



Linklaters



Sentencing of women convicted of drug-related offences



A multi-jurisdictional study by Linklaters LLP
for Penal Reform International

**Sentencing of women convicted of drug-related offences:
A multi-jurisdictional study by Linklaters LLP
for Penal Reform International**

Linklaters LLP and Penal Reform International would like to thank all staff from Linklaters and other contributing firms who volunteered their time for this study as detailed in the Acknowledgements on page 156. They would also like to thank the International Drug Policy Consortium for their input and for co-publishing this study.

This publication may be freely reviewed, abstracted, reproduced and translated, in part or in whole, but not for sale or for use in conjunction with commercial purposes. Any changes to the text of this publication must be approved by Penal Reform International. Due credit must be given to the co-publishers and to this publication. Enquiries about reproduction or translation should be addressed to publications@penalreform.org.

This publication was produced with the financial assistance of Linklaters LLP. The contents of this document are the sole responsibility of Linklaters LLP and Penal Reform International.

Please note that this report considers relevant laws across 18 jurisdictions, but does not purport to be a comprehensive review of all of the law and case law on this topic.

Penal Reform International

Headquarters

1 Ardleigh Road

London N1 4HS

Email: publications@penalreform.org

Twitter: @PenalReformInt

Facebook: @penalreforminternational

www.penalreform.org

Linklaters LLP

One Silk Street

London EC2Y 8HQ

Telephone: +44 (0) 20 7456 2000

Twitter: @LinklatersLLP

www.linklaters.com

International Drug Policy Consortium

61 Mansell Street

London E1 8AN

Telephone: +44 (0) 20 7324 2974

Twitter: @IDPCnet

www.idpc.net

First published in February 2020

ISBN: 978-1-909521-67-4

© Linklaters LLP and Penal Reform International 2020

Sentencing of women convicted of drug-related offences

**A multi-jurisdictional study by Linklaters LLP
for Penal Reform International**

**Report on Argentina, Australia, Colombia, Costa Rica, Ecuador, England
and Wales, France, Germany, Hong Kong, Japan, Mexico, New Zealand,
the Philippines, Poland, Portugal, Russia, Spain, and the United States.**

Cover photo

Produced by the Washington Office on Latin America (WOLA) as part of a photo series.

Photographer and producer: Jessamine Bartley-Matthews.

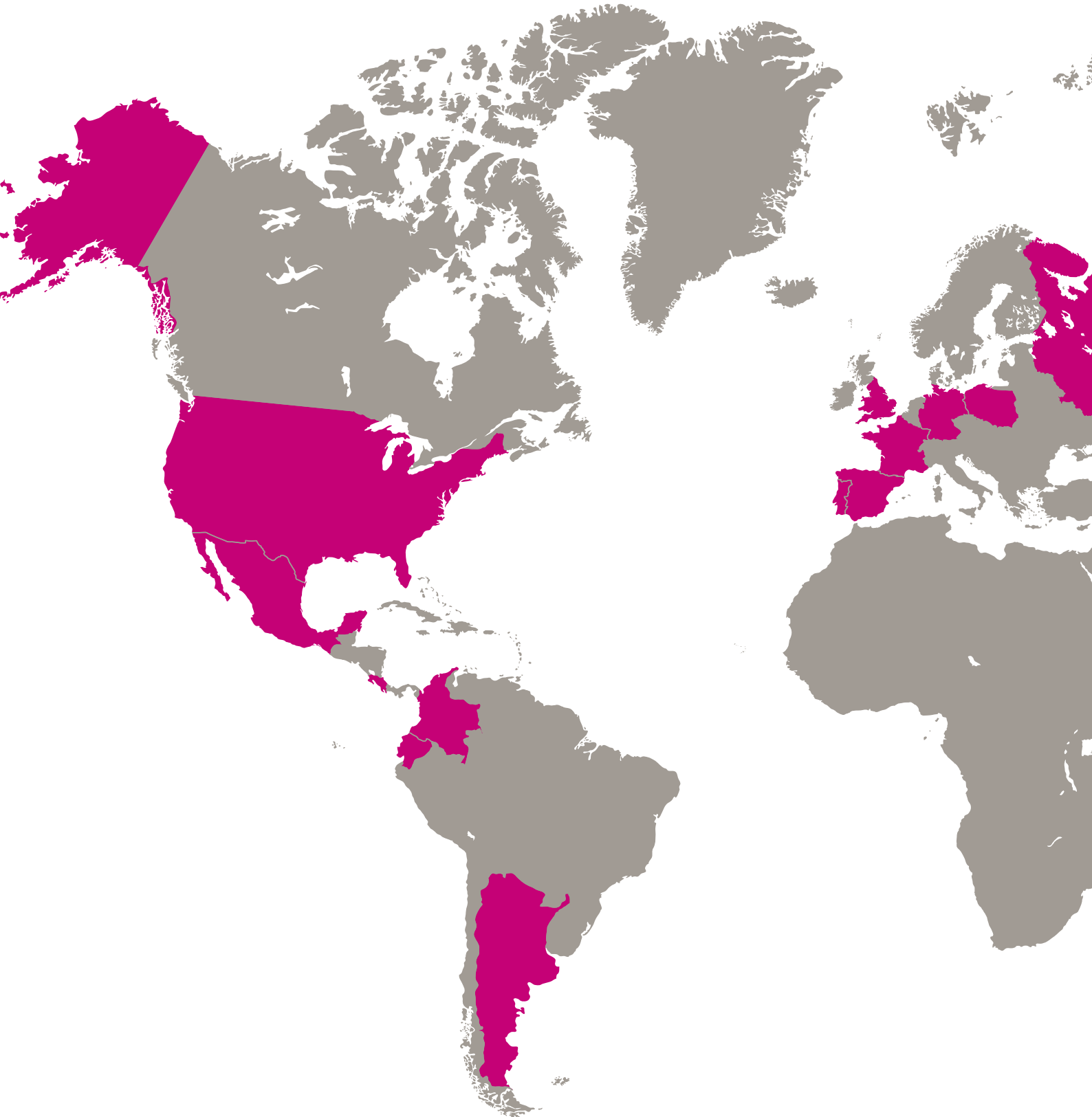
Woman, Sara, aged 50, fled her family at age 13 to escape sexual abuse at the hands of her uncle. With no education or opportunities, she became drug dependent and worked in the sex trade, and was eventually arrested for selling small quantities of crack to support her own consumption. Out of desperation, she attempted to bribe the police officer arresting her for selling drugs with the equivalent of US\$3.75. She is currently serving a combined seven-year plea-bargained sentence for the two offenses.

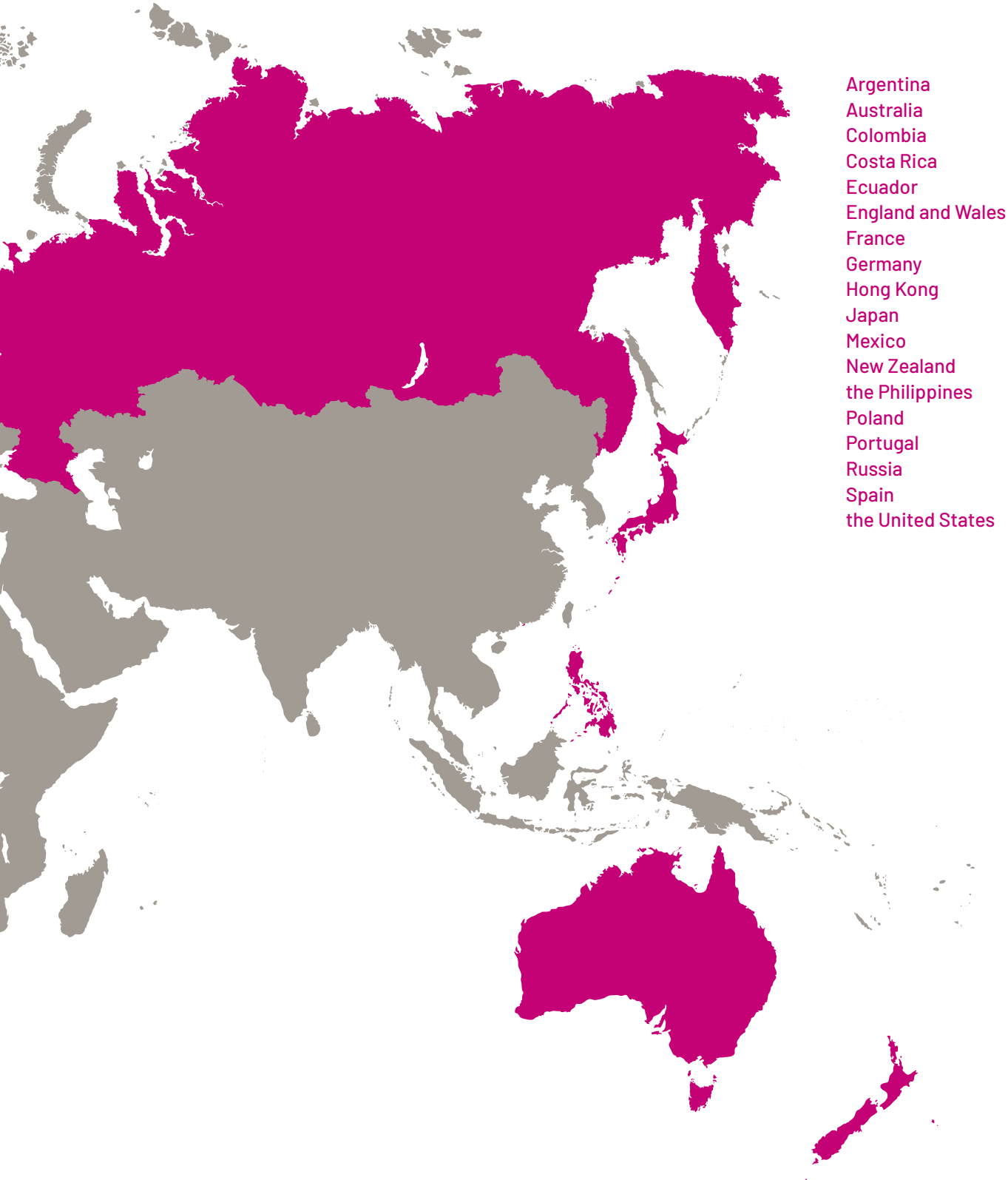
See more at: womenanddrugs.wola.org/photo_essay/failed-by-the-system.

Contents

Jurisdictions surveyed	4
Executive summary	5
Multi-jurisdictional responses: high-level summary	15
Chapter 1: Argentina	38
Chapter 2: Australia	42
Chapter 3: Colombia	58
Chapter 4: Costa Rica	62
Chapter 5: Ecuador	66
Chapter 6: England and Wales	72
Chapter 7: France	80
Chapter 8: Germany	88
Chapter 9: Hong Kong	96
Chapter 10: Japan	100
Chapter 11: Mexico	102
Chapter 12: New Zealand	106
Chapter 13: Philippines	112
Chapter 14: Poland	118
Chapter 15: Portugal	124
Chapter 16: Russia	128
Chapter 17: Spain	134
Chapter 18: United States	138
Resources	154
Acknowledgements	156

Jurisdictions surveyed





- Argentina
- Australia
- Colombia
- Costa Rica
- Ecuador
- England and Wales
- France
- Germany
- Hong Kong
- Japan
- Mexico
- New Zealand
- the Philippines
- Poland
- Portugal
- Russia
- Spain
- the United States

Executive summary

Key findings

Drug-related offences are known to have a particular and disproportionate impact on women. This report considers five key questions relating to the sentences imposed on women for drug-related offences across criminal justice systems in 18 jurisdictions.

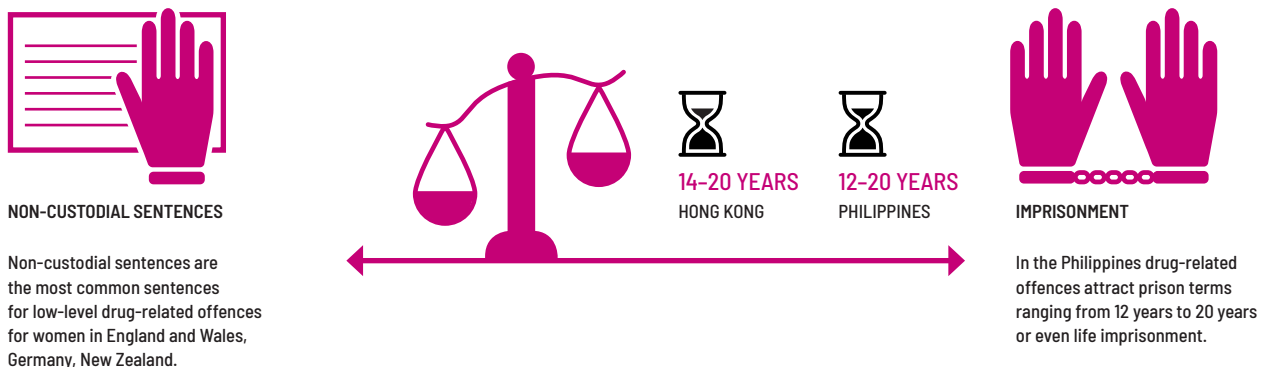
The key finding is that the complex reasons and pathways of women’s confrontation with criminal justice systems for drug-related offences are not adequately reflected in legislation or (where existing) sentencing guidelines, nor sentencing practices across the 18 jurisdictions studied for this report.

Drug legislation and sentencing guidelines in the majority of jurisdictions surveyed fail to take account of, or consider, the typical circumstances and roles of women’s involvement with drugs. While there is a variety of considerations mentioned in a number of jurisdictions’ legal instruments that can mitigate culpability or lessen a sentence for a woman prosecuted or convicted for drug-related offences, the impact on their sentence received is less certain. Factors typically include consideration of pregnancy, single-parent status, or other circumstances such as experience of violence or coercion, role in the crime, or status of vulnerability. Where such factors are explicitly mentioned, they are given weight of differing degrees or discretion is limited by the applicable law or sentencing

guidelines (including mandatory minimum sentences), thus limiting their impact. In cases where they have been taken into account, it is difficult to quantify the effect on the sentence given.

In a number of jurisdictions covered, non-custodial sentences are the more common form of sentences for low-level drug-related offences for women (for example, in England and Wales, Germany and New Zealand). In contrast, in Russia, non-custodial sentences are only issued in about 4% of drug-related offences cases. Data suggests that in some jurisdictions, like France, prison terms handed down to female offenders appeared less severe than for male offenders, with reasons suggested including that first-time female offenders tend to be prosecuted for less complex offences and they have a lower reoffending rate. This correlates to evidence that women tend to commit minor non-violent crimes, often related to poverty and in a context of violence and discrimination.¹ At the other end of the spectrum, in Hong Kong, a look at a sample of cases involving drug trafficking by women in situations of vulnerability (including one pregnant woman) shows harsh prison sentences as long as 14 to 20 years been common. Similarly, in the Philippines drug offences attract prison terms ranging from 12 years and one day to 20 years or life imprisonment.

Sentencing range for women convicted for drug-related offences



1. UN Special Rapporteur on violence against women, 'Pathways to, conditions and consequences of incarceration for women', A/68/340 (2013).

Background and international legal framework

The number of women and girls in prison, estimated to be more than 714,000, is increasing: from 2000 to 2017, this figure globally increased by more than 50%, while the overall prison population increased by around 20%. It is clear from country-based research that the number of women in prison has not grown dramatically because of an increase in criminal activity, but because of political choices, including harsh drug policies.²

Drug policies are known to have a particular and disproportionate impact on women, and their children. Eighty-two per cent of all women in prison in Thailand are imprisoned for a drug offence; in the Philippines, the proportion of women in prison for a drug offence is 53% and in Peru and Costa Rica it is more than 60%. In Brazil, 63% of women in prison in 2014 were there because of minor drug-related offences – compared to a quarter of men.³ The recent United Nations (UN) Global Study on Children Deprived of Liberty estimated that in 2017 there were approximately 19,000 children living in prison with a primary caregiver (normally their mother).⁴ The number of children affected by their mothers' imprisonment is significantly more than this however, as globally the vast majority of imprisoned women are mothers; for instance, in Russian and the United States, 80% of women in prison leave children outside.⁵

According to 2014 UN estimates, one in five people currently in prison around the world are there because of a drug offence.⁶ The criminalisation of people who use drugs has had little effect on the overall prevalence of drug use worldwide, while it has driven people away from health-based interventions in the community.⁷ The mass incarceration of low-level drug offenders has also led to an overloading of the criminal justice system in many countries – rendering courts unable to tackle serious crime cases – and brought crisis levels of prison overcrowding.⁸

For women, the increase in their imprisonment for drug-related offences has been attributed, in part, to the greater ease with which low-level crimes can be prosecuted, with women's primary role in drug trafficking usually being that of a drug courier.

→ A 2017 UN report highlighted links between poverty, family roles and drug-related offences committed by women, raising concerns at their 'overincarceration' for 'transporting drugs (as mules), having a secondary role in the commission of crimes or performing low-level high-risk tasks, often at the request of their partners'.

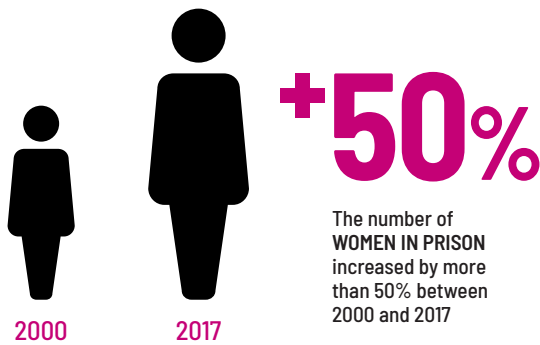
This makes them typically easy targets for drug enforcement authorities, even though it does little to disrupt drug-trafficking networks. Furthermore, a UN report indicated that more serious offenders, mainly male, escape imprisonment or have their sentences reduced by entering plea-bargaining deals and providing assistance to the prosecution, which women are usually unable to provide.⁹

The impact of punitive drug policies on women has now been recognised within discussions at the international level. For instance, in 2016, the Outcome Document of the UN General Assembly Special Session on the world drug problem (UNGASS)¹⁰ recognised the specific vulnerabilities of women in detention for drug-related offences, and the typical roles they play in drug-related crime. It calls on states to address protective and risk factors, as well as the underlying reasons for their involvement in drug crimes.

Furthermore, a 2017 UN report highlighted links between poverty, family roles and drug-related offences committed by women, raising concerns at their 'overincarceration' for 'transporting drugs (as mules), having a secondary role in the commission of crimes or performing low-level high-risk tasks, often at the request of their partners'.¹¹

2. Roy Walmsley, Institute for Criminal Policy Research, *World Female Imprisonment List*, 4th edition, 2017.
3. Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2019*, p20.
4. UN Global Study on Children Deprived of Liberty, Manfred Nowak, November 2019, omnibook.com/Global-Study-2019.
5. Office of the United Nations High Commissioner for Human Rights (2018), *Women deprived of liberty: Submission to the Working Group on the issue of discrimination against women in law and in practice*.
6. UN system coordination Task Team on the Implementation of the UN 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*, March 2019, www.unodc.org/documents/commissions/CND/2019/Contributions/UN_Entities/What_we_have_learned_over_the_last_ten_years_-_14_March_2019_-_w_signature.pdf.
7. See for instance the 2019 UNAIDS Report, *Health, Rights and Drugs*, www.unaids.org/sites/default/files/media_asset/JC2954_UNAIDS_drugs_report_2019_en.pdf.
8. See for instance Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2019*, p8.
9. UN Special Rapporteur on violence against women, 'Pathways to, conditions and consequences of incarceration for women', A/68/340 (2013), para. 26.
10. Our joint commitment to effectively addressing and countering the world drug problem, UN General Assembly, 4 May 2016, A/RES/S-30/1.
11. UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding, 21 August 2017, A/HRC/36/28, para. 13.

Number of women and girls in prison



This is the case for a large number of women in prison for drug-related offences in Southeast Asia who are foreign nationals, usually convicted for drug trafficking or selling drugs for, or with, their male partners.¹² Evidence shows that the backgrounds and reasons for their involvement in such crimes are complex and thread with violence, coercion and vulnerability.¹³

The need to promote alternatives to punishment to address overcrowding and overincarceration of drug offenders is also recognised at the international level.¹⁴ International standards promote the use of alternatives to imprisonment and go as far as requiring pre-trial detention to be used as a means of last resort. The UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) adopted in 1990 seek to avoid unnecessary use of imprisonment through non-custodial measures. The Tokyo Rules are supplemented by the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, also known as the Bangkok Rules, which were adopted by the UN General Assembly in December 2010 and provide standards for the specific characteristics and needs of women offenders and prisoners, including to reduce the unnecessary imprisonment of women.¹⁵

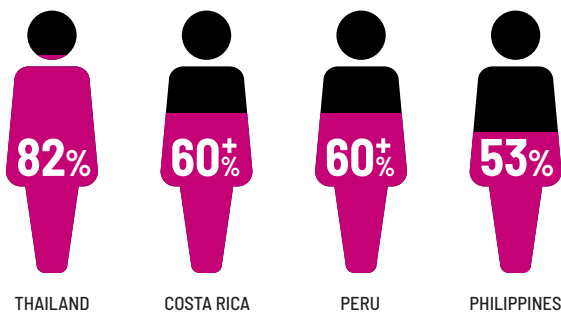
Number of children living in prison with their mother



The Bangkok Rules recognise that many women, including those charged with or convicted of drug offences, should not be in prison given the harmful impact of imprisonment. They bear in mind the negative consequences on the women's children and the complex backgrounds behind involvement in drug-related crime. The rules were also drafted with the knowledge that alternatives to imprisonment targeting drug use can be more effective in addressing any rehabilitative and support needs.

Rule 64 of the Bangkok Rules specifically encourage non-custodial sentences for pregnant women and women with dependent children to be preferred, which should be read in light of Article 3 of the UN Convention on the Rights of the Child (which enjoys ratification by all UN member states, except for the United States) that requires children's best interests to be assessed and taken into account as a primary consideration in all actions or decisions concerning them. Rule 61 further requires courts to consider mitigating factors when sentencing women offenders, noting specifically lack of criminal history, relative non-severity and nature of the offence, caretaking responsibilities and typical backgrounds.

Ratio of women in prison sentenced for a drug offence



Consequence of mass incarceration for low-level drug offences



12. Chuenurah C., & Park, M.Y., *Women prisoners in Southeast Asia: Their Profiles and Pathways to Prison*, Korean Journal of Correctional Discourse, 2016, 10(3), 75-79.
 13. Dr Samantha Jeffries, Chontit Chuenurah, *Vulnerabilities, Victimization, Romance and Indulgence: Thai Women's Pathways to Prison in Cambodia for International Cross Border Drug Trafficking*, International Journal of Law, Crime and Justice, Volume 56, March 2019, Pages 39-52.
 14. See the UN System Common Position supporting the implementation of the international drug control policy through effective inter-agency collaboration, p14, fileserver.idpc.net/library/CEB-2018-2-SoD_Common-position.pdf.
 15. See www.penalreform.org/priorities/women-in-the-criminal-justice-system/bangkok-rules-2. The full text of the Bangkok Rules is available at: www.penalreform.org/issues/women/international-standards.

→ The United Nations Bangkok Rules recognise that many women, including those charged with or convicted of drug offences, should not be in prison given the harmful impact of imprisonment.

With regard to offences entailing drug use, Rule 62 requires the 'provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community' for diversion and alternative sentencing purposes.

The principle of proportionality, as an internationally recognised legal principal, is essential when considering the overincarceration of women for drug-related offences. The UNGASS Outcome Document recommends the promotion of 'proportionate national sentencing policies, practices and guidelines for drug-related offences whereby the severity of penalties is proportionate to the gravity of offences and whereby both mitigating and aggravating factors are taken into account...'.¹⁶

Against this backdrop, this multi-jurisdictional study is a key step to advocating for and assisting with the implementation of these international standards to reduce the unnecessary imprisonment of women for drug-related offences. It is instrumental in building a better understanding of the case law around women accused of drug-related offences - which offences they are imprisoned for, what penalties are received, and whether there is scope for more proportionate sentencing, including alternatives to prison for pre-trial detention and post-conviction stages. It provides analysis and data to improve understanding on the drivers of overincarceration of women in various regions of the world. This study is a solid basis for the development of policy guidance and recommendations to legislators and sentencing authorities (which will be published in 2020), building on the 10-point plan on reforming criminal justice responses to drugs, published by Penal Reform International and the International Drug Policy Consortium.¹⁷ While this study provides the evidence to call for reform of drug policies that disproportionately impact women, the findings are equally relevant to broader reform efforts concerning men, women and children.

QUESTIONS RESEARCHED

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor - see above)?

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Gendered elements could include coercion by a male, violence, domestic abuse, dependent children, head of a sole family, poverty or lack of stable accommodation.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

¹⁶ Paragraph 4(l).

¹⁷ Penal Reform International and the International Drug Policy Consortium (2016), *Reforming criminal justice responses to drugs*, www.penalreform.org/resource/ten-point-plan-reforming-criminal-justice-responses-drugs.

Methodology

Linklaters LLP has prepared this report in conjunction with local lawyers in each jurisdiction covered¹⁸ and with the helpful input of Penal Reform International and the International Drug Policy Consortium. The research project initially commenced in June 2018 with a first phase of countries, with additional jurisdictions added to the scope of the report as local volunteers in additional jurisdictions were identified.¹⁹ The research was complete by September 2019. All local lawyers researched the same five questions (detailed on page 9).

While the country chapters cover the relevant law in relation to those five questions, this report does not purport to be a comprehensive review of all the law and case law in this area. In some jurisdictions, public information on the questions researched – including previous cases – has been much more readily available than in others. Three global coordinators in the Linklaters London office²⁰ have overseen the project and the production of this report.

Overview of findings

Definitions of low-level drug-related offences

Definitions of low-level drug-related offences (e.g. use, possession, supply or low-level trafficking) vary across the jurisdictions reviewed. Many distinguish between whether the drugs in question are for personal use or supply/sale to others.²¹ In addition, the amount (in weight) and type of drugs that gave rise to the offence, as well as the role of the offender, are relevant considerations in defining an offence in many jurisdictions.

A number of jurisdictions do not distinguish between trafficking and other supply-side activities, although there are exceptions such as in Queensland, Australia where case law provides that trafficking involves knowingly engaging in the movement of drugs and penalties apply regardless of the amount of drugs involved. Similarly, in Japan trafficking is regarded as a high-level offence, regardless of the amount or price of drug traded.

The jurisdictions surveyed generally do not include provisions as to quantities of drugs that constitute “trafficking”, but with some exceptions.

For example:

- The **Colombian** Criminal Code includes no minimum threshold in terms of quantity of drugs that constitutes “trafficking”.
- In **England and Wales**, there is no minimum quantity required to constitute a “trafficking” offence in the law, but the relevant guideline specifies that the Court must consider the quantity and class of the drug concerned in determining the category range. This means that the smaller the quantity of the drug, the lower the starting point is for the sentence.
- In **Costa Rica**, possession of a large quantity of drugs will give rise to a presumption of trafficking.
- In **Germany**, the quantity of drugs can be a mitigating factor, particularly when so small as to be for the person’s own consumption.
- In **Spain**, drug quantity thresholds for “trafficking” depend on the type of drug; for example, 100 grams is the threshold for marijuana and 0.03 grams is the threshold for LSD (also known as acid).

Some jurisdictions look to the substances involved to define the type of sentencing tariffs available. For example, in Hong Kong courts consider how harmful the drugs are and how addictive they are, while in New Zealand, one consideration in sentencing is the class of risk based on their perceived risk of harm.

In the United States, the federal government and many state governments classify a ‘substance’ looking at factors including whether it is deemed addictive or has recognised medical use.

In some jurisdictions, including Russia and Spain, the law separates drug offences into criminal offences or administrative offences.

Specific effect of drug legislation on women

Although the letter of the law in relation to drug offences is not explicitly different for men and for women in all jurisdictions surveyed, its practical consequences frequently have a particularly negative effect on women, and in some cases positively account for the differing circumstances women commit drug-related offences. For example, a number of jurisdictions (including Ecuador, Portugal and Russia) either explicitly or implicitly consider pregnancy to be a mitigating factor, or at least a reason for incarceration to be delayed. Most jurisdictions surveyed included some recognition of personal circumstances or needing to care for small children which, in practice, means that women are more likely to benefit from such mitigating circumstances.

¹⁸. Either from Linklaters’ offices in that country or from external law firms. Please refer to the acknowledgments on page 156 for details.

¹⁹. Jurisdictions reviewed in this report are Argentina, Australia, Colombia, Costa Rica, Ecuador, England and Wales, France, Germany, Hong Kong, Japan, Mexico, New Zealand, the Philippines, Poland, Portugal, Russia, Spain, and the United States of America.

²⁰. Lauren O’Brien (Managing Associate), Rebecca Saunders (Associate) and Verity Egerton-Doyle (Managing Associate).

²¹. Although in some jurisdictions, there is no distinction between possession for personal use or possession for supply to others and everything is considered as a supply activity with harsh penalties.

For example:

- In **Argentina**, age, level of education, and personal relationships and circumstances are generally considered when deciding sentences.
- In **Costa Rica**, the law has taken into account the following mitigating factors in relation to smuggling drugs into prison (as a visitor): poverty; being the head of a vulnerable household; being responsible for minors, elderly or disabled persons; and being an elderly woman in vulnerable conditions. Precedents show that courts have also taken into account violence and coercion experienced by the women being sentenced as mitigating factors. For instance, there have been cases where female offenders have been absolved of smuggling drugs into prisons where they have been found to have been coerced.
- **German** criminal law recognises single parenthood as a factor to be borne in mind for sentencing.
- In **Portugal**, judges take into account any special state of vulnerability and the possibility of giving birth in a prison facility when deciding on the appropriate sentence.
- In **Russia**, carers for small children are given shorter sentences.
- In **Spain**, the personal circumstances of the offender must always be taken into account, which could be particularly relevant to female offenders in practice due to child dependants or single-parent status.

However, while many jurisdictions surveyed have mitigating factors recognising that women are often exploited in the context of a drug crime (such as Argentina, Colombia, Costa Rica, Ecuador and Russia), some jurisdictions also have aggravating factors that might be more relevant to women. For example, in New South Wales in Australia and in England and Wales, there are aggravating factors relating to committing an offence in the presence of children.

Overall there is an absence of explicit mitigating circumstances commonly experienced by women involved in low-level drug offending in applicable legislation or sentencing guidance (such as coercion by a male, violence, domestic abuse, dependent children, head of a sole family, poverty or lack of stable accommodation).

In some jurisdictions there is some consideration given to the role that a woman plays in the drug supply chain. When lesser sentences are imposed for people who have less direct involvement or are involved in lower-level drug-related offences, that is likely to affect women more than men and, in some cases, results in more lenient sentences for women convicted of drug crimes.

Instances of this include:

- In **Australia**, there are legislative provisions that would allow a female playing a minor role in a criminal drug enterprise to have her sentence mitigated, but these are very limited, and the sentence would not be mitigated on that basis alone. Case law in New South Wales indicates that the sentence imposed on a woman with a drug dependency may be more lenient than those imposed on a woman who was seen as only seeking financial benefit. Local precedent also allows for a person's role in supply to be considered in sentencing; however, this is not gender-specific.
- In **England and Wales**, the Sentencing Council stated in 2012 that it intended to reduce sentences for drug couriers. As a result, the role of the offender is one of two elements that are used to determine the category range of the offence and therefore the starting point for the sentence. However, the Sentencing Council's Drug Offences Definitive Guideline maintains the previous minimum suggested sentence of three years in custody for the importation of even a small quantity of class A or B drugs.
- **German** criminal law takes the offender's role in the drug supply chain into account for finding out the level of participation (perpetrator or participant) for sentencing.
- In **New Zealand**, case law has included statements about the culpability of offenders in the drug supply chain which suggest that the manufacturer is the most culpable and the supplier is the least culpable. Sentencing guidelines state that if a person has limited involvement in the crime, this is a mitigating factor when determining the appropriate sentence. This is, however, only one sentencing consideration and there are examples where women have had limited involvement in the crime but have not had their sentences adjusted because of the desire of the courts to promote deterrence.
- In **Spain**, a drug courier will be punished less severely than for offences committed higher in the drug trafficking chain.

Sentencing rules

Sentencing procedure varies between the jurisdictions considered by this report. Beyond pregnancy or childcare responsibilities, none of the jurisdictions considered by this report explicitly provides (whether in the applicable law or sentencing guidelines) that gendered elements²² will be taken into account during sentencing for low-level drug-related offences – with one exception being Costa Rica in limited cases.

22. Gendered elements could include: coercion by a male, violence, domestic abuse, dependent children, head of a sole family, poverty or lack of stable accommodation. While some of these factors may affect men too, evidence shows they disproportionately impact women in conflict with the law.

Indeed, most of the criminal courts in the jurisdictions considered do have some discretion in sentencing for low-level drug-related offences, although this discretion is normally strictly limited by the applicable law or sentencing guidelines. However, where there is a substantial amount of judicial discretion, this means that some factors which may be more likely to apply to female offenders can be taken into account by the relevant court. Although it is difficult to determine, often due to a lack of research and data, these factors may sometimes reduce the sentence handed down to a woman convicted for a low-level drug offence.

In some jurisdictions considered by this report, there are formal sentencing guidelines that constrain judicial discretion in sentencing. In these jurisdictions, there is limited evidence that gendered elements have ever been taken into account in such guidance; for instance:

- In **Australia**, sentencing guidelines and policy generally do not explicitly permit gendered elements to be considered when setting sentences for low-level drug-related offences. However, courts across the states often rely on the broad discretion of the court to take account of all relevant factors; taking relevant case law into consideration, there are instances of gendered elements being considered at sentencing but the effect on the sentence given is difficult to quantify.
- In **England and Wales**, the judiciary has a limited amount of discretion when determining which category range of sentence to give to a particular offence. Once the category range is assigned, the court assesses the relevant mitigating and aggravating factors to adjust the sentence within the specified range. There is some case law where the courts have discussed how potentially gendered elements will be considered as mitigating factors.
- In the **United States**, the courts have a limited amount of discretion, but as sentencing decisions are not publicly available it is difficult to substantiate how gendered elements might be considered during sentencing and what impact (if any) they have on the sentence. There are, inevitably, some minor differences across the various states, which are identified in Chapter 18.

More jurisdictions permit judicial discretion within limits that are prescribed by the relevant criminal legislation or code. There is some, albeit scant, evidence that gendered elements may, or may not, be considered as part of the discretionary function of the judiciary:

- In **Argentina** and **Colombia**, the limited case law available seems to indicate that gendered elements are not considered in detail by the court at sentencing.

- In **Costa Rica, Ecuador, Mexico** and the **Philippines**, there is some evidence that the judiciary may be influenced by certain mitigating factors such as poverty; being head of a vulnerable household; being responsible for minor, disabled or elderly dependants; or the degree of participation, any of which may help to ensure that a female offender is given a proportionate sentence. However, there is still a lack of research and statistics in these jurisdictions, especially in the Philippines.
- In **France, Russia, New Zealand** and **Poland**, the courts appear to have a very wide level of discretion during sentencing. There is evidence that all judicial levels in France have considered gendered elements in sentencing. The Russian judiciary is obliged to take all potentially aggravating or mitigating factors into account. However, sometimes – in New Zealand or Poland for example – it is difficult to determine what effect certain mitigating factors (such as care-giving responsibilities, duress or abuse) have on the sentence.
- In **Germany** and **Portugal**, the judiciary does have discretion during sentencing, but they are not, in principle, permitted to take account of factors not explicitly referenced in the applicable law; therefore, arguably, gendered elements may not be considered at sentencing.
- In **Japan**, the courts have prescribed sentencing limits derived from the relevant drug regulations, but discretion within them to consider factors as they wish. Case law does not indicate that gendered elements are normally considered, although mitigating factors such as it being the offender's first offence will be.

Some other jurisdictions do not rely on any specific sentencing rules or guidelines that limit judicial discretion at sentencing. As such, there is little or no indication of a harmonious approach to the consideration of gendered elements in sentencing:

- In **Spain**, the courts have considerable discretion during sentencing and they will take account of the personal circumstances of offenders when sentencing "drug couriers".
- In **Hong Kong** there is no evidence that gender has an impact on the sentencing process, which is at the complete discretion of the judiciary.

Sentencing of women for drug-related offences in practice

Sentencing decisions vary between the jurisdictions considered by this report. Based on reported data, non-custodial sentences are the more common form of sentences for female drug offenders in the following jurisdictions:

- In **England and Wales**, female offenders account for a small percentage of defendants prosecuted for indictable drug-related offences (in 2017, they accounted for only 8%). The majority of female defendants do not receive a custodial sentence and the most common sentencing outcome for indictable drug-related offences is a fine. Only a minority of women convicted of drug-related offences are imprisoned.
- Likewise, in **Germany**, female offenders are rarely sentenced to imprisonment for drug-related offences. In 2016, although nearly a quarter received such sentences, the majority were granted probation, leaving only 5% of all women convicted for drug-related offences actually imprisoned. Of those, over half were sentenced to one year or less. Female offenders tend to receive a financial penalty.
- In **New Zealand**, although no disaggregated data is available specifically for female offenders, across the board statistics show that non-custodial sentences are the most common outcomes for drug-related offences.

Where there is a lack of official data on sentencing for minor drug-related offences, we do however observe that in a number of the jurisdictions studied courts prefer non-custodial and alternative measures such as fines, community service, house arrest and electronic surveillance to prison sentences. For instance:

- In **Colombia**, recent developments could make women, under certain conditions, more likely to receive a non-custodial sentence such as house arrest or electronic surveillance than a prison sentence (albeit at present there are still high rates of women in prison convicted of a drug offence). Such specific conditions include that they have a child that is less than 12 years old. Note that this relates to sentencing for supply offences, since possession for personal use is decriminalised in Colombia.
- In **Poland**, courts tend to prefer alternative measures such as fines or community service to imprisonment in cases of possession of an insignificant quantity of drugs for personal use or small-scale drug dealing.

- In **Portugal**, in cases where the offender (male or female) does not have a criminal history and the drug amount concerned is low, the judge can substitute the prison sentence for a fine or the provisional suspension of criminal procedure. There is also the possibility of community service as a penalty. Note that this relates to sentencing for supply offences, since drug use and possession for personal use is decriminalised in Portugal (they constitute administrative offences).

There are exceptions to this however, for instance:

- In **Russia**, alternative sentences (such as fines or community service) are only issued in about 4% of drug-related offences cases.
- In the **Philippines** under the Comprehensive Dangerous Drugs Act of 2002, probation cannot be granted for drug trafficking or dealing regardless of the actual penalty imposed.

In some jurisdictions, like France and Australia, custodial sentences for female offenders are less severe than for male offenders. In **France**, statistics for low-level drug-related offences also show that women are less likely to be convicted following arrest compared to men. This may reflect the role of women in drug-related crimes, of being minor in nature.

Among the jurisdictions where prison sentences are imposed, the length of the sentence can range from a few months to over a couple of years at one end of the spectrum, to long sentences at the other end of the spectrum as seen in a couple of states with harsh drug policies, like Hong Kong:

- In **Argentina**, case law over the last few years shows that prison sentences of around four to five years were imposed on female drug suppliers and drug couriers.
- In **Australia**, average prison sentences have ranged from three to six months to around five years.
- In **Japan**, depending on the nature of the offence, prison sentences can be between 14 and 18 months.
- From a sample of reported cases in **Hong Kong** involving drug trafficking by women in situations of vulnerability (including one pregnant woman), prison sentences between 14 and 20 years have been handed down.
- In **Russia**, the majority of the custodial sentences are between one and two years with only 1% of prison sentences imposed over two years.

We also note that in some jurisdictions courts have some degree of flexibility in deciding conditions or specifics for the implementation of a sentence. Although not specific to women, gendered elements may be considered. For instance:

- In **Mexico**, subject to the judge's discretion, sentences can be adapted. For instance, a judge could order imprisonment at a facility close to the offender's home or to social rehabilitation centres.
- In **Costa Rica**, drug-related offences carry a minimum sentence of three years, but drug use is not criminalised and in some cases no sentences have been imposed.
- In **Ecuador**, certain offences can be examined under an abbreviated procedure (which is commonly requested by women accused of drug trafficking) under which the sentence can be reduced to one-third of the minimum penalty established by law if the accused admits the facts.

Key conclusions and issues requiring discussion

A number of critical issues arise in relation to the sentencing of women for low-level drug-related offences, based on our research. Although responses to drug-related offences are now widely recognised as having a differentiated impact on women, in general this is not reflected in the applicable legislation and/or sentencing guidelines and practices across the jurisdictions studied for this report. In addition, the sentencing of women in practice varies in terms of length and type of sentence.

This report is intended to be used as a starting point for discussions to elaborate guidance and recommendations for legislators and policy makers who need to consider what action can be taken to ensure that women convicted of low-level drug offences are treated fairly and proportionately. In jurisdictions where judicial discretion is the sole means for specific circumstances of women who come into conflict with the law being considered, awareness-raising is critical.

Judicial discourse

While there is significant discourse regarding broader issues around drug-related offences or female offenders in several of the jurisdictions examined in this report, the specific issue of sentencing receives detailed judicial or academic attention in a more limited number of countries. Jurisdictions included in this report where there has been discourse on this specific issue (albeit to varying degrees) include Australia, Costa Rica, Ecuador, England and Wales, Hong Kong, Mexico and Russia. One particular topic which features in the discourse of several jurisdictions considered is the disproportionate impact on ethnic minorities. This is noted in particular in Australia, New Zealand, England and Wales and Hong Kong. For example, the only demographic of the prison population that is increasing in New Zealand is indigenous Māori women.

MULTI-JURISDICTIONAL RESPONSES

High-level summary

This is a summary of the responses to the specific research questions in relation to the sentencing of female drug offenders. Please note that these responses are intended to provide a high-level summary only.

For the more complete responses, please see the main chapters that have been individually prepared for each jurisdiction, at Chapters 1 to 18.

1. Establishing the crime

QUESTION 1:

What constitute low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

ARGENTINA

The Argentine legislation considers low-level or “correctional offences” to include supply of medical substances without prescription; production or manufacture of medicinal substances in unauthorised establishments; failure to comply with duties relating to direction, administration, control or surveillance of an establishment selling medicine; and the possession of narcotic drugs for personal use.

AUSTRALIA

In Australia, drug-related offences are governed by the legislation of each state and territory, and the approach is not uniform. However, generally drug possession for personal use is criminalised in the jurisdictions surveyed, other than the Northern Territory.²³

In **New South Wales**, the possession of a prohibited drug may be considered a low-level offence, attracting a penalty of two years’ imprisonment or a fine. However, the possession of an amount equal to or greater than the specified “traffickable quantity” of each particular drug is deemed to be for the purpose of supply. Such offences therefore attract significant terms of imprisonment or fines, which increase where the amount of drugs

involved is a commercial quantity or the supply is on an ongoing basis. There is no separate offence for trafficking, as this falls under the category of supply.

In **Victoria**, a low-level drug offence exists only for the possession of less than a “small quantity” of cannabis or THC and is punishable by a fine. For other drugs, or larger quantities of cannabis or tetrahydrocannabinol (THC), the penalties increase and include imprisonment. Possession of an amount greater than the “traffickable amount” is considered to be *prima facie* evidence of trafficking. Trafficking offences carry a significant term of imprisonment, with the maximum sentences increasing where, e.g. the amount of drugs involved is a commercial quantity or large commercial quantity. There is no separate offence for supply, as this falls under the category of trafficking.

In **Queensland**, possession offences are also divided by the type and weight of the drug. However, there are no low-level possession offences as all offences carry the possibility of long maximum sentences. Unique from other reviewed jurisdictions, Queensland makes a distinction between the offences of supply and trafficking, with case law providing that trafficking involves knowingly engaging in the movement of drugs.

²³ Some decriminalisation has taken place in several Australian jurisdictions that were not surveyed, see “A Quiet Revolution: Drug Decriminalisation Across the Globe”, Niamh Eastwood, Edward Fox and Ari Rosmarin, March 2016, www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf at pages 14 to 17.

The penalties for trafficking apply regardless of the amount of drugs involved, in contrast to the other jurisdictions which have an ascending scale of penalties linked to the amount of drugs involved.

The **Northern Territory** divides its drug-related offences according to the type and weight of the drug. Offences relating to drugs of a certain type (e.g. cocaine, heroin and methamphetamine) and of a certain quantity (e.g. a commercial quantity) are considered more serious and offences relating to them generally carry greater penalties. The Northern Territory is the only jurisdiction to codify the option of a fine for the lowest-level supply offence, being the supply of less than a commercial quantity of drugs. This option is also provided for lower-level possession offences, including possession of less than a traffickable quantity. Failure to pay the fine does not result in a criminal conviction or record,²⁴ effectively decriminalising low-level possession offences. Similar to New South Wales, there is no separate trafficking offence in the Northern Territory.

Across all jurisdictions, there are ancillary offences relating to possession of drug paraphernalia, drug premises and the proceeds of drug crime. However, these are generally charged in addition to a possession, supply or trafficking offences, and therefore they should not be considered low-level offences.

COLOMBIA

There is no separate definition of low-level drug-related offences in the Colombian legislation. However, the quantity of drugs transported, possessed or distributed could lead to a lower sentence. For example, drug trafficking may result in a sentence of 10 to 30 years. The sentence will be lowered to five to nine years if the confiscated drugs do not exceed the amount of 1,000 grams of cannabis, 100 grams of cocaine or cocaine-based products or 200 grams of synthetic drugs. Possession for personal consumption is generally not criminalised in Colombia. There is, however, an exception concerning use in public spaces such as parks, which is penalised by an administrative fine up to \$200,000 COP (approx. 55 EUR).

COSTA RICA

Costa Rican criminal law prohibits conduct relating to drug trafficking, sale, distribution and commercialisation. Possession for personal consumption is not criminalised. However, possession of a significant quantity of drugs is usually considered as giving rise to a presumption of trafficking. There is

no set amount established by law in order to presume trafficking or sale. The law is unclear about the legality of drug cultivation for personal use, but a recent precedent suggests that growing marijuana for personal use is tolerated.

ECUADOR

While possession of narcotic or psychotropic substances for personal use is not criminalised, trafficking, which is defined broadly as including the offering, storage, intermediation, distribution, purchase, sale, delivery, transportation, marketing, importation, exportation or possession of narcotic or psychotropic substances, is an offence. Penalties for trafficking range from one to 13 years' imprisonment depending on the applicable scale of the trafficking as set out in statute (which corresponds to the quantity of drugs involved). The quantities for the scales were revised in 2015, which has resulted in an even thinner line between illegal low-level trafficking and (in theory) legal possession of drugs for personal use.

ENGLAND AND WALES

The principal offences relating to the misuse of controlled drugs include possession (with or without intent to supply), supply, importation and production. There are also inchoate offences including participating in, attempting to commit, conspiracy to commit and encouraging or assisting the commission of the above offences.

A prosecution is usual when a case involves the possession of a Class A drug or for the possession of more than a minimal quantity of Class B or C drugs. The supply and possession with intent to supply of any controlled drugs will almost always result in a prosecution, although there may be exceptional circumstances where possession with intent to supply a small amount of Class B or C drugs will not be charged. It has to be mentioned that for cannabis the possibility of a police warning rather than prosecution exists.

FRANCE

French law criminalises the following low-level drug-related offences: use of illegal drugs; inciting a third party to use illegal drugs; transportation, detention, offer, sale or acquisition of illegal drugs; sale or offering to sell illegal drugs (in quantities limited to a person's personal consumption); helping someone use illegal drugs; providing prescriptions for regulated drugs on frivolous grounds; and laundering funds acquired through drug trafficking.

24. *Ibid*, p. 15.

GERMANY

German law classifies the following as low-level drug offences: cultivating, manufacturing, trafficking (construed widely), importing, exporting, selling, supplying, otherwise placing on the market, purchasing or otherwise acquiring drugs; providing incorrect or incomplete information in order to receive a drugs prescription; actions that help or encourage third persons to obtain drugs; and violating certain provisions in administrative ordinances; possession of drugs. If the narcotics were intended for personal consumption in small quantities, special proportionality considerations apply. Cases of personal use of small quantities of cannabis (as defined by each German federal state), especially involving first-time offenders often will not be prosecuted. Regarding other narcotics, the common practice differs widely between the federal states.

Drug-related activities exceptionally allowed under the Narcotics Act constitute criminal offences when carried out without respecting drug-handling rules.

The above offences can become mid-level if committed in a particular way, such as with the involvement of minors, resulting in death, or as part of gang activity.

HONG KONG

In Hong Kong, there are different sentencing guidelines depending on the substance involved. The courts establishing and reviewing sentencing tariffs consider how harmful the drugs are (i.e. how often they lead to fatalities) and how addictive they are.

JAPAN

Low-level drug-related offences in Japan include the use, possession or transfer of a drug without the intention of profiting from the transfer, with regulations for each type: stimulants, cannabis, opium, narcotics and psychotropics. The use of cannabis does not constitute an offence in Japan. Trafficking is regarded as a high-level offence (regardless of the amount or price of drug traded).

MEXICO

The criminal legislation of Mexico prohibits conduct relating to drug production, commerce and supply. There is no low-level drug offence as such in Mexico. Under thresholds defined in the law, possession of certain drugs for personal consumption will not be prosecutable, but in practice Mexican police tend to prosecute. This is mainly due to the very low thresholds established in the law.

NEW ZEALAND

There are no low-level drug-related offences as such in New Zealand. The severity of an offence is determined by the type and quantity of the drug to which the offence relates, rather than the conduct. In New Zealand, controlled drugs are divided into three different classes based on their perceived risk of harm. Drugs in Class A (such as methamphetamine) which has the highest sense of risk will have more severe punishments for the same conduct as drugs in Class C (such as cannabis).

For example, supplying or dealing a Class A drug is punishable by up to life imprisonment; supplying or dealing a Class C drug is punishable by up to three months' imprisonment. For all three classes, drug use and possession of drugs is a criminal offence; however, the severity of the punishment is higher if the drug is Class A than for those in Class C.

PHILIPPINES

Philippine law does not explicitly define low-level drug-related offences; however, there are drug-related offences that are less severely punished than others. These include, but are not limited to, the first offence only of manufacture or possession of equipment to consume drugs and the use of drugs. However, where: (i) the offender has committed this offence at least once before, then the offence is punishable by imprisonment for a longer term; and (ii) the quantity of drugs in the body exceeds a mere residue, then the offence will qualify as drug possession which is punishable by a longer term of imprisonment. This is indicative of the Philippines' tough stance on illicit drugs.

POLAND

There is no legal definition of low-level drug-related offences under Polish law; however, in minor cases (i.e. when the court considers that the harmfulness of the offence was negligible), courts have an option to adopt a more lenient approach while sentencing or even to discontinue the procedure. Drug-related offences under Polish law comprise drug trafficking, transporting, importing, exporting, placing on the market, supplying, cultivating and possessing. Provisions of law do not explicitly prohibit the use of drugs. However, the Polish Supreme Court has stated that every possession of a narcotic drug or a psychotropic substance constitutes possession within the meaning of Article 62(1) of the Act on Counteracting Drug Addiction and, as use of drugs is often related to possession of such drugs, in effect there is an indirect penalisation of drug use.

PORTUGAL

Drug-related offences under Portuguese law comprise drug trafficking, cultivating, manufacturing, extracting, preparing, supplying, selling, purchasing, transporting, importing, exporting and possession.

Drug use and possession for personal consumption, under specific thresholds, do not constitute criminal offences. However, they are administrative offences. Possession of drugs over the prescribed thresholds would be categorised as drug trafficking.

RUSSIA

Russian law provides for two separate types of offences – criminal offences which are covered by the Criminal Code and may entail imprisonment, and administrative offences which are much less severe, covered by the Code of Administrative Offences, and which may entail a fine and/or an administrative arrest of up to 15 days.

Administrative offences include: (i) illegal acquisition, storage, transportation, manufacture, possession without the purpose of sale of narcotic drugs, psychotropic substances or their analogues, as well as illegal acquisition, storage and transportation without the purpose of sale of plants (their parts) containing narcotics or psychotropic substances below a threshold; and (ii) use of drugs or psychotropic substances (or new potentially dangerous psychoactive substances) without a doctor's prescription or non-fulfilment of a lawful demand of an authorised official to undergo a medical examination for the state of intoxication by a person with respect to whom there are sufficient grounds to believe that he/she has consumed narcotics or psychotropic substances without a doctor's prescription or new potentially dangerous psychoactive substances.

In addition, certain criminal offences can be considered "low-level" if the activity is not for the purpose of resale and/or involving a substantial volume. These offences are: unlawful acquisition, storage, transportation, preparation, recycling of drugs, psychotropic substances or their analogues as well as unlawful acquisition, storage, transportation of plants (their parts) containing drugs or psychotropic substances.

SPAIN

Under Spanish law, possession of small amounts of drugs for personal use or use of drugs in public spaces is considered an administrative offence, and therefore low-level.

Cultivating, manufacturing, encouraging, enabling or facilitating in any way the illegal consumption of toxic drugs, narcotics or psychotropic substances or possessing them for these purposes constitute criminal offences. The Spanish criminal law also

distinguishes between two types of drug trafficking: dealing in drugs that cause serious damage to health (known as hard drugs, such as heroin, cocaine, LSD, etc.) and all the rest (known as soft drugs, such as cannabis, etc.).

UNITED STATES

In the United States, drug-related offences are covered under both state and federal law. However, in general, the lowest-level offence relates to possession for personal use. Moreover, many states have passed laws either fully or partially decriminalising certain marijuana possession offences, meaning no arrest, incarceration, or criminal record for the first-time possession of a small amount of marijuana for personal consumption. In most decriminalised states, these offences are treated like a minor traffic violation. These states are: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii (effective as of 2020), Illinois, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, and Vermont.²⁵

When a state or federal government classifies a substance as "controlled," the use and distribution of the substance is governed by law. Often, controlled substances are classified into different schedules under federal and state statutes. While it varies from state to state, generally Schedule I means the drug is deemed highly addictive, without accepted medical use, and not safe even under medical supervision. Schedule II means the drug is deemed highly addictive, has medical uses and may lead to severe drug dependence. Schedule III means the drug has a low potential for abuse, has accepted medical uses and is deemed to have a moderate risk of dependence. Schedules IV and V mean the drug has potential for drug abuse, has accepted medical uses and has limited impact for dependence.

In **Arizona**, personal possession (other than possession for sale, production, manufacturing or transportation for sale) or use of a controlled substance is generally treated as a less severe class of felony.

In **California**, possession for use of a controlled substance is generally treated as a misdemeanour punishable by not more than one year in prison. In addition, any person convicted of non-violent drug possession, absent other prior convictions or extenuating circumstances, receives a sentence of probation rather than incarceration.

In **Colorado**, possession of controlled substances without the presence of unlawful distribution or manufacturing tends to constitute a lower-level drug-related offence.

²⁵ *Marijuana Overview*, National Conference Of State Legislatures, www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last visited Aug. 30, 2019).

In **Illinois**, persons convicted of the manufacture, trafficking or possession of controlled substance will be charged with a Class 3 Felony (1 being the most severe, and 4 the lowest-level felony) if the amounts of the controlled substance are less than 1g of heroin, fentanyl, cocaine, 10g of morphine, 5g of LSD, 50g of peyote, and as otherwise detailed in the statute. Possession of amounts less than 15g of heroin, cocaine, morphine, LSD and others set forth in the statute will be a Class 4 Felony.

New York drug laws classify drug offences according to the type and weight of the drug possessed or sold, ranging from Class A felonies (most serious) to Class E felonies (least serious). Class A felonies include offences such as possessing at least 227g of a narcotic and selling at least 142g of a narcotic. Class E felonies include offences such as possessing more than 227g of marijuana. There are also a number of misdemeanour drug crimes, such as selling 2 grams or less of marijuana

or possessing a chemical with intent to use it to produce methamphetamine. Moreover, in New York, there are five schedules of controlled substances (Schedules I to V).²⁶

In **Ohio**, the lowest-level drug offences apply to possession where the conduct involves smaller quantities of substances (e.g. less than 200g of marijuana, less than 5g of cocaine, or less than 1g of LSD). Controlled substances are broken down into 5 schedules (Schedule I to V).²⁷

In **Washington**, smaller-scale possession is a Class C, rather than Class B felony. The manufacturing, possession or delivery of controlled substances in large quantities is considered trafficking. Washington also has five schedules and corresponding test schedules for controlled substances (Schedule I to V).²⁸

In **West Virginia**, the lower-level crimes are divided into possession, possession with intent to distribute and drug distribution (along with certain other specified crimes). The criteria for controlled substances are divided into five schedules (Schedules I to V).²⁹

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are particularly relevant for female offenders?

ARGENTINA

The Argentine regime is gender-neutral but there are some mitigating factors (such as personal circumstance), which might disproportionately affect women. Such personal circumstances include: education; previous conduct of the offender; the causes that moved the offender to commit the crime; and how poor the offender is and/or how difficult is for the offender to earn a living. Further, judges may consider other personal circumstances as long as deemed relevant for the case.

AUSTRALIA

The Australian regime does not contain any gender-specific provisions. However, aggravating circumstances appear to be more likely to disproportionately affect female offenders. Leniency based on mitigating circumstances appears to be unevenly applied.

COLOMBIA

The Colombian regime is gender-neutral and does not refer to factors that are particularly relevant for female offenders. However, house arrest and parole may be used as an alternative to pre-trial detention if the accused: (i) is a pregnant woman with two months or less until expected birth or if she gave birth fewer than six months ago; and/or (ii) has a child that is 12 years or younger or has a disability that demands permanent care and attention. There have been other, but so far unsuccessful proposals for legislative amendments in relation to women convicted of low-level drug-related offences.

COSTA RICA

Costa Rican criminal law includes some mitigating factors which provide for a more favourable treatment of vulnerable female offenders. In practice, the courts also analyse a woman's position as part of the culpability study of supply cases.

26. N.Y. PUB. HEALTH § 3306 (McKinney, current through L.2019, ch. 186).

27. OHIO REV. CODE ANN. § 3791.41 (West, current through Files 1 to 9, immediately effective RC sections of File 10, and Files 11 to 14 of the 133rd Gen. Ass. (2019-2020)).

28. WASH. REV. CODE ANN. §§ 69.50.212 (West, current with all currently effective legis. from the 2019 Reg. Sess. of the Washington Legis.).

29. W. VA. CODE ANN. §§ 60A-2-203 - 60²-2-212.

ECUADOR

Ecuador's criminal law does not in general make any distinction between offenders based on sex or gender but provides for a number of mitigating factors (e.g. poverty, coercion) that can be especially relevant for women. Pregnancy can mean an offender is not incarcerated immediately and is considered an aggravating factor in cases where a pregnant woman is used to commit the offence.

ENGLAND AND WALES

There are no general gender-specific aspects to sentencing, but some factors, including the role of the offender in the drug-trafficking chain, must be taken into account when determining the sentence which may be especially relevant for female offenders.

FRANCE

No legal source seems to include factors especially relevant to female offenders. Please note that there are no sentencing guidelines in French law.

GERMANY

There are no particular gender-specific aspects to sentencing for drug-related offences. However, German criminal law recognises some factors that must be taken into account when determining the sentence which may especially affect female offenders, e.g. being a single parent.

HONG KONG

The case law suggests many considerations for sentencing (including the type and quantity of drugs involved, the purpose of the drug offence, the defendant's criminal record and the presence of paraphernalia associated with packaging and trafficking drugs), but there does not seem to be any factor particularly relevant to gender.

JAPAN

There is no sentencing legislation or guidelines in Japan, as Japanese courts have full discretion in setting sentences within the range set out in drug-related offences regulations. Japanese courts tend to follow similar precedents to maintain equality between cases.

MEXICO

To date, there are no sentencing legislation or guidelines in Mexico that include reference to factors which are disproportionately relevant to female offenders. Notwithstanding this, judges in Mexico have an obligation to address the personal situation of each accused.

NEW ZEALAND

The legislation is drafted in mostly gender-neutral terms, though sentencing reports acknowledge differences for female offenders.

PHILIPPINES

The sentencing legislation appears to be gender-neutral in the Philippines and there are no general gender-specific aspects to sentencing. However, before the death penalty was abolished in the Philippines in 2006, the death penalty could not be imposed on pregnant women.

POLAND

Polish legislation does not differentiate between offenders based on their gender. However, some factors provided in the law for drug-related offences can be especially relevant for female offenders. For instance, the perpetrator's personal situation as well as his or her behaviour before and after the offence must be taken into account.

PORTUGAL

The state of pregnancy of the offender is understood as the only gender-specific factor which is accepted to be taken into account in practice, even though not expressly stated as a mitigating factor in the law. In such cases, the judge will take into account the offender's special state of vulnerability and the possibility of giving birth in a prison facility when deciding on the sentence.

RUSSIA

Mitigating and aggravating factors are applicable to all crimes and non-gender-specific (except for pregnancy, which is the only gender-specific mitigating factor). However, some mitigating factors, such as being a carer for small children, can be expected to especially affect women.

SPAIN

The Spanish regime is generally gender-neutral. However, the personal circumstances of the offender must always be taken into account, which could lead to women being especially affected (e.g. child dependants or single-parent status).

UNITED STATES

Federal sentencing guidelines are intended to make the US regime “*entirely neutral*”. However, different states diverge significantly in relation to the approach taken and the discretion of the judiciary in making sentencing decisions.

For example, some states, such as Colorado and Ohio, provide principles-based sentencing legislation which provide a wide discretion to the judiciary in making

sentencing decisions. Others, such as New York, provide for more technical sentencing based on the level of possession, with some limited judicial discretion. Many states’ sentencing guidelines are intended to be entirely neutral as to factors such as race, sex, national origin, creed and socio-economic status. Not many states explicitly recognise factors which are particularly relevant to females, although most recognise mitigating factors such as coercion and aggravating factors such as violence.

QUESTION 2A:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, role in organised crime, housing situation, foreign national or ethnic minority; did she have legal representation? What quantity of drugs constitutes “trafficking”?

ARGENTINA

Factors that are considered (for both male and female offenders) include age, level of education, and personal relationships and circumstances.

AUSTRALIA

Across Australia, sentencing legislation does not contain any specific gendered mitigating factors that a court must consider on sentencing an offender.

In **New South Wales**, the sentencing provisions do not include any mitigating factors which are specifically relevant for female offenders. However, general mitigating factors which may disproportionately affect women include the offender acting under duress and the likelihood of reoffending.

In **Victoria**, the Sentencing Manual specifically notes that gender or hardship to an offender’s family is not enough to discount a sentence and is only relevant in exceptional circumstances (this is not restricted to drug-related offences). However, “*exceptional circumstances*” is a difficult threshold to meet.

The sentencing provisions in **Queensland** do not make mention of specific gendered factors. In fact, the appeal courts in Queensland have consistently held that family responsibilities specifically should not overwhelm other considerations.

In the **Northern Territory**, the sentencing legislation does not expressly refer to women or gender and includes only very general provisions which may mitigate sentencing. Further, customary law and cultural practice must not be taken into account, which may adversely affect Indigenous women.

Across **Australia**, legislation does not specify a quantity of drugs that constitutes “*trafficking*”. Instead, in most jurisdictions the quantity of drugs to which the offence relates determines the maximum possible penalty. In Victoria, the Northern Territory and New South Wales there is a step-up in possible penalties for larger quantities (e.g. in Victoria, the lowest maximum penalties start at 15 years’ imprisonment for trafficking of any quantity and up to life imprisonment for trafficking of a “*large commercial quantity*”). In Queensland, the quantity of drugs trafficked is not relevant at the legislative level, and there is a maximum penalty of 25 years’ imprisonment for the offence, which is influenced by aggravating factors.

