Gender Differences in Sentencing Outcomes

Sentencing Advisory Council
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Contributors

Author	Dr Karen Gelb
Sentencing Advisory Council	
Chair	Arie Freiberg
Deputy-Chair	Thérèse McCarthy
Council Members	Carmel Arthur David Grace QC Andrea Lott Jenny Morgan Barbara Rozenes Gavin Silbert SC Lisa Ward David Ware
Chief Executive Officer	Stephen Farrow

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Executive summary

Gender differences in criminal court outcomes for men and women are almost axiomatic in contemporary criminology. Since the early 1970s a plethora of studies in the United States has found evidence of 'discrimination' in sentencing. While most of these studies initially focused on issues of racial discrimination, an increasing number of researchers have since turned their attention to the examination of gender differences in court processing outcomes.

This paper examines the research literature and presents data from Victoria, Australia, to consider differences in sentencing outcomes for men and women. Data on gender differences in police recorded offending and in prison statistics are also included in order to complete the picture.

Findings from the analyses of Victorian police, courts and prison data are broadly consistent with the large body of literature in this field. In particular, several key conclusions can be drawn from these analyses.

Men and women have different patterns of criminal behaviour. Women's offending tends to be less serious in terms of the nature of the criminal behaviour, with women being less likely to be involved in violent offences.

In the Victorian County and Supreme Courts, overall women are less likely to be sentenced to a term of imprisonment and, when they are, women receive shorter average total effective terms. For most offences women are more likely to be sentenced to a wholly suspended sentence or a community-based order, both of which are served in the community rather than in custody.

In the Magistrates' Court of Victoria, women are less likely to receive a sentence of imprisonment for all of the offence categories examined. For most of the offence types, women receive a shorter term of imprisonment than do men.

Women's sentences are shorter as they are more likely than men to have a constellation of factors that can validly reduce the length of a sentence.

The profile of men and women in Victorian prisons is substantially different. Women prisoners have less serious criminal histories than do men, with fewer prior convictions and less serious previous and current offending in terms of the type of offences for which they have been imprisoned. They also tend to be sent to prison for shorter periods, likely a reflection of their less serious offending and their more complex personal histories and situations.

The biographies of female offenders vary systematically from those of men. Contributing to their blurred status as both victims and offenders, women are more likely than men to have a history of factors that are often causally interrelated, such as mental illness, physical or sexual victimization in childhood or early adulthood, and substance abuse. Women are also more likely than men to have primary caregiver status.

The effect of gender on sentencing is not direct, but travels via two distinct paths: via gender differences in offending behaviour; and via the individual biographies of women that see a greater proportion of women coming before the court with a constellation of characteristics that creates legitimate mitigating circumstances. It is these mitigating factors that lead to disparities in sentencing outcomes for men and women in the criminal courts, disparities that appear warranted and that are not immediately indicative of any pervasive 'bias'.

Thus the disparities seen in sentencing outcomes for men and women are a reflection of legitimate but gender-linked characteristics: differences are evident because of factors *associated with* being female, not because of gender *per se*.

'Our knowledge of female offenders has been beset with myths, muddles and misconceptions' (Gelsthorpe and Morris, 2002, p. 289).

Introduction

Gender differences in criminal court outcomes for men and women are almost axiomatic in contemporary criminology. Since the early 1970s a plethora of studies in the United States has found evidence of 'discrimination' in sentencing. While most of these studies initially focused on issues of racial discrimination, an increasing number of researchers have since turned their attention to the examination of gender differences in court processing outcomes.

This paper aims to contribute to the research literature on gender differences in sentencing by:

- presenting an overview of existing findings from the literature on differential sentencing outcomes for men and women;
- summarizing the most prominent theories about why such differences might exist, considering the role of women in society and the family, and women's patterns of offending; and
- presenting data to examine the role of gender in the court in Victoria, Australia.

As sentencing outcomes are partially the product of police practices, the literature review and presentation of data will include an examination of gender differences in criminal behaviour. And as sentencing outcomes from the courts are partially reflected by prisoner statistics, information on gender differences in prison data will also be included.

Gender differences in offending

The chain of the criminal justice system begins with the police: arrests lay the foundation and set the basic patterns on which later decisions and processes in the system are built. Arrests thus provide the first opportunity to use official statistics to examine the question of gender differences in the criminal justice system.

Men offend at rates about five to ten times higher than women, regardless of whether crime rates are measured by official arrest statistics, by victimisation surveys or by self-report studies (Steffensmeier and Haynie, 2000: cited in Belknap, 2001, p. 96). Women have consistently been found to be most strongly represented in prostitution offences and property offences such as larceny-theft, fraud, forgery and embezzlement, while men are more often involved in offences against the person such as assault.

This section examines gender differences that have been found in official police statistics. While the results from crime victimization studies and self-reported offending studies also show substantial gender differences in offending,[1] the focus of this section is on crime recorded by the police as it is only such officially actioned offences that may ultimately come before the courts and are thus relevant to gender differences in sentencing.

Gender differences in recorded police statistics overseas

Criminologists have long accepted that gender differences in crime are universal. With the exception of prostitution offences, men offend at much higher rates than women for all offence types. The gender gap in criminal offending is greatest for serious crimes and is smallest for minor crimes (Steffensmeier and Allan, 1996, p. 460).

Considering arrest rates per 100,000 of the total population in the United States, Daly and Tonry (1997) provide evidence for significant differences in patterns of arrest for men and women. Arrest rates for women are substantially lower than are those for men: for all offences combined, men's arrest rates (7,480 per 100,000 men) are more than four times greater than women's (1,475 per 100,000 women).

1 Findings of victimization surveys corroborate the officially recorded police statistics: men commit far more (reported and unreported) crimes than do women. Results from self-reported offending studies are also consistent: self-reported offending mirrors the patterns found in official statistics and victimization surveys in that women tend to commit less serious crimes, have a lower prevalence of offending than men and have a lower frequency of offending than men. However, gender differences are smaller for self-report data than for official data, especially in the area of minor offences (Steffensmeier and Allan, 1996, p. 463). Thus gender differences in offending are not attributable solely to differential policing practices or responses to women's offending.

Analysing the Federal Bureau of Investigation's Uniform Crime Reports, Heimer (2000) found that, while men still far outnumber women in arrests, there was an appreciable narrowing of the 'gender gap' in both property and violent offending in the period from 1960 to 1997.

Heimer's analysis showed that there was an upward trend between 1960 and 1997 in arrests of women for all crimes except murder, which declined over this period. Overall, women's arrests for property crime increased from 1960 to 1997, particularly for fraud offences and for more serious property crimes such as burglary, where women's share of arrests increased from 3 per cent in 1960 to 12 per cent in 1997. A similar pattern was found for violent offences, where arrests of women for assault and robbery showed constant upward trends, with greater increases from 1985 to 1995. By 1997, women accounted for nearly 18 per cent of arrests for assault and 9 per cent of arrests for robbery. Heimer concludes that changes in the gender ratio for crime have occurred, in general, because of a decline in rates for men coupled with an increase, or little change, or a smaller decline in crime rates for women (Heimer, 2000, p. 441).

This narrowing of the gender gap has been found in juvenile offending as well: in 1980 girls represented 11 per cent of juvenile arrests for violent offences in the United States, but by 2004 the proportion had increased to 30 per cent. While arrest rates for boys remained higher than for girls, the convergence occurred as arrest rates for boys decreased while arrest rates for girls increased (Office of Juvenile Justice and Delinquency Prevention, 2010, p. 1).

Heimer's findings concur with those of other researchers in western countries (such as the United Kingdom) who have noted that, over the past few decades, women and men have converged in their rates of crime. Some researchers have posited that women's crime rates have increased with their increasing economic and social independence from men, thereby narrowing the gender gap in offending (the 'liberation' or 'emancipation' hypothesis). However, most empirical research does not support this contention. Another explanation for this convergence that has gained some support is the economic marginalisation hypothesis. According to this perspective, the gender gap in crime has narrowed as women have experienced increasing economic hardship relative to men. As a growing percentage of women are the sole breadwinners for themselves and their children (as opposed to living in male-headed or dual-income families), gender inequality in wages has meant that these women are worse off economically than single men and couples. Averaging across all women, this has resulted in increasing economic marginalization of women compared with men. As the financial instability of women has increased over time relative to men, women's rates of crime have increased relative to men. In other words, women's economic wellbeing has not kept pace with men's economic wellbeing (Heimer, 2000, p. 428). This hypothesis is supported by the work of Belknap (2007), who suggests that apparent increases in arrest rates for less serious property crimes and, to a lesser extent, drug offences, may be at least partially due to the 'feminisation of poverty' (Belknap, 2007, p. 134).

Gender differences in offending behaviour are common in western countries. In Canada, women are arrested by police at a much lower rate than are men. According to official data from nine provinces (under the Incident-based Uniform Crime Reporting Survey), females aged 12 years and older accounted for only one-fifth of all people accused of a criminal offence in 2005. The overall rate of arrest among women that year was one-quarter that of men (1,080 versus 4,193 per 100,000 population) (Kong and AuCoin, 2008, pp. 2–3).

The Canadian data also show that women are typically less likely than men to be persistent offenders and when they do commit crimes more than once, their crimes typically do not escalate in severity (Carrington, 2005; Carrington, 2007: cited in Kong and AuCoin, 2008, p. 5).

Data from the United Kingdom present a similar picture. Between the mid-1980s and the mid-1990s around five men were cautioned or convicted for an indictable offence for every one woman. Over that period there was an increase in the proportion of women dealt with for violent and drug offences, although in 1992 the majority of women's offending (71 per cent) still involved theft-related offences, compared with only 43 per cent of men's offending (Hedderman and Hough, 1994, p. 2).

Gender differences in recorded police statistics in Australia

The most recent Australian data available on the question of gender differences in offending are from New South Wales. Holmes (2010) examined police statistics on 'persons of interest' to identify men and women proceeded against by police. The analysis shows that the number of women proceeded against by police between July 1999 and June 2009 increased by 15 per cent, while the number of men recorded by police remained stable. While the overall proportion of offences committed by women was stable across the entire ten years (with women accounting for 17 to 19 per cent of offences), the proportion of women offenders increased significantly for assaults, shoplifting, breach offences, robbery and drug offences (Holmes, 2010, p. 5). Holmes concludes that women are committing more offences than they were a decade ago and that the offences they are committing are more likely to be violent.

It is not entirely clear whether the recorded shifts in the proportion of all arrests accounted for by women are a reflection of 'real' increases in women's offending or changes in police practices and policies in response to women's crime.[2] Some researchers have argued that better record-keeping practices, combined with a shift over several decades to credit-based currency systems, can explain increases in women's arrests for less serious property crimes and for fraud (see, for example, Steffensmeier, Allan and Streifel, 1989). Tougher law enforcement practices (such as increased scrutiny of offenders on bail) and an increased public willingness to contact police could also lead to increases in the number of women appearing in police figures, rather than an increase in the number of crimes actually committed (Bureau of Crime Statistics and Research, 2010).

Gender differences in recorded offending in Victoria

As in other western jurisdictions, in Victoria there is evidence for significant differences in patterns of arrest for men and women.

There were 9,958 adult women arrested in 2008–09 in Victoria, compared with 51,394 adult men. Gender differences were evident across all offence categories. Some of the least common offences for which women were arrested in 2008–09 were rape (1 woman),[3] kidnapping (16 women) and homicide (16 women). The number of men arrested for these offences, while still small compared with the number of men arrested for other offences, was far greater than for women: 115 men were arrested for rape in 2008–09, 177 were arrested for kidnapping and 106 for homicide (Victoria Police, 2009, pp. 39–40).

The most common offences for which women were arrested in Victoria in 2008–09 were theft from a shop (1,927 women) and deception (1,639 women). The most common offences for which men were arrested in 2008–09 were assault (6,561 men), deception (4,730 men) and offences against justice procedures, such as breach of intervention order or failing to answer bail (4,580 men) (Victoria Police, 2009, pp. 39–40).

2 The closing of the gender gap seen in earlier decades may be due to the low base of recorded crime from which women's recorded offending was increasing through the 1980s and 1990s. The low levels of recorded crime for women in the middle part of the twentieth century were not necessarily due to low levels of actual offending, but could well have been a reflection of policing practices—and indeed a general trend in the study of crime in general—that focused heavily on male offending and tended to ignore much about female offending.

3 While rape is overwhelmingly committed by men, women are also charged with and convicted of rape under the broad definition of sexual penetration in section 35 of the *Crimes Act 1958* (Vic) or as an aider, abettor, counselor or procurer under section 324 of the *Crimes Act 1958* (Vic).

Figures 1 to 4 depict the number of arrests of men and women for selected offences over time. The data clearly demonstrate the differences in the number of men and women arrested for various crimes in Victoria, with men far outnumbering women for all types of crime.

Figure 1: Number of adult men arrested by Victoria Police, selected offences, July 1995 to June 2009

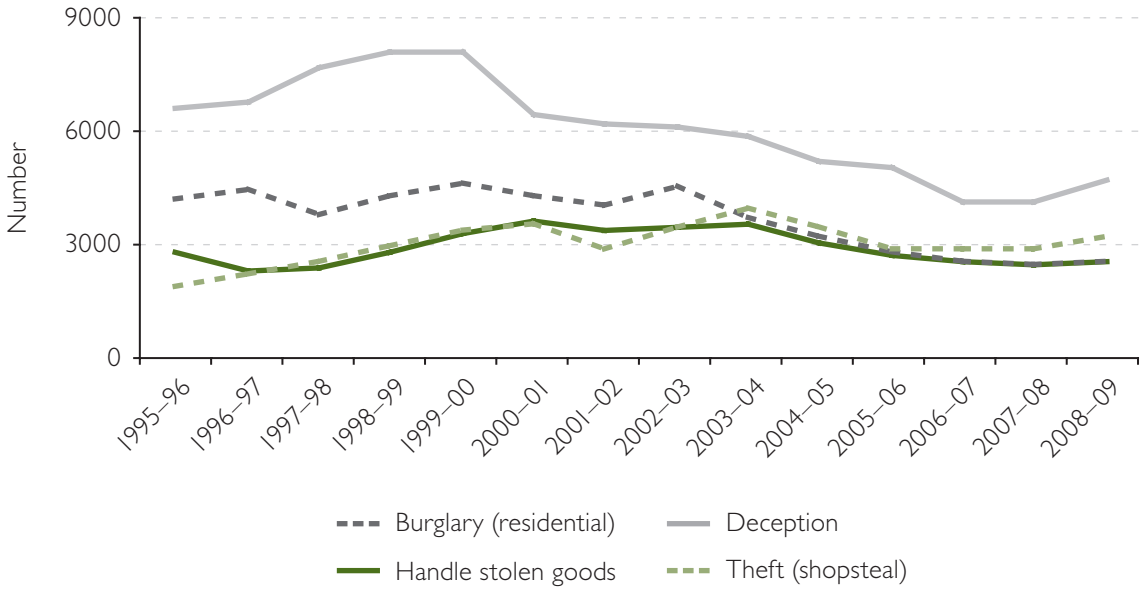
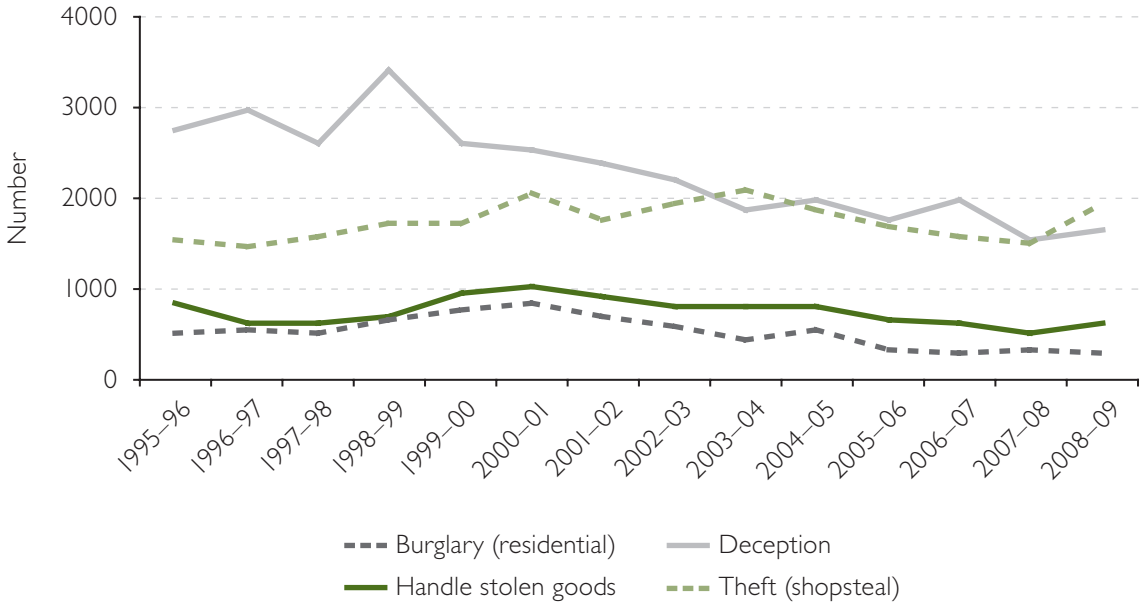


Figure 2: Number of adult women arrested by Victoria Police, selected offences, July 1995 to June 2009



For both men and women, the number of people arrested for deception related offences has decreased over the past fifteen years, while the number arrested for theft from a shop has increased slightly. Arrests for handling stolen goods have remained stable, as has the number of women arrested for burglary, while the number of men arrested for burglary has decreased.

