factors. None of the women were resentenced to death or to life in prison.

Source: The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (2018).

<sup>183</sup> Article 6 (2), International Covenant on Civil and Political Rights.

<sup>184</sup> Human Rights Committee, General Comment No. 36 (2018), CCPR/C/GC/36, para. 35; and International Narcotics Control Board (INCB), Annual Report 2018, p. 111.

<sup>185</sup> Human Rights Committee, General Comment No. 36 (2018), CCPR/C/GC/36, para. 37.

<sup>186</sup> Harm Reduction International, *The Death Penalty for Drug Offences: The Impact on Women* (2019).

<sup>187</sup> Ibid.

### 3.5 Self-assessment exercise

1. How could your country improve gender-responsiveness in relation to the way the criminal legal system treats:
  - a. Survivors of gender-based violence, in particular women arrested for wounding or killing an abusive partner?
  - b. Foreign national women who may be survivors of trafficking?
  - c. Women arrested for drug offences?

### 3.6 Training exercise

**Case Study 1:** Linh was raised in a farming family in Viet Nam and has three children. She ran away from her abusive husband who deployed her as a “drug mule”. Working as a waitress in Hanoi, Linh was promised a better job abroad by some regular customers. She was taken with six or seven other women and girls, travelling first to the Russian Federation before being led on foot through the countryside to Slovakia, then taken at night by boat to Czechia where they were forced to hand over their passports and money, taken to a house and forced to have sex with men who visited. Later, Linh was taken to the United Kingdom in the back of a lorry and left near a train track. She met a woman who promised to find her a job. She was then trafficked within the United Kingdom, forced into prostitution and cannabis production. She has been arrested and remanded in prison for cannabis production.

1. *As a prosecutor, what factors will you consider when deciding what next steps to take?*
2. *As a judge, what non-custodial measures will you consider?*

*Note:* This case study is based on an actual case dealt with by Hibiscus, a United Kingdom charity supporting trafficked women. Hibiscus supported Linh for 5 months while she was in prison and worked with a lawyer and immigration lawyer. The case was eventually dropped and she was released to safe housing with support services. See further, Prison Reform Trust, *Still No Way Out: Foreign national women and trafficked women in the criminal justice system* (2018).

**Case Study 2:** Sally was only 16 when she met 22-year-old Richard. At first, he was charming but gradually the abuse began. He bullied and belittled her, controlled their money and who she was friends with, not allowing her to socialize without him. But, while he forced strict restrictions on her behaviour, he himself would flaunt his money, have numerous affairs and visit brothels. If she challenged him, he would turn it back on her and make her feel she was going mad. Although Sally did manage at one point to leave Richard, even starting divorce proceedings, she was so emotionally dependent on him that she soon returned, even signing a ‘post nuptial’ agreement he drew up that denied her full financial entitlement in the divorce and forbade her from interrupting him or speaking to strangers.

It was not long after this reunion with Richard that the offence took place. Sally, so utterly dependent on Richard, wanted to believe that they could be together, but his behaviour towards her was increasingly humiliating. The final straw was when he sent Sally out in the rain to get his lunch so that he could phone a woman he had been planning to meet from a dating agency. Sally returned suspicious and challenged him. He commanded her not to question him and she struck him repeatedly with a hammer.

Sally has two sons.

She is charged with murder and the matter comes before your court.

*What gender-specific factors will you take into account when determining sentence?*

*Note:* This case study is based on an actual case in the United Kingdom. Sally Chalen was convicted of murder and sentenced to life-imprisonment with a minimum tariff of 18 years.

## 4. Terminology

***Absolute discharge:*** An absolute discharge is a legal term for a judicial action that nullifies the underlying basis of the case in criminal and certain types of civil actions. The actual definition of this type of discharge differs by jurisdiction. In criminal cases in many jurisdictions an absolute discharge is a dismissal of the case that is granted by a judge to an innocent defendant who has already been found guilty. The effect of the discharge is to throw out the criminal conviction as if it had never happened. The defendant's criminal record is wiped clean and it is as if he or she was never indicted for the offence. Certain jurisdictions define an absolute discharge in criminal cases differently. In the United Kingdom, for instance, a defendant who is guilty can also be granted an absolute discharge by the court. The United Kingdom allows the court to find that a person may be guilty of an offence but that it is not in the public interest for the person to be punished for his actions. In this case the person's discharge may appear on his or her criminal record.

***Caution:*** Warning given following admission of guilt as an alternative to prosecution. Cautions may either be simple or conditional. A 'simple caution' is used to deal quickly and simply with those who commit less serious offences and it is not a criminal conviction, but it will usually be recorded on the police database. With 'conditional cautions', the person must comply with certain conditions to receive the caution and to avoid prosecution for the offence committed. Just like a simple caution it is not a conviction.

***Community service order:*** A sentence served in the community during which the person in contact with the law undertake unpaid work, which is of benefit to the community, under supervision.