COLOMBIA

Colombian legislation includes a number of mitigating factors considered during sentencing but does not include any factors that are particularly relevant for female offenders. Generally applicable mitigating factors include, inter alia, insurmountable coercion of others; insurmountable fear; unawareness of the unlawfulness; and the right of defence. Furthermore, the Colombian Criminal Code provides that individuals suffering from psychological immaturity, mental disorder, socio-cultural diversity or similar states shall not be subject to sentencing.

The Colombian Criminal Code includes no minimum threshold in terms of quantity of drugs that constitutes “*trafficking*”.

COSTA RICA

The law includes the following mitigating factors in relation to smuggling drugs into prisons (as a visitor), although they have been considered in other drug-related cases to mitigate the sentences of women:

- poverty.
- head of a vulnerable household.
- being in charge of minors, elderly or disabled persons.
- being an elderly woman in vulnerable conditions.

Precedents show that courts have also taken into account violence and coercion as mitigating factors. For instance, there have been cases where female offenders have been absolved of introducing drugs into prisons where they have been found to have been coerced.

There is some uncertainty in the law and in the jurisprudence as to the quantity of drugs which constitute “trafficking”, but possession of a large quantity of drugs will give rise to a presumption of trafficking.

ECUADOR

The only gendered factors considered by Ecuadorian law relate to pregnant and nursing mothers. Ecuadorian law prohibits the incarceration of a pregnant woman until 90 days after birth (alternative sentences such as house arrests can be used instead). Nursing mothers are also able to serve their sentences in minimum security facilities with their child.

Criminal law also provides that judges must especially protect those that, by reason of their economic, physical or mental condition, are facing vulnerable circumstances. In particular, committing an offence under intense fear or under violence or committing an offence against poverty without violence and under the influence of economic circumstances constitute mitigating factors. Where two mitigating factors apply, the minimum penalty will be applied and reduced by one-third, as long as there are no aggravating circumstances.

The quantity of drugs required to constitute trafficking depend on the substance in question. The thresholds for trafficking were reduced in 2015 which has blurred the line between illegal low-level trafficking and (in theory) legal possession of drugs for personal use.

ENGLAND AND WALES

Certain factors the court must take into consideration to decide the category range of the offence could be particularly relevant to female offenders.

The court is directed to consider the offence as less serious if the offender had a “lesser role”, which could be demonstrated by characteristics including:

- performing only a limited function under direction.
- being engaged by pressure, coercion or intimidation.
- being involved through naivety or exploitation.
- having no influence on those above in a chain.
- having very little, if any, awareness or understanding of the scale of the operation.

There is no minimum quantity required to constitute a “trafficking” offence, but the Guideline specifies that the Court must also consider the quantity and class of the drug concerned in determining the category range. This means that the smaller the quantity of the drug, the lower the starting point for the sentence, with the smallest category being about 150g.

After the category range is determined, the non-exhaustive list of mitigating factors may justify the court adjusting the sentence downwards from the category’s starting point and some of these factors may be particularly relevant to female offenders, such as:

- involvement due to pressure, intimidation or coercion falling short of duress.
- the offender’s vulnerability was exploited.
- the offender is a sole or primary carer for dependent relatives.

FRANCE

Sentencing legislation provides for the following mitigating circumstances, which are not gender-specific: legitimate defence; state of necessity; and denunciation.

These legitimate defence and necessity mitigating factors recognise situations of threats or acute danger of the defendant. French law makes no reference to a minimum quantity of drugs required to constitute “trafficking”.

GERMANY

The sole mitigating factor relevant to female offenders only is pregnancy. However, pregnancy does not necessarily result in a more lenient sentence.

Other factors include family situation (particularly responsibility for underaged children), coercion and duress, or being under the dominant influence of another. The quantity of drugs can be a mitigating factor, particularly when so small as to be for self-consumption.

The quantity of drugs is not generally decisive for whether an offence constitutes “trafficking”.

HONG KONG

There has been some discussion about whether it would be a mitigating factor that the drugs were meant to be distributed to a friend at no charge or shared, rather than sold for profit. However, judicial statements have indicated that this may not be a mitigating factor in itself. Overall, the Hong Kong courts appear to be hesitant to reduce punishments for factors beyond the type, amount and purpose of the drug offence.

JAPAN

There is no sentencing legislation or guidelines under Japanese law. There is no set quantity for trafficking.

MEXICO

The law sets out certain mitigating factors and lays out certain criteria for sentencing based on the: (i) seriousness of the crime; (ii) specific condition of the victim; and (iii) level of guilt and participation of the offender. The judge may take into consideration mitigating factors such as age, level of education, social and economic situation of an offender, including poverty, as well as the underlying motivation for carrying out an offence, ethnic origin and all other special and personal conditions that affected the offender at the time of the crime as long as they are relevant to determine the applicable penalty.

Mexican criminal legislation distinguishes between different levels of participation in a criminal offence. For accomplices, who have no control over the realisation of the criminal conduct, the law prescribes that the penalty can be reduced by up to one-third of the corresponding penalty. The law also provides for the concept of "autoría mediate" or acting through another person.

The person used as an "instrument" for the criminal conduct through coercion for instance would have no criminal responsibility. However, this provision is not often used in practice.

The quantity of drugs required to constitute trafficking depends on the substance in question. While possession of certain substances for personal consumption is in theory not criminalised, in practice Mexican police tend to prosecute. This is mainly due to the very low (quantity) thresholds for trafficking.

NEW ZEALAND

Sentencing legislation does not specifically mention gendered mitigating factors, but refers to general factors such as age and evidence of previous good character.

What quantity of drugs is presumed to be for supply/trafficking varies depending on the drug. For example, any amount of methamphetamine, amphetamine, morphine, MDMA (commonly known as ecstasy) at 5 grams or over will be presumed for trafficking. Other drugs such as cannabis plant will be 28 grams or 100 cigarettes containing the drug, and cocaine and heroin is set at half a gram. Any controlled drug that is not specified will be presumed for trafficking at and over the level of 56 grams.

PHILIPPINES

Mitigating factors appear to be gender-neutral in the Philippines. The Supreme Court has set out the criteria that judges must consider when deciding on the appropriate sentence within the prescribed limits. In particular, judges consider factors including, but not limited to, the age of the offender, the gravity of the offence and the circumstances under which the offence was committed.

POLAND

As a general rule, under Polish law, the severity of the sentence should not exceed the degree of guilt. Personal circumstances of the offender are one of the factors that should be taken into account when deciding on a sentence. However, Polish law does not specifically mention factors as dependent children/sole head of a family. Other mitigating factors which can be disproportionately relevant for women include minor gravity of the offence, limited role as a facilitator or lack of awareness.

PORTUGAL

Under Portuguese law, mitigating factors may either justify the unlawfulness of the offence or exclude the culpability. There are no gender-specific mitigating factors. However, the Criminal Code expressly attributes the effect of excluding guilt to certain circumstances including unawareness of illegality or lack of freedom of decision.

Furthermore, the judge is obliged to take into account all relevant circumstances of the committed crime including the background and attitude of the offender.

As drug use is decriminalised in Portugal, the law specifies the amounts as per drug type which can be held by a single individual. Drug use and possession for personal use remain administrative, rather than criminal offences.

RUSSIA

The following factors may be considered for low-level drug-related offences: committing a low-level offence for the first time due to coincidence of circumstances; being under 18; pregnancy; having small children; committing an offence due to difficult life circumstances (this may include, inter alia, difficult life circumstances where a person has limited independent financial resources); committing an offence due to physical or mental coercion or due to economic need or other dependence; and confessions, active assistance in disclosure of a crime, criminal prosecution of other defendants and search for criminal proceeds. Pregnancy is the only explicitly gender-related factor even though some mitigating factors might be particularly relevant for women (e.g. having small children, difficult life circumstances or physical or mental coercion).

In Russia, there is also specific defence based on gender. A sentence for a low-level offence, including a low-level drug offence, may be deferred if a woman is pregnant or has a child under 14 years. Some drug-related offences may also be deferred if the perpetrator is: (i) sentenced to detention for the first time; or (ii) recognised as a person dependent on drugs and has voluntarily accepted to get treatment for drug dependency.

If the quantity of drugs exceeds the “substantial volume” threshold described above, this would constitute “trafficking” (transportation) for the purposes of Article 228 part 1 of the Code. For example, for each of cocaine and heroin it is more than 0.5 gram, for hashish it is more than 2 grams and for LSD it is more than 0.0001 gram.

SPAIN

There are no gender-specific mitigating factors in Spanish law. However, the judge is obliged to take into account all relevant circumstances of the committed crime including the personal circumstances of the offender, some of which may disproportionately affect female offenders (children depending on them, single-parent families, poverty, housing situation, racial minority or nationality) and the seriousness of the offence. Mitigating factors may either justify the unlawfulness of the offence or exclude the culpability (e.g. the offence was committed under threat or duress, or in a situation of necessity).

Drug quantity thresholds for “trafficking” depend on the type of drug, for example, 100g is the threshold for marijuana and 0.003g is the threshold for LSD.

UNITED STATES

In the United States, both federal state laws come into play on drug-trafficking cases. Pursuant to federal drug-trafficking laws, the federal government prohibits manufacturing, distributing, dispensing or possessing controlled substances. Sentencing is based on the quantity and the type of the prohibited substance. For instance, 10 years to life in prison for 1 kilogram of heroin, 5 kilograms of cocaine and 1,000 kilograms of marijuana; five to 40 years for 100 grams of heroin or 500 grams of cocaine; and not more than five years for 50 kilograms of marijuana. Like federal law, all states prohibit the manufacture, distribution or possession of controlled substances.

In the United States, most states do not explicitly recognise mitigating factors, which are especially relevant to women. However, most states recognise certain mitigating factors such as coercion, which may affect women more. The following are such mitigating factors:

- in **California**, if the defendant was motivated by a desire to provide necessities for his or her family, or himself or herself.
- in **Illinois**, if imprisonment of the defendant would entail excessive hardship to his or her dependants, or if, at the time of the offence, the defendant is or had been the victim of domestic violence and the effects of the domestic violence tended to excuse or justify the defendant’s criminal conduct. The judge may also consider substantial grounds tending to excuse or justify the defendant’s criminal conduct.

QUESTION 2B:

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime?

ARGENTINA

Argentine legislation includes a number of aggravating factors which, where applicable, will result in more severe sanctions. Of particular relevance are crimes: (i) against a pregnant woman; (ii) using children under the age of 18; (iii) with violence, intimidation or deception; (iv) in the vicinity of certain locations, such as teaching institutions, welfare centres; and (v) by a teacher, educator or an employee of the educational system in general, abusing his/her specific function.

AUSTRALIA

In **New South Wales**, courts must take into account aggravating factors, which may result in harsher penalties for female offenders, for example, aggravating factors which must be taken into account include committing an offence in the presence of a minor, the offence being part of organised crime and the actual or threatened use of violence.

In **Victoria**, neither the Sentencing Act nor the Sentencing Manual specifically mentions aggravating factors in relation to drug-related offences.

In **Queensland**, relevant aggravating factors include the effect of the offence on a child and the use of violence. The court must take such factors into account. Further, participation in organised crime carries a mandatory sentence.

In the **Northern Territory**, aggravating factors must be taken into account and include the use or threat of violence and whether the offence involved substantial planning and organisation, which would encompass organised crime.

COLOMBIA

Colombian legislation provides for several aggravating factors that are drafted in gender-neutral terms and relate to the offender taking advantage of a particularly vulnerable person. These include: (i) if the offence is carried out using a vulnerable person such as a minor, a person suffering from a mental disorder or a dependent person; (ii) if the offence is carried out in educational, cultural, sports, recreational or holiday centres or in prisons; and (iii) if the offender is a teacher. There is a separate offence for supplying, administering or facilitating a minor with drugs that produce dependence or induce the minor to consumption.

COSTA RICA

There are a number of potentially relevant aggravating factors provided for in the law, including:

- drugs being distributed to minors, disabled persons or pregnant women.
- distribution at education, cultural or sports centres, as well as in prisons or at public shows.
- use of minors, disabled persons or people dependent on drugs for the execution of offences.
- offences executed by a public officer, abusing his or her position.

ECUADOR

There are several general aggravating factors provided by law, including:

- using children, adolescents, elderly persons, pregnant women or disabled individuals to perpetrate the offence.
- perpetrating the offence to the detriment of children, adolescents, elderly persons, pregnant women or disabled individuals.
- Aggravating factors specific to illicit drug trafficking include selling, distributing or giving drugs to children or adolescents.

ENGLAND AND WALES

A non-exhaustive list of aggravating factors may justify the court adjusting the sentence upwards from the starting point specified in the Guideline. For “trafficking” offences, these include:

- the offender using or permitting a person under 18 to deliver a controlled drug.
- sophisticated nature of concealment and/or attempts to avoid detection.
- attempts to conceal or dispose of evidence.
- presence of a weapon.

FRANCE

Sentencing legislation takes into account non-gender-specific aggravating factors for all offences, such as repetition of offences and links to organised crime.

The Criminal Code also includes aggravating factors specifically applicable to drug-related offences. For example, selling illegal drugs to a person that has sold illegal drugs to a minor or selling in/near a school or a public administration building are aggravating factors.

The Public Health Code also provides an aggravating factor specifically applicable to offenders who are public officials or employees of transport companies that have used illegal drugs in the course of their profession.

GERMANY

There are no aggravating factors that apply only to women. Aggravating factors under German law include the attitude and background of the offender, and background of the crime (e.g. previous sentences, extensive damage or negative impact on victim).

Aggravating factors specific to the Narcotics Act include acting on a commercial basis, endangering health of several people, involvement of minors, assaults by a gang or carrying a gun.

HONG KONG

Harsher sentences are given out to “bosses” in Hong Kong or those who play an “aggravated” role in the drugs trade. Another aggravating factor is the sale of drugs to a minor. Courts can also consider an “international element”, pursuant to which the transportation of drugs across the border can result in a higher sentence.

JAPAN

There are no sentencing legislations or guidelines in general or specifically in relation to drug-related offences in Japan.

MEXICO

Aggravating factors include the involvement of minors. Participation in organised crime is not an aggravating factor but a crime per se. Organised crime is legally defined as the association of three or more persons to engage in permanent or reoccurring criminal offences. In practice, the result is that a drug offence linked to organised crime will be more severely punished.

NEW ZEALAND

The use of violence and involvement in a criminal organisation are both aggravating factors. Where the supply of drugs is concerned, it is also an aggravating factor if those drugs are supplied to children or young people.

PHILIPPINES

Aggravating factors are gender-neutral in the Philippines. The Supreme Court has previously considered that the absence of aggravating factors (including, but not limited to, disregard for the victim’s age or sex, commission of the crime in consideration of a financial gain, rewards or promise, commission of the crime by taking advantage of superior strength) can reduce the maximum term of imprisonment. However, the use of minors or mentally incapacitated individuals is punishable by life imprisonment, as is also the case where the victim is a minor or mentally incapacitated individual.

POLAND

There are several aggravating factors under Polish law, including: (i) the complicity of minors; (ii) the commission of an offence against a person who is helpless due to age or a health condition; and (iii) intent to obtain substantial material or personal benefit. Drug-specific aggravating factors include supplying or inciting a minor to use narcotic drugs or psychotropic substances.

PORTUGAL

There are several aggravating factors under the Portuguese Narcotics Law, including:

- substantial monetary compensation.
- participation in other organised criminal activities of an international scope.
- collaboration of minors or disabled persons.

However, as with mitigating factors, the law does not distinguish between men and women, social background, ethnicity, religious beliefs, etc. Therefore, there is no provision of aggravating factors only applicable to women.

RUSSIA

All aggravating factors are equally applicable by courts to all criminal offences and to both genders. Aggravating factors include: (i) recidivism; (ii) involvement in organised crime; and (iii) commission of a crime against a woman who is obviously in a state of pregnancy or against a minor or another defenceless or helpless person.

SPAIN

Involvement of minors and use of violence constitute aggravating factors. However, the aggravating factor of use of minors is applied restrictively in practice.

UNITED STATES

Many states recognise the involvement of minors, involvement of a pregnant individual and use of violence to constitute aggravating factors, but there is variation as between states.

For instance, in **West Virginia**, the penalties are harsher for drug-related crimes that involve sales to minors or are within school zones. A person convicted of a felony violation or incarcerated faces harsher penalties if: (i) a person convicted of a felony violation is 21 years of age or older and the person to whom the controlled substance was distributed is under 18 years of age at the time of the distribution; or (ii) a person convicted is 18 years of age or older and the distribution occurred in or within 1,000 feet of a school in West Virginia.³⁰

In **New York**, the criminal sale of controlled substances to a child constitutes a Class B felony for anyone over the age of 21, who knowingly and unlawfully sells a controlled substance to a person younger than 17 years old. New York's Penal law includes a broad definition of school grounds as: (i) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high,

vocational or high school; or (ii) any area accessible to the public located within 1,000 feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within 1,000 feet of the real property boundary line comprising any such school.³¹

In **California**, aggravating factors include that the defendant: (i) induced a minor to commit or assist in the commission of the crime; and (ii) induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.³²

In **Ohio**, aggravating factors relevant to sentencing include whether the offender committed the offence for hire or as a part of an organised criminal activity.³³

In **Arizona**, aggravating factors taken into account for sentencing include: (i) infliction or threatened infliction of serious physical injury; (ii) use or threatened use or possession of a deadly weapon or dangerous instrument; (iii) the presence of an accomplice; and (iv) the defendant is an undocumented alien in the United States or is engaged in the bringing of undocumented aliens into the United States. In addition, the knowing use of a minor in relation to drug offences increases the severity of the class of felony and makes the person convicted of such an offence involving a minor ineligible for suspension of sentence, probation, pardon or release from confinement until the sentence has been served or commuted.³⁴

QUESTION 2C:

With regard to drug supply, do they take into account the role of women in the chain? (e.g. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

ARGENTINA

The Argentine regime does not account for the role of women in the chain of drug supply.

AUSTRALIA

In **New South Wales**, there are very limited legislative provisions that would allow a female offender playing a minor role in a criminal drug enterprise to have her sentence mitigated on that basis. However, case law indicates that the sentence imposed on a woman with a drug dependency will be more lenient than a woman who

was seen as only seeking financial benefit. Case law also allows for a person's role in supply to be considered in sentencing; however, this is not gender-specific.

In **Victoria** and the Northern Territory, sentencing does not take into account the role of women in the supply chain. In the Northern Territory, involvement in substantial planning and organisation is potentially an aggravating factor.

In **Queensland**, if a female offender fits within the broad definition of a participant in a criminal organisation, mandatory prison sentences would apply, regardless of her role.

30. W. VA. CODE ANN. §§ 60A-4-406(a)-(b).

31. N.Y. PENAL LAW § 220.00(14).

32. 2018 Cal.R. Court Rule 4.421.

33. OHIO REV. CODE ANN. § 2929.12 (West, 2018)

34. Aggravating factors: A.R.S. § 13-701.D; Knowing use of a minor: A.R.S. § 13-3409.

COLOMBIA

The Colombian regime does not account for the role of women in the chain of drug supply.

COSTA RICA

The law does not provide for any specific obligation to take into account the role of women in the drug-supply chain. However, judges have some discretion (within the minimum and maximum sentences set by law) to take into account relevant circumstances which could include a woman's role.

ECUADOR

No specific provisions for women exist in this context. The severity of the penalty applied by a judge will depend on the scale of the offence (determined by the quantity of drugs involved) and this is used to differentiate between small-scale (drug courier) trafficking and large-scale trafficking. Ecuadorian law also distinguishes between "perpetrators" and "accomplices". Accomplices will receive a penalty corresponding to one-third to one-half of the penalty which applies for perpetrators.

ENGLAND AND WALES

As part of its consultation before implementing the Guideline in 2012, the Sentencing Council stated in 2012 that it intended the Guideline to reduce sentences for drug "couriers". As explained above, the role of the offender is one of two elements that is used to determine the category range of the offence and therefore the starting point for the sentence. However, the Guideline maintains the previous minimum suggested sentence of three years in custody for the importation of even a small quantity of Class A or B drugs.

FRANCE

Judges take various factors, such as violence, organised crime, involvement of minors and facilitating consumption, into account (including financial gain) when sentencing, but they are not addressed from a gender perspective.

GERMANY

Criminal Law takes the role in the drug-supply chain into account for either finding out the level of participation (perpetrator or participant) or for sentencing. Other individual factors such as the offender's financial interest, financial background or living circumstances are taken into account. No specific provisions for women exist in this context. Conversely, if the offender availed themselves of distressed persons taking advantage of their subordinate position, it may be an aggravating factor for the supply of drugs.

HONG KONG

While there is a trend of women acting as drug couriers to carry drugs into Hong Kong from elsewhere, no drug-related offences cases have specifically discussed gender to date. While "bosses" can expect a harsher punishment, there appears to be no recognition of the reasons why women become involved in drug-related offences. Lower-level involvement in the chain, or the fact that a person is trafficking only to pay for their own drug dependence, is not usually considered a mitigating factor.

JAPAN

There are no sentencing legislations or guidelines in general or specifically in relation to drug-related offences in Japan.

MEXICO

The role in the supply chain or the financial benefit from the crime is not taken into account and the offence will qualify as commercialisation of narcotics, subject to the full sentence provided for by the law.

NEW ZEALAND

Generally, the amount and/or value of the drug involved determines the sentence. However, case law has noted that "*Where offenders are at a low-level in the chain of command, then amount and value as aggravating factors, while still of importance, are less central.*" Courts have also made statements about the culpability of offenders in the supply chain which suggest that the manufacturer is the most culpable and a supplier is the least culpable. Sentencing guidelines also state that, if a person has limited involvement in the crime, this is a mitigating factor when determining the appropriate sentence.

This is, however, only one sentencing consideration and there are examples where females have had limited involvement in the crime but have not had their sentences adjusted because of the desire to deter involvement in illicit drug activities.

The sentencing guidelines also do not allow for consideration of gender and, with the Courts' focus on deterrence, there is often not much consideration for personal mitigating factors, where specific gender issues could be assessed.

PHILIPPINES

The sentencing legislation in the Philippines does not take into account the role of women in the drug-supply chain. The role of the perpetrator in the drug chain will be taken into account by judges to the extent that any person who organises, manages or acts as a financier of the sale, trading, distribution, transportation of drugs shall be sentenced to the maximum sentence prescribed by law.

POLAND

The Polish legislation on drug-related offences does not specifically mention organised crime. However, the Polish Criminal Code generally provides that the severity of punishment would depend on the role performed in an organised group and the motivation of the offender (i.e. financial gain would be an aggravating factor).

PORTUGAL

Regardless of gender, the participation in organised crime is an aggravating factor, as well as significantly profiting from the transaction.

RUSSIA

Courts take the individual's role in the drug-supply chain into account when looking at applicable rules and sentencing. Case law suggests there is little difference between men and women charged with similar offences.

SPAIN

The role in the drug-supply chain is taken into account; however, a drug courier will be punished less severely than the offences committed higher in the trafficking

chain. The same sentence would, however, be awarded regardless of gender. In fact, experience of crime in Spain has shown that more men than women are involved in drug trafficking, irrespective of their role within the organisation.

UNITED STATES

Under **Federal** sentencing guidelines, the applicable sentence may be decreased if a defendant was a "minimal" or "minor" participant in any criminal activity. There is no distinction between men and women charged with the offence. Some states will take into consideration the role of the offender in the drug chain. For example:

In **Arizona**, it is a relevant mitigating factor if the degree of the defendant's participation in the crime was minor, although not so minor as to constitute a defence to prosecution.

In **Colorado**, the level of participation of the defendant can be a mitigating factor.

In **California**, mitigating factors include the defendant being a passive participant or playing a minor role in the crime.

In **New York**, offenders who are not leading the drug operations – drug couriers, for example – and are not deriving large personal financial gain from the crime are classified as Class B to Class E offenders (which are of a lower level to more serious offences).

In **Washington**, it is an aggravating factor if the offender occupied a high position in the drug distribution hierarchy or committed the offence to maintain his or her position in the hierarchy of an organisation or committed the offence to benefit a criminal street gang.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

ARGENTINA

Overall, the case law shows that the Argentine courts do not place much weight on gendered elements or characteristics in setting prison sentences. There was one case identified in which judges considered carefully the socio-economic background of a female offender. However, despite the thorough analysis, the sentence was comparable/similar to other cases in which such an analysis had not been undertaken.

AUSTRALIA

In **New South Wales**, in practice, courts have noted gendered factors in their sentencing remarks, such as whether the woman had young dependent children, coercive male co-offenders and histories of abuse. However, it is not evident that these factors had a significant impact on sentencing. Emphasis is instead placed on guilty pleas and drug dependency and a consideration of the properties of successful rehabilitation.

In **Victoria**, courts sometimes consider the individual circumstances of an offender, and the wider context of their offending, including both negative family and social influences, and broader power dynamics in play with women offenders. A few cases mentioned gendered factors such as becoming involved in offending due to male partners or family members, and the difficulty of being separated from children and family by a custodial sentence. These considerations do sometimes reduce sentences but are not always decisive and early guilty pleas, previous offending and rehabilitation chances tend to carry more weight.

In **Queensland**, gendered factors are noted in judges' remarks at sentencing; however, it is often not clear whether this affects the sentence that is handed down. More emphasis is usually placed on guilty pleas, rehabilitation chances, youth and previous convictions (or lack thereof) than gendered factors such as young dependent children or a history of domestic violence. However, there are some examples where gendered factors have been taken into account and reduced a female offender's sentence.

In the **Northern Territory**, gendered factors are not consistently applied at sentencing. However, there are a couple of examples of courts taking gendered elements into account in sentencing by lower levels of the judiciary. However, a higher court explicitly stated that having a young child reliant on a female offender was not a "special circumstance".

COLOMBIA

Drug legislation in Colombia only permits a low-level of discretion in setting sentences.

COSTA RICA

Women will be treated more favourably if mitigating factors, such as: (i) poverty, (ii) head of a vulnerable household, (iii) in charge of minors, disabled or elderly dependants, or (iv) an elderly woman in a vulnerable condition, apply in their case. Judges also have some discretion when setting the final sentence (within minimum and maximum limits permitted by law).

ECUADOR

In practice, judges' discretion is limited by the applicable law which makes no explicit distinction between male and female offenders. However, judges may take into account the degree of participation, circumstances that in fact limit criminal responsibility together with any aggravating and mitigating factors in order to individualise sentencing for the offence committed.

ENGLAND AND WALES

The court has a limited amount of discretion when determining which category range to give the offence as the Guideline sets a structured approach which takes into account the role of the offender, the class and quantity of the drug.

However, the court will then use its discretion to consider the relevant mitigating and aggravating factors so as to adjust the sentence within the category range specified. In some cases, the courts may move outside of the range, but this is only in a minority of cases.

There are a number of cases where the courts in practice have discussed sentencing of drug-related offences in relation to potentially gendered elements specifically as a consideration of mitigating factors.

FRANCE

Courts of First Instance and Courts of Appeal have a very wide margin of discretion in defining the appropriate level of sanctions and will consider a spectrum of elements which could in practice include some gendered elements in certain cases. However, while it is difficult in France to have access to accurate data on sentences imposed, statistics for low-level drug offences show women are less sanctioned for drug-related offences than males in the French judicial system. There are some studies analysing possible factors for this.

GERMANY

In principle, the courts do not have discretionary power to incorporate gendered elements in sentencing decisions. Gender-specific elements will not be taken into account as mitigating or aggravating circumstances, as this constitutes a legal error and can be appealed.

HONG KONG

Hong Kong courts do appear to have a high level of discretion in determining sentences for cases; however, research did not uncover any cases where the courts have specifically discussed gender, or considered factors specifically related to gender as relevant to sentencing.

JAPAN

The Japanese courts have full discretion in setting sentences within the range set out in the relevant drug regulations. Precedents do not tend to consider gendered aspects when determining appropriate sentence lengths. Rather, mitigating factors such as whether this is the offender's first offence are usually taken into account.

MEXICO

Mexican law does not take into account gendered elements. However, judges must individualise sentences and they have a certain level of discretion in setting the sentence (within the limits provided by law). Additionally, the current trend seems to be to increasingly take into account a woman's vulnerable position (*tendencia garantista*) which may encourage the judiciary to find a family that is close to the woman's home or to use house arrest in special circumstances. There is currently a lack of detailed research and statistics in Mexico that consider the lengths of prison sentences handed down for low-level drug-related offences perpetrated by women.

NEW ZEALAND

In practice, the courts take a broad range of factors into account. For example, courts have taken into account the offender's care-giving responsibilities (such as having children or other dependent family members), duress or other pressure experienced by the offender, the offender's upbringing and personal history and abuse or other trauma experienced by the offender. However, in some cases, these factors are noted but do not necessarily adjust the sentence because the main consideration of courts in sentencing for drug-related offences is deterrence and community protection. This means that the courts give little or no weight to personal mitigating factors in sentencing drug-related offences.

PHILIPPINES

The court has a limited amount of discretion when determining the most appropriate sentence within the lower and upper limits prescribed by law. Recently, plea bargaining became available for certain drug-related offences (i.e. possession of certain quantities of drugs, and sale of certain quantities of marijuana and methamphetamine hydrochloride). However, probation remains forbidden for such offences, even in the case of minors. There are unfortunately no available statistics for drug-related offences on sentencing and/or the use of plea bargaining to indicate whether or not the courts take into account gendered elements in setting sentences for female low-level drug offenders.

POLAND

Polish courts enjoy a high degree of discretion when setting sentences for low-level drug-related offences. The analysis of some relevant cases shows that judges do exercise their discretion to examine the perpetrators' personal situations and that gender-related factors (such as the role of the female offender as a mother in case No. IV K 475/16) can be considered in this

context. However, case law also indicates that male and female offenders that commit the same offence receive equal sentences.

PORTUGAL

Since the criminal law does not provide for any expressly gendered factors and judges do not have the discretion to take into account factors which are not envisioned in the Portuguese criminal code, the possibility for judges to consider gendered elements when sentencing for drug-offences is null in principle.

RUSSIA

All mitigating/aggravating factors are applicable to all criminal offences and the courts are obliged to take them into account, but they have discretion with regard to their impact on the severity of the sentence. Case law suggests there is little difference between men and women charged with similar offences. However, courts are obliged to take into account mitigating factors (such as pregnancy, small children, or a difficult life situation), but it is entirely up to them to decide how this will affect the sentence. From the available court practice, we have seen that presence of such factors may decrease the sentence for a period between one month and one year of imprisonment, the usual one being six months.

SPAIN

Spanish courts do not take gender into account for any offences relating to drug trafficking or any other drug-related offences. However personal circumstances of offenders are taken into account in when sentencing "drug couriers". For example, in 2001 the Provincial Court of Zaragoza considered a high qualified state of necessity in the case of a drug courier who was a father with six children and a pregnant wife, unemployed and without public subsidies. Public prosecutors in Spain find, however, that drug couriers tend to be men rather than women.

UNITED STATES

Generally speaking, sentencing decisions from the trial-court level are not publicly available and not a lot of drug-specific sentencing research exists. From the limited data available, the State courts do not appear to take explicitly gendered factors into account during sentencing. The state of **Ohio** may be an exception though where on appeal there are sporadic examples of cases in which gendered considerations are taken into consideration.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

ARGENTINA

The case law over the last few years show that prison sentences of around four to five years were imposed on female offenders at the federal level for drug-related offences. Due to widespread use of abbreviated trials in the Argentine criminal regime, there are certain limitations on the possibilities to conduct a fully comprehensive analysis on this question.

AUSTRALIA

Statistics indicate that women in **New South Wales** are likely to receive more lenient sentences than men for drug-related offences. However, Indigenous women appear to receive harsher sentences at a higher rate for possession offences, including triple the rate of prison sentences.

For possession offences, the most common penalties include fines and bonds without conviction, while a term of imprisonment is most common for trafficking offences. The average sentence for a possession offence is 3.2 months and the average sentence for trafficking is 13 months.

Statistics in **Victoria** suggest that women are more likely to receive less severe sentences by category of offence (e.g. possession or trafficking). However, the severity of the sentences within a category cannot be determined from the statistics reviewed (e.g. low-level trafficking offences cannot be separated from high-level trafficking offences). It was reported that the raw number of low-level drug offence cases involving women increased by 126% between 2007 and 2017.

Based on reported data in **Queensland**, women are more likely to receive a wholly suspended sentence for trafficking and more likely to receive a good behaviour bond and/or avoid a fine for possession. The average sentence for a possession offence is 7.2 months, while the average sentence for trafficking is 3.6 years.

In the **Northern Territory**, from 2015 to 2016, 17 female offenders were imprisoned for an “*illicit drug crime*”. The most common sentence lengths were between two to five years and three to six months. While it can be assumed that these different ranges relate to different offences, this was not clear from the statistics available.

COLOMBIA

According to reported data, women appear to be more likely to receive a non-custodial sentence such as house arrest or electronic surveillance than a prison sentence. Of the 16,743 offenders sentenced to a prison sentence for drug-related abuses, 2,515 (15%) are women. With house arrest, 2,628 out of the 7,482 individuals are women (35%) and with electronic surveillance, 220 out of 631 individuals are women (35%).

COSTA RICA

Drug-related offences carry a minimum sentence of three years (but in some cases no sentences have been imposed) and a maximum sentence of 15 years (20 years where there are aggravating circumstances). No particular trend can be observed with regard to the sentences imposed on women for drug-related offences.

ECUADOR

For minimum to high-scale trafficking (punished by up to 10 years in prison), offences can be examined under an abbreviated procedure (which is commonly requested by woman accused of drug trafficking) under which the sentence can be reduced to one-third of the minimum penalty established by law if the accused admits the facts. The law also provides for the possibility of suspended sentences for sentences up to five years (but this is not available under the abbreviated procedure).

ENGLAND AND WALES

Female offenders account for a small percentage of defendants prosecuted for indictable drug-related offences (in 2017, they accounted for only 8%). The majority of female defendants do not receive a custodial sentence and the most common sentencing outcome for indictable drug-related offences is a fine.

Only a minority of women convicted of drug-related offences are imprisoned and in 2017 the custody rate for women was 15% (down from 20% in 2005 but an increase from 11% in 2015).

The average custodial sentence length for convicted female offenders for indictable drug-related offences has also been slightly reducing (from 32.2 months in 2008 to 29 months in 2015).

FRANCE

Statistics for low-level drug offences show women are less sanctioned for drug-related offences than men in the French judicial system (women represent only 9% of potential offenders arrested for drug-related offences and 6% of those convicted of drug-related offences).

53% of women accused of drug-related offences benefit from alternative measures to prosecution compared to only 43% of men. In addition, women benefit from more lenient sentences than men (for example 33% of all imprisonment sentences – including non-related drug offences – pronounced against women are for less than three months compared to only 25% for males).

Explanations for these differences may be from the fact that female offenders tend to be prosecuted for less complex offences than males and have proportionally a lower reoffending rate (29% compared with 55% for males). Other studies tend to demonstrate that other external factors may influence sentencing of women such as the judge's own gender.

GERMANY

Women have tended to engage in drug-related offences that could end in incarceration less often than men. Female offenders are rarely sentenced to imprisonment for drug-related offences; in 2016, although nearly a quarter received such sentences, the majority were granted probation leaving 5% of all female convicts actually imprisoned. Of those, over half were sentenced to one year or less. Women offenders tend to receive financial penalties. The courts rarely defer penal enforcement.

HONG KONG

The law allows for sentences up to life imprisonment for trafficking/manufacturing and up to seven years imprisonment for possession. However, given the limited case law available and the important variation in sentences in practice depending on the type, amount and purpose of the possession of the drugs involved, it is difficult to establish an average range of sentences imposed on women for drug-related offences.

JAPAN

There appears to be no distinction between female and male sentencing. For an offender who is accused for the first time of using or possessing a stimulant, and no continuation of usage is proven, the sentence will be 18 months' imprisonment, suspended for three years. For other drugs such as cannabis, the imprisonment can be shorter (14-16 months), also with suspension of three years.

MEXICO

There is no distinction under Mexican law between male and female sentencing. Subject to the judge's discretion, the implementation of sentences can in practice be adapted in the case of female offenders. For instance, a judge who sentences a woman to serve time in prison could try to have her imprisoned at a facility close to her home or to social rehabilitation centres.

NEW ZEALAND

No data is available specifically for female offenders. However, a review of the cases show that sentencing can range from home detention (five months to 11 months) to imprisonment (15 months to seven years). Across the board statistics show that non-custodial sentences are the most common sentences for drug-related offences in New Zealand.

PHILIPPINES

The review of some sentences handed down to female and male offenders for similar offences seem to indicate that there is no gender-based difference in the sentences imposed on low-level drug offenders. However, police statistics show that most of the Filipino drug couriers arrested are female.

POLAND

Women in Poland are mostly sentenced for possession of an insignificant quantity of drugs for personal use or small-scale drug dealing. Courts tend to prefer alternative measures such as fines or community service to imprisonment sentences in those cases.

PORTUGAL

There are no publicly available official statistics.

In case the offender (male or female) does not have a criminal history and that the drug amount concerned is low, the judge can substitute the prison sentence for a fine or the provisional suspension of criminal procedure. There is also the possibility of community service as a penalty.

RUSSIA

Russian courts usually give prison sentences to female offenders charged for unlawful acquisition, storage, transportation or preparation of drugs which is the most common low-level drug offence. Alternative sentences (such as fines or community service) are only issued in 4% of these cases. For these sentences, nearly two-thirds of custodial sentences are between one and two years, with a quarter less than one year. Only 1% of prison sentences imposed are over two years (note that in some cases the length of the prison sentence reflects involvement in other more serious offences).

SPAIN

Spanish criminal law does not contain any specific provisions to mitigate the sentences of women that commit drug-related offences. The Spanish prosecution service also does not have any specific guidelines that lead it to pursue lighter sentences for women that commit such offences, and the courts do not take gender into account. Latest statistics from 2015 show that women represented 13.5% of the total who received sentences for public health offences (specific figures for drug-related offences are not available) and 13% of the prison population incarcerated for public health offences. Older statistics from 2005 to 2011 revealed that 25% of male offenders are serving sentences for drug trafficking while for women this proportion is somewhere between 44 and 48%, depending on the year, even reaching 50% in 2009.

UNITES STATES

On a **Federal** level, the average sentence imposed increased slightly over the last five years, from 27 months in fiscal year 2013 to 28 months in fiscal year 2017. Generally, sentencing decisions from the trial court level are not publicly available and not a lot of drug-specific sentencing research exists. Broader research findings concerning the sentencing of female offenders vary from state to state.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

ARGENTINA

While there is no literature around this specific issue of which we are aware, the Argentine Ombudsman produced a report on the conditions of women in prisons following the adoption of the Bangkok Rules by the UN in 2010. While the report concluded that conditions for women's imprisonment within the Argentine federal system were overall compliant with international standards, there were some discrepancies detected. These discrepancies related to medical care, hygiene, violence and prison supervision and prisoners' proximity to family and visits.

AUSTRALIA

There is limited research on women convicted of low-level drug-related offences, as researchers and policy groups usually have a broader focus on either female offenders or drug offenders generally. However, many studies and policy papers consider drug use and offending by women as a relevant factor.

In a paper considering the Bangkok Rules in the **Australian** context, Felicity Gerry QC recommended that a more proactive judicial approach must be taken in relation to the sentencing of women. She suggested that the courts should take into account the impact imprisonment has on motherhood and the fact that most female offenders have been victimised at some point.

The Australian Institute of Family Studies also published a report in 2012 which identified that women are receiving prison sentences for minor crimes at a higher rate, and that there are a significant number of women on remand. The Australian Institute of Criminology has further identified a statistical correlation between victimisation and drug use and noted that drug use among females often begins before committing any crimes.

Indigenous women have been a focus of research in **New South Wales**, with multiple academics noting the detrimental effect that the *"equality sentencing principle"* has on these offenders. Research indicates that female Indigenous offenders are generally younger, less educated and more likely to be mothers or drug dependant.

In **Victoria**, a report of the Sentencing Advisory Council 2018 titled *"Trends in Minor Drug-related offences Sentenced in the Magistrates' Court of Victoria"* looked at sentencing for possession or use of drug-related offences. This reported some interesting statistics regarding drug offending by women. For example, it reports that the proportion of minor drug-related offences committed by women between 2012-13 and 2016-17 increased from 14% to 20%. The raw number of minor drug offence cases involving women increased by 126% from 2007-08 to 2016-17. The gender distributions

across minor offences for different drugs tended to be relatively stable, at 83% male offenders and 17% female. The data also indicated that women are more likely to play a secondary role in offending and are sentenced accordingly.

In **Queensland**, a report of the Queensland Sentencing Advisory Council 2018 titled *“Sentencing Spotlight on trafficking in dangerous drugs”* looked at sentencing outcomes for trafficking offences in Queensland between 2006 and 2016. While the report did not focus on women, it provided some interesting statistics regarding the percentage of offenders that were female and the sentences received. In particular, it was reported that 98.5% of female trafficking offenders received custodial sentences, whereas 94.5% of females with possession as their most serious offence received non-custodial sentences.

In 2017, the **Northern Territory** Ombudsman published a report titled *“Ombudsman NT Investigation Report, Women in Prison II – Alice Springs Women’s Correctional Facility”* which specifically recognised the need to change the way in which gendered issues are dealt with in sentencing.

COLOMBIA

There has not been any specific formal research or academic study on the sentencing of women for low-level drug-related offences, of which we are aware.

Dejusticia, a Non-governmental organisation (NGO) based in Colombia, has published studies focusing on the need for change in the current Colombian drug policy on women involved in drug trafficking. In addition, the National Gender Commission created by the judicial administration has looked at the difference in treatment between men and women more generally (without a specific focus on drug trafficking).

COSTA RICA

There has been some academic discourse and studies on this topic. This discourse indicates that statistics point to around two-thirds of women serving prison sentences in Costa Rica having been convicted for drug-related crimes.

ECUADOR

In 2011, an article was published by Sandra Edwards about the feminisation of criminal offences involving drugs which argued that women are exceptionally vulnerable in relation to micro-marketing of drugs because they play a role at the lowest drug-trafficking level, usually as drug couriers or low-level traffickers.

In Ecuador, most incarcerated women have been convicted for drug-related offences (52.9% in 2018). This is considered to be directly related to the policy shift which took place in 2015 from a preventative approach to a punitive approach. In particular, under the preventative approach, pardon was granted to drug couriers by the Constituent Assembly in 2008 and proportionality of penalties for drug trafficking was introduced in 2014. However, the “counter reform” of 2015 increased the penalties for low- and mid-level drug trafficking and lowered the quantitative thresholds necessary to constitute drug trafficking. This has been noted in the academic discourse.

ENGLAND AND WALES

The issue of how female drug offenders are treated by the criminal justice system and the need to reduce the numbers of women sent to prison more generally has been a topic of much discussion and academic commentary in the United Kingdom.

These concerns partially led to the implementation in 2012 of the Sentencing Council’s definitive guideline for sentencing of drug-related offences. The impact of this – leading to shorter sentences for drug traffickers in a “lesser” role – has been noted in the academic discourse, with differing appraisals.

Since then, analysis by the Global Drug Policy Observatory in 2014 noted that, despite being a statistical minority in all aspects of the drug trade, women tend to be most involved in the lower levels of trade where the greatest concentration of arrests occur. The report also noted the double penalty of a drug conviction for women, with many losing their jobs, accommodation and care for children.

FRANCE

There is little discussion of this topic in France; academia and public policy tend to focus on offenders’ social origin rather than gender. Public debate in recent years has therefore mostly revolved around drug trafficking in the suburbs of major French cities.

GERMANY

There is currently no notable academic or judicial discourse regarding the sentencing of women for drug-related offences in Germany, of which we are aware. In the last five to 10 years, the legal policy discussion on drugs has not focused on gender-specific questions.

HONG KONG

A study from 2015 suggests that women comprise a higher proportion of the prison population in Hong Kong than elsewhere in the world (at 20.5%). There have been criticisms in the press of the “blindness” of the Hong Kong courts to systemic bias against women with vulnerable backgrounds who are easy prey for drug syndicates, as well as to the impact of incarceration of single mothers on children.

JAPAN

None of which we are aware.

MEXICO

There are several academic sources that analyse and try to raise awareness of the significant increase of the female population in Mexican jails. Studies stress the need for reform in Mexico in connection with low-level drug-related offences carried out by women. It is often proposed in the literature to adopt new mitigating factors to address this specific situation and to encourage alternatives to imprisonment as sentences.

NEW ZEALAND

There is limited academic or judicial discourse dealing specifically with this issue in New Zealand. One example, however, is an article by Monique Mann, Helena Menih and Catrin Smith titled “*There is ‘hope for you yet’: The female drug offender in sentencing discourse*” which studies the ways in which sentencing decisions construct female drug offenders using gendered language and norms (for example, in terms of femininity, vulnerability, passivity and/or motherhood).

In addition, there is a reasonable amount of commentary on the sentencing of Māori for low-level drug-related offences (and the only demographic of the prison population that is increasing in New Zealand is Māori women) as well as significant discourse on reforming the current approach to criminalising drugs more generally.

PHILIPPINES

The issue of how female drug offenders are treated by the Philippine criminal justice system does not appear to have been substantially considered in academia or by the judiciary.

The “war on drugs” started by President Duterte immediately after his election in July 2016 has resulted in a surge in the number of drug cases being heard in court. Additional special courts for drugs were created

to deal with the increase. This shift towards a tougher policy against illegal drugs has been heavily criticised by the international community. The UN recently announced an investigation into the ‘staggering number of unlawful deaths and police killings in the context of the so-called war on drugs’ they recorded.³⁵

POLAND

There is not much academic or judicial discourse around the sentencing of women convicted of low-level drug-related offences of which we are aware. Based on police statistics, women play a minor role in drug trafficking in Poland. Females represented 6% of the population arrested for drug trafficking in 2011 (most of them were under 17 years old). Female offenders are generally convicted for possession of drugs or of small-scale drug dealing but appear to be largely uninvolved in organised crime groups or in violent offences. The courts do consider the prevailing character of non-violent involvement in the committed offence. However, women may face greater social stigma in Poland for involvement in drug-related offences, making their return to communities more challenging.

PORTUGAL

None of which we are aware.

RUSSIA

There is little public discussion relating to the sentencing of women for low-level drug-related offences. Relevant questions are usually only considered as a part of a more general discussion on women’s sentencing. There is however some discussion in the Open Society Foundations (OSF) Report of 2016, as well as limited individual articles. The OSF report highlights the fact that women are generally not organisers of drug-related crime and that, as children are removed from their family when their mother is identified as having drug dependency, women with children tend not to apply for drug dependency treatment.

In Russia, the number of women convicted under drug-related offences is substantially fewer than the number of men, although drug-related offences continue to be the most frequent offences committed by women.

35. ‘UN human rights experts call for independent probe into Philippines violations’, 7 June 2019, www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24679&LangID=E.

SPAIN

The sentencing of women convicted of drug-related offences is not considered a controversial matter in Spain. We are not aware of any discussion on the topic other than on the more general issue (i.e. not specifically connected to drug-related offences) that imprisoned women carry an additional social burden because they are no longer taking care of their families.

UNITED STATES

The following resources are available at a country-wide level, but are not drug offence-specific:

The Prison Policy Initiative tracks state-level incarceration of women and publishes reports and advocacy on penal reform.

The Sentencing Project looks at similar issues: www.sentencingproject.org/issues/drug-policy.

There are certain other state-specific reports which also consider incarceration of female offenders, but again are often not specific to drug-related offences.

CHAPTER 1

Argentina

Incarceration rates	Women	Men	Proportion of women
Total ³⁶	4,130	88,031	4.5%
For drug-related offences	Not available	Not available	Not available

Introduction

Argentina has a federal system of government,³⁷ with each province having its own local government and justice department. While each oversees matters concerning their specific province, federal authorities are competent to act in all cases set forth by the national constitution or relating to events occurring within the territory of several provinces.

For criminal law matters, this results in provinces and federal jurisdictions intervening as appropriate depending on the conduct and/or territory concerned. Drug-related offences are in principle considered federal crimes and therefore tend to fall under the remit of federal jurisdictions.

In Argentine prisons, the vast majority of prisoners are men (more than 92% of total convicts), whereas the percentage of women is relatively small.³⁸ The number of imprisoned women has, however, increased in recent years, mainly as a consequence of calls for more severe penalties.³⁹ Notably, more than 60% of female inmates were imprisoned for drug-related crimes which is a markedly higher proportion than male inmates imprisoned for the same.⁴⁰ Going back a few years, to 2014, and looking solely at foreign women detained in Argentine prisons, 96% were imprisoned for drug-related offences.⁴¹

Generally, women are imprisoned for low-level offences, with females in commanding positions within drug organisations still being relatively rare. Indeed, academic studies indicate that the role of the drug courier is often carried out by a woman and that drug organisers tend to employ drug couriers to reduce the risk of getting caught themselves.⁴²

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

The current Argentine drug regime (Law N° 23,737) was adopted in 1989, in the context of “*the war against drugs*”. The regime generally differentiates between high-level offences (“**criminal offences**”) and low-level offences (“**correctional offences**”). This distinction also applies to drug-related offences.

Low-level offences can result in a maximum term of three years in prison, while sentencing for criminal offences can go beyond that term. The distinction between criminal and correctional offences also influences the applicable procedure. A system of abbreviated procedure (abbreviated trial⁴³ or *sp. juicio abreviado*) can be used for minor offences.

36. www.prisonstudies.org/world-prison-brief-data.

37. In accordance with Article 1 of the national constitution, the “*Argentine Nation adopts for its government the federal republican representative form*”.

38. 2017 Annual report of the Argentine *Procuración Penitenciaria de La Nación*, p. 41.

39. 2014 Annual report of the Argentine *Procuración Penitenciaria de La Nación*.

40. 2017 Annual report of the Argentine *Procuración Penitenciaria de La Nación*, p. 529.

41. 2014 Annual report of the Argentine *Procuración Penitenciaria de La Nación*, p. 374.

42. Puente Alba, L.M. “*Perspectivas de género en las condenas por tráfico de drogas*” 2012; p. 112.

43. Please refer to Article 431 bis of the Argentine National Criminal Procedural Code.

This procedure applies when the prosecutor considers a sanction of fewer than six years to be sufficient and the accused person agrees to comply with the proposed sanction. In this context, according to a report from the *Defensoría General de la Nación*, abbreviated trials are not appropriate for drug-related cases.

Law N° 23,737 considers correctional offences as:

- supplying medical substances in a kind, quality or quantity that does not correspond to a medical prescription or supplying medical substances without medical prescription when required.
- the production or manufacture of medicinal substances in unauthorised establishments.
- a person in charge of the direction, administration, control or surveillance of an establishment selling medicine fails to comply with the duties under their charge.
- the possession of narcotic drugs for personal use.⁴⁴

The criminal offences include, *inter alia*:

- the production, manufacture, commerce or supply of narcotic drugs or any raw material or tools destined for the production thereof, without authorisation or prescription.
- the organisation, facilitation or financing of any drug-trafficking activity.
- the prescription, supply or delivery of drugs by a doctor or any other authorised professional for extra-therapeutic purposes or in greater dosage than necessary.
- publicly advocating the use of narcotic drugs or using the same in an ostentatious manner.
- the use of narcotic drugs in order to execute another crime (this conduct will be used as an aggravating circumstance to increase the sanction for the other crime).
- a public official's failure to comply with his/her duty to control the sale of narcotic drugs.

As follows from the above, Law N° 23,737 penalises the possession of drugs for personal use as well as for sale. Looking at personal use specifically, pursuant to Argentine legislation, the prison term *“shall be from one month to two years when, due to its small quantity and other circumstances, it is unequivocally established that the possession is for personal use”*. The law was initially aimed at protecting “public health” but “public security” was subsequently added as an additional underlying value. Due to this addition, drug-related offences (possession for personal use, consumption, distribution, supply and trafficking) have been increasingly linked to the protection of individual freedoms, privacy, national defence and even family protection.

Lastly, since the Argentine Republic is bound by its international obligations to sanction drug-related offences prohibited by International Treaties, Law N° 23,737 provides curative and educational safety actions as an alternative to prison sanctions for drug users. In this sense, Law N° 23,737 provides a range of alternative punitive strategies such as fines, or therapeutic actions, depending on the type of offence and on the offender's profile.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

The Argentine anti-drug regime is gender-neutral and gender is not to be considered by judges, as neither an aggravating factor nor a mitigating circumstance. The only article of Law N° 23,737 mentioning “women” is Article 11, which refers to offences committed *“to the detriment of a pregnant woman”* (this is an aggravating factor that could generate a more severe sanction). As such, the only expressly gender-related aspect of the law is focused on the victim rather than the offender.

The Argentine Criminal Code does not include any provisions for the offender's gender to be taken into account when sentencing. Article 41 lists the factors which judges must consider while determining sanctions:

- age.
- education.
- current and previous conduct.
- causes that induced the offender to commit a crime, especially difficulty to earn an income necessary to afford decent living conditions for themselves and their family.
- actual participation in the crime.
- personal conditions, including personal relationships and circumstances demonstrating how dangerous the offender may actually be, such as repeat offenders and those with other previous criminal convictions.

These factors can be either mitigating or aggravating, depending on the case at hand. As such, even though the Argentine criminal regime does not directly consider the offender's gender in this context, the list of factors from Article 41 will also be considered in drug-related cases involving female offenders.

In addition, Article 11 of Law N° 23,737 includes a number of aggravating factors which, where applicable, will result in more severe sanctions.

⁴⁴. Please note that this has been challenged on the ground of the right for privacy set forth by Article 19 of the Argentine National Constitution, according to which *“Private actions that in no way offend order and public morals, or harm a third party, are reserved only to God, and exempt from judicial scrutiny [...]”* (translated from Spanish).

Of particular relevance in this context are crimes committed:

- against a pregnant woman.
- using children under the age of 18.
- with violence, intimidation or deception.
- in the immediate vicinity or inside certain locations, such as teaching institutions, welfare centres, detention centres, sports, cultural or social institutions, public performance and entertainment venues or in other places hosting children and students for educational, sports or social activities.
- by a teacher, educator or an employee of the educational system in general, abusing his/her specific function.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Overall, the case law analysis indicates that Argentine courts show little consideration for gender-specific factors (see Section 4 below). Tolosa, Rosa Y. s / infracción a la ley 23.737 is the only case identified in which judges considered carefully the socio-economic background of a female offender. However, despite the thorough analysis, the sentence was comparable to other cases in which such an analysis had not been undertaken (see Section 4 below).

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

This Section provides a brief case law overview, setting out examples of sentences imposed on female offenders involved in drug-related cases. Please note that the widespread use of abbreviated trials⁴⁵ in the Argentine criminal regime imposes certain limitations on the possibilities to conduct a fully comprehensive analysis.⁴⁶ All cases selected below come from federal jurisdictions.

Magdalena, Iris María s / contrabando de estufacientes

On 1 February 2006, airport personnel at Ezeiza International Airport arrested a woman carrying illegal drugs. She was convicted, following an abbreviated trial, and sentenced to four years and seven months in prison.

An abbreviated trial does not give judges the opportunity to carefully consider the offender's socio-economic conditions when determining the sentence. Sections of judgments from abbreviated trials assessing mitigating and/or aggravating factors are usually quite brief. In this case, the only socio-economic elements cited in the judgment were her nationality and her level of education. It is, however, difficult to assess the impact of these factors on the sentencing.

Roa Antelo, Aura s / contraband de estupefacientes

In *Roa Antelo, Aura s. / contraband de estupefacientes*,⁴⁷ a woman was charged with possession of cocaine that had been detected by an x-ray machine at Ezeiza International Airport. The judgment describes the offender as being a poor housewife, illiterate and living with one of her children. It was also apparent from the facts that she was a drug courier in a much more complex drug-trafficking organisation. While it appeared that she was not in a position to properly evaluate costs and benefits and make an informed choice due to her socio-economic conditions, she was sentenced to four years and seven months in prison.

Inna Melkanova⁴⁸

On 22 January 2007, personnel at Ezeiza International Airport, while conducting a routine inspection, found 13,240 grams of cocaine hidden in the luggage of Inna Melkanova. Her education level (university studies) was considered an aggravating factor and it was noted that she worked as a Russian and Italian interpreter and as a tourist guide in Milan, Italy. Despite these aggravating factors, she was given a sentence of four years and nine months. It is unclear from the judgment why her prison sentence was only two months longer than previous cases involving socially and economically disadvantaged women.

Tolosa, Rosa Y. s / infracción a la ley 23.737⁴⁹

On 2 May 2009, a woman was arrested while getting off a bus and taken to a hospital where 494.45 grams of illegal drugs were found inside her body. From a reading of the facts, it appears likely that she was denounced and reported to the authorities via an anonymous call from a person involved in the same drug-trafficking

45. An analysis conducted by the Argentine Security Ministry on rulings issued between 2014 and 2016 on all drug-related offences concluded that, of the 127,750 cases initiated, only 2% had a judicial sentence, of which 76.8% had a sanction imposed.

46. The *Procuración Penitenciaria de la Nación* and the Human Rights Permanent Assembly, a non-governmental organisation recognised as an advisory entity by the Economic and Social Council in 2014. (E / CN.6 / 2014 / NGO / 68). Commission on the Status of Women 58th session, March 10-21 2014, states that "more than half of the women in prison (55.4%) are processed without a final and binding resolution".

47. "Roa Antelo, Aura s / contrabando de estupefacientes"; Tribunal Oral en lo Penal Económico Nro. 2, 07/18/2007, Roa Antelo, Aura, La Ley Online; AR/JUR/5335/2007.

48. "Melkanova, Inna s / contrabando de estupefacientes"; Tribunal Oral en lo Penal Económico Nro. 2, 08/13/2007, La Ley Online; AR/JUR/4804/2007.

49. "Tolosa, Rosa Y. s / infracción ley 23,737", (Expte. N. 92-T-10); Tribunal Oral en lo Criminal Federal Nro. 1 de Córdoba, 02/15/2011, ABELEDO PERROT N°: 70068875.

organisation. Indeed, we understand that it is common for these organisations to sacrifice some drug couriers to ensure the success of other operations.

Unlike the previous cases, the socio-economic conditions of the female offender were carefully considered. The fact that she was a mother of six children and the absence of previous criminal records were put forward as mitigating factors. Despite this unusually thorough evaluation, she still received a prison sentence of five years. This calls into question the actual impact of mitigating factors in Argentine sentencing.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

As noted above, the prevailing trend is an increased number of imprisoned women, with the majority being imprisoned for low-level drug-related offences. While this calls for special attention to be paid to the role of women in drug-related crimes, we are not aware of any such studies.

In 2010, the United Nations adopted the first international standards relating specifically to women prisoners – the Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the “**Bangkok Rules**”). Following this, a report from the Argentine Ombudsman concluded that the conditions for women’s imprisonment within the Argentine federal system are overall compliant with international standards. However, as detailed below, a few discrepancies were detected.

Medical Care

Results suggested that medical procedures were not always implemented in Argentine prisons. For example, there was no standardisation in the medical tests given to women – more than a third of the female prisoners surveyed reported that they never received a Pap test for cervical cancer screening, and almost three-quarters of them had never received breast cancer screening.

Hygiene

Bangkok Rule 5 provides that female prisoners must receive materials to meet their gender-specific hygiene needs, including free sanitary towels and a regular supply of water. However, over 26% of the female prisoners reported not having sufficient access to sanitary towels.

Violence and prison supervision

Bangkok Rule 9 provides that, where prisoners are housed in dormitories, they should be regularly supervised at night and only those “*carefully selected as being suitable to associate with others*” should reside together. In addition, Bangkok Rule 31 requires prisons to establish policies and regulations for prison staff that protect female prisoners from gender-based violence or harassment.

In contrast with these rules, Argentine prisons apply a policy of grouping all the “*worst*” behaved women together⁵⁰. Paired with the relatively unsupervised nature of the pavilions, this creates an environment that can foster violence. The information gathered indicates that torture is a widespread phenomenon in penitentiary settings throughout the country. Interviews with prison administrators and incarcerated women indicated that violence between prisoners is indeed a problem. One prisoner claimed, “*The first few months in prison was terrible. There was a lot of violence. Girls fight with each other.*”

Both the Inter-American Commission on Human Rights⁵¹ and the United Nations Human Rights Committee⁵² note with concern the penitentiary violence that is manifested by the high number of cases of torture and ill-treatment against incarcerated persons in Argentina. Such violence includes women being subjected to vexatious searches with partial or total nudity and being forced to do push-ups for vaginal examinations. In solitary confinement cells, women are subject to extreme conditions, including denial of food and indefinite prolongation of the situation, beatings and other forms of ill-treatment in an absolute state of helplessness, in which they are unable to seek outside assistance.

Prisoners’ proximity to family and visits

According to Bangkok Rule 4, female prisoners “*should be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities [...]*”. Rule 26 further provides that policies and strategies should be developed for women in prisons to improve their contact with their families and children.

However, more than half of the prisoners surveyed (54%) were detained in facilities located more than 100 km from their home and family, with almost 90% being imprisoned at least 30 km away from their home. Of the prisoners held more than 100 km from their home and family, over 80% indicated that they would resume responsibility for at least one child upon their release.

50. fileserv.idpc.net/library/Women_in_prison_in_Argentina.pdf.

51. See Inter-American Commission on Human Rights, Press release N°151/16, “Relatoría sobre los Derechos de Personas Privadas de Libertad realiza visita a Argentina” available online at <https://www.oas.org/es/cidh/prensa/comunicados/2016/151-EN.pdf>; Inter-American Commission on Human Rights, Press Release No. 64/10, “Relatoría de la CIDH constata graves condiciones de detención en la provincia de Buenos Aires” available online at www.cidh.org/Comunicados/Spanish/2010/64-10sp.htm.

52. United Nations Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Argentina, 117th session, from 20 June to 15 July 2016.

CHAPTER 2

Australia

Incarceration rates	Women	Men	Proportion of women
Total ⁵³	3,467	38,813	8.2%
For drug-related offences ⁵⁴	746	6,033	11%

Introduction

In Australia, most criminal law matters are governed at the state level, rather than the federal level. The states and territories approach the issue of female drug offenders differently, although there are some similarities across jurisdictions. This report concentrates on the three largest Australian jurisdictions by population (New South Wales, Victoria and Queensland) and also includes the Northern Territory for special consideration due to, among other things, its mandatory sentencing laws and proportionately larger indigenous prison population. We address each part of this summary on a jurisdiction-by-jurisdiction basis.

We identified no provisions specifically for gendered issues in legislation and sentencing guidelines in any jurisdiction reviewed. One jurisdiction (Victoria) specifically prohibits taking an offender's gender into account when sentencing. Courts do have broad powers to take into account all relevant factors when sentencing, and our review of a large sample of sentencing remarks and case reports identified instances where these broad powers appeared to be exercised to take account of gendered factors. However, the approach of judges is not consistent, even within the same jurisdiction.

Alternative approaches are also available in some jurisdictions. These include Drug Courts, which redirect certain offenders who are dependent on drugs to treatment, rather than prison, and police diversionary powers, which can divert low-level and/or first-time offenders from the criminal justice system altogether. Australian jurisdictions have largely adopted the recommendations of the International Drug Policy Consortium in relation to Drug Courts, and most Australian commentary and media has been positive or neutral. Drug Courts are supported by the law societies in each of the jurisdictions which utilise them and by the Aboriginal Legal Service.

Limited data on types of penalties and length of prison sentences was identified, and at a macro level there appear to be statistical indications that female drug offenders are treated more leniently than males.⁵⁵ However, this conclusion is disputed by at least one academic.⁵⁶ Our access to data was limited⁵⁷ and comparing data across jurisdictions was also difficult, due to the different legislative, judicial and prison environments and the differing sources of data in each jurisdiction.

Despite difficulty in finding research specifically focused on the sentencing of low-level female drug offenders, the available research on female offenders in general consistently points to histories of sexual abuse⁵⁸ and highlights the different path that the average female

53. www.prisonstudies.org/country/australia.

54. www.abs.gov.au/ausstats.

55. See Section 4 below.

56. See Section 5 below and in particular Naylor, B. 1999, 'Sentencing Female Offenders in the Magistrate's Court: Preliminary Report on a Pilot Study', *Women and the Law*.