Figure 3: Number of adult men arrested by Victoria Police, selected offences, July 1995 to June 2009

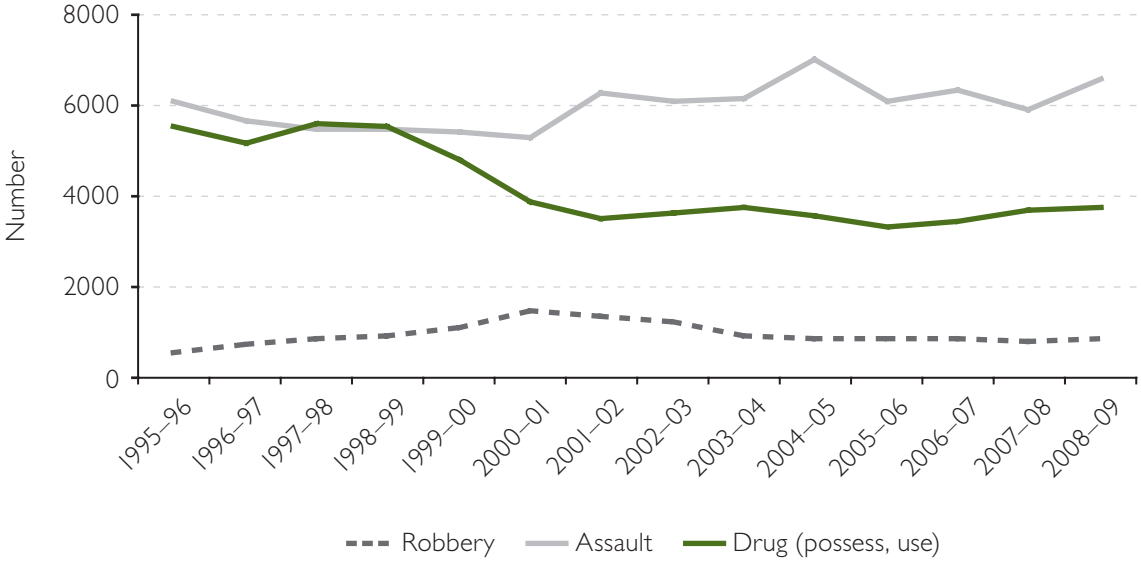
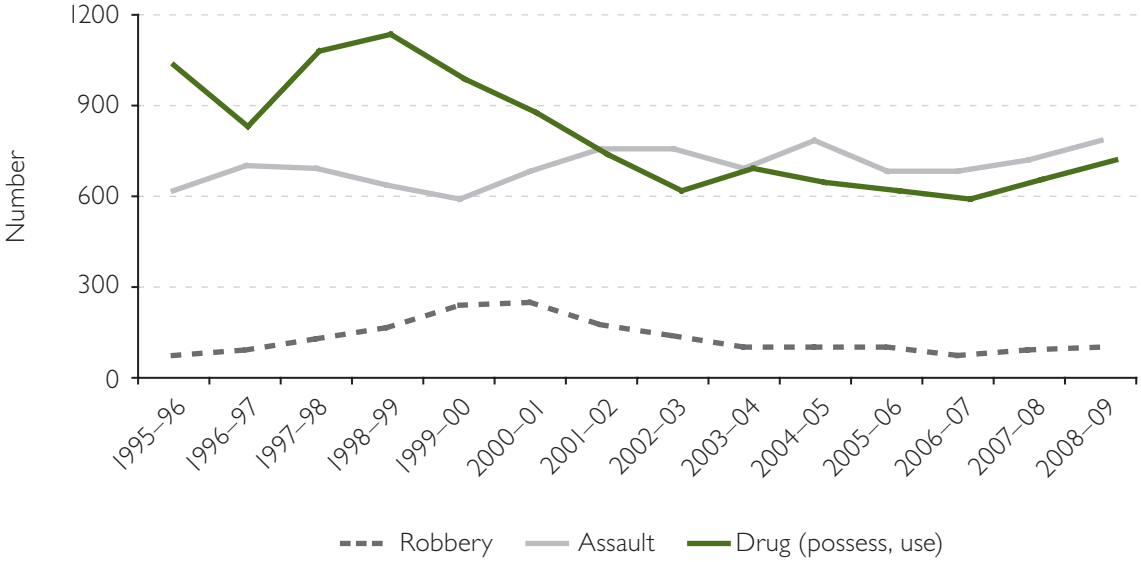


Figure 4: Number of adult women arrested by Victoria Police, selected offences, July 1995 to June 2009



For both men and women, the number of people arrested for robbery has remained fairly stable over the past fifteen years, while the number of people arrested for drug offences has decreased dramatically. However, there has been a slight increase in the number of people arrested for assault offences for both men and women.

Despite fluctuations over time in the *number* of men and women arrested for various offences, the *proportion* of all arrests accounted for by women has remained fairly stable over the past fifteen years.

The proportion of all arrests in 2008–09 that were arrests of women presents a similar picture to that found in other countries. Women were most commonly arrested for theft from a shop (37.2% of all arrests in 2008–09), while women were recorded as the offender in more than a quarter (25.7%) of all arrests for deception (fraud) offences. While the figures for theft have decreased over time, even at their peak in 1995–96 women accounted for less than half (44.7%) of all recorded thefts.

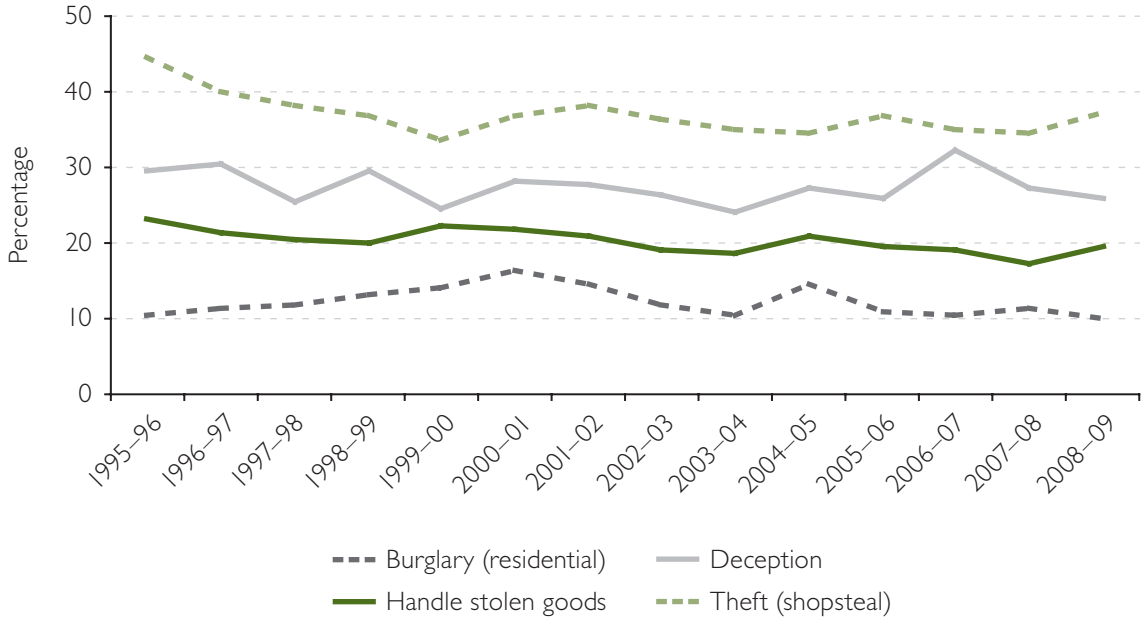
Figures 5 and 6 depict the trends over time for selected offences in the proportion of adult arrests that involved women as alleged offenders.

This pattern has been fairly consistent over the past decade or more. Victoria Police statistics show that the proportion of adult arrests involving women offenders for each offence category has not changed substantially over the past ten to fifteen years. Theft from a shop has seen a small decrease in the proportion of adult arrests accounted for by women, from 44.7 per cent in 1995–96 to 37.2 per cent in 2008–09. Assault has remained stable at around 10 per cent while robbery has fluctuated from 11.8 per cent in 1995–96, through a high of 17.7 per cent in 1999–2000 before falling back to 10.2 per cent in 2008–09. Drug offences have remained fairly stable, ranging between 14 and 18 per cent.

In addition to differences in the prevalence of offending for men and women, men's offending also tends to be more serious in terms of the number of contacts with police: for 2007–08, Victorian men were more likely to be repeat offenders, with 23 per cent of men and 17 per cent of women having been proceeded against by police on multiple occasions during the year (Australian Bureau of Statistics, 2009).

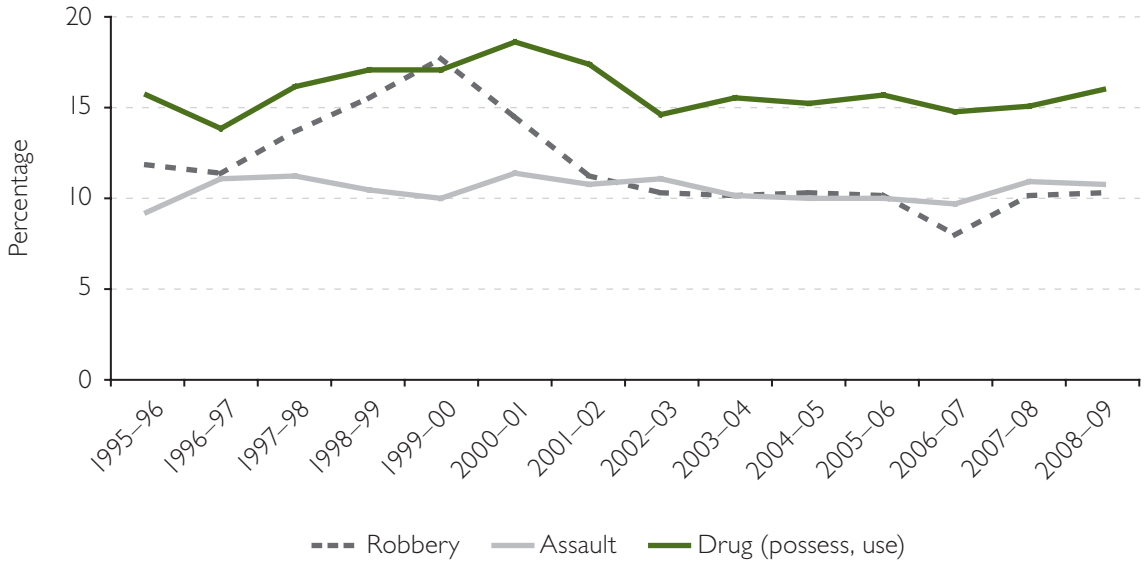
It is clear from both the international literature and the Victorian data that there are substantial differences in the officially recorded patterns and prevalence of offending for men and women. But other sources of data are required to determine if these differences reflect differences in police responses to women's crime or if they truly reflect underlying differences in women's offending. Crime victimization studies and self-report studies attempt to illuminate the hidden offending that does not come to the attention of the police.

Figure 5: Proportion of adult arrests that involved women as alleged offenders, selected offences, July 1995 to June 2009



Source: Victoria Police Crime Statistics

Figure 6: Proportion of adult arrests that involved women as alleged offenders, selected offences, July 1995 to June 2009



Source: Victoria Police Crime Statistics

Summary

Both the Australian and the Victorian data are consistent with the evidence from studies on gender differences in offending, with men being far more likely than women to be recorded in official police statistics. Such differences in the patterns of offending will inevitably influence the outcomes that men and women receive in the criminal courts.

Gender differences in sentencing outcomes

The primary focus of this paper is on discrepancies in sentencing outcomes for men and women in the criminal courts.[4] A significant body of research has now developed around this issue, although the findings of the research have been inconsistent. This is at least partly due to differences in the sophistication of the methodologies employed, the factors examined in the analyses and the data from which the samples were drawn.

This section identifies some of the more important studies that have been undertaken in this field that attempt to use more sophisticated methodologies. It also critically assesses the contribution that the studies have made to our overall understanding of gender differences in sentencing outcomes.

Gender differences in sentencing outcomes—prior research

Many western countries have experienced a substantial increase in the use of imprisonment as a sentencing outcome, at least partly due to the 'get-tough' approach that has seen prison populations explode.

Deakin and Spencer (2003) present an interesting explanation for the increase in the number of women in the criminal justice system in the United Kingdom over recent years. Between 1990 and 1999 there was a 'startling increase of over 60 per cent' in the total number of women sentenced to immediate custody. In the year 2001 alone, the women's prison population in the United Kingdom grew more than 30 per cent from 3,143 in January to more than 4,000 in December (Deakin and Spencer, 2003, pp. 124–125). The researchers suggest that there has been a change in sentencing strategy for women in recent years.

According to Deakin and Spencer, women are being fast-tracked into prison—they are being escalated up the sentencing ladder and thus are ending up in prison faster than are men. During the late 1980s and early 1990s women offenders were frequently sentenced to community supervision (higher up the sentencing

4 Gender differences have also been found in earlier stages of the court process, including in the decision to remand a person in custody (see, for example, Spohn and Spears (1997) and Spohn (1999), who found that women were more likely than men to be released prior to trial rather than being remanded in custody). While the number of people remanded in custody in Victorian prisons has increased in recent years (particularly for women), a full investigation of the causes of this increase is beyond the scope of this paper.

hierarchy) rather than fines or cautions (lower on the sentencing hierarchy) so that they could be treated and supported, providing a focus on rehabilitation—their offending was implicitly seen as a 'cry for help'. But while this may have been done with the best of intentions, it has resulted in women entering formal criminal justice penalties at a higher level, potentially leading to imprisonment at an earlier stage in their contact with the criminal justice system.

Ross and Forster (2000) attempted to explain the increase in the rate of women's imprisonment in Australia since the early 1980s. They suggested three possible explanations for the sustained increase in women's imprisonment seen in the two states they examined (Victoria and South Australia):

- that women's offending has become generally more serious (leading to longer prison sentences);
- that women's reoffending rates have increased (such that the nature of the offending has not changed but its frequency has); and
- that changes in sentencing policy have led to longer terms of imprisonment for women.

While their paper did not address the third hypothesis, Ross and Forster did find some evidence from Victoria and South Australia that the severity of women's offending had increased (with an increase in the proportion of women prisoners whose most serious offence was assault) and that their reoffending rate had slightly increased over twenty years (Ross and Forster, 2000, p. 7). These legal factors that sentencers must consider when imposing sentence—offence seriousness and prior criminal history—may partly explain the increasing rate of women being sentenced to imprisonment in the Australian courts.

Similar results were found by Gelb (2003) in an analysis of prisoner data across Australia from 1995 to 2002. Over that period the rate of incarceration for men increased from 245.9 per 100,000 population to 282.4 per 100,000—an increase of almost 15 per cent. But for women the rate of imprisonment increased far more dramatically, rising from 12.0 per 100,000 population in 1995 to 19.2 per 100,000. The 60 per cent increase in the rate of women's imprisonment was four times the increase for men (Gelb, 2003, p. 3).

Using data from the Australian Bureau of Statistics, the study involved an examination of three possible causes for the disproportionate increase in women's imprisonment across Australia: that there had been changes in women's offending behaviour; that there had been changes in the characteristics of women prisoners; and that there had been changes in the courts' responses to women's criminality relative to the courts' responses to that of men.