***Compensation:*** A sanction or measure that involves requiring a person to compensate the victim.

***Conditional discharge:*** The discharge of a person in contact with the law without sentence on condition that he/she does not reoffend within a specified period of time. If an offence is committed in that time then the person in contact with the law may also be sentenced for the offence for which the conditional discharge was given.

**Discharge:** The person in contact with the law is found guilty of the offence and the conviction appears on his or her criminal record, but either no further action is taken at all (absolute discharge), or no further action is taken as long as the person in contact with the law does not offend again within a certain period of time (conditional discharge).

**Diversion:** An administrative procedure allowing certain people in contact with the law to bypass the formal criminal justice system in order to avoid further prosecution and conviction by participating in, for example, mediation processes or treatment programmes, or by compensating the victim.

**Deferred sentence:** A decision is taken not to pass sentence on condition that the person in contact with the law undertakes some action, such as undergoing treatment for alcoholism, drug addiction or receiving psychological counselling. Depending on the result, the person in contact with the law may not receive a formal sentence, and then, depending on the jurisdiction, no permanent record of the crime will be made.

**Electronic monitoring:** a method of supervising or keeping track of those who have been released awaiting trial, or as a means of enforcing a range of sentences that are implemented in the community, as well as in cases of early release. The accused or the person in contact with the law wears an electronic tag or bracelet on the ankle or wrist which notifies monitoring services if the person is absent during the curfew hours.

**Fine:** A sentence of the court which involves the person in contact with the law paying money to the court as punishment for their offence.

**Half-way house:** A living space, normally run by the probation or prison service, designed to bridge the gap between life in prison and life in society.

**Victim-offender mediation:** A direct or indirect restorative justice process wherein the victim and the person in conflict with the law engage in a discussion of the crime and its impact that is facilitated by an impartial third party trained for this purpose, either in a face-to-face meeting or through other indirect means. This service may be provided by probation services or civil society or victim support organizations.

**Non-custodial measures:** The Tokyo Rules refer to non-custodial measures in a broad sense, including measures and sanctions at the pretrial, sentencing and post-sentencing stage. The term is used in the same way in the present toolkit. Non-custodial measures are a preferred term to alternatives to imprisonment which implies that they are a lesser or secondary option. In a narrower sense, the term refers to those requirements imposed on a defendant in order to avoid pretrial detention. They may include: undertakings to appear before the court as and when required; not to interfere with witnesses; periodic reporting to police or other authorities; submitting to electronic monitoring and/or curfews or surrender of passports.

**Non-custodial sanctions:** Sentences of the court which deal with the person in contact with the law in the community rather than in prison. These involve some restriction of liberty through the imposition of conditions and obligations such as attendance at counselling programmes or drug treatment and testing. Non-custodial sanctions are a preferred term to alternatives to imprisonment which implies that they are a lesser or secondary option.

***Parole or early conditional release:*** means the early release of sentenced prisoners under individualized post-release conditions. It can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made whether to release a prisoner conditionally after a certain period of the sentence has been served. Conditional release or parole is always accompanied by a general condition that the prisoner should refrain from engaging in criminal activities. However, this is not always the only condition imposed. Other conditions may be imposed on the prisoner, to the extent that these are appropriate for his/her successful social reintegration.

***Remission:*** Remission of sentence is a form of unconditional release. Remission is usually awarded automatically after a fixed proportion of a sentence has been served, but it may also be a fixed period that is deducted from a sentence. Sometimes remission is made dependent on good behaviour in prison and can be limited or withdrawn if the prisoner does not behave appropriately or commits a disciplinary offence.

***Restorative justice:*** A process in which the victim and the person in conflict with the law, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. A restorative justice process can be a part of a conventional criminal justice process, for example, as a form of diversion, or be an alternative to it. A restorative justice process can take place at any stage of the criminal justice process.

***Suspended sentence:*** Where a sentence of imprisonment is pronounced but its implementation is suspended for a period on a condition or conditions set by the court. There are two types of suspended sentences. A judge may unconditionally discharge the defendant of all obligations and restraints. An unconditionally suspended sentence ends the court system's involvement in the matter and the defendant has no penalty to pay. However, the defendant's criminal conviction will remain part of the public record. A judge may also issue a conditionally suspended sentence. This type of sentence withholds execution of the penalty as long as the defendant exhibits good behaviour. For example, if a person was convicted of shoplifting for the first time, the judge could impose thirty days of incarceration as a penalty and then suspend the imprisonment on the condition that the defendant not commit any offences during the next year. Once the year passes without incident, the penalty is discharged. If, however, the defendant does commit another crime, the judge is entitled to revoke the suspension and have the defendant serve the thirty days in jail.





## 5. Further resources

Amnesty International, *Fair Trial Manual*, 2nd Edition (2014).

Penal Reform International, *Resources for implementing a gender-sensitive approach to non-custodial sentences* (2017).

Penal Reform International, *Women in detention: Putting the UN Bangkok Rules on women prisoners into practice* (2017).

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UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007).

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# UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria

Tel.: (+43-1) 26060-0, Fax: (+43-1) 263-3389, [www.unodc.org](http://www.unodc.org)