57. E.g. specific data dealing with female drug offenders was difficult to locate, and often had to be parsed from general statistical data dealing with all offenders or court outcomes.

58. See, *inter alia*, Felicity Gerry QC, Panel Discussion at National Judicial College of Australia Conference 6 and 7 February 2016, *Can sentencing of women who are victims of abuse accommodate the social problems that underpin the offending? Is enough being done to keep women offenders from returning to prison?*, viewed 15 August 2019, njca.com.au/wp-content/uploads/2017/12/Gerry-Felicity-Women-in-prison-in-Australia-Paper.pdf.

drug offender takes to prison in comparison to males.⁵⁹ Academics also critique imprisonment as onerous and inappropriate for women, given that the prison system is largely designed for male offenders.⁶⁰

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Drug-related offences are largely defined in relevant state or territory legislation, and the approach is not uniform.

With the exception of Queensland, possession, supply and trafficking are subdivided into offences with a rising scale of maximum penalties, based on the type and quantity of drugs involved.

In several jurisdictions, a fine is the maximum penalty for low-level possession offences. In the Northern Territory, a fine is the heaviest penalty available for the lowest-level supply offence. No jurisdiction provides for low-level trafficking offences, and long maximum prison sentences apply for the vast majority of supply and possession offences. There are also ancillary offences relating to possession of drug paraphernalia, drug premises and the proceeds of drug crime, but our research indicates that they are generally charged in addition to a possession, supply or trafficking offence, and should not be considered low-level offences.

Possession

Each jurisdiction (except Queensland) has a low-level possession offence, although in Victoria this applies to possession of cannabis/THC only.

New South Wales

While possession is not legislatively defined, at common law possession comprises two elements:

- the drug was in the person's physical control
- the person knew they had the drug in their custody.

Possession carries a penalty of two years' imprisonment or 20 penalty units.⁶¹ This penalty is for possession of any quantity of drugs (there is no minimum amount). Possession of a traffickable (or greater) quantity of drugs is deemed to be for supply,⁶² and the offender would be charged under the relevant supply offence.

Victoria

A substance is deemed to be in the possession of a person "so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever", unless the court is otherwise satisfied.⁶³

Possession of less than a small quantity⁶⁴ of cannabis or THC carries a penalty of five penalty units.⁶⁵ For other drugs (or larger quantities of cannabis or THC), a maximum penalty of 30 penalty units or one year's imprisonment applies.⁶⁶ In all other possession cases, the maximum penalty is 400 penalty units and/or five years' imprisonment.⁶⁷ Possession of an amount greater than the traffickable amount of any drug is prima facie evidence of trafficking,⁶⁸ with the onus of proof placed upon the offender to demonstrate that they were not engaged in trafficking.⁶⁹

Queensland

Possession includes "having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question".⁷⁰

Drugs are categorised into "Schedule 1" and "Schedule 2" drugs. Schedule 1 contains the drugs considered more serious, such as heroin, methamphetamine and cocaine.⁷¹ Possessing a Schedule 1 drug carries a maximum penalty of 25 years' imprisonment,⁷² although a maximum penalty of 20 years applies for possession of smaller quantities, if a convicted person can satisfy a judge that they are a drug-dependent person.⁷³ Possessing a Schedule 2 drug carries a maximum penalty of 15 to 20 years' imprisonment, depending on the quantity.⁷⁴

59. See, *inter alia*, Holly Johnson, *Key findings from the Drug Use Careers of Female Offenders*, Trends and Issues in Crime and Criminal Justice no. 289, 2004, viewed 15 August 2019, aic.gov.au/publications/tandi/tandi289.

60. See, *inter alia*, Parliament of Victoria, Drugs and Crime Prevention Committee 2010, *Inquiry into the Impact of Drug-related Offending on Female Prisoner Numbers*, page v.

61. *Drug Misuse and Trafficking Act 1985* (NSW), ss 10 and 21. As of December 2018, one Penalty Unit in NSW was AUD 110.

62. *Ibid*, S 29.

63. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 5.

64. 50g (as of October 2018. Source: Part 2 of Schedule 11 of the *Drugs, Poisons and Controlled Substances Act 1981* (VIC)).

65. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(1)(a). As of December 2018, one Penalty Unit in VIC was AUD 165.22.

66. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(1)(b).

67. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(1)(c).

68. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(2).

69. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(1)(b).

70. *Criminal Code 1899* (Qld), S 1.

71. *Drug Misuse Regulation 1987* (Qld), Schedule 1.

72. *Drug Misuse Act 1986* (Qld), S 9(1)(a).

73. *Drug Misuse Act 1986* (Qld), S 9(1)(b)(i).

74. *Drug Misuse Act 1986* (Qld), S 9.

Northern Territory

Possession is defined to include being subject to the person's control notwithstanding that the thing possessed is in the custody of another person.⁷⁵

Similar to Queensland, the Northern Territory categorises drugs into "Schedule 1" and "Schedule 2" drugs, with penalties dependent on the quantity of drugs involved. Possession of a commercial quantity of a Schedule 1 drug carries a maximum penalty of 25 years' imprisonment, while the same offence with a Schedule 2 drug carries a maximum penalty of 14 years' imprisonment.⁷⁶

Imprisonment is not a penalty option for the lowest-level possession offences.⁷⁷ The Northern Territory is the only jurisdiction to legislatively mandate a fine as the maximum penalty, while other jurisdictions leave the determination of sentence to sentencing legislation and judicial discretion. Fines are also specifically available for a number of lesser offences, such as possession of less than a traffickable quantity of drugs in a public place.⁷⁸

Supply

While New South Wales and Queensland legislation define supply offences (with high maximum penalties), Queensland legislation notably does not reference the weight of the drugs involved – only the category and aggravating factors are used to determine the applicable maximum sentence. Victoria handles supply cases under its trafficking offence, due to possession of a traffickable amount of drugs being prima facie evidence of trafficking (see Section 1.1 above). The Northern Territory is the only jurisdiction reviewed which provides for a fine as an alternative penalty for the lowest-level supply offence. This is an exception, and generally speaking there are no low-level supply offences in these jurisdictions.

New South Wales

Supply includes selling and distributing, agreeing to supply, offering to supply, keeping or having in possession for supply, sending, forwarding, delivering or receiving for supply, authorising, directing, causing, suffering, permitting or attempting any of those acts or things.⁷⁹ This wide definition means that offences

which constitute a trafficking offence in other jurisdictions are dealt with under the supply offence in New South Wales.

Maximum penalties range from 15 years' imprisonment to life imprisonment for drugs other than cannabis, and 10 to 20 years' imprisonment for cannabis, depending on the quantities involved.⁸⁰

Queensland

Supply is defined⁸¹ to mean:

- give, distribute, sell, administer, transport or supply.
- offering to do any act specified in paragraph (i).
- doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in (paragraph (i).

Supply of a Schedule 1 drug carries a maximum penalty of 20 years' to life imprisonment, depending on aggravating factors (see Section 2 below).⁸² Supply of a Schedule 2 drug carries a maximum penalty of 15 to 25 years' imprisonment, depending on aggravating factors (see Section 2 below).⁸³ The penalties apply regardless of the amount of drugs involved, in contrast to other jurisdictions which have an ascending scale of penalties linked to the amount of the drugs involved.

Northern Territory

Supply is defined⁸⁴ to mean:

- give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration; or
- offer to do an act mentioned in paragraph (i); or
- do, or offer to do, an act preparatory to, in furtherance of, or for the purpose of, an act mentioned in paragraph (i), and includes barter and exchange.

Supply of a commercial quantity of a Schedule 1 drug carries a maximum penalty of 25 years' imprisonment, while the same offence with a Schedule 2 drug carries a maximum penalty of 14 years' imprisonment.⁸⁵ A maximum penalty of life imprisonment applies for the supply of a Schedule 1 drug to a child.⁸⁶

⁷⁵ *Misuse of Drugs Act 1990* (NT), Subdivision 3.

⁷⁶ *Misuse of Drugs Act 1990* (NT), S 7.

⁷⁷ *Misuse of Drugs Act 1990* (NT), S 7B.

⁷⁸ *Misuse of Drugs Act 1990* (NT), S 7D.

⁷⁹ *Drug Misuse and Trafficking Act 1985* (NSW), S 3.

⁸⁰ *Drug Misuse and Trafficking Act 1985* (NSW), ss 25, 25A, 32 and 33.

⁸¹ *Drug Misuse Act 1986* (Qld), S 4.

⁸² *Drug Misuse Act 1986* (Qld), ss 6(1)(a)-(c).

⁸³ *Drug Misuse Act 1986* (Qld), ss 6(1)(d)-(f).

⁸⁴ *Misuse of Drugs Act 1990* (NT), S 3.

⁸⁵ *Misuse of Drugs Act 1990* (NT), S 5.

⁸⁶ *Misuse of Drugs Act 1990* (NT), S 5B, 5C.

A fine is provided as an alternative penalty option for the lowest-level supply offences,⁸⁷ in contrast to other jurisdictions which set all supply penalties in terms of maximum prison sentences.

Trafficking

Only Queensland and Victoria have specific trafficking offences. New South Wales and the Northern Territory do not have a separate trafficking offence, as offences considered to be trafficking in other jurisdictions would fall into the category of serious supply offences. There are no low-level trafficking offences.

Victoria

Possession of an amount greater than the traffickable quantity is prima facie evidence of trafficking.⁸⁸ Trafficking is not exhaustively defined, but “*in relation to a drug of dependence, includes (to):*

- *prepare a drug of dependence for trafficking;*
- *manufacture a drug of dependence; or*
- *sell, exchange, agree to sell, offer for sale or have in possession for sale, a drug of dependence.*⁸⁹

Attempted trafficking is also caught. Maximum penalties range from 20 years to life imprisonment.⁹⁰

Queensland

Trafficking is defined by case law.⁹¹ It typically involves selling dangerous drugs but requires something more than just sales. Courts have used the test of “*knowingly engaging in the movement of drugs from source to ultimate owner*”.⁹²

It is an offence to traffic any quantity of dangerous drugs.⁹³ The maximum penalty is 25 years’ imprisonment.⁹⁴ Mandatory prison sentences also apply if trafficking is committed in an organised crime context.⁹⁵ As with Queensland supply offences, the quantity of drugs trafficked is not relevant at the legislative level, in contrast to other jurisdictions.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Legislation and sentencing guidelines in the jurisdictions surveyed do not require courts to specifically consider gendered factors when sentencing. There are general provisions, both mitigating and aggravating, in every jurisdiction, but whether gendered factors are considered under them is at the court’s discretion. The aggravating circumstances in each jurisdiction appear more likely to disproportionately affect female offenders, while any leniency based on mitigating circumstances is less straightforward and appears to be unevenly applied (see Section 3 below).

There are diversionary regimes in place in several jurisdictions which offer alternatives to the court system and could be built upon to improve the current approach towards female drug offenders.

New South Wales

The *Crimes (Sentencing Procedure) Act 1999* (NSW) does not expressly refer to women, female offenders or gender. It contains very general mitigating and aggravating factors to which judges must refer when sentencing offenders. The court is required to take into account objective and subjective factors that affect the seriousness of the offence. There are some mitigating factors which may be more frequently applied to women, particularly whether the offender was acting under duress⁹⁶ and whether the offender is unlikely to reoffend.⁹⁷

87. *Misuse of Drugs Act 1990* (NT) S 5A.

88. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 73(2).

89. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 70(1).

90. *Drugs, Poisons and Controlled Substances Act 1981* (VIC), S 71.

91. Queensland Sentencing Advisory Council 2018, *Sentencing Spotlight on trafficking in dangerous drugs*, viewed 15 August 2019, www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0020/555320/sentencing-spotlight-on-trafficking-in-dangerous-drugs.pdf, page 3.

92. *R v Elhusseini* [1988] 2 Qd R 442, 450.

93. *Drug Misuse Act 1986* (Qld), S 5(1).

94. *Ibid.*

95. *Penalties and Sentences Act 1992* (Qld), S 161R.

96. *Crimes (Sentencing Procedure) Act 1999* (NSW), S 21A(3)(d).

97. *Crimes (Sentencing Procedure) Act 1999* (NSW), S 21A(3)(g).

There are also specific aggravating factors that a court is to take into account. These include the actual or threatened use of violence;⁹⁸ committing the offence in the presence of a minor;⁹⁹ the offence being part of planned or organised criminal activity;¹⁰⁰ and the offence being committed for financial gain.¹⁰¹

There are limited legislative provisions that would allow a female offender to have her sentence mitigated for playing a minor role in a criminal drug enterprise. However, case law does allow the woman's role to be considered. In relation to a person's role in supply, New South Wales courts have held that: "An assessment of the Applicant's role is not to be determined by the selection of a label which might properly attach to him. The criminality of a New South Wales drug supply offender ought to be assessed by consideration of the involvement of the offender in the steps taken to effect the drug supply offences. Problems may emerge when a sentencing court attempts to categorise the role of the offender in the drug enterprise as, in many cases, the full nature and extent of the enterprise is unlikely to be known to the Court."¹⁰²

Drug Courts have been established in New South Wales (and most states) to provide an alternative avenue for sentencing some classes of drug offenders.¹⁰³ These courts can either divert the person from imprisonment by placing them on a programme or treatment plan or, at the very least, defer sentencing until their prospects of rehabilitation can be assessed.¹⁰⁴ Drug Courts adopt a public health approach to sentencing which takes into account how drug-dependent offenders often lack a support structure (such as stable accommodation, income support or stable relationships) to successfully complete rehabilitation or community services programmes.¹⁰⁵

The objects of the New South Wales Drug Court are "to reduce the drug dependency of eligible persons and eligible convicted offenders, to promote the re-integration of such drug dependent persons into the community, and to reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies".¹⁰⁶ However, eligible offenders are referred on a lottery basis, due to limited court capacity.¹⁰⁷ Cases reviewed suggest that the Drug Court has the potential to assist women. In many of these cases, judges indicated that the offender's drug dependency was causative and that the prospects of re-offending were low.

While international commentary on the use and efficacy of Drug Courts is mainly negative,¹⁰⁸ most Australian commentary and media reviewed has been positive or neutral.¹⁰⁹ Two reviews by the Bureau of Crime Statistics and Research concluded that Drug Courts are both more effective and less expensive than incarceration.¹¹⁰ Individuals who have participated in Drug Court schemes are between 17 and 37% less likely to be reconvicted for any offence.¹¹¹ Academic literature has recognised and endorsed the conclusions of these studies,¹¹² but noted that the results of some studies are mixed.¹¹³ Drug Courts are supported by the law societies in each of the jurisdictions which utilise them and by the Aboriginal Legal Service.¹¹⁴

The International Drug Policy Consortium, which advocates against the use of Drug Courts,¹¹⁵ recommends that the availability of Drug Courts should be limited to those charged with serious offences, including violent crimes, that would otherwise result in incarceration to avoid unintended negative consequences of their operation.¹¹⁶

98. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(b).

99. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(ea).

100. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(n).

101. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(o).

102. *Paxton v R* (2011) 219 A Crim R 104 at [135] citing *The Queen v Olbrich* (1999) 199 CLR 270 at 279.

103. Geraldine Mackenzie and Nigel Stobbs, 'Principles of Sentencing', page 243.

104. Geraldine Mackenzie and Nigel Stobbs, 'Principles of Sentencing', page 243; *Drug Court Act 1998* (NSW) s 7A(5).

105. Geraldine Mackenzie and Nigel Stobbs, 'Principles of Sentencing', page 244.

106. *Drug Court Act 1998* (NSW) s 3(1).

107. *Drug Court Act 1998* (NSW) s 6.

108. International Drug Policy Consortium (IDPC), 2016 'A Public Health Approach to Drug Use in Asia: principles and practices for decriminalisation' viewed on 26 August 2019 idpc.net/publications/2016/03/public-health-approach-to-drug-use-in-asia-decriminalisation; Social Science Research Council, Drugs Security and Democracy Program, 2018 *Drug Courts in the Americas* viewed on 26 August 2019 s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/DSD_Drug+Courts_English_online+final.pdf.

109. Michelle Edgely 'Addressing the Solution-Focused Sceptics: Moving Beyond Punitivity in the Sentencing of Drug-Addicted and Mentally Impaired Offenders' [2016] UNSW Law JI 6; Cherise Donovan, 2017 'To investigate and research effective Drug Court initiatives' viewed on 26 August 2019 www.churchilltrust.com.au/media/fellows/Donovan_C_2017_To_investigate_and_research_effective_Drug_Court_initiatives.pdf; Ryan Kornhauser 'The effectiveness of Australia's drug courts' [2016] ANZSOC 5(1).

110. Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua, NSW Bureau of Crime Statistics and Research (2008) *The NSW Drug Court: A re-evaluation of its effectiveness*; *Judicial Officers Bulletin* (2019), 31(1) Twenty years of the Drug Court of NSW.

111. *Ibid.*

112. Michelle Edgely 'Addressing the Solution-Focused Sceptics: Moving Beyond Punitivity in the Sentencing of Drug-Addicted and Mentally Impaired Offenders' [2016] UNSW Law JI 6; Ryan Kornhauser 'The effectiveness of Australia's drug courts' [2016] ANZSOC 5(1); Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua, NSW Bureau of Crime Statistics and Research (2008) *The NSW Drug Court: A re-evaluation of its effectiveness*.

113. Ryan Kornhauser 'The effectiveness of Australia's drug courts' [2016] ANZSOC 5(1); E Pritchard, J Mugavin and A Swan 'Compulsory Treatment in Australia: A Discussion Paper on the Compulsory Treatment of Individuals Dependent on Alcohol and/or Other Drugs' (2007) ANCD Research Paper No 14, Australian National Council on Drugs.

114. Parliament of Queensland, *Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017*, Report No. 67; Inverell Times, 'Drug courts and more rehabilitation services needed in regional and remote areas' published 11 August 2018.

115. International Drug Policy Consortium (IDPC), 2016 'A Public Health Approach to Drug Use in Asia: principles and practices for decriminalisation' viewed on 26 August 2019 idpc.net/publications/2016/03/public-health-approach-to-drug-use-in-asia-decriminalisation; International Drug Policy Consortium (IDPC), 2016 'A Public Health Approach to Drug Use in Asia: principles and practices for decriminalisation' viewed on 26 August 2019 idpc.net/publications/2016/03/public-health-approach-to-drug-use-in-asia-decriminalisation.

116. Social Science Research Council, Drugs Security and Democracy Program, 2018 *Drug Courts in the Americas* viewed on 26 August 2019 s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/DSD_Drug+Courts_English_online+final.pdf.

Australian jurisdictions have largely adopted this approach, which may be a reason why the reduction in recidivism is more pronounced. Offenders may only participate in Drug Courts if it is highly likely that they would be sentenced to imprisonment if they were convicted.¹¹⁷

Victoria

The primary sources for sentencing in Victoria are the *Sentencing Act 1981* (Vic) (the “VIC Sentencing Act”) and the Victorian Sentencing Manual (the “*Sentencing Manual*”). The Sentencing Manual aims to provide a more granular guide on sentencing method and philosophy, while also providing particular advice for sentencing offences from specific areas of the law.¹¹⁸

The VIC Sentencing Act provides that a core purpose of sentencing is to promote consistency of approach.¹¹⁹ There is a general requirement that “*aggravating and mitigating factors concerning the offender or other relevant circumstances*” must be taken into account when sentencing.¹²⁰ The details of these factors are largely left to the Sentencing Manual and case law.

The Sentencing Manual provides that gender alone is no basis for differential treatment in sentencing.¹²¹ It specifically references¹²² *Harkness & Ors*¹²³ in which the two female offenders were involved in an offence on the basis that they were loyal de facto partners of male co-offenders. This was not considered a mitigating factor. In addition, hardship to an offender’s family, of the type that occurs when a parent or caregiver is imprisoned, is only a relevant, mitigating factor to sentencing in exceptional circumstances.¹²⁴ In *Wall*, which involved a mother with two daughters aged 10 and 13, the hardship to be suffered by the children due to the mother’s sentence of imprisonment did not constitute an exceptional circumstance¹²⁵. However, it was taken into account by the judge when deciding that a sentence of imprisonment would be harder for the offender to bear due to separation from her daughters.

There are also a number of diversionary programmes, such as Cannabis Cautions and Drug Diversion, which allow police discretion to release without charge

first-time offenders in possession of small quantities of drugs. This is available for all drugs, although for drugs other than cannabis the offender is also required to participate in a drug assessment and treatment programme.

Queensland

The *Penalties and Sentences Act 1992* (Qld) (the “QLD Sentencing Act”) does not expressly refer to female offenders or gender and includes only very general provisions which may mitigate sentencing. Specific aggravating factors are set out and organised crime provisions also exist which may disproportionately disadvantage female offenders.

There are several general provisions allowing a court to exercise a wide discretion when sentencing.¹²⁶ However, appeal courts in Queensland have consistently held that family responsibilities should not overwhelm other considerations when sentencing.¹²⁷ Specific provisions exist which identify Aboriginal and Torres Strait Islander heritage as a relevant factor to consider in sentencing.¹²⁸ While these provisions are not gender-specific, they do provide a possible model for female-specific provisions.

Courts do take into account aggravating factors, including the effect of the offence on children,¹²⁹ use of violence¹³⁰ and previous convictions,¹³¹ which may result in harsher penalties for female offenders. Involvement in organised crime is also relevant. A prison sentence is mandatory (and mandatorily increased) for anyone that commits any of the crimes set out in Schedule 1C of the QLD Sentencing Act (which includes various drug-related offences) as part of a criminal organisation.¹³²

The definitions of “*criminal organisation*”¹³³ and a “*participant*”¹³⁴ in a criminal organisation are very broad and likely to capture any person knowingly engaged in serious drug crime, regardless of their role. Therefore, a female offender fitting within the broad definition of a participant in a criminal organisation would receive a mandatory prison sentence regardless of her role. However, none of the cases reviewed referred to the organised crime provisions.

117. Ryan Kornhauser *The effectiveness of Australia’s drug courts* [2016] ANZSoc 51(1).

118. *Victorian Sentencing Manual* (2018), viewed 15 August 2019, www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#13888.htm.

119. *Sentencing Act 1981* (VIC), s 1(a).

120. *Sentencing Act 1981* (VIC), s 5(2).

121. *Sentencing Manual*, chapter 10.6 and chapter 33.9.3.

122. *Sentencing Manual*, chapter 33.9.3.

123. [2001] VSCA 87 at [58].

124. *Sentencing Manual*, chapter 33.9.9.

125. (1999) 105 A Crim R 426.

126. *Penalties and Sentences Act 1992* (Qld), ss 9(2)(d) and 9(2)(r).

127. See, e.g., *R v D’Arrigo* [2004] QCA 399.

128. *Penalties and Sentences Act 1992* (Qld), s 9(p).

129. *Penalties and Sentences Act 1992* (Qld), s 9(2)(c)(ii).

130. *Penalties and Sentences Act 1992* (Qld), s 9(2A).

131. *Penalties and Sentences Act 1992* (Qld), s 9(10).

132. *Penalties and Sentences Act 1992* (Qld), s 161R.

133. *Penalties and Sentences Act 1992* (Qld), s 161O.

134. *Penalties and Sentences Act 1992* (Qld), s 161P.

A number of additional provisions and alternative sentencing regimes can be used to divert offenders from the courts. Police must discontinue an arrest in relation to possession of small amounts of cannabis in certain circumstances (primarily relating to first-time offenders with no other concurrently committed crimes), provided that the person agrees to attend a drug diversion assessment programme.¹³⁵ A similar regime exists for minors.¹³⁶ In addition, Queensland is one of several jurisdictions that have experimented with a specialised drug court, although they have not been in continuous operation, having been first established in 2003 and then defunded by the state government in 2014. They were re-established in early 2018. Currently, the option of the drug court is only available to offenders within the Brisbane area who meet certain eligibility criteria.¹³⁷

Northern Territory

The Sentencing Act (NT) (the “*NT Sentencing Act*”) does not expressly refer to gender and includes only very general provisions which may mitigate sentencing. In addition, customary law and cultural practice cannot be taken into account,¹³⁸ which may negatively affect Indigenous women.

The NT Sentencing Act details a number of aggravating factors, including use or threat of violence¹³⁹ and an offence involving substantial planning or organisation¹⁴⁰, which would encompass organised crime activities.

There is mandatory sentencing for drug-related offences with either a maximum penalty of seven years’ imprisonment or more, or for offences with lesser penalties which were accompanied by an aggravating circumstance.¹⁴¹ Offenders sentenced under this provision must serve a minimum of 28 days in prison, before any parole or suspension of sentence can take effect. There is a long list of aggravating circumstances.¹⁴² These provisions are particularly troubling for their arbitrariness, as they override the court’s normal discretionary powers when sentencing, unless the court can find “particular circumstances” of the offence or the offender.¹⁴³

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

In reviewing several hundred cases and sentencing decisions, we identified that gendered factors are not consistently taken into account by judges in any jurisdiction. While there are examples of courts taking gendered factors into account, they are in all cases the minority. In the majority of cases reviewed involving female drug offenders, judges routinely highlight or focus on other elements, such as youth, rehabilitation chances, early guilty pleas and previous offences. They routinely downplay, or note only as background, elements common to female drug offenders, such as a history of abusive relationships, ethnic minority background, care of children and poverty. Particular issues relating to female drug offenders on remand were also identified in New South Wales.¹⁴⁴

New South Wales

There is no indication that gendered factors had a significant impact on sentencing in New South Wales. While some gendered factors were considered (dependent children, coercive male co-offenders and histories of abuse), the emphasis was usually placed on guilty pleas and drug dependency, which in turn led to a consideration of rehabilitation prospects.

In a few cases reviewed in New South Wales, the court sentenced the offender to a prison term equal to the time the offender had already spent in custody on remand and the offender was therefore released immediately. Rather than being a positive finding, these cases should be understood in the broader context of lengthy delays in the New South Wales court system,¹⁴⁵ which increase the time offenders spend in custody prior to being convicted or sentenced.¹⁴⁶ This has implications for female drug offenders, as prisoners on remand do not have access to the same rehabilitation programmes that are available to offenders who have been convicted and sentenced. Recent initiatives

¹³⁵. *Police Powers and Responsibilities Act 2000* (Old), S 379.

¹³⁶. *Youth Justice Act 1992* (Old), S 173.

¹³⁷. An offender must be a person dependent on drugs charged with a non-violent, non-sexual offence, which would encompass a broad range of offences beyond drug offences alone.

¹³⁸. *Crimes Act 1914* (Cth), S 16AA.

¹³⁹. *Sentencing Act* (NT), S 6A(f).

¹⁴⁰. *Sentencing Act* (NT), S 6A(h).

¹⁴¹. *Misuse of Drugs Act* (NT), S 37(2).

¹⁴². *Misuse of Drugs Act* (NT), S 37(1).

¹⁴³. *Misuse of Drugs Act* (NT), S 37(2).

¹⁴⁴. We note that this was not an exhaustive survey as access to court records is limited in several jurisdictions. However, we believe that a representative sample was reviewed.

¹⁴⁵. Don Weatherburn and Jacqueline Fitzgerald, *Trial court delay and the NSW District Criminal Court*, NSW Bureau of Crime Statistics and Research, No 185, 2015.

¹⁴⁶. *Ibid*, 8.

in New South Wales attempt to address this issue, including the introduction in 2017 of the Remand Addiction Intervention programme, a voluntary programme for people on remand who have a substance abuse problem.¹⁴⁷

Of the 40 cases identified involving female drug offenders, 17 discussed gendered factors. Although our review naturally focuses on those 17 cases, this ratio should not be overlooked, as the absence of discussion of these factors in the other 23 cases may indicate uneven application of court discretion. It may suggest that, in certain cases, backgrounds and histories of female offenders may not be considered relevant by the court or, in the absence of clear sentencing benefit to the offender, may not even be raised by the offender or her lawyer.

The offender's (often abusive) relationship with a male co-offender was highlighted in numerous cases.¹⁴⁸ Elements of coercion were commented upon in several of these. In *R v Garland*, it appears to have been a key element of sentencing, as the offender was sentenced to 150 hours of community service, as opposed to three years and nine months' imprisonment for her male partner. Generally, however, the link was not as clear cut.

Another factor often mentioned is the care of children, especially where the offender was the sole carer of young children. *Linden v The Queen*¹⁴⁹ was a prime example of this, with the offender's two small children (both with special needs) featuring prominently in the appeal court's finding of special circumstances, leading to a reduced sentence that allowed her to be released immediately on parole. Counter-examples (where children were discussed but did not impact sentence) also exist.¹⁵⁰ *Hue Pham Ho v The Queen* is an interesting counter-example in relation to the role of a female offender in a drug offence, as her appeal based on sentencing disparity with a male co-offender (she was sentenced to a longer non-parole period) was specifically dismissed due to her greater role in the offence.

Common threads shared by almost all 17 cases are offender backgrounds involving sexual or physical abuse from partners or in childhood, mental illness and/or drug use. It is often clear, however, that these backgrounds are not adequately taken into account. *Yang v The Queen*¹⁵¹ involved an offender who used drugs and was subjected to abuse when young. Her appeal, based on the original court failing to take into account her

mental illness, failed, and her original sentence of five years' imprisonment for supply was upheld. Similarly, an appeal by the offender in *Alliston v The Queen*¹⁵², who had a history of foster care and physical and sexual abuse, was denied. Her original sentence of seven years' imprisonment for supply was upheld.

Victoria

In two cases highlighted below, gendered factors were specifically referenced and ultimately influenced the court's sentencing decision in favour of the offender. This was, however, not the norm.

In the case of *Howarth*¹⁵³, the offender was found guilty with several co-offenders in relation to trafficking commercial quantities of drugs. The sentencing judge did not explicitly mention any factors of Howarth's offending as mitigating but did discuss the influence of her relationship with Dalton (who was the kingpin) on Howarth's involvement, Howarth's youth (22 years old at the time of offending) and her early guilty plea. In addition, Howarth's logistical and support role was seen as relatively minor. She was ultimately sentenced to a non-custodial community corrections order, community service, and drug, alcohol and mental health assessment and treatment. Other co-offenders (one male, one female) with minor roles also received community corrections orders, while the main offender received a sentence of eight years' imprisonment.

In *DPP v Barker & Ors*¹⁵⁴, which involved possession of drug-manufacturing equipment, the traumatic background and circumstances of the offender were specifically taken into account by both the court and the prosecution. She had been exposed to drugs as a child by her mother, sexually abused by her step-father, and physically abused by subsequent partners. The prosecution requested a suspended sentence, which was what was imposed. While not specifically gendered, this is a case where a background of abuse and violent relationships clearly led to leniency. It is difficult to estimate to what extent the leniency shown in this case was due to the judge as opposed to the lighter sentence requested by the prosecution. It should be stressed that the offender's history of abuse in this case was the worst of all cases reviewed in Victoria. The leniency of the prosecution is therefore not evidence of a policy of progressive treatment of women offenders.

While encouraging, the above cases were in the minority. Gendered factors did not feature prominently in the court's reasons for sentencing in other relevant cases

¹⁴⁷ Corrective Services, *Policy for Implementation and Recording Remand Interventions for State-wide Programs*, 2017, 9.

¹⁴⁸ *Remington v The Queen* [2018] NSWCCA 98; *Pleasance v The Queen* [2016] NSWCCA 113; *El-Ahmad v The Queen* [2015] NSWCCA 65; *Hue Pham Ho v The Queen* [2013] NSWCCA 174; *Alliston v The Queen* [2011] NSWCCA 281; *R v Garland* [2017] NSWDC 258.

¹⁴⁹ [2017] NSWCCA 321.

¹⁵⁰ *Ching v The Queen* [2018] NSWCCA 101; *Bao v The Queen* [2016] NSWCCA 16; *Hue Pham Ho v The Queen* [2013] NSWCCA 174.

¹⁵¹ [2012] NSWCCA 49.

¹⁵² [2011] NSWCCA 281.

¹⁵³ *DPP v Dalton*; *DPP v Howarth*; *DPP v Montgomery*; *DPP v Verry* [2014] VCC 1048 (18 June 2014).

¹⁵⁴ [2013] VCC 1414 (6 September 2013).

reviewed.¹⁵⁵ In these cases, courts would often note a female offender's difficult background (including abusive relationships, drug use or poverty) but concentrate on other factors when making a sentencing decision. *DPP v Pham* is particularly illustrative of the ways in which courts can, absent legislative or official guidance, fail to take gendered factors into account. While no gendered factors are specifically mentioned in the sentencing reasoning, in a post-sentence monologue, the judge frames Pham's refugee family history of deprivation and status as a mother of two young children as aggravating factors, rather than recognising the ways in which these circumstances could have contributed to her offending.

The cases reviewed indicate that Victorian judges have sometimes considered individual factors of an offender, and the wider context of their offending, including both negative family and social influences, and broader power dynamics in play with female offenders. Several cases mentioned gendered factors, such as involvement in offending due to male partners or family members, and the difficulty of being separated from children and family by a prison sentence. The uncertain weight accorded to such factors is a reflection of the lack of clarity in sentencing laws and guidelines regarding which factors must be considered and how much weight should be accorded to them. Judges tended to be more concerned with early guilty pleas, previous offending and rehabilitation chances than with any gendered factors.

Queensland

In many of the cases reviewed, although gendered factors are noted in the judges' remarks, it is not clear that they had a significant impact on sentencing. As in other jurisdictions, the number of cases reviewed is telling: 37 cases were identified that involved female drug offenders in the sample of 329 cases publicly available. Of these, only 17 had significant discussion of gendered factors.

In some cases, there are indications that guidance based on previous cases (involving male offenders) was followed. More emphasis was usually placed on guilty pleas, rehabilitation chances, youth and previous convictions (or lack thereof) than on gendered factors, such as young dependent children or a history of domestic violence victimisation. However, there were also some clear examples where gendered factors were taken into account in sentencing, such as *The Queen v Carly Marie Robyn Younger*¹⁵⁶ and *The Queen v Tammy Beau Sanderson*.¹⁵⁷

Younger involved an offender who had been the victim of significant domestic violence as a child and in her adult relationships, and whose drug use was directly linked to this victimisation. She was also a single mother of two children, one of whom was autistic. The case is notable in that the court declined to impose a prison sentence, despite the offence (possession) being committed during the period of a previously imposed suspended sentence. The court concluded that imposing a prison sentence in this case would be "unjust" given the circumstances.

Sanderson is also a significant case showing a clear difference in treatment by the court between two offenders due to gendered factors. Sanderson had been in a relationship with an older male co-offender, against whom she had taken out a domestic violence order. She also had six children under the age of seven. The judge in the case specifically mentioned the hardship on her children as a determining factor in allowing her to be released on parole immediately, while the co-offender received a longer sentence and a non-parole period of 18 months.

A common thread of child wellbeing also emerged in a number of cases¹⁵⁸ where the court appeared to grant leniency due to the offender's need to care for young children. However, these cases should be contrasted with others¹⁵⁹ which involved discussion of significant gendered factors that appear to have had little or no influence on the sentencing outcome.

Northern Territory

There were a very limited number of cases publicly available for review, although they followed the same general trends as in other jurisdictions. In particular, in the very small sample (10) of sentencing remarks from lower courts we were able to obtain, only one case contained any mention of gendered factors. Significantly, in one of the cases from higher courts highlighted below, gendered factors such as the care of young children were not considered "special circumstances" that would justify a court not imposing a mandatory sentence.

*Musgrave v Yarllagulla*¹⁶⁰ was a case where gendered factors heavily influenced sentencing. In a Crown appeal against a recording of no conviction at first instance for supply, the Indigenous offender was 18 years old at the time of the offence and the mother of two young children, one of whom was breast feeding.

¹⁵⁵. *DPP v Pham* [2017] VCC 683 (26 May 2017); *DPP v Le Loan* [2014] VCC 1780 (31 October 2014); *DPP v Cutri* [2013] VCC 1058 (5 September 2013); *DPP v Thu* [2012] VCC 1878 (7 December 2012).

¹⁵⁶. Sentencing Remarks 19 July 2017, viewed 5 August 2019, www.sclqld.org.au/caselaw/sentencing-remarks.

¹⁵⁷. Sentencing Remarks 16 March 2017, obtained by request from the Queensland Supreme Court Library.

¹⁵⁸. *The Queen v Aleesha Kristy O'Sullivan* (Sentencing Remarks 7 November 2017); *The Queen v Bianca Jayne Parker* (Sentencing Remarks 9 March 2017); *The Queen v Melinda Jane Darx* (Sentencing Remarks 28 February 2017), and *The Queen v Natalea Hazel Hope Bornen* (Sentencing Remarks 28 February 2017). All cited sentencing remarks obtained by request from the Queensland Supreme Court Library.

¹⁵⁹. *The Queen v Rachel Anne Revie* (Sentencing Remarks 12 March 2018, viewed 15 August 2019 www.sclqld.org.au/caselaw/sentencing-remarks; *The Queen v Jarnene Carolanne Weber* (Sentencing Remarks 13 October 2017); *The Queen v Simone Shepperd* (Sentencing Remarks 12 December 2017); and *The Queen v Derya Kutbay* (Sentencing Remarks 18 December 2017). All cited sentencing remarks obtained by request from the Queensland Supreme Court Library, unless otherwise specified.

¹⁶⁰. [2006] NTSC 17.

The magistrate considered she was in a vulnerable state at the time of being asked to carry drugs by a family member, as she had just given birth and her newborn was ill. She was “*timid, immature, naïve, shy, reticent, inexperienced*” which led to her being “*preyed upon*” by another. The original sentence (no conviction) was upheld.

*Maurisa Luanna Jane Henwood v Vivien Lynette Balchin*¹⁶¹ is notable because it involved the imposition of a mandatory sentence. The offender appealed her five-month sentence for supply and possession. She was married with six children, and one child was to attend an Indigenous ceremony in the next few days, for which both parents would be required. Several of the children were very young and in need of her care. The appeal succeeded due to the sentence being “*manifestly excessive*” and the original magistrate failing to take into account, among other things, the gendered factors mentioned above. Although her sentence was reduced from five to three months’ imprisonment, gendered factors were not considered to be “*particular circumstances*” that would justify not imposing the mandatory 28-day prison sentence, which she was still required to serve.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

The penalties imposed on female offenders vary by jurisdiction, although fines, community service and good behaviour bonds make up the majority of penalties for possession, while a custodial sentence is usually imposed for more serious offences.¹⁶² For New South Wales and Queensland, average sentence lengths for women differ markedly. Sentences for possession average 3.2 months in New South Wales and 7.2 months in Queensland.¹⁶³ For trafficking, the average sentence is 13 months in New South Wales and 3.6 years in Queensland.¹⁶⁴ It is difficult to assess the reasons for these differences; however, categorisation of data, (non-)inclusion of parole periods, as well as possible differences in sentencing legislation and judicial approach may be responsible.

The use and presentation of relevant statistics was not uniform across the three jurisdictions,¹⁶⁵ making it difficult to provide accurate comparisons. However, a top-level analysis of the data indicates that women tend to receive less severe penalties and (if sentenced to prison) shorter sentences than men for the same

category of drug crime. However, caution should be exercised given these conclusions have been criticised by at least one academic (see Section 5 below). Limited relevant data was available for the Northern Territory.

New South Wales

Data provided by the New South Wales Bureau of Crime Statistics and Research (“BOSCAR”)¹⁶⁶ shows several countervailing trends. On the one hand, there is a general increase in the number of female offenders. On the other hand, there is a small, but statistically significant difference in the types of sentences female offenders are receiving, such that women more often receive more lenient sentences than men. Indigenous women, however, appear to receive harsher sentences at a higher rate, including triple the rate of prison sentences. Further information on these statistics is set out below.

1. For possession offences from 2013 to 2017, data provided by BOSCAR reveals the following:

- 18.1% of offenders were female. The percentage of female offenders has risen since 2013 from 17.1% (1,316) to 19.6% (2,182).
- The most significant sentences for female offenders were fines (53.3%), bonds without conviction (23.9%) and no conviction being recorded (8.5%). From the data provided, female offenders are more likely than male offenders to receive bonds without conviction (23.9% v 19.5%) and have no conviction recorded (8.5% v 7.5%) and less likely to be fined (53.3% v 57.2%).
- Less than 1% of female offenders found guilty were required to serve jail time.
- Female offenders sentenced to imprisonment received an average sentence of 3.2 months in jail between 2013 and 2017. This figure was the same for male offenders sentenced to imprisonment.
- BOSCAR also keeps data on Indigenous female offenders in respect of possession or use offences:
- The number of female offenders increased from 246 in 2013 to 384 in 2017. However, this represents a decrease in the number of Indigenous females as a percentage of all female offenders (18.7% in 2013 v 17.6% in 2017).

¹⁶¹. [2011] NTSC 84.

¹⁶². See, e.g., BOSCAR statistics on trafficking offences in Section 4.1 below.

¹⁶³. Refer to relevant sections below.

¹⁶⁴. Refer to relevant sections below.

¹⁶⁵. No statistical data was publicly available for the Northern Territory.

¹⁶⁶. BOSCAR is a government agency within the Department of Justice which maintains databases on crime statistics in NSW.

- The most significant sentences for Indigenous female offenders were fines (68.7%), nominal penalties (6.7%), bonds without conviction (6.2%), bonds with and without supervision (each 5.1%) and no conviction being recorded (3.8%).
- 2.9% of Indigenous female offenders found guilty were required to serve a prison term in 2017. This was a slight increase from 2013 (2.8%) after a dip in 2014 (1.5%) and 2015 (1.7%).
- Indigenous female offenders sentenced to imprisonment received an average sentence of two months in jail. For Indigenous male offenders sentenced to imprisonment, the average sentence was three months in jail.

2. Statistics provided in relation to dealing and trafficking offences indicate similar trends to those identified for possession offences: an increase in overall numbers of female drug offenders, although women receive, on average, shorter prison sentences than men. The picture for Indigenous women is mixed, as they receive prison terms at a higher rate, although the average sentence is shorter than for female offenders in general. Further information on these statistics is set out below.

According to data provided by BOSCAR in respect of *dealing or trafficking* offences¹⁶⁷ from 2013 to 2017:

- The percentage of female offenders has risen since 2013 from 17.8% (228) to 19.2% (355).
- Approximately 30% of female offenders sentenced received a term of imprisonment.
- Female offenders sentenced to imprisonment received an average sentence of 13 months in jail in 2017. Male offenders sentenced to imprisonment received an average sentence of 20 months in jail in 2017.¹⁶⁸
- The number of female offenders who received an Intensive Correction Order has increased tenfold, from three in 2013 to 34 in 2017. This trend was mirrored in male offenders, increasing from 56 in 2013 to 197 in 2017. However, imprisonment remained the most common penalty for both female and male offenders.
- In relation to Indigenous female offenders in respect of dealing or trafficking offences:

- The number of offenders increased from 59 in 2013 (being 25.9% of female offenders found guilty) to 78 in 2017 (22.9%)(with a peak of 99 in 2016).
- 47.4% of Indigenous female offenders found guilty were required to serve a prison term in 2017. This increased from 44.1% in 2013 (with a low of 35.4% in 2016).
- Indigenous female offenders sentenced to imprisonment received an average sentence of nine months in jail in 2017, a decline from 13 months in 2013. For Indigenous male offenders sentenced to imprisonment, the average sentence fluctuated between 11 and 15 months in jail. In 2013 and 2014, Indigenous male offenders sentenced to imprisonment were likely to receive an average sentence of one month less in jail than Indigenous female offenders.
- The number of Indigenous female offenders who received an Intensive Correction Order¹⁶⁹ was less than non-Indigenous female offenders, with only six Indigenous female offenders receiving an Intensive Correction Order between 2013 and 2017.

Victoria

Victorian statistics indicate that women are less likely to receive harsher sentences by category. There are two shortcomings with this data, namely that the severity of the sentences within each category cannot be determined and the less serious versions of an offence could not be isolated.

The Minor Drug Offences Sentencing trends report¹⁷⁰ covers trends in sentencing for possession or use of drugs of dependence¹⁷¹ for the period from 1 July 2007 to 30 June 2017.¹⁷² The report covers only possession or use of small quantities of drugs, particularly cannabis, methamphetamine, amphetamine, heroin, ecstasy and prescription drugs.¹⁷³

Over the 10-year period covered by the report, there was a substantial increase in minor drug offence convictions. This was particularly evident between 2010–11 and 2016–17 which saw a 97% increase, from 8,586 to 16,937.¹⁷⁴ The increase was primarily driven by an increase in proven charges related to methamphetamine.¹⁷⁵

The proportion of minor drug-related offences committed by women between 2012–13 and 2016–17 increased from 14% to 20%.¹⁷⁶ The period to 31 March

¹⁶⁷ The *Drug Misuse and Trafficking Act 1985* (NSW) does not contain a “trafficking” or “dealing” offence. Offences of this nature are dealt with as supply offences. We assume these statistics refer to supply offences.

¹⁶⁸ These figures exclude life sentences.

¹⁶⁹ An alternative sentence available if the court sentences an offender to one year or less in jail. It is served in the community, but subject to strict monitoring.

¹⁷⁰ Sentencing Advisory Council 2018, *Trends in Minor Drug Offences Sentenced in the Magistrates’ Court of Victoria*, viewed 15 August 2019, www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Trends_in_Minor_Drug_Offences_Sentenced_in_the_Magistrates_Court.pdf.

¹⁷¹ Minor drug offence is defined as offences under s 73(1a)-(b) and s 75(a)-(b) of the *Drugs, Poisons and Controlled Substances Act 1981* (VIC).

¹⁷² *Ibid*, page xi.

¹⁷³ *Ibid*, page 3.

¹⁷⁴ *Ibid*, page xi.

¹⁷⁵ *Ibid*, page xi.

¹⁷⁶ *Ibid*, page 14.

2016 indicates that women have “slightly higher rates of recorded offending than men for heroin, methamphetamine and prescription drugs”.¹⁷⁷ The raw number of “minor drug offence cases involving women increased by 126% over the term of the report, from 755 in 2007-08 to 1,707 in 2016-17”.¹⁷⁸ The gender distributions across minor offences for different drugs was relatively stable, at 83% male offenders and 17% female.¹⁷⁹

Queensland

In Queensland, there is some suggestion from the available data that female offenders are being treated differently from males in certain respects. They are more likely to receive a wholly suspended sentence for trafficking and more likely to receive a good behaviour bond and/or avoid a fine for possession. However, there is insufficient data to conclude that consideration of gendered factors in sentencing is the cause of these differences.

The main sources of relevant publicly available statistics in Queensland are two reports published by the Queensland Sentencing Advisory Council.

1. Sentencing Spotlight on trafficking in dangerous drugs¹⁸⁰ surveyed sentencing outcomes for trafficking offences in Queensland over the 10 years up to 2016. The main takeaways were:

- 16.3% of offenders were female.¹⁸¹
- 98.5% of female offenders sentenced (in cases where trafficking was their most serious offence) received custodial sentences.¹⁸² Little difference was seen between Indigenous and non-Indigenous women.¹⁸³
- 84.1% of female offenders who received custodial sentences were required to serve some amount of jail time.¹⁸⁴ The remainder (15.9%) received either Intensive Correction Orders¹⁸⁵ or wholly suspended sentences.¹⁸⁶ Female offenders were more likely to receive wholly suspended sentences than male offenders (15.0% vs 10.9%).¹⁸⁷

- Female offenders sentenced to imprisonment received an average sentence of 3.6 years in jail.¹⁸⁸ This is the sentence length only, and actual time in prison could be shorter due to parole or sentence suspension.

2. Sentencing Spotlight on possession of dangerous drugs¹⁸⁹ surveyed sentencing outcomes for possession offences in Queensland over the 10 years up to 2016. Its main takeaways were:

- 21.2% of offenders were female.¹⁹⁰
- 94.5% of female offenders sentenced (in cases where possession was their most serious offence) received non-custodial sentences.¹⁹¹ This was the same for Indigenous and non-Indigenous women.¹⁹²
- The most significant non-custodial sentences for female offenders were fines (50.3%), good behaviour bonds (37.9%) and probation (8.7%).¹⁹³ The report notes that female offenders were significantly more likely than male offenders to receive good behaviour bonds (37.9% vs 32.3%)¹⁹⁴ and less likely to be fined (50.3% vs 58.1%).¹⁹⁵
- 56.2% of female offenders who received custodial sentences were required to serve some amount of jail time.¹⁹⁶ The remainder (43.8%) received either Intensive Correction Orders or wholly suspended sentences.¹⁹⁷
- Female offenders sentenced to imprisonment received an average sentence of 7.2 months in jail.¹⁹⁸ This is the sentence length only, and actual time in prison could be shorter due to parole or sentence suspension.

Northern Territory

Limited statistical data was available regarding the sentences imposed in the Northern Territory. However, it was reported that 17 female offenders received a penalty of imprisonment where an “illicit drug crime”

¹⁷⁷ *Ibid*, page 2.

¹⁷⁸ *Ibid*, page 14.

¹⁷⁹ *Ibid*, page 14.

¹⁸⁰ Queensland Sentencing Advisory Council 2018, *Sentencing Spotlight on trafficking in dangerous drugs*, viewed 15 August 2019, www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0020/555320/sentencing-spotlight-on-trafficking-in-dangerous-drugs.pdf.

¹⁸¹ *Ibid*, page 2.

¹⁸² *Ibid*, page 11.

¹⁸³ *Ibid*, page 11.

¹⁸⁴ *Ibid*, page 12.

¹⁸⁵ *Ibid*, page 12.

¹⁸⁶ *Ibid*, page 12.

¹⁸⁷ *Ibid*, page 12.

¹⁸⁸ *Ibid*, page 13. This does not include partially suspended sentences.

¹⁸⁹ Queensland Sentencing Advisory Council 2017, *Sentencing Spotlight on possession of dangerous drugs*, viewed 19 July 2018, www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0009/539145/sentencing-spotlight-on-possession-of-dangerous-drugs-oct-2017.pdf.

¹⁹⁰ *Ibid*, page 2.

¹⁹¹ *Ibid*, page 12.

¹⁹² *Ibid*, page 12.

¹⁹³ *Ibid*, page 14.

¹⁹⁴ *Ibid*, page 13.

¹⁹⁵ *Ibid*, page 13.

¹⁹⁶ *Ibid*, page 13.

¹⁹⁷ Queensland Sentencing Advisory Council 2017, as above no 132, page 13.

¹⁹⁸ *Ibid*, page 17. This does not include partially suspended sentences.

was their most serious offence in 2015–16.¹⁹⁹ The most common sentence lengths for these offences were two to five years (six offenders) and three to six months (five offenders).²⁰⁰

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is limited research on women convicted of low-level drug-related offences, as researchers and policy groups usually have a broader focus on either female offenders generally or drug offenders generally. However, many studies and policy papers consider drug use and offending by women as a relevant factor. The commentary often discusses the social and economic factors which lead to women becoming imprisoned, such as histories of physical or sexual abuse, learning difficulties and poverty. There is also some discussion of the appropriateness of the prison system for women, particularly for female drug offenders. Academics have considered these topics at a federal level and also in respect of particular states.

Australia

In a paper presented in 2016, academic and barrister Felicity Gerry QC²⁰¹ considered the Bangkok Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders in the Australian context. In her paper, Gerry recommended a proactive judicial approach to sentencing women, including promoting greater judicial understanding of the circumstances in which women commit offences.²⁰² She also noted that the majority of female offenders have themselves been victimised at some point in their lives, and that this needs to be taken into account to a greater degree when sentencing.²⁰³ She further commented on motherhood and the impact of imprisonment on a female offender's children,

stating that: *"In a threshold case, the impact on a dependent child can tip the scales and a proportionate sentence can become disproportionate."*²⁰⁴

At a policy level, the Australian Institute of Family Studies published a report in 2012²⁰⁵ that identified increases in female incarceration generally, and identified that women (especially Indigenous women) were also receiving prison sentences for minor crimes at a higher rate.²⁰⁶ In addition, there was a high rate of women on remand (in jail awaiting trial or sentencing), a period in which they are not eligible for rehabilitation programmes.²⁰⁷

The report focused on the sexual abuse histories of female offenders, which it reported are significantly higher than among the general female population,²⁰⁸ as well as higher levels of repeated victimisation among female offenders. It summarised the current literature on the effect of sexual abuse on victims, including the complex trauma that victims carry into adulthood, which can lead to criminal acts.²⁰⁹ Additionally, it outlined the different path that many female offenders take to crime, in comparison to the path taken by men.²¹⁰ While the report focused its conclusions on addressing the needs of women already in the prison system, the gendered elements it considers (especially in relation to sexual and other violent abuse) are equally relevant at the sentencing stage.

Research by the Australian Institute of Criminology²¹¹ into the drug-using habits of female offenders Australia-wide included some relevant findings. Among them was a statistical indication that drug use among female offenders often begins before committing any crimes, whereas male offenders' initial crimes are often committed concurrently with commencement of drug use.²¹² The research also detailed the correlation between, among other factors, victimisation and drug use,²¹³ drawing a causative line from female victimisation to female offending. While the report considered all female offenders (not just drug offenders) and concluded with a focus on policy considerations aimed at drug prevention and early intervention for high-risk children, the findings would be just as relevant when considered in the context of sentencing reform.

^{199.} Northern Territory Department of the Attorney-General and Justice, *Northern Territory Correctional Services and Youth Justice Annual Statistics 2015 – 2016*, viewed 17 January 2019, justice.nt.gov.au/_data/assets/pdf_file/0009/430110/2015-16-NTCS-Annual-Statistics.pdf, page 30.

^{200.} *Ibid.*

^{201.} Felicity Gerry QC, Panel Discussion at National Judicial College of Australia Conference 6 and 7 February 2016, *Can sentencing of women who are victims of abuse accommodate the social problems that underpin the offending? Is enough being done to keep women offenders from returning to prison?*, viewed 15 August 2019, njca.com.au/wp-content/uploads/2017/12/Gerry-Felicity-Women-in-prison-in-Australia-Paper.pdf.

^{202.} *Ibid.*, page 1.

^{203.} *Ibid.*, page 3.

^{204.} *Ibid.*, page 9.

^{205.} Australian Institute of Family Studies, *Addressing women's victimisation histories in custodial settings*, ACSSA Issues No. 13, December 2012.

^{206.} *Ibid.*, page 2.

^{207.} *Ibid.*, page 2.

^{208.} *Ibid.*, page 3.

^{209.} *Ibid.*, pages 3–5.

^{210.} *Ibid.*, pages 5 and 6.

^{211.} Holly Johnson, *Key findings from the Drug Use Careers of Female Offenders*, Trends and Issues in Crime and Criminal Justice no. 289, 2004, viewed 15 August 2019, aic.gov.au/publications/tandi/tandi289.

^{212.} *Ibid.*, page 4.

^{213.} *Ibid.*, page 5.

New South Wales

In New South Wales, there is some significant academic research on Indigenous offenders.

In relation to Indigenous women, the Aboriginal and Torres Strait Islander Justice Commissioner in its 'Social Justice Report 2002' identified that, for Indigenous women, the "intersection of race, gender and class is of particular relevance ... [but] the discrimination faced by Indigenous women is more than a combination of race, gender and class. It includes dispossession, cultural oppression, disrespect of spiritual beliefs, economic disempowerment ... and more".²¹⁴ However, the law on sentencing Indigenous offenders, both men and women, has not changed since 1982, when the court in *Neal*²¹⁵ formulated the "substantial equality principle": that the same sentencing principles should be applied irrespective of the offender's membership of an ethnic or other group. This race-neutral approach was upheld in the 2013 case of *Bugmy*,²¹⁶ in which the court reiterated that Aboriginality is not a factor *per se* that should be considered in sentencing.²¹⁷

This is despite recent research indicating that the Indigenous women's experience contributes to their committing offences, and custodial sentences having a harsher impact on them, including:

- social and economic factors – according to a 2009 study into drug use and crime, Indigenous women were "younger, had less education, were more likely to be caring for children and to be living in public housing, and were less likely to be employed than non-Indigenous women"²¹⁸
- violence – according to the Aboriginal and Torres Strait Islander Justice Commissioner report mentioned above, "studies of Indigenous women in prison reveal experiences of life in a society fraught with danger and violence"²¹⁹
- family – 80% of Indigenous women in prison are mothers²²⁰
- health and wellbeing – a study into drug use by female offenders in 2004 revealed 80% of Indigenous female offenders had a drug dependency. The rate among non-Indigenous female offenders was 64%.²²¹

Victoria

The Victorian literature provides useful, qualitative context within which to understand the trends in sentencing seen in sentencing data. While several reports argue that female offenders are treated less harshly than males, there is evidence from both Government reports and academics that women are treated with similar severity to men, provided that one controls for the circumstances of an offence.^{222, 223} A further common conclusion in the literature is that incarceration is uniquely onerous for women, resulting in predominantly negative effects on both the women themselves and their communities.^{224, 225}

One view on the differential sentencing of women is contained in a report from the Sentencing Advisory Council.²²⁶ It focuses on gender differences in sentencing and concludes that women are less likely to receive a sentence of imprisonment in the Victorian Magistrates' court.²²⁷ The Sentencing Advisory Council attributed this trend to women being more likely than men to have a constellation of factors that can validly reduce the length of a sentence.²²⁸ A section of this report focused specifically on sentencing for drug-related offences in the Victorian County and Supreme courts and Magistrates' court. Once again, the data showed that women were less likely to be sentenced to imprisonment than men, and were also more likely to receive wholly suspended sentences.²²⁹ The report provided context for these figures on the basis that women were more likely to play secondary roles in drug offending, such as drug couriers for coercive male co-offenders.²³⁰ This suggests that, while women are less likely to receive sentences of imprisonment, they are still being sentenced in accordance with their role in offending.

214. Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report 2002', HREOC, 2002, 15.

215. (1982) 149 CLR 305.

216. (2013) 249 CLR 271.

217. Jackson, L, 'Sentencing Indigenous Women after Bugmy', *Alternative Law Journal*, 40 (3) 2015, 171.

218. Loxley, W and Adams, K, 'Women, Drug Use and Crime: Findings from the Drug Use Monitoring in Australia Program', Research and Public Policy Series No 99, AIC 2009, xi.

219. Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report 2002', HREOC, 2002, 2.

220. Behrendt, L, Cunneen, C and Libesman, T, 'Indigenous Legal Relations in Australia', Oxford University Press, 2009, 16.

221. Jackson, L, 'Sentencing Indigenous Women after Bugmy', *Alternative Law Journal*, 40 (3) 2015, 173 citing Johnson, H, 'Drugs and Crime: A Study of Incarcerated Female Offenders', Research and Public Policy Series No. 63, AIC, 2004.

222. Sentencing Advisory Council Victoria, *Gender Differences in Sentencing Outcomes 2010*, viewed 17 January 2019, www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf, page 33.

223. Naylor, B. 1999, 'Sentencing Female Offenders in the Magistrate's Court: Preliminary Report on a Pilot Study', *Women and the Law*, page 181.

224. Parliament of Victoria, Drugs and Crime Prevention Committee 2010, *Inquiry into the Impact of Drug-related Offending on Female Prisoner Numbers*, pages v 28-29, and 76.

225. Flat Out Inc & the Centre for the Human Rights of Imprisoned People (CHRIP), *Submission to the Drugs and Crime Prevention Committee - Inquiry into the Impact of Drug-related Offending on Female Prisoner Numbers 2010*, viewed 17 January 2019, www.flatout.org.au/wp-content/uploads/2012/04/FO_CHRIP-Drugs-and-Crime-Submission1.pdf, pages 8 and 12.

226. Sentencing Advisory Council Victoria, *Gender Differences in Sentencing Outcomes 2010*, viewed 17 January 2019, www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf.

227. *Ibid.*

228. *Ibid.*, page vii.

229. *Ibid.*, pages 25-26, 32.

230. *Ibid.*, page 26.

This is supported by the much smaller discrepancy between sentence length between both men and women sentenced to imprisonment for the same crimes. The largest discrepancy identified by the Sentencing Advisory Council in the Magistrates' court was 0.9 months, with women receiving 5.8 months' imprisonment on average for drug cultivation, versus 6.7 months for men.²³¹

A separate report into the impact of drug offending on female prisoner numbers by the Drugs and Crime Prevention Committee²³² sought to explain the growing numbers of women incarcerated in Victorian prisons and suggest possible solutions. The Victorian Department of Justice attributed the increase in women's imprisonment rates to successful police operations targeting organised crime (which were more likely to sweep up vulnerable women used as low-level drug couriers or farmers), a shift away from viewing prison as a last resort and the increasing number of women being placed on remand.²³³ The Drugs and Crime Prevention Committee contextualised the increase in female incarceration within the wider trend of increasing imprisonment of women in countries like New Zealand, the United Kingdom and the United States.²³⁴ The report also looked at factors affecting imprisonment at the micro, judicial, and systemic levels. The key micro-level factor was deemed to be women's higher likelihood of experiencing homelessness, poverty and mental illness. This in turn resulted in judges imposing sentences of imprisonment, as women were less able to pay a fine or comply with community corrections orders.²³⁵ The report identified other judicial-level factors contributing to incarceration, these being increasingly punitive responses from judges despite increased awareness of the negative effects of prison, and increased funding for rehabilitation programmes. The report paraphrased academic Pat Carlen's theory that perversely, increases in "policies, programs and prison reforms" designed to assist prisoners had caused incarceration to be seen by judges as something beneficial to the offender, rather than as an option of last resort.²³⁶ Finally, the report made the major structural point that prisons

have historically been designed with the punishment and discipline of men as their focus and, as such, are generally ill-suited for female prisoners.²³⁷

Similar themes were picked up on in one advocacy group's submission to the Drugs and Crime Prevention Committee. The group submitted that, from the viewpoint of previously incarcerated women, any shifting judicial or societal conception of incarceration from punishment to a site of rehabilitation is misguided.²³⁸ The submission considered that imprisoned women become "entrenched in a cycle of poverty, with very high risks of recidivism".²³⁹ The group also disputed the effectiveness of prison-based rehabilitation programmes, stating their view that incarceration was an inefficient method of providing the social and health support and services required by drug users.²⁴⁰

In contrast to the reports cited above, academic Bronwyn Naylor provides a critical discussion of how gender interplays with sentencing generally. While noting that this research was published almost two decades ago, it remains relevant to the discussion, as it found that any statistical indication of leniency towards women was unlikely to have correctly controlled for factors such as a woman's higher likelihood of being a first-time offender and offending at less severe levels.²⁴¹ Naylor noted two further studies from the 1980s which both concluded that gender had no direct influence on severity of sentence or probability of reconviction in the Victorian Magistrates' court.²⁴² Naylor's research also surveyed other studies in the area, and found that other academics suggested that women who conform more to social stereotypes of femininity tend to receive more lenient sentences than those who do not.²⁴³ Relevant factors which resulted in more severe sentences for women were the degree to which a woman was under informal social control, marital status, race, youth and broken family upbringings.²⁴⁴

²³¹ *Ibid*, page 33.

²³² Parliament of Victoria, Drugs and Crime Prevention Committee 2010, *Inquiry into the Impact of Drug-related Offending on Female Prisoner Numbers*.

²³³ *Ibid*, pages 25-26.

²³⁴ *Ibid*, page 23.

²³⁵ *Ibid*, page 33.

²³⁶ *Ibid*, page 25.

²³⁷ *Ibid*, page v.

²³⁸ Flat Out Inc & the Centre for the Human Rights of Imprisoned People (CHRIP), *Submission to the Drugs and Crime Prevention Committee - Inquiry into the Impact of Drug-related Offending on Female Prisoner Numbers 2010*, viewed 17 January 2019, www.flatout.org.au/wp-content/uploads/2012/04/FO_CHRIP-Drugs-and-Crime-Submission1.pdf.

²³⁹ *Ibid*, page 3.

²⁴⁰ *Ibid*, page 3.

²⁴¹ Naylor, B. 1999, 'Sentencing Female Offenders in the Magistrate's Court: Preliminary Report on a Pilot Study', *Women and the Law*, p.181.

²⁴² *Ibid*, page 181.