Consistent with Ross and Forster (2000), Gelb's analyses showed a change in the nature of offences for which women were being sentenced to prison between 1995 and 2002, with a clear increase in the proportion of women prisoners who had been sentenced for a violent crime. The increase was most pronounced for robbery, rising from 6.9 per cent of women prisoners' crimes in 1995 to 11.9 per cent in 2002. There was also a concomitant decrease in non-violent offences, particularly for deception offences: the proportion of women sentenced to prison for deception offences decreased from 16.4 per cent in 1996 to 9.7 per cent in 2002 (Gelb, 2003, p. 7). Comparing these changes with trends for men, Gelb found that changes in offending patterns were unique to women, and were not part of a general change in offending behaviour across the prisoner population.

While Gelb's study found no change in the characteristics of women prisoners, the analyses did show some increase in the severity of sentencing of women in the early years of the study. From 1995 to 1997 the median sentence length for women increased from 18.2 months to 24 months (an increase of 32 per cent), although it remained stable thereafter. For men, median imprisonment lengths increased by 10 per cent between 1995 and 2000, from 38.1 months to 42 months. While sentencing outcomes for women thus became disproportionately harsher during the mid-1990s, the median lengths of women's sentences remained well below those for men, even when the type of offence was held constant. The only exception to this pattern was found for drug dealing and trafficking offences, where median sentence lengths were the same for men and women. This finding is consistent with other, later research from Canada that found

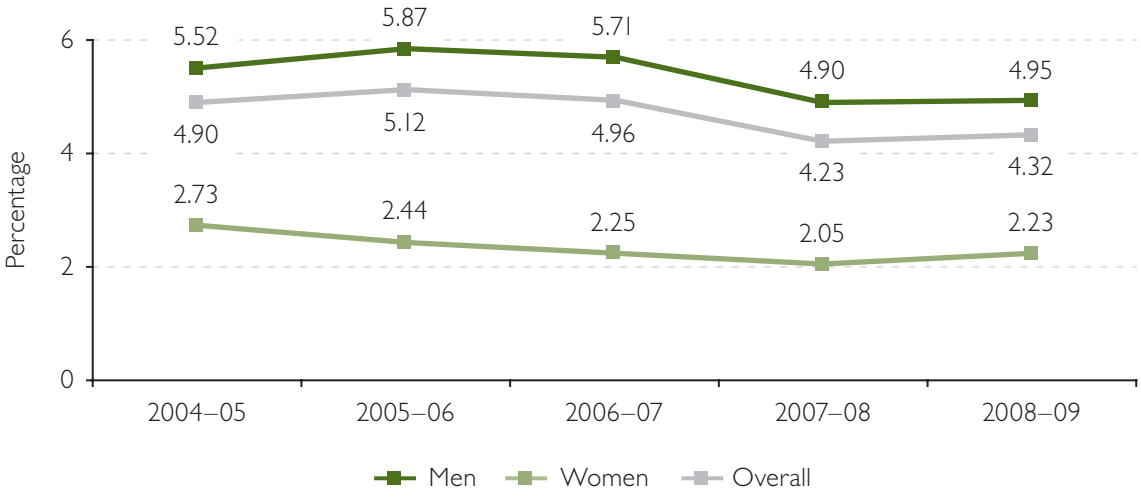
that differential sentencing outcomes were not apparent for sentencing of drug offences (Kong and AuCoin, 2008). Gelb noted that, while these findings seem to suggest disparity in sentencing practices, variations in the seriousness of offences may still exist within these broad offence categories (Gelb, 2003, p. 12).

The conclusions of both studies are consistent with the later work from the United Kingdom (Home Office, 2003; Hanks, 2007)—that greater use of custody is primarily due to increases in the severity of sentencing practices for women.

Increasing severity of sentencing practices for Victorian women

Sentencing practices in the Victorian courts show similar trends in increasing sentencing severity for women. While data from the Magistrates' Court show general stability in the proportion of women sentenced to a term of imprisonment (with a decrease from 2.73% in 2004–05 to 2.23% in 2008–09), data from the higher courts show both an increase in the proportion of women being sentenced to imprisonment and an increase in the average length of imprisonment terms.

Figure 7: Proportion of people sentenced to imprisonment, Magistrates' Court, July 2004 to June 2009[5]



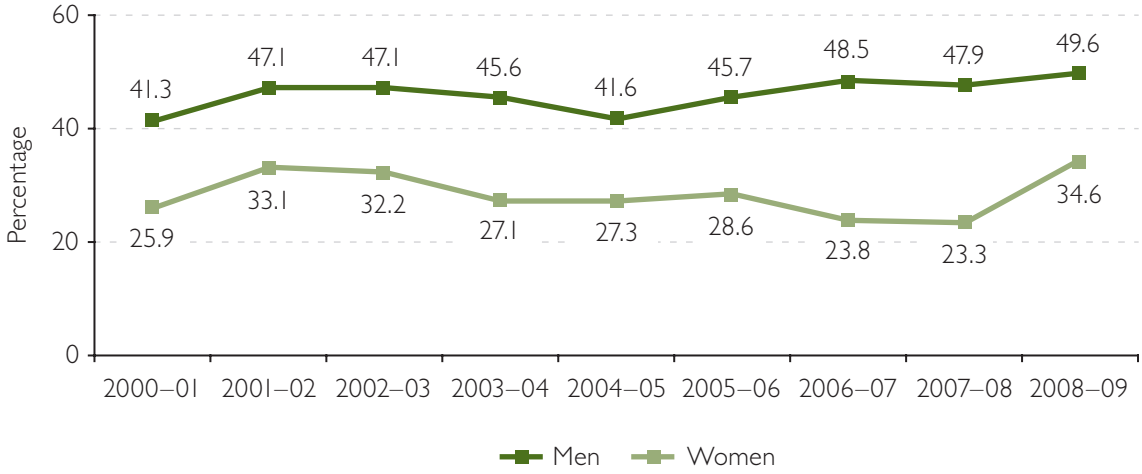
Source: Department of Justice (Vic), Unpublished statistics

Figure 8 (page 14) shows the recent rapid increase in the proportion of women sentenced to imprisonment in the higher courts after decreases over several years—an increase far steeper than the one seen for men. While the proportion of men sentenced to imprisonment increased slightly from 47.9 per cent to 49.6 per cent in the most recent year, the proportion of women sentenced to imprisonment increased from 23.3 per cent to 34.6 per cent over that period—an increase of almost 50 per cent.

However, the number of women sentenced, while increasing in the last year, remains very low: in 2000–01 there were 62 women sentenced to imprisonment in the higher courts, while in 2008–09 there were 54 (up from 49 in 2007–08). This compares with 881 men being sentenced to imprisonment in the higher courts in 2008–09.

5 This graph includes people who have been placed on a Criminal Justice Diversion Plan (CJDP). While a CJDP is not technically a sentencing order, it has been included in the analysis as it is a disposition available to the courts and may thus contribute to the overall picture of court outcomes for men and women. Indeed, the proportion of men and women being placed on a CJDP varies substantially: in 2008–09 1,558 out of 16,317 women (9.5%) were placed on a CJDP compared with 3,747 out of 64,549 men (5.8%). Thus it is apparent that women are more likely than men to be placed on a CJDP, thereby avoiding a formal sentence.

Figure 8: Proportion of people sentenced to imprisonment, higher courts, July 2000 to June 2009



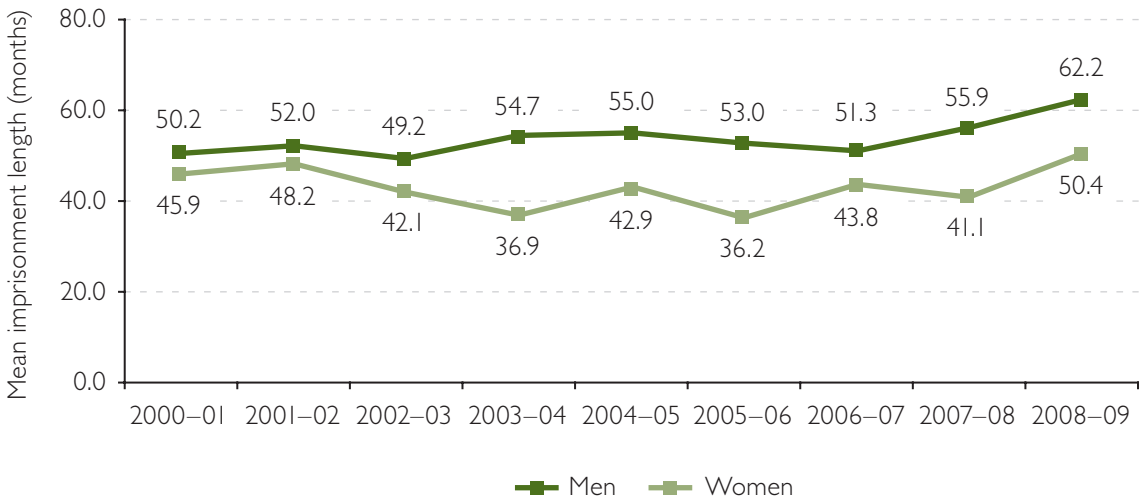
Source: Department of Justice (Vic), Unpublished statistics

The strongest evidence of an increase in the severity of sentencing practices for women is found in the average length of imprisonment terms, which have increased substantially in the last year and even more substantially in the previous three years.

While the average length of imprisonment terms for men has increased by just over 10 per cent from 55.9 months to 62.2 months, the average for women has increased by almost 25 per cent, from 41.1 months to 50.4 months.

The phenomenon of increasing rates of imprisonment for women is not limited to Victoria. Researchers overseas have spent much time and effort examining factors that influence judicial decision-making. While statistical studies of sentencing outcomes clearly show that the strongest and most consistent predictors of outcomes are the gravity of the offence charged and the defendant's criminal history, the question of whether defendant attributes—in particular the defendant's gender—play an independent role in judicial decision-making has been the subject of considerable debate.

Figure 9: Average length of imprisonment terms for men and women sentenced in the higher courts, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

Differential treatment of women

Many researchers in this field have shown that gender still plays an important role in sentencing outcomes, over and above the influence of other legal factors.

In the United Kingdom through the 1980s and 1990s, little quantitative research had been conducted into the issue of gender disparities in sentencing. To address this dearth of robust and sophisticated research in the United Kingdom, Hedderman and Gelsthorpe undertook a comprehensive examination of sentencing data, focusing on the sentencing decision and the factors that magistrates themselves perceive as affecting it.

Hedderman and Gelsthorpe began with an analysis of differences in sentencing patterns, which they then used as a basis for a series of interviews with magistrates about the factors that influence their sentencing decisions.

Using data from the Offenders Index and a small amount of additional data on a matched sub-sample of cases, the authors compiled a database of adult offenders drawn from the index over a six-week period in 1991. Their data included 3,763 offenders convicted of theft from a shop, 6,547 violent offenders and 3,670 drug offenders. They chose these three offences as they were thought to reflect different perceptions of women offenders. Shoplifting was chosen as a 'typical' female crime; violent offences were chosen as these are seen as particularly atypical for women and it has been claimed that women will be particularly heavily penalized for committing such 'unfeminine' crimes; and drug offences were chosen as they are generally the only indictable offence for which similar proportions of men and women go to prison (Hedderman and Gelsthorpe, 1997, p. 5).

For both shoplifters and violent offenders, women were less likely than men to be sentenced to a term of imprisonment, community sentence or a fine and were more likely to be placed on probation or discharged (Hedderman and Gelsthorpe, 1997, p. 15). In contrast to other studies that have found an attenuated gender effect once legal variables were included in the analysis, differences in the use of custody in this study were not simply a consequence of differences in offending (Hedderman and Gelsthorpe, 1997, p. 2).

For first-time drug offenders, a somewhat higher proportion of men than women were sentenced to prison. This is likely due to the different profiles of women coming to court—women were much more likely to be first-time offenders (53% of women versus 25% of men) and the average number of their previous offences was only three, as opposed to nine for men. However, women who were repeat drug offenders were as likely as men to receive a prison sentence (Hedderman and Gelsthorpe, 1997, p. 3).

In the second part of their study Hedderman and Gelsthorpe interviewed 189 lay magistrates and eight stipendiary magistrates in 1995 about how they approached their sentencing decisions and the factors that most influenced them. In particular, magistrates were asked whether they would treat men and women differently when they appeared for theft, drug or violent offences.

From their discussions it emerged that magistrates saw defendants broadly in terms of whether they were 'troubled' or 'troublesome'. 'Troubled' defendants included those who stole out of need for food or clothes, while 'troublesome' defendants stole out of greed, stealing alcohol or videos to sell. Magistrates commonly referred to women stealing to feed their children, while they typically saw men stealing to support drug habits. Women were thus typically thought of as 'troubled' and men as 'troublesome' (Hedderman and Gelsthorpe, 1997, p. 26).

Magistrates perceived their use of custody for women as a sentence of last resort, used either because the crime was so serious that prison was the only option or because they were forced into it by legislation, such as for non-payment of fines. In contrast men were seen as eligible for any sentencing option. Men reached the 'custody threshold' much faster than women, either because of the perceived motivation for the offence (greed versus need) or because they had little mitigation material compared with women (such as no direct responsibility for dependent children) (Hedderman and Gelsthorpe, 1997, p. 45). Magistrates considered family circumstances and responsibilities to be much more relevant in mitigation for women than for men,

confirming the work of earlier researchers in both the United Kingdom (such as Farrington and Morris (1983) and Eaton (1983 and 1986)) and in the United States (such as the extensive work of Kathleen Daly) that sentences are shorter for 'familied' women (Hedderman and Gelsthorpe, 1997, p. 53).

Daly and Bordt (1995) examined statistical research on gender disparity in sentencing by adopting a meta-analytical approach that included 50 unique data sets from studies published through 1990. By adopting this meta-analytical approach, Daly and Bordt were able to clarify the evidence in the field and to summarise a substantial body of research.

Daly and Bordt (1995) found that, of the 249 individual outcomes reported from the 50 data sets in their study, 149 (60 per cent) showed effects favouring women while only two of the individual outcomes showed differences favouring men. Studies that included multivariate analyses controlling for a variety of variables (in particular, prior criminal history) attenuated the strength of the effect of gender but did not eliminate it altogether: all other factors being equal, women still received shorter sentences than did men. This was particularly so for the decision to incarcerate (the 'in–out' decision), although women still had slightly shorter imprisonment sentences (Daly and Bordt, 1995, p. 158). Across the best of these studies the magnitude of the 'in–out' gender gap ranged from 8 to 25 percentage points.

The literature on gender disparities in sentencing from Australian research is sparse. A somewhat dated but nonetheless interesting and informative study was conducted in the early 1990s and looked at differences in sentencing outcomes for men and women in the Victorian Magistrates' Court. In her observational study of 1,301 cases heard in the Magistrates' Court, Naylor hypothesized that differential treatment of men and women would primarily be due to the operation of gender stereotypes.

Naylor found that women appearing before the court were typically poorer than men, were more likely to be financially dependent and were more likely to have responsibility for childcare (Naylor, 1992, pp. 14–16). In terms of differences in the nature of their offending, women were more likely to be first offenders, acting alone, and charged with an offence against property or public order. They were unlikely to be charged with a violent offence (Naylor, 1992, pp. 19–20).

When it came to sentencing, men and women were equally likely to receive a penalty at the higher end of the scale, whether a custodial sentence, a suspended sentence or a community-based order. However, differences arose at the lower end of the penalty scale, with women being more likely to receive a bond (35% of women compared with 23% of men) and less likely to be fined (49.3% of women compared with 61.2% of men). When women were fined, the fine amount tended to be lower than for men (Naylor, 1992, p. 13).

Preliminary multivariate analysis, however, found that gender *per se* had little influence on sentencing, except in relation to the size of any fines received. After controlling for measures of offence seriousness and prior criminal history, gender played no role in the type of sentence received. However, even after controlling for these factors, gender did still predict the amount of the fine (Naylor, 1992, p. 4).

While sentencing practices may well have changed since this study was published more than fifteen years ago, it represents a valuable contribution to the field in its use of observational data collection. By sitting in court and listening to real cases, the researchers were able to collect rich and detailed information that would otherwise be unavailable from secondary analysis of administrative datasets. In particular, the availability of information on prior history of offending is critical to understanding the nature of gender differences in sentencing outcomes in the criminal courts.