²⁴³ Naylor, B. 1993, 'Gender and Sentencing in the Victorian Magistrates' Courts: A Pilot Project', *Criminology Research Council Report 42-90*, p.8.

²⁴⁴ *Ibid*, pages 7-9.

Northern Territory

The Northern Territory Ombudsman published an extensive report on female prisoners in the Northern Territory in 2017.²⁴⁵ Of particular relevance is the feedback from the Chief Executive of the NT Department of Corrections quoted in the report, which is worth replicating in full:

*"The Report] discusses, with reliance on the Tokyo and Bangkok Rules, the need to take female gender, pregnancy/child care status into account in sentencing and applying diversionary options to Courts and relevant authorities. This would require significant stakeholder consultation as well as requiring legislative amendment because family hardship upon imprisonment is not ordinarily a factor in sentencing save in exceptional circumstances in the NT or across most jurisdictions in Australia. Nor is gender (in itself) such a factor."*²⁴⁶

In response to this feedback, the Ombudsman acknowledged the need for stakeholder engagement, and stated that *"there is a need for fundamental changes to the way society deals with these issues"*.²⁴⁷ It is therefore clear that, at least in the Northern Territory, there is governmental awareness of the issues relating to the sentencing of women, but constraints on the action that can be taken without increased public support.

²⁴⁵ Ombudsman NT Investigation Report, *Women in Prison II – Alice Springs Women's Correctional Facility*, May 2017, viewed 15 August 2019, www.ombudsman.nt.gov.au/sites/default/files/downloads/women_in_prison_ii_aswcf_report_vol1-final_26.05.17.pdf.

²⁴⁶ *Ibid.*, page 12.

²⁴⁷ *Ibid.*, page 12.

CHAPTER 3

Colombia

Incarceration rates	Women	Men	Proportion of women
Total ²⁴⁸	8,250	111,772	6.9%
For drug-related offences	Not available	Not available	Not available

Introduction

Colombia is a key international supplier of cocaine with almost all cocaine consumed across the globe originating from Colombia, Peru and, to a lesser extent, Bolivia. Colombia has long been a global centre of the “war on drugs”, under significant diplomatic pressure and financial support from the United States.

Part of the complexity of the “war on drugs” in Colombia is due to drug trafficking having been the fuel for the internal conflict in the country and, in particular, the role of FARC, which to a large degree was financed through drug trade. Following the signing of the peace agreement between Colombia’s government and FARC in 2016, many hoped that the disarmament would impact drug trafficking. However, coca cultivation has grown relentlessly, the demand for cocaine has not diminished and where FARC has disappeared other actors have quickly taken over.

The challenges faced by Colombian society have resulted in the Government taking a hard stance towards drug-related offences, with imprisonment being a fundamental basis of Colombian drug policies. Imprisonment serves “an essentially symbolic purpose: *The Government is forced to legislate to show the public that it is responding in a severe way to the challenges posed by the drug entrepreneurs*”.²⁴⁹ This hard stance was questioned by former president Juan Manuel Santos who favoured social policies to curb drug trafficking. Indeed, Santos used his Nobel Peace Prize acceptance

speech to call for the world to “rethink” the war on drugs: *“The way in which the war against drugs is being waged is equally or even more harmful than all of the wars being fought in the entire world today, combined [...] And it’s time to change our strategy.”* The current president, Iván Duque, however, supports a more aggressive anti-drugs policy.

This aggressive approach has in many ways proven inefficient in terms of adapting to the special role that women have in Colombian crime policy²⁵⁰ as well as in respecting women’s role as the backbone of the Colombian family concept.²⁵¹ It has also been completely ineffective in curbing the scale of the illicit drug market in Colombia: according to the UNODC World Drug Report 2018, coca cultivation was at record highs, with 69% taking place in Colombia.²⁵² Global cocaine manufacture rose by 56% from 2013 – 2016, and all evidence points to an increased global use of cocaine.²⁵³

We understand that, in order to find means and resources to care and provide for their dependants, the prevailing tendency is for women in Colombia to enter the drug market by performing low-level, high-risk tasks. Whereas these offences are not highly profitable, they provide women with the means necessary to satisfy their daily necessities. Indeed, the share of women convicted for what could be defined as low-level drug-related crimes is higher than the share convicted for any other crime.

²⁴⁸ www.prisonstudies.org/world-prison-brief-data.

²⁴⁹ Uprimny, R., Chaparro, S. & Cruz, L. (2016), *Delitos de drogas y sobredosis carcelaria en Colombia*, Bogotá: Colectivo de Estudios Drogas y Derecho.

²⁵⁰ Please note in this context that the criminal policy is wider in scope than the criminal code.

²⁵¹ Ruling T-388 of 2013 (Constitutional Court of Colombia).

²⁵² *World Drug Report 2018* (United Nations publication, Sales No. E.18.XI.0).

²⁵³ *Ibid.*

Looking at the prison population as a whole, the vast majority of offenders having committed drug-related crimes are men. Of the almost 25,000 offenders registered for drug-related crimes in 2016, over 85% were men and just under 15% women.²⁵⁴ However, the proportion of women incarcerated for drug offences within the total female prison population is higher than that of their male counterparts (34.37% of women cf. 13.72% of men in 2018).²⁵⁵

According to Dejusticia, a Colombia-based NGO dedicated to the strengthening of the rule of law and the promotion of social justice and human rights, the trend in recent years is that “*the imprisonment of women linked to drug-related offences has increased significantly and the years of prison to which they are sentenced have also increased*”.²⁵⁶ According to the National Penitentiary and Jail Institute, the number of incarcerated women has multiplied by 5.5 since 1991. Correspondingly, between 2000 and 2014, the number of imprisoned women increased by a staggering 271%.²⁵⁷ Almost 50% of these women are in prison for drug-related offences. It is further noted that 93% of these women are mothers and 52% are head of household.²⁵⁸

Dejusticia has identified Colombia’s current crime policy as part of the reason for the increased number of imprisoned women. According to Dejusticia, the system is based on political connotations that are indifferent to gendered considerations and, as long as the media reports on an increased number of prisoners serving time, the general perception of safety is improved.²⁵⁹

In 2015, the Advisory Commission for Drug Policy in Colombia called on the Government to formulate a national drug policy that identified strategic objectives and mechanisms for co-ordination, monitoring, evaluation and effectiveness. Pursuant to these recommendations, the Colombian drug policy should be designed with a public health criterion and in respect of human rights. Further, the policy should contain programmes and strategies which are differentiated by territory, population group and intervention need. In particular, the policy should consider possible impacts on discriminated and vulnerable groups – such as women, ethnic minorities and the poor.

The implementation of these recommendations has, however, yet to materialise and Colombian crime policy remains driven by public opinion and the need for politicians to satisfy calls for hard and exemplary sentencing.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Colombian drug legislation covers the full cycle of the drug trade – from cultivation through marketing and trafficking to consumption (above the minimum dose levels approved in a 2012 ruling of the Constitutional Court). Whereas there are no specific criteria to determine what a low-level offence is under Colombian law, the Criminal Code (Law 599 of 2000) (*sp. Código Penal*) establishes a number of offences that under some circumstances (such as the amount of drugs transported, possessed or distributed) could be seen as constituting low-level crimes. Pursuant to these rules, cultivation is unlikely to be considered a low-level crime.

In terms of low-level crimes, and by way of illustration, for drug-trafficking, the legislation stipulates general sentencing ranging between 10 and 30 years.²⁶⁰ If the confiscated drugs do not exceed the amount of 1,000 grams of cannabis, 100 grams of cocaine or cocaine-based products or 200 grams of synthetic drugs, the prison sentence will, however, be reduced to between five and nine years.²⁶¹

In addition to the above, the Colombian Constitutional Court ruled in 1994 that anyone caught with less than 20 grams of cannabis, five grams of hashish, 1 gram of cocaine or 2 grams of methaqualone will not be prosecuted or detained. The Court’s ruling is based on the consumption for personal use having its place in the private sphere and, as such, having no effect on third-party rights. There have been relatively recent changes to this policy as Colombia’s president, Iván Duque, on 1 October 2018 issued a decree (Decree 1844) prohibiting the personal use of drugs

²⁵⁴ Ministerio de Justicia (2017). Lineamientos Política Nacional de Drogas. Bogotá D.C.: Ministerio de Justicia. Reviewed 18 October 2018, from www.odc.gov.co/Portals/1/publicaciones/pdf/pnacional/PN031152017_lineamientos_politica_nacional_drogas_2017.pdf.

²⁵⁵ Office of the United Nations High Commissioner for Human Rights (2018), *Women deprived of liberty: Submission to the Working Group on the issue of discrimination against women in law and in practice*.

²⁵⁶ A private, non-profit organisation, dedicated to evaluating crime policy in Colombia: www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_834.pdf.

²⁵⁷ Statistics were provided by the National Penitentiary Institution (IMPEC) to the Colectivo de Estudios Drogas y Derechos (CEDD).

²⁵⁸ National Penitentiary and Jail Institute (2015). “*Respuesta a Derecho de petición al Centro de Estudios de Derecho, Justicia y Sociedad*”. February 2015. Radicado No. 8110-0FPLA- DINPE.

²⁵⁹ Dejusticia (2016) “*Mujeres, políticas de drogas y encarcelamiento / una guía para la reforma de políticas en Colombia*”. Bogotá D.C, WOLA – Washington Office for Latin America and the Open Society Foundations. Reviewed 18 October 2018.

²⁶⁰ Colombian Criminal Code, Article 376.

²⁶¹ If the confiscated drugs meet the quantitative threshold but do not exceed the amounts of 10,000 grams of cannabis, 2,000 grams of cocaine or cocaine-based products or 4,000 grams of synthetic drugs, the prison sentence will range between eight and 12 years.

in parks and other public spaces. Pursuant to this decree, such use can be penalised by an administrative fine up to \$200,000 COP (approx. 55 EUR).

It is worth noting that Colombian penalties for low-level drug-related offences have been subject to criticism. It has been stated that the severity of the penalties is disproportionate when compared to other crimes which have a greater social impact and are more likely to affect third parties. For example, the minimum jail term for homicide, sexual abuse and personal injury is eight years, whereas drug trafficking results in jail terms of no less than 10 years. Similarly, the maximum prison term for drug-related crimes is 30 years, whereas the maximum term for human trafficking and sexual abuse of victims under 14 years old is 20 years.²⁶²

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Colombian sentencing legislation includes a number of mitigating factors, but the legislation does not include any factors that are particularly relevant for female offenders. Generally applicable mitigating factors include, *inter alia*, insurmountable coercion of others; insurmountable fear; unawareness of the unlawfulness; and the right of defence. Furthermore, the Colombian Criminal Code provides that individuals suffering from psychological immaturity, mental disorder, socio-cultural diversity or similar states shall not be subject to sentencing.

The Colombian Criminal Code includes no minimum threshold in terms of quantity of drugs that constitutes ‘trafficking’. The quantity will, however, be relevant in determining the sentence.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

The Colombian Criminal Code, Article 384, provides for several aggravating factors. Whereas these are drafted in gender-neutral terms, they do relate to the offender taking advantage of a particularly vulnerable person.

Where applicable, these factors result in the sentence for trafficking, manufacturing or possession of narcotics being doubled. Aggravating factors include, *inter alia*:

- if the offence is carried out using a vulnerable person such as a minor, a person suffering from a mental disorder or a dependent person.
- if the offence is carried out in educational, cultural, sports, recreational or holiday centres or in prisons.
- if the offender is a teacher.

We also note that Article 381 of the Colombian Criminal Code introduces a specific offence for supplying, administering or facilitating a minor with drugs that produce dependence or induce the minor to consumption. Such an offence results in a prison term of between eight and 18 years.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Colombian drug legislation on trafficking, manufacture and possession is drafted in gender-neutral terms and does not give consideration to whether the offender is a woman or her particular background or socio-economic status.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Drug legislation in Colombia allows for a low-level of discretion in setting sentences. Judges generally face limitations in reducing sentences or fines, as well as in imposing sanctions other than imprisonment, even in circumstances where this would appear justified. This approach was recently upheld by the Colombian Supreme Court.²⁶³

As noted above, the percentage of women convicted for what could be defined as low-level drug-related crimes in Colombia is higher than the percentage of women convicted for any other crime. The majority of women criminalised for drug-related offences are part of the lowest-levels of criminal structures. It could therefore be argued that the legislation should take into consideration the special situation of many women involved in such offences. These judgments against women do not significantly back the efforts of the

²⁶² Uprimny Yepes Rodrigo, Dian Esther Guzmán and Jorge A. Parra (2013). *Penas alucinantes. La desproporción de la penalización de las drogas en Colombia*. Bogotá: Centro de Estudios de Derecho y Sociedad, De Justicia, pages 53 and 54.

²⁶³ Supreme Court of Justice, Criminal Chamber (2016), Ruling SP-9182016 (46647).

Colombian Government to reduce illegal drugs. Instead, these are likely to severely worsen the economic and social life of these women, who in most cases are poor and of low social status. However, recent developments have provided for rules that may be considered as a first step in mainstreaming gender into legal standards:

- House arrest can be used as an alternative to pre-trial detention if (i): the accused woman is pregnant with two months or less until the expected birth or if she gave birth less than six months ago; and/or (ii) the offender has a child that is 12 years or younger or that has a disability that demands permanent care and attention.
- Similarly, in these circumstances, house arrest and parole can be used as alternative measures to detention.

If the above conditions are not met, women can only be placed under house arrest or granted parole if the offence relates to low quantities of drugs (1,000 grams of marijuana, 100 grams of cocaine or cocaine-based products and 200 grams of synthetic drugs).

Further developments indicate that Colombian authorities are considering gender when dealing with low-level drug-related offences, such as the following proposals for legislative amendment:

- Following the recommendation of the Organisation of American States to seek alternatives to imprisonment, the Colombian Government committed itself in the Final Peace Agreement²⁶⁴ to urgently submit proposals for legislative amendments aimed at granting benefits to “small farmers who are or have been involved with illicit crops” as well as to “women in poverty, with parental or family responsibilities” who have been convicted for non-violent drug-related

offences (representing almost 84% of women jailed for drug-related offences). However, as of this date, no proposals have been submitted for the implementation of such measures.

- The Ministry of Justice submitted Bill 146 of 2016 before Congress, which was intended to amend criminal and penitentiary regulations. Among others, the proposals included granting house arrest, suspension of the sentence or parole for women sentenced for low-level drug-related offences. Even though the bill did not pass in Congress in the 2016 legislature, similar bills are intended to be presented to Congress for debating.

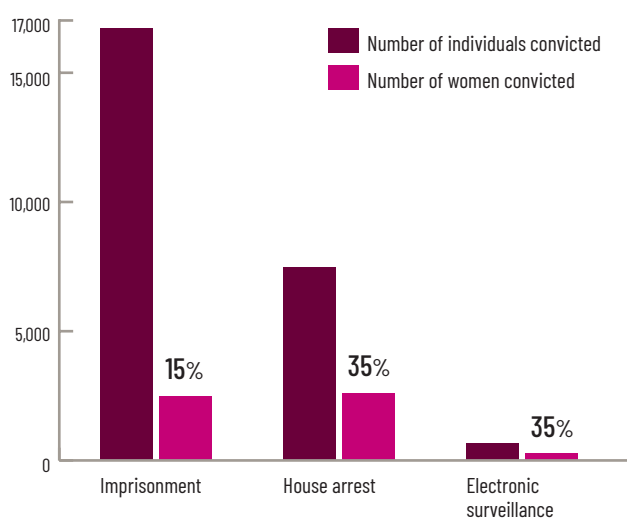
QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

The Colombian Criminal Code, Article 376, allows for a penalty of up to 30 years for drug-related offences. We have, however, not seen any statistics on what sentences are imposed in practice.

Looking at applicable penalties, the Colombian criminal system provides for three sanctions: imprisonment, house arrest and electronic surveillance. According to statistics provided by the National Penitentiary and Jail Institute, women are overrepresented in the two latter sanctions. Indeed, there are currently 16,743 inmates convicted pursuant to Article 376, of which 2,515 (15%) are women. Looking at house arrest, there are 7,482 individuals concerned, of which 2,628 (35%) are women. Likewise, there are 631 individuals under electronic surveillance, including 220 women (35%).

Ratio of women receiving custodial and non-custodial sentences (compared to total number) in Colombia



3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

Dejusticia has published studies targeting women and drug trafficking.²⁶⁵ Dejusticia’s position is that there is a need for change in the current Colombian drug policy on women involved in drug trafficking.

Further, the judicial administration has created an internal group of studies, the “National Gender Commission”. The Commission has issued documents on the difference in treatment between men and women generally by the judicial branch. However, there has not been any formal research or academic study matter related to drug trafficking specifically.²⁶⁶

²⁶⁴ Final Peace Agreement, Section 4, Drugs and Section 6, Implementation.

²⁶⁵ Dejusticia (2016) “Mujeres, políticas de drogas y encarcelamiento / una guía para la reforma de políticas en Colombia”. Bogotá D.C, WOLA - Washington Office for Latin America and the Open Society Foundations. Reviewed 18 October 2018, www.odc.gov.co/PUBLICACIONES/ArtMID/4214/ArticleID/5883/Mujeres-pol237ticas-de-drogas-y-encarcelamiento-una-gu237a-para-la-reforma-de-pol237ticas-en-Colombia.

²⁶⁶ www.ramajudicial.gov.co/web/comision-nacional-de-genero/libros1.

CHAPTER 4

Costa Rica

Incarceration rates	Women	Men	Proportion of women
Total ²⁶⁷	1,034	18,192	5.4%
For drug-related offences	Not available	Not available	Not available

Introduction

Statistics point to around two-thirds of women serving prison sentences in Costa Rica having been convicted for drug-related offences. Most convicted women come from very vulnerable backgrounds.

Costa Rican laws only include one norm aimed at providing mitigating factors to those women who come from vulnerable backgrounds and are convicted for drug-related crimes.²⁶⁸ In practice, the courts also analyse the woman's position as part of the culpability study of each case. Based on this, the courts have some level of discretion when determining the final prison sentence, and on some occasions those factors may even result in an absolute sentence where the woman is not convicted.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

The most relevant legislation which regulates drug-related offences in Costa Rica is the Criminal Code and Act 8204 ("**Drug Act**"). In general terms, the criminal legislation of Costa Rica places sanctions on conduct relating to drug trafficking, sale, distribution and commercialisation.

Possession is not criminalised so long as it relates to personal use. However, possession of a significant quantity of drugs is usually considered as giving rise to a presumption of trafficking. There is no set amount established by the law in order to presume trafficking or sale. Unfortunately, the issue has not been clearly resolved by means of jurisprudence either. There have been some contradictory positions in prior case law, and this is a matter which might be best addressed by an amendment to the law.

There was a recent important precedent related to the growth of drugs for personal use. The law is not clear since Article 58 of the Drug Act could be interpreted as prohibiting any type of cultivation. However, in a recent case involving cultivation of marijuana for personal use, the accused person was ultimately absolved.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

²⁶⁷ www.prisonstudies.org/world-prison-brief-data.

²⁶⁸ Strictly speaking this provision applies only in relation to woman convicted of carrying drugs into prisons but in practice it has been applied by the courts in other drug-related cases.

The law provides for more favourable treatment of women in vulnerable positions. In addition, by means of the jurisprudence of the criminal courts, there has been more favourable treatment of women in some specific instances.

The law does include mitigating factors which may be considered by the judge when establishing the final penalty or prison sentence (Article 77 of the Drug Act).

These factors are:

- poverty
- head of a vulnerable household
- being in charge of minors, elderly or disabled persons
- being an elderly woman in a vulnerable condition.

Although Article 77 of the Drug Act establishes these factors only in relation to introducing drugs to prisons, these factors have also been considered in other drug-related cases to mitigate the sentences of women.

There are some other factors such as violence and coercion which can also mitigate the sanction and even result in an absolute sentence where the woman is not ultimately convicted, e.g. there have been absolute sentences in drug-trafficking cases related to the introduction of drugs to prisons, where the accused woman had been coerced to execute the trafficking.

As already noted, there is no fixed quantity that constitutes trafficking. Trafficking may occur regardless of the quantity so long as it is demonstrated that the drugs were part of a sale, commercialisation or distribution chain. However, large quantities of drugs will usually give rise to a presumption of trafficking.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

Article 77 of the Drug Act establishes a number of aggravating factors. These include:

- drugs being distributed to minors, disabled persons or pregnant women.
- distribution at education, cultural or sports centres, as well as in prisons or at public shows.
- use of minors, disabled persons or people dependent on drugs to execute the conduct.
- conduct executed by a public officer, abusing his or her position.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

The analysis of a woman's role in the chain is considered by the judge as part of the culpability study of the case. However, there is no specific legal norm that addresses this issue expressly. The judge has some discretion in determining the final sentence or punishment. This includes considering the mitigating and aggravating factors provided for by law (discussed above), but there are also other situations such as the role in the trafficking chain, which can also be considered by the judge to determine the severity of a sentence.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Courts do have discretion in setting sentences within the minimum and maximum sanctions set out in the law.

Gender is not expressly stated as a factor to be taken into account at final sentencing. However (as noted above), women who meet any of the following mitigating factors may receive a lower sentence according to Article 77 of the Drug Act: (i) poverty; (ii) head of a vulnerable household; (iii) in charge of minors, disabled or elderly dependants; or (iv) an elderly woman in a vulnerable condition.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

Drug-related offences have a minimum sentence of three years and a maximum sentence of 15 years. However, there are aggravating factors which can lead to a maximum 20-year sentence. There are no specific trends as to how the courts are resolving these crimes in general terms, since this is a case-by-case matter. There are cases where female offenders have received non-custodial sentences or have been absolved entirely. However, there have equally been cases where female offenders have received the maximum sentence.

In 2014, the Inter-Institutional Network for comprehensive assistance to women involved in a criminal justice process was set up.²⁶⁹ Managed by the Public Defender's Office, one of the groups which benefit from its support is women who have received non-custodial sentences or served time in prison but are subsequently granted an alternative to incarceration.

²⁶⁹ www.wola.org/wp-content/uploads/2017/05/DONE-3-Red-interinstitucional-Costa-Rica_ENG_FINAL-.pdf.

They can access the Network as part of a social rehabilitation programme that accompanies their alternative sentence.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

In terms of research on this subject, there are some articles and studies available in the public domain, including studies looking at general statistics related to the incarcerated population in Costa Rica (which nevertheless may be useful when considering specifically the position of women convicted for drug-related offences).

In 2011, an article titled *“Women incarcerated in Costa Rica due to drug trafficking”* by Claudia Palma Campos was published, focusing on the conviction of women for offences related to drug trafficking.²⁷⁰ The article concluded that around two-thirds of women serving prison sentences in Costa Rica had been convicted for drug-related crimes.

In 2016, Maria de los Angeles Londoño published a study titled *“Judicial Roots of Incarceration: Who is in prison and why?”*.²⁷¹ This study includes general statistics and information relating to the incarcerated population in Costa Rica (regardless of gender). It also supports the statistic noted above that around two-thirds of incarcerated women in Costa Rica are convicted for drug-related offences.

In 2017, an article was published by Nischa Pieris about the 2011 reform of drug legislation in Costa Rica, namely the entry into force of Article 77 which introduced greater proportionality of sentencing and gender sensitivity in her paper *“Reducing female incarceration through drug law reform in Costa Rica”*.²⁷² The paper details the backdrop to the introduction of Article 77, including the approval of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Woman Offenders (the **“Bangkok Rules”**). The paper also highlights Article 77 as a positive example of reform focusing on gender and vulnerability factors instead of quantities or types of substance.

Nischa Pieris also published an article in 2017 called *“Costa Rica’s Inter-Institutional Network in Support of Women Caught in the Criminal Justice System”*.²⁷³ The article details the work of the Inter-Institutional Network which works to divert vulnerable women away from the criminal justice system, including supporting woman serving non-custodial sentences/women who have served time in prison and are subsequently offered an alternative to incarceration as discussed in response to Question 4 above.

²⁷⁰. See [fileserv.idpc.net/library/UCR-Mujeres-carcel-trafico-drogas-costa-rica%20\(1\).pdf](https://fileserv.idpc.net/library/UCR-Mujeres-carcel-trafico-drogas-costa-rica%20(1).pdf).

²⁷¹. Londoño, María de los Ángeles. 2016. Raíces judiciales del encarcelamiento: ¿Quiénes son y por qué están en prisión? Segundo informe. Estado de la justicia.

²⁷². See www.wola.org/wp-content/uploads/2017/05/DONE-2-Costa-Rica-77bis_ENG_FINAL-.pdf

²⁷³. See www.wola.org/wp-content/uploads/2017/05/DONE-3-Red-interinstitucional-Costa-Rica_ENG_FINAL-.pdf.

CHAPTER 5

Ecuador

Incarceration rates	Women	Men	Proportion of women
Total ²⁷⁴	3,051	33,470	8.4%
For drug-related offences ²⁷⁵	1,614	Not available	Not available

Introduction

In Ecuador, most incarcerated women have been convicted for drug-related offences. According to statistics from the Ministry of Justice, women convicted of drug-related offences accounted for 52.9% of the female incarcerated population in Ecuador in 2018. This is directly related to legislative changes enacted in Ecuador from 2008 onwards, reflecting a change in approach to addressing drug-related offences.

From 2008 to 2014, drug policy in Ecuador moved away from a clearly punitive approach to a preventative approach. However, since 2015, there has been a “snapback” to a more punitive approach.

The amendments which gave rise to the **preventative approach** related to the pardon granted to drug-trafficking drug couriers by the Constituent Assembly in 2008, the decriminalisation of drug use and possession for personal consumption established in the 2008 Constitution, and the promulgation of the New Comprehensive Organic Criminal Code in 2014 which introduced proportionality of penalties, with the use of thresholds to establish whether the trafficking offence is of a lower or higher level.

A return to the **punitive approach** was marked by the so-called counter reform that, in 2015, introduced changes to the Criminal Code – increasing the penalties for illicit low- and mid-level drug trafficking and reducing the thresholds (in terms of quantities of narcotic substances) necessary to constitute illicit trafficking. These changes have, in practice, resulted in the criminalisation of people who use drugs, given

the fine line between the classification of trafficking and personal consumption due to very low quantity thresholds, and have led to an increase in the number of people incarcerated for drug-related offences. Procedural changes to the criminal justice system were also introduced, including extended use of abbreviated lawsuits for offences penalised with up to 10 years’ imprisonment (which allow an accused to negotiate a substantial reduction in penalty with the prosecutor in exchange for not contesting the facts of the case). Most women accused of drug trafficking will tend to opt for this procedure, to avoid the costs and contingencies associated with an ordinary proceeding.

According to international and local studies, it is known that drug-related offences have a specific impact on women, their children and their families. In Ecuador, however, such investigation is limited, perhaps because the extensive use of abbreviated lawsuits has lessened the attention placed on this matter, and because the punitive approach has been accepted in Ecuadorian society and has placed micro-trafficking at the centre of the debate.

The 2015 counter reform signified a lost opportunity: returning to the punitive approach which has been ineffective in reducing the scale of the illicit drug market. The increase in incarcerated women has not corresponded to a reduction in drug consumption or illicit drug trafficking. The so-called “war on drugs” has left victims behind and led to significant prison overcrowding.

²⁷⁴. National Service of Assistance for Incarcerated People, 2018 statistics.

²⁷⁵. *Ibid.*

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Article 220 of the Comprehensive Criminal Code (“COIP”) provides that possession of narcotic or psychotropic substances for personal use or consumption in the quantities set forth in the corresponding rules will not be punishable. It also provides that illicit trafficking includes offering, storage, intermediation, distribution, purchase–sale, delivery, transportation, marketing, import, export, possession or, generally, illicit trafficking of narcotic and psychotropic substances or any preparations that contain them, whether done directly or indirectly without the authorisation and requirements set forth in the corresponding regulations. It also establishes scales and penalties for trafficking offences (see Table 1).

Table 1: Scales and penalties for drug-trafficking offences in Ecuador

Scales	Penalties for trafficking offences
Minimum scale	1 To 3 years
Medium scale	3 To 5 years
High scale	5 To 7 years
Large scale	10 To 13 years

Source: Supplement Official Register 180, February 2014.

According to Resolution No. 001-CONSEP-CD-2015 of 9 September 2015, the Board of Directors of the National Council for Narcotic and Psychotropic Substances (“CONSEP”) issued revised tables showing the quantities of narcotic and psychotropic substances necessary to constitute illicit trafficking at the minimum-, medium-, high- and large-scale level established in Article 220 of the COIP. In these revised tables, the Board of Directors of CONSEP (as a result of pressure to combat increased drug consumption by adolescents) reduced the thresholds for each of the trafficking levels and increased the penalties imposed for drug-related offences. This has resulted in an even more blurred line between what is considered to be micro-trafficking and consumption.²⁷⁶ These revised tables were ratified according to Resolution No. CONSEP-CD-002 and remain in force. See Table 2 and Table 3.

Table 2: Quantities of narcotic substances considered as illicit trafficking in Ecuador (2015)

Narcotic substances								
Scale (grams)	Heroin		Cocaine base paste		Cocaine hydrochloride		Marijuana	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Net weight								
Minimum scale	>0	0.1	>0	2	>0	1	>0	20
Medium scale	>0.1	0.2	>2	50	>1	50	>20	300
High scale	>0.2	20	>50	2,000	>50	5,000	>300	10,000
Large scale	>20		>2,000		>5,000		>10,000	

Source: Second Supplement Official Register 586, September 2015.

Table 3: Quantities of psychotropic substances to penalise illicit trafficking in Ecuador (2015)

Psychotropic substances						
Scale (grams)	Amphetamines		Methylenedioxy-phenethylamine (MDA)		Ecstasy (MDMA)	
	Min.	Max.	Min.	Max.	Min.	Max.
Net weight						
Minimum scale	>0	0.090	>0	0.090	>0	0.090
Medium scale	>0.090	2.5	>0.090	2.5	>0.090	2.5
High scale	>2.5	12.5	>2.5	12.5	>2.5	12.5
Large scale	>12.5		>12.5	14	>12.5	

Source: Second Supplement Official Register 586, September 2015.

²⁷⁶ Paladines, J. (2016). “En busca de la prevención perdida: reforma y contrarreforma de la política de drogas en Ecuador”. Available at www.pensamientopenal.com.ar/system/files/2016/04/doctrina43306.pdf.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Ecuador’s criminal law does not make any distinction between offenders based on sex or gender and does not include mitigating factors relating to e.g. domestic violence, dependent children, etc. which are particularly relevant to female offenders.

Criminal law does, however, contemplate “*the obligation of judicial servants to implement equality among the parties during procedural actions and to especially protect such individuals that by reason of their economic, physical or mental condition are facing vulnerable circumstances*” (COIP 2014, Article 5). Through the Public Advocate’s Office, Ecuador guarantees legal advice and defence to such persons who, by reason of their defencelessness or economic, social or cultural condition, are unable to retain attorneys to defend their rights.

The COIP (Article 45) establishes in general the following mitigating factors:

- committing criminal infractions against property without violence, under the influence of pressing economic circumstances;
- acting under intense fear or under violence;
- voluntarily trying to cancel or reduce the consequences of the offence, or providing immediate help and assistance to the victim;
- voluntarily repairing the damage or fully compensating the victim; and
- voluntarily appearing before the authorities.

In order to benefit from a reduction in sentence, at least two mitigating factors must apply. Where two mitigating factors apply, the minimum penalty will be applied according to the criminal type, reduced by one-third, as long as there are no aggravating circumstances (COIP, Article 44).

Additionally, where an accused provides exact, true, verifiable and relevant information, this will be taken into account as a mitigating factor (termed “*atenuante transcendental*”). In such cases, the accused will receive one-third of the correspondent sentence, provided that no aggravating factors apply (COIP, Article 46). There is also a separate mitigating factor for effective co-operation. This will apply where an agreement between the offender and the public prosecutor is reached that

the offender will provide data, instruments, effects, goods or accurate, verifiable and truthful information that contributes to the clarification of the facts investigated or the identification of those responsible or serves to prevent, neutralise or stop other crimes of the same/greater severity being committed (COIP, 2014, Article 491). For effective co-operation, the penalty will not be less than 20% of the minimum penalty and, where the co-operation allows for the prosecution of leaders of a criminal organisation, the penalty will not be less than 10% of the minimum fixed (COIP, Article 493).

Another means for offenders to obtain a reduction in sentence is by using the so-called abbreviated proceeding. This is available where the offence in question carries a maximum penalty of up to 10 years in prison. In relation to drug trafficking, this would cover minimum-, medium- and high-scale trafficking. In abbreviated proceedings, the accused must admit the facts and agree the sanction with the prosecutor (but the penalty imposed cannot be less than one-third of the minimum penalty established for the criminal conduct in question) (COIP, Articles 635, 636).

In addition, Ecuador’s criminal legislation expressly takes the condition of a pregnant woman into account: the law states that a woman cannot be incarcerated and cannot be served a sentence unless 90 days after childbirth have elapsed. During that period, house arrest may be imposed or use of an electronic tracking device may be ordered (COIP 201, Article 624). In respect of nursing mothers, they will be able to serve their sentence in a “shelter” which is a minimum-security penitentiary facility allowing mothers to live with their nursing babies.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

In respect of aggravating factors, the law contemplates general factors established for all persons involved in a criminal offence as well as factors specific to illicit drug trafficking. Aggravating factors include:

- perpetrating the offence with malice or fraud;
- perpetrating the offence by reason of a promise, price or reward;
- perpetrating the offence as a means to perpetrate another offence;
- taking advantage of mass concentrations, tumults, commotions, sports events or public misfortune or natural disasters in order to perpetrate the offence with participation of two or more persons;
- using labour, teaching, religious or similar situations of superiority;

- using children, adolescents, elderly persons, pregnant women or disabled individuals to perpetrate the offence;
- perpetrating the offence to the detriment of children, adolescents, elderly persons, pregnant women or disabled individuals;
- improperly using military, police or religious insignias, uniforms or names as a means to perpetrate the offence;
- using armed individuals to perpetrate the offence;
- using false credentials, uniforms or badges of public entities for purposes of posing as public officers, employees or workers as a means to perpetrate the offence;
- an incarcerated person perpetrating the offence totally or partially from a prison;
- the perpetrator being chased or being a fugitive from justice after a firm guilty verdict; and
- taking advantage of his/her position as a public servant to perpetrate a criminal offence (COIP, Article 47).

The COIP also increased the maximum sentence by one-third where narcotic or psychotropic substances are sold, distributed or given to children or adolescents (COIP, Article 220).

Finally, recidivism will result in the maximum sentence established for the crime being increased by one-third (COIP, Article 57).

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

According to Ecuadorian legislation, by having established tables showing the quantity of narcotic and psychotropic substances for each scale and with proportional sentences for minimum-, medium-, high- and large-scale trafficking, it is considered that there are sufficient parameters to differentiate the small (drug courier) trafficker from the big trafficker.

In respect of other relevant circumstances, these are covered in the mitigating and aggravating factors considered in response to question 2.1 above.

With regard to participation in the trafficking chain, the COIP considers traffickers as **perpetrators** or **accomplices** (COIP 2014, Article 41). As far as perpetrators are concerned, the legislation differentiates between direct perpetrators (those that perpetrate the offence), co-perpetrators (those who mainly help to perpetrate the offence) and mediate perpetrators (those that incite, order or oblige other individuals to perpetrate an offence) (COIP 2014, Article 42).

Regarding penalties, the COIP does not differentiate between the different types of perpetrators: the same penalties are applied to all. Accomplices will, however, receive a penalty equivalent to one-third to one-half of the penalty established for perpetrators. (COIP, Article 43).

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

The COIP limits judges' discretion when imposing sentences, regardless of the offence, and makes no explicit distinction between male and female offenders. However, the COIP establishes criteria that judges may take into account to individualise sentencing: degree of participation, circumstances that in fact limit criminal responsibility, and aggravating and mitigating factors (COIP 2014, Article 54).

In practice, the majority of those arrested for drug possession seek an abbreviated trial in which they plead guilty and agree with the prosecutor the penalty. Art. 635(6) of the COIP establishes that "*in no case may the penalty applied be greater or more severe than that suggested by the prosecutor*". Judges will therefore at sentencing accept the agreement reached between the accused and prosecutor.

Where there is evidence that a convicted woman is pregnant, Art. 624 of the COIP states that she cannot be incarcerated until 90 days after childbirth. During this period, house arrest or electronic surveillance may be imposed. In respect of nursing mothers, they will be able to serve their sentence in a "shelter" which is a minimum-security penitentiary facility allowing mothers to live with their nursing babies.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

According to legal mandate, sentences imposed by the judges on offenders (regardless of gender) due to illicit trafficking of controlled substances cannot be more severe than those set forth in Article 220 of the COIP. The sentence will depend on the circumstances of the punishable event, on any mitigating or aggravating circumstances, on the degree of participation, as well as all other circumstances that may limit criminal liability (COIP 2012, Article 54).

Until recently, different sentences were being imposed in relation to the same offences in abbreviated proceedings as a result of individualised negotiations with prosecutors. Therefore, the National Court's interpretation was necessary. In its resolution dated 5 September 2018, the Court established that, in abbreviated proceedings, the sentence to be imposed can never be lower than one-third of the minimum sentence determined for the criminal conduct in question.

The COIP also establishes a conditional suspension of sentence where the sentence does not exceed five years, such as in the case of minimum- and medium-scale drug trafficking, provided that no other sentence is being handed down and that the offender's background indicates that enforcement of the sentence is not necessary (COIP, Article 630). It should be noted that the National Court in its resolution dated 16 April 2016 clarified that, in abbreviated proceedings, a jail sentence cannot be suspended.

Under the COIP, in lawsuits involving trafficking of controlled substances, some minimum- and medium-scale offenders may also be judged according to a direct proceeding (COIP, Article 640). This proceeding concentrates all the stages into one single hearing and it applies to offences deemed to be flagrant and penalised with a maximum jail term of up to five years. For direct proceedings, it is possible to request conditional suspension of the penalty when the sentence is pronounced.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

In 2011, Sandra Edwards²⁷⁷ wrote about the feminisation of criminal offences involving drugs and argued that women are exceptionally vulnerable for being used for micro-marketing of drugs because they play a role at the lowest drug-trafficking level, usually as drug couriers or low-level traffickers. She noted that, in 2008, 34% of all incarcerated individuals in Ecuador were incarcerated because of drug-related offences. As highlighted above, according to information provided by the Ministry for Justice and Human Rights, in 2018, 52.9% of incarcerated women had been convicted of drug-related offences.

Recently, following the amendments implemented from 2008 to 2014 and the counter reform of 2015, the number of persons incarcerated for illicit trafficking of controlled substances has significantly increased. "Thus, while from January to June 2015 there were 4,629 persons incarcerated for possessing controlled substances, from January to June 2016 the number was 7,413, that is, 2,784 more individuals were convicted during the first semester of 2016 in comparison with the first semester of 2015."²⁷⁸ The counter reform also had an impact on individuals incarcerated for trafficking according to the scale of the trafficking: "there is evidence of a lower number of persons convicted on account of minimum scale (-46%) and large scale (-4%), while there is an increase in the number of persons convicted on account of medium (139%) and high scale (480%)".²⁷⁹ To sum up, "the results of applying the second amendment are evidenced in that the drug user is transformed into the medium and high scale micro-trafficker, because those who were incarcerated for minimum and medium scale trafficking are now incarcerated for high scale trafficking".²⁸⁰ Table 4 evidences these facts in relation to women incarcerated for drug-related offences two years after the counter-reform.

In 2015, "10,364 individuals were detained due to illicit trafficking of marijuana, heroin 'H', cocaine base paste and cocaine hydrochloride. The majority were men (83%) between 15 to 29 years of age (57%)".²⁸¹ In that year, 1,796 women were incarcerated for drug-related offences, but what caught the attention of the researchers was that the so-called counter reform had increased the number of men convicted due to drug-related offences, especially young men between

Table 4: Number of women incarcerated for drug-related offences (COIP Article 220 and related paragraphs)

Article and paragraph no.	Incarcerated women	Participation %
Article 220, No. 1 - LA - Minimum	92	5.76%
Article 220, No. 1 - LB - Medium	580	36.30%
Article 220, No. 1 - LC - High	660	41.30%
Article 220, No. 1 - LD - Large scale	236	14.77%
Article 220, No. 2	9	0.56%
No information	21	1.31%
Total	1,598	100%

Source: Administrative records of incarceration centres, Economic and Statistical Analysis Department, Ministry of Justice and Human Rights, December 2017.

277. Edwards, S. (s.f.). La legislación de drogas de Ecuador y su impacto sobre la población penal en el país. Available at: www.drogasyderecho.org/wp-content/uploads/2015/02/ss-ecuador.pdf.

278. Max Paredes, M. G. (2017). *Políticas de Drogas en el Ecuador un Balance Cuantitativo para Transformaciones Cualitativas*. Available at: library.fes.de/pdf-files/bueros/quito/13594.pdf.

279. Max Paredes, 2017, page 27. *Ibid.*

280. Max Paredes, 2017, page 46. *Ibid.*

281. Max Paredes, 2017, page 49. *Ibid.*

19 and 22 years of age. Perhaps this fact as well as others can explain the few references to women incarcerated for drug-related offences.

Despite the foregoing, the existing conclusions and opinions about drug-related offences are valid both for men and women involved in illicit drug trafficking. Jorge Paladines, an academic and criminologist, considers that the counter reform of September 2015 put an end to prevention as the core of the drug policy and ruled out repression whereby “*what has been lost in Ecuador’s drug policy is not public order or repression – it is prevention*”.²⁸²

Table 5: Women incarcerated in 2017 for drug-related offences in Ecuador

Article and paragraph no.	Incarcerated women	Participation %
COIP Article 219: Illicit production of controlled substances	2	0.12%
COIP Article 220: Illicit trafficking of controlled substances	1,598	96.61%
COIP Article 221: Organisation or financing for illicit production or trafficking of controlled substances	4	0.24%
COI Article 222: Planting or cultivation	1	0.06%
Law on Narcotic and Psychotropic Substances (before COIP 2014)	49	2.96%
Total	1,654	100%

Table 6: Women incarcerated in 2017 for drug-related offences in Ecuador, per marital status

Article and paragraph no.	Incarcerated women	Participation %
Unmarried	1,068	64.57%
Living together	259	15.66%
Married	187	11.31%
Common law marriage	52	3.14%
Divorced	49	2.96%
Widowed	29	1.75%
Separated	8	0.48%
No information	2	0.12%
Total	1,654	100%

The so-called counter reform had a bearing on the increase in incarcerated individuals due to illicit drug trafficking, but this fact “*did not guarantee that the dynamics of the illicit market would be affected; on the contrary, it would seem that it encouraged it because drug consumption increased in 2016 in comparison with 2015 among students 12-17 years of age*”.²⁸³

The following statistical tables show the numbers of women incarcerated in Ecuador in 2017 for drug-related offences (Tables 5, 6 and 7).

Table 7: Women incarcerated in 2017 for drug-related offences in Ecuador, per country of origin:

Country of origin	Incarcerated women	Participation %
Ecuador	1,338	80.89%
Colombia	275	16.63%
Mexico	10	0.60%
Peru	8	0.48%
Venezuela	6	0.36%
Bolivia	2	0.12%
Guatemala	2	0.12%
Cuba	1	0.06%
El Salvador	1	0.06%
Slovakia	1	0.06%
Spain	1	0.06%
United States	1	0.06%
Netherlands	1	0.06%
India	1	0.06%
Italy	1	0.06%
Libya	1	0.06%
Namibia	1	0.06%
Paraguay	1	0.06%
Poland	1	0.06%
Dominican Republic	1	0.06%
Total	1,654	100%

Source for Tables 5,6 and 7: Administrative records of incarceration centres, Economic and Statistical Analysis Department, Ministry of Justice and Human Rights, 27 December 2017.

²⁸². Jorge Paladines, “En busca de la prevención perdida, reforma y contrarreforma”, 2016.

²⁸³. Max Paredes, 2017, page 100.

CHAPTER 6

England and Wales

Incarceration rates	Women	Men	Proportion of women
Total ²⁸⁴	3,197	69,546	4.4%
For drug-related offences ²⁸⁵	446	10,675	4.0%

Introduction

The issue of how female drug offenders are treated by the criminal justice system and the need to reduce the numbers of women sent to prison has been a topic of much discussion in the UK. It was recognised that, despite being a minority in all aspects of the drug trade, women tend to be most involved in the lower levels of the drug trade, where the greatest concentration of arrests occur. These concerns partially led to the review of the Sentencing Council's Drug Offences Definitive Guideline²⁸⁶ (the "Guideline") in 2012 after an extensive consultation with professionals and the public. This Guideline requires the courts to consider the role the offender played in the drug operation when setting the provisional sentence range and then they should consider further aggravating and mitigating factors to adjust the sentence within the range. These mitigating factors include elements that are particularly relevant to female offenders when deciding the final sentence.

While there is still an emphasis on imprisonment for drug offenders, for relatively long periods of time, and particularly in relation to trafficking, only a minority of women convicted of drug-related offences are imprisoned and the numbers are reducing. There is a large amount of UK academic and judicial discourse about the sentencing of women convicted of drug-related offences, which has generally recognised the reduction in sentences over the last decade, partly as a result of courts being able to consider

gender-related factors in their sentencing, while also considering that problems still remain, particularly in relation to foreign national women.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

The principal offences relating to the misuse of controlled drugs are contained in the Misuse of Drugs Act 1971.²⁸⁷ These offences include possession (with or without intent to supply), supply, importation and production. There are also inchoate offences including participating in, attempting to commit, conspiracy to commit and encouraging or assisting the commission of the above offences.

In relation to offences of possession (with or without intent to supply), supply, production or cultivation of cannabis or opium-related offences, it is a defence for the accused to show that: (i) they neither knew, suspected, nor had reason to suspect the existence of some fact that the prosecution is required to prove, for example that they were in possession of the drug; (ii) they neither believed, suspected, nor had reason to suspect that the substance in question was a controlled drug; or (iii) they believed the product to be a controlled drug, which, had it been that drug, would mean that

²⁸⁴. Annual Prison Population 2019, (25 July 2019) table A1.6, available at: www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2019.

²⁸⁵. Ibid.

²⁸⁶. Sentencing Council, Drug Offences Definitive Guideline, available at: www.sentencingcouncil.org.uk/publications/item/drug-offences-definitive-guideline.

²⁸⁷. Crown Prosecution Service, "Drug Offences" (3 August 2018), available at: www.cps.gov.uk/legal-guidance/drug-offences.

they would not have been committing an offence at the time that they committed it.²⁸⁸ The accused bears the evidential burden in relation to calling evidence that they lacked the requisite knowledge, belief or suspicion.²⁸⁹

The importation and exportation of controlled drugs is prohibited under section 3 of the Misuse of Drugs Act 1971, although it does not itself create an offence. The offence of knowingly acquiring possession of or being knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any controlled drugs is contained in section 170 of the Customs and Excise Management Act 1979.

A prosecution is usual when a case involves the possession of a Class A drug or for the possession of more than a minimal quantity of Class B or C drugs. The supply and possession with intent to supply of any controlled drugs will almost always result in a prosecution, although there may be exceptional circumstances where possession with intent to supply a small amount of Class B or C drugs will not be charged.²⁹⁰

The sentence for the offence will depend on the relevant sentencing range within the Sentencing Council's Guideline (determined by the role of the offender and class and quantity of the drug), as well as a consideration of aggravating and mitigating factors.²⁹¹ The maximum penalty will also depend on whether the trial is held at the Magistrates' court (for offences deemed less serious) or the Crown Court.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

There are no general gender-specific aspects to sentencing, but some factors must be taken into account when determining the sentence which may be disproportionately relevant for female offenders.

Table 1: Sentencing guidelines for importing/exporting a Class A drug (England and Wales)

	Length of sentence per category					
	Category 1 ~5 kilos		Category 2 ~1 kilo		Category 3 ~150g	
	Starting point	Category range	Starting point	Category range	Starting point	Category range
Leading role*	14 years	12-16 years	11 years	9-13 years	8 years, 6 months	6 years, 6 months to 10 years
Significant role†	10 years	9-12 years	8 years	6 years, 6 months to 10 years	6 years	5-7 years
Lesser role‡	8 years	6-9 years	6 years	5-7 years	4 years, 6 months	3 years, 6 months to 5 years

Source: Sentencing Council, *Drug Offences: Definitive Guideline*, 2012.

* Leading role

Directing or organising buying and selling on a commercial scale; substantial links to, and influence on, others in a chain; close links to original source; expectation of substantial financial gain; uses business as cover; abuses a position of trust or responsibility.

† Significant role

Directing or organising buying and selling on a commercial scale; substantial links to, and influence on, others in a chain; close links to original source; expectation of substantial financial gain; uses business as cover; abuses a position of trust or responsibility.

‡ Lesser role

Performs a limited function under direction; engaged by pressure, coercion, intimidation; involvement through naivety/exploitation; no influence on those above in a chain; very little, if any, awareness or understanding of the scale of operation; if own operation, solely for own use (considering reasonableness of account in all the circumstances).

²⁸⁸. Misuse of Drugs Act 1971, section 28.

²⁸⁹. *R v Lambert* (2002) 2 AC 545.

²⁹⁰. Crown Prosecution Service, "Drug Offences" (3 August 2018), available at: www.cps.gov.uk/legal-guidance/drug-offences.

²⁹¹. UK Government, "Drugs penalties", available at: www.gov.uk/penalties-drug-possession-dealing.

Section 125(1) of the Coroners and Justice Act 2009 provides that, when sentencing offences committed after 6 April 2010, “every court – (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so”.

The Guideline applies to drug-related offences and specifies “offence ranges” – the range of sentences appropriate for each type of offence. Within each offence, it specifies three “category ranges”, which reflect varying degrees of seriousness. For importation, possession with intent to supply, supply and production, the court determines the category by taking into account both the role of the offender (whether the offender took a leading, significant or lesser role) and the harm caused (based on the class and quantity of the drug). For possession, the category is determined only by the class of the drug. A “starting point” is also identified within each category which defines the position within a category range from which to start calculating the provisional sentence. Once the starting point is established, the court will consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the category range specified. In some cases, having considered these factors, it may be appropriate to move outside of the category range.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Under the Guideline, certain of the factors the court must take into consideration to decide the category range of the offence could be particularly relevant to female offenders. The court is directed to consider the offence as less serious if the offender had a “lesser role”, which could be demonstrated by characteristics including:

- performing only a limited function under direction.
- being engaged by pressure, coercion or intimidation.
- being involved through naivety or exploitation.
- having no influence on those above in a chain.
- having very little, if any, awareness or understanding of the scale of the operation.

The presence of such factors may therefore mitigate the sentence that is ultimately imposed on some female offenders.

There is no minimum quantity required to constitute a “trafficking” offence under section 170 of the Customs and Excise Management Act 1979, but the Guideline specifies that the court must also consider the quantity and class of the drug concerned in determining the category range. This means that the smaller the quantity of the drug, the lower the starting point for the sentence. The smallest category starts with about 150g.

After the category range is determined, certain of the non-exhaustive list of mitigating factors that may justify the court adjusting the sentence downwards from the category’s starting point may be particularly relevant to female offenders, such as:

- involvement due to pressure, intimidation or coercion falling short of duress.
- the offender’s vulnerability being exploited.
- the offender being a sole or primary carer for dependent relatives.²⁹²

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

After the category range is determined, a non-exhaustive list of aggravating factors may justify the court adjusting the sentence upwards from the starting point specified in the Guideline. In relation to the section 170 “trafficking” offence, these include:

- the offender using or permitting a person under 18 to deliver a controlled drug.
- sophisticated nature of concealment and/or attempts to avoid detection.
- attempts to conceal or dispose of evidence.
- presence of a weapon.

Other aggravating factors for the offence of possession of a controlled drug with intent to supply include:

- an offender aged 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when the school is in use as such or at a time between one hour before and one hour after they are to be used.
- targeting of any premises intended to locate vulnerable individuals or supply to such individuals and/or supply to those under 18.
- the presence of others, especially children and/or non-users.²⁹³

²⁹². Sentencing Council, *Drug Offences Definitive Guideline*, page 7.

²⁹³. Sentencing Council, *Drug Offences Definitive Guideline*, page 14.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

As explained above, the role of the offender is one of two elements that is used to determine the category range of the offence and therefore the starting point for the sentence. Characteristics considered include the level of management the offender has of the operation, their links and influence over others in the chain and the level of financial gain the offender expects to receive from the operation. The higher the levels, the more serious the crime is considered to be and the longer the custodial sentence. The Sentencing Council has stated that, in terms of culpability, drug couriers “will likely fall into the ‘lesser’ role category, on the basis of their limited culpability, where their offending results from coercion by others”.²⁹⁴

As part of its consultation prior to implementing the Guideline in 2012, the Sentencing Council stated that it intended the Guideline to reduce sentences for drug couriers given “these are frequently vulnerable individuals who have been exploited into importing drugs by family members, friends or acquaintances” and in some cases the Sentencing Council considered previous “sentencing to be disproportionate to the levels of culpability and harm caused”.²⁹⁵ This was on the basis of feedback from judges that the drug couriers, those lowest in the distribution chain, were usually low-culpability offenders for whom lesser sentences than the courts were sometimes giving at that time were thought to be appropriate.²⁹⁶ The majority of consultees, including the Prison Reform Trust, IDPC, Hibiscus, the Law Society and Drugscope, agreed with their approach and the Justice Select Committee recognised that drug couriers are generally “poor, foreign people, often women, who have imported drugs in circumstances falling short of the legal defence of duress but which have elements of coercion and in which personal profit is minimal”.²⁹⁷

However, it should be noted that the Guideline maintains the previous minimum suggested sentence of three years in custody for the importation of even a small quantity of Class A or B drugs due to the harm the Sentencing Council perceived was caused by drug smuggling. For importation offences, the implementation of the Guideline led to an immediate

decrease in sentencing severity (which the Sentencing Council concluded was most likely to be due to a lowering of sentences for so-called drug couriers), but this was followed by an upward trend thereafter. The Sentencing Council’s analysis of survey data suggested that this may be due to a coincidental rise in the seriousness of offences coming before the courts at that time, and an increase in the purity or yield of drugs involved in these offences (which would increase the seriousness of the offence).²⁹⁸

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

As discussed above, the court must take a structured approach, as determined by the Guideline, when setting sentences for drug-related offences and thus has a limited amount of discretion when determining which category range to give the offence. The court classifies the offender as having either a leading, significant or lesser role based on the characteristics set out in the Guideline, which allows the court to take into account factors that may more commonly be present in relation to female offenders. The second element – determining the category of harm – is based purely on the facts of the class and quantity of the drugs in question. However, once the category range is determined, the court will then use its discretion to consider the relevant mitigating and aggravating factors so as to adjust the sentence within the category range specified. In some cases, the court may move outside of the range, but this is only in a minority of cases. Since February 2012, based on Crown Court survey data, ca 90% of importation sentences imposed annually fell within the Guideline offence range, with only very few above and some below the range.²⁹⁹

Based on content analysis of judges’ sentencing remarks comparing “lesser role” cases pre- and post-Guideline (as discussed in the Sentencing Council’s Assessment of the impact and implementation of the Guideline), there is some evidence to suggest judges

²⁹⁴. Sentencing Council, *Drug offences: Response to consultation* (January 2012), available at: www.sentencingcouncil.org.uk/publications/item/drug-offences-response-to-consultation.

²⁹⁵. Sentencing Council, *Drug offences: Professional Consultation* (March 2011), available at: www.sentencingcouncil.org.uk/wp-content/uploads/Drug-Offences-Guideline-Professional-Consultation.pdf.

²⁹⁶. Sentencing Council, *Assessing the impact and implementation of the Sentencing Council’s Drug Offences Definitive Guideline* (June 2018), available at: www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-guideline-assessment.pdf.

²⁹⁷. Sentencing Council, *Drug offences: Response to consultation* (January 2012), available at: www.sentencingcouncil.org.uk/publications/item/drug-offences-response-to-consultation.

²⁹⁸. Sentencing Council, *Assessing the impact and implementation of the Sentencing Council’s Drug Offences Definitive Guideline* (June 2018), available at: www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-guideline-assessment.pdf.

²⁹⁹. Sentencing Council, *Annual Report 2012/2013* (July 2013), available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264031/9780108512377.pdf; Sentencing Council, *Annual Report 2018/2019* (July 2019), available at: www.sentencingcouncil.org.uk/wp-content/uploads/SCReport_FINAL-Version-for-Publication-April-2018.pdf.

now place more emphasis on the limited role of the offender in importation type cases since the Guideline has come into force and impose lower sentences on drug couriers.³⁰⁰

While the gender of the offender may not be a specific factor referred to in sentencing guidelines and judgments, it is considered in the wider context of the case, particularly in mitigation. There are a number of cases where the court in practice has discussed sentencing of drug-related offences in relation to potentially gendered elements and emphasised the importance of adhering to the Guideline.

R v Boakye and Others (2012) EWCA Crim 838

This case involved the appeal of six female offenders against sentences imposed for being involved in the importation of cocaine. Each of the applicants were described as “couriers” because the drugs they carried belonged to others. However, the Court held that their culpability varied given the differences in their backgrounds and the circumstances of their offences.

Although the Court concluded that the Guideline did not apply to any of the applicants (they were sentenced before it was implemented), it went on to explain that couriers are not all treated the same under the Guideline and the sentence to be passed will depend on the courier’s role and all the circumstances. In particular, the Court stated that *“A third-world offender exploited by others will be likely to be assessed by the judge as having a lesser role... by contrast, the courier who is worldly wise, who knows what he or she is doing, and does it as a matter of free choice for the money, is likely to be assessed as having a significant role.”*³⁰¹ The Court recognised that the Guideline would result in reductions in sentence (and on many occasions a significantly shorter sentence) for the sub-class of disadvantaged couriers, particularly from low-income countries, who had been exploited by serious drug criminals and persuaded to carry drugs, often for very small reward.³⁰² In the judgment, the Court considered the characteristics and circumstances of each of the applicants to illustrate the potential differences in culpability attaching to those who could all generally be described as couriers. One of them in particular, who had accepted an inducement of money to bring drugs to the UK from Guyana (and who the judge in the case acknowledged had acted out of financial desperation), was mentioned as an offender who if sentenced under the Guideline may have properly been regarded as having a lesser role.³⁰³

R v Henry (Nadine Chrystel) (2014) EWCA Crim 980

In this case, the female defendant was convicted of importing cocaine after she was approached by a stranger who asked her to go on holiday to “bring back a present”. She flew to Trinidad with tickets provided for her and the drugs were delivered to her at the hotel, together with an order of service for a funeral to provide cover for the trip and she then returned to the UK. Her reward was to be £5,000 to help her pay her debts and set up a business.

The Court upheld the finding that the defendant played a “significant” rather than “lesser” role in the crime, as *“this was not a case of a gullible defendant who was already abroad being asked to carry a package at short notice as a ‘drugs courier’ and doing so on impulse. Here ... it was the appellant herself who made the running in following up an opportunity, which she suspected was criminal, to make a substantial sum of money by travelling specially to Trinidad, heedless of her children, for the sole purpose of bringing back drugs.”*³⁰⁴ However, the defendant was awarded a “very substantial” reduction in her sentence from the starting point as a result of the mitigating factors of her vulnerability being exploited, her long-standing mental ill health and her being the primary carer for six dependent children, although no specific reference was made in mitigation to her gender.

R. v Solis Jaramillo (Johanna Estefania) and others (2012) EWCA Crim 2101

This case concerned four defendants (three of whom were women) who imported cocaine into the UK from the Dominican Republic. All were vulnerable due to their severe financial problems and had various personal mitigation circumstances such as being a sole carer for children, unemployment, prostitution, drug dependence and history of drug use. The Court acknowledged that the appellants were not organisers or managers but couriers, under the control of the organisers, and may not have realised until they were under the control of their handlers that they would be carrying drugs in such substantial quantities. Although they did not fall within the sub-class of courier described in *Boakye*, because they had voluntarily travelled and knew that they would become drug couriers on arrival for substantial sums of money, their sentences were reduced to recognise the substantial gap in culpability between organisers of a drugs operation and those towards the bottom of the hierarchy.

³⁰⁰. Sentencing Council, *Assessing the impact and implementation of the Sentencing Council’s Drug Offences Definitive Guideline* (June 2018), pages 18–19 available at: www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-guideline-assessment.pdf.

³⁰¹. *R v Boakye and Others* (2012) EWCA Crim 838, paras. 35–36.

³⁰². *Ibid*, para 9

³⁰³. *Ibid*, para 46.

³⁰⁴. *R v Henry (Nadine Chrystel)* (2014) EWCA Crim 980, para 11.

QUESTION 4:**What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?**

Female offenders account for a small percentage of defendants prosecuted for indictable drug-related offences; in 2017, they accounted for only 8%.³⁰⁵ The majority of female defendants do not receive a custodial sentence. Of all female defendants sentenced for their first drug import, export or production offence in 2015, only 10% were imprisoned (compared to 24% of male defendants).³⁰⁶

The most common sentencing outcome for indictable drug-related offences for both sexes was a fine – 29% of females and 37% of males in 2017. The proportion of offenders sentenced who received a conditional discharge has decreased, from 22% to 18% for females and from 16% to 12% for males.³⁰⁷

The custody rate for indictable drug-related offences by female offenders has increased since 2015, following a period of stability between 2013 and 2014 and a steady decline prior to 2014. In 2017, the custody rate for females was 15% (up from 11% in 2015).³⁰⁸ In contrast, the custody rate for men for indictable drug-related offences (around 20%) has remained broadly the same over the same period of time.

The drug-related offence which females were most commonly prosecuted for was possession of a controlled Class A drug and the production, supply and possession with intent to supply of a controlled Class A drug, both accounting for 25% of female indictable drug offence prosecutions, whereas, in 2017, males were most commonly prosecuted for production, supply and possession with intent to supply of cannabis (37%). Production, supply and possession with intent to supply of a Class A drug accounted for the majority of those sentenced to immediate custody for both women and men, 57% and 65% respectively in 2017. Over this period, the number of women sentenced to immediate custody for production, supply and possession with intent to supply of a Class A drug fell by 29%, while the number of men increased by 30%.³⁰⁹

In 2015, the average custodial sentence length for convicted female offenders for indictable drug-related offences showed a decreasing trend – it was 29

months in 2015, compared to 30.8 months in 2011 and 32.2 months in 2008 (compared to male offenders: 34 months in 2015, 31 months in 2011 and 32.8 months in 2008).^{310, 311}

As female drug traffickers are more likely to be in a “lesser” role than men (72% of female traffickers were judged to be “lesser” compared to only 48% of male traffickers), the changes to sentencing brought in by the Guideline have had a more significant effect on women. The average length of sentence given to women for drug-related offences decreased following the introduction of the Guideline and 90% of women received sentences of seven years or less, compared with only 70% before.³¹²

3. General

QUESTION 5:**Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?**

There is a large amount of academic commentary on this area in the UK. In recent times, there has been an emphasis on reducing the number of women in prison for all offences. In 2006, the Home Secretary asked Baroness Jean Corston to conduct a review of vulnerable women in the criminal justice system. An overarching recommendation of her report was the need to reduce the number of women in custody, stating that “custodial sentences for women must be reserved for serious and violent offenders who pose a threat to the public” and it noted that “coercion by men can form a route into criminal activity for women”.³¹³

The Global Drug Policy Observatory’s situation analysis³¹⁴ emphasises that patterns of drug use, sales and trafficking are profoundly gendered. It states that most users, dealers and traffickers are men and, despite being a statistical minority in all aspects of the drug trade, women tend to be most involved in the lower levels of the trade, where the greatest concentration of arrests occur, and interventions neglect to seriously consider their impact on women. The impact of a drugs conviction carries a double penalty for women: many lose their job and accommodation and care for children and drug-related offences carry stigma and

³⁰⁵ Ministry of Justice, *Statistics on Women and the Criminal Justice System* (2017), page 120, available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759770/women-criminal-justice-system-2017.pdf.