Gender differences in sentencing outcomes in Victoria

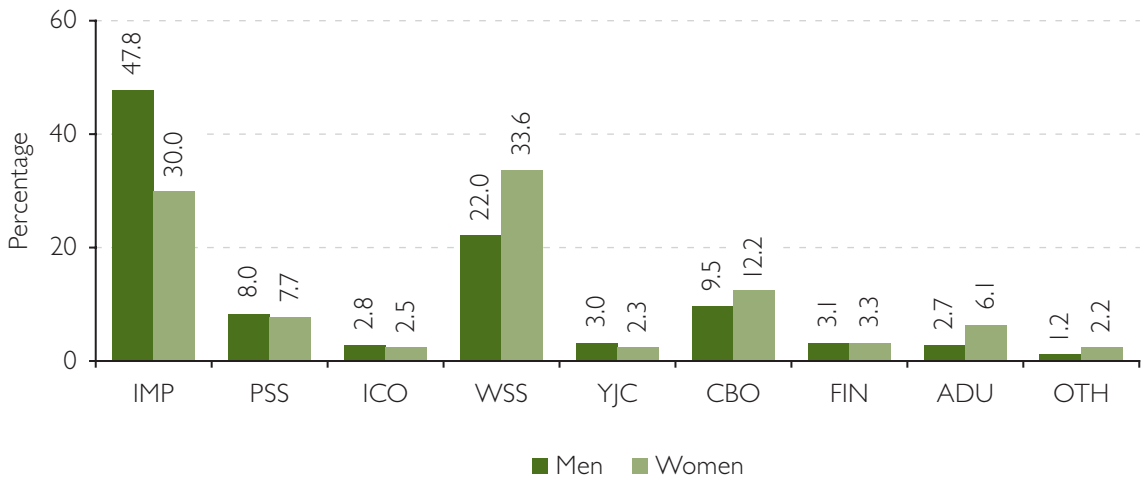
Consistent with the literature, disparities in sentencing outcomes are evident in the Victorian criminal courts—on the face of the evidence, women sentenced in the Victorian courts seem to receive shorter sentences than do men.

Sentencing in the Victorian County and Supreme Courts

The number of people sentenced in the County and Supreme Courts (the higher courts) each year is only a fraction of those in the Magistrates' Court. As the higher courts hear only cases with more serious offences, and as women are less likely to be charged with a serious offence than are men, the number of women appearing in the higher courts each year is very small. Nonetheless, the literature suggests that gender disparities are greater for more serious crimes; we might thus expect to see substantial differences in sentencing outcomes despite the low numbers of women sentenced in the higher courts.

Figure 10 shows the overall sentence outcome distribution for men and women sentenced in the Victorian higher courts over a nine-year period.

Figure 10: Percentage of defendants sentenced in the higher courts by total effective sentence type and gender, July 2000 to June 2009



IMP = Imprisonment; PSS = Partially suspended sentence of imprisonment; ICO = Intensive correction order; WSS = Wholly suspended sentence of imprisonment; YJC = Youth justice centre order; CBO = Community-based order; FIN = Fine; ADU = Adjourned undertaking; OTH = Other[6]

Source: Department of Justice (Vic), Unpublished statistics

Overall in the higher courts, men are far more likely than women to be sentenced to a term of imprisonment (47.8% of men compared with 30.0% of women), while women are more likely to be given a wholly suspended sentence (33.6% of women compared with 22.0% of men), a community-based order (12.2% compared with 9.5%) or an adjourned undertaking (6.1% compared with 2.7%). Thus men are more likely to receive an immediate custodial sentence[7] while women are more likely to receive a sentence that allows them to remain in the community.

In just the most recent year (2008–09) there were 156 women sentenced in the Victorian higher courts, compared with 1,776 men. Of these people, 54 women were sentenced to imprisonment (34.6%) compared with 881 men (49.6%). Thus overall, women appearing before the higher courts are less likely to be sentenced to a term of imprisonment than are men. However, this disparity is not consistent across all offence types, as shown in the following analyses.

6 'Other' includes: Indefinite term of imprisonment; Combined custody and treatment order; Home detention order; Youth attendance order; Youth supervision order; Hospital security order; Residential treatment order; Restricted involuntary treatment order; Custodial supervision order; Non-custodial supervision order; Good behaviour bond; Dismissal; Discharge; and Conviction and discharge.

7 An immediate custodial sentence is one that involves at least some element of immediate (as opposed to wholly suspended) imprisonment or detention.

The following sections present information only for those principal proven offences[8] for which there were sufficient numbers of women sentenced from July 2000 to June 2009 to allow for a meaningful analysis.[9] The three most common offences for which women were sentenced in the higher courts over the nine years were armed robbery (257 women), trafficking in a non-commercial quantity of drugs (193 women) and theft (170 women).

Sentencing for offences against the person

As seen in the section above considering gender differences in official police statistics, women are less likely than men to commit violent offences; when they do, their crimes are often of a different nature.[10] Thus differences in sentencing outcomes for men and women for these offences might be expected.

For the three selected offences against the person, men are more likely than women to be sentenced to a term of imprisonment. The most noticeable difference is for causing serious injury recklessly, where men (37.2%) are twice as likely as women (18.3%) to be imprisoned.

Gender differences are also clearly apparent in the use of wholly suspended sentences for these selected offences against the person, with women being far more likely than men to receive a wholly suspended sentence of imprisonment. This difference is most pronounced for armed robbery, where women (19.1%) are more than twice as likely to have an imprisonment sentence wholly suspended than are men (9.1%).

A similar gender discrepancy is seen in the imposition of community-based orders: for both causing serious injury recklessly and armed robbery, women are more likely than men to receive a community-based order. This is most evident for causing serious injury recklessly, where women (25.0%) are almost twice as likely to receive this sentence as are men (12.7%).

The existence of a differential use of partially suspended sentences for offences against the person is less clear. For armed robbery and causing serious injury intentionally men and women were equally likely to receive a partially suspended sentence. For causing serious injury recklessly this sentence was more common for men.

As would be expected by the more serious nature of armed robbery (and the higher maximum penalty), a higher proportion of both men and women were sentenced to imprisonment for this offence than for the others. This graduated sentencing—with more severe outcomes for the more serious offence—is also evident for the injury offences, where the highest proportion of both men and women were imprisoned for the most serious form of the offence, causing serious injury intentionally.

A similar pattern is seen in the average length of the total effective terms of imprisonment imposed for these offences against the person. For all three offences men face a longer term of imprisonment than do women. This difference is least pronounced for causing serious injury intentionally, where the average total effective terms are quite similar.[11]

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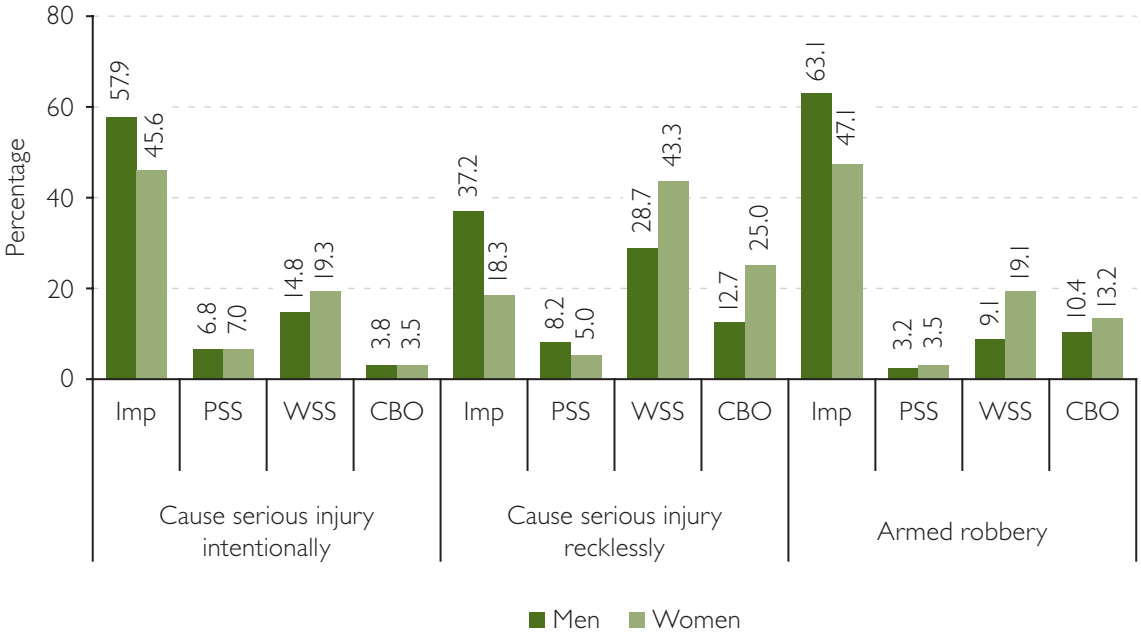
8 The principal proven offence is the offence that received the most severe sentence within a case.

9 Only offences with more than 20 women sentenced (and 10 women imprisoned) over the nine-year period were included in this analysis. For the selected offences, the number of women sentenced ranged from 20 women sentenced for murder to 257 women sentenced for armed robbery, while the number of women sentenced to imprisonment ranged from 11 for causing serious injury recklessly to 121 for armed robbery. It is possible that the low number of women imprisoned by the higher courts may slightly distort the data on average imprisonment lengths and thus make it less robust than the equivalent data for men. Data on average lengths of imprisonment terms for women should thus be treated with some caution.

10 This is further discussed below in the specific context of the offences of murder and manslaughter.

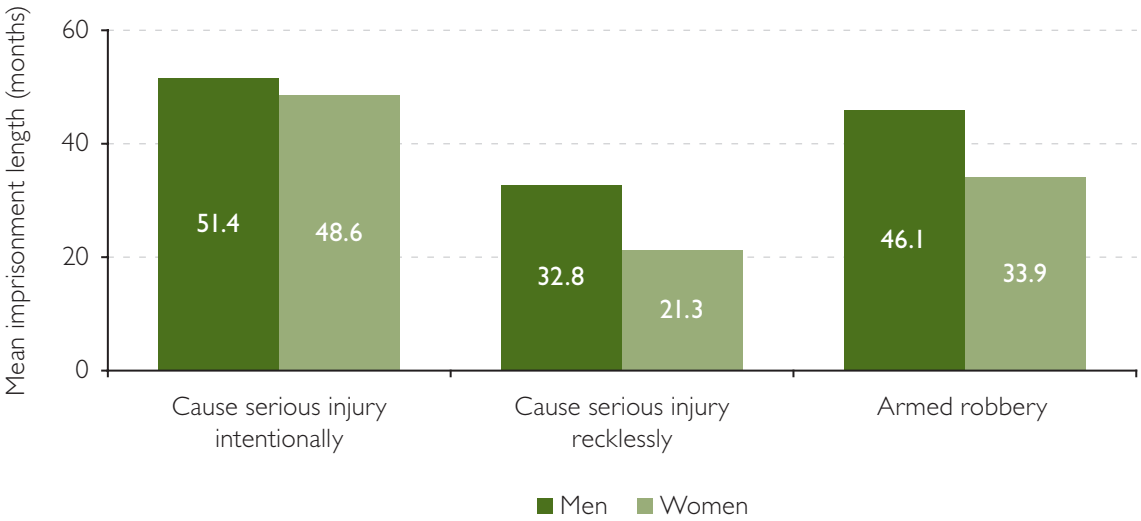
11 As the number of women sentenced to imprisonment for the injury offences is quite low (n = 26 for causing serious injury intentionally and n = 11 for causing serious injury recklessly), the findings need to be interpreted with some caution. However, the higher number of women sentenced to imprisonment for armed robbery (n = 121) suggests that the findings are robust.

Figure 11: Percentage of men and women sentenced in the higher courts for selected offences against the person, by sentence type, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

Figure 12: Average length of imprisonment terms for men and women for selected offences against the person, higher courts, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

This clear pattern of differences in sentencing outcomes for men and women is somewhat attenuated in the most serious offences heard in the higher courts—those involving the death of a victim. For these the picture becomes quite complex.

For both murder and manslaughter, the pattern is in the expected direction, with women being less likely to receive a sentence of imprisonment. Extensive research has shown that the circumstances under which men and women kill are vastly different, with women being far more likely to kill their domestic partners in the context of ongoing domestic violence.[12] Thus the finding of differences in the likelihood of imprisonment is not unexpected.

As expected, women sentenced for manslaughter are far more likely to be sentenced to a wholly suspended term of imprisonment (12.0% compared with 2.6% of men). Again, the differences in the context of the offending for men and women are likely to play a significant role in this discrepancy.

What is unexpected, however, is the greater likelihood of women being sentenced to a term of imprisonment for culpable driving causing death. Of the 32 women who were sentenced for this offence over the nine-year period, 29 (90.6%) were imprisoned, far more than the 78.0 per cent of men. However, further analysis shows that an additional 24 men (12.6%) were sentenced to detention in a youth justice centre, resulting in a total of 90.6 per cent of men in adult or juvenile detention. The odd gender differential has thus disappeared completely when this additional sentence outcome is considered. This indicates that the age profile of men and women sentenced for this offence likely varies, with women being older than men. Indeed, previous research on sentencing outcomes for this offence in Victoria has shown that women sentenced for culpable driving causing death tend to be, on average, about six years older than men.[13]

Figure 13: Percentage of men and women sentenced to a term of imprisonment for selected offences involving death, higher courts, July 2000 to June 2009

Source: Department of Justice (Vic), Unpublished statistics

12 For a brief overview of the nature and context of women's offending in this area, see Gelb (2007). For extensive and detailed analyses of the circumstances of men's and women's offending for these crimes, see Polk (1994) and Morgan (2002).

13 See Sentencing Advisory Council (2007, 2009), Sentencing Snapshot No. 29 and No. 86 on sentencing trends for culpable driving causing death in the higher courts of Victoria.

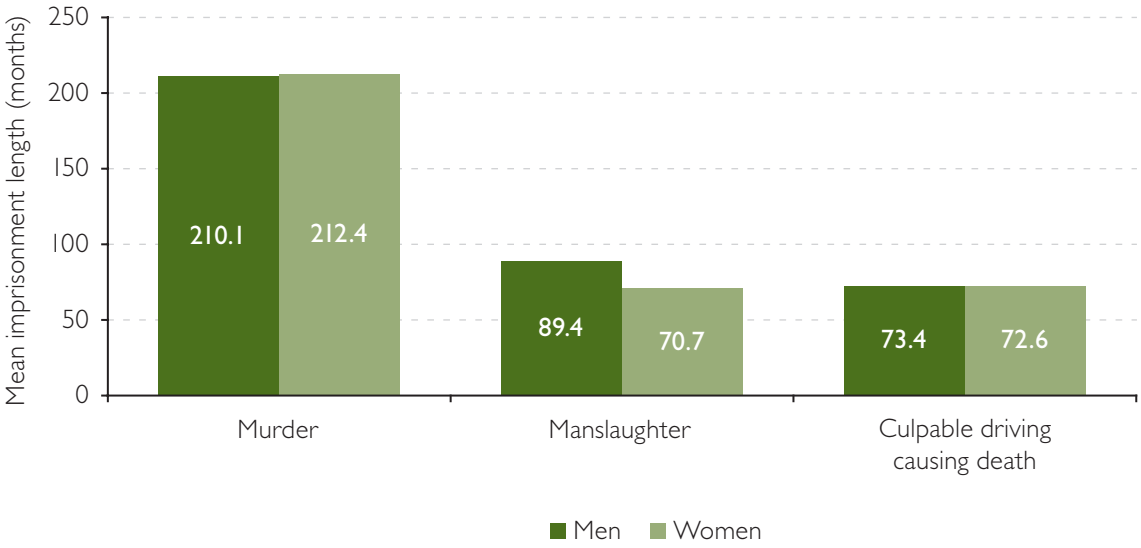
When it comes to the length of the imprisonment terms, the most obvious feature for these offences is the similarities between men and women for murder and for culpable driving causing death. It seems that in these most extreme offences, any gender discrepancies disappear.

However, women's average length of imprisonment for manslaughter remains well below that for men (almost six years for women compared with seven and a half years for men),[14] possibly due to the fact that in many instances where women kill their partners in the context of a history of domestic victimization, women are convicted of manslaughter rather than murder. It is also possible that women are more likely than men to be convicted of less serious forms of manslaughter such as criminal negligence manslaughter or in the circumstances of a suicide pact, while men may be more likely to be convicted of more serious forms of the offence such as unlawful and dangerous act manslaughter. However, this hypothesis remains untested.

It is possible that the differential sentencing outcomes seen for these offences are due to the less serious nature of women's offending within each offence type. For example, one would expect sentences to be less severe for people who are convicted of fewer co-occurring offences—offences for which the person is sentenced at the same time.