³⁰⁶ Ministry of Justice, *Association between being male or female and being sentenced to prison in England and Wales in 2015* (2015), page 4, available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571737/associations-between-sex-and-sentencing-to-prison.pdf.

³⁰⁷ Ministry of Justice, *Statistics on Women and the Criminal Justice System* (2017), page 121, available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759770/women-criminal-justice-system-2017..pdf.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*, page 122.

³¹⁰ Ministry of Justice, *Statistics on Women and the Criminal Justice System* (2015), page 155.

³¹¹ Ministry of Justice, *Statistics on Women and the Criminal Justice System* (2011), page 74.

³¹² International Drug Policy Consortium, Fleetwood, J, *Briefing Paper: Sentencing reform for drug trafficking in England and Wales* (2015).

³¹³ Corston, J, *The Corston Report: A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System* (2007).

³¹⁴ Global Drug Policy Observatory, *Developing drug policy: gender matters* (2014).

social isolation which their children often share. It recommends that responses to women involved with drugs must take gender into account and gender sensitivity must be incorporated into all aspects of drug policy to produce fair outcomes that ensure international human rights obligations and meet the reality of women's lives.

Janet Loveless in the *Criminal Law Review*³¹⁵ wrote that, while sentences are likely to be shorter for some under the Guideline, the emphasis on retaining current sentencing practice may pose a barrier to more profound change. The Guideline does, nevertheless, represent an attempt to reflect women's concerns and offers opportunities to courts to demonstrate a more thorough understanding of the causes and reality of female offending than might previously have been the case, particularly as reductions may be achieved by applying additional mitigating factors, several of which reflect the specific concerns of women.

The fact that the Guideline has led to shorter sentences for drug traffickers in a "lesser" role has been highlighted by an International Drug Policy Consortium briefing paper,³¹⁶ which explains that sentencing in the UK for trafficking cases involving a Class A drug used to ignore mitigating factors or the offender's role. This approach was criticised, particularly in relation to women's exploitation. However, a study conducted by Marie Nougier in 2017 found that the Guideline "has led to more proportionate sentencing, particularly for women in situations of vulnerability engaged as drug couriers".³¹⁷

A 2012 paper from the Prison Reform Trust³¹⁸ focuses on foreign national female offenders and recognises that a disproportionate number of the overall female prison population are foreign nationals, partly as a result of their high levels of conviction for drug-related offences – 46% of the foreign national prison population falls within the drug-related offences category, of which the majority are sentenced for importation of Class A drugs. The paper discusses the use of these women as drug couriers and states that these women have been used as commodities by others who make large profits and target them because of their vulnerabilities. It also recognises that it is often these vulnerable women (where coercion, misinformation and threats are frequent factors behind their offences) and not those higher up in the chain who are caught and convicted and recommends a greater focus on identifying those ultimately behind the offences, for example, by reducing focus on airport arrests and carrying out surveillance on those who meet the drug couriers. Its recommendation that sentencing guidelines for drug couriers should take account of the role that women play and introduce scope for mitigation such as evidence of coercion or exploitation has been addressed by the Guideline.

³¹⁵ Loveless, J, Women, *Sentencing and the Drug Offences Definitive Guidelines* (2012), *Criminal Law Review* 8: 592.

³¹⁶ International Drug Policy Consortium, Fleetwood, J, *Briefing Paper: Sentencing reform for drug trafficking in England and Wales* (2015).

³¹⁷ Nougier, M, *Ensuring more proportionate sentences for female drug offenders in the United Kingdom* (2017), available at www.wola.org/wp-content/uploads/2017/05/DONE-13-UK-proportionality_ENG_FINAL.pdf.

³¹⁸ Prison Reform Trust, *Briefing paper on foreign national women in prison in England and Wales* (2012).

CHAPTER 7

France

Incarceration rates	Women	Men	Proportion of women
Total ³¹⁹	2,580	69,130	3.6%
For drug-related offences ³²⁰	3,964	64,250	5.8%

Introduction

In France, women do not appear to be a specific focus of law enforcers in drug supply or trafficking cases and their involvement in such cases has not been a matter of public interest.

Furthermore, gender studies are still somewhat limited in French academia compared to other countries where the need to have a specific “gender response” or “gender responsive justice” has been raised, studied and sometimes implemented. Therefore, gender-specific measures regarding women have not been created in French law nor really implemented in the case law.³²¹

Furthermore, French constitutional law protects the constitutional right of equality before the law set forth by Article 6 of the Declaration of the Rights of Man and of the Citizen according to which the law “must be the same for all, either that it protects, or that it punishes” and to Article 1 of the French Constitution which states that the French Republic ensures the “equality of all citizens before the law”. According to this principle, the law must apply similar rules to similar situations. It stems from the French Constitutional Supreme Court’s (“**Conseil constitutionnel**”) case law that in most cases a difference in gender is not a sufficient distinction to justify the application of different rules. It could thus be argued that the creation of gender-specific criminal law rules would face serious constitutional challenges in France. However, the Constitution itself, as well as the case law of the Supreme Court, recognise certain

distinctions based on gender on certain specific issues (such as political quotas or measures facilitating the empowerment of women in important companies).

Moreover, the specific nature of the French legal system has made this research somewhat complex. As French law is mainly based on codified legal texts, case law is not as easily accessible as in common law jurisdictions. This is especially true of lower courts’ decisions, where most drug-related cases are judged. These are often not published and are always anonymised before publication. This constituted a significant limitation in conducting a systematic overview of French case law. As a result, only a selection of decisions from the higher courts and of other decisions listed in academic articles were reviewed.

Finally, it is important to briefly mention the three different categories of offences established by French criminal law. In decreasing order of seriousness, these categories of offences are: criminal offences or felonies, misdemeanours, and contraventions (in French “*crimes*”, “*délits*” and “*contraventions*”). Most drug-related offences are misdemeanours that may become criminal offences if there are aggravating factors (see below).

³¹⁹. www.justice.gouv.fr/art_pix/Statistique_juillet_2019_trim.pdf.

³²⁰. www.ofdt.fr/statistiques-et-infographie/series-statistiques/interpellations-et-condamnations-pour-ils-evolution-depuis-1995-femmes.

³²¹. « Les gender studies » (Gender studies), Martine Herzog-Evans, AJ Pénal 2010 p. 20.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

French criminal law sets out a list of drug-related offences, which are cumulative.

Use of illegal drugs³²²

The use of illegal drugs is prohibited by the French Public Health Code. The offender incurs up to one year of imprisonment and a fine up to €3,750.

Inciting a third party to use illegal drugs³²³

Provoking or inciting a third party to use illegal drugs is sanctioned by the French Public Health Code even if this provocation has not been followed by actual consumption of illegal drugs by the third party.

The offender incurs up to five years of imprisonment and a fine up to €75,000

Transport, detention, offer, sale, acquisition of illegal drugs³²⁴

One material fact may result in multiple offences based on this same text of the French Criminal Code. For instance, if found carrying drugs on a public thoroughfare, the relevant individual would have committed two offences, transport and possession of illegal drugs.

Each offence can be punished by up to 10 years of imprisonment and a fine of up to €7,500,000.

Sale of, or the offer to sell, illegal drugs (in quantities limited to a person's personal consumption)³²⁵

As previously described, the sale of illegal drugs is a specific offence sanctioned by up to 10 years of imprisonment (see above). This separate offence is designed to sanction small distributors through a simplified procedure. This offence enables the use of an immediate summons procedure, coupled with a smaller penalty (the sanction is divided by two, five years of imprisonment and a fine of up to €75,000).

Helping someone use illegal drugs (lending money to buy drugs, encouraging its use in a night club, etc.)³²⁶

Facilitating the use of illegal drugs can be regarded as complicity under French criminal law. However, this specific offence was created to enable the application

of stricter penalties than if general complicity rules had been applied. This offence is punishable by up to 10 years of imprisonment and a fine of up to €7,500,000.

Providing prescriptions for regulated drugs on frivolous grounds³²⁷

The offence targets and punishes both the prescription provider and the beneficiaries of the prescription. However, to sanction a pharmacist in such a case, the prosecution will have to establish beyond a reasonable doubt that he or she knew that the prescription was fake (which can be very difficult in practice). The offender incurs up to 10 years of imprisonment and a fine of up to €7,500,000.

Laundering funds acquired through drug trafficking³²⁸

Facilitating by any way the deceptive justification of the origin of the goods or earnings of the offender of a specific drug-related offence listed above is punished as a separate offence.

Additionally, the two following elements can also be considered as laundering:

- providing any kind of support to a financial transaction involving any proceeds from drug trafficking.
- concealing and converting such proceeds (including assets of any kind as well as property rights of these assets).

This offence is punished by up to 10 years of imprisonment and a fine of up to €750,000.

The inability of a person to justify the income corresponding to his or her lifestyle³²⁹

This offence is not specific to drug-related activities can be used in this context. Indeed, French law sanctions the inability of a person to justify the income corresponding to his or her lifestyle when having been in regular contact with a person sanctioned for committing a felony or misdemeanour bringing him/her a profit and is sanctioned by more than five years of imprisonment.

This offence is punished by a maximum of three years of imprisonment and a fine of up to €7,500.

As a general comment, it must be noted that drug offences are very severely sanctioned by French law. Most drug-related offences are therefore mostly classified as misdemeanours (as opposed to lower-level "contraventions" and more serious "crimes" as explained above in introduction). The offences listed above are all

³²². Article L 3421-1 of the French Public Health Code.

³²³. Article L 3421-4 of the French Public Health Code.

³²⁴. Article 222-37 of the French Criminal Code.

³²⁵. Article 222-39 of the French Criminal Code.

³²⁶. Article 222-37 of the French Criminal Code.

³²⁷. Article 222-37 of the French Criminal Code.

³²⁸. Article 222-38 of the French Criminal Code.

³²⁹. Article 321-6 of the French Criminal Code.

misdemeanours and should therefore be considered as a combination of low- and mid-level offences depending on the maximum sentenced incurred.

The least severely repressed drug-related offences are: (i) the Public Health Code's provisions prohibiting the use of illegal drugs and any act inciting a third party to use illegal drugs; and (ii) the Criminal Code's provision sanctioning sales of illegal drugs in quantities limited to a person's personal consumption. These three offences are sanctioned by a maximum of one to five years of imprisonment. It must, however, be noted that, these offences when combined with certain aggravating factors (described below at Section 2.2) can result in significantly increased sanctions (see below at Section 2.2).

The other misdemeanours listed above can in theory be sanctioned with longer imprisonment sentences (up to 10 years) specifically if combined with certain aggravating factors (more than 10 years as detailed in Section 2.2 below). However, it must be recalled that in French criminal law there are no minimum sentences and therefore judges remain free to impose much lower sentences than the maximum sentences incurred. In practice, courts rarely impose the maximum sentence incurred by the offender. For example, the offence of transporting or detaining drugs which is detailed ad for which the offender theoretically up to 10 years of imprisonment (see above) will often be sanctioned with a much shorter suspended prison sentence. Such offences should therefore also be considered as low- or mid-level offences.

More serious offences such as the illegal production of illegal drugs³³⁰ have not been mentioned in the detailed list above. Indeed, these are criminal offences which are sanctioned by longer imprisonment sentences of up to 20 years. These offences can therefore not be considered low-level.

Complementary sentences

The French Criminal Code also provides additional penalties ("sentences complémentaires") which are penalties applicable to certain offences or misdemeanours in addition to (and more rarely instead of) the sanction specifically provided for this offence or misdemeanour.³³¹

Articles 222-44 of the French Criminal Code and L 3421-1 of the French Public Health Code list the additional penalties applicable to the drug-related offences described above. They include such sanctions as the prohibition to perform certain social or professional

activities, driver's licence suspension, obligation to attend classes on certain topics, etc. In most cases, judges have discretion on whether to impose such penalties or not.

Other remarks on sentencing of drug-related offences

The French Criminal Code also provides for alternative sentences. For example, under certain conditions (see below), an imprisonment sentence or a fine can be suspended.

There are different types of suspensions: ordinary suspension (i.e. the sanction is suspended and becomes void after a period of five years if the offender is not sanctioned for any crime in this time frame)³³² or suspension with probation (i.e. the sanction is suspended but will only remain suspended and become void after five years if the offender respects certain conditions specified in the Criminal Code and imposed by the judge).³³³

First-time offenders are almost always given suspended sentences and fines in almost all cases related to drugs. Only in certain international major drug cases would judges impose imprisonment without probation. They would also do so for repeat offenders. It is a case-by-case decision and there are no guidelines on sentencing in France.

Therefore, in practice, in low-level drug-related cases, judges very often impose alternative sentences, in particular imprisonment sentences/fines under suspension with probation. The conditions imposed on offenders will then include different obligations such as the obligation to receive visits from social workers, to inform the social worker or to undergo medical examination or treatment for drug dependence, etc.³³⁴

Please note that French law also provides for alternative measures to prosecution³³⁵ that apply mostly to lower offences (which also include non-drug-related offences) and only when the offender has recognised the facts and charges laid against him/her. These measures are directly imposed by the prosecutor.

They typically take the form of a reminder of the law (i.e. the prosecutor or police officer brings to the offender's attention the duties imposed by the law), a settlement, remedial measures (this type of measure may include for example the completion of a citizenship internship, a civic training course, a stay in a health, social or professional structure, or a sensitisation training on the dangers of the use of narcotics) or a criminal mediation. Prosecutors can freely assess which

³³⁰. Article 222-35 of the French Criminal Code.

³³¹. Article 131-10 of the French Criminal Code.

³³². Article 132-29 and following of the French Criminal Code.

³³³. Article 132-40 and following of the French Criminal Code.

³³⁴. Article 132-45 and following of the French Criminal Code.

³³⁵. See for example the legal text for a reminder of the law: article 41-1 of the French Criminal Procedure Code.

measure applies best to the situation depending on the circumstances, including, but not limited to, the (nature of the offence, or the damages sustained by the victim).

There is not necessarily a victim in all criminal cases. For example, if an individual is caught in possession of illegal drugs, he or she will be prosecuted but there will not be any civil victim who would have suffered any harm from the mere possession of these illegal drugs. The only victim is society and it is the Prosecutor's duty to pursue the offender and imposed the best-suited measure based on the nature of the offence.

Although not drafted as gender-specific, recent statistics show that 53% of women accused of a drug-related offence benefited from an alternative measure to prosecution, compared to only 43% for men.³³⁶ (These statistics take into account all drug-related offences and therefore include drug offences of different nature and committed in different circumstances.)

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Neither the Criminal Code nor any other legal source explicitly includes factors that are disproportionately relevant to female offenders. Indeed, as mentioned in the introduction, discriminating between male and female offenders could be considered as unconstitutional in France.

However, the offence based on a person's inability to justify his/her income can, however, be perceived as especially targeting women. Though the text does not include any clearly gendered elements, in practice this offence has been created by French legislators to sanction the family and close friends of persons convicted of certain offences (and especially drug-related offences) who benefit from the profits of those criminal activities. They therefore very often target the drug-related offenders' spouses, and therefore mostly women (as the clear majority of drug-related offenders in France are men³³⁷).

Furthermore, a close review of certain additional penalties (see Section 1 above) also reveals a certain gendered bias. The two following penalties may appear to have been specifically drafted to target women, although they are less commonly used in drug-related cases:

- The obligation to attend classes on good parenting:³³⁸ although it should be noted that this sentence applies to both male and female offenders, it could be seen as being specifically relevant to female offenders.
- The obligation to attend classes on sexual and domestic violence:³³⁹ this sentence is rather disconnected from illegal drug-related offences (as it is also applicable to other offences) but constitutes a specific protection for women.

However, these additional penalties are only very rarely used in drug-related cases (and are usually more applicable used to child or domestic violence cases).

Finally, a similar review of the different obligations which can be imposed on offenders who have received a suspended sentence with probation (see Section 1 above) also shows that certain obligations have been drafted with a certain gender bias. For example, it can be argued that the possibility of the court requiring that the offender demonstrates that: (i) he or she is contributing to the family's expenses; or (ii) that he or she regularly pays alimony has been drafted as specific protections for women.³⁴⁰

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

Though there are no sentencing guidelines in France, sentencing legislation includes provisions for mitigating factors. However, these factors do not appear to be gender-specific.

French law does not specify the quantity of drugs required to constitute a "trafficking" offence, and courts do not apply a minimum quantity requirement in practice.³⁴¹

Mitigating factors

1. Legitimate defence

In French general criminal law, there is a specific provision for a "legitimate defence" ("*légitime défense*") which can be put forward by a defendant to argue that he or she committed an offence only to protect his or her health or life in a situation where he or she was put in danger and had no other way of escaping this danger.³⁴² However, the required thresholds to accept such a defence are very high and are not gender-specific.

³³⁶. « Interpellations et condamnations pour infractions à la législation de stupéfiants parmi les femmes, évolution depuis 1995 » (Women arrested and convicted for drug-related offences since 1995", Observatoire Français des drogues et des toxicomanes, séries statistiques.

³³⁷. « Les condamnations, statistiques année 2016 » (Statistics convictions 2016), Ministère de la Justice, p. 11.

³³⁸. Article 222-45 of the French Criminal Code.

³³⁹. Article 222-45 of the French Criminal Code.

³⁴⁰. Article 132-45 of the French Criminal Code

³⁴¹. Information found on the following public website: www.drogues-info-service.fr/Tout-savoir-sur-les-drogues/La-loi-et-les-drogues/Le-trafic-de-stupefiants#.W3q8wExuJaQ.

³⁴². Articles 122-5 and 122-6 of the French Criminal Code.

2. State of necessity

Another specific provision exists for a “state of necessity” (“*état de nécessité*”) which can be put forward by a defendant if he or she was only trying to protect a greater interest and had no other option but to commit the prohibited offence³⁴³.

However, in order for such a defence to be allowed:

(i) there must be an actual or imminent danger; and (ii) the defendant’s reaction must have been proportionate and necessary to protect that greater interest, i.e. it must have been the best way to protect it and that interest must be superior to the interest sacrificed.

For example, the application of the state of necessity defence can be used when the production and use of drugs such as cannabis appear necessary to the defendant to reduce their pain. A French court’s decision (Court of Appeal of Papeete, 27 June 2002) admitted such a defence but was later criticised by commentators.³⁴⁴

Even though this provision is not gender-specific, it could be relevant for women. For instance, a woman in a state of great poverty may use such a defence if she stole food to feed herself or her children. However, no relevant case law where this defence was applied to a female offender for a drug-related offence could be found.

3. Denunciation

Any imprisonment sentence imposed on a drug-related offender is reduced by half where, having alerted the judicial or administrative authorities, he or she has enabled the criminal conduct to be ended and if applicable has enabled the other offenders to be identified.³⁴⁵

4. Legal representation

In France, legal representation is a fundamental right for any defendant, regardless of gender.³⁴⁶

However, it is only mandatory for a potential offender to have such a representation in front of higher courts where he / she is judged for a crime.³⁴⁷ When the defendant appears before a lower court for a low-level offence,³⁴⁸ such as the offences listed in question 1 above, he or she is not required to have legal representation.

The offender can appoint and pay for legal representation, or the judge will appoint a public defender to represent him/her if asked by the offender or if mandatory before this court. It must also be noted that legal aid is available to help the offender if specific financial criteria are met (created by French Statute dated 10 July 1991, n°91-647). In any case, the absence of legal representation, when permitted by law, is not a mitigating factor.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

The sentencing legislation provides for several general aggravating factors that apply to all offences, including, but not limited to:

- repeated offences.³⁴⁹
- violence.
- Organised crime, which implies the existence of a group of persons and an agreement in view of committing one or more offences.³⁵⁰

In such cases, the maximum fine and length of prison sentence specified for the offence or the misdemeanour will be increased.

The Criminal Code also includes aggravating factors specifically applicable to certain drug-related offences.

For example, offenders that have sold illegal drugs to a person for their personal consumption incur an increased sanction if they sell to a minor; or in/near a school or a public administration building.³⁵¹ Similarly, an offender accused of being unable to justify the income corresponding to his or her lifestyle faces an increase sentence if the person committing a felony or misdemeanour with whom the offender has been in regular contact is a minor.³⁵²

Finally, the Public Health Code provides an aggravating factor to the offence of illegal drug use. The sentence incurred is indeed increased when the offence is committed by a public official acting in the course of his or her duties or by an employee of a transport company acting in the course of his or her employment.³⁵³ The sanction incurred for the offence of provoking the use

³⁴³ Article 122-7 of the French Criminal Code.

³⁴⁴ « *La consommation de cannabis nécessaire à la sauvegarde de la santé : une application contestable de l'article 122-7 du code pénal* » (‘A cannabis use necessary to safeguard public health : a questionable application of Article 122-7 of the French Criminal Code’), Pascal Gourdon, *Recueil Dalloz* 2003 p. 584.

³⁴⁵ Article 222-43 of the French Criminal Code.

³⁴⁶ Article 6§3 of the European Convention on Human Rights, European directive IP/11/689.

³⁴⁷ Articles 274 and 317 of the French Criminal Procedure Code.

³⁴⁸ Article 417 of the French Criminal Procedure Code.

³⁴⁹ Article 132-8 of the French Criminal Code.

³⁵⁰ Article 132-71 of the French Criminal Code.

³⁵¹ Article 222-39 of the French Criminal Code.

³⁵² Article 312-6 of the French Criminal Code.

³⁵³ Article L 3421-1 of the French Public Health Code.

of illegal drugs is also increased if the offender pushed a minor to use drugs or if the offence is committed in/near a school or a public administration building.³⁵⁴

Such factors do not appear to be gender-specific and case law reviewed does not suggest that they disproportionately affect women.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Such factors are not specifically mentioned in French criminal law but are taken into account by judges when sentencing (e.g. a judge will consider the offender's financial gain to set the amount of the fine). These factors are not gender-specific.

However, in a 2013 case,³⁵⁵ a man was sentenced to seven years of imprisonment and a fine of €500,000 for criminal conspiracy and non-justification of the origin of certain earnings.³⁵⁶ However, he was discharged of several other offences such as transport, detention or illegal import of drugs for lack of evidence. On the other hand, the three women involved were arrested and sentenced for their role as drug couriers in the same case.

This example illustrates how women acting as drug couriers may be easier targets for drug enforcement authorities than men who often are more serious offenders and who may escape conviction for less serious offences based on lack of evidence.

Such cases, however, appear to be quite rare in French case law. Furthermore, the Criminal Code provides that where, in the course of the same proceedings, the accused person is found guilty of several concurrent offences, each of the penalties applicable may be imposed, but if several penalties of a similar nature are incurred, only one such penalty may be imposed.³⁵⁷ This could explain why prosecutors only focus on establishing the most serious offences and why males, who are usually more serious offenders than women, can escape conviction for less serious offences.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Courts of First Instance and Courts of Appeal have a very wide margin of discretion in assessing the facts of a crime and defining the appropriate level of sanctions.

They generally take into consideration a spectrum of elements (social background, family situation, financial situation, etc.) which could include gendered elements, which are difficult to evaluate as French Court's decisions are usually very brief and lower courts' decisions are usually not published. This discretion is essential for personalising sentences.³⁵⁸

In order to personalise sentences, judges rely on reports prepared by social workers who interview alleged offenders before they appear in front of the court. Such reports are not mandatory (except under certain conditions such as when the offender is under 21 years of age) but are in practice nearly always requested by judges before imposing a sanction.³⁵⁹

The French Criminal Supreme Court ("Cour de cassation") exercises a limited judicial review and does not reconsider the assessment of facts that was done by inferior courts.

Nonetheless, some judgments by the French Supreme Court still illustrate how gendered elements can be taken into account when sentencing women.

For instance, in 2012,³⁶⁰ a man was sentenced to four years of imprisonment with one year suspension with probation, and his wife was sentenced to 18 months of imprisonment with one year suspension with probation for complicity and for having handled and laundered the funds acquired. To assess and lower the woman's sentence, judges took into account "*the fear she felt towards her husband*" (free translation).

In a 2011 decision,³⁶¹ a court of appeal confirmed a lower court decision sentencing a male offender to two years' imprisonment (including 18 months of suspension under probation) and a female offender to only six-month imprisonment under suspension for having detained and imported approximately 800 grams of cannabis from

³⁵⁴. Article L 3421-4 of the French Public Health Code.

³⁵⁵. Decision of the Cour de cassation, Chambre criminelle, 14 novembre 2013, n°09-80.072.

³⁵⁶. See the specific laundering offence developed in point 1.

³⁵⁷. Article 132-4 of the French Criminal Code.

³⁵⁸. « *La personnalisation des peines dans le nouveau code penal français* » (The individualisation of sentences in the new French Criminal Code), Théodore Papathéodorou, RSC 1997 p.15.

³⁵⁹. Article 41 of the French Criminal Procedure Code.

³⁶⁰. Decision of the Cour de cassation, Chambre criminelle, 19 December 2012, n°12-80.435.

³⁶¹. Decision of the Montpellier Court of appeal, 5 May 2010, n°10/00031.

Morocco. The court sentenced the female offender to a lower sentence because she had admitted that “*she had accepted out of love and at her boyfriend’s request to hide the cannabis in her chest to clear customs*” (free translation). In addition, the Court also noted that she had been in a relationship with the male since she was 16 and that at the time the offence was committed she was five months pregnant.

These examples illustrate how judges can adopt a more lenient approach when sentencing women by taking into account mitigating factors such as coercion, fear, or the potential influence of a spouse. This analysis seems confirmed by the statistics set out in Section 4 below.

However, it is important to recall that in general judges remain extremely strict on drug-related offences and sanction both men and women very severely. For example, in 2011, a court of appeal³⁶² sentenced a female offender to a two-year sentence of imprisonment for drug trafficking, while her male companion was only sentenced to 18 months of imprisonment. Both were repeat drug-related offenders. The court highlighted that the female offender “*appeared to have the dominant role in the relationship*” (free translation) with the male offender (they had lived together for seven years). Female offenders can therefore also be sanctioned severely especially when they are repeat offenders and their active role can be clearly established.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

It is difficult in France to have access to accurate data on sentences imposed. Some studies have, however, been published analysing a potential gender gap before French courts.

With regards to all criminal offences, a 2017 study published by the French Ministry of Justice and relying on 2014 data highlighted that women were in appearance less sanctioned than males at all levels of the French judicial system.³⁶³

Out of 2 million individuals arrested in 2014, only 345,000 were women (18%), 37% of whom saw their case dismissed by the prosecution (compared to only 26% of males).³⁶⁴

Furthermore, 60% of female offenders then benefited from an alternative measure to prosecution (when only 41% of men offenders did)³⁶⁵ and therefore only 35% of female offenders were prosecuted before a French court (compared to 53% of men offenders)³⁶⁶

Female offenders who are prosecuted (representing 10% of the offenders trialled in France)³⁶⁷ then benefit from more lenient sentences than their male counterparts both in terms of the type of sanction imposed (imprisonment, suspension, fines, etc.) and of the severity of the sanction imposed.

Regarding misdemeanours, only 10% of women trialled in France receive an imprisonment sentence (compared to 23% of males) and 35% of them received a suspended sentence (compared to only 28% of males). Furthermore, female offenders usually receive shorter imprisonment sentences (33% of all imprisonment sentences pronounced against women are for less than three months compared to only 25% of sentences imposed on males). Women therefore only represented 4% of the total incarcerated population.³⁶⁸

With regards to drug-related offences specifically, several studies exist and reveal similar trends. For instance, in 2015:³⁶⁹

- out of 199,704 individuals who were arrested for drug-related offences, 18,545 were women (9%).
- out of 64,250 individuals who were convicted for drug-related offences, 3,964 were women (6%).
- 53% of women accused of drug-related offences benefited from an alternative measure to prosecution, against 43% for men.

Several explanations have been put forward to explain these statistics. First time female offenders tend to be prosecuted for less complex offences than males (for example, in 2014, 24% of women prosecuted for misdemeanours were trialled for several offences compared to 30% of males).³⁷⁰ Secondly, female offenders tend to have a lower reoffending rate, as in 2014 only 29% of female offenders trialled for misdemeanours had previously been sentenced compared to 55% of males.³⁷¹

These external factors are not however the only explanation for this gender gap before French courts. Academics have indeed tried to demonstrate that other factors play an important part.

³⁶². Decision of the Caen Court of appeal, 20 July 2011, N°11/00584

³⁶³. « Un traitement judiciaire différent entre hommes et femmes délinquants » (« A different judiciary approach to male and female offenders »), Faustine Büsch, Odile Timbart, Infostat Justice, n° 149, March 2017.

³⁶⁴. *Ibid.* p.2.

³⁶⁵. *Ibid.* p.2.

³⁶⁶. *Ibid.* p.3.

³⁶⁷. *Ibid.* p.3.

³⁶⁸. *Ibid.* p.3.

³⁶⁹. See « Interpellations et condamnations pour infractions à la législation de stupéfiants parmi les femmes, évolution depuis 1995 » (“Women arrested and convicted for drug-related offences since 1995”), Observatoire Français des drogues et des toxicomanes, séries statistiques.

³⁷⁰. « Un traitement judiciaire différent entre hommes et femmes délinquants » (“A different judiciary approach to male and female offenders”), Faustine Büsch, Odile Timbart, Infostat Justice, n° 149, March 2017, p.5.

³⁷¹. *Ibid.*, p.6

For example, a working paper from the Toulouse School of economics on “Gender disparities in criminal justice” which used a compilation of criminal records from the statistics service of the French Ministry of Justice between 2000 and 2003 demonstrated that sentencing is affected by the judge’s own gender.³⁷² Indeed, this study shows that, as the share of women among judges increases, female offenders tend to receive, on average, a longer prison term and shorter suspended prison time.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

This does not appear to be a very extensively discussed topic in French academia. Regarding the regulation of the illegal drug market, academia and public policies focus more on the offenders’ social origin (social and economic background, place of residence, nationality, etc.) rather than their gender. Therefore, the public debate in recent years has revolved mostly around drug trafficking in the suburbs of major French cities

For example:

1. The “Government plan for drugs 2013-2017”³⁷³ sets out among its priorities the need to take into account the populations that are most exposed to drugs to reduce the risks and social consequences of drug trafficking, notably by having specific measures implemented depending on the geographical or social origin of the offenders.
2. Another academic article (“Drug users, deconstruction of criminal policies”)³⁷⁴ points out the importance of the offender’s social background when it comes to drug-related offences and the particular issue of drug trafficking in the French suburbs.

Finally, the articulation between drugs and social/geographical origin also appears to be a matter of interest in the national and international press.³⁷⁵ Politicians have made the transformation of suburbs and the fight against drug dealing in these areas a priority.

³⁷². “Gender disparities in criminal justice”, Arnaud Philippe, Working Papers n°17-762, February 2017, p.2.

³⁷³. “Government Plan for Combating Drugs and Addictive Behaviours 2013-2017”, Official Report collections, La documentation Française.

³⁷⁴. « Usager de drogues : (dé)construction d’une figure de politiques pénales » (“Drug users, deconstruction of criminal policies”), Nelson das Neves Ribeiro, RSC 2018 p. 569.

³⁷⁵. See the two following press articles from the Guardian: “France ‘invisible disaster’: how heroin devastated the banlieues in the 1980s”, Sylvia Zappi, 18 February 2014; and “Sarkozy promises to transform suburbs”, Fred Attewill and agencies, 8 February 2008.

CHAPTER 8

Germany

Incarceration rates	Women	Men	Proportion of women
Total ³⁷⁶	2,929	47,462	5.81%
For drug-related offences ³⁷⁷	346	6,016	5.44%

Introduction

Under German criminal law, drug-related offences – including “low-level” drug-related offences, such as drug possession and supply – are, in principle, prohibited by the German Narcotics Act (*Betäubungsmittelgesetz* – *BtMG*, the “**Narcotics Act**”). In general, there are no particular gender-specific provisions in respect of drug-related offences, neither statutory nor developed by case law, to be considered in determining the sentence. The German Constitution (*Grundgesetz* – *GG*, the “**Constitution**”) requires equal treatment of all genders. Thus, the duty to abide by the law exists regardless of gender or social role. Moreover, a woman will not be sentenced differently just because she is a woman or a mother. However, judges must take into account certain aspects that are disproportionately relevant for women (e.g. pregnancy, social obligations of an offender towards relatives, especially a single parent).

Relevant statistics show a clear disproportionality by gender of drug-related offences as well as convictions: it appears that women are far less frequently involved in drug-related offences and are also less frequently convicted to a prison sentence.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Overview

The Narcotics Act contains different categories of drug-related offences.³⁷⁸

The central provision in relation to criminal drug-related offences is section 29(1) Narcotics Act, which contains a comprehensive list of offences – such as manufacturing, trafficking, supplying, acquiring or possession of drugs – for which prison sentences or fines may be imposed. Unless combined with aggravating factors, however, the offences listed in section 29(1) Narcotics Act do not carry any mandatory minimum sentences. As the least severely punished offences, they can therefore be considered “low-level” drug-related offences.

Conversely, section 29(3) Narcotics Act categorises the offences listed in section 29(1) as “mid-level” with a minimum sentence of one year’s imprisonment if they are committed in a particularly severe way, e.g. where an offender acts on a commercial basis to generate a regular income or endangers the health of several people. Sections 29A, 30 and 30A Narcotics Act address particularly severe drug-related crimes that entail stricter punishments. German law categorises drug-related offences as particularly

³⁷⁶. Statistisches Bundesamt, Fachserie 10 Reihe 4.1, Rechtspflege: Strafvollzug 2018, Published: 31.11.2018.

³⁷⁷. Statistisches Bundesamt, Fachserie 10 Reihe 4.1, Rechtspflege: Strafvollzug 2018, Published: 31.11.2018.

³⁷⁸. Summary of German drug legislation by the European Monitoring Centre for Drugs and Drug Addiction, available at: www.emcdda.europa.eu/html.cfm/index5174EN.html?pluginMethod=eidd.countryprofiles&country=DE.

severe if the offender has, in addition to committing a “normal” drug-related offence, fulfilled one of the following criteria:³⁷⁹

- involvement of minors in drug-related offences.
- handling so-called “not-small quantities” (*nicht geringe Mengen*)³⁸⁰ of drugs (as defined by case law with respect to the relevant substances³⁸¹).
- committing drug-related offences as part of a criminal gang (*Bande*).
- recklessly causing the death of another person.
- while committing a drug-related offence, carrying a gun or other object that is suitable for and aimed at hurting people.

Section 32 Narcotics Act addresses administrative offences (*Ordnungswidrigkeiten*), which remain below the threshold of “criminal” conduct and can only be punished by fines. Section 32 Narcotics Act mainly sanctions violations of rules governing legal drug-handling,³⁸² such as non-compliance with notification, documentation and authorisation requirements. Offenders will typically be doctors, pharmacists and others who deal with drugs on a legal basis, in particular for medical purposes.

In 1994, the German Federal Constitutional Court ruled that the offences set out in section 29(1) Narcotics Act are constitutional in principle with regard to the prohibition of cannabis, such as possessing small quantities for personal use. Nevertheless, it imposed restrictions on law-enforcement authorities, which would have to observe the principle of proportionality and, therefore, may have to refrain from initiating criminal proceedings or imposing sentences.

In the following, section 29(1) Narcotics Act will be analysed in more detail, as it constitutes by far the most relevant provision regarding low-level drug-related offences.

Main low-level drug-related offences (section 29(1) Narcotics Act)

Section 29(1) Narcotics Act contains 14 types of drug-related offences, which are set out below.

Pursuant to section 29(1) no. 1 Narcotics Act, cultivating, manufacturing, trafficking, importing, exporting, selling, supplying, otherwise placing on the market, purchasing and otherwise acquiring drugs constitute criminal offences. Drug “trafficking”, which is construed widely and covers any self-serving effort aimed at enabling or

promoting the circulation of drugs, takes a major role among these offences. Slightly more narrowly construed is the notion of “selling” drugs, which means drug supply in exchange for remuneration without self-serving motives, e.g. at cost price, and drug “supply”, which means the transfer of somebody’s own actual command over drugs to other persons without remuneration.³⁸³ Drug use itself does not constitute a criminal offence. However, it will often be preceded by drug acquisition or possession, which is defined as actual command over drugs intended to last a considerable time.³⁸⁴

Drug-related activities that can exceptionally be allowed under the Narcotics Act, such as manufacturing certain substances (no. 2), possession of drugs (no. 3), transferring them through Germany (no. 5), prescribing, administering and leaving them for someone else to use (nos. 6, 6a), providing drugs in pharmacies or as a pharmaceutical entrepreneur (no. 7), and advertising drugs (no. 8) are criminal offences if they are carried out without respecting the drug-handling rules, such as the obligation to obtain special permits stipulated by the Narcotics Act. Further criminal offences laid down in section 29 Narcotics Act include providing incorrect or incomplete information in order to receive a drugs prescription (no. 9), and actions that help or encourage third persons to obtain drugs (nos. 10, 11, 12), including by providing financial means (no. 13), and violating certain provisions laid down in administrative ordinances, such as the Narcotic Drugs Prescription Ordinance (*Betäubungsmittel-Verschreibungsverordnung*, no. 14).

As regards possession of drugs, it is irrelevant for the purpose of determining if such possession constitutes an offence whether it is for personal use only or only a small quantity is possessed. However, as outlined below,³⁸⁵ in case of a small quantity which is determined for self-consumption the court may refrain from imposing a sentence (section 29(5) Narcotics Act).

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

As already stated in the Introduction above, there are no particular gender-specific aspects to sentencing for drug-related offences, neither statutory nor developed by case law, as the Constitution requires equal treatment of all genders.³⁸⁶ However, German criminal

³⁷⁹ Oğlakcioğlu, *Münchener Kommentar zum Strafgesetzbuch*, Vol. 6, 3rd edition 2018 (“MüKo-StGB/VI”), preliminary remarks to section 29A Narcotics Act, recitals 1-3.

³⁸⁰ The Narcotics Act distinguishes between “small quantities”, which is a mitigating factor (e.g. sections 29(5), 31A Narcotics Act), “not-small quantities”, which is an aggravating factor (e.g. section 29A Narcotics Act) and “normal quantities”; see Patzak, *Körner/Patzak/Volkmer, Betäubungsmittelgesetz*, 9th edition 2019 (“Körner/Patzak/Volkmer, BtMG”), section 31A, recital 21.

³⁸¹ For a detailed overview see Weber, *Betäubungsmittelgesetz, Kommentar* (“Weber, BtMG”), section 29A recitals 76 et seq. The thresholds determined by the Federal Constitutional Court of Justice are widely accepted, see Patzak, *Körner/Patzak/Volkmer, Betäubungsmittelgesetz, BtMG*, section 29A, recital 50.

³⁸² Kotz/Oğlakcioğlu, *MüKo-StGB/VI*, section 32 Narcotics Act, recital 1.

³⁸³ Weber, *BtMG*, section 29 recitals 167, 168; Oğlakcioğlu, *MüKo-StGB/VI*, section 29 Narcotics Act, recitals 814, 866.

³⁸⁴ Kotz/Oğlakcioğlu, *MüKo-StGB/VI*, section 29 Narcotics Act, recitals 1109, 1120.

³⁸⁵ Cf. explanation of sections 29(5) and 31A Narcotics Act in question 3 below.

³⁸⁶ Kinzig, *Schönke/Schröder, Strafgesetzbuch, Kommentar*, 30th edition 2019 (“Schönke/Schröder, StGB”), section 46 recital 36.

law recognises some factors that must be taken into account when determining the sentence, which may disproportionately affect female offenders.

Pursuant to section 46 of the German Criminal Code (*Strafgesetzbuch – StGB*, hereinafter referred to as the “**Criminal Code**”), which is the general provision under German criminal law setting out some basic principles of sentencing, the basis for a sentence is the offender’s individual guilt.³⁸⁷ The court must assess the offender’s guilt by gaining a comprehensive impression of the criminal act and the offender’s personality and by determining, evaluating and balancing all incriminating and exculpatory circumstances.³⁸⁸ This not only includes circumstances related to the committed crime – such as, *inter alia*, the motives and aims of the offender, the attitude reflected in the offence, the *modus operandi* and the consequences caused by the offence – but also characteristics and circumstances attributable to the offender – such as, *inter alia*, the offender’s prior history, his or her personal and financial circumstances as well as his or her conduct after the offence.

Furthermore, the effects which the sentence can be expected to have on the offender’s future life in society shall be taken into account. In light of certain characteristics or circumstances attributable to the offender’s personality, especially custodial sentences which may have different significance for the individual offender and, therefore, such factors may lead to a higher sensitivity to penalty (“*Strafempfindlichkeit*”). For example, high age, poor health, as well as the offender’s family conditions and professional or social position may be considered as mitigating factors. These factors may disproportionately affect women more because, compared to most men, their family conditions may more frequently raise the sensitivity for penalty. For example, the clear majority of single parents in Germany are women. In contrast, only 12.3% of single parents are men (as of 2017).³⁸⁹ However, such characteristics or circumstances must be substantial and can only be considered as mitigating factors if they make the sentence appear particularly burdensome.³⁹⁰

Notwithstanding the above, in cases where the offender is sentenced to a term of imprisonment not exceeding two years, the court may suspend the enforcement of the sentence for a probationary period (*StrafAussetzung zur Bewährung*, “**Probation**”). Such decision requires a favourable social prognosis, which can include factors that are disproportionately relevant for female offenders: within their discretionary decision, the judge has to consider the personality of the offender, their

past life, their living conditions including family and job, and the effects a Probation could have on the offender, such as on their family life. But it is important that the judge’s decision primarily considers the future living conditions within the period of Probation and further on. From a legal perspective, the Probation is not granted because of the former living conditions that might explain the actions of the offender.³⁹¹

Besides these general principles of sentencing, the Narcotics Act as well as the Criminal Code provide for ancillary measures and, under certain circumstances, allow for mitigation of the sentence or refraining from imposing or deferring the enforcement of a sentence. This is particularly true in cases of self-consumption of drugs in small quantities, in which case, the public prosecutor’s office may refrain from initiating criminal proceedings (section 31A(1) Narcotics Act), the court may close such proceedings with the public prosecutor’s office’s consent (section 31A(2) Narcotics Act) or the court may refrain from imposing a sentence (section 29(5) Narcotics Act).

Moreover, for offenders experiencing drug dependence, the court may – besides imposing a sentence – place an offender in a detoxification institution (section 64 Criminal Code), if it can be expected that the offender will commit future serious unlawful acts as a result of their drug dependence. In cases in which an offender with drug dependency has been imposed with a custodial sentence of not more than two years, enforcement of the sentence may be deferred in favour of rehabilitation therapy (section 35 Narcotics Act). From a legal perspective, a drug withdrawal has a higher priority than punishment because many crimes committed in connection with drugs are committed because of the drug dependency of the offender.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

As the sole potential mitigating factor that is only relevant to female offenders, pregnancy may lead to a higher sensitivity in penal proceedings. However, according to the German Federal Court of Justice, the sensitivity is not generally increased by the fact that a female offender will presumably give birth to her child during imprisonment.³⁹² The German Penal Law (*Strafvollzugsgesetz – StVollzG*) contains provisions

³⁸⁷. Miebach/Maier, *Münchener Kommentar zum Strafgesetzbuch*, Vol. 2, 3rd edition 2016 (“MüKo-StGB/II”), section 46 recital 1; Kinzig, Schönke/Schröder, StGB, section 46 recital 3.

³⁸⁸. Federal Court of Justice, resolution dated 10 April 1987, GSSt 1/86

³⁸⁹. Alleinerziehende in Deutschland, Begleitmaterial zur Pressekonferenz am 2. August 2018, Statistisches Bundesamt, p. 13.

³⁹⁰. Federal Court of Justice, judgment dated 15 July 1998, 2 StR 192-98; Kinzig, Schönke/Schröder, StGB, section 46 recital 54.

³⁹¹. GroB, MüKo-StGB/II, section 56 recital 30; Kinzig Schönke/Schröder, StGB, section 56 recital 31.

³⁹². Federal Court of Justice, judgment dated 15 July 1998, 2 StR 192/98.

accounting for the special situation and needs of pregnant offenders (e.g. right to medical attendance, in principle a right to childbirth in a hospital outside of the prison). Moreover, children below the age of compulsory schooling may live with their mother in prison if it is deemed beneficial for the children's well-being. These provisions did not result from the Bangkok Rules, they were implemented even before, since 1977.

The family situation is another factor that may lead to a higher sensitivity to penalty. The fact of whether the offender is responsible for others (especially underaged children) can constitute a mitigating factor, because a custodial sentence can have a negative effect on relatives and dependent children. Consequently, the German Federal Court of Justice has ruled that the fact that the offender is a father to five children – three of which were young – for which he had to care, may constitute a mitigating factor.³⁹³ In line with this, the Federal Court of Justice also ruled that the fact that the offender's third child had recently been born, likewise has to be taken into account as a mitigating factor.³⁹⁴ In another case, the Federal Court of Justice ruled that the fact that the offender was a single parent to a 10-year-old and a one-year-old child has to be taken into account as a mitigating factor.³⁹⁵ This is disproportionately relevant for female offenders, as, according to recent studies, 87.7% of the single parents in Germany are female (as of 2017).³⁹⁶

Furthermore, specific circumstances may even suspend culpability. For example, coercion (e.g. if the offender is forced to participate in the crime by a criminal organisation) can, if the offender is faced with an imminent danger to life, limb or freedom, which cannot otherwise be averted, result in him or her not being punished due to absent guilt ("duress"). This does, however, often not apply to cases of forced drug trafficking, because the courier is not deemed to be in imminent danger during the delivery and could ask for help at the national authorities.³⁹⁷ Exceptions to this are conceivable, e.g. if a relative of the courier is kept hostage and threatened with death should the courier not cooperate. However, even when duress does not preclude punishment because of a lack of such imminent danger, it has to be considered as a mitigating factor when assessing the sentence.³⁹⁸

In this context, the Federal Court of Justice decided on a drug courier case, where a mother of three illegitimate children, whose fathers did not pay alimony, was threatened with death to contraband cocaine in her

body. The lower court had denied a minor case within the meaning of section 30(2) Narcotics Act (where the minimum sentence would be considerably lower), as the case at hand would constitute a "typical drug courier case". However, the Federal Court held that the lower court had to take into account whether an overall analysis of the crime, including all subjective factors and the personality of the offender, deviated from the average of comparable cases to such an extent that the application of the standard penal framework no longer seemed appropriate.³⁹⁹

In a case of a married couple selling and supplying heroin, the Federal Court of Justice ruled that it must be considered as a mitigating factor for the woman that she was rather young and under a dominant influence of her much older husband and did not fully understand the dangerous nature of her criminal acts. Although this was, according to the facts, obviously no case of coercion or domestic violence or abuse, the fact alone that the husband had a dominant influence over his wife, which she could not resist, had to be taken into account as a mitigating factor.⁴⁰⁰

The quantity and danger of drugs is, although generally not decisive for whether an offence constitutes trafficking, a very important factor for sentencing, which can constitute both a mitigating factor as well as an aggravating factor.⁴⁰¹ In case of a small quantity which is determined for self-consumption, the court may even refrain from imposing a sentence (section 29(5) Narcotics Act).

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

As mentioned above, all relevant circumstances of the committed crime must be considered when sentencing. Accordingly, the law recognises different aggravating factors under the general principles of sentencing. Especially the attitude and background of the offender and the background of the crime can affect the sentencing, for example: previous sentences, extensive damage, negative effects on the victim. However, the law does not distinguish between men and women, ethnicity or any other social element. Therefore, there are no aggravating factors which only apply to women.

³⁹³. Federal Court of Justice, resolution dated 1 June 1983, 3 StR 197/83.

³⁹⁴. Federal Court of Justice, resolution dated 20 February 1998, 2 StR 20/98.

³⁹⁵. Federal Court of Justice, resolution dated 10 August 2011, 2 StR 221/11.

³⁹⁶. Alleinerziehende in Deutschland, Begleitmaterial zur Pressekonferenz am 2. August 2018, Statistisches Bundesamt, p. 13

³⁹⁷. Federal Court of Justice, resolution dated 19 March 2015, 2 StR 35/15.

³⁹⁸. Körner/Patzak/Volkmer, BtMG, section 29 recitals 282.

³⁹⁹. Federal Court of Justice, resolution dated 19 March 2015, 2 StR 35/15.

⁴⁰⁰. Federal Court of Justice, judgment dated 25 May 1977, 3 StR 130/77.

⁴⁰¹. Miebach/Maier, MüKo-StGB/II, section 46 recital 207.

Furthermore, the Narcotics Act recognises aggravating factors specifically applicable in case of offences against the Narcotics Act. Certain factors – such as acting on a commercial basis (“*gewerbsmäßig*”), endangering the health of several people or even causing the death of someone else, involvement of minors, assaults by a gang or carrying a gun – can constitute a particularly severe case or a more serious statutory offence (see above question 1). Even in cases where the requirements for a particularly severe case or a more serious statutory offence are not met, these factors can be taken into account when setting the sentence. However, such aggravating factors can only be considered in determining the sentence if the same factors have not been considered in determining the statutory offence or a particularly severe case (*Verbot der Doppelverwertung*).⁴⁰²

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

The Criminal Law takes the role in the chain into account in determining the type of crime and as part of the general principles of sentencing.

First, the role in the chain has to be considered when it comes to finding out the level of participation in drug trafficking, thus whether the accused person is the perpetrator or participant of the crime. Participation in a criminal offence is only possible if the main offence constitutes a criminal offence. The differentiation between perpetrator and participant and different forms of participation has a considerable impact on the sentence, as the Criminal Code stipulates mandatory mitigation for participants who, in contrast to instigating the perpetrator (*Anstiftung*), are just aiding and abetting him or her (*Gehilfen*). Within the distinction between perpetrator and participant numerous factors are relevant, such as the degree of self-interest, the extent of the involvement, the responsibility and authority and also the direction of the will. The decisive factor is the significance of the concrete contribution to the overall transaction.⁴⁰³

Thus, a drug courier can be both perpetrator and participant. He/She is a participant when he/she merely transports the drugs and does not significantly influence the transaction as a whole.⁴⁰⁴ In his/her subordinate role in the drug trafficking, the drug courier equals a human tool.

On the other hand, the drug courier is to be classified as a perpetrator, if he/she engages in significant activities beyond mere transportation of the drugs, such as purchase and sale, storage, portioning or packaging.⁴⁰⁵

Moreover, the role in the chain can be relevant for sentencing purposes. Depending on several factors and the contribution of the offender to the crime, an offender might be sentenced more or less severely. Such factors can be, for example, the financial interest of the offender in the transaction or the role in the chain. Further, the Narcotics Act recognises different types of drug crimes, e.g. possession, smuggling, trafficking, which influences the sentencing. In addition, individual factors, i.e. the role of the offender in the chain, his or her financial interest in the transaction, his or her financial background and living circumstances as well as drug dependency, are taken into account in determining the sentence. The subordinate role in the drug trafficking can have a mitigating effect.⁴⁰⁶

On the other hand, it can be an aggravating factor in determining the sentence if the accused availed himself/herself of distressed persons, such as sellers, buyers or couriers, for a small fee and thus takes advantage of their subordinate position.⁴⁰⁷ As a result, it can be stated, that the extent of the responsibility for the crime is a decisive factor. A backer (*Hintermann*) will usually be punished more severely than a drug courier, even if the backer “only” instigates the criminal act and is thus a participant and not a perpetrator.

Although we have not come across any case law specifically taking into account the role of women in the chain, these general principles will be applied in favour of men and women, as in general both genders have to be treated equally.

However, any factors taken into account in determining the type of crime may not be taken into account in determining the sentence, since under German law it is forbidden to use such factors twice.

⁴⁰². Miebach/Maier, MÜKo-StGB/II, section 46 recitals 449 et seq.

⁴⁰³. Federal Court of Justice, judgment dated 3 October 1989, 1 StR 441/89; Federal Court of Justice, resolution dated 12 August 2014, 4 StR 174/14; Federal Court of Justice, resolution dated 7 September 2017, 1 StR 409/17.

⁴⁰⁴. Federal Court of Justice, judgment dated 28 February 2007, 2 StR 516/06; Patzak, Körner/Patzak/Volkmer, BtMG, section 29 recital 214.

⁴⁰⁵. Federal Court of Justice, resolution dated 7 September 2017 – 1 StR 409/17; Federal Court of Justice, judgment dated 14 December 2006, 4 StR 421/06.

⁴⁰⁶. Federal Court of Justice, resolution dated 30 October 2008, 5 StR 345/08; Federal Court of Justice, resolution dated 4 February 2014, 3 StR 447/13.

⁴⁰⁷. Patzak, Körner/Patzak/Volkmer, BtMG, section 29 recitals 290.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

According to the principles set out under question 2 above, in principle, courts do not have discretionary power to incorporate gendered elements in their decisions. Consequently, gender-specific elements will not be taken into account as mitigating or aggravating circumstances and a divergently established jurisprudence does not exist.⁴⁰⁸

Within the legal framework set out under question 2 above, the courts have a considerable level of discretion in setting sentences. When a court's decision will be appealed against, it will only be reviewed to the extent that it is free from legal error, such as in the case of arbitrary exercise of discretion, a decision based on incomplete findings of facts or in breach of the principles of proportionality.⁴⁰⁹ Consequently, if the courts took into account the offender's gender as a mitigating or aggravating factor, this would constitute a legal error since the Constitution requires equal treatment of all genders. On the other hand, where the court does not take into account the factors described under question 2 – even if they are disproportionately relevant for women – this could also be appealed against.

For example, in a Federal Court of Justice judgment, a mother of three illegitimate children whose fathers did not pay alimony was threatened with death by the brother-in-law of a friend from whom she had gotten a loan to contraband cocaine in her body. The lower court had denied a minor case as this would be the “*typical drug mule case*”. The Federal Court of Justice explained that the applicability of a minor case pursuant to sec. 30 Para. 2 Narcotics Act is not dependent on whether a “*typical drug mule case*” is at present (including a body contraband) and that it has to be determined whether if the single case differs from the average in such way that the normal range of sentence appears to be inappropriate.⁴¹⁰

The courts' discretion may be limited in cases of occasional personal use of cannabis in small quantities. As already mentioned under question 1 above, the

German Federal Constitutional Court imposed restrictions on the law-enforcement authorities in this respect. In order to observe the principle of proportionality, the courts may have to refrain from imposing a sentence pursuant to section 29(5) Narcotics Act or close criminal proceedings pursuant to section 31A(2) Narcotics Act.⁴¹¹ The German Federal Constitutional Court was asked to rule on the proportionality of criminalising offences associated with personal cannabis use, such as possession of small quantities. The Constitutional Court held that penalty-enforced prohibition of cannabis was constitutional in principle. However, if cannabis use was limited to occasional self-consumption without endangering others, the courts and the public prosecutor's office would generally have to apply section 29(5) or section 31A Narcotics Act or the general rules of sections 153 et seq. German Criminal Code in order to observe the principle of proportionality. The court also stated that prosecution authorities should ensure a “*basically uniform practice of application*” across Germany.

Following this, German federal states adopted directives stipulating criteria and quantities for the application of section 31A. Regarding cannabis, the amount falling under section 31A Narcotics Act ranges between 6 and 10 grams in most federal states and 15 grams in Berlin. In most directives, the respective amount is a threshold which allows or advises, but does not oblige, the prosecution authorities to dismiss the case. Four federal states additionally passed directives for drugs other than cannabis. They introduced thresholds between: (i) 0.5 grams and 1 gram for heroin; (ii) 0.5 grams and 3 grams for cocaine; (iii) 0.5 grams and 1.5 grams for amphetamines; and (iv) between “up to three pills” and “significantly less than 10 pills” for ecstasy. Some of the other directives allow to dismiss the case at the prosecutor's discretion or only in exceptional cases, whereas others do not provide for the possibility of dismissal at all if drugs other than cannabis are involved.⁴¹² However, these directives are not legally binding for courts.⁴¹³

Several Higher Regional Courts (*Oberlandesgerichte*) have ruled that, with regard to the personal use in small quantities, a custodial sentence may only be set in exceptional cases and – if such sentence is considered indispensable – using only the lower end of the penalty range, even if the defendant has been previously convicted of a drug-related offence.⁴¹⁴

⁴⁰⁸. Kinzig, Schönke/Schröder, StGB, section 46 recital 36.

⁴⁰⁹. Federal Court of Justice, judgment dated 17 September 1980, 2 StR 355/80; Federal Court of Justice, judgment dated 2 March 1989, 2 StR 733/88; Federal Court of Justice, judgment dated 20 December 2012, 3 StR 426/12.

⁴¹⁰. Federal Court of Justice, judgment dated 19. March 2015, 2 StR 35/15.

⁴¹¹. Federal Constitutional Court, judgment dated 9 March 1994, 2 BvL 43/92; likewise, the public prosecutor's office may have to refrain from initiating criminal proceedings; cf. question 1 above.

⁴¹². Patzak, Körner/Patzak/Volkmer, BtMG, section 31a, recitals 43–45.

⁴¹³. Weber, BtMG, section 29; recitals 2138, 2139.

⁴¹⁴. Higher Regional Court of Hamburg, resolution dated 27 September 2006, 1 Ss 166/06; Higher Regional Court of Oldenburg, resolution dated 11 December 2009, 1 Ss 197/09; Higher Regional Court of Hamm, resolution dated 6 March 2014, 1 RVs 10/14.

On the other hand, Higher Regional Courts have ruled that sec. 29 para. 5 Narcotics Act should not apply if the defendant is a chronic user of drugs and does not show awareness of this problem.⁴¹⁵

Furthermore, Higher Regional Courts in several cases have overruled judgments of lower courts which failed to apply sec. 29 para. 5 Narcotics Act correctly.⁴¹⁶ For example, a judgment setting a sentence of a fine of 15 daily rates against a defender who possessed 0.4g of cannabis was overruled because the court did not take sec. 29 para. 5 Narcotics Act into consideration.⁴¹⁷

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

Female perpetrators of drug-related offences are rarely sentenced to imprisonment. In 2016, only 23.6% of all female perpetrators of drug-related offences were sentenced to imprisonment. However, almost 80% of these convicts were granted Probation, leaving only 5% of all female convicts on whom imprisonment was actually enforced. This number has declined since 2010, where almost 8.2% of all female perpetrators were sentenced to imprisonment without Probation. In 2016, around 51.7% of the female convicts that were sentenced to imprisonment (including those that were granted Probation) were convicted to one year or less.⁴¹⁸

- Around 18.6% of all females convicted of drug-related offences are sentenced to suspended imprisonment.
- Around 5.0% of all female perpetrators of drug-related offences are sentenced to imprisonment without Probation.
- Consequently, the other (76.4%) of females convicted of drug-related offences are sentenced to a financial penalty.⁴¹⁹

Overall, women appear to be much less involved in drug-related offences than men. In 2016, about 9.5% of all convicts for drug-related crimes were female offenders. This figure has been fairly stable in previous years, varying between 9.5% and 10.3%. As of 31 March 2016, only about 6% of all prisoners for offences against the Narcotics Act were women. This figure has also been quite stable in previous years, varying only between 5.9% and 6.2%.

In addition, the proportion of male convicts that are sentenced to imprisonment slightly exceeds the respective proportion for women: In 2016, 18.8% of all males convicted for drug-related offences were sentenced to suspended imprisonment (around 18.6% for women) and 8.8% of all male convicts were sentenced to imprisonment without Probation (around 5.0% for women).⁴²⁰

There are no recent statistics regarding convicts who are on Probation. The most recent study shows that, as of 31 December 2011, 9.8% of all those convicted for drug-related offences were women.⁴²¹

Furthermore, the disproportionality of male and female perpetrators of drug-related crimes is also reflected in the number of suspects (i.e. people against whom police investigations are running). In 2017, about 12.4% of all those suspected of drug-related offences were women. This figure has slightly increased since 2009, where only 11.6% of all those suspected of drug-related offences were women. It is noteworthy that, since 2010, the total number of those suspected of drug-related offences in a year has significantly increased (by 46% for women and 36% for men), but this increase is not reflected in the number of convicts, which has (as already stated above) been fairly stable. Thus, there is reason to presume that in a majority of cases the prosecution stops the criminal proceedings due to insignificance of the offence or subject to conditions.⁴²²

Overall, the statistics show that, like in other jurisdictions, women make up a minority of drug-related offenders. For drug-related offences:

- around 12% of all suspects are women.
- around 10% of all convicts are women.
- around 6% of all prisoners are women.

The courts rarely make use of a deferral of penal enforcement pursuant to section 35 Narcotics Act. In the years 2009 to 2012, between 0.6% and 0.8% of all those convicted for drug-related offences (0.4–0.8% for women and 0.6–0.8% for men) have benefited from a deferral of penal enforcement in favour of rehabilitation therapy.

⁴¹⁵. Higher Regional Court of Hamm, resolution dated 17 March 2009, 3 Ss 15/09; Higher Regional Court of Celle, judgment dated 29 November 2016, 2 Ss 124/16; Higher Regional Court of Düsseldorf, resolution dated 4 August 1994, 5 Ss 244/94 - 72/94 I.

⁴¹⁶. Higher Regional Court of Braunschweig, judgment dated 10 May 2013, 1 Ss 29/13; Higher Regional Court of Dresden, judgment of 31 August 2015, 21 Ss 210/15.

⁴¹⁷. Higher Regional Court of Dresden, judgment of 31 August 2015, 21 Ss 210/15.

⁴¹⁸. Statistisches Bundesamt, Fachserie 10 Reihe 3, Rechtspflege: Strafverfolgung 2016, Published: 04.12.2017.

⁴¹⁹. This statistic does not differentiate between low-level drug offences and other drug offences and thus covers all drug-related offences.

⁴²⁰. Statistisches Bundesamt, Fachserie 10 Reihe 4.1, Rechtspflege: Strafverfolgung 2016, Published: 15.03.2017.

⁴²¹. Statistisches Bundesamt, Fachserie 10 Reihe 5, Rechtspflege: Bewährungshilfe 2011, Published: 04.02.2013.

⁴²². Bundeskriminalamt, Polizeiliche Kriminalstatistik, Jahrbuch 2017, Band 3, Tatverdächtige, 65. Edition, V 1.0.

On the contrary, the number of convicts placed in a drug treatment institution pursuant to section 64 Criminal Code increased until the year 2011, where in total 3.8% of all convicts for drug-related offences were placed in such an institution. It seems noteworthy that only 2.6% of all female convicts in the year 2011 were placed in a detoxification institution.⁴²³

Other treatments may be offered at such facilities. However, maintenance treatments neither fulfil the requirements for a deferral of penal enforcement pursuant to section 35 Narcotics Act, nor are they a measure that can be imposed pursuant to section 64 Criminal Code. Detoxification is the only relevant measure provided for under German criminal law.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is currently no notable academic or judicial discourse regarding the sentencing of women for drug-related offences. In the last five to 10 years, the legal policy discussion on drugs in general has rather focused on strategies against drug use as well as the

classification of substances as narcotic drugs and thus as illegal or at least subject to prescription. The main events were the introduction of a new guideline to modernise the drug and drug-dependency policy by the German government in February 2012 ("**National Strategy on Drug and Addiction Policy**"), the reformation of the prohibition of new psychoactive substances by the "New Psychoactive Substances Act" which entered into force in November 2016 and the change of law allowing the medical use of cannabis passed by the German parliament in March 2017. The opposition parties "FDP", "Die Linke" and "Bündnis 90/Die Grünen" support an even broader approach of legalising cannabis, and the co-governing party "SPD" is also open for proposals. Gender-specific questions have not been considered in the drug discussions.

⁴²³. Zentrum für Interdisziplinäre Suchtforschung der Universität Hamburg, Medizinische Rehabilitation Drogenkranker gemäß § 35 BtMG ("Therapie statt Strafe"): Wirksamkeit und Trends, Abschlussbericht August 2013.

CHAPTER 9

Hong Kong

Incarceration rates	Women	Men	Proportion of women
Total ⁴²⁴	1,748	6,433	20.8%
For drug-related offences ⁴²⁵	262	1,429	15.5%

Introduction

Drug-related offences in Hong Kong are set out in Cap. 134 Dangerous Drug Ordinance, and there are different sentencing guidelines for different drugs. Hong Kong courts appear to generally consider the type of drug (how harmful the drugs are, and how addictive they are), the quantity involved, and whether the drugs were intended to be sold or used personally as relevant factors when considering appropriate sentences for drug-related offences.