Taking armed robbery as an illustration of this possible difference in the circumstances and gravity of men's and women's offending, data from the courts show that the *type* of co-occurring offences for which men and women are sentenced does not vary much. For both men and women sentenced for armed robbery between July 2004 and June 2009, the most common offence sentenced at the same time as the armed robbery was theft. Other offences sentenced include causing injury, robbery, burglary and drug possession. The difference between men and women lies in the *number* of co-occurring offences, with women being sentenced for fewer offences on average than men. Women were sentenced for an average of 2.64 offences while men were sentenced for an average of 3.39 offences. It is likely that the lower number of offences for which women are convicted is playing a role in the differential sentencing outcomes observed in the data.

Figure 14: Average length of imprisonment terms for men and women for selected offences involving death, higher courts, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

14 As the number of women sentenced to imprisonment for these offences is quite low (n = 15 for murder, n = 18 for manslaughter and n = 29 for culpable driving causing death), the findings need to be interpreted with some caution.

Sentencing for property offences

For each of the four selected property offences, men are more likely to be sentenced to a term of imprisonment than are women. Substantial differences are found for two of the offences: men are almost twice as likely to be imprisoned for aggravated burglary and for obtaining financial advantage by deception.

The smallest difference is seen for theft, which is probably the most 'typical' of women's crimes. For theft, 42.2 per cent of men and 37.1 per cent of women were sentenced to a term of imprisonment over the nine-year period. It is possible that the circumstances of women's offending for this particular offence are more similar to men's than they are for other types of offending, resulting in more similar sentencing outcomes.

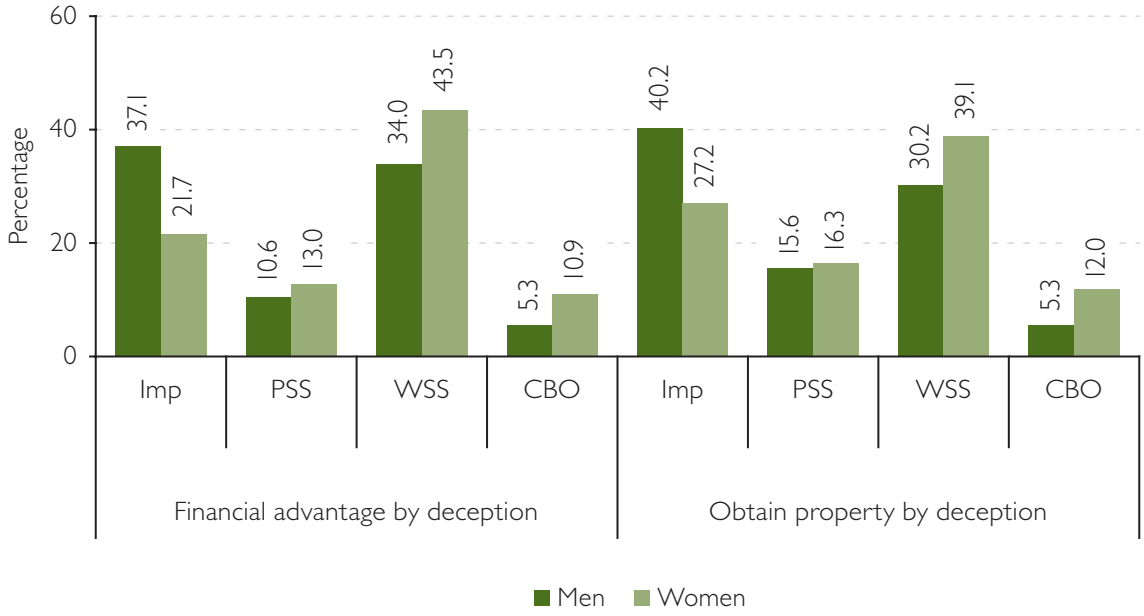
For each of the property offences included in the analysis, women are more likely to receive a wholly suspended sentence than are men. The difference is most apparent for aggravated burglary (54.2% of women compared with 33.7% of men).

Gender differences in the use of community-based orders are inconsistent across the offences examined. The only clear pattern is for the two deception offences, where women are more than twice as likely as men to receive a community-based order.

Figure 15: Percentage of men and women sentenced in the higher courts for selected property offences, by sentence type, July 2000 to June 2009

Source: Department of Justice (Vic), Unpublished statistics

Figure 16: Percentage of men and women sentenced in the higher courts for selected property offences, by sentence type, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

A different pattern emerges when considering the average total effective length of imprisonment terms for men and women for these property offences.[15] For three of the four offences, the expected pattern is seen, with women serving shorter terms of imprisonment than men.

However, the high-volume offence of theft (170 women sentenced) stands out among these property offences, both for the similar proportion of men and women being sentenced to a term of imprisonment (37.1% of women compared with 42.2% of men) and for the longer average terms of imprisonment imposed on women (36.7 months for women compared with 31.5 months for men).

Gender differences in the number of co-occurring offences cannot explain the unusual pattern seen for theft, as women sentenced for this offence are sentenced for an average of 6.42 offences, compared with 7.11 offences for men. Thus the unusual pattern is not caused by a higher average number of co-occurring offences. As this is one of the most common offences for which women are sentenced, it is possible that judges do not allow any scope for differential sentencing outcomes based on gender, especially as the offences appearing before the higher courts are the more serious ones.

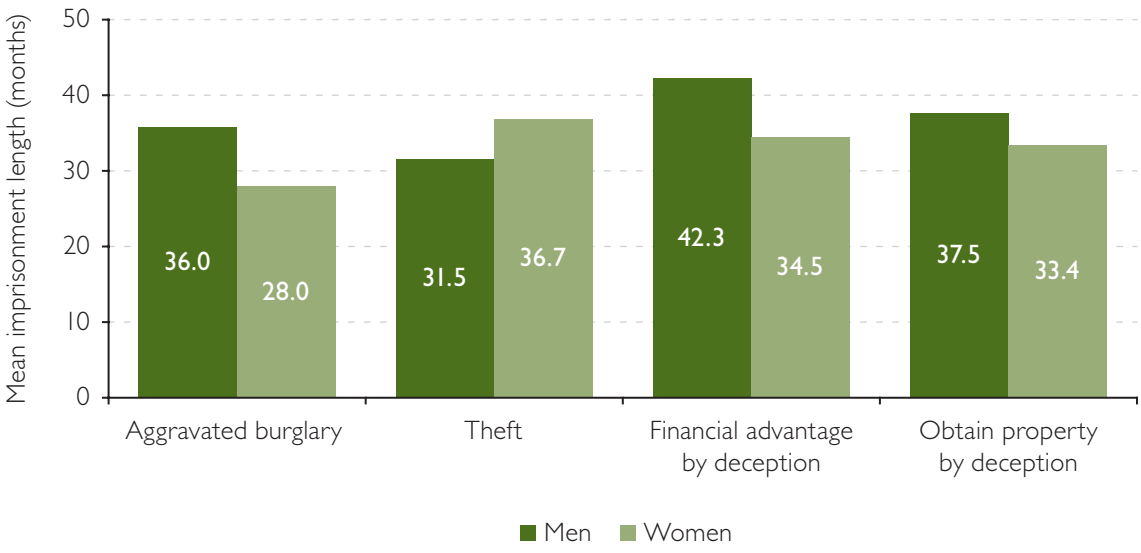
15 As the number of women sentenced to imprisonment for some of these offences is quite low (n = 23 for aggravated burglary, n = 20 for obtaining financial advantage by deception and n = 25 for obtaining property by deception), the findings need to be interpreted with some caution. However, the higher number of women sentenced to imprisonment for theft (n = 63) suggests that the findings are more robust.

There are two other possibilities that might account for the different patterns observed in the data for theft. The value of the property stolen by men and women may vary—women's theft offences may involve larger property values than men's. Women may also be more likely to be stealing to finance gambling debts, which is rarely treated as a strongly mitigating factor.[16] While these hypotheses are all theoretically viable, the data do not allow for them to be tested.

As with offences against the person, it is possible that the differential sentencing outcomes seen for most of these offences are due to the less serious nature of women's offending within each offence type.

For example, data on co-occurring offences for obtaining a financial advantage by deception show an even greater gender difference than did the data for armed robbery. While both men and women share a very similar set of offences sentenced at the same time as the deception offence, women are being sentenced for far fewer offences on average than are men. Women sentenced for obtaining a financial advantage by deception are sentenced for an average of 5.75 offences while men are sentenced for an average of 9.66 offences. Once again it is likely that the lower number of offences for which women are convicted is playing a role in the differential sentencing outcomes observed in the data.

Figure 17: Average length of imprisonment terms for men and women for selected property offences, higher courts, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

16 See, for example, *R v Dawsan* [1997] VSCA (Unreported, Winneke P, Brooking JA and Ashley JA, 27 May 1997) 6. In more recent times, Justice Redlich stated in *R v Grossi* [2008] VSCA 51 (Unreported, Vincent, Neave and Redlich JJA, 2 April 2008) and affirmed in *R v Wang* [2009] VSCA 67 (Unreported, Ashley and Redlich JJA, 19 March 2009) that a gambling addiction will not ordinarily be treated as a mitigating circumstance due to a number of reasons: (1) the nature and severity of the symptoms will not warrant a reduction in moral culpability or any moderation of general deterrence; (2) crimes associated with gambling addiction are typically repeated and extended over a protracted period; (3) in cases involving dishonesty, the crimes will commonly be sophisticated, devious and the result of careful planning; (4) the gravity of such offences, if there is a breach of trust, will commonly attract an increased penalty; (5) as the offender has a degree of choice as to how to finance the addiction, there is a reluctance to reduce moral culpability; and (6) the direct causal link between the addiction and the crime will often be unsubstantiated.

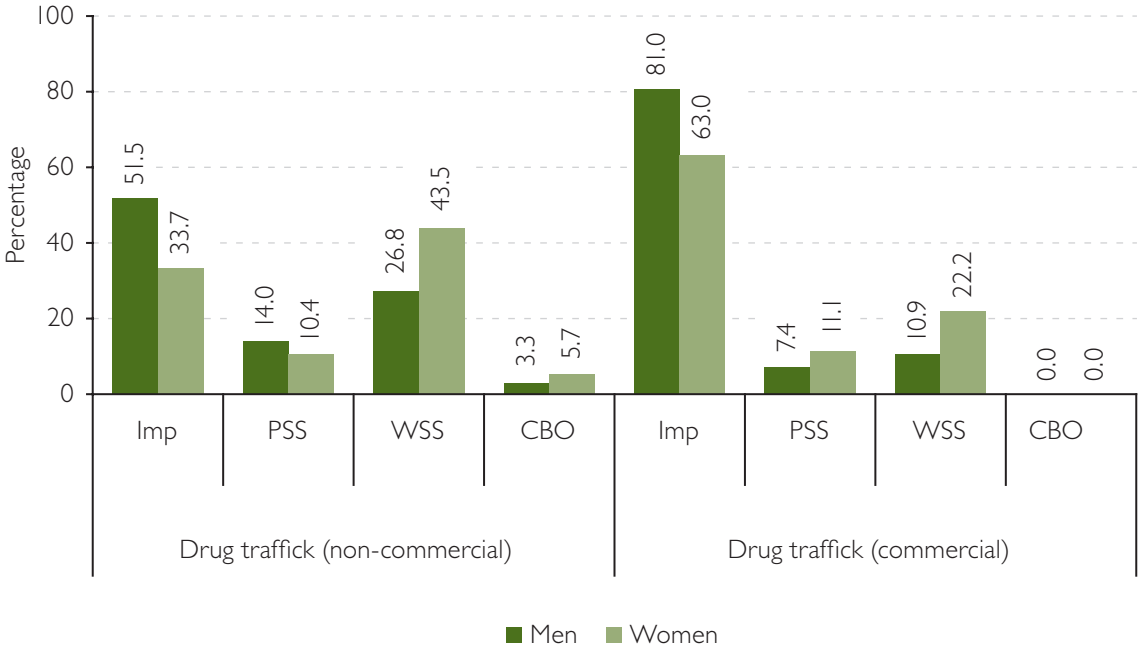
Sentencing for drug offences

As seen above in the section examining gender differences in official police statistics, women are less likely than men to commit drug offences; when they do, their crimes are often of a different nature.[17] Thus differences in sentencing outcomes for men and women for these offences might be expected.

Sentencing for drug offences follows the expected pattern, with women being less likely to be sentenced to a term of imprisonment for both of the offences for which there were sufficient numbers of women sentenced to allow for a meaningful analysis.[18]

On the other hand, for both of these drug offences women are far more likely than men to receive a wholly suspended sentence. The largest difference is for trafficking a commercial quantity of drugs, with women being more than twice as likely as men to receive a wholly suspended term of imprisonment (22.2% compared with 10.9%).

Figure 18: Percentage of men and women sentenced in the higher courts for selected drug offences, by sentence type, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

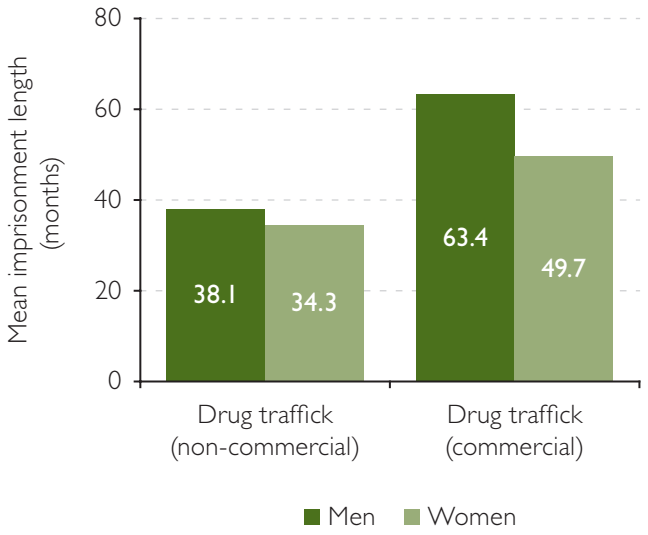
17 Women are more likely than men to have committed their offences while under the influence of drugs or to support their drug habits (Corrections Victoria, 2005, p. 9): on average, 64.7% of women prisoners committed their offences while under the influence of drugs or to support their drug habit, compared with 47.5% of men. One theory for this gender difference in patterns of drug use is that women tend to use illegal drugs (including illegal use of prescription medications) as a way of coping or self-medicating for psychological distress. In particular, research has shown that experiences of abuse—in particular, childhood abuse—are associated with the development of anxiety disorders such as post-traumatic stress disorder, which can subsequently increase the likelihood of drug abuse. Indeed, in their study of Australian prisoners, Forsythe and Adams (2009) found that women who had experienced childhood abuse were more likely than men to abuse drugs, and women showed a stronger relationship than men between experiences of abuse and mental illness. This finding confirms the previous work of researchers such as Byrne and Howells (2002), whose review of the literature showed that a history of abuse is often associated with the development of anxiety disorders. Substance abuse is commonly used to manage the symptomatology associated with such disorders among women victims who are not able to find other adequate strategies to manage their emotional distress (Byrne and Howells, 2002, p. 36).

18 Over the nine years there were only four women sentenced for trafficking in a large commercial quantity of drugs and 17 women sentenced for cultivating a non-commercial quantity of a narcotic plant. While there were 27 women sentenced for cultivating a commercial quantity of a narcotic plant, only six were sentenced to imprisonment. The cut-off chosen for these analyses was a minimum of 20 women sentenced overall and 10 sentenced to imprisonment over the reference period. As a result these three drug offences were excluded from the analysis.

As expected, imprisonment is the most common sentence for both men and women convicted of trafficking a commercial quantity of drugs, due to the seriousness of the offence and its maximum penalty of life in prison. However, the pattern is quite different for trafficking a non-commercial quantity of drugs: the most common sentence for men convicted of this offence is imprisonment (51.5% of men) but the most common sentence for women convicted of this offence is a wholly suspended sentence (43.5% of women).

As with most of the other offences examined in these analyses, for drug offences women are sentenced to shorter average total effective terms of imprisonment than are men.[19]

Figure 19: Average length of imprisonment terms for men and women by selected drug offences, higher courts, July 2000 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

It is likely that the gender discrepancies seen in sentencing outcomes for drug offences in particular are due to the different nature of the offending of male and female drug offenders. In these kinds of offences women typically play a subordinate role to men, often adopting the 'drug mule' role under coercion from their male co-offenders (who are often also their spouses or partners). This secondary role, often taken as a less-than-willing participant, is likely to play at least some part in the differential sentencing outcomes seen in these data.

Summary

In the Victorian County and Supreme Courts, women seem to be sentenced differently to their male counterparts. For all but a few offences women are less likely to be sentenced to a term of imprisonment and, when they are, women receive shorter average total effective terms. For most offences women are more likely to be sentenced to a wholly suspended sentence or a community-based order, both of which are served in the community rather than in custody.

Thus for sentencing of serious offences, gender disparities in sentencing outcomes do appear to exist. But without knowing the nature of the offending, it is difficult to determine if there are variations in offence seriousness *within* these offence types. A more detailed examination of offence seriousness will be presented in a multifactor analysis to follow later in this report.

19 As the number of women sentenced to imprisonment for trafficking in a commercial quantity of drugs is quite low (n = 17), the findings need to be interpreted with some caution. However, the higher number of women sentenced to imprisonment for trafficking in a non-commercial quantity of drugs (n = 65) suggests that the findings are more robust.

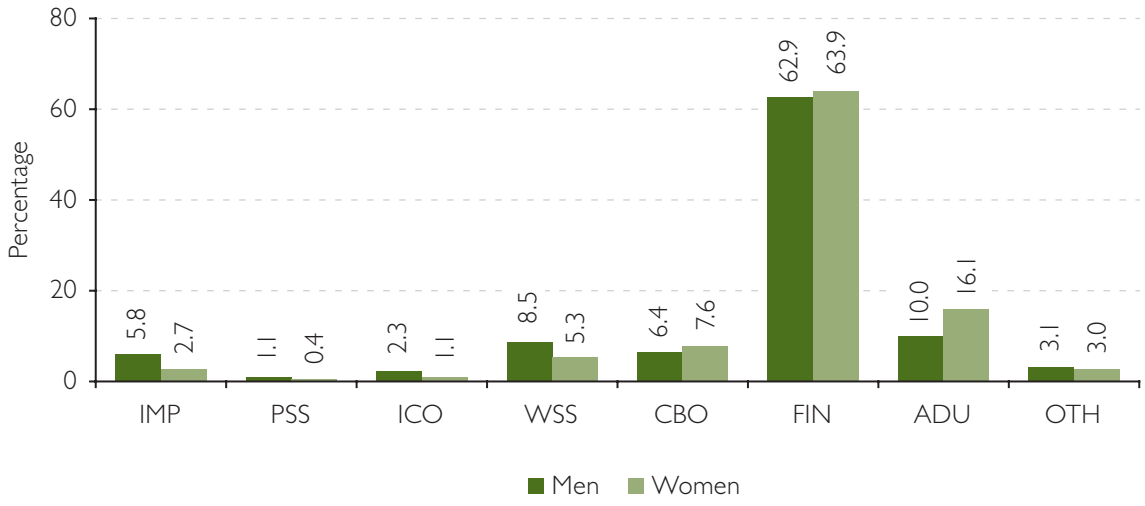
Sentencing in the Victorian Magistrates' Court

Far more people are sentenced each year in the Magistrates' Court than in the higher courts, with the vast majority of these being men: in 2008–09 there were 64,549 men (80% of all people sentenced) and 16,317 women (20% of all people sentenced) sentenced in the Magistrates' Court of Victoria. The most common offence for which women were sentenced in the Magistrates' Court in the five years from July 2004 to June 2009 was theft (9,947 women), while the most common offence for which men were sentenced over this period was driving while disqualified or suspended (33,173 men).

Figure 20 shows the overall sentence outcome distribution for men and women sentenced in the Victorian Magistrates' Court over a five-year period.

The overall picture emerging from the Magistrate's Court is similar to that seen in the higher courts, with women again being less likely than men to be sentenced to an immediate term of imprisonment: men in the Magistrates' Court are more than twice as likely as women to be imprisoned (5.8% of men compared with 2.7% of women). However, in the Magistrates' Court women are also less likely than men to receive a wholly suspended sentence (5.3% of women compared with 8.5% of men), whereas in the higher courts women were more likely to receive this sentence.

Figure 20: Percentage of defendants sentenced in the Magistrates' Court by total effective sentence type and gender, July 2004 to June 2009



IMP = Imprisonment; PSS = Partially suspended sentence of imprisonment; ICO = Intensive correction order; WSS = Wholly suspended sentence of imprisonment; CBO = Community-based order; FIN = Fine; ADU = Adjourned undertaking; OTH = Other[20]

Source: Department of Justice (Vic), Unpublished statistics

20 'Other' includes: Combined custody and treatment order; Drug treatment order; Home detention order; Youth justice centre order; Hospital security order; Dismissal; Discharge; and Conviction and discharge.

As in the higher courts, in the Magistrates' Court women are more likely than men to be sentenced to a community-based order (7.6% of women compared with 6.4% of men), although the difference is less pronounced than it is in the higher courts. Women are also more likely than men to receive an adjourned undertaking in the Magistrates' Court (16.1% compared with 10.0%). The proportion of men and women receiving a fine is about the same, but while fines account for only a few per cent of all sentences in the higher courts, they account for almost two-thirds of sentences for both men and women sentenced in the Magistrates' Court.

Of the 16,317 women sentenced in the Magistrates' Court in just the most recent year (2008–09), 364 were sentenced to imprisonment (2.23%). Of the 64,549 men sentenced in the Magistrates' Court that year, 3,197 were sentenced to imprisonment (4.95%). Thus overall, men appearing before the Magistrates' Court are more than twice as likely as women to be sentenced to a term of imprisonment. However, this disparity is not consistent across all offence types, as shown in the following analyses.

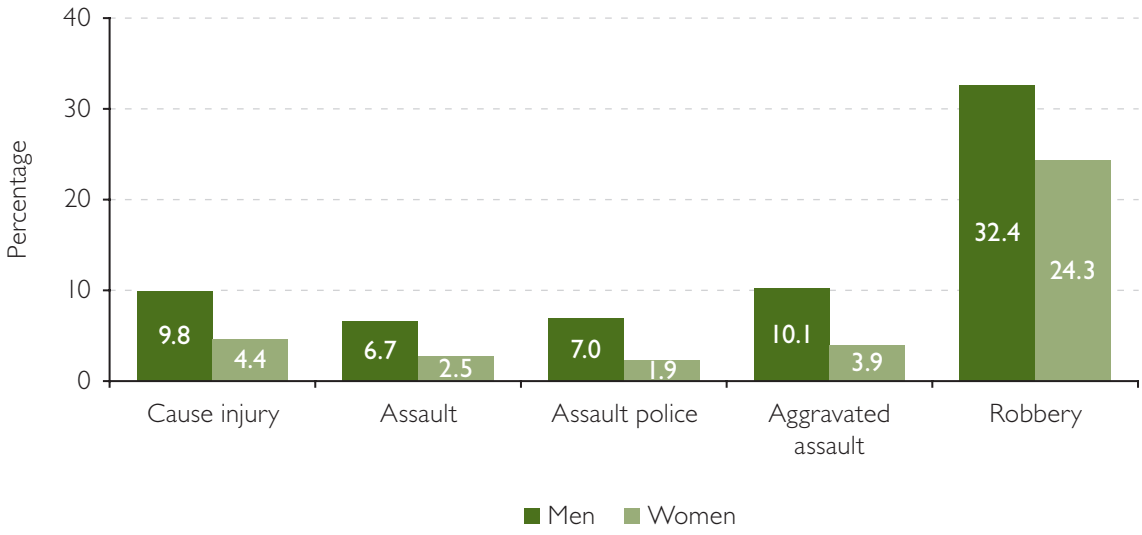
The following sections present information on a variety of offences for which there were sufficient numbers of women sentenced over the five years to allow for a meaningful analysis.[21]

Sentencing for offences against the person

Women are far less likely to be sentenced to a term of imprisonment than are men for each of these offences against the person. The difference is most pronounced for assaulting a police officer, where men are more than three times as likely to be imprisoned (7.0% or 291 of 4,164 men compared with 1.9% or 20 of the 1064 women).

Both men and women are far more likely to be sentenced to a term of imprisonment for robbery than they are for the other offences, with almost a quarter of women (24.3% or 18 of 74 women) and a third of men (32.4% or 180 of 555 men) being sent to prison for this crime. These are the second highest rates of imprisonment for any of the offences included in this analysis, only behind aggravated burglary.

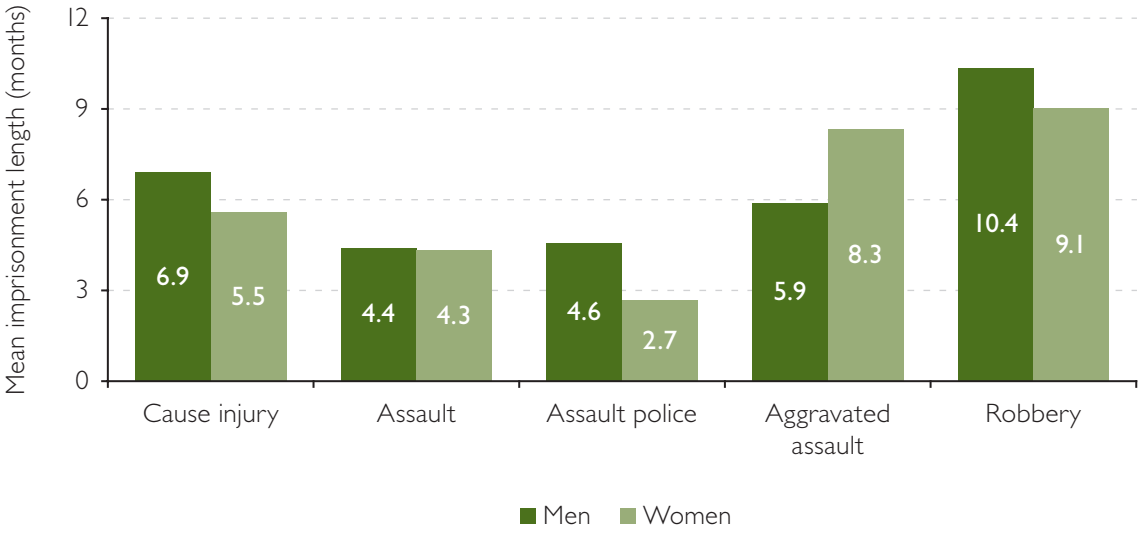
Figure 21: Percentage of men and women sentenced to a term of imprisonment for selected offences against the person, Magistrates' Court, July 2004 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

21 Only those offences for which at least 10 women were sentenced to imprisonment over the five years are included in this analysis. It is possible that the low number of women imprisoned by the Magistrates' Court may slightly distort the data on average imprisonment lengths and thus make it less robust than the equivalent data for men. However, the small variation in lengths of sentences imposed by the Magistrates' Court (due to jurisdictional limits on the length of prison terms able to be imposed by the Magistrates' Court) means that the cut-off of 10 people will still allow for valid comparison between men and women.

Figure 22: Average length of imprisonment terms for men and women for selected offences against the person, Magistrates' Court, July 2004 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

This same pattern is found in the data for average length of imprisonment terms, where women typically receive shorter sentences. While sentences for assault approach equal lengths for the 50 women and 600 men sentenced to imprisonment, the only offence for which women are sentenced to longer terms of imprisonment on average is aggravated assault (a substantial difference of 8.3 months for the 19 women compared with 5.9 months for the 221 men).[22]

Offences against the person are not the type of criminal behaviour typically associated with women. It is thus possible that sentencing for women convicted of committing violent offences will be harsher than for men. In terms of the proportion of women imprisoned, this is clearly not the case, with women being *less* likely than men to receive a term of imprisonment.

However, for the average lengths of imprisonment terms, this hypothesis does garner some support, at least for aggravated assault, where the average term of imprisonment for women (8.3 months) is substantially longer than that for men (5.9 months). It is possible that this more serious form of assault, with the use of a weapon, additional violence such as kicking or the offence being performed in the company of others, is seen as especially deviant for women, leading to longer terms of imprisonment for those 3.9 per cent of women who are sent to prison for this offence. But without more detailed information on the nature of the offenders, such as their prior criminal histories and type of plea, this hypothesis remains untested.

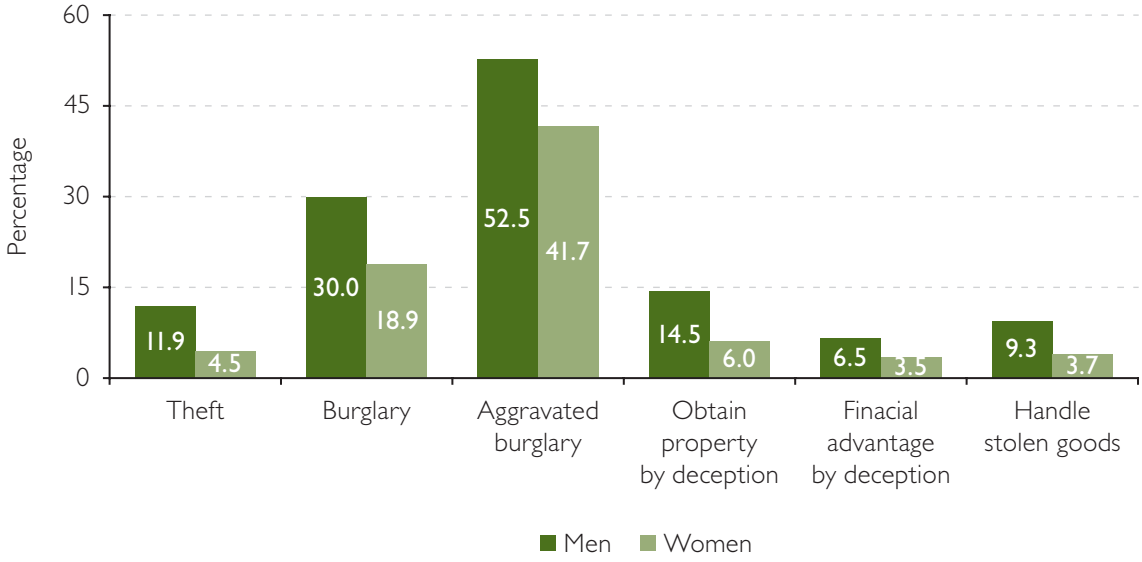
22 For causing injury 75 of 1,715 women were sentenced to a term of imprisonment, compared with 1,039 of 10,568 men.

Sentencing for property offences

Women are far less likely to be sentenced to a term of imprisonment than are men for each of these property offences. The difference is most pronounced for the more 'typical' crimes committed by women: theft (4.5% or 444 of 9,947 women versus 11.9% or 2,293 of 19,202 men being sentenced to a term of imprisonment), obtaining property by deception (6.0% or 119 of 1,999 women versus 14.5% or 539 of 3,730 men) and handling stolen goods (3.7% or 21 of 566 women versus 9.3% or 196 of 2,105 men). While theft was the most common offence for which women were sentenced over this period, obtaining property by deception was the seventh most common, with 1,999 women sentenced.

Both men and women are far more likely to be sentenced to a term of imprisonment for aggravated burglary than they are for the other offences, with almost half of all women (41.7% or 20 of 48 women) and more than half of all men (52.5% or 180 of 343 men) being sent to prison for this crime. These are the highest rates of imprisonment for any of the offences included in this analysis of sentencing practices in the Magistrates' Court.[23] This is to be expected, given the serious nature of aggravated burglary, which carries a maximum term of imprisonment in Victoria of 25 years.