Judges may consider certain activities to be aggravating factors resulting in a longer sentence, such as manufacturing drugs, importing drugs, selling drugs to children or having a leading role in the drug trade organisation. Although such activities lead to longer sentences, drug couriers or sellers lower in the hierarchy of a narcotics organisation cannot expect leniency below the tariff sentences. Consequently, it is not necessarily the case that lower-level involvement would be seen as a mitigating factor, resulting in a lower sentence.

There appears to be a trend of women acting as drug couriers to carry drugs into Hong Kong from elsewhere. Indeed, Hong Kong has one of the highest incarceration rates for women worldwide, with drug-trafficking convictions particularly said to be on the rise.⁴²⁶ Despite this, and the high level of discretion that Hong Kong courts appear to have in determining sentences for particular cases, our research has not uncovered cases

where the courts have specifically discussed gender, or considered factors specifically related to gender as relevant to sentencing.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Drug-related offences in Hong Kong are set out in Cap. 134 Dangerous Drug Ordinance, which includes drug use and possession.⁴²⁷ While there is no definition of low-level drug offences, sentencing fines are set by courts. In order to apply a jail sentence, the court generally must first consider a report of the Commissioner of Correctional Services on the suitability of such person for rehabilitation. For example, for possession of a small amount of cannabis with no indication of trafficking, the sentence is typically a small fine – HKD200 to HKD900 (~ USD25 to USD 115). For trafficking under 2 kg of cannabis, a sentence of up to 16 months' imprisonment is recommended by the fine guidelines.

There are different sentencing guidelines depending on the substance involved. The courts establishing and reviewing sentencing fines consider how harmful the drugs are (i.e. how often they lead to fatalities) and how addictive they are.⁴²⁸

⁴²⁴ www.prisonstudies.org/world-prison-brief-data.

⁴²⁵ www.statistics.gov.hk/pub/B11303032019AN19B0100.pdf (table 8.5 showing total number of persons for 2018).

⁴²⁶ Kwok, Y. 'More women are in Hong Kong's prisons than anywhere else. They should be protected, not criminalised' (*The Guardian*, 31 August 2017).

⁴²⁷ Available at www.elegislation.gov.hk/hk/cap134.

⁴²⁸ See www.scmp.com/article/83092/legalise-cannabis-say-top-hk-judges; www.hongkongcaselaw.com/hksar-v-wong-suet-hau-ice; www.hongkongcaselaw.com/hksar-v-ng-tak-hung.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Most of the cases reviewed consider only the type of drug, the quantity involved and whether the drugs were intended to be sold as relevant factors to sentencing.

There has been some judicial discussion about whether it would be a mitigating factor if the drugs were meant to be distributed to a friend at no charge or shared, rather than sold for profit. For example:⁴²⁹

“Judges are expected to use their experience, assisted by a large measure of common sense, to decide whether a distinction can properly be drawn between a trafficker who can genuinely advance mitigation that no profit motive was involved in the small supply of drugs to a friend, and others who carry a supply to give to their friends as and when the occasion may arise. In the former category, there might, for example, be the individual who purchases a small quantity of a dangerous drug for recreational use and gives part of it to his partner, who has previous experience of the drug, to consume at a social event.”

Judicial statements have also cautioned, however, that the fact that the drugs are provided only to a friend without charge may not be a mitigating factor in itself:⁴³⁰

“In our opinion, while some of the ‘social’ or ‘non-commercial’ trafficking cases involving small quantities of drugs can properly be regarded, when all the circumstances are examined, as falling into the lower end of the sentencing scale applicable to the dangerous drug in question, we are firmly of the view that this factor should not in itself provide a general basis for imposing a lighter sentence than would have been imposed for commercial trafficking. The ‘friend’ who starts off or perpetuates another’s abuse of drugs is as dangerous to the community as the commercial supplier of small quantities who will generally traffic in drugs with those already addicted.”

The considerations suggested in case law as relevant to sentencing are as follows:

- the quantity of drugs and, if known, their value.
- the general circumstances, including how the drugs are wrapped, and how many wraps or packets are found.
- where the drugs have been discovered, whether at a residential address owned or rented in the trafficker’s own name or in someone else’s name, or whether they were being carried in a public place.
- the presence of paraphernalia associated with the drugs, including, on the one hand, items used for packaging, weighing and diluting drugs and, on the other, items which are used for the consumption of drugs.
- whether the defendant is dependent on drugs or is otherwise accepted to have been a habitual user of the drug in question.
- the explanation given by the defendant following arrest.
- the defendant’s general means and his ability to pay for his drugs otherwise than by trafficking in them.
- the defendant’s criminal record, if any, in relation to previous drug-related offences.⁴³¹

Under Cap. 134 Dangerous Drug Ordinance, “trafficking” is defined as “importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, or possessing the dangerous drug for the purpose of trafficking”. There is no definition of what quantity of drugs constitutes trafficking.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

The statutory considerations for increasing a sentence (up to the statutory limit) are focused on interactions with minors.

There are suggestions of various aggravating factors in the case law, such as: “For example, selling cannabis in any form to children might well warrant a sentence well in excess of that suggested by the guidelines”.⁴³²

Additionally, bringing drugs across a border into Hong Kong could result in extending the sentence by months or even years.⁴³³

Manufacturing or importing drugs can also lead to a higher penalty.⁴³⁴

⁴²⁹. www.hongkongcaselaw.com/hksar-v-wong-suet-hau-ice.

⁴³⁰. www.hongkongcaselaw.com/hksar-v-wong-suet-hau-ice.

⁴³¹. www.hongkongcaselaw.com/hksar-v-wong-suet-hau-ice.

⁴³². www.hongkongcaselaw.com/category/tuen-shui-ming.

⁴³³. www.hongkongcaselaw.com/tag/criminal-appeal-no-85-of-2015.

⁴³⁴. *HKSAR v Manalo* [2001] 1 HKLRD 557; www.hongkongcaselaw.com/hksar-v-wong-suet-hau-ice.

“Whilst those who play an aggravated role in the drugs trade, such as the manufacturers, the wholesalers and the ‘bosses’ who send the couriers out onto the streets to traffic can all expect longer sentences than the couriers and storekeepers, the couriers and storekeepers themselves cannot expect to receive less than the tariff sentence.”

It was also held in the same case that:

“It is quite apparent from this passage in Lau Tak-ming that the court had no intention of treating couriers or storekeepers of heroin as if they were deserving of more lenient treatment than the guideline tariffs generally suggest. The same would obviously apply to couriers and storekeepers of ice. Not even youth, old age or disability will carry much weight and more often than not it carries none.”

It is therefore clear that, although the punishment for drug-related offences could be greater for “bosses” (i.e. colloquial term for leaders of criminal gangs) in Hong Kong, courts appear to be hesitant to reduce punishments in reliance on factors other than the type, amount, and purpose of the drug offence (trafficking or otherwise).

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

There appears to be a trend of women acting as drug couriers to carry drugs into Hong Kong from elsewhere. Courts can consider an “international element” pursuant to which the transporting of drugs across the border can result in a higher sentence.⁴³⁵ Our research has not uncovered cases where the courts have specifically discussed gender. There are cases that suggest that, if a person is trafficking only to pay for their own drug dependency, this will not be considered a mitigating factor.

While “bosses” could expect a greater punishment, there does not appear to be any recognition given to how women become involved in such crimes, nor will lower-level involvement in the chain necessarily act as a mitigating factor resulting in a lower sentence (as further detailed in the previous section).

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Hong Kong courts do appear to have a high level of discretion in determining sentences for particular cases. As discussed above, weight is given to the type, amount and purpose of possession of the drugs involved, but gender itself is not considered.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

The law allows for sentences up to life for trafficking or manufacturing and up to seven years for possession (including for personal use).⁴³⁶ However, given the limited case law available and the important variation in sentences in practice, it is difficult to establish an average range of sentences imposed on women for drug-related offences.

While we have seen an example of one young woman who was given a fine rather than a jail sentence because of her “good background” and this being her first offence,⁴³⁷ the sentences generally imposed in practice range according to the type, amount and purpose of the possession of the drugs involved.

In 2015, it was reported that a 30-year-old woman was sentenced to over 14 years in jail for trafficking 1.3 grams of cocaine. She committed the crime while pregnant. The judge noted that he could have sentenced her to 16 years in jail but had been as lenient as possible in light of the hardships she had experienced.⁴³⁸

In 2018, it was reported that three Filipino women were each sentenced to over 20 years in jail for collectively trafficking four kilograms of cocaine into Hong Kong. One received a longer jail term of 24 years for delivering suitcases of cocaine to a location in Hong Kong.⁴³⁹

In 2019, it was reported that a 17-year-old girl was sentenced for 17 years for trafficking over 16 kilograms of cocaine from Shenzhen to Hong Kong. She was 15 when she committed the crime, came from a disadvantaged

⁴³⁵ www.hongkongcaselaw.com/tag/criminal-appeal-no-85-of-2015; www.scmp.com/comment/letters/article/2175257/why-hong-kong-policy-drug-crime-must-treat-mules-and-traffickers.

⁴³⁶ www.police.gov.hk/ppp_en/04_crime_matters/drug/law_pen.html.

⁴³⁷ coconuts.co/hongkong/news/daughter-of-retired-cops-spared-jail-and-fined-for-possession-of-marijuana.

⁴³⁸ coconuts.co/hongkong/news/filipina-sentenced-more-14-years-hong-kong-jail-trafficking-cocaine-while-pregnant.

⁴³⁹ cms.ati.ms/2018/08/filipina-drug-couriers-jailed-for-over-20-years-in-hong-kong.

background and potentially was trafficking drugs to help support her mother. She had no prior criminal record. Aggravating factors included the amount of drugs involved and the cross-border nature of the crime.⁴⁴⁰

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

Women comprised 20.5% of the prison population in Hong Kong in 2017 which is reported to be higher than any of the 221 jurisdictions covered by the study conducted on the basis of the World Prison Brief data compiled by the Institute Centre for Prison Studies.⁴⁴¹

Female prisoners in Hong Kong are usually serving sentences for non-violent crimes and are mostly foreign nationals primarily from mainland China, Vietnam and Indonesia, according to an opinion article written by Yenni Kwok for *the Guardian*.⁴⁴² According to Kwok's article, immigration violations (often by sex workers) are the most commonly cited crimes for prison sentences among women, although Kwok notes that "*drug trafficking convictions are said to be rising in the city's female prison population*".

Kwok argues that, by not considering gender in criminal sentencing, Hong Kong is "*blind to the gender biases that are systemically stacked against women*", such as vulnerability to drug syndicates and human trafficking rings, and also overlooks the impact of incarceration of single mothers on children.

⁴⁴⁰ www.thestandard.com.hk/section-news.php?id=209065&sid=4.

⁴⁴¹ www.prisonstudies.org/country/hong-kong-china.

⁴⁴² www.theguardian.com/commentisfree/2017/aug/31/more-women-are-in-hong-kongs-prisons-than-anywhere-else-they-should-be-protected-not-criminalised.

CHAPTER 10

Japan

Incarceration rates	Women	Men	Proportion of women
Total ⁴⁴³	4,317	47,488	8.3%
For drug-related offences ⁴⁴⁴	698	4,693	12.9%

Introduction

Drug-related offences are set out in various regulations in Japan, according to the type of drug involved. There are no official sentencing guidelines or regulations in Japan, neither specific to drug-related offences, nor of general application. The Courts have full discretion in setting sentences for drug-related offences within the ranges set out in the relevant regulations. However, Japanese courts do tend to follow similar precedents in an attempt to maintain consistency between cases. To our knowledge, these precedents do not typically consider gendered aspects in imposing appropriate sentence lengths or whether the sentence should be suspended. Rather, factors such as whether there has been multiple counts of usage or possession, an excess amount of drug involved, or whether the offence is denied despite clear evidence are primarily relevant. There is very limited discussion available in relation to the role of gender in drug-related offences and appropriate sentencing in Japan, including as part of judicial discussion in case law, statistics compiled on matters such as incarceration rates for drug-related offences for women, or academic or judicial discourse.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Stimulants, cannabis, opium, narcotics and psychotropics are each regulated under various regulations, including: Articles 41 to 44 of the Stimulants Control Act;⁴⁴⁵ Articles 24 to 26 of the Cannabis Control Act;⁴⁴⁶ Articles 51 to 62 of the Opium Act;⁴⁴⁷ and Articles 64 to 76 of the Narcotics and Psychotropics Control Act.⁴⁴⁸ There are other drugs which are specified by the Ministry of Health, Labour and Welfare which are also regulated but with slightly lower sentences than the four types of drug specified above. Low-level drug-related offences would be to use (other than cannabis, use of which does not constitute an offence in Japan), possess (including for personal use) or transfer (without the intention of profiting from the transfer of the drug). Trafficking is classified as a high-level drug offence (regardless of the amount of drug traded or the price) in Japan. There is no set quantity for trafficking.

⁴⁴³ www.prisonstudies.org/world-prison-brief-data.

⁴⁴⁴ New inmates for the year 2017, available at: hakusyo1.moj.go.jp/en/66/nfm/n_66_2_2_4_1_3.html, the only publicly available source found.

⁴⁴⁵ Available at: www.japaneselawtranslation.go.jp/law/detail/?id=2814&vm=04&re=01.

⁴⁴⁶ Available at: www.japaneselawtranslation.go.jp/law/detail/?id=2594&vm=&re=.

⁴⁴⁷ No English translation available.

⁴⁴⁸ Available at: www.japaneselawtranslation.go.jp/law/detail/?id=2849&vm=04&re=01.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

There are no sentencing legislations or guidelines in general or specifically in relation to drug-related offences in Japan. Rather, Japanese courts have full discretion in setting sentences within the range set out in the regulations set out above under Question 1 above. However, Japanese courts tend to follow similar precedents in order to maintain equality between cases.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

No. The courts have full discretion in setting sentences within the range set out in the regulations set out above under Question 1 above. However, the courts tend to follow similar precedents in order to maintain equality between the cases.

To our knowledge, the precedents do not tend to consider gendered aspects when determining appropriate sentence lengths. Rather, factors such as whether the offender has a drug dependency may be relevant. In addition, whether the offence is a first-time offence tends to be considered as a mitigating factor. Other factors such as needing to care for small children or family members testifying their support to rehabilitate the accused are usually mentioned by the defence attorney as mitigating factors, however these factors are not always taken into account by the judge.

There are not many cases that refer to how sentences are imposed. However, there are High Court judgments⁴⁴⁹ which provide that if the offender has been involved in drug use within the suspension period from the previous sentence or shortly after the period has been fulfilled, the sentence should be 14–18 months' imprisonment, unless there are significant mitigating or aggravating factors. High Court judgments are regarded as important precedent that other courts would refer to in similar cases; however, they do not bind other courts. Further, the factors which are considered to determine the penalty are thought to be case sensitive and would not bind other courts.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

If a person is accused for the first time of using or possessing a stimulant (which is the most typical drug offence that is brought to court in Japan) and no continuation of usage or possession is proved, the sentence will be imprisonment for 18 months, which is suspended for three years.

For other drugs such as cannabis, the length of imprisonment could be shorter (14–16 months), also with suspension of three years.

There are no mitigating factors typically considered other than the type of drug possessed or used. Multiple times of usage or possession, the excess amount of drug possessed or used and denying the usage or possession when such usage or possession is clear from the evidence would be aggregating factors which would not allow suspension of the imprisonment term.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

None that we are aware of.

⁴⁴⁹ Judgment of Tokyo High Court, 30 October 2015, *Koutousaibansho Keijisaiban Sokuhoushuu* (H27) and judgment of Tokyo High Court, 2 July 2015, *Koutousaibansho Keijisaiban Sokuhoushuu* (H27) – no English translation available.

CHAPTER 11

Mexico

Incarceration rates	Women	Men	Proportion of women
Total ⁴⁵⁰	10,591	192,773	5.2%
For drug-related offences	Not available	Not available	Not available

Introduction

Mexico is a country with a population of approximately 119 million people, of which 61 million are women. Until the twentieth century, Mexico was primarily a rural country where the role of women was expected to focus on family. Women in Mexico have for the most part been dependent on their male partners for economic and emotional subsistence. Regrettably, such dependency has also resulted in widespread domestic abuse including, in certain social strata, the involvement of women in criminal activity, whether or not they knowingly or willingly engaged in it. Additionally, the growth and persistence of drug trafficking in Mexico has pulled women into drug-related offences, increasing the number of incarcerated women to concerning levels. The criminal system in Mexico is based on the Civil Law tradition, where statute is the primary source of law and judicial precedent is persuasive except in specific circumstances where case law may be binding. Such a system has the inherent disadvantage of not allowing a dynamic adaptation to socio-economic situations and the resulting criminal implications. Below, we cover the analysis and impact of the existing Mexican criminal law system and women's role in drug-related offences.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Mexican law does not contemplate a classification of low-level drug-related offences. Mexican law distinguishes between: (i) drug-related offences which are classified as a crime against health (*delito contra la salud*); and (ii) narcotic-related conduct such as possession for personal consumption (within the thresholds set by the General Health Law). The Seventh Chapter of the Mexican Federal Criminal Code sets out a long list of offences against health which range from drug production, possession and trafficking to sex-related offences, among other crimes against health. The General Health Law and the Mexican Federal Criminal Code define the following drug-related offences (without any qualification as to whether they may be considered as low-level offences or not):

- Production, meaning the manufacturing, production, preparation or boosting of narcotics.
- Commerce, meaning the sale, purchase, acquisition or transfer of any type of narcotic.
- Supply, meaning the direct or indirect actual transfer, by any means, of narcotics.

Moreover, Article 19 of the Mexican Constitution gives judges the authority to impose pre-trial detention in the case of serious offences (*delitos graves*). Offences against health (*delitos contra la salud*)

⁴⁵⁰ www.prisonstudies.org/world-prison-brief-data.

(i.e. all drug-related offences other than possession for personal consumption) fall within the serious offence (*delitos graves*) classification.

As long as: (i) the total amount of narcotics is under the allowed quantity (for personal consumption) as per the table below;⁴⁵¹ and (ii) there are no elements to presume organised crime, such offences will be prosecuted by State authorities rather than by the Federal justice system. Otherwise, if the quantity of narcotics is higher than the allowed threshold, or the quantity of narcotics is not defined and included in the General Health Law, then Federal authorities will prosecute such offences. In practice, the line is often blurred by police during arrests relating to possession and personal consumption. To address this, the General Health Law contemplates two possible scenarios: if alleged personal consumption takes place in schools, general care centres, or police facilities, then prosecution must be pursued, while, if consumption takes place at all other locations, then prosecution shall not be pursued but rather the police must inform and direct the user to the closest rehabilitation centres.

Table 1: Current maximum allowed doses for personal consumption

Narcotic	Maximum allowed doses
Opium	2 gr.
Diacetylmorphine or Heroin	50 mg.
Cannabis Sativa, Indica o Mariguana	5 gr.
Cocaine	500 mg.
LSD	0.015 mg.
MDA, Metilendioxi-anfetamina powder, granulated, crystal or tablets	40 mg.
dl-34-metilendioxi-ndimetilfeniletamina	40 mg.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

To date, there is no sentencing legislation or guidelines in Mexico that include reference to factors which are disproportionately relevant to female offenders. Notwithstanding this, judges in Mexico have an obligation to address the personal situation of each accused. Therefore, the judge must personalise sentencing (*individualización de la pena*) and apply the final imprisonment sanction and/or economic penalty based on: (i) objective considerations (the law); and

(ii) subjective considerations (i.e. facts related to the offence, aggravating and mitigating factors, such as age, education, or social conditions of the offender). Because imprisonment suspends certain human rights, such as guardianship (*tutela*), a Mexican judge would be compelled to consider such special and personal circumstances of a prosecuted female and question if she had dependants at the time of the offence and therefore had a need to undertake illegal activity to resolve a given situation.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

Article 52 of the Mexican Federal Criminal Code sets out certain mitigating factors and lays out certain criteria for sentencing based on the: (i) seriousness of the crime; (ii) specific condition of the victim; and (iii) level of guilt and participation of the offender. The judge may take into consideration mitigating factors such as age, level of education, social and economic situation of an offender including poverty, the underlying motivation for carrying out an offence, ethnic origin, and all other special and personal conditions that affected the offender at the time of the crime, as long as the same are relevant to determine the applicable penalty. Mexico is also a signatory to international treaties on human rights, which may be relied upon by a judge in order to "*personalise the sentencing*" (*individualización de la pena*).

It is important to point out that Mexican criminal legislation distinguishes between the levels of participation in a criminal offence which may provide the judge with additional elements to take into consideration in sentencing. For example, the concepts of authorship (*autoría*) and participation (*participación*) draw differences between the "subject" controlling the events giving rise to criminal conduct and the "participant" who has no control over the realisation of the criminal conduct but, instead, adds an essential contribution to its accomplishment. Under Mexican law, an individual may be regarded as taking part in criminal activity as an accomplice. The Mexican Federal Criminal Code sets out a reduced penalty for accomplices which can be up to one-third of the corresponding penalty. Accordingly, a judge may rely on the nature of the participation of female offenders in criminal conduct and classify such participation as that of an accomplice with the ensuing reduction in penalty. However, it is important to note that this assessment by the judge

⁴⁵¹ It is worth noting here that the quantities permitted for personal consumption are extremely low and therefore most people stopped for possession are considered to be drug traffickers.

would not be based on a gender qualification but rather on the underlying facts of the case and the role that the female offender played.

It is also relevant to point out, in connection with those acting as drug couriers in Mexico, that one of the modalities of committing a crime contemplated by the Mexican Federal Criminal Code (and many of the state criminal codes), is the “*autoría mediate*” or acting through another person. The “other person” is considered as an “instrument” for the perpetrator to accomplish her/his criminal purpose. The forms of acting through another person are by means of: (i) coercion; (ii) misleading; (iii) taking advantage of her/his diminished consciousness (or diminished mental capacity); or (iv) through an organised body (i.e. the army, a drug cartel, etc.). In most of these hypotheses, the “instrument” has no criminal responsibility and, therefore, cannot be sentenced to any penalty (regardless of its nature). However, while all defendants have the right to have an attorney and a proper defence under Mexican law, public defenders generally lack expertise and the possibility of relying on the “*autoría mediate*” defence is often overlooked.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

The involvement of minors (or persons with mental disabilities) in the sale and supply of narcotics is an aggravating factor. Furthermore, Mexican criminal law contemplates increased penalties for crimes carried out concurrently (*concurso de delitos*).

In most (if not all) cases, drug-related offences such as production, sale and supply are carried out by organised criminals. Organised crime is defined in the Mexican Constitution as the association of three or more persons to engage in permanent or recurring criminal offences. Participation in organised crime will result in a crime per se given the national security issues involved. Drug-related offences such as transportation, even if carried out by unknowing and/or unwilling persons (such as drug couriers), are likely linked to organised crime.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Regardless of whether the offender is a woman and has only acted as a drug courier or the economic gain for her was minimal, because her participation in the supply chain qualifies as commercialisation of narcotics without authorisation under the General Health Law, she will be at risk of being sentenced to the full extent provided in the law.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Under Mexican law, there are currently no guidelines which take into account gender elements. Mexican criminal judges may individualise sentencing and include human rights in their analysis and final decision. Lately, there has been a trend to protect human rights (*tendencia garantista*) and to take into consideration whether a woman may be in a vulnerable situation. Judges have a certain level of discretion to determine the applicable sentence on a case-by-case basis as long as: (i) the sentence is within the ranges of imprisonment or economic penalties provided by law; and (ii) the sentence is in compliance with law and based on coherent reasoning.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

There is no distinction under Mexican law between male and female sentencing. It may be the case that in practice a judge may have discretion to consider the nature and role of a woman in society and, therefore, may try to have her imprisoned at a facility close to her home or at a social rehabilitation centre. However, this is subject to availability and at the judge’s sole discretion.

In relation to the length of prison sentences for low-level drug-related offences, there are no statistics which would allow the Mexican government to properly analyse sentencing and the impact on the woman involved and the wider society. In order to promote a more efficient system, it is crucial that studies (including statistical information) are carried out at both the federal and local level in order to determine and adjust the current enforcement of justice.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There are several academic sources that analyse the significant increase of the female population in Mexican jails and propose more lenient sentencing of women who are involved in low-level drug-related offences. Such academic sources are seeking to raise awareness

Table 2: Current minimum and maximum sentences for drug-related offences in Mexico

Criminal Offence	Imprisonment + Fine
Commerce or supply (even if gratuitous) without a legal authorisation If the victim is underage or lacks mental capacity	4-8 years + 200-400 days' fine
Penalties will be increased by half in case the same are carried out: <ul style="list-style-type: none"> ■ By public officers, who shall also be terminated. ■ At educational centres or within a 300 radius of the same. ■ By health professional, who shall also be suspended for 5yrs. 	7-15 years + 200-400 days' fine
Possession of narcotics in a lower amount of Current Table of Maximum Allowed Doses for Personal Use above, without authorisation and with the purpose to commercialise with said narcotics.	3-6 years + 80-300 days' fine
Possession of narcotics in a lower of Current Table of Maximum Allowed Doses for Personal Use above, and the same is not for commercialisation purposes.	10 months - 3 years
Plant and harvest of marihuana, opium, mushrooms, peyote, or any other vegetable that produces similar effects, in the event the farmer lacks knowledge and is under extreme need.	1-6 years
Production, transportation, trafficking, commercialisation, supply or prescription (even if gratuitous) without the authorisation.	10-25years + 100-500 days' fine

in the judicial community of social rehabilitation as a better tool than harsh penalties. In the majority of the cases reviewed, women were driven to participate in narcotic-related offences by their male partner or in order to provide economic support for their children. Such sources identify that the intent of the offence by a woman is in many cases not a calculated risk nor a financially driven-one but falls more within the

emotional arena of being coerced by her male partner or as a source to provide for her family. If such factors were seen as mitigating circumstances in low-level drug-related offences, they would provide judges with the necessary tools to address a specific situation that may be solved by a warning, rehabilitation or through other alternative means.

Ana Paula Hernández, a sociologist who has worked for over 12 years on human rights, including a tenure at the UN's Human Rights Office in Mexico, has analysed the topic of sentencing of women convicted of low-level offences in her paper "Drug legislation and imprisonment situation in Mexico".⁴⁵² Unfortunately, due to gender inequalities, women do not have access to a proper judicial process. A 2015 analysis carried out by *Animal Politico*⁴⁵³ on the inequalities that women endure during judicial processes for alleged narcotic offences in the southern state of Oaxaca found that: (i) 91% of the women arrested in connection with alleged drug-related offences were not armed when arrested; (ii) a similar percentage did not have any criminal record; (iii) 60% had not been able to complete high school and were suffering economic duress; (iv) 43% of women used as drug couriers were from rural areas; (v) 90% had children who were their economic dependants; and (vi) the average age of women arrested was between 18 and 40 years old. In a previous study carried out in 1996, eight out of 10 women in prison in Mexico had been incarcerated on the grounds of low-level drug-related offences.⁴⁵⁴ According to such studies, many of the women in Mexico used as drug couriers in drug-related crimes were not even aware of the merchandise value nor the type of narcotic until their arrest and incarceration on drug-trafficking charges.

Women in Mexico are often victims of violence, lacking a complete education, on low incomes and with a long history of abuse. However, women in Mexico are also the head of the family and in charge of providing for the economic and moral wellbeing of their homes. Given the cultural weight and importance of the role of women in Mexico, studies stress the need for reform in Mexico in connection with low-level drug-related offences carried out by women and the elimination of preventative imprisonment as well as an exhaustive review of the aggravating and mitigating factors during sentencing (if a sentence is applicable) to such low-level drug-related offences. The foregoing is the central proposition of Mónica López, a Mexican judge, who has identified the shortcomings of the system first hand.⁴⁵⁵ Unfortunately, legal reform addressing the precarious situation of women that have fallen into drug-related organised crime has not been forthcoming.

⁴⁵². Available at: www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/WOLATNI-Systems_Overload-mexico-def.pdf.

⁴⁵³. Published 23 June 2015 and written by Tania Montalvo.

⁴⁵⁴. *Las mujeres olvidadas: un estudio sobre la situación actual de las cárceles de mujeres en la República Mexicana*, by Elena Azaola y Cristina José Yacamán, Colegio de México, 1996.

⁴⁵⁵. "Mujeres en Prisión" by Mónica López, *La Jornada*, March 12, 2016.

CHAPTER 12

New Zealand

Incarceration rates	Women	Men	Proportion of women
Total ⁴⁵⁶	717	9,252	7.2%
For drug-related offences ⁴⁵⁷	11% of persons in prison are serving a sentence for drug-related offences		

Introduction

In New Zealand, all drug-related offences are codified in statute. Three pieces of legislation further define these offences: Misuse of Drugs Act 1975, Psychoactive Substances Act 2013, and the Summary Offences Act 1981.

In these statutes, controlled drugs are divided into three classes according to the perceived risk of harm: Class A drugs are the most serious and Class C drugs the least serious. Examples of well-known drugs in each class include methamphetamine, heroin and cocaine for Class A;⁴⁵⁸ amphetamines, MDMA, cannabis oil for Class B;⁴⁵⁹ and cannabis plant and seed and codeine for Class C.⁴⁶⁰ The same offence can have vastly different consequences depending on the class of drug involved. For example, supplying or dealing a Class A drug is punishable by up to life imprisonment; supplying or dealing a Class C drug is punishable by up to three months' imprisonment. The majority of drug convictions are for methamphetamine and cannabis, making up 44% and 43% of drug convictions in 2017 respectively. Methamphetamine and cannabis are classified Class A and Class C drugs, respectively.

There has been very little formal research or academic study about women and low-level drug-related offences. However, case law suggests that gender factors, when considered, are not applied consistently at sentencing. Factors such as acting under duress, or family commitments are considered as mitigating factors

and have resulted in discounted sentences in some circumstances but have been disregarded on other occasions. It is an area however, that would benefit from further research and analysis.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Criminal offences in New Zealand are divided into four categories determined by their maximum sentences (e.g. Category 1 is the lower level of offending, where maximum penalty is a fine only, whereas Category 4 is the high level of offending, such as murder and manslaughter). These categories determine the default trial type, being either a judge-alone trial or a jury trial. Offences in category 2 or lower are generally considered low-level. These are offences that are punishable by two years' imprisonment or less and are tried by a judge alone.

The problem with defining low-level drug-related offences in this way is that it excludes almost all methamphetamine-related offending – even those that might be considered low-level offences – because it is a Class A drug with high maximum potential sentences. Given the significant prevalence of methamphetamine-related offences, and to accurately

⁴⁵⁶. As at June 2019: www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_june_2019.html.

⁴⁵⁷. *Ibid*, data broken down between men and women is not available.

⁴⁵⁸. Misuse of Drugs Act 1975, Schedule 1.

⁴⁵⁹. Misuse of Drugs Act, Schedule 2.

⁴⁶⁰. Misuse of Drugs Act, Schedule 3.

study drug-offending jurisprudence in New Zealand, we have expanded the definition of low-level drug offence to include a sentence of two years' imprisonment or less regardless of which drug they relate to.

This definition can capture importing, exporting, producing or manufacturing; supplying or administering, or offering to supply or administer; possession for the purpose of supply; possession for personal use; use of the drug and permitting premises to be used for the purposes of committing a drug-related offence.

Drug trafficking (or dealing with controlled drugs as referred to in our legislation) occurs when someone:⁴⁶¹

- imports into or exports from New Zealand any controlled drug.
- produces or manufactures any controlled drug.
- supplies or administers (or offers to supply or administer) any:
 - Class A or Class B controlled drug to any other person.
 - Class C controlled drug to a person under 18 years of age.
- sells or offers to sell any Class C controlled drug to a person of or over 18 years of age.
- has any controlled drug in his possession for the purpose of supplying or selling.

Someone in possession of a controlled drug will be presumed to be in possession for dealing depending on certain quantities. The amount will differ according to each drug, for example 5 grams of methamphetamine will be considered for supply, compared to 28 grams (or 100 cigarettes) of cannabis plant. If an amount is not specified for a particular drug, then the general rule is 56 grams will possession with intention to deal.⁴⁶²

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

The approach to sentencing in New Zealand is largely codified in the Sentencing Act 2002. The Sentencing Act is drafted in mostly gender-neutral terms.⁴⁶³ It sets out factors and principles that the Court must take into account when deciding a sentence. Case law has established the process the Court follows to apply these factors and principles. In particular, case law sets out the bands for offending, in order to guide judges into appropriate sentence lengths, based on the level of the offence. The judge uses these bands to establish a starting point for the length of a potential term of imprisonment.

The Sentencing Act also allows for the Court to consider aggravating and mitigating features of the offender and the offence. The Court uses these factors to determine the final sentence imposed by considering the relevant aggravating and mitigating factors and determining whether these should either increase or decrease the starting point previously determined. Of note, these include whether the offence involved actual or threatened violence,⁴⁶⁴ and the offender's participation or involvement with an organised criminal group,⁴⁶⁵ both of which are considered aggravating factors.

Factors that are relevant for the offender generally relate to the offender in the context of the offence, rather than wider life circumstances such as familial conditions or socio-economic status. The main exception is consideration for the age of the offender and evidence of previous good character. However, the Court may take into account any other aggravating and mitigating factors that it believes is relevant.

One way the Court can assess the relevance of wider circumstances of the offender is through pre-sentence reports. Judges routinely order a pre-sentence report where an offender is convicted of an offence punishable by imprisonment. Pre-sentence reports are prepared by probation officers, who also supervise offenders living in the community after receiving community-based sentences or after their release from prison.⁴⁶⁶

⁴⁶¹ Misuse of Drugs Act, s 6(1).

⁴⁶² Misuse of Drugs Act, Schedule 5.

⁴⁶³ That is, gender-neutral as that term was understood at the time the Act was drafted – using both masculine and feminine pronouns, rather than just masculine pronouns. Now, New Zealand legislation drafters avoid using gender-specific language like "he or she", recognising that that, too, excludes some people. See generally Parliamentary Council Office, "Principles of clear drafting" at [3.70B], available at www.pco.govt.nz/clear-drafting.

⁴⁶⁴ Sentencing Act 2002, s 9(1)(a).

⁴⁶⁵ Sentencing Act, s 9(1)(h).

⁴⁶⁶ "Sentencing decisions" Courts of New Zealand www.courtsofnz.govt.nz.

The reports include information about:

- the offender's personal background and family (*whānau*) circumstances.
- the offender's lifestyle and other factors which are considered to have contributed to the offending.
- recommendations relating to courses of training or treatment which might assist the rehabilitation of the offender.
- the risk of further offending.
- a recommendation as to the appropriate penalty, including proposed terms and conditions for the offender's supervision, training and treatment within the community whether immediately or upon release from prison.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

There has been no formal study completed about sentencing of women in New Zealand for low-level drug-related offences, so there is no clear review of how the Courts approach this. Furthermore, most of the sentencing for this level of crime is done at District Court level and there is limited access to these sentencing decisions. The High Court is tasked with sentencing more serious offences – where the sentence may be two years' imprisonment or higher. Case studies reflect this more serious end of drug offending, but this provides a relatively accurate picture of the factors that Courts take into account when deciding sentences for drug offending.

In keeping with the Sentencing Act, Courts generally purport to take a gender-neutral approach to sentencing. However, this does not necessarily play out in practice.

The Court's main focus when deciding a sentence for drug offending is on the harm that illicit drugs cause to the community. Detering and denouncing the offences are the primary considerations. The offender's rehabilitation is another paramount concern, particularly if the offender suffers from a drug dependency. Rehabilitation reduces the risk of reoffending, which benefits the community as a whole. The Court treats these factors – deterrence, denunciation and

rehabilitation – as gender-neutral. The Court also tends to assume that imprisonment has a deterrent effect, and home detention has less of a deterrent effect.⁴⁶⁷

This focus on deterrence means the Court often gives little or no credit for personal mitigating factors, especially if there was a commercial element to the offending. However, that is not always the case. Despite the apparent limits on judges' discretion, the case law shows that they do take into account the offenders' mitigating circumstances, to varying degrees. Some examples are set out below.

Permitting premises to be used

In *R v Murray*, a female defendant was convicted of permitting premises to be used for manufacturing methamphetamine for commercial supply. The judge adopted a low starting point for imprisonment during sentencing, apparently to reflect the fact that the defendant's husband and brother-in-law were running the operation, they lived in a rural area and it would have been a "very big step" for her to take action to prevent the property from being used.⁴⁶⁸ The starting point was two years and nine months' imprisonment, and the defendant's final sentence was 11 months' home detention.

In *R v Bearsley*, the defendant was convicted of permitting premises to be used for cultivating cannabis (less serious than methamphetamine). The defendant also lived in a rural area, and shared the property with the man who ran the operation. She was severely (about 85%) physically incapacitated due to a motor accident. The judge said that it was "up to [the defendant] to stop [the man she lived with] from doing what he was doing. The alternative was to leave the property". The starting point was 15 months' imprisonment and the final sentence was five months' home detention.

Low-level of involvement

In *R v Pihana*, the defendant was a "catcher" in a methamphetamine importation operation that was organised by her brother, with whom she lived. She provided a safe address to which packages of methamphetamine could be sent without arousing suspicion (in theory). She received several packages but never opened them or arranged for their distribution. The total amount of methamphetamine was unknown – which seems to have allowed the judge some discretion to impose a lower sentence. The lead offence was attempted importation of methamphetamine. When setting the starting point, the judge described her offending as "at the very bottom of this drug operation", but nonetheless crucial to the overall importation. He considered her to be "naïve" when it comes to the world of illicit drug dealing and wilfully blind to the contents

⁴⁶⁷. But see *R v Wellington* [2018] NZHC 2196.

⁴⁶⁸. *R v Murray* [2014] NZHC 1843.

of the packages. He set the starting point at four years' imprisonment and reduced this to 23 months to take into account mitigating factors, including her recent bereavement and illness. Her final sentence was 11 months' home detention.

R v Ishak provides an interesting comparison. The defendant assisted a friend with co-ordinating the handover of a package of methamphetamine, because her friend did not want to arrange it personally. Her role was limited to making telephone calls to the man who held the methamphetamine to arrange the handover. She was charged with possession for supply, even though she never actually possessed any of the drug. She did not benefit financially; her motivation was simply to help her friend. She did not know how much methamphetamine was involved, but assumed that the amount was very low. As it transpired, there were 1.5 kilograms of methamphetamine. When setting the starting point, the judge described the defendant's offending as at the lowest end, and not crucial to the importation operation. But he reluctantly adopted a starting point of 10 years' imprisonment. The judge considered that, because of the amount of methamphetamine involved, he was bound to adopt the highest sentencing band. The judge allowed a six-month discount for the defendant's personal circumstances: two of her family members were seriously ill and dependent on her, she did not drink or use drugs, and she was of very good character (she had cared for people with intellectual and/or mental illness for 20 years). The judge allowed a further 5% for remorse and 25% for her guilty plea. Her final sentence was four years' imprisonment.

In *R v Wellington* (mentioned above), the judge emphasised that the culpability of an offender is influenced not only by the quantity of methamphetamine involved but also by their role, and other aggravating or mitigating factors including whether they are dependent on drugs themselves. The judge considered that the Court bands are not meant to be applied mechanistically or rigidly.⁴⁶⁹ He also recognised that *"those at the lower end of the operation are often vulnerable and used by those higher up in the hierarchy who prey on their vulnerability such as drug addiction"*.⁴⁷⁰ In this case, the defendant had supplied just over 1.3 kilograms of methamphetamine over several occasions. His Honour commented that her role was not important; the defendant just *"went along for the ride for much of this offending"*.⁴⁷¹ The offending would have happened

without her, and her involvement was not particularly sophisticated or well thought out – although she was willingly involved with supplying large quantities on repeated occasions. He set her starting point at nine years and six months' imprisonment – below the relevant band.⁴⁷²

The judge then reduced the sentence by one year and six months to reflect the following:⁴⁷³

- the defendant's offending was driven by her drug dependency.
- her prospects for rehabilitation were strong (she had already made progress).
- she was 26 years old and had a nine-year-old daughter.
- she had previous and concurrent methamphetamine-related convictions.

The defendant was ultimately sentenced to seven years' imprisonment.

Duress

In *Hillman v R*, the defendant was sentenced to two years and six months' imprisonment for cultivating cannabis and possessing cannabis oil⁴⁷⁴ for supply – specifically, for smuggling into prison.⁴⁷⁵ She appealed on the basis that her former partner had initiated the operation before he was imprisoned for sexual offences against the defendant's children. Her former partner's associates were responsible for sustaining the operation after he was imprisoned. He exerted pressure on the defendant from prison, and there was evidence that he had threatened her. The sentencing judge had set a starting point of four years' imprisonment. He then allowed an 18-month discount for mitigating factors, including the *"degree of duress"* that Ms Hillman was under from her former partner. But the judge also found that the defendant acted *"relatively independently"*.⁴⁷⁶ The Court of Appeal upheld the final sentence, commenting that the 18-month discount was *"generous if anything"*.⁴⁷⁷

R v Llewellyn concerned a woman who was a member of an organised criminal group involved in dealing methamphetamine.⁴⁷⁸ The group was organised by "Mr X". She also had her own independent supply of methamphetamine. The judge adopted a starting point of eight years' imprisonment. Turning to the defendant's personal circumstances, the judge noted that she had been in several abusive relationships, including one with Mr X. The judge acknowledged that her *"personal will may*

⁴⁶⁹. *R v Wellington*, above n 3, at [21].

⁴⁷⁰. At [19], citing *Chan v R* [2018] NZCA 148 at [20].

⁴⁷¹. At [41].

⁴⁷². At [42]–[43].

⁴⁷³. At [49]–[58].

⁴⁷⁴. Cannabis oil is a Class B drug: MDA, Schedule 2, cl 1.

⁴⁷⁵. *Hillman v R* [2010] NZCA 337.

⁴⁷⁶. At [19] and [22].

⁴⁷⁷. At [22].

⁴⁷⁸. *R v Llewellyn* [2016] NZHC 1873.

have been overcome” by Mr X.⁴⁷⁹ But he balanced that against the fact that she had a taser and an independent methamphetamine supply. The judge allowed 12% discount for the defendant’s personal circumstances, her drug dependency and desire to rehabilitate, and her time on electronic bail. Her final sentence was five years and six months’ imprisonment.

Trauma/tragic circumstances

In *Wheeler v R*, the defendant was part of a methamphetamine dealing operation run by a senior gang member, K.⁴⁸⁰ She had supplied or offered to supply small amounts of methamphetamine on at least 71 occasions, while she was on bail for similar previous offending. She dealt to support her own drug dependency, which was a way of coping with the significant stresses in her life. She had had a dysfunctional and destructive childhood and a traumatic marital relationship. She had PTSD. Her husband had passed away and she had no family support. She was vulnerable to victimisation, which K exploited. The sentencing judge gave no discount for these circumstances. The Court of Appeal upheld this decision. The Court expressed “considerable sympathy” for the defendant but held that there was not a sufficient nexus between her circumstances and the offending.⁴⁸¹ Further, [the judge considered that] the sentence was not unduly harsh. Prison offered the defendant opportunities to gain psychological skills and access to support. The Court upheld her sentence of three years and eight months’ imprisonment.

Contrast *R v Murray*, in which the judge gave a nine months’ discount to take into account the fact that a sentence of imprisonment would be more difficult for the defendant given the recent loss of her husband.⁴⁸²

Previous clean record and family

In *R v Whiu*, the defendant sold three “tinnies”⁴⁸³ to undercover police officers on two separate occasions.⁴⁸⁴ She met the police officers on a property occupied by other members of her whanau, including her son. Her son had established a “tinnie house” there. The defendant said that she had agreed to assist her son in the hope of developing a better and closer personal relationship with him, in the context of “a certain amount of family disharmony”.⁴⁸⁵

The judge set the starting point at two years’ imprisonment. He then allowed a 25% discount for her early guilty plea. The defendant had a previously clean

record and was assessed as unlikely to reoffend. She had 10 children, four of whom were living with her (the youngest being little over a year old) and was pregnant at the time of sentencing. But the judge did not allow any discount for mitigating factors. He considered that the Court of Appeal precedent had made it clear that “where drug offending is concerned, little significance can be attached to a previous good record”.⁴⁸⁶ The judge did, however, take those factors into account when considering whether to commute the defendant sentence to home detention. Ultimately, the defendant was sentenced to eight months’ home detention – slightly less than half of what her prison sentence would have been, to reflect her previous good record.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

There is no data which can answer this question with any precision. The Ministry of Justice does release data on drug offending, but not specifically on the sentences imposed on female offenders. In 2017, women made up 19.7% of all people convicted of drug-related offences. Between 2008 and 2017, women made up 18.1% of people convicted of drug-related offences.

Those rates are slightly higher for methamphetamine offences alone: women made up 22% of convictions for methamphetamine offences in 2017, and 24.6% between 2008 and 2017. In contrast, they are slightly lower for cannabis offences alone: women made up 17.9% of cannabis-related convictions in 2017, and 15.7% between 2008 and 2017.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is very little academic or judicial discourse that deals specifically with this issue. The main consideration appears in an article which studied the ways in which sentencing decisions construct female drug offenders using gendered language and norms (for example, in terms of femininity, vulnerability, passivity and/or motherhood).⁴⁸⁷

⁴⁷⁹. At [8].

⁴⁸⁰. *Wheeler v R* [2017] NZCA 193.

⁴⁸¹. At [16].

⁴⁸². *R v Murray*, above n 4, at [61]–[62].

⁴⁸³. New Zealand slang for a small package of cannabis wrapped in tin foil, usually sold for NZD 20 to NZD 25.

⁴⁸⁴. *R v Whiu* [2013] NZHC 950.

⁴⁸⁵. At [6].

⁴⁸⁶. At [11].

⁴⁸⁷. Monique Mann, Helena Menih and Catrin Smith, “There is ‘hope for you yet’: The female drug offender in sentencing discourse” (2014) 47 ANZOC 355.

There is some discourse on sentencing of women offenders in New Zealand,⁴⁸⁸ and sentencing for drug-related offences generally.⁴⁸⁹ There is also material on the effects of alcohol and drug policies on women in New Zealand.⁴⁹⁰

There is also a fair amount of commentary on the sentencing of Māori for low-level drug-related offences. Māori make up 15% of New Zealand's population, but 51% of the prison population. We further note that the only demographic of the prison population that is increasing is Māori women. Around 40% of Māori prisoners are incarcerated for drug-related offences.⁴⁹¹

There is also a significant amount of discourse on reforming the current approach to criminalising drugs. On 20 December 2017, a bill was introduced which, if enacted, will legalise the use, possession and supply of cannabis by anyone with a terminal illness.⁴⁹² Prime Minister Jacinda Ardern has recently "rejected ... Donald Trump's call for a renewed war on drugs".⁴⁹³ New Zealand will not sign the "Global Call to Action on the World Drug Problem", a document which the United States presented to the United Nations at the end of September 2018.⁴⁹⁴

The Law Commission reviewed the Misuse of Drugs Act in 2011 and recommended major reforms, including decriminalising medicinal cannabis use, diverting minor drug offenders through a cautioning system instead of the courts, and making separate funding available for treating offenders through the justice sector, to support courts in imposing rehabilitative sentences.⁴⁹⁵

Finally, the New Zealand government has piloted a new programme for offending that is fuelled by alcohol and other drug dependencies. The Alcohol and Other Drug Treatment Courts, established in 2012, target offenders who would otherwise be imprisoned for offending caused by these drug dependencies, and provides an intensive therapeutic process to prevent further reoffending.⁴⁹⁶ While there is little data on this currently, particularly considering gender, reports have shown that it reduces likelihood of reoffending by around 15% compared to offenders who go through the standard court process.⁴⁹⁷

⁴⁸⁸ Devon L L Polaschek "Women offenders: Another look at the evidence" (2018) 6 New Zealand Corrections Journal (online ed) <www.corrections.govt.nz/resources/research_and_statistics/journal>.

⁴⁸⁹ Ben Heather "Petty drug users fill New Zealand jails" Stuff (online ed, Auckland, 8 January 2018); Catriona MacLennan "There's something wrong with the sentences" Matters of substance (online ed, Wellington, November 2016).

⁴⁹⁰ George Parker "A New National Drug Policy for New Zealand: Ministry of Health" (Women's Health Action Trust, Auckland, February 2014).

⁴⁹¹ Simon Day "Why cannabis reform needs to be done with Māori, for Māori" (24 July 2017) The Spinoff www.thespinnoff.co.nz; Mava Enoka "How our drug laws disproportionately affect Māori" (12 December 2016) The Wireless thewireless.co.nz.

⁴⁹² Misuse of Drugs (Medicinal Cannabis) Amendment Bill 2017 (12-1).

⁴⁹³ See Russell Brown "PM's position on 'drug war' balanced and realistic" (25 September 2018) RNZ www.radionz.co.nz.

⁴⁹⁴ Week beginning 24 September 2018.

⁴⁹⁵ Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011).

⁴⁹⁶ Amy Adams, Jonathan Coleman *Report-back on the Alcohol and Other Drug Treatment Court Pilot and other AOD-related initiatives* (Ministry of Justice, 2017) at [4].

⁴⁹⁷ Amy Adams, Jonathan Coleman, above n 34, at [5].

CHAPTER 13

Philippines

Incarceration rates	Women	Men	Proportion of women
Total ⁴⁹⁸	12,658	175,620	8.9%
For drug-related offences	Not available	Not available	Not available

Introduction

In the Philippines, the recent and ongoing “war on drugs” has led to an increasing case flow of drugs cases in the Philippine courts. In fact, in 2017, the Philippine Supreme Court added 240 more courts to the current 715 special courts for drugs to exclusively handle drugs cases, basically designating all 955 Regional Trial Courts nationwide as special courts for drug-related offences.⁴⁹⁹

Notwithstanding this high number of special courts for drugs, there is no readily available data on the actual sentences imposed on female low-level drug offenders and on whether gendered elements are considered in these sentences in practice. Statistics from courts and other relevant government agencies refer only to matters such as the number of acquittals, dismissals and convictions in courts, and the number of pending and disposed cases in the regional trial courts and appellate courts. Likewise, there is no academic or judicial discourse available about the sentencing of women convicted of low-level drug-related offences.

In recent years, there has been a significant increase in the number of arrested female drug couriers. Data from the Philippine Drug Enforcement Agency (“PDEA”) indicates that, of the 710 recorded arrests of Filipino drug couriers, 445 (or 63%) are females. PDEA explains that females are usually targeted by drug-trafficking syndicates since: (i) they are (generally) less likely to

arouse the suspicion of the authorities; and (ii) the female body has more cavities in which to conceal the drugs, thereby minimising the risk of detection.⁵⁰⁰

Sentencing legislation in the Philippines is gender-neutral and does not explicitly consider factors which are disproportionately relevant for female drug offenders.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

The primary Philippine law concerning drug-related offences is Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act (the “CDDA”). The CDDA does not explicitly define the severity or features of low-level drug-related offences. On the whole, drug-related offences in the Philippines are generally heavily criminalised; the normal penalty is imprisonment ranging from 12 years and one day to 20 years or life imprisonment.

There are, however, a few exceptions which may be loosely considered as low-level drug-related offences. For the purpose of this paper, offences which are penalised under the CDDA with imprisonment of up to six years are considered as low-level drug-related offences:

⁴⁹⁸ www.prisonstudies.org/world-prison-brief-data.

⁴⁹⁹ The Judiciary Annual Report 2016-June 2017, available from sc.judiciary.gov.ph/files/annual-reports/SC_Annual_17.pdf.

⁵⁰⁰ PDEA, Drug Courier, available from pdea.gov.ph/drug-trends/drug-courier.

Manufacture or delivery of equipment, instrument apparatus, and other paraphernalia for dangerous drugs and/or controlled precursors and essential chemicals⁵⁰¹

The manufacture or delivery of equipment, instruments, apparatus and other paraphernalia to be used in injecting, ingesting, inhaling or otherwise introducing into the human body a drug is penalised with imprisonment ranging from six months and one day to four years and a fine ranging from Peso (“P”) 10,000 to P 50,000 (approximately US\$200 to US\$1,000).

Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs

The possession of equipment, instrument, apparatus and other paraphernalia for drugs is penalised with imprisonment ranging from six months and one day to four years and a fine ranging from P 10,000 to P 50,000 (approximately US\$200 to US\$1,000).

Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs during parties, social gatherings or meetings⁵⁰²

The possession of equipment, instrument, apparatus and other paraphernalia fit or intended for smoking, consuming, administering, injecting, ingesting or introducing any drug into the body, during parties, social gatherings or meetings, or in the proximate company of at least two persons is penalised with imprisonment of four years and a fine of P 50,000 (approximately US\$1,000).

Use of dangerous drugs⁵⁰³

A person apprehended or arrested, who first tests positive for use of any drug, and then tests positive again in a confirmatory drug test, shall be penalised with a minimum of six months’ rehabilitation in a government centre for the first offence. If an offender is, however, apprehended or arrested for the second offence, he/she shall be penalised with imprisonment ranging from six years and one day to 12 years and a fine ranging from P 50,000 to P 200,000 (approximately US\$1,000 to US\$4,000). Thus, where the offender is not a first-time offender, due to the greater sentencing powers available, that cannot be considered as a low-level drug offence.

According to case law, to be arrested for the use of drugs, the offender must: (i) be in possession of drug residue; and (ii) test positive for the use of drugs in a confirmatory drug test. Where the quantity of drugs in the individual’s possession is greater than a mere residue, he/she will be charged for possession of drugs, which is punishable by imprisonment ranging

from 12 years and one day to life imprisonment.⁵⁰⁴ The applicable term of imprisonment will depend on the quantity and type of the drugs in his/her possession.

Maintenance and keeping of original records of transactions on dangerous drugs and/or controlled precursors and essential chemicals⁵⁰⁵

Any practitioner, manufacturer, wholesaler, importer, distributor, dealer or retailer who fails to keep and maintain original records of transactions involving any drug/controlled precursor/essential chemical in accordance with the provisions of the CDDA will, if found guilty, be subject to a term of imprisonment ranging from one year and one day to six years and a fine ranging from P 10,000 to P 50,000 (approximately US\$200 to US\$1,000).

Plea-bargaining framework in drugs cases

In addition to the foregoing, on 10 April 2018, the Philippine Supreme Court issued its A.M. No. 18-03-16-SC entitled the “Adoption of the Plea-Bargaining Framework in Drugs Cases”. Pursuant to these guidelines, certain offences which were always heavily penalised may now be plea bargained to a lower penalty of six years or under. Considering the possibility of using a plea bargain to significantly lower penalty of six years or under, certain offences may also be considered as low-level drug-related offences, albeit only when plea bargained effectively.

As a result, the Philippine Supreme Court has adopted certain guidelines which are summarised in **Table 1** (overleaf).

For the above offences which can be plea bargained, the court has discretion to impose an indeterminate or definite term of imprisonment within the range prescribed by law.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

The sentencing legislation in the Philippines does not include reference to factors which are disproportionately relevant to female drug offenders. The sentencing legislation in the Philippines for low-level drug-related offences is framed as being gender-neutral.

We note, however, that under Act No. 3815 or the Revised Penal Code of the Philippines, the penalty of death shall not be inflicted upon a woman within the three years following the date of the sentence or while

⁵⁰¹. Section 10, Par. 2 of the Comprehensive Dangerous Drugs Act.

⁵⁰². Section 14 of the Comprehensive Dangerous Drugs Act.

⁵⁰³. Section 15 of the Comprehensive Dangerous Drugs Act.

⁵⁰⁴. *Dela Cruz vs. People of the Philippines*, G.R. No. 200748 (23 July 2014).

⁵⁰⁵. Section 17 of the Comprehensive Dangerous Drugs Act.

Table 1: Plea bargaining guidelines in drugs cases

Offence	Original sentence	Plea bargain to a lesser offence	Plea bargain sentence
Possession of dangerous drugs 0.01-4.99g	Imprisonment: 12 years + 1 day – 20 years + Fine: P 300,000 to P 400,000 (~ US\$6,000 – 8,000)	Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs	Imprisonment: 6 months + 1 day – 4 years + Fine: P 10,000 to P 50,000 (~ US\$200 – 1,000)
Possession of dangerous drugs 0.01-299.99g of marijuana	Imprisonment: 12 years + 1 day – 20 years; + Fine: P 300,000 to P 400,000 (~ US\$6,000 – 8,000)	Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs	Imprisonment: 6 months + 1 day – 4 years + Fine: P 10,000 to P 50,000 (~ US\$200 – 1,000)
Sale, trading etc. of dangerous drugs 0.01-0.99g of methamphetamine hydrochloride	Life imprisonment or the death penalty + Fine: P 500,000 to P 10,000,000 (~ US\$10,000 – 200,000)	Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs	Imprisonment: 6 months + 1 day – 4 years + Fine: P 10,000 to P 50,000 (~ US\$200 – 1,000)
Sale, trading etc. of dangerous drugs 0.01-9.99g of marijuana	Life imprisonment or the death penalty + Fine: P 500,000 to P 10,000,000 (~ US\$10,000 – 200,000)	Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs	Imprisonment: 6 months + 1 day – 4 years + Fine: P10,000 to P50,000 (~ US\$200 – 1,000)

Source: Philippines Supreme Court.

she is pregnant. We note again that the death penalty in the Philippines was abolished in 2006 through Republic Act No. 9346.

It is likewise noted that the CDDA provides for gender-neutral sentencing guidelines for drug-related offences, as follows:

Non-Applicability of the Probation Law⁵⁰⁶

Under the Probation Law of the Philippines, where the accused has already been convicted, the court may suspend the sentence and enforce a probation regime instead.

This privilege has, however, been curtailed under the CDDA, which expressly provides that any person convicted for drug trafficking or pushing, regardless of the actual penalty imposed, may not be granted under the Probation Law. While there is no available information or sentencing statistics, which indicate how trial courts have implemented this guideline,

the Supreme Court case of *Padua vs. People of the Philippines* shows a strict adherence to this prohibition. In this case, the accused who was charged with the sale of drugs had applied for probation on the basis that he was a minor. The Supreme Court denied the application on the basis of a strict interpretation of the CDDA's provision on the non-applicability of probation.

Plea-Bargaining Provision⁵⁰⁷

The CDDA originally provided that any person charged under any of its provisions, regardless of the impossible penalty, shall not be allowed to avail plea bargaining. However, in the Supreme Court case of *Estipona, Jr. vs. Lobrigo*, the prohibition on plea bargaining in drugs cases was declared unconstitutional for being contrary to the rule-making authority of the Supreme Court. The Supreme Court then promulgated the above cited guidelines.

⁵⁰⁶. Section 24 of the Comprehensive Dangerous Drugs Act.

⁵⁰⁷. Section 23 of the Comprehensive Dangerous Drugs Act.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

The sentencing legislation in the Philippines does not appear to include any mitigating factors relevant for female drug offenders.

However, it is noted that, in the Supreme Court case of *People of the Philippines vs. Gutierrez*, the absence of any aggravating circumstances was taken into account in the sentence handed down by the court. In that case, the accused was charged with Possession of Dangerous Drugs which, was punishable by imprisonment ranging from 12 years and one day to 20 years. In view of the fact that the accused had not committed an aggravating circumstance (i.e. the following factors, among others, were absent: taking advantage of public position; disregard of the offended party’s rank, age, sex or dwelling place; abuse of confidence; commission of the offence where public authorities are engaged in the discharge of their duties, or in a place of religious worship; commission of the crime with the aid of armed men; commission of the crime in consideration of a price, reward, or promise; commission of the crime with evident premeditation; commission of the crime by taking advantage of superior strength, etc.), the Supreme Court considered that a term of imprisonment of 17 years, four months and one day was the maximum imposable penalty under the Indeterminate Sentence Law. We note that this was specific to the facts of the case and that this judgment did not, in any way, reflect an approach being taken because of the offender’s gender.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

The sentencing legislation in the Philippines does not include any aggravating factors specifically relevant for female drug offenders.

We note, however, that, regardless of the gender of the offender, the offence of sale, trading, administration, dispensation, delivery, distribution and transportation of drugs and/or controlled precursors and essential chemicals, the use of minors or mentally incapacitated individuals as runners, couriers and messengers, or in any other capacity directly connected to the dangerous drugs and/or controlled precursors and essential chemical trade, shall be punishable by up to life imprisonment.

Similarly, regardless of the gender of the offender, the offence of sale, trading, administration, dispensation, delivery, distribution or transportation of any drug and/or a controlled precursor and essential chemical, if the victim is a minor or a mentally incapacitated individual, shall be punishable by up to life imprisonment.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

The sentencing legislation in the Philippines does not (explicitly) take into account the role of women in the drug supply chain.

Regardless of the gender of the offender, any person who organises, manages or acts as a “financier” of the sale, trading, administration, dispensation, delivery, distribution and transportation of dangerous drugs and/or controlled precursors and essential chemicals, shall be punishable by up to life imprisonment.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

There is no available information or sentencing statistics which indicate whether or not courts take into account gendered elements in setting sentences for female low-level drug offenders in practice. However, according to the United Nations Office on Drugs and Crime, prison statistics in the Philippines show that a higher percentage of women than men are imprisoned for drug-related offences. The gender disparity has been attributed to the greater ease with which low-level crimes can be prosecuted. The UNODC also suggested that more serious offenders, mainly male, escape imprisonment or have their sentences reduced by entering plea-bargaining deals and providing assistance to the prosecution, which women are usually unable to provide.

The Philippine courts have discretion in setting sentences, although that discretion is limited to handing down an indeterminate term of imprisonment within the parameters set by the applicable law, including drug-related offences pursuant to the CDDA.

In the case of *People of the Philippines vs. Ducosin*, the Supreme Court enumerated the considerations which should guide courts in fixing the minimum term of imprisonment imposed upon the convicted individual.

The Supreme Court explained that the factors that should be considered include, but are not limited to: (1) his age, especially with reference to extreme youth or old age; (2) his general health and physical condition; (3) his mentality, heredity and personal habits; (4) his previous conduct, environment and mode of life (and criminal record, if any); (5) his previous education, both intellectual and moral; (6) his proclivities and aptitudes for usefulness or injury to society; (7) his demeanour during trial and his attitude with regard to the crime committed; (8) the manner and circumstances in which the crime was committed; and (9) the gravity of the offence.

While there is no available information or sentencing statistics on the sentences imposed by trial courts where plea bargaining is allowed, as mentioned above, the court is given the discretion to impose a minimum period and a maximum period to be taken from the range prescribed by law. In such cases, it can be said that the very same rationale governing the Indeterminate Sentence Law can be applied by analogy, and the factors mentioned above may likewise be considered by the court in setting the minimum period of imprisonment.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

There is no available information or sentencing statistics on the sentences imposed on female low-level drug offenders in practice. Similarly, there is no available case law which expressly considers the female gender in the sentence imposed on the offender. A review of existing case law does not indicate that there is a difference in the sentences imposed on low-level offenders that can be aligned with gender.

Case law involving a female drug offender

In *People vs. Quimanlon*, the female offender was convicted of possession under Section 11, Article II of the CDDA for having in her possession 0.27 grams of methamphetamine hydrochloride. She was sentenced to between 12 years and one day and 14 years and nine months' imprisonment, plus a fine in the amount of c. US\$6,000.

Similarly, in *People vs. Marcelino*, the female offender was convicted of possession under Section 11, Article II of the CDDA for having in her possession 3.296 grams (under 5 grams) of methamphetamine hydrochloride. She was sentenced to between 12 years and one day and 13 years' imprisonment, plus a fine in the amount of c. US\$6,000.

Case law involving a male drug offender

In *People vs. Gaspar*, the male offender was convicted of possession of 0.04 grams (under 5 grams) of methamphetamine hydrochloride under Section 11, Article II of the CDDA. He was sentenced to a similar penalty of between 12 years and one day and 15 years' imprisonment, plus a fine in the amount of c. US\$6,000.

In *People vs. Posada*, which involved a husband and wife both accused of having in their possession 0.4578 grams of methamphetamine hydrochloride. They were both convicted by the trial court under Section 1, Article II of the CDDA and both were sentenced to between 12 years and one day and 14 years and nine months' imprisonment and a fine of c. US\$6,000. The Supreme Court affirmed the sentence and, in doing so, did not (expressly or impliedly) consider the respective genders of the pair. The Supreme Court therefore affirmed, *in toto*, the same penalty for both.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is no substantial, available academic or judicial discourse regarding the sentencing of women convicted of low-level drug-related offences. A study by Penal Reform International on Global Prison Trends 2015 shows that female prison population levels in some countries have risen particularly sharply between 2015 and 2017 and the Philippines is one of 12 countries with the highest rates of incarceration for women worldwide.⁵⁰⁸

On 1 July 2016, immediately after the election of President Rodrigo Duterte, the Philippine Government through the Philippine National Police ("PNP") adopted Command Memorandum Circular No. 16-2016, otherwise known as "Project Double Barrel". This was adopted in light of the new President's policy to eliminate illegal drugs during the first six months of his term.

Project Double Barrel represented the Philippine Government's shift towards a tougher policy against illegal drugs. It aims to "clear all drug affected barangays across the country, conduct no let up operations against illegal drugs personalities and dismantle drug syndicates". It likewise sought the "neutralisation" of illegal drugs personalities and the illegal drugs network in the country. Under Project Double Barrel, police operatives were expressly directed as a matter of policy to conduct "house visitation" pursuant to apparently verified intelligence regarding illegal drug activities.

⁵⁰⁸ Penal Reform International (2015), Global Prison Trends 2015 available at www.penalreform.org/resource/global-prison-trends-2015.

Project Double Barrel was heavily criticised for the number of deaths caused by its investigations. As of May 2018, it was reported that at least 4,729 suspects had died in police anti-drug operations. Human rights organisations, however, estimate the actual number of suspects that died to be around 20,000.

While there is no available data or information comparing how court sentencing policy has been affected by Project Double Barrel, the following examples in case law may be indicative of how the judicial approach has been effected:

- On 10 April 2018, in a pending petition filed before the Supreme Court by several human rights advocates, the court directed the PNP to release details of the 20,322 confirmed deaths caused during Project Double Barrel to seek to confirm the legitimacy of police operations.
- As mentioned earlier, in recognition of the increase in the number of drugs cases, the Supreme Court added 240 more special courts for drugs to the current corps of special courts for drugs to exclusively handle dangerous drugs cases, basically designating all 955 Regional Trial Courts nationwide as special courts for drugs.
- Moreover, as also mentioned above, the Supreme Court in 2017 struck down as unconstitutional a provision in the Comprehensive Dangerous Drugs Act prohibiting plea bargaining in drugs cases and even issued in 2018 guidelines on plea bargaining in drugs cases.
- Lastly, it is indicated in the Judiciary Annual Report for 2017 that the Philippine Judicial Academy is currently completing a PHILJA Judicial Journal on Drugs Law which shall be distributed to judges, justices and other members of the Philippine judiciary.

In 2018, NoBox Transitions Foundation conducted a study on women incarcerated for drug offences which concluded that 59.99% of women sentenced in the bureau of corrections are sentenced for *“crimes related to opium and other prohibited drugs”* compared to only 15.10% of men. The study also found that a large percentage of those incarcerated for drug-related offences are in pre-trial detention or still awaiting sentencing.

As a response to the problem with overcrowded prisons, the Philippine Supreme Court had issued Administrative Order A.M. No. 18-03-16-SC (discussed above), which provides for the adoption of a plea-bargaining framework for drugs cases allowing certain offences to be plea bargained to a lesser offence thereby reducing the final sentence. However, the effectiveness of this approach is yet to be seen.

CHAPTER 14

Poland

Incarceration rates	Women	Men	Proportion of women
Total ⁵⁰⁹	3,282	71,291	4.4%
For drug-related offences	Not available	Not available	Not available

Introduction

In Poland, low-level drug-related offences are regulated by the Polish Criminal Code of 6 June 1997, as well as the Act on Counteracting Drug Addiction of 29 July 2005 and other statute concerning drug-related offences.

Polish legislation does not differentiate between offenders based on their gender. According to the applicable provisions of the criminal law, judges decide whether an offence was committed and what the appropriate punishment should be. Polish courts have an extensive degree of discretion with regard to sentencing. The offender's personal circumstances (e.g. their mental and moral development, age, economic position, level of education, marital status, etc.) are a factor that should always be taken into account for sentencing. Such factors are not gender-specific but depend on the circumstances of the case. Polish case law shows that female and male offenders who committed the same offences were usually punished equally. The courts therefore rarely consider gendered elements in passing sentences in practice.

Importantly, police statistics showed that women tend to be most involved in non-violent offences and play a minor role in drug-related offences in Poland. When it comes to drug-related offences, most women are convicted for possession of drugs or small-scale drug dealing. Penalties for drug-related offences in Polish law include fines, limitation of liberty or imprisonment. In practice, courts tend to impose fines and alternative measures to imprisonment, such as community service. Analysis of jurisprudence shows that female and male

offenders who committed the same offences under the same circumstances are likely to be punished equally.⁵¹⁰ However, the social repercussions can be notably much more severe for women. The courts take into consideration the predominantly non-violent character of the offences committed by women. However, it is said that women are often stigmatised due to the presence of double standards in society, which makes their return to communities more difficult.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Drug-related offences are mainly categorised in the Act on Counteracting Drug Addiction of 29 July 2005 covers several drug-related offences. This act recognises **five main types** of offences related to drugs, namely:

- Offences concerning trafficking of narcotic drugs, psychotropic substances or poppy straw:**
 - importing.
 - exporting.
 - transporting.
 - intra-Community purchase or consignment;
- Placing narcotic drugs, psychotropic substances or poppy straw on the market or participating in such an activity.**

⁵⁰⁹ www.prisonstudies.org/country/poland (as of 31 July 2019)

⁵¹⁰ Due to significant impediment to the availability of court judgments on this matter in the public domain, the sample on which this statement is based is up to 100.

3. Offences concerning use of narcotic drugs or a psychotropic substance by another person (with or without intent to gain material or personal benefit):

- supplying.
- facilitating or enabling.
- inciting.

4. Possessing narcotic drugs or psychotropic substances (any drug possession, even possession of a small amount for personal use, is penalised under Polish law – provisions of law do not explicitly prohibit the use of drugs. However, the Polish Supreme Court has stated that every possession of a narcotic drug or a psychotropic substance is a possession within the meaning of Article 62(1) of the Act on Counteracting Drug Addiction and, as use of drugs is often related to possession of such drugs, in effect there is an indirect penalisation of drug use.

5. Cultivating poppy, cannabis plant or coca tree.

There is no legal definition of what constitutes a low-level drug-related offence; however, in minor cases, courts have an option to adopt a more lenient approach while sentencing. In case of possession of small amounts of narcotic drugs and psychotropic substances for personal use, both the prosecutor and the judge have the option to discontinue criminal procedures without sentencing the offender.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Polish legislation does not differentiate between offenders based on their gender and legislation concerning drug-related offences is equally applicable to both genders.

The factors courts should take into account during sentencing are set out in both general criminal law regulations (i.e. the Polish Criminal Code) and the specific legislation concerning drug-related offences.

According to the applicable criminal law provisions, judges decide whether an offence was committed and the appropriate punishment for it.

Generally, those are not gender-specific but, depending on the circumstances, might be more relevant for female offenders. In particular, courts should take into account several factors, such as the motivation and conduct of the offender, especially where an offence was committed against a person who is helpless due to age or health condition, or crimes committed in complicity with a minor. The type and degree of violation of the perpetrator's duties and the type and extent of negative consequences of the offence should also be considered.

Factors not directly concerning the committed offence that should nonetheless be taken into consideration include the characteristics and personal conditions of the offender (e.g. mental and moral development, marital status, economic and social situation, level of education, etc.) and the offender's way of life before and after the commission of the offence.

The Polish Criminal Code specifies that the severity of the sentence should not exceed the degree of guilt (wilful misconduct or negligence). Courts must also consider the degree of social harm caused by a given act. The sentence can be increased or decreased, depending on the existence of aggravating or mitigating factors. According to jurisprudence, the objectives of sentencing vis-à-vis the defendant are prevention and education.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

Some of the mitigating factors which a court must take into consideration when deciding on a case could be particularly relevant to female offenders (e.g. in case of a marginal involvement). The offender's personal circumstances should be always be considered during sentencing. However, Polish law does not specifically mention factors such as dependent children or sole head of a family.

Depending on the circumstances of the case, a woman's insignificant role in organised crime could be considered a mitigating factor if the degree of guilt is proportionately low (the general rule is that the sentence should not exceed the degree of guilt).

Generally, legislation concerning drug-related offences includes several mitigating factors such as lesser gravity, possession of insignificant quantity (in Polish case law, it would be e.g. up to 10 grams of marijuana, up to 3 grams of hashish and 0.25 gram of amphetamine), possession solely for personal use or cultivating low-morphine poppy/fibrous hemp. The criminal liability is mitigated in such cases. The possessor shall then be fined, punished by restriction of liberty or imprisonment for a year. Additionally, in the case of possession of an insignificant quantity of drugs and solely for personal use, the proceedings against a defendant might be discontinued.

Furthermore, the Polish Criminal Code of 6 June 1997 includes subsequent mitigating factors generally applicable to offences such as negligible damage to society. Another mitigating factor is if the perpetrator voluntarily desisted from further activities and has

taken substantive efforts aimed at preventing the commission of the intended offence. The perpetrator's situation including high age, mental illness, or serious harm suffered by his or her closest relative as a result of the offence also constitute relevant mitigating factors. Whether the perpetrator only acted as a facilitator is also important when considering the mitigating factors. Lastly, the behaviour of the perpetrator has a mitigating character if the perpetrator acted unintentionally or without a full awareness of what he or she was doing or that it was illegal.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

In general, Polish courts always consider the motivation and manner of conduct of an offence, as well as the type and degree of the violation of the perpetrator's duties. Courts would consider it an aggravating factor if the offence were committed against a person who was helpless due to age or health condition or if it were committed in complicity with a minor. Legislation concerning drug-related offences includes several aggravating factors, such as offences involving a considerable quantity (i.e. sufficient for dozens of people; in such a case, the objective should be taken into consideration in order not to punish people dependent on drugs more severely than drug dealers), offences committed with the intent of gaining a material or personal benefit, and supplying or inciting a minor to use narcotic drugs or psychotropic substances.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Legislation concerning drug-related offences does not include provisions regarding organised criminal groups. Certain general provisions are set out in the Polish Criminal Code. Under Polish law, both setting up and leading a criminal group, as well as participating in such a group, is penalised. However, the severity of punishment would depend on the role performed in the group.

The role of a person in the group is important when deciding on both the type of a committed offence and the penalty and is given due weight by courts. The severity of the punishment would also depend on the offender's motivation. Acting with the intent of a financial gain, for example, is an aggravating factor.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Polish courts have a high degree of discretion with regard to verdicts on low-level drug-related offences. They can consider mitigating factors such as insignificant social harm, possession solely for personal use, and possession of an insignificant amount, as well as absence of a prior criminal conviction.

Other factors which should be taken into account are the offender's degree of guilt and awareness of the social consequences of the act, preventative and educational objectives of the penalty, and the need to develop legal awareness in society. In addition, the Act on Counteracting Drug Addiction and the Polish Criminal Code set out a number of mitigating and aggravating factors to be considered.

Analysis of the judicial decisions of Polish courts shows that judges do exercise a high level of discretion in considering the sentencing guidelines and this is also the case for drug-related cases. However, courts rarely take into account gendered elements in setting sentences in practice. A number of court cases (see cases ref. No. II K 159/17/06; VII K 325/17; IV K 106/18) demonstrated that female and male offenders who committed the same offences were punished equally.

From the below case law, it seems that in Poland prior convictions are usually the deciding factor in drug-related offences. While female and male offenders who have committed the same offences are usually punished equally, gender-related factors still appear to be taken into account in some cases (e.g. in case no. IV K 475/16 the role of the female offender as a mother).

Case ref. no. II K 159/17/06

The court found that possession of an insignificant amount of drugs by a young female and a male did not carry a significant social harm. Due to the circumstances and the offenders' repentance, the court decided to discontinue the proceedings and impose a fine amounting to PLN 500 on each of them. This demonstrates that the court did not take into account gender-related elements.

Case ref. no. V K 173/14

A woman was accused of dealing in a considerable amount of drugs. The court decided on a prison sentence due to her prior conviction. The court took into consideration the character of the offence committed to gain a financial benefit and decided that it carried a significant social harm, which amounted to a pivotal factor at the sentencing stage.

Case ref. no. II K 408/14

Despite being dependent on drugs and suffering from schizophrenia, a female dealer was considered to be able to control her actions and to be acting with the intention to gain a financial benefit. In making its decision, the court took into account the motivation of the offender, as well as the social consequences of the offence and the offender's conduct after the crime. Despite a significant level of social harm, the court decided that the absence of a prior conviction was a factor that was pivotal to the suspension of her sentence.

Case ref. no. II K 148/15

A female suspect was found not guilty in the proceedings against her and her partner. The police discovered that a young male and a female were growing cannabis in the apartment where they lived with a 16-month-old child. The female defendant denied having taken part in the offence, although she said she suspected her partner who was dependent on drugs. The court sided with her and found her innocent. Her partner was imprisoned and directed to a rehabilitation facility. This could potentially be interpreted as taking gender-related factors into account at the sentencing stage.

Case ref. no. IV K 475/16

The facts of the case were largely based upon the poor financial situation of the female accomplice. She agreed to keep the narcotics at her house in exchange for her partner paying off her debts and giving her financial help. She refused to take part in drug-trafficking (although she had previously helped with preparing narcotics for sale). At the sentencing stage, the court concluded that incarceration would not serve its purpose in her case. The court took into consideration the community interview and the fact that the female offender was considered to have a good reputation not only as a neighbour but also, and more importantly, as a mother. This could be interpreted as taking a gender-related factor into account at the sentencing stage.

Case ref. no. VIII K 946/11

The court found that, despite a prior conviction, the female offender had not acted immorally. A crucial factor for the court was the fact that she was in a long-term relationship and planned to start a family. In the court's view, incarceration would have had a deleterious effect on her social rehabilitation and would have adversely affected her plans. This can, therefore, be recognised as a gender-related factor influencing the court's decision.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

Women mostly commit offences regarding possession of an insignificant amount of drugs for personal use. In most of the reviewed cases, the offences were committed single-handedly without the involvement of any other persons. It is not common for the courts to impose imprisonment sentences in those cases.

In Poland, based on a report from 2010, prison sentences are imposed in 72% of cases where there is a conviction for drug offences, and of the prison sentences imposed, 61% of these are suspended sentences. Financial penalties are imposed in 17% of cases.⁵¹¹

The courts tend to impose fines (especially in drug-possession cases) ranging from PLN 200 to 10,000. It may be observed that courts also prefer alternative measures to custody, such as community service (case ref. nos. V K 127/15, V K 694/16).

Incarceration as a punishment, in 71% of cases lasting for 1 to 5 years,⁵¹² has not been found to be an effective crime prevention tool. Women experience high stress in relation to their offences which has an impact on the household and on relationships within the family. In cases where imprisonment is chosen as the appropriate punishment, pursuant to Article 87(4) of the Polish Executive Penal Code (Journal of Laws No. 90, item 557, as amended) women may use onsite childcare facilities (organised in certain penal institutions) in order to be directly involved in the upbringing of their infant until the age of three.

⁵¹¹ iws.gov.pl/wp-content/uploads/2018/08/Kolor_IWS_Sekcja-Analiz_Struktura-kar-orzekanych-w-Polsce-i-w-innych-państwach-UE.pdf (as of 2010).

⁵¹² iws.gov.pl/wp-content/uploads/2018/08/Kolor_IWS_Sekcja-Analiz_Struktura-kar-orzekanych-w-Polsce-i-w-innych-państwach-UE.pdf (as of 2010).

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is not much academic or judicial discourse around sentencing of women convicted of low-level drug-related offences. However, it is said, based on police statistics, that women play a minor role in drug-related offences in Poland. It is estimated that in 2011 only 6% of those convicted of drug-related offences were females. Interestingly, the majority of suspects were young women (up to 16 years of age).

CHAPTER 15

Portugal

Incarceration rates	Women	Men	Proportion of women
Total ⁵¹³	825	12,230	6.4%
For drug-related offences ⁵¹⁴	167	1508	10%

Introduction

The adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, duly signed by Portugal and ratified by Resolution of the Assembly of the Republic No. 29/91 and Decree of the President of the Republic No. 45/91, published in the *Diário da República* on 6 September 1991, is the determining reason for the diploma which prohibits drug-related offences: Decree-Law no. 15/93, 22 January ("*Lei da Droga*", hereinafter "**Narcotics Law**").

Under Portuguese criminal law, the category of "low-level" drug-related offences does not exist. The Portuguese system does not rank these types of offences as low- or high-level offences as the legal framework and penalties are all evenly considered. However, drug use and possession of drugs for personal use do not constitute criminal offences but rather are administrative offences.

According to the Narcotics Law, trafficking 10 kilos of cocaine is the same as trafficking 10 kilos of cannabis for penalty purposes. Drug trafficking is condemned in itself, regardless of the substance trafficked. What impacts the applicable penalty (either a prison sentence or a fine) is: (i) the amount of the drug trafficked, with small amounts (grams) being associated with the sale of drugs to finance personal use; and (ii) the specific circumstances of the offender, such as criminal history.

The Portuguese Constitution prohibits discrimination, in particular gender-based discrimination, either positive or negative. Expressly gender-based reasoning

in decisions is thus excluded and courts are unable to balance decisions considering the perpetrator's gender, religious background, beliefs, ethnicity, etc.

The main difficulty in assessing the factors taken into account for drug-related offences which could be disproportionately relevant for women is that case law is not as easily available as in common law jurisdictions. All case law publications are anonymised and only high court decisions are available, namely from the courts of appeal (five in total) and from the supreme court. It is also to be noted that these drug-related crimes are mainly judged in first instance courts which do not publicise their decisions. Moreover, cases regarding women (or men) with poor resources, playing the role of drug courier, do not generally reach high courts because of the legal fees. As a result, public decisions, i.e. higher court decisions, very often relate to organised drug trafficking. This then translates into a higher number of male convictions.

Similarly, publicly available statistics on this topic do not exist apart from the detention facilities' data provided by their administrative services. Likewise, the three Portuguese criminal police bodies are not all under the purview of the same ministry. This results in constraints in crossing and gathering data and it is not known if these bodies share information or communicate periodically the data collected.

To conclude, gender issues do not appear to constitute a particular concern, which is further attested by the lack of academic studies on this matter.

⁵¹³ www.prisonstudies.org/world-prison-brief-data.

⁵¹⁴ dgrsp.justica.gov.pt/Estatisticas-e-indicadores/Prisionais/2018. This information includes both Portuguese nationals and foreigners incarcerated on Portuguese prisons. It also includes drug-trafficking, trafficking of lower quantities, trafficking for personal use and other drug-related offences.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Drug-related offences under the Narcotics Law comprise drug trafficking as well as cultivating, manufacturing, extracting, preparing, supplying, selling, purchasing, transporting, importing, exporting and possessing drugs with intent to supply, for which prison sentences or fines may be imposed.

Drug use and possession of drugs for personal use do not constitute criminal offences but rather are administrative offences. The law specifies (as per drug type) and quantifies the amount (in grams) which can be held by a single individual and still be considered for personal use. This assessment is effected with reference to a 10-day period. In practical terms, this means whether or not an individual is carrying doses for 10 days of use. For this purpose, the Narcotics Law contains several tables that illustrate which are the forbidden substances and the grams above which a drug offence is deemed to have been committed. In addition, there are other pieces of legislation which reiterate and simplify this assertion, such as Law no. 30/2000, of 29 November that specifically states in Article 2(2) the 10-day period mentioned above.

In practical terms, the amounts considered for personal use can vary between different types of drug depending on the perception of the drug's risk to health. For example, the quantity deemed to be for personal use of cannabis allows for an individual to hold more grams than for the personal use of heroin. This has further importance when considering the situation in which an individual carries amounts above those permitted by law in order to finance his own personal use. In such a case it still constitutes drug trafficking, nonetheless, the penalty applicable will be lower (prison sentence of 120 days to up to one year or a fine). This concept is not applicable when the offender has already been flagged by the authorities or has a criminal history.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

In the Portuguese legal system, sentencing guidelines do not exist. Portuguese law is based on codified legal texts.

The state of pregnancy of the offender is understood as the only gender-specific factor which is accepted in practice, even though not expressly stated as a

mitigating factor in the law. In principle, it is understood that, in such cases, judges may take pregnancy into consideration when sentencing. The vulnerability of a woman when pregnant is taken into consideration when deciding on a prison sentence, even though Portuguese prisons have a special regime for pregnancy and mothers with children below school age. This means, in practical terms, that, if a woman is pregnant and is possibly facing a prison sentence, the judge will take into account her special state of vulnerability and the possibility of giving birth in a prison facility.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

The mitigating factors foreseen are the same for almost all crimes and there are few specific mitigating factors for drug-related offences.

There are general mitigating factors (for all offences) that may either justify the unlawfulness of the offence or exclude the culpability. In cases where the justifying cause of unlawfulness is verified, the exclusion of culpability is deemed redundant and unnecessary as that action no longer constitutes an offence. The Portuguese Criminal Code contains a general rule of exclusion of unlawfulness in Article 31, paragraph 2, listing self-defence (Article 32), the right of necessity (Article 34), the conflict of duties (Article 36) and consent (Article 38).

The Criminal Code also expressly provides the possibility to exclude guilt in certain circumstances; acceptable unawareness of illegality (Article 17) or lack of freedom of decision (Article 35 and Article 33 paragraph 2). In these cases, it will be considered that the agent had no guilt and therefore that action no longer constitutes an offence.

In the Narcotics Law, there is a specific provision, in Article 31, which foresees a mitigation of the penalty or even an exemption of penalty. Hence, if the offender voluntarily withdraws his/her activity, or significantly diminishes it or diminishes the danger caused by the conduct, prevents or seriously endeavours to prevent the result which the law seeks to prevent from happening, or specifically assists the authorities in the collection of decisive evidence for the identification or capture of other persons responsible, particularly in the case of groups, organisations or associations, the penalty may be particularly attenuated or even dismissed.

The judge is obliged to consider all relevant circumstances of the committed crime, including the attitude and background of the offender, as well as the circumstances under which the crime occurred. Nevertheless, the Portuguese criminal law does not distinguish these factors when before a male or a female offender.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

There are several aggravating factors set forth in Article 24 of the Narcotics Law which reflect the general criminal law, such as:

- Where the substances or preparations were delivered or were intended for minors or psychologically diminished persons.
- The substances or preparations have been distributed to a large number of persons.
- The offender obtained, or sought to obtain, substantial monetary compensation.
- The offender is an official responsible for the prevention or prosecution of such offences.
- The offender is a physician, pharmacist or any other health technician, a prison official or social reinsertion services worker, a mail, telegraph or telephonic worker, teacher, educator or educational establishment worker or service worker, institutions of social action worker, and the offence is committed in the exercise of their profession.
- The offender participates in other organised criminal activities of an international scope.
- The offender partakes in other illegal activities facilitated by the practice of the infringement.
- The offence has been committed in drug treatment facilities, social reinsertion services, social services or institutions, in a prison, military unit, educational establishment, or in other places where students are engaged in, or in the vicinity of, educational, sporting or social activities.
- The offender uses the collaboration, in any way, of minors or disabled persons.
- The offender acts as a member of a group likely to repeatedly perpetrate the criminal offences foreseen in articles 21 and 22, with the collaboration of at least one other member of the group.

- The substances or preparations have been corrupted, altered or tampered with by manipulation or mixing, increasing the danger to the life or physical integrity of others.

However, the law does not distinguish between men and women, social background, ethnicity, religious beliefs, etc. Therefore, there is no provision for aggravating factors applicable only to women.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

As mentioned above, participation in organised crime is an aggravating factor, as well as significantly profiting from the transaction. Nevertheless, the role a woman or a man plays is irrelevant from a punitive standpoint.

According to statistics, men are the predominant offenders in these crimes; however, this data only refers to drug trafficking in general and does not distinguish if the conviction was based around organised crime activities or sale of drugs to finance personal use.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

The mitigating factors which the judge can take into account are all covered by criminal law which does not provide for any expressly gendered factors. Moreover, Portuguese criminal law obeys the principle of typicity/legality, thus preventing the judge from, at his/her discretion, consider other factors which are not envisioned in the Portuguese criminal code (*Código Penal*). This means that the possibility of the judge having a level of discretion in setting sentences is null in principle.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

We do not have access to this kind of information as there are no official (and public) statistics on this matter, as mentioned above. The general perception is that a prison penalty is mostly applied in cases of drug trafficking. However, in cases where the offender

(either male or female) does not have a criminal history and the drug amount is low, the judge can substitute the prison sentence for a fine or the provisional suspension of a criminal procedure. There is also the possibility of applying a community service penalty.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

There is little research on this topic, particularly in relation to sentencing of women. After the decriminalisation in 2001 of possession of drugs for personal use, there was a substantial reduction in drug convictions. Instead of being convicted, people consuming, buying or possessing drugs are subject to treatment programmes.

Even though there is not much information available on the effects of Portuguese drug policy in relation to the sentencing of women, in relation to low-level drug offences, it is likely that the number of incarcerated women has decreased. In fact, by looking at the statistics there was indeed a decrease in the number of women incarcerated after the new policy for drug-related offences was introduced: while in 2001 the number of women incarcerated for drug-related offences was 1012, in 2010 it was 240 and in 2018 it was 167.

It is also important to note that, until 2018, drug-related offences constituted the most prevalent offences among incarcerated women. In 2018, crimes against property exceeded those offences.

CHAPTER 16

Russia

Incarceration rates	Women	Men	Proportion of women
Total ⁵¹⁵	43,440	540,657	8.0%
For drug-related offences	Not available	Not available	Not available

Introduction

Russia is a civil law jurisdiction and the primary source of Russian criminal law is the Criminal Code (the “Code”), which sets out the rules for establishing a criminal act and sentencing. Case law in Russia has no binding force and there is no doctrine of precedent in criminal law. Only rulings of the Russian Supreme Court which summarise its approach to particular offences are persuasive and may therefore have an impact on the interpretation of legislation (including the Code).

In Russia, pregnancy is the only gender-related mitigating factor, even though some other mitigating factors might be disproportionately relevant for women (e.g. having small children, difficult life circumstances or physical coercion). Russian law also provides for a specific sentencing-related factor based on gender: a sentence for a low-level offence, including a low-level drug offence, may be deferred if a woman is pregnant or has a child under 14 years.

The number of women convicted of drug-related offences is substantially less than the number for men, although drug-related offences continue to be the most frequent offences committed by women.

There has been little discussion around the issue of women convicted of low-level drug-related offences in Russia. Relevant questions are usually only considered as part of a more general discussion on women’s sentencing. Official statistics on low-level drug-related offences are not public and indicators such as the number of low-level drug-related offences committed, age and gender of the offenders are therefore not available.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Russian law provides for two separate types of offences – criminal offences which are covered by the Code and may entail imprisonment, and administrative offences which are much less severe, covered by the Code of Administrative Offences of the Russian Federation and which may entail a fine and/or an administrative arrest of up to 15 days.

Administrative offences

Administrative offences are not considered to constitute crimes and do not entail criminal liability (and relevant track records). They aim at punishing small violations of public order considered as less important.

This report concentrates on criminal offences only. However, for the sake of completeness, we describe the relevant administrative drug-related offences below:⁵¹⁶

- Illegal acquisition, storage, transportation, manufacture, possession without the purpose of sale of narcotic drugs, psychotropic substances or their analogues, as well as illegal acquisition, storage and transportation without the purpose of sale of plants (their parts) containing narcotics or psychotropic substances: punished by an administrative penalty

⁵¹⁵ www.fsin.su/structure/inspector/iao/statistika/Kratkaya%20har-ka%20UIS.

⁵¹⁶ Articles 6.8 and 6.9 of the Code of Administrative Offences of the Russian Federation.

of up to RUB 5,000⁵¹⁷ or an administrative arrest of up to 15 days. If the volume of drugs/substances exceeds a certain threshold (please refer to the “Criminal offences” section for more details), such behaviour would then qualify as a criminal offence.

- Use of drugs or psychotropic substances (or new potentially dangerous psychoactive substances)⁵¹⁸ without a doctor’s prescription or non-fulfilment of a lawful demand of an authorised official to undergo a medical examination for the state of intoxication by a person with respect to whom there are sufficient grounds to believe that he/she has consumed narcotics or psychotropic substances without a doctor’s prescription or new potentially dangerous psycho-active substances: punished by an administrative penalty of up to RUB 5,000⁵¹⁹ or an administrative arrest of up to 15 days.

If the perpetrator of these offences is a foreigner or a stateless person, that person may also be subject to deportation.

Criminal offences

Russian criminal law includes four provisions which can be classified as constituting low-level drug offences, discussed in turn below.

Article 228 part 1 of the Code

Article 228 part 1 of the Code governs unlawful acquisition, storage, transportation, preparation, recycling of drugs, psychotropic substances or their analogues as well as unlawful acquisition, storage, transportation of plants (their parts) containing drugs or psychotropic substances, if any of the above activities is without the purpose of resale and in a substantial volume.

“Substantial volume” in relation to each drug/substance is established by the Russian government. For example, for each of cocaine and heroin it is more than 0.5 gram, for hashish it is more than 2 grams and for LSD it is more than 0.0001 gram.

This offence can be punished by a number of different penalties:

- Fine up to rub 40,000⁵²⁰ or up to three months’ salary of the convicted person.
- Obligatory community service up to 480 hours (unpaid labour which a convicted person should perform outside of his/her working or study hours).

- Correctional community service up to two years (community labour which a convicted person should perform at his/her workplace and pay between 5% and 20% of his/her salary to the state).
- Limitation of freedom⁵²¹ up to three years.
- Imprisonment up to three years.

Article 228.3 of the Code

Article 228.3 of the Code criminalises unlawful acquisition, storage or transportation of precursors (substances which are used for production or recycling of drugs or psychotropic substances) as well as unlawful acquisition, storage, transportation of plants (their parts) containing precursors for drugs or psychotropic substances, if any of the above activities is in a large or extra-large volume.

Large and extra-large volumes in relation to each precursor are established by the Russian government. Please see **Table 1** for certain examples in this respect.

Table 1: Amounts per classification

Substance	Large Volume (gram)	Extra-Large Volume (gram)
Cocaine	5	1,500
Heroin	2.5	1,000
Hashish	25	10,000
LSD	0.005	1

As stipulated by the Criminal Code.

This offence can be punished by a number of different penalties:

- Fine up to rub 500,000⁵²² or up to 12 months’ salary of the convicted person.
- Obligatory community service up to 240 hours (unpaid labour which a convicted person should perform outside of his/her working or study hours).
- Correctional community service up to two years (unpaid labour which a convicted person should perform at his/her workplace and pay between 5% and 20% of his/her salary to the state).
- Limitation of freedom up to two years.
- Imprisonment up to two years.

⁵¹⁷. Approximately US\$75, based on the official Russian Central Bank exchange rate as of 25 September 2018.

⁵¹⁸. Russian law does not contain any explanation what “new potentially dangerous psychoactive substances” mean, so this may cover any substances which a court considers affecting people’s psyche.

⁵¹⁹. Approximately US\$75 based on the official Russian Central Bank exchange rate as of 25 September 2018.

⁵²⁰. Approximately US\$605 based on the official Russian Central Bank exchange rate as of 25 September 2018.

⁵²¹. This may include the following limitations and/or obligations: obligation not to leave the place of permanent residence (stay) at a certain time of the day, not to visit specific places within an area, not to leave the relevant area, not to visit places where mass events are held and not to participate in such events, not to change the place of residence or stay (this limitation shall be established in all cases of limitation of freedom), obligation to report to a specific state agency one to four times a month.

⁵²². Approximately US\$7,560 based on the official Russian Central Bank exchange rate as of 25 September 2018.

Article 228.2 of the Code

Article 228.2 of the Code governs violation of the rules of production, recycling, storage, accounting, sale, distribution, transportation, sending, acquisition, use, import, export, destruction of drugs or psychotropic substances or their precursors, tools or equipment used for making drugs or psychotropic substances which are under special control, entailing their loss; violation of the rules for cultivation of plants containing drugs, or psychotropic substances, or precursors thereof, for their use for scientific and educational purposes and also in expert activities; violation of the rules for storage, registration, sale, transportation, acquisition, use, importation, exportation or elimination of plants containing narcotics, or psychotropic substances, or their precursors and of their parts containing drugs, or psychotropic substances, or their precursors, this entailing the loss of such plants or parts thereof, if this deed has been committed by a person in charge of observing said rules.

The maximum penalties for this offence (depending on certain aggravating factors) are:

- Fine up to rub 300,000⁵²³ or up to 24 months' salary of the convicted person.
- Obligatory community service up to 480 hours (unpaid labour works which a convicted person should perform outside of his/her working or study hours).
- Limitation of freedom up to three years.
- Imprisonment up to three years.

Article 231 part 1 of the Code

Article 231 part 1 of the Code criminalises illegal cultivation on a large scale of plants containing drugs, or psychotropic substances, or their precursors.

The following penalties may be applied:

- Fine up to rub 300,000⁵²⁴ or up to 24 months' salary of the convicted person.
- Obligatory community service up to 480 hours (unpaid labour which a convicted person should perform outside of his/her working or study hours).
- Limitation of freedom up to two years.
- Imprisonment up to two years.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

The Code contains a number of mitigating and aggravating factors for criminal offences. Most of them are of a general nature, i.e. applicable to all crimes and non-gender-specific. The judge must take into account the presence of any mitigating/aggravating factors, but it is left to his or her discretion to decide how they will affect the severity of the sentence.

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes "trafficking"?

We have identified the following factors which may be considered for low-level drug criminal offences:⁵²⁵

- Committing a low-level offence for the first time due to coincidence of circumstances.
- Being under 18 years old ("juvenile defendant").
- Pregnancy (the only gender-specific factor).
- Having small children.
- Committing an offence due to difficult life circumstances.⁵²⁶
- Committing an offence due to physical or mental coercion or due to economic, work or other dependence (this may include, inter alia, difficult life circumstances where a person has limited independent financial resources).
- Confession, active assistance in disclosure of a crime, criminal prosecution of other defendants and search of criminal proceeds.

There are also certain factors which allow the execution of the sentence to be deferred. The judge has the discretion to take them into account or not:

1. There is, in particular, a **gender-specific defence** which can allow the execution of a sentence to be deferred: a court may defer the execution of the sentence, including for low-level drug-related offences, if a woman is pregnant or has a child under 14 years old, until the child is 14 years old. When the child reaches the age of 14, the court must either: (i) relieve the woman from serving the punishment or the remaining part of the punishment with expunging of the record of conviction; or (ii) replace the remaining part of the punishment with a lighter type of punishment.⁵²⁷

⁵²³. Approximately US\$4,535 based on the official Russian Central Bank exchange rate as of 25 September 2018.

⁵²⁴. Approximately US\$4,535 based on the official Russian Central Bank exchange rate as of 25 September 2018.

⁵²⁵. Article 61 of the Code.

⁵²⁶. There are no official guidelines on circumstances which shall be considered being difficult life circumstances. In practice, this may cover serious health issues of a convicted person or his/her close relatives, financial difficulties in case a convicted person tried to find a job but did not succeed, etc.

⁵²⁷. Article 82 of the Code.

2. For drug-related offences: a court may defer execution of the sentence for the offences described in Sections 1.2i and 1.2iv above (i.e. unlawful acquisition, storage, transportation, preparation, recycling of drugs and illegal cultivation on a large scale of drugs), if the person is: (i) sentenced to detention for the first time; or (ii) recognised as a person dependent on drugs and has voluntarily accepted to get treatment for drug dependence. The maximum period of deferral is five years. If remission from drug dependence can be proved after the end of the treatment for at least two years, a court shall exempt the offender from serving the punishment or the remaining part of the punishment. The court shall explain this provision to a person convicted of a drug-related offence, so that he/she may express his/her wish to be engaged in treatment for drug dependence.⁵²⁸

For most low-level offences (including drug-related offences), the court has also the possibility to sentence the defendant to a conditional punishment, subject to a trial period of six months and five years. This is applied by a judge based on his/her discretion.

If the quantity of drugs exceeds the “substantial volume” threshold described above, this would constitute “trafficking” (transportation) for the purposes of Article 228 part 1 of the Code (please refer to the “Criminal offences” section for more details).

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

Again, as with mitigating factors, most aggravating factors are applicable to all crimes and non-gender-specific.⁵²⁹

- Recidivism of offences.
 - Grave consequences of the commission of a crime.
 - Commission of a crime by a group of persons or a group of persons by agreement, by an organised group, or by a criminal community (criminal organisation).
 - Active role played in the commission of a crime.
 - Involvement in the commission of a crime of persons who suffer from heavy mental illness, who are in a state of intoxication, or who have not reached the age of criminal liability.
 - Commission of a crime by reason of political, ideological, racial, national or religious hatred or enmity or by reason of hatred or enmity with respect to some social group.
- Commission of a crime out of revenge for rightful actions of other persons, for the purpose of concealing other criminal activity or facilitating the commission of other criminal activity.
 - Commission of a crime against a person or his/her relatives in connection with his/her official activity or the discharge of his/her public duty.
 - Commission of a crime against a woman who is obviously in a state of pregnancy, or against a minor, another defenceless or helpless person, or a person who is dependent on the defendant.
 - Commission of a crime with heightened brutality, sadism or mockery, or involving tormenting the victim.
 - Commission of a crime with the use of weapons, ammunition, explosives, fake explosives, specially manufactured technical means, narcotic agents, psychotropic, potent, poisonous or radioactive substances, medicinal or other chemical and pharmacological preparations, or as a consequence of physical or mental coercion.
 - Commission of a crime during a state of emergency, natural or social disaster, or during mass disturbances, or during an armed conflict or hostilities.
 - Commission of a crime, abusing confidence placed in the defendant through his/her official position, or through a contract.
 - Commission of a crime with the use of uniforms or documents of representatives of the authorities.
 - Commission of an intentional crime by a worker of a body of internal affairs.
 - Commission of an offence in respect of a minor by a parent or other legal guardian, as well as by a pedagogical worker or other worker of an educational organisation, medical organisation, an organisation engaged in rendering social services or other organisation who is bound to exercise supervision over the minor.
 - Commission of a crime for the purpose of propaganda, justification and support of terrorism.

These have not been analysed in detail, as they are equally applicable by courts to all criminal offences and to both genders.

The general rule is that for first-time low-level offences, in the absence of aggravating factors, the court may not sentence the perpetrator to imprisonment. The offences described in Sections 1.2i and 1.2iv (i.e. unlawful acquisition, storage, transportation, preparation,

⁵²⁸. Article 82.1 of the Code.

⁵²⁹. Article 63 of the Code.

recycling of drugs and illegal cultivation on a large scale of drugs) are exceptions to this rule, i.e. imprisonment is still available if a defendant is found guilty of them even in the absence of aggravating factors.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Drug supply is not considered a low-level drug offence in Russian law.

That being said, Russian courts do take into account the role of each individual in the chain (i.e. whether the individual has organised the supply or is merely a drug courier) as it has an impact on the applicable rules and the potential sentence. However, on the basis of the court practice reviewed, it is very hard to conclude whether courts consider unique circumstances or factors applicable more to women and men who may play the same roles in the chain (e.g. all drug couriers).

In most cases reviewed,⁵³⁰ women do not seem to be making any significant financial gains from the low-level drug-related criminal activities they are involved in (as often they use the money they get from sale of drugs to purchase some drugs for themselves). However, it seems that, from this perspective, there is not much difference between women and men charged with similar drug supply offences (as, most of the time, men do not make any significant financial gains either from the low-level drug-related crime).

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

According to Russian law and to the official guidelines of the Russian Supreme Court, there are no requirements to take into account gendered elements while considering a sentence for a particular crime. All persons should be treated equally based on the applicable legislation.

As mentioned above, there are a few gender-specific factors (pregnancy and the possibility to defer execution of the sentence if a woman is pregnant or has a child under 14 years old) applicable to all criminal offences, including low-level drug-related offences.

Courts are obliged to take into account mitigating factors (such as pregnancy, small children, or a difficult life situation), but it is entirely up to them to decide how this will affect the sentence. From the available court practice, we have seen that presence of such factors may decrease the sentence for a period between one month and one year of imprisonment, the usual one being six months.

With regard to the possibility of deferring the sentence if a woman is pregnant or has a child under 14 years old, this is again left to the courts' discretion. There are no public statistics on the number of women who committed low-level drug-related offences and received a deferral, but we have seen cases where the court refused a deferral as it believed that it was not possible to correct a woman's behaviour without real imprisonment. General official statistics show that in 2016 14.1% of all women sentenced to imprisonment received a deferral, while in 2017 this number increased to 15.2%. This shows that courts have increased the number of deferrals for women, even though that increase was not substantial.

As explained above, there is also a specific provision which allows for deferral of a sentence for a low-level drug-offence if the person is: (i) sentenced to detention for the first time: or (ii) recognised as a person dependent on drugs and has voluntarily agreed to get treatment for drug dependence. Again, separate statistics for women are not available. Generally, in 2016 the number of persons who received such a deferral was 156, and in 2017 130, so numbers are very low.

Please see below two examples of how the courts are imposing sentences for women accused of drug offences:

Example 1

"S" was been accused of illegal acquisition, storage and possession of narcotic drugs in substantial volume without the purpose of sale (together with "F") (Article 228 part 1 of the Code). The first instance court took into consideration the following mitigating factors:

- "S" had fully admitted her guilt.
- "S" had two small children.
- "S" had actively assisted to investigation of the relevant crime.

Based on these factors, "S" was sentenced to 2.5 years of imprisonment, with conditional service, subject to a trial period of three years. The appeals court having reviewed a complaint from "S" further reduced the term of imprisonment to 1.25 years (in view of the mitigating factors and absence of aggravating factors).⁵³¹

⁵³⁰. Our analysis was mostly concentrated on decisions of appeal courts.

⁵³¹. Resolution of the Presidium of the Moscow Region Court dated 21.11.2018. Case No. 44y-234/2018.

Example 2

"A" had been accused of illegal acquisition and storage of narcotic drugs in substantial volume without the purpose of sale (Article 228 part 1 of the Code). The first instance court took into consideration the following mitigating factors:

- "A" had fully admitted her guilt.
- "A" had a small child.
- "A" had health problems, as did others of her relatives.

Based on these factors, "A" was sentenced to one year of imprisonment. The appellate court having reviewed an appellate complaint from "A" decided that the prosecutor had not provided sufficient evidence of "A" having "illegally acquired" narcotic drugs and changed her conviction to "illegal storage of narcotic drugs in substantial volumes without the purpose of sale". On this basis, the appellate court reduced the term of imprisonment to 11 months.⁵³²

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

Russian courts usually give prison sentences to female offenders charged for unlawful acquisition, storage, transportation, and preparation of drugs, which is the most common low-level drug offence (Section 1.2i, Article 228 part 1 of the Code). Alternative sentences (such as fines or community service) are only issued in 4% of the drug-related cases. The lengths of the prison sentences imposed are as follows:

- Less than one year: approx. 25%.
- One year – 1.5 Years: approx. 64%.
- 1.5 Years – two years: approx. 10%.
- Over two years: approx. 1%.

Please note that in a number of cases female offenders are also charged with other crimes, often more serious drug-related ones. This results in much longer total prison sentences imposed by courts. This equally affects both men and women as the law provides for more severe punishment (e.g. longer total prison sentence) for more serious drug-related offences committed by offenders of both genders.

According to the publicly available information, less than 1.5% of unlawful acquisition, storage, transportation and preparation of drugs (Article 228 part 1 of the Code) are committed by women. However, this statistic may be inaccurate due to the fact that: (i) not all court rulings in respect of, in particular, low-level drug-related offences are published in public sources; and (ii) quite often offenders are also charged with other crimes, often more serious drug-related ones, so it is quite difficult to include relevant cases only.

3. General**QUESTION 5:**

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

Discussions related to sentencing of women convicted of low-level drug-related offences are quite rare according to public sources. Relevant questions are usually considered as a part of general discussion on women's sentencing.

The authors of the Open Society Foundations Report of 2016 on Influence of Antidrug Policy to Women (the "Report") draw attention to the fact that generally women are not organisers of drug-related crimes. However, their percentage of imprisonment for drug-related offences is usually higher for women than for men. Based on the official statistics of the Russian Federal Service of Execution of Sentences, this statement is not correct in relation to Russia. The total number of persons sentenced to imprisonment for drug-related crimes (including low-level offences) in 2016 was 138,260, including 16,274 women (i.e. 11.8%), and in 2017 – 136,029, including 15,268 women (i.e. 11.2%). Olga Omelchenko in her article mentions that starting from 2010 there has been a decrease in the number of women convicted for drug-related offences. We should note, however, that based on official statistics all drug-related offences are the most common criminal offences committed by women (please note that there are no separate statistics for low-level drug-related offences).

The Report also mentions that, in Russia, children are removed from their family when their mother is identified as having drug-dependence issues. Consequently, women with children tend not to apply for drug-dependency treatment. Between 49 and 94% of women charged with drug-related offences in Russia at some point of their lives were forced to provide sex services.

Olga Omelchenko's article specifically pointed out that only 2% of women convicted for drug-related offences have finished university, while 40% have only finished secondary school. This, together with unemployment, is considered as one of the factors affecting the number of crimes committed by women.

The Russian antidrug policy until 2020 (approved by the President of the Russian Federation in 2010) does not contain any gender-specific elements at all, although it specifically addresses children and young people up to 30 years old.

⁵³² Appellate Resolution of the Moscow City Court dated 22.05.2018. Case No. 10-8433/2018.

CHAPTER 17

Spain

Incarceration rates	Women	Men	Proportion of women
Total ⁵³³	4,522	54,807	7.62%
For drug-related offences ⁵³⁴	1,066	7,601	12.29%

Introduction

The sentencing of women convicted for drug-related offences has not generally been discussed in Spain, and Spanish criminal law does not contain any distinctions based on gender. There are therefore no available judicial resources regarding the sentencing of women convicted of drug-related offences, as well as limited academic discourse. Additionally, the crime statistics published by the Ministry of Justice do not distinguish between genders. Public prosecutors were consulted, and they confirmed that Spanish law enforcement does not differentiate how it charges or accuses women or men.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

In Spain, the possession of small amounts of drugs, or use of drugs in public spaces is considered a serious administrative offence, punishable by the authorities with a fine of €601 to €30,000 (~ USD675 to USD33,645).⁵³⁵ Minors will not receive a penalty if they agree to treatment, rehabilitation or re-educational activities.

Article 368 of Spanish Criminal Code (*Código Penal*)⁵³⁶ sets out the drug-related criminal offences: cultivating, manufacturing and encouraging; enabling or facilitating in any way the illegal consumption of toxic drugs, narcotics or psychotropic substances; or possessing them for these purposes. However, the Spanish Supreme Court's (*Tribunal Supremo*) practice has for many years been to consider that possession for a person's own use does not constitute an offence (see below). The offence usually known as drug trafficking is defined in articles 368 et seq. In Spanish law, it is not defined as a separate offence, but rather falls within the public health offences section of the criminal legislation. Article 368 distinguishes between two types of drug trafficking: dealing in drugs that are considered to cause serious damage to health (known as hard drugs, such as heroin, cocaine, LSD, etc.) and other illicit substances (known as soft drugs, such as cannabis, magic mushrooms, etc.). Dealers in what are considered "hard" drugs receive harsher punishments (imprisonment between three to six years, and fines of up to three times the value of the drugs) than dealers in "soft" drugs (imprisonment between one and three years and fines of up to double the value of the drugs).

Since 2010, article 368 has contained a second paragraph that allows courts and tribunals, to give out more lenient sentences than the above (imprisonment between 18 months and three years and the relevant fine for trafficking in "hard" drugs, and imprisonment between six months and one year plus the relevant fine

⁵³³. www.prisonstudies.org/world-prison-brief-data.

⁵³⁴. Prison statistics can be consulted at www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html. Please note that these figures refer to the category of offences against public health, which includes not only offences relating to toxic drugs, but also food fraud and offences relating to medicines; however, the number of convictions for the latter two classes of offences is insignificant, and the number of persons entering prison after having been convicted of these offences is even smaller.

⁵³⁵. Article 36, Law on protection of public safety (*Ley Orgánica 4/2015 de Protección de la seguridad ciudadana*) www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3442.

⁵³⁶. Spanish Criminal Code (*Código Penal*) www.boe.es/buscar/act.php?id=BOE-A-1995-25444.

for trafficking in “soft” drugs based on the relative minor nature of the offence and the personal circumstances of the offender (see below for more details). This more lenient category of drug-related offences (which could be considered as minor dealing) is intended to punish the very frequent cases of small-scale drug dealing, usually to feed the dependence of the defendant.

There are various defined categories of drug trafficking (with much heavier sentences) which depend on the defendant’s personal circumstances, whether large amounts of drugs are involved and whether these are doctored, membership of criminal gangs and their role in those organisations, the place where they deal in drugs, and many other factors.

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

The Spanish Criminal Code includes mitigating factors, some of which can even result in non-conviction, such as duress or necessity. Such mitigating factors, however, are considered irrespective of the gender of the defendant.

Spanish sentencing rules require the court or tribunal to always bear in mind the personal circumstances of the offender (child dependants, single-parent families, poverty, housing situation, ethnic minority or nationality), as well as the seriousness of the offence.⁵³⁷ However, no distinction is made based on the defendant’s gender, although factors such as child dependants or single-parent status are likely to be disproportionately relevant for women as compared with men.

As discussed above, possession of drugs for trafficking constitutes an offence, even though the Supreme Court has interpreted that possession for own use is not. Drug amount thresholds depend on their type and purity. The Supreme Court uses a table issued by the Spanish toxicology institute (*Instituto Nacional de Toxicología*)⁵³⁸ on 18 October 2001 on minimum psychoactive dosages. The toxicology institute maintains that a regular consumer usually acquires the necessary amount for themselves for five days. By way of example, a person might handle the following amounts:

Table 1: Minimum psychoactive dosages that a regular consumer usually acquires for themselves for five days

Illegal substance	Minimum psychoactive dosage (grams)
Marijuana	100
Cannabis	25
Cocaine	7.5
Heroin	3
Methadone	1.2
Ecstasy	1.4
Amphetamines	0.9
LSD	0.003

Source: Instituto Nacional de Toxicología.

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

Spanish criminal legislation includes aggravating factors rendering offences more serious, such as using minors in drug trafficking and the use of violence. The aggravating factor consisting in the use of minors is applied restrictively in practice. The minor should have a relevant contribution for that factor to be considered. It is irrelevant whether or not the minor is aware of being used to commit a criminal offence.

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Acting as a drug courier (the last link in organised drug trafficking) is punished under article 368 of the Spanish Criminal Code; offenders higher up the chain receive higher sentences.

Drug couriers can be men or women and receive the same penalties. In fact, experience of crime in Spain has shown that many more men than women are involved in the offence of drug trafficking (indeed in all offences), irrespective of their role within the organisation. However, women convicted for drug-related offences represent a bigger proportion of the total female prison population compared to the same ratio calculated for male prisoners. According to the 2017 General Report on Penitentiary Institutions, 20.1% of the total male prison

⁵³⁷ Art. 66.1.6. of the Criminal Code.

⁵³⁸ The Annex on minimum psychoactive dosages has been obtained from www.google.com/search?q=instituto+nacional+de+toxicolog%C3%ADa+consumo+de+drogas+tabla&ie=utf-8&oe=utf-8&client=firefox-b-ab.

population are convicted for offences against public health, the proportion amounting to 32.8% of the total female prison population.

2. Sentencing

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

As Spanish criminal legislation does not make any distinctions between offenders based on gender, Spanish courts do not take gender into account in relation to drug trafficking or any other drug-related offences in their practical application of their legal toolkit.

Necessity has been considered on occasion – usually as a mitigating factor. For example, when drugs are brought into prison, the offence is often committed by the prisoner’s mother, and so women may be disproportionately affected, even if the same consideration would be made for fathers and brothers of prisoners. The experience of the public prosecutors consulted in preparing this report is that drug couriers tend to be men rather than women. Occasionally, their personal circumstances are taken into account by the courts. For example, the Provincial Court of Zaragoza ruling num. 211/2001 dated 11 May 2001 (ECLI:ES:APZ:2001:1202) considered a highly qualified state of necessity in the case of a drug courier who was an unemployed father with six children and a pregnant wife, without public subsidiaries. The court considered that, in accordance with the case law of the Supreme Court, his circumstances must be considered in a fair judgment.

A few months later, the Supreme Court ruling num. 806/2002 dated 30 April 2002 (ECLI:ES:TS:2002:3095) also followed this approach for trying a 46-year-old woman who was caught carrying cocaine to Italy. The fact that she was a divorced mother of three children, the youngest being seriously ill, was considered as a partial mitigating factor equivalent to a state of necessity.

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

As stated above, Spanish criminal law does not contain any specific provisions to mitigate the sentences of women that commit drug-related offences. The Spanish prosecution service also does not have any specific guidelines that lead it to pursue lighter sentences for women that commit such offences, and the courts do not take gender into account.

There is an article of legal commentary, written by Professor Puente Aba, which looks at the figures on public health offences (which includes drug trafficking without specific figures for those offences) and statistics on the Spanish prison population in terms of gender. The figures are from the years 2005 to 2011, and the author reaches the following conclusions from them.

“The percentage of women serving custodial sentences in prison facilities is minimal compared to men: in line with the figures for offences committed, around 92% of those serving prison sentences are men, and only 8% are women. However, the figures change if, instead of comparing the total number of people sentenced to prison, we look at those imprisoned for drug-related offences. Around 27-26% of prisoners are serving sentences for public health offences; of these prisoners, approximately 87% are men and 13% women. If we look at the level of drug trafficking offences for each sex, we see that around 25% of male prisoners are serving sentences for these offences, while for women this proportion is somewhere between 44-48%, depending on the year, even reaching 50% in the figures for 2009”.⁵³⁹

“The typical characteristics of a woman in prison are those of a victim of poverty, who tends to have a low-level of education and also professionally, she has family dependants, and generally comes from a foreign country; among adults, there was a high level of drug use among these prisoners”.⁵⁴⁰

The latest court statistics in Spain are from 2017 and show that 11,527 people received sentences for public health offences, of which 9,911 were men (85.98%) and 1,616 were women (14.01%).⁵⁴¹ Prison statistics from May 2019 show that the total prison population was 59,329, of which 54,807 were men (92.38%) and 4,522 were women (7.62%). Of that population, 8,667 were in prison for public health offences, of which 7,601 were men (87.7%) and 1,066 were women (12.29%).⁵⁴²

⁵³⁹. LM Puente Aba, *Perspectivas de género en las condenas por tráfico de drogas* (Gender considerations in sentencing for drug trafficking) at page 110. Available at opo.iisj.net/index.php/ols/article/viewFile/142/36.

⁵⁴⁰. LM Puente Aba, *Perspectivas de género en las condenas por tráfico de drogas* (Gender considerations in sentencing for drug trafficking) at page 111. Available at opo.iisj.net/index.php/ols/article/viewFile/142/36.

⁵⁴¹. 2017 court statistics can be consulted at www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Datos-penales-civiles-y-laborales/Delitos-y-condenas/Condenados-explotacion-estadistica-del-Registro-Central-de-Penados. Prison statistics can be consulted at www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html.

⁵⁴². Prison statistics can be consulted at www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html.

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

We are not aware of any court precedents nor any legal commentary on this specific topic other than on the more general issue (i.e. not specifically connected to drug-related offences) that imprisoned women carry an additional social burden because they are no longer taking care of their families. The only legal article of which we are aware that addresses this topic is that by Professor Puente Aba, mentioned above.

CHAPTER 18

United States

Incarceration rates	Women	Men	Proportion of women
Total ⁵⁴³	219,000	2,064,400	9.6%
For drug-related offences ⁵⁴⁴	58,200	389,800	13%

Introduction

In the United States of America, drug-related offences may be prosecuted under state or federal law. Each state has its own drug laws and regulations. However, the federal Controlled Substances Act allows federal agencies to enforce federal drug laws in any jurisdiction regardless of the laws of any state. In practice, however, most drug-related offences are handled at the state level. The most common federal drug crime is trafficking, especially across state borders, while the most common drug crime at the state level is for possession.

In most states, lower-level offences are reserved for possession of small amounts for personal use. The seriousness of possession offences may differ widely from state to state but is typically based upon the volume and categorisation of the controlled substance. In many states, the classification of controlled substances is based upon the federal classification system.

Felony is a serious crime usually punishable by imprisonment for more than one year or by death.⁵⁴⁵ In contrast, a misdemeanour, also called a minor crime, is a crime less serious than a felony and is usually punishable by fine, penalty, forfeitures, or confinement (usually for a brief term) in a place other than prison

(such as a county jail).⁵⁴⁶ Misdemeanours are often treated differently than felonies “[in] the procedures employed in trying such cases as well as [in] the consequences of a conviction”.⁵⁴⁷

Mandatory sentencing, also known as determinate or fixed sentencing, is a statutorily specified penalty that automatically follows a conviction for the offence, often with a minimum mandatory term.⁵⁴⁸ Mandatory minimum sentencing laws require judges to administer minimum sentences for certain federal and state crimes based on the charges a prosecutor brings against a defendant which result in a conviction.⁵⁴⁹ The most common of these laws deal with drug-related offences. Because judges cannot lower the sentences, even for extenuating circumstances, such mandatory sentences have the effect of transferring some sentencing power from judges to prosecutors.⁵⁵⁰

States differ materially in relation to the approach taken and the discretion of the judiciary in making sentencing decisions. For example, some states such as Colorado and Ohio have principles-based sentencing legislation which provide a wide discretion to the judiciary in making sentencing decisions. Some states provide specific guidance to the judiciary through statutorily recognised mitigating and aggravating factors.

⁵⁴³. See Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, Prison Policy Initiative (Nov. 13, 2018), www.prisonpolicy.org/reports/pie2018women.html; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), www.prisonpolicy.org/reports/pie2019.html.

⁵⁴⁴. See *Ibid.*

⁵⁴⁵. *Felony*, Black's Law Dictionary (11th ed. 2019).

⁵⁴⁶. *Misdemeanor*, Black's Law Dictionary (11th ed. 2019).

⁵⁴⁷. *Ibid.* (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 15 (3d. 3d. 1982)).

⁵⁴⁸. *Mandatory sentencing*, Black's Law Dictionary (11th ed. 2019).

⁵⁴⁹. See *Sentencing and Mandatory Minimum*, The Leadership Conference On Civil And Human Rights (Mar. 28, 2018), civilrights.org/resource/sentencing-and-mandatory-minimums; *Mandatory Sentencing and Sentencing Reforms*, Criminal Justice Policy Foundation, www.cjpf.org/mandatory-minimums (last visited Aug. 29, 2019).

⁵⁵⁰. *Ibid.*

Others, such as **New York**, provide for a more technical sentencing matrix, with judicial discretion generally operating to correct disproportionality.

Many states' sentencing guidelines are intended to be entirely neutral as to factors such as race, sex, national origin, creed and socio-economic status. Accordingly, most states recognise mitigating factors such as coercion and aggravating factors such as violence, but otherwise states typically do not explicitly recognise factors which are indirectly disproportionately relevant to female offenders. That said, in most states, the relevant factors which judges may consider in making sentencing decisions are not closed, and there are some notable exceptions to the rule, such as **Colorado** and **Illinois** which have recognised, for example, offenders' domestic situations.

Alternative approaches are also available in some jurisdictions. For example, under the **California** Penal Code, women convicted of non-violent offences are generally eligible for alternative custody programmes in lieu of confinement in state prison. An alternative custody programme is a voluntary programme developed for eligible offenders that allows them to serve up to the last 12 months of their sentence in approved facilities in their community rather than state prison.⁵⁵¹ Such alternative custody programmes allow qualified incarcerated women to reunite families and keep children out of the foster care system.⁵⁵² However, these initiatives tend to be state-specific and do not appear to be widespread. Most states also have specialised drug courts, which may in some cases allow treatment programmes as an alternative to incarceration or diversion policies for offenders completing treatment programmes.⁵⁵³

Drug courts present an alternative to incarceration for people arrested for minor drug-related offences and offer court-supervised treatment for offenders.⁵⁵⁴ Generally, judges preside over drug court proceedings, monitor offenders' progress with scheduled and random drug testing, status hearings in court, punitive sanctions and incentives.⁵⁵⁵ They serve to reduce prison and jail populations and ensure comprehensive court-supervised substance abuse treatment for those who need it.⁵⁵⁶ The United States has established

the drug courts in all 50 states and its territories and other countries (particularly in Latin America and the Caribbean) are adopting drug courts.⁵⁵⁷

According to the findings in a report conducted by Drug, Security and Democracy Program (the "**Report**"), the drug courts have limited impact on reducing incarceration for drug-related offences and evidence is mixed about the courts' effectiveness in reducing cost, recidivism and time spent in prison.⁵⁵⁸ For instance, many people who could benefit from drug courts are not eligible because drug courts generally limit eligibility to those charged with drug possession or non-violent drug-related substances, so offenders with prior violent offences or subject to overriding sentences (such as mandatory minimum sentences) are excluded from some drug courts.⁵⁵⁹ Moreover, drug courts are costly and cumbersome because they "*increase[e] criminal justice supervision and subject[] those who fail to graduate to harsher penalties than they might otherwise have received*".⁵⁶⁰

The National Drug Court Institute reports that 32% of all state drug court participants are female, while 25% of state probationers are female and only 7% of state prisoners are female. While women receive access to drug courts in numbers proportionate to their population in the criminal justice system, the Report found that they graduate at rates substantially below those of male drug court participants.⁵⁶¹ Women in drug courts have limited access to treatment tailored to their specific needs and circumstances – including pregnancy, childcare responsibilities, distinct patterns of substance use, exposure to trauma and domestic violence, and dependence on opioids.⁵⁶² The Report also found some evidence that there is a higher retention rate and improvement for women offenders when drug courts offer treatment facilities with childcare, prenatal care and special programmes for pregnant women or have women-centred programmes.⁵⁶³

Limited data on types of penalties and length of prison sentences was identified, with most academic discourse focused either on female incarceration in general, or incarceration for drug-related offences as a whole. In addition, comparisons across states tend to be difficult due to the differing severity of statutory penalties and sentencing approaches from state to state.

⁵⁵¹ *Alternative Custody Program*, California Department Of Corrections And Rehabilitation, www.cdcr.ca.gov/adult-operations/acp (last visited Aug. 29, 2019).

⁵⁵² *Alternative Custody Program (2015)*, California Women's Law Center, www.cwlc.org/download/alternative-custody-program (last visited Aug. 29, 2019).

⁵⁵³ For a detailed discussion of such courts, please see www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.

⁵⁵⁴ See *Drugs, security and democracy program*, Drug courts in the americas, social science research council, 1, 9 (Oct. 2018).

⁵⁵⁵ *Ibid.* at. 12.

⁵⁵⁶ *Ibid.* at. 2, 9.

⁵⁵⁷ *Ibid.* at. 1.

⁵⁵⁸ See *Ibid.* at. 2, 18 ("The courts themselves can be costly: they require the participation of prosecutors, defense attorneys, judges, court staff, case managers, treatment providers, and probation or other community supervisors; residential and outpatient drug treatment; regular drug testing; and jail or prison time. . . ."); 23 (noting mixed results where some drug court graduates show little or no impact on recidivism whereas others experience fewer rearrests and reconvictions);

⁵⁵⁹ *Ibid.* at. 11.

⁵⁶⁰ *Ibid.* at. 2.

⁵⁶¹ *Ibid.* at. 33.