Figure 23: Percentage of men and women sentenced to a term of imprisonment for selected property offences, Magistrates' Court, July 2004 to June 2009



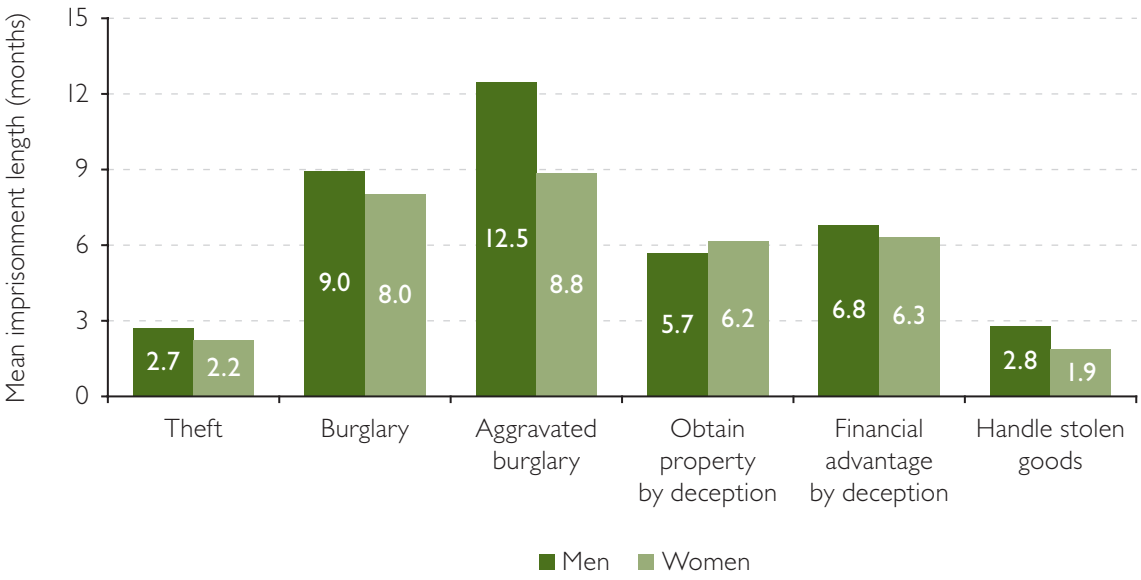
Source: Department of Justice (Vic), Unpublished statistics

23 For burglary 185 of 978 women were sentenced to imprisonment compared with 2,283 of 7,611 of men. For gaining financial advantage by deception 14 of 404 women were sentenced to imprisonment compared with 56 of 859 of men.

This same pattern is found in the data for average length of imprisonment terms, where women typically receive shorter sentences. The only offence for which women are sentenced to slightly longer terms of imprisonment on average is obtaining property by deception (6.2 months for women compared with 5.7 months for men).

It is surprising that women receive longer terms of imprisonment, on average, than do men for obtaining property by deception, even though the difference is only slight. Given the low proportion of women sentenced to prison for this offence in the first place (6%), it is likely that these women represent the most serious types of offenders, perhaps participating in the criminal behaviour over an extended period, targeting multiple victims or gaining a significant amount of property as a result of their crimes. It is also likely that in some of these cases there is a breach of trust by an employee or an abuse of professional status. If the deception offences included in this analysis were committed in such a context, and if women are more likely than men to commit these offences in this context, then harsher sentences for women are not unexpected, given that deterrence tends to be considered as a particularly significant sentencing purpose in this situation.[24] However, without more detailed information on the specific nature of the offending, these possibilities remain untested.

Figure 24: Average length of imprisonment terms for men and women for selected property offences, Magistrates' Court, July 2004 to June 2009



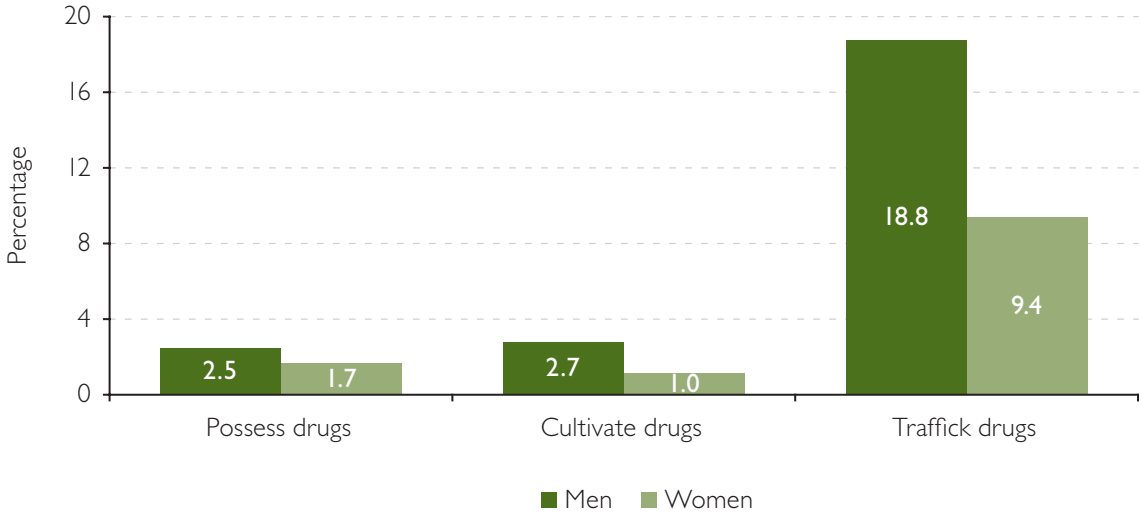
Source: Department of Justice (Vic), Unpublished statistics

24 Judicial College of Victoria (2010), Section 27.6.1.6 states that 'any hardship to the family as a result of an offender's incarceration has limited significance as the sentencing purpose of deterrence normally attracts more weight'. That is, women's possible mitigation of sentence due to an adverse impact on their family may have limited significance for such white-collar deception offences. Section 27.6.1.2 states that 'where offences are committed in breach of trust, good character and the absence of prior convictions may count for little due to the need for general deterrence'. See also *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105 (Unreported, Maxwell P, Nettle, Neave, Redlich and Weinberg JAA, 5 May 2010) in which a bench of five discussed the issue of mercy on the ground that imprisonment would cause hardship to family members or other dependents. It has long been a position at common law that, unless exceptional circumstances are shown to exist, family hardship should be disregarded as a sentencing consideration. In this case the applicants contended that, even in the absence of exceptional circumstances, a court could nonetheless exercise a 'residual discretion of mercy'. However, it was held that there is no residual discretion where circumstances are not shown to be exceptional; that is, that consideration of family hardship can only be given in limited situations.

Sentencing for drug offences

Women are far less likely to be sentenced to a term of imprisonment than are men for each of these drug offences. Consistent with the greater seriousness of offences involving trafficking drugs, both men (18.8% or 681 of 3,623 men) and women (9.4% or 73 of 777 women) are far more likely to be sentenced to a term of imprisonment for this offence than for cultivation or possession offences.

Figure 25: Percentage of men and women sentenced to a term of imprisonment for selected drug offences, Magistrates' Court, July 2004 to June 2009

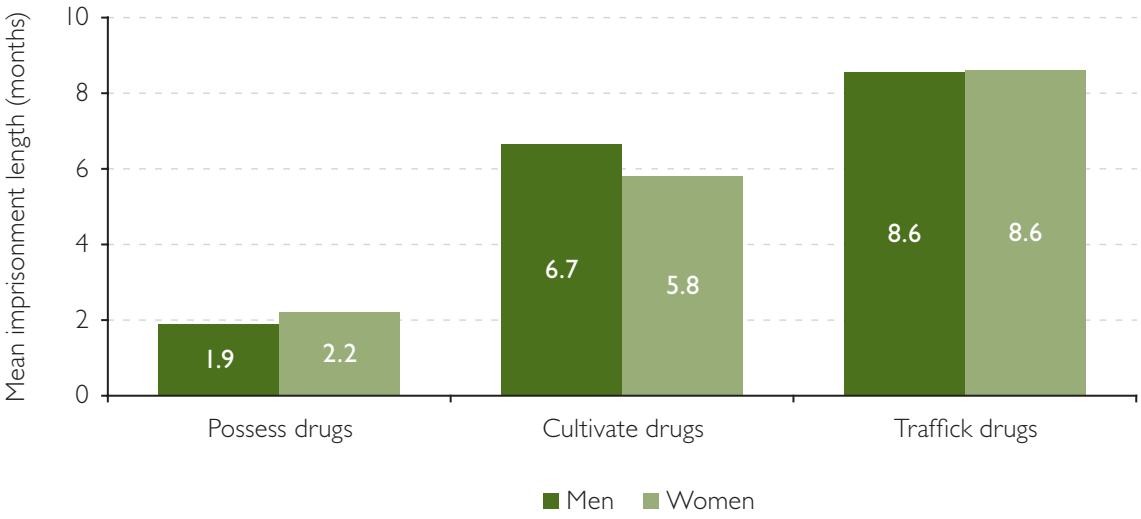


Source: Department of Justice (Vic), Unpublished statistics

A different pattern is found in the data for average length of imprisonment terms for drug offences. While for person and property offences women typically receive shorter sentences than do men, for drug offences the pattern is not so clear.

The only drug offence for which women receive shorter average terms of imprisonment is cultivation, where women's average term of imprisonment (5.8 months for the eight[25] of 812 women sentenced to prison) is slightly shorter than is men's (6.7 months for the 114 of 4,162 men sentenced to prison). For trafficking, men and women have identical average imprisonment lengths (8.6 months) while for possession, women have slightly longer average terms of imprisonment (2.2 months for the 19 of 1,128 women sentenced to imprisonment) than men (1.9 months for the 140 of the 5,620 men who were sentenced to imprisonment). For the most serious drug offence—trafficking—there is therefore no gender difference in the length of imprisonment term for the 9.4% of women sent to prison. The gender difference for this offence lies instead in the proportion of people imprisoned, with exactly twice as many men being imprisoned (18.8%) as women.

Figure 26: Average length of imprisonment terms for men and women for selected drug offences, Magistrates' Court, July 2004 to June 2009



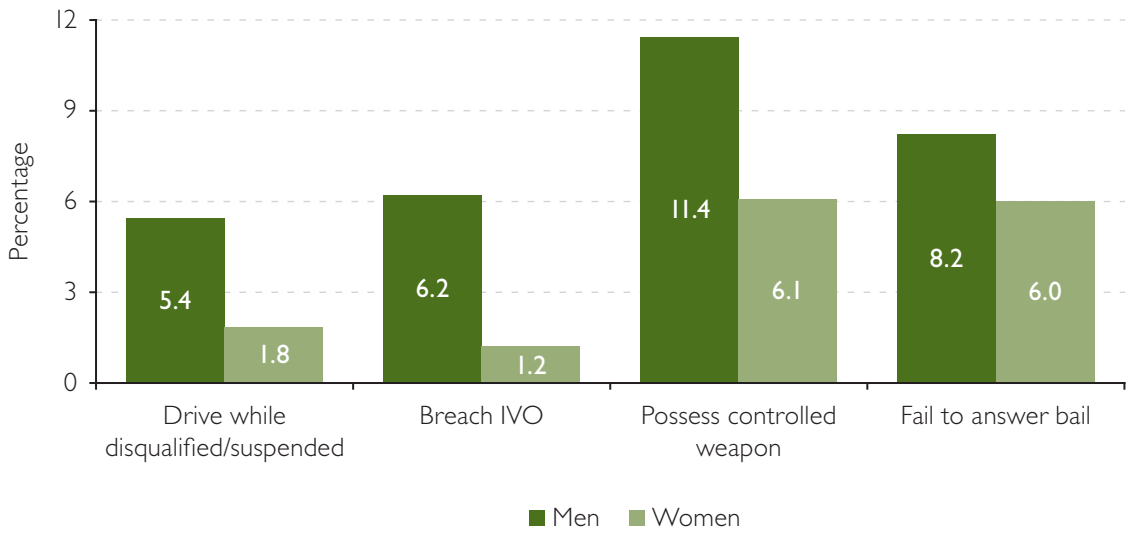
Source: Department of Justice (Vic), Unpublished statistics

25 Although the cut-off rule for inclusion in these analyses is for 10 women to be sentenced to imprisonment, an exception was made in the case of drug cultivation to allow for all three types of drug offences—trafficking, cultivating and possessing—to be represented. The data for cultivation, while indicative, should thus be treated with some caution.

Sentencing for other offences

Women are far less likely to be sentenced to a term of imprisonment than are men for each of the offences examined in this section—for driving while disqualified or suspended, breach of an intervention order, possessing a controlled weapon and failing to answer bail. The greatest difference lies in the offence of breach of an intervention order, with 1.2 per cent of women (or 10 of 830 women) and 6.2 per cent of men (or 247 of 3,979 men) being sentenced to a term of imprisonment.[26] This difference is likely due to the fact that these breaches typically occur in the context of family violence, and offending by men may be seen by the courts as being more serious—with potentially more serious consequences—than similar offending by women.[27]

Figure 27: Percentage of men and women sentenced to a term of imprisonment for selected other offences, Magistrates' Court, July 2004 to June 2009



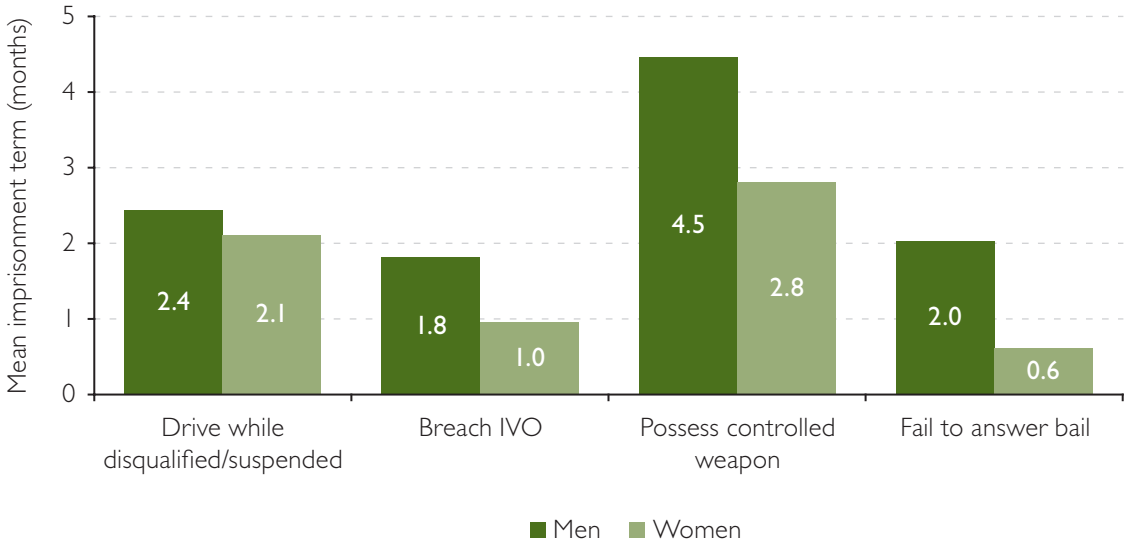
Source: Department of Justice (Vic), Unpublished statistics

26 For driving while disqualified 86 of 4,748 women were sentenced to imprisonment compared with 1,801 of 33,173 men. For possessing a controlled weapon 22 of 362 women were sentenced to imprisonment compared with 363 of 3,183 men. For failing to answer bail 28 of 468 women were sentenced to imprisonment compared with 173 of 2,107 men.

27 Prior research by the Sentencing Advisory Council has discussed the gendered nature of family violence, showing that breaches of family violence intervention orders are much less prevalent among women and tend to occur in situations where there are intervention orders in place against both the man and the woman. In addition, women typically do not breach their orders in the same ways as men do. For a more detailed discussion of the nature of breaches of family violence intervention orders, and the responses to these breaches by the courts, see Sentencing Advisory Council (2009a).

A similar pattern is found in the data for average length of imprisonment terms for these offences. As with the pattern found for most person and property offences, women sentenced for these other offences receive shorter average sentences than do men.

Figure 28: Average length of imprisonment terms for men and women for selected other offences, Magistrates' Court, July 2004 to June 2009



Source: Department of Justice (Vic), Unpublished statistics

Summary

Across all the offence categories examined, gender differences are most strongly present in the proportion of people being sentenced to a term of imprisonment: for every offence presented, a smaller proportion of women than men are imprisoned by the Magistrates' Court.

For most of the offences, these differences are also present in the average lengths of imprisonment terms. However, for several offences—aggravated assault, obtaining property by deception and drug possession—women's terms of imprisonment are slightly longer than men's. But these differences are not sufficient to qualify the overall conclusion from the Magistrates' Court—that, accepting broad offence type as the measure of seriousness of offending, women receive shorter sentences than do men sentenced for the same offence.

Clearly, then, gender differences in sentencing outcomes are evident in the Victorian criminal courts. However, the operational data from the courts cannot provide information on the nature of the offending other than the type of offence; it remains unclear whether men's and women's offending differs *within* each type of offence. That is, without knowing the details of the case it is impossible to know if, for example, an assault committed by a woman is less serious in terms of the harm caused or the offender's culpability than is the same offence committed by a man. To consider this issue requires a more detailed analysis of sentencing for specific cases. Such an analysis is presented later in this report.

Even without such detailed analysis of the seriousness of offences, the data nonetheless suggest that, overall, there are substantial gender differences in sentencing outcomes—in the proportion of people sentenced to a term of imprisonment and in the average lengths of imprisonment terms—in the Victorian courts. But do these data prove that women receive preferential treatment in the Victorian courts? Are these discrepancies indeed unwarranted, or are there perhaps legitimate, legally valid explanations for them?

The law in Victoria requires that judges and magistrates apply their judicial discretion in determining the appropriate sentence by considering all the specific circumstances of the offence and the offender appearing before the court. Under this discretionary sentencing regime, judges must consider myriad factors associated with the offence and the offender—factors that may vary systematically between men and women. This possibility will be further considered later in this report.

Under more structured sentencing regimes, judges and magistrates are constrained in the types of individual factors that they may consider when imposing sentence. Sentencing guidelines and various mandatory sentencing schemes are used in some jurisdictions to limit judicial discretion and thus reduce disparity in sentencing outcomes.

Gender differences under sentencing guidelines and mandatory sentencing

Sentencing reform in the United States since the 1970s has taken the form of sentencing guidelines. Under these guidelines, the only two criteria to be considered in sentencing were the severity of the current offence and the defendant's prior criminal record. Reformers had opted for removing discrimination by enforcing strict equality of treatment[28]—they determined that it was preferable to endorse the symbolism of gender-neutral equal treatment than to be concerned with potential increases in sentences for women (Parent, 1988: cited in Daly and Tonry, 1997, p. 206). And indeed an early evaluation of the first guidelines in the United States, in Minnesota, found that sentencing disparities between men and women had decreased—sentences for women had become more severe (Knapp, 1984: cited in Daly and Tonry, 1997, p. 206). This same pattern of increased severity of sentences for women has been found under most of the guideline sentencing systems in the United States (see, for example, Bogan and Factor, 1995: cited in Daly and Tonry, 1997, p. 206).

Sentencing guidelines not only ensure that more women are sent to prison, but also that they spend more time in prison. The guidelines have increased the rate of imprisonment for economic crimes, and have ensured that sentences for drug offenders have drastically increased; women are typically more highly represented in both of these offences (Raeder, 1995, p. 157). By focusing on the offence and the offender's prior criminal history, sentencing guidelines act to discount offender characteristics such as motivations, family obligations and amenability to rehabilitation (Raeder, 1993, p. 915).

Thus sentencing guidelines, designed to eliminate disparity based on factors such as sex and race, may inadvertently be having differential effects on women and men. As the Chief Judge of the United States District Court in the Eastern District of Michigan notes of the sentencing guidelines, 'the professed "neutrality" makes certain women's issues—especially family responsibility and dependent relationships—virtually invisible' (Cook, 1995, p. 145). Indeed, it has been argued, 'unfair gender effects can now be added to the long list of reasons supporting abolition of mandatory minimums' (Raeder, 1995, p. 161).

While Victoria does not have a broad system of mandatory sentencing (except for a small number of driving offences, such as driving while disqualified or suspended), instead retaining judicial discretion as the foundation of the court system, other states in Australia (such as New South Wales) have introduced systems of mandatory minimum periods of imprisonment for certain offences. It is unclear whether such systems have had a differential impact on women and men as studies of the effects of such schemes are yet to be undertaken. But given the literature on the gender differences in sentencing under mandatory sentencing regimes, it is at least theoretically possible that women are faring worse than men under these systems in Australia as well.

28 Graycar and Morgan (2002, pp. 28–30) cite the 1994 work of the Australian Law Reform Commission that describes two common understandings of the meaning of gender equality that predominated in academic and legal discourses in the 1970s and 1980s. The strict equal treatment approach, known as formal or rule equality, saw equality as a matter of gender neutral treatment, requiring simply that men and women be treated exactly the same in all circumstances and denying any important, immutable differences between them. The differences approach acknowledged women's differences and recognized that women do not necessarily have the same experiences as men, suggesting that women's differences from men need particular recognition.

Theoretical explanations for gender differences in the courts

Broadly, there have been two distinct approaches to the explanation of the effect of gender on criminal processing. A 'behavioural' explanation contends that women in contemporary society are, in fact, far less criminal than are men. According to this view, differential outcomes are based on the simple fact that women commit crime less often. When they do commit crime, it is of a less serious nature than the crimes that men commit. And finally, when women commit crimes they are more often accomplices and less often the primary instigator of the offence (Alozie and Johnston, 2000, p. 240).

A 'structural' explanation for the effect of gender on criminal processing posits that men and women are inherently treated differently by the criminal justice system. All else being equal, women are thus less likely to be prosecuted and convicted for their crimes. When they do face court, women are likely to receive a less severe penalty than their male counterparts (Alozie and Johnston, 2000, p. 240).

There have been several main theoretical explanations in the literature for differential sentencing outcomes, each attempting to explain why women seem to receive shorter sentences than do men for the same types of crime. They are primarily structural explanations, focusing on systemic discrepancies in the approach to women by the criminal justice system. It is only the last of the theoretical approaches described below—a multifactor explanation of differential treatment—that has aimed to combine both a structural and behavioural understanding of the treatment of women in the courts.

Paternalism/chivalry

The most common explanation in the criminological literature of differential treatment of women has been judicial paternalism or chivalry toward women. The concept of chivalry was first proposed by Pollak in 1950, with judicial paternalism being posed as a separate concept by Nagel and Weitzman some twenty years later (1971: cited in Daly and Tonry, 1997, p. 234).

While the concept of paternalism is rarely defined beyond the notion of the desire of sentencers to protect women, Moulds (1980) instead proposes a distinction between the concept of judicial chivalry and that of judicial paternalism. According to Moulds (1980, pp. 279–282), judicial chivalry is confined to superficial deferential courtesies, but judicial paternalism indicates power relations and reflects women's social and legal inferiority to men. Under such paternalism, women supposedly need to be supported, guided and protected.

From this perspective, sentencers treat women differently as they try to protect them from the stigma of a criminal record or from the harsh realities of prison life. Women are viewed as the 'weaker sex' who need to be looked after if they cannot manage themselves. This has been called the 'protective paternalism' dimension of paternalism. The second dimension of paternalism—'patronising paternalism'—constructs women as less aggressive, less able to endure punishment, less accountable than men and less able to tolerate punishment (Alozie and Johnston, 2000, p. 241).

While some researchers have argued that paternalistic treatment inevitably generates shorter outcomes for women, others have countered that it may instead lead to harsher sentencing outcomes. Simon (1975), for example, argued that some women might be treated more harshly if their crimes violated certain sex-role stereotypes. Such an 'unconventional woman'[29] is perceived to have repudiated her femininity (Warner, 2002, p. 95) and thus to deserve harsher sentencing. According to this thesis, chivalry is reserved for women charged with more traditional, 'feminine' crimes such as theft and fraud, but is denied to women charged

29 This term is found in the Australian literature on gender and sentencing. In the literature from the United States the term 'evil woman' is typically used.

with more violent, 'masculine' crimes such as armed robbery. Meda Chesney-Lind suggests that the criminal justice system may be characterized less by chivalry or paternalism and more by 'judicial enforcements of sex-role expectations' (Chesney-Lind, 1978, p. 217: cited in Spohn and Spears, 1997, p. 32).

Despite the entrenchment of the concept of paternalism in the criminological literature, few researchers have sought to gather evidence about whether sentencers are, in fact, concerned with the protection of the women who come before them (Daly, 1987a, p. 268). The intentions of sentencers as they impose penalties on women is thus far from clear.

Social control arguments

A social control explanation has been applied to explain gender differences in the courts and also to explain gender differences in offending, for both adults and juveniles. The key to this explanation is the inverse relationship between informal and formal social control and the effect of these social controls on offending behaviour, arrest rates and sentencing outcomes.

Underlying social control arguments is the belief that people with close ties to others (such as family members) will be subject to high levels of informal social control. When people have high levels of such informal social control, they are more likely to avoid reoffending as they bear the disapproval of these important others about their offending behaviour. People who are thus exposed to informal controls will be less likely to need formal social controls—penal sanctions—to reform their behaviour.

In the context of gender differences in court outcomes, proponents of this perspective argue that differences in the amount of informal social control in the lives of men and women can account for differences in the amount of formal social control to which they are subject (see, for example, Kruttschnitt, 1984; Kruttschnitt and Green, 1984). That is, as women tend to be more closely tied to their families than are men, and more economically dependent on others, sentencers believe that lower levels of formal social control are needed for women. Women are thus treated differently to men in terms of sentencing outcomes.

Such social control arguments rest on a significant assumption: that women's informal social controls (that is, their families) will provide them with a pro-social framework within which to guide their behaviour. In other words, these arguments rest on the notion that the families to which women belong will necessarily view their offending behaviour as wrong and will place pressure on women (and provide support to women) to cease their offending. The literature on gender differences in sentencing is silent on the validity of this assumption—the assumption that women are more likely than men to be subject to informal social controls that will reduce the likelihood of reoffending remains unproven.

Feminist explanations

One of the additional factors that has been suggested as critical in understanding the differential sentencing of women is the fact that many women coming before the court have children. Many researchers have proposed that differential sentencing is due primarily to the presence of dependent children. In particular, Daly's extensive work on this issue has shown that 'familied' women receive the shortest sentences in the courts.

Daly notes that 'although sentencing studies may reveal more lenient outcomes for women, they tell us little about how court officials arrive at these decisions' (Daly, 1987a, p. 268). To address this gap in the literature, Daly observed court proceedings and interviewed prosecutors, defense attorneys, probation officers and judges in 1981 and 1982 to document their considerations when sentencing men and women. She is one of only a few researchers in this field who have attempted to find evidence for the competing theoretical explanations.

Based on her interviews with sentencers in both lower and higher state courts in Massachusetts, Daly found that court personnel repeatedly mentioned three factors when characterizing cases: the defendant's prior record; the circumstances of the incident, including how it arose and the defendant's motivation; and the defendant's work and family situation (Daly, 1987a, p. 273).

Daly focuses on the third of these factors. For her interviewees, work and family situations were consistently seen as important determinants of sentencing outcomes: defendants who provided economic support or care for others were seen to deserve shorter sentences than those without these responsibilities. This approach toward these 'familied' defendants, as Daly calls them (Daly, 1987a, p. 273), was justified by both sentencers and prosecutors on the grounds that these defendants were more stable and had more to lose by reoffending—these defendants had more informal social control and a greater stake in conformity and normative society.

These social control considerations were not used in isolation. Rather, they were used by Daly's respondents to reflect their concern about the potential social costs of sending the defendant to prison.

When familied defendants are sent to prison, their dependants are also punished. The social cost of a broken family was seen as justification for shorter sentences for familied defendants, both male and female. But this cost was seen to be greater for familied women than for familied men. Perceived differences in the expected responsibilities of familied men and women, combined with the family profiles of defendants appearing in the courts, fostered discrepancies in treatment. These differences were based on the following three beliefs that Daly considers to be analytically distinct, but overlapping in practice, each acting as a manifestation of paternalism in the courts (Daly, 1987a, p. 279):

- Women are more likely to have dependent children than men.
- Familied women fulfil their familial obligations more responsibly than familied men.
- Child care is more important than breadwinning in the maintenance of families.

Daly concludes that her interviews do indeed provide evidence for a form of paternalism in the courts. But this paternalism is not as the traditional theory would suggest, where sentencers act out of a concern for protecting weak and troubled women. Rather, the paternalism Daly sees has its emphasis firmly on protecting the social institution of the family—in the interests of maintaining social order, one should not break up families; and in the interests of justice, one should punish the guilty and protect the innocent—by maintaining familied defendants' labour (especially women's caretaking labour) and protecting those who are dependent on the defendant's economic support or care. Daly suggests that these results reveal that the real object of court paternalism is families, not women *per se*. She labels this 'familial paternalism' (Daly, 1987a, p. 282). In a later paper on the same issue, Daly concludes that 'net of case severity, charge severity, the type of offence charges, prior record, and other defendant characteristics, male and female defendants are treated differently on the basis of their ties to and responsibilities for others' (Daly, 1987b, p. 167).

The findings of these many studies can be difficult to interpret as their results have not been overwhelmingly consistent. Some researchers (for example, Kruttschnitt and Green, 1984; Daly, 1989) have found little evidence of gender disparities in sentencing, instead suggesting that other factors, such as sex-role stereotypes or family ties, mitigate the direct effect of gender on sentencing outcomes. Other researchers (for example, Spohn and Beichner, 2000; Kong and AuCoin, 2008; Hedderman and Gelsthorpe, 1997) have found that gender disparities do exist, even when other legal factors are taken into account.

The following analyses attempt to contribute to this debate by examining detailed sentencing data from the Victorian courts.

Multifactor analysis of sentencing in the Victorian courts

In order to provide a more nuanced view of Victorian data beyond the use of descriptive statistics on sentencing outcomes, a matched sample analysis has been undertaken to identify other factors that may influence sentencing outcomes for men and women.

A matched sample analysis: armed robbery

The information available via operational datasets is necessarily limited in scope; as the datasets are used primarily for day-to-day case management purposes, rich and detailed data are not available. Judicial sentencing remarks, on the other hand, do typically contain data of a more narrative form, providing context and additional information on the circumstances of the victim, the offender and the offence. These remarks thus provide an opportunity for a more nuanced analysis of gender differences in sentencing outcomes.

The offence of armed robbery was selected for this exercise as it is not usually considered as an offence typically committed by women. When women do commit an armed robbery offence, we might thus expect that they are seen as especially culpable—reflecting the 'unconventional woman' hypothesis discussed in the literature. Women sentenced for this offence might thus be reasonably expected to receive sentences that are less dissimilar to those of their male counterparts.

Data for this matched sample analysis were obtained from judicial sentencing remarks given in Victorian cases that involved an armed robbery, for the period from 1 July 2006 through 30 June 2008.[30] Only those cases where armed robbery was the principal proven offence[31] were included in this analysis.

Of the 26 women who were sentenced for the principal proven offence of armed robbery in the higher courts over the two-year period, sentencing remarks were available for 19 of them. Of these, missing data on key variables necessitated that an additional three women be excluded from the analysis, leaving a sample of 16 women for the matching process. All of these 16 women pleaded guilty.

Given the very low number of women in the sample, rather than a quantitative matching process, a qualitative process of manual matching was undertaken. Thus the results of this exercise should be seen more in the light of a case study than as a definitive statistical test.

Of the 380 men who were sentenced for the principal proven offence of armed robbery in the higher courts, sentencing remarks were available for 295 of them. Missing data further reduced the sample to 273 men. As all the women in the sample pleaded guilty, any men who had contested their charges were also excluded from the analysis. This resulted in a final sample for matching of 263 men.

There were four key factors in the database that were used for matching purposes, each of which is potentially linked with sentencing outcomes: plea type, prior convictions, age of offender and weapon type. As the database was initially restricted to include only those people who had pleaded guilty, matching was conducted on the basis of the other three factors.

30 The Council has previously released three Snapshots on sentencing practices for armed robbery in the higher courts (see Snapshot No. 7 covering 2000–01 to 2004–05, Snapshot No. 35 covering 2002–03 to 2006–07 and Snapshot No. 92 covering 2004–05 to 2008–09). The Council has also recently released a statistical report that examines sentencing practices for armed robbery and identifies factors that influence sentence type and length.

31 The principal proven offence is the offence that received the most severe sentence within a case.

Prior convictions. Offenders were classified into two broad groups: those with prior convictions and those without. For those with priors, data were also available for whether the prior convictions were for armed robbery or for some other offence.

Age. Offenders were categorised into two groups: those aged under 25 and those aged 25 and over. This division is consistent with sentencing principles in place in Victoria for young adult offenders.[32]

Weapon type. Offenders were classified into three groups based on their use of specific weapons: guns, knives and 'other' weapons (such as syringe, bat/bar/club and glass). For the purposes of the matching process, offenders were matched on only the first two—gun and knife.

Matching process

Matching on all three factors at once resulted in eight possible groupings into which each offender could be placed (see Table 1).

Table 1: Characteristics of groups matched on prior convictions, age of offender and weapon type

Group number	Prior convictions	Age of offender at sentence	Weapon type
Group 1	no	young (<25)	knife
Group 2	yes	young (<25)	knife
Group 3	yes	adult (25+)	knife
Group 4	yes	young (<25)	gun
Group 5	yes	adult (25+)	gun
Group 6	no	adult (25+)	knife
Group 7	no	adult (25+)	gun
Group 8	no	young (<25)	gun

32 For example, the Magistrates' Court has the power to defer the sentencing of an offender between the ages of 18 and 25: *Sentencing Act 1991* (Vic) s 83A. For further discussion of the special needs and circumstances of young adult offenders in the 18 to 25 age group, see Sentencing Advisory Council (2008), Chapter 10.

Of the 279 men and women in the matching sample, 166 were able to be classified into one of these groups[