⁵⁶² *Ibid.* at. 33-34.

⁵⁶³ *Ibid.* at. 34.

1. Establishing the crime

QUESTION 1:

What constitutes low-level drug-related offences (e.g. use, possession, supply, low-level trafficking); how are they defined?

Federal

The Controlled Substances Act (“CSA”) Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is the comprehensive federal legislation covering the regulation and control of drugs. Specifically, 21 U.S. Code Part D specifies drug-related offences, such as: (i) 21 U.S.C. § 841, prohibiting, *inter alia*, the manufacture, distribution, dispensing, or possession with intent to manufacture, distribute or dispense, of a controlled substance; (ii) 21 U.S.C. § 844, prohibiting to knowingly possess or the intentional possession of a controlled substance except where obtained from a licensed practitioner; and (iii) 21 U.S.C. § 856, penalising the maintenance of “*drug-involved premises*” (to “knowingly open, lease, rent, use, or maintain any place, *whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance*[.]”).

The CSA categorises drugs into five schedules based on their medical value, potential for abuse and status in international treaties. Generally speaking, drugs in Schedule I are the most strictly regulated and carry a heavier range of criminal penalties than substances appearing in later schedules.⁵⁶⁴ However, some drugs (for example, marijuana, which is technically classified as a Schedule I drug) have standalone penalty statutes. Many states have based their own classification system upon the federal system, although some states have diverged to some degree, for example in relation to the legality or classification of marijuana.

Both federal and state laws come into play on drug-trafficking cases. If a person is caught trafficking a controlled substance across state lines, federal law will apply, but if the drug trafficking is entirely within one state, that state’s laws will usually apply.

Arizona

Personal possession (other than possession for sale, production, manufacturing or transportation for sale) or use of a controlled substance is generally treated as a less severe class of felony (Class 4). However, if the defendant has not had past felony convictions and the dangerous drug was not a type of amphetamine, the crime may be a Class 1 misdemeanour. In Arizona, “dangerous drug” includes almost every drug other than marijuana, including prescription narcotics. In addition,

offenders who qualify under Arizona’s Proposition 200 (a first or second conviction for personal possession or use), are generally eligible for probation rather than incarceration.⁵⁶⁵ After Proposition 200 passed, judges can no longer send first – or second – time nonviolent drug offenders to prison until their third conviction. The standard sentence is a term of probation and mandatory drug treatment programme; however, if probation is violated, a jail term can be imposed.

Possession for sale and transport for sale are considered Class 2 felonies, which means they are likely to carry higher prison sentences. Possession or transportation for sale charges include offenders who are caught in the act of selling drugs and may also include offenders who are in mere possession of drugs if the amount possessed is more than the threshold amount. In Arizona, generally, the amount of the controlled substance in possession is used for the determination of whether such possession was intended for personal use or possession for sale. For example, threshold amounts of amphetamine and methamphetamine are 9 grams, 9 grams of powder form cocaine, 750 milligrams of rock form cocaine, 0.5 millilitre of LSD, 2 pounds of marijuana and 4 grams of PCP. Even if the threshold amounts are not met, police and prosecutors will look for other evidence supporting an intent to sell, such as large amounts of cash, packaging style of drugs, possession of other paraphernalia (plastic bags, cutting agents, scales, etc.), ledgers, and recorded communications involving drug transactions.

Possession of chemicals and supplies to make other dangerous drugs is a Class 3 felony.

Sentencing and penalties vary depending on personal possession versus possession for sale or transportation. Factors considered in sentencing are non-gendered elements such as amount of drugs involved as well as the offender’s history of felony convictions. If the amount of drugs fall below the threshold amount and it is the offender’s first-time offence, then the sentence may range from probation to 12 and a half years in prison. However, if the amount of drugs possessed exceed threshold amount, even first-time offenders must be sentenced to prison (typically between three and 12 and a half years). If the offender has two prior felony convictions, then the prison term may be between 10 and 35 years.

Sentencing for possession or use of methamphetamine in Arizona is particularly harsh. A first-time offender for possession of methamphetamine may be sentenced to a maximum sentence for three and three-quarter years in prison, whereas an offender for possession for sale results in a mandatory sentence of five to

⁵⁶⁴. Federal statute, at 18 U.S.C. § 3559 (2006), sets out the sentencing classification of federal criminal offences ranging from Class A felonies (punishable by life imprisonment or death, if that is the maximum penalty), down to infractions (punishable by five days’ imprisonment or less).

⁵⁶⁵. A.R.S. §§ 13.3401-13.3408. Statutes available at: www.azleg.gov/arsDetail/?title=13.

15 years. An offender with felony conviction history may receive a mandatory sentence of two and one-quarter to seven and a half years in prison for possessing methamphetamine, whereas possession for sale or transportation results in a mandatory prison sentence of ten to 20 years. Prison sentences imposed for methamphetamine must be served in full prior to release, unlike prison sentences for other drugs where the offender must serve only 85% of the sentence.

California

In November 2014, Proposition 47 relaxed some of California's drug possession laws, lowering possession for use of a controlled substance to a misdemeanour in most cases. However, such misdemeanours remain punishable by up to one year in prison depending on the amount and type of controlled substances, which are categorised into six schedules under the California Health and Safety Code 11350.

California also has a specialised drug court system with specialist treatment diversion programmes for first-time offenders who use or are dependent on drugs.

Possession, or transport, for sale of a controlled substance is a felony generally punishable pursuant to the California Determinate Sentencing Law. Transport between non-contiguous counties increases the severity of the crime. Soliciting, inducing, encouraging or intimidating any minor with the intent that such minor violates any law regarding the possession of a controlled substance is also treated as a more serious felony than mere possession or transport for sale.

In addition, any person convicted of non-violent drug possession, absent other prior convictions or extenuating circumstances, receives a sentence of probation rather than incarceration.⁵⁶⁶

Colorado

Colorado has legalised the possession and use of marijuana (within some limits) but, under the Colorado Revised Statutes, it otherwise remains a felony to possess, use, distribute, manufacture, dispense or sell controlled substances.

The severity of the penalty is determined by the relevant controlled substance and its quantity. In Colorado, the type of drug has less bearing on the charge than the quantity. The relevant controlled substances and the relevant quantities for criminal prosecution are set forth in Schedules I-V of Title 18 of the Colorado Revised Statutes.⁵⁶⁷ These schedules are modelled after those established by the federal government.

Colorado drug laws favour treatment over imprisonment in terms of drug-related offences for personal use. Consequently, unlawful possession of small quantities of all but the most serious controlled substance is a misdemeanour. However, when the drugs are narcotics or the offence is sales or manufacturing, the offence could amount to a felony, which can include both prison time and fines. This depends on various factors such as the schedule on which the drug is listed (the more serious the drug, the more serious the sentence), the quantity of drugs involved, purpose of drugs (personal use, sale, large-scale distribution), habitual drug offender or history of drug-related convictions, and probation, parole or incarceration for a felony offence.⁵⁶⁸

Generally, low-level drug-related offences include possessing less than 14 grams of cannabis, ecstasy, heroin, psychedelics, morphine, methadone and methylphenidate, "Ritalin", or less than 7 grams of methamphetamine, ketamine or cathinones. However, repeat offenders will be subject to higher sentences.

It is also a "petty offence" (resulting in a fine of up to \$100) to possess drug-related paraphernalia.

Illinois

In Illinois, it is unlawful for any person knowingly to possess a controlled or counterfeit substance or controlled substance.⁵⁶⁹ Offences for the possession of controlled substances are more or less severe depending on the type of drug involved and the quantity of drug involved, ranging from a Class C misdemeanour (anabolic steroids) to a Class 1 felony. Possession of such substances with intent to manufacture or deliver are more severely punished.

Persons convicted pursuant to § 401 above will be charged with a Class 3 felony (1 being the most severe, and 4 the lowest-level felony) if the amounts of the controlled substance are less than 1g of heroin, fentanyl or cocaine, 10g of morphine, 5g of LSD, 50g of peyote, and as otherwise detailed in the statute. Possession of amounts less than 15g of heroin, cocaine, morphine, LSD and others set forth in the statute will be a Class 4 felony.⁵⁷⁰

Persons who manufacture, deliver, possess or possess with intent to deliver more than one type of prohibited controlled substance may be subject to multiple convictions and sentences. For the most part, manufacturing drugs is a Class 4 felony.

⁵⁶⁶. California Health and Safety Code Sections 11350-11392 leginfo.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=HSC&division=10.&title=&part=&chapter=&article= California Penal Code Section 1210.1 leginfo.ca.gov/faces/codesTOCSelected.xhtml?tocCode=PEN&tocTitle=+Penal+Code++PEN.

⁵⁶⁷. Colo. Rev. Stat. Ann. §18-18-403.5, § 18-18-404, § 18-18-405.

⁵⁶⁸. See *Ibid.* § 18-18-403.5.

⁵⁶⁹. § 402 Possession of Controlled Substance.

⁵⁷⁰. 720 Ill. Comp. Stat. Ann. 570/402 Illinois Controlled Substances Act is available here: www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1941&ChapterID=53.

Under § 401.1, “any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver a controlled or counterfeit substance in this or any other state or country is guilty of controlled substance trafficking”. Convictions for trafficking attract penalties of between twice the minimum and twice the maximum term assigned for manufacture offences.

New York

New York is known for having some of the toughest drug laws in the country. The statutory framework addresses the sale and possession of drugs (controlled substances) in the New York State Penal Law, which are also known as the Rockefeller Drug Laws.

In New York, the Penal Law classifies substance offences according to the type and weight of the drugs possessed, sold, or used. While the Penal Law does not explicitly define what constitutes “low-level drug-related offences”, the offences are broken up into various tiers or classes – from Class A felonies that are the most serious, to Class E felonies that are the least serious.⁵⁷¹ For instance, a Class A-1 felony offence, including the possession of 8 or more ounces of substances containing a narcotic drug, may result in a sentence of 8 to 20 years in prison or a \$100,000 fine.⁵⁷² Sentences for offences for Class B to Class E felonies range from one to nine years’ imprisonment or fines from \$15,000 to \$40,000 for Class B and Class C felonies.⁵⁷³ Moreover, there are three types of misdemeanour, which encompass low-level drug crimes such as the unlawful possession of marijuana that may lead to no more than 15 days of imprisonment or a fine of less than \$250.

The definitions of various drug-related offences are found in New York statutes and case law. A person is guilty of the criminal sale or possession of a controlled substance under New York law if the offender knowingly and unlawfully sells or possesses a specified controlled substance, sometimes at a particular location, and often of a specified aggregate of pure weight.⁵⁷⁴

Under New York law, the sale of drugs is defined expansively. To sell means to sell, exchange, give or dispose of to another person, or to offer or agree to

do the same.⁵⁷⁵ The sale does not require money to be exchanged in return for the drug substances, or even for the actual sale to be consummated.⁵⁷⁶

Possession means physical possession or otherwise to exercise dominion or control over the tangible property.⁵⁷⁷ A person is deemed to have physical possession by holding the property in his or her hand or carrying it in or on his or her body or person.⁵⁷⁸ Moreover, constructive possession is established by the burden on the prosecution to prove that the defendant exercised dominion or control over the area where the contraband is found; however, the prosecution is not required to establish that the defendant had exclusive access to the area.⁵⁷⁹

Whether a person is considered a trafficker depends on the quantity of drugs, and the role of the person in the drug business chain. As part of the 2009 Drug Law Reform Act, the focus of drug crime enforcement shifted towards major drug traffickers, so-called “kingpins”.⁵⁸⁰ The 2009 Reform added a new crime of “operating as a major trafficker”, which applies to directors and profiteers of controlled substance organisations who sell controlled substances worth \$75,000 or more in a six-month period, or act as the leader of an organisation that sells controlled substances worth \$75,000 or more in a 12-month period.⁵⁸¹ The statute addressing kingpins is the only drug offence statute that imposes an indeterminate sentence under the existing law.

Ohio

Ohio has strict drug laws which prohibit possession and use of controlled substances. All drug-related offences under Ohio law are codified at Chapter 2925: Drug Offences of the Ohio Revised Code. Ohio categorises drugs into five schedules, based in essence on the federal classification system. Possession of drugs falling within Schedule I or II gives rise to an aggravated possession of drugs charge.

The lowest-level drug-related offences (fifth-level felonies) apply where the conduct involves less than 200g of marijuana, less than 5g of cocaine or less than 1g of LSD.⁵⁸² Offences involving less than 20g of marijuana are considered a minor misdemeanour for the first offence.⁵⁸³

⁵⁷¹ N.Y. Penal Law §§ 70.70(a)(i)-(iv) (setting out term of determinate sentences for felonies in Class B to Class E); N.Y. Penal Law §§ 70.71(a)(2)-(5) (setting out sentences of imprisonment for a Class A felony drug offender); see also *New York Drug Possession Laws*, FindLaw, statelaws.findlaw.com/new-york-law/new-york-drug-possession-laws.html (last visited Oct. 28, 2018).

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ See William C. Donnino, *Practice Commentary of N.Y. Penal Law* § 220.00 (Westlaw, 2018).

⁵⁷⁵ N.Y. Penal Law § 220.00(1); see *People v. Logan*, 695 N.Y.S.2d 4 (App. Div. 1999); *People v. Valentin*, 53 N.Y.S.3d 592 (2017).

⁵⁷⁶ See N.Y. Crim. Law § 29:4 (McKinney, current through L.2018, chapter 1 to 321); see also *People v. Mike*, 92 N.Y.2d 996 (1998); cf. *People v. Whitehead*, 13, N.Y.S. 3d 642 (2015).

⁵⁷⁷ N.Y. Penal Law § 10:00(8) (McKinney, 2008); see also N.Y. Crim. Law § 29:12 (McKinney, 2008).

⁵⁷⁸ See William C. Donnino, *Practice Commentary of N.Y. Penal Law* § 220.00 (Westlaw, current through L.2018, ch. 1 to 321).

⁵⁷⁹ N.Y. Crim. Law § 29:11.

⁵⁸⁰ See William C. Donnino, *Practice Commentary of N.Y. Penal Law* § 220.00; see also *Edward J. Maggio, New York's Rockefeller Drug Laws, Then and Now*, 78 N.Y. ST. B.J. 30, 31-32 (2006) (introducing the additions in the 2009 Drug Law Reform Act).

⁵⁸¹ New York Penal Law §§ 220.77(1)-(3) (describing when a person is guilty of operating as a major trafficker).

⁵⁸² See, e.g., O.R.C. § 2925.03.

⁵⁸³ *Ibid.*

Under the Ohio Revised Code, drug trafficking is defined as follows: “(1) Sell[ing] or offer[ing] to sell a controlled substance or a controlled substance analog; (2) Prepar[ing] for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person”.

The punishment for drug trafficking can vary widely depending on several factors, including the type and quantity of drugs involved, the type of drugs, geographic area of distribution, and whether children were targeted.

The Ohio Sentencing Commission publishes a Drug Offence Quick Reference Guide which sets out the various categories of drug-related offences.⁵⁸⁴

Washington

Under Washington State law, drug-related offences are codified by the Uniform Controlled Substances Act Chapter 69.50, Article IV Offences and Penalties of the Washington Revised Code (“RCW”).

The severity of drug possession charges depends primarily on the type of drug and amount, as well as other factors such as the existence of prior convictions. Washington also has alternative sentencing provisions, for example, allowing treatment-based diversion programmes for offenders meeting certain criteria.

According to RCW 69.50.401,⁵⁸⁵ the manufacturing, possession or delivery of any form of a controlled substance included in the statute’s Schedule I or II and classified as a narcotic, flunitrazepam or amphetamine is considered a Class B felony and, upon conviction, offenders may be imprisoned for a maximum of 10 years, fined or both. The fine may be determined as follows:

- A maximum of \$25,000 if the crime involved less than 2 kilograms of the drug.
- A maximum of \$100,000 for the first 2 kilograms and a maximum of \$50 for each gram in excess of 2 kilograms.

According to RCW 69.50.401, the manufacturing, possession, or delivery of any form of a controlled substance included in Schedule I, II, III, IV or V,⁵⁸⁶ but not classified above as a Class B felony, is considered

a Class C felony, which RCW 9A.20.021⁵⁸⁷ defines as punishable by up to five years in prison, a maximum fine of \$10,000 or both.

For the purposes of Washington State law, the manufacture, possession or delivery of controlled substances in large quantities would be considered trafficking.

West Virginia

West Virginia classifies drugs into five Schedules, ranging from the most dangerous or addictive (Schedule I) to the least dangerous or addictive (Schedule V). Low-level crimes are divided into possession, possession with the intent to distribute and drug distribution – along with certain other specified crimes.

Knowingly or intentionally possessing a controlled substance without a valid prescription is prohibited.⁵⁸⁸ Possessing controlled substances covered by Schedule I (such as marijuana and heroin) or Schedule II (such as cocaine) for personal use is a misdemeanour and is punishable by 90 days to six months in jail, and up to \$1,000 in fines.⁵⁸⁹ For a second or additional offence, the penalties double to one year jail time and at most \$2,000 in fines.⁵⁹⁰

To deliver drugs means the actual, constructive or attempted transfer from one person to another of: (1) a controlled substance whether or not there is an agency relationship; (2) a counterfeit substance; or (3) an imitation controlled substance.⁵⁹¹

To distribute means to deliver, other than by legally administering or dispensing, a controlled substance, a counterfeit substance, or an imitation controlled substance.⁵⁹² To dispense means to deliver to a person who lawfully possesses a controlled substance for his or her use or for administering to an animal owned by him or her.⁵⁹³ The penalty for distributing or dealing depends on the type of drug (as listed in the Schedules). For instance, dealing marijuana is a felony offence that can be punished by one to five years in prison and a fine of up to \$15,000; and a second offence can result in a sentence of double the regular penalties.⁵⁹⁴ Selling cocaine is a felony that can result in one to

⁵⁸⁴. Ohio Sentencing Commission, Drug Offence Quick Reference Guide, available at www.supremecourt.ohio.gov/Boards/Sentencing/resources/judPractitioner/drugQuickRef.pdf.

⁵⁸⁵. See “Prohibited Acts: A—Penalties” RCW 69.50.401 app.leg.wa.gov/RCW/default.aspx?cite=69.50.401.

⁵⁸⁶. See the Schedules under Uniform Controlled Substances Act Chapter 69.50: Schedule I app.leg.wa.gov/RCW/default.aspx?cite=69.50.204; Schedule II app.leg.wa.gov/RCW/default.aspx?cite=69.50.206; Schedule III app.leg.wa.gov/RCW/default.aspx?cite=69.50.208; Schedule IV app.leg.wa.gov/RCW/default.aspx?cite=69.50.210; Schedule V app.leg.wa.gov/RCW/default.aspx?cite=69.50.212.

⁵⁸⁷. See “Maximum sentences for crimes committed July 1, 1984, and after” RCW 9A.20.021.

⁵⁸⁸. See West Virginia Cocaine Laws, statelaws.findlaw.com/west-virginia-law/west-virginia-cocaine-laws.html (last visited Nov. 16, 2018).

⁵⁸⁹. See West Virginia Marijuana Laws, statelaws.findlaw.com/west-virginia-law/west-virginia-marijuana-laws.html (last visited Nov. 16, 2018); West Virginia Cocaine Laws, statelaws.findlaw.com/west-virginia-law/west-virginia-cocaine-laws.html (last visited Nov. 16, 2018).

⁵⁹⁰. *Ibid.*

⁵⁹¹. W. VA. Code Ann. § 60A-1-101(h) (West Current with legislation of the 2018 First Extraordinary Session).

⁵⁹². W. VA. Code Ann. § 60A-1-101(k).

⁵⁹³. W. VA. Code Ann. § 60A-1-101(i).

⁵⁹⁴. See West Virginia Marijuana Laws, statelaws.findlaw.com/west-virginia-law/west-virginia-marijuana-laws.html (last visited Nov. 16, 2018).

15 years in prison and/or a fine of up to \$25,000; and a second offence can result in a sentence of double the regular penalties.⁵⁹⁵

Trafficking means to transport or cause to be transported into West Virginia with the intent to deliver the controlled substance or with the intent to manufacture a controlled substance.⁵⁹⁶ The penalty varies depending on the type of drug as set out in Schedules I to V.⁵⁹⁷

QUESTION 2:

To what extent do sentencing legislation or guidelines include reference to factors which are relevant for female offenders?

Specifically:

Do they include any relevant mitigating factors such as: coercion, violence, domestic abuse, dependent children, sole head of a family, poverty, housing situation, foreign national or ethnic minority, did she have legal representation? What quantity of drugs constitutes “trafficking”?

Do they include any relevant aggravating factors such as: involvement of minors, violence, links with organised crime (consideration of role in organised crime should be noted, however, as a mitigating factor – see above)?

With regard to drug supply, do they take into account the role of women in the chain (i.e. is she a drug courier? What was the (financial) gain for the woman? Is she leading or benefiting greatly from the transaction?)

Federal

The Federal Sentencing Guidelines (“Guidelines”) are used as the starting point and the “initial benchmark” in imposing a sentence.⁵⁹⁸ Federal sentencing judges are permitted to “exercise a wide discretion in the sources and types of evidence used to assist [...] in determining the kind and extent of punishment to be imposed within limits fixed by law...particularly the fullest information possible concerning the defendant’s life and characteristics”.⁵⁹⁹

Nevertheless, sentencing judges are required to give “serious consideration to the extent of any departure from the Guidelines” and are required to explain

any conclusion that an unusually lenient sentence is appropriate in a particular case with sufficient justifications”.⁶⁰⁰ A sentencing judge’s decision will be reviewed by appellate courts for reasonableness of a sentence outside the range suggested by the Guidelines.⁶⁰¹

The Guidelines do not explicitly provide that gender-related considerations be taken into account in sentencing, as they are intended to be “entirely neutral” as to race, sex, national origin, creed and socio-economic status.⁶⁰² Additionally, lack of representation is generally not a factor in sentencing because all criminal defendants have a right to legal representation in criminal trials under the Sixth Amendment to the United States Constitution.

Mitigating factors

While the Guidelines do not explicitly mention potentially mitigating factors such as domestic abuse or violence, poverty, or housing situation as reasons to depart from the recommended sentence,⁶⁰³ certain provisions do allow for departures from the recommended sentence. For example, mental and emotional conditions, if present to an unusual degree and distinguishing the case from the typical cases covered by the Guidelines, may warrant a downward departure under the Guidelines”.⁶⁰⁴ Similarly, the Guidelines provide that a downward departure may be warranted in cases where the defendant committed the offence because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defence.⁶⁰⁵

Aggravating factors

Under the Guidelines § 2D1.2, the applicable sentence may be increased if it occurred near protected locations or involved an underage or pregnant individual. Additionally, under Guidelines § 2D1.1, the applicable sentence may be increased if the defendant used violence, made a credible threat to use violence, or directed the use of violence. Lastly, links to organised crime may trigger the application of relevant conspiracy statutes and, in some cases, may increase the applicable Guidelines sentence.⁶⁰⁶

⁵⁹⁵ See West Virginia Cocaine Laws, statelaws.findlaw.com/west-virginia-law/west-virginia-cocaine-laws.html (last visited Nov. 16, 2018).

⁵⁹⁶ W. VA. Code Ann. § 60A-4-409(a).

⁵⁹⁷ See W. VA. Code Ann. §§ 60A-4-409(b)(1)-(4).

⁵⁹⁸ *Pepper v. United States*, 562 U.S. 476 (2011) (citing *Gall v. United States*, 552 U.S. 38, 49-51 (2007)).

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Gall v. United States*, 552 U.S. 38, 46 (2007).

⁶⁰¹ *Ibid.*

⁶⁰² See Federal Sentencing Guidelines available at <https://www.ussc.gov/guidelines>.

⁶⁰³ Note that under Guidelines §5H1.6, “family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted”.

⁶⁰⁴ Guidelines § 5H1.3.

⁶⁰⁵ Guidelines § 5K2.12. The Guidelines go on to state that “[t]he extent of the decrease ordinarily should depend on the reasonableness of the defendant’s actions, on the proportionality of the defendant’s actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure”.

⁶⁰⁶ See, e.g., Guidelines § 2D1.5.

Level of participation in drug supply

Under the Guidelines, the applicable sentence may be decreased if a defendant was a “minimal” or “minor” participant in any criminal activity.⁶⁰⁷ The definition of “minimal participant” covers “defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant”. The definition of “minor participant” covers one who is “culpable than most other participants in the criminal activity, but whose role could not be described as minimal”.⁶⁰⁸

The Guidelines at § 3B1.2 gives the following example: “a defendant who is convicted of a drug trafficking offence, whose participation in that offence was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline”.⁶⁰⁹

Similarly, a “defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline”.⁶¹⁰

Lastly, under the Guidelines § 2D1.1, the applicable sentence may be decreased if a defendant receives a “minimal participant” reduction and the offence involves all three of the following: “(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offence and was otherwise unlikely to commit such an offence; (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and (C) the defendant had minimal knowledge of the scope and structure of the enterprise.”

Arizona

The **Arizona Drug Sentencing Guidelines** take into account certain relevant factors, but none of which are explicitly related to gender. Relevant factors include the person’s conviction history (e.g., repeat offender), type and quantity of drug involved, intention and purpose of drug (e.g., personal use, sale, manufacturing). In Arizona, felonies are divided into five classes (Class 2 to Class 6). Each class has five potential sentences: (i) “mitigated” sentence is available if at least two mitigating factors are involved; (ii) “minimum” sentence

is available if at least one mitigating factor is proven; (iii) “presumptive” sentence is the normal sentence for the crime; (iv) “maximum” sentence is available if at least one aggravating factor is shown; and (v) “aggravated” sentence is for crimes involving at least two aggravating factors.⁶¹¹

Mitigating factors

In Arizona, a judge is required to consider mitigating factors for sentencing. Mitigating factors include: the person’s age, recognition of wrong doing or difficulty obeying the law (e.g., addiction), unusual or substantial duress, role in the crime, nature of the crime, offender’s character or background or circumstances that the judge finds relevant.⁶¹²

Aggravating factors

Aggravating factors include (but are not limited to): infliction or threatened infliction of serious physical injury; use or threatened use or possession of a deadly weapon or dangerous instrument; vicinity to a school; involvement of minors; gang-related crimes; crime committed while on parole; presence of an accomplice.⁶¹³ In addition, the knowing use of a minor in relation to drug-related offences increases the severity of the class of felony.⁶¹⁴

Level of participation in drug supply

It is a relevant mitigating factor if the degree of the defendant’s participation in the crime was minor, although not so minor as to constitute a defence to prosecution.⁶¹⁵ Otherwise, there is no mitigating factor in respect of limited financial gain or the role of a woman in the overall chain of drug trafficking except for the general consideration of the defendant’s character or background or the nature or circumstances of the crime.⁶¹⁶

Certain classes of “serious drug-related offences” are subject to increased sentences where such drug-related offences are part of a pattern of engaging in prohibited drug-related offences and represent a source of income exceeding \$25,000 for a calendar year.

California

Under the **California Penal Code**, women convicted of non-violent offences are generally eligible for alternative custody programmes in lieu of confinement in state prison. Such alternative custody programmes include, but are not limited to, confinement in a residential home

⁶⁰⁷. Guidelines § 3B1.2.

⁶⁰⁸. *Ibid.*

⁶⁰⁹. *Ibid.*

⁶¹⁰. *Ibid.*

⁶¹¹. See Ariz. Rev. Stat. Ann. §§ 13-701 – 13-7023 (Current through the First Reg. Sess. Of the 54th Legis. 2019).

⁶¹². *What Factors Influence Sentencing in Drug Offenses in Arizona?*, Blichak Law, www.phoenixcriminaldefense.com/drug-offenses/factors-influence-sentencing-drug-offenses-arizona (last visited Aug. 29, 2019).

⁶¹³. *Ibid.*

⁶¹⁴. *Ibid.* §§ 13-701.D, 13-3409.

⁶¹⁵. *Ibid.* § 13-701.E.

⁶¹⁶. *Ibid.* §§ 13-3410, 13-701.

during designated hours, confinement to a residential drug or treatment programme during designated hours (addressing individualised treatment for: housing; employment; transportation; substance abuse; parenting and life skills; anger management and criminal thinking; career technical education programme and educational needs; social service needs; and medical, dental, and mental health needs),⁶¹⁷ or confinement to a transitional care facility. As a result of a federal court case regarding equal protection, *Sassman v. Brown*, 99 F.Supp.3d 1223 (E.D.Cal. 2015), this alternative custody programme has also been extended to male prisoners otherwise meeting the relevant eligibility criteria.⁶¹⁸

Mitigating factors

Mitigating factors that are relevant include: (i) the defendant being a passive participant or playing a minor role in the crime; (ii) the defendant participated in the crime under circumstances of coercion or duress; (iii) the defendant was induced by others to participate in the crime; and (iv) the defendant was motivated by a desire to provide necessities for her family or herself.⁶¹⁹

Aggravating factors

Aggravating factors include that the: (i) defendant induced a minor to commit or assist in the commission of the crime; and (ii) defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.⁶²⁰

Level of participation in drug supply

As noted above, it is a relevant mitigating factor if the defendant was a passive participant or played a minor role in the crime. Otherwise, there is no distinction in the base offences for possession or transport of a controlled substance for sale due to the role in the supply chain.⁶²¹

Colorado

Colorado's sentencing laws are principles-based, with certain discretion for judges to consider the individual circumstances of defendants when imposing jail terms or alternatives to incarceration for low-level drug offences. Depending on the offender's drug offence and criminal history, these rehabilitative alternative sentences include pre-trial diversion for drug misdemeanours or deferred sentences.⁶²² With a pre-trial diversion, trial is delayed so that the offender can complete a court approved treatment programme.

With a deferred sentence following a conviction or a plea of guilty or no-contest to a low-level drug offence, the offender is placed on probation and required to attend a drug-treatment programme. After successfully completing the programme and the probation period, the offender's drug felony will be reduced to a misdemeanour possession. Colorado's criminal code includes discretion for judges to allow certain defendants to undergo certain supervised rehabilitation programmes ahead of, and sometimes in lieu of, trial.⁶²³ The relevant criteria do not reference the gender of the defendant but do include the nature of the crime and the characteristics of the defendant.⁶²⁴ Types of treatment that individuals are referred to include programmes specific for parenting, fighting addiction for teens and young adults, mental health treatment, substance abuse treatment, outpatient rehab inpatient rehab, and other specific drug-abuse programmes.

Mitigating factors

Colorado's criminal code includes certain mitigating factors that may be considered when imposing a sentence, some of which may be relevant to female offenders in particular, such as "*the defendant was under unusual and substantial duress, although not such duress as to constitute a defence to prosecution; or the defendant was a principal in the offence which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defence to prosecution*".⁶²⁵

Level of participation in drug supply

As noted above, it is a relevant mitigating factor if the defendant's participation was relatively minor.

Illinois

Illinois' drug sentencing laws are largely based on the quantity of the controlled substance, but there are certain mitigating factors which trial judges may take into account, as set forth below. A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation.

Mitigating factors

Domestic violence, impact on dependants and other character-based aspects are mitigating factors in sentencing. Mitigating factors include:⁶²⁶

⁶¹⁷. Cal. Code Of Reg. 14 CCR §§ 3078.4(b)(1)(A)-(I)(Barclays, current through Aug. 16, 2019 Register 2019, No. 33).

⁶¹⁸. Cal. Penal Code § 1170.05 (West, current with urgency legis. through Ch. 161 of the 2018 Reg. Sess. (noting some statute sections may be more current)).

⁶¹⁹. 2018 California Rules of Court Rule 4.423 www.courts.ca.gov/cms/rules/index.cfm?title=four.

⁶²⁰. 2018 California Rules of Court Rule 4.421.

⁶²¹. California Health and Safety Code Sections 11350-11392.

⁶²². Colo. Rev. Stat. Ann. §§ 18-1.3-101, 102 (West, Current through legis. Effective Aug. 2, 2019 of the 2019 Reg. Sess.).

⁶²³. Colo. Rev. Stat. Ann. § 18-1.3-101.

⁶²⁴. *Ibid.*

⁶²⁵. *Ibid.* § 18-1.3-1201.

⁶²⁶. § 28:48.Factors in mitigation, 6A Ill. Prac., Criminal Practice & Procedure § 28:48 (2d ed.).

- The defendant acted under provocation.
- There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defence.
- The defendant's criminal conduct was induced or facilitated by someone other than the defendant.
- The character and attitudes of the defendant indicate that he or she is unlikely to commit another crime.
- The imprisonment of the defendant would entail excessive hardship to his or her dependants.
- At the time of the offence, the defendant is or had been the victim of domestic violence and the effects of the domestic violence tended to excuse or justify the defendant's criminal conduct.⁶²⁷

New York

Presently, New York's sentencing legislation does not refer to factors that disproportionately affect female drug offenders. The statutory framework primarily focuses on imposing sentences based on the quantity of drugs. Since the 2009 Drug Law Reform Act, judicial discretion has been reintroduced into sentencing based on the circumstances of the offence and the characteristics of the offender. Non-gendered factors that a judge may consider in sentencing mainly include: drug quantity, type of drugs involved, and the offender's criminal record.⁶²⁸

Mitigating factors

There are some mitigating factors, but they are non-gendered and do not disproportionately affect women offenders. Judges can consider mitigating factors such as the nature and circumstances of the crime, and history and character of the defendant.⁶²⁹ They have the authority to divert people convicted of certain felony offences from prison to community-based treatment if the offender is eligible for diversion and has a history of alcohol or substance use or dependence that contributed to the drug charge.⁶³⁰ In New York, an individual with a substance abuse disorder is eligible for diversion, requiring one to plead guilty and present evidence of substance addiction.⁶³¹ Exceptions to eligibility may include offenders charged with a violent

felony offence (depends on court), offenders who risked public safety (e.g., driving under the influence of alcohol), offenders with psychiatric disorders, and offenders with an established residency.⁶³² For misdemeanour violations, judges also have discretion to impose any lesser sentence authorised by law if the definite sentence would be unduly harsh and so long as the alternative sentence would be consistent with public safety and does not depreciate the seriousness of the crime.⁶³³

Previously, under the Rockefeller Drug Laws, there was one instance where judges could take into consideration the context of the women's offence. Judges considered the mitigating aspects of the crime for women in a relationship and whether she (as well as all other offenders) were eligible for the "rare case exception".⁶³⁴ The rare case exception granted the judges a limited opportunity to refuse applying the mandatory sentences and instead exercise their judicial discretion to prescribe a lesser sentence.⁶³⁵ Despite the rare case exception, it was rarely used.

Aggravating factors

The current legal framework includes some aggravating non-gendered factors including violence and the involvement of youths. The 2009 Drug Law Reform Act aims to protect youths. It made the criminal sale of controlled substances to a child a Class B felony for anyone over the age of 21 who knowingly and unlawfully sells a controlled substance to a person younger than 17 years old.⁶³⁶ It also imposed higher penalties on first-time offenders from a determinate sentence with a minimum of one year to a determinate sentence with a minimum of two years.⁶³⁷

Whether the drug-related offence was violent or non-violent is important. Class B to Class E felonies correlate to different sentences depending on whether they are classified as violent or non-violent crimes.⁶³⁸

Level of participation in drug supply

Whether the offender derived a financial gain, led the transaction or organised the transaction are considerations built into the Penal Law. There is a separate section addressing penal law for major drug

⁶²⁷ 14.20 As used in this paragraph (15), "domestic violence" means abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986.

⁶²⁸ N.Y. CRIM. LAW § 29:33 (McKinney, current through L.2019, ch. 144); see also *People v. Galunas*, 966 N.Y.S.2d 280 (App. Div. 2013).

⁶²⁹ E.g. N.Y. Penal Law § 70.15(1)(McKinney, current through L.2019, ch. 144) ("If the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not depreciate the seriousness of the crime").

⁶³⁰ *Id.*; *Background on New York's Draconian Rockefeller Drug Laws*, Drug Policy Alliance, www.drugpolicy.org/sites/default/files/FactSheet_NY_Background%20on%20RDL%20Reforms.pdf (last visited Aug. 29, 2019).

⁶³¹ Rockefeller Institute Of Government's Center For Law & Policy Solutions (Prijenett S. Flores et al.), *An Analysis Of Drug Treatment Courts In New York State* 9-13 (May 23, 2018).

⁶³² *Ibid.*

⁶³³ N.Y. Penal Law § 70.15(1)

⁶³⁴ Eda K. Tinto, *Note: The Role of Gender and Relationship in Reforming Rockefeller Drug Laws*, 76 N.Y.U.L. REV. 910 (June 2001).

⁶³⁵ *Id.*

⁶³⁶ William C. Donnino, *Practice Commentary of N.Y. Penal Law § 220.48* (Westlaw, current through L.2018, ch. 1 to 321).

⁶³⁷ *Id.*

⁶³⁸ YPD crime, *New York State Law - Consolidated Laws of New York's Penal Code: Felony Classes and Sentences*, ypdcrime.com/penal-law/felony_sentences.htm (last visited Oct. 28, 2018) (comparing the sentence of five to 25 years for Class B violent felony with the sentence of one to three years (with 25 years maximum) for Class B non-violent felony).

traffickers. Major drug traffickers include directors and profiteers selling controlled substances worth more than \$75,000 in a given timeframe.⁶³⁹

A person is not a profiteer, however, if he or she acts only as an employee or acts only under the direction and control of others, and exercises no substantial, independent role in arranging or directing the drug transaction in question.⁶⁴⁰ Offenders who are not leading the drug operations – drug couriers, for example – and are not deriving large personal financial gain from the crime are classified as Class B to Class E offenders. For less serious crimes, imprisonment is no longer mandatory for first-time offenders. Courts can impose other sanctions including but not limited to: probation, split sentences, jail terms and drug treatment.⁶⁴¹

Ohio

Ohio's sentencing legislation is principles-based. It provides that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources".⁶⁴² However, the sentencing legislation explicitly provides that a court shall not base a sentence upon the race, ethnic background, gender or religion of the offender.

Mitigating factors

Gender-related factors are not explicitly mentioned in the Ohio sentencing legislation. Lack of legal representation generally should not be a factor in sentencing since the right to the assistance of counsel is guaranteed under the Sixth Amendment of the United States Constitution as well as Article I, Sec. 10 of the Ohio Constitution.

Under Ohio Rev. Code Ann. § 2929.12 (West 2018), mitigating factors relevant to sentencing include whether: (1) the victim induced or facilitated the offence; (2) in committing the offence, the offender acted under strong provocation; (3) in committing the offence, the offender did not cause or expect to cause physical harm to any person or property; and/or (4) there are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defence".⁶⁴³

Aggravating factors

Under Ohio Rev. Code Ann. § 2929.12 (West 2018), aggravating factors relevant to sentencing include whether the offender committed the offence for hire or as a part of an organised criminal activity.

Washington

Drug-related offences committed on or after 1 July 2003 are divided into three seriousness levels and sentenced according to a drug grid (2017 Washington State Adult Sentencing Guidelines Manual⁶⁴⁴ ("**Manual**") Section 4, p. 105), taking into consideration both the "Seriousness Level" and the "Offender Score".

Sentences imposed on or after 1 July 2013 for drug crimes, regardless of the date of the offence, should be calculated and entered in accordance with the grid. The court must impose a sentence within the applicable sentence range indicated by the grid unless it finds "*substantial and compelling reasons justifying an exceptional sentence*".

Mitigating factors

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. Mitigating factors include the existence of duress, coercion, threat or compulsion insufficient to constitute a complete defence but which significantly affected his or her conduct, where the defendant, with no apparent predisposition to do so, was induced by others to participate in the crime, where the defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offence and the offence is a response to that abuse, where the offence involved domestic violence,⁶⁴⁵ and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offence and the offence is a response to that coercion, control, or abuse".⁶⁴⁶

Aggravating factors

The trial court may impose an aggravated exceptional sentence, where the current offence was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offence of its statutory definition.

Level of participation in drug supply

This is more relevant as an aggravating rather than mitigating factor. For example, the presence of the following may identify a current offence as a major

⁶³⁹. See *Practice Commentary of N.Y. Penal Law* §§ 220.77(1)-(3).

⁶⁴⁰. *Id.*

⁶⁴¹. N.Y. Crim. Law § 29:33; see Memo from Al O'Connor, New York State Defenders Association to Criminal Defence Attorneys.

⁶⁴². Ohio Rev. Code Ann. § 2929.11 (West 2018).

⁶⁴³. Ohio Rev. Code Ann. § 2929.12 (West 2016).

⁶⁴⁴. See the 2017 Washington State Adult Sentencing Guidelines Manual www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf.

⁶⁴⁵. As defined in RCW 10.99.020.

⁶⁴⁶. See "Departure from the Guidelines" RCW 9.94A.535 app.leg.wa.gov/RCW/default.aspx?cite=9.94A.535.

VUCSA: the circumstances of the current offence reveal the offender to have occupied a high position in the drug distribution hierarchy; the current offence involved a high degree of sophistication or planning, occurred over a lengthy period of time or involved a broad geographic area of disbursement; the defendant committed the offence to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organisation, association or identifiable group; or the defendant committed the offence with the intent to directly or indirectly cause any benefit, aggrandisement, gain, profit, or other advantage to or for a criminal street gang's (as defined in RCW 9.94A.030) reputation, influence, or membership.

West Virginia

In West Virginia, the legislation does not explicitly specify factors that are disproportionately relevant for female offenders. Under the general provisions concerning crimes and their punishments in the West Virginia's statutes, section 61-11-1a, however, distinguishes offenders who are women from men. Section 61-11-1a states, "*upon conviction of a female for a felony and subsequent sentence of confinement, the trial court shall sentence her to the custody of the state department of corrections*".⁶⁴⁷ There is no language guiding how a court should sentence men who are convicted of a felony.⁶⁴⁸

According to the West Virginia Supreme Court of Appeals, there is an emerging body of authority which sets forth guidelines which trial courts should follow and factors which the trial courts should consider in sentencing defendants convicted of drug-related offences.⁶⁴⁹ Some of these factors include aggravating and mitigating circumstances of the particular drug offence.⁶⁵⁰ While the factors do not distinguish between the amounts of illegal controlled substances involved, the courts view the factors as important guidelines, for example, in sentencing persons convicted of drug-related offences, and especially important where the drug was marijuana, the amount involved was less than 15 grams and the conviction was a first offence.⁶⁵¹

Mitigating factors

These types of mitigating factors are not explicitly mentioned. However, pursuant to case law, the judges are given a large amount of discretion when sentencing offenders.

Aggravating factors

The penalties are harsher for drug-related crimes that involve sales to minors or are within school zones. A person convicted of a felony violation and is to be incarcerated faces harsher penalties if: (1) a person convicted of a felony violation is 21 years of age or older and the person to whom the controlled substance was distributed is under 18 years of age at the time of the distribution; or (2) a person convicted is 18 years of age or older and the distribution occurred in or within 1000 feet of a school in West Virginia.⁶⁵²

Level of participation in drug supply

These are not particularly relevant, aside from the harshness of the penalty for certain types of offences. The penalties for possession are particularly weak in West Virginia. The penalties for distribution of certain drugs are harsher (maximum of 15 years) than those operating a clandestine laboratory (with a maximum of 10 years).⁶⁵³

QUESTION 3:

Do courts take into account gendered elements in setting sentences in practice (whether following legislation/guidance or otherwise)? What level of discretion do courts have in setting sentences for low-level drug-related offences?

Federal

The Guidelines as a whole, as well as the specific provisions listed above, are routinely taken into account by courts in imposing sentences relating to drug-trafficking crimes. Although the Guidelines are not binding, sentencing judges are required to give "*serious consideration to the extent of any departure from the Guidelines*" and are required to explain their conclusions that an unusually lenient sentence is appropriate in a particular case with sufficient justifications".⁶⁵⁴

Arizona

Evidence does not support gendered elements being considered in practice. Arizona has the sixth highest female state imprisonment rate for 2016. In addition, drug-related offences represent a disproportionate amount of the commitment offences for the confined population of women in Arizona prisons, as 32.6% of the confined female population in Arizona prisons were incarcerated for drug crimes relative to a 22% rate of drug crimes for the confined population generally.⁶⁵⁵

⁶⁴⁷ W. Va. Code Ann § 61-11-1(a)(Current with Legis. through the 2019 Reg. Sess. and with laws of the 2018 First Extraordinary Sess. approved through Aug. 7, 2019).

⁶⁴⁸ Cf. *Ibid.*

⁶⁴⁹ *State v. Nicastro*, 383 S.E.2d 521, 528 (W. Va. 1989).

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

⁶⁵² W. VA. Code Ann. §§ 60A-4-406(a)-(b).

⁶⁵³ Cf. W. VA. Code Ann. § 60A-4-409.

⁶⁵⁴ Gall, 552 U.S. at 46.

⁶⁵⁵ The Sentencing Project, "Fact Sheet: Incarcerated Women and Girls:1980-2016", May 2018 and Arizona Department of Corrections, "Admissions, Releases, Confined Population Fact Sheet", FY2017.

California

There is no explicit gendered element to sentencing for drug crimes under California law. Each felony offence has a low, medium and high range for the sentence which the judge determining the sentence assigns based on the presence of mitigating and aggravating factors (noted above) under the California Determinate Sentencing Law.⁶⁵⁶

Colorado

Sentencing decisions from the trial court level are not publicly available. Gender-related considerations do arise in the context of appellate review of convictions and sentencing decisions (though sentences are largely affirmed upon appellate review).

In *People v Jackson*, the Court of Appeals held that a “sentence of one to three years’ imprisonment for unlawful possession of a controlled substance would be reduced where it appeared that, other than during the seven-month period that the accused was a drug user, she was a good citizen and concerned mother of seven children and where she was no longer a drug user”.⁶⁵⁷

New York

Sentencing decisions from the trial court level are not publicly available.

On appeal, courts do not explicitly take into account gendered elements. Instead, they are generally more inclined to consider non-gendered elements such as the age of the offender or the existence of coercion.⁶⁵⁸ However, gender may be indirectly taken into account (e.g. young women who are parents are more likely to be in charge of the education of their children).

In *People v. Holmes*, the court considered factors such as family responsibilities and the presence of violence accompanying the drug-related offence.⁶⁵⁹ The court ordered sentences to be served concurrently rather than consecutively (for Class B drug felony convictions) in light of the fact that the defendant had custody of five children and a non-violent criminal history.⁶⁶⁰

In *People v. Thompson*, the Court of Appeal reversed the sentence of the lower court, which reduced a sentence below the mandatory minimum because it constituted

cruel and unusual punishment when imposed on a 17-year-old girl who was coerced to sell cocaine by her uncle.⁶⁶¹ The offender was a drug packer (low-level offence) but ended up with a minimum legislatively mandated sentence of 15 years to life.⁶⁶² The Court of Appeals held, however, that this did not constitute cruel and unusual punishment when the only strong mitigating factor was the defendant’s youth.⁶⁶³

Ohio

Sentencing decisions from the trial court level are not publicly available. Gender-related considerations do appear to arise in the context of appellate review of convictions and sentencing decisions (though it appears that sentences are largely affirmed upon appellate review). For example, in *State v. Thompson*,⁶⁶⁴ the Court of Appeal for the Third District of Ohio upheld a female defendant’s child endangerment connection in connection with her drug trafficking offences. As a further example, in *State v. Sherrer*,⁶⁶⁵ the Court of Appeal for the Second District of Ohio upheld a woman’s conviction, where the trial court’s sentence had been based in part upon an inference regarding the defendant’s knowledge of and participation in her fiancé’s drug-trafficking business.

Washington

Sentencing decisions from the trial court level are not publicly available. There is no explicit gendered element to sentencing for drug crimes under Washington State law. Each felony offence has a low, medium and high range for the sentence which the judge determining the sentence assigns based on the presence of mitigating and aggravating factors (noted in Question 2 above) under the Sentencing Reform Act of 1981.

West Virginia

Presently, courts in West Virginia do not specifically take gendered elements into account when sentencing. However, the courts benefit from a broad level of discretion and may consider various circumstances.

⁶⁵⁶. California Penal Code 1170. Also see Jonathan Grossman “Four Easy Steps to Understanding Determinate Sentencing Law”.

⁶⁵⁷. *People v. Jackson*, App. 3 Dist.1974, 21 Ill.App.3d 326, 315 N.E.2d 204. Criminal Law Key Number Symbol 1184(4.1).

⁶⁵⁸. See Hon. Karen Morris & Nicole L. Black, *Criminal Law in New York* § 29:33 Sentencing, 4th ed. (Dec. 2017).

⁶⁵⁹. *People v. Holmes*, 758 N.Y.S.2d 212 (App. Div. 2003).

⁶⁶⁰. *Ibid.*

⁶⁶¹. See *People v. Thompson*, 611 N.Y.S.2d 470 (1994)(reversing lower court’s order that the punishment of minimum mandatory sentence of 15 years was not cruel and unusual).

⁶⁶². *Ibid.*

⁶⁶³. *Ibid.*

⁶⁶⁴. No. 13-17-26, 2018 WL 985966, at *14, 2018-Ohio-637, at ¶ 89 (3d Dist. Feb. 20, 2018).

⁶⁶⁵. No. 2015-CA-40, 2016 WL 3032737, at *5, 2016-Ohio-3198, at ¶ 26, appeal not allowed, 146 Ohio St. 3d 1516, 60 N.E.3d 7 (Table), 2016-Ohio-7199, at ¶ 26 (2d Dist. 2016).

QUESTION 4:

What sentences are imposed on female offenders in practice (i.e. length of prison sentence, any non-custodial sentences imposed)?

Federal

There are no drug-specific resources considering the sentences imposed on female offenders.

More generally, according to a factsheet published by the U.S. Sentencing Commission on Women in the Federal Offender Population, “females make up a small percentage of federal offenders” (13.1% of offenders in FY 2017). In FY 2017, 37.2% of all female offenders were sentenced for drug-trafficking offences.⁶⁶⁶ According to the same source, more than two-thirds of female offenders (68%) had little or no prior criminal history, and their cases involved weapons less frequently than cases involving men. More than three-quarters (76.9%) of female offenders in FY 2017 were sentenced to imprisonment and, for each of the past five years, female offenders were sentenced within the range prescribed by the Guidelines in less than half of all cases. The average sentence imposed slightly increased over the last five years, from 27 months in FY 2013 to 28 months in FY 2017.

Arizona

Arizona does not collect aggregate data related to actual sentencing laws for any category of crime.⁶⁶⁷

California

Only 4.5% of the incarcerated female population in the California Department of Corrections and Rehabilitation was incarcerated due to a drug crime as of YE 2017. More detailed information about the actual sentences for drug-related offences based on the gender of the offender is not publicly available for California in respect of periods under the current statutory system.⁶⁶⁸

Colorado

Approximately 44% of women serving prison time in Colorado are there for drug-related offences. Sentences for women for drug-related offences vary and may be upwards of 50 or more months for the most serious offences, but sentences for the lowest-level of offences are reported to be on average four to six months for new convictions and nine months or more for parole returns.

The Colorado Division of Criminal Justice projects that the number of women imprisoned in Colorado will increase by 48% over the next six years.

Illinois

The largest category of female inmates, 28%, are imprisoned for possession of controlled substances. The class of felony that female inmates are charged with seems to be almost evenly spread between Class 1 and Class 4, with the largest percentage, 22%, being for Class 2 felonies.

Illinois also publishes details of its prison population, including gender, offence and length of sentence.⁶⁶⁹

New York

New York does not collect aggregate data related to actual sentencing laws for any category of crime.

Ohio

Comprehensive statistics are not available for drug-offence sentencing for female offenders. Ohio courts may, under certain circumstances, impose community control sanctions, such as community service, in lieu of imprisonment (particularly for low-level felonies).⁶⁷⁰

Washington

Sentencing decisions from the trial court level are not publicly available. There is no explicit gendered element to sentencing for drug crimes under Washington State law.

West Virginia

Statistics are not available. However, if convicted of possession of a controlled substance, an offender faces between 90 days and six months in jail, as well as a fine.⁶⁷¹ First-time offenders, however, are eligible for “conditional discharge” where the judge defers the offender’s trial and places them on probation.⁶⁷² If the offender completes his or her probation without incident, the charges pending are dismissed.⁶⁷³ Repeat offenders are not eligible for conditional discharge and the maximum sentence and/or fine is doubled.⁶⁷⁴ Moreover, sentences for more serious crimes are longer (e.g. maximum of 15 years in prison for delivery of a Schedule I, II or III drug).

⁶⁶⁶ Quick Facts, Women in the Federal Offender Population, available at www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Female_Offenders_FY17.pdf. Note that this data is not limited to drug crimes.

⁶⁶⁷ Schmidt, Tuscon.com, “Study: Arizona spends \$600K a day to house drug offenders in prison”.

⁶⁶⁸ California Department of Corrections and Rehabilitation: Offender Data Points for 24-month period ending December 2017.

⁶⁶⁹ Illinois Department of Corrections Female Offender Statistics www2.illinois.gov/idoc/reportsandstatistics/Documents/Final_Female_Fact_Sheet_Data_FY2017.pdf Illinois Prison Population Data Sets www2.illinois.gov/idoc/reportsandstatistics/Pages/Prison-Population-Data-Sets.aspx.

⁶⁷⁰ Ohio Rev. Code Ann. § 2929.13 (West 2016).

⁶⁷¹ W. VA. Code Ann. § 60A-1-101(i).

⁶⁷² W. VA. Code Ann. § 60A-4-407(a).

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

3. General

QUESTION 5:

Is there any other academic or judicial discourse around sentencing of women convicted of low-level drug-related offences?

The following state-level resources are generally available, but many are not drug offence-specific:

- The Prison Policy Initiative tracks state-level incarceration of women and publishes reports and advocacy on penal reform.
- The Sentencing Project which looks at similar issues.⁶⁷⁵

There is also some information at state level about the representation of female offenders at drug courts: see reports from the National Court Institute, United States Sentencing Commission.⁶⁷⁶

Federal

In addition to the above factsheet on Women in the Federal Offender Population, the U.S. Sentencing Commission publishes a report on Demographic Differences in Sentencing.^{677, 678}

In addition, the following state-specific resources exist:

Arizona

The American Friends Service Committee-Arizona completed a study of drug sentencing in Arizona under Arizona's mandatory sentencing guidelines which identified the adverse implications of sentencing for women, but the broader issues in respect of drug-offence sentencing in Arizona appear to dominate the discourse.⁶⁷⁹

California

Due to the recent statutory changes and legalisation of marijuana in California, there does not appear to be scholarly work focused on this area in respect of the currently applicable statutory system.

Illinois

The Women's Justice Initiative and the Illinois Department of Corrections produced a report detailing the challenges and baselines for the treatment of women in prisons.

New York

More information can be found in the following academic and judicial discourse:

- Peter Mancuso, Comment: Resentencing After the 'Fall' of Rockefeller: The Failure of the Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009, 73 Alb. L. Rev. 1535 (2010).
- Eda K. Tinto, Note: The Role of Gender and Relationship in Reforming Rockefeller Drug Laws, 76 N.Y.U.L. Rev. 906 (June 2001).
- Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepp. L. Rev. 905 (1993).

Ohio

The Ohio Justice Reinvestment Committee is currently examining sentencing as part of an effort to reduce corrections spending.⁶⁸⁰

⁶⁷⁵ See, e.g., Prison Policy Initiative: www.prisonpolicy.org/women.html; The Sentencing Project: www.sentencingproject.org/issues/women or www.sentencingproject.org/issues/drug-policy.

⁶⁷⁶ Available here www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf and here www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf.

⁶⁷⁷ U.S. Sentencing Commission, available at www.uscc.gov/topic/data-reports.

⁶⁷⁸ See also Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepp. L. Rev. 905 (1993).

⁶⁷⁹ Fealk & Issacs "Drug Sentencing in Arizona: a Prescription for Failure".

⁶⁸⁰ Ohio Justice Reinvestment Committee, available at www.supremecourt.ohio.gov/Boards/Sentencing/committees/justiceReinvest; csqjusticecenter.org/jr/oh.

Resources

There are a range of resources with further information on women and sentencing, imprisonment and drug policies to assist with reform efforts.

Gender and drug policy

Women, Drug Policies, and Incarceration: A Guide to Policy Reform in Latin America and the Caribbean.

WOLA, IDPC, CIM, Dejusticia, 2016, English, Spanish, and Portuguese.

womenanddrugs.wola.org/women-drug-policy-and-incarceration-a-guide-for-policy-reform-in-latin-america-and-the-caribbean

Pretrial Detention in Latin America: The Disproportionate Impact on Women Deprived of Liberty for Drug Offenses.

Teresa Garcia Castro, WOLA, IDPC, CIM, Dejusticia, 2019, English and Spanish.

www.wola.org/wp-content/uploads/2019/05/Pretrial-detention-in-Latin-America_June-2019.pdf

Policy guides: Women, incarceration and drug policies in South East Asia: Promoting humane and effective responses

A policy guide for Indonesia (English), 2019, IDPC, LBH Masyarakat.

fileserv.idpc.net/library/Indonesia_Policy_Guide_Women.pdf

A policy guide for Thailand (English), 2018, IDPC, Ozone Foundation.

fileserv.idpc.net/library/Thailand_Policy_Guide_Women.pdf

A policy guide for the Philippines (English), 2018, IDPC, NoBox Philippines.

fileserv.idpc.net/library/Philippines_Policy_Guide_Women.pdf

Series: Gender and Drug Policy: Exploring Global Innovative Approaches to Drug Policy and Incarceration

Incorporating a Gender Perspective into Drug Policies: the Uruguayan Experience.

Reducing Female Incarceration Through Drug Law Reform in Costa Rica.

Costa Rica's Inter-Institutional Network in Support of Women Caught in the Criminal Justice System.

The 2008 National Pardon: Reducing Female Incarceration in Ecuador.

Two Steps Forward, One Step Back: Proportionality of Sentencing in Ecuador.

Organizing for the Incarcerated and their Families: the Case of Acifad In Argentina.

Justicehome: Breaking Barriers & Helping Families via Alternatives to Incarceration.

Diversion from the Criminal Justice System: the Lead Program in the United States.

Women Organizing to Protect their Human Rights: Project Safe in Philadelphia, United States.

An Alternative to Pre-Trial Detention: the New York City Supervised Release Program at Rikers Island.

Ban the Box: Reducing the Harmful Effects of Criminal Records in the United States.

The Portuguese Model for Decriminalizing Drug Use.

Ensuring more Proportionate Sentences for Female Drug Offenders in The United Kingdom.

Examples of innovative approaches that incorporate a gender perspective and the principles of public health and human rights into drug policy. Such innovations will have the best possible outcomes only when they are accompanied by more fundamental drug law reform

Produced as part of the project of Women, Drug Policy, and Incarceration being carried out by WOLA, the International Drug Policy Consortium (IDPC), Dejusticia, and the OAS Inter-American Commission of Women, available in multiple languages at:

www.wola.org/gender-drug-policy-exploring-global-innovative-approaches-drug-policy-incarceration

Women and imprisonment

Toolbox on the UN Bangkok Rules on women prisoners

A range of resources published by Penal Reform International, with partners including the Thailand Institute of Justice. Includes a Guidance Document, a free online course, a Workbook and specific briefings on specific issues and actors involved in the treatment of women in prison.



All resources are available in multiple languages.

www.penalreform.org/issues/women/work/tools-resources

Prison conditions for women facing the death penalty.

World Coalition Against the Death Penalty, Cornell Law School and Penal Reform International (PRI), 2018, English.

www.penalreform.org/resource/prison-conditions-for-women-facing-the-death-penalty

Acknowledgements

This research report was produced on a pro bono basis. The global team was coordinated by Linklaters London lawyers Lauren O'Brien, Rebeca Saunders and Verity Egerton-Doyle. The global coordinators were assisted by other Linklaters London lawyers acting as regional coordinators, namely, Pauline Bruant, Kabya Chaharia, Juliane Guderian, Ina Lunneryd, Rachel Malloch, Penelope Pasley, Molly Snaith, Ellen Thomson and Jennifer Willis. We are very grateful to the many people from Linklaters and other firms who contributed to this project, including the following:

Argentina

Luis Diego Barry, Macarena María Szytko and María Carolina Abdelnabe Vila of Pérez Alati, Grondona, Benites & Arntsen.

Australia

Renee Boundy, Michael Gibling, Jessica O'Sullivan and Daniel McDougall of Allens-Linklaters in Australia.

Colombia

Alejandro García de Brigard, Iván Camilo Montenegro Quintero, Manuel Felipe Ramos Criollo, Mateo Vásquez Villa and Laura Ribero Díaz of Brigard Urrutia.

Costa Rica

Claudio Antonio Donato Lopez and Erick Ramos of Zurcher Odio & Raven.

Ecuador

Robert Puertas of Fundación Fabián Ponce - Pérez Bustamante & Ponce.

England and Wales

Jennifer Willis, Eleanor Tayler, Pauline Bruant, Rachel Malloch, Masha Okun, Sophie Leane, Hannah Day, Emily Craske, Nicole Chui and Sarah Dombek of Linklaters London.

France

Vincent Ville of Linklaters Paris.

Germany

Annika Bilics, Marco Huchzermeier, Alina Kelter, Jan Lindenlauf, Julia Riedle, Alexandra Schuppli, Nur Tuna.

Hong Kong

Matthew Klas of Linklaters Hong Kong.

Japan

Nana Sakuma of Linklaters Tokyo.

Mexico

S.C. Leonel Pereznieta, Valentina Villa and Santiago Acosta of Creel, García-Cuellar, Aiza y Enriquez.

New Zealand

Edward Scorgie, Chloe Fleming, Matthew Denton and Zared Wall-Manning of Chapman Tripp.

Philippines

Perry L. Pe, Daniel Kendrick T. Tumangan, Cristina Collantes Garcia and Ponce Miguel Lopez of Romulo Mabanta Buenaventura Sayoc & Delos Angeles.

Poland

Jakub Kulicki, Karol Macias and Marta Szrajder of Linklaters Warsaw.

Portugal

Mariana Sampaio and Andreia Santos of Linklaters Lisbon.

Russia

Ivan Chupranov, Anna Mikhailova, Alexandra Nikitina and Anna Saenko of Linklaters Moscow.

Spain

Miguel Andreu, Lorenzo Roses and Gonzalo Sánchez del Cura of Linklaters Madrid; María Concepción Molina of ICADE Law School.

United States

Ellen Thomson and Kabya Chaharia of Linklaters London; Pierre-Emmanuel Perais and Somin Lee of Linklaters New York.

Linklaters LLP and Penal Reform International would also like to express their thanks to the following representatives of civil society who provided expertise and input to the research report: Gloria Lai, Marie Nougier and Coletta Youngers of the International Drug Policy Consortium; and at Penal Reform International, Olivia Rope, Vicki Prais and Aldyen Krieger.

About Penal Reform International

Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide. We work to promote criminal justice systems that uphold human rights for all and do no harm. We run practical human rights programmes and support reforms that make criminal justice fair and effective. Our primary objectives are to secure trials that are impartial, sentencing practices that are proportionate and promote social rehabilitation, and humane conditions of detention where alternatives to imprisonment are not possible. We work through country missions, regional hubs, remote coordination, and through partners.

www.penalreform.org

About Linklaters

Linklaters is a global law firm that advises the world's leading companies, financial institutions and governments. Linklaters is committed to empowering people around the world and helping them to transform their lives through its social impact programmes. One of the most powerful ways it seeks to do this is by contributing the legal skills and experience of its people to bespoke, cross-border pro bono studies, run in collaboration with frontline NGOs advocating for crucial change.

www.linklaters.com

About The International Drug Policy Consortium

The International Drug Policy Consortium (IDPC) is a global network of non-government organisations that aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

www.idpc.net

**Penal Reform International
Headquarters**

1 Ardleigh Road
London N1 4HS

+44 (0) 207 923 0946
www.penalreform.org

Linklaters LLP

One Silk Street
London EC2Y 8HQ

+44 (0) 20 7456 2000
www.linklaters.com

**International Drug Policy
Consortium**

61 Mansell Street
London E1 8AN

+44 (0) 20 7324 2974
www.idpc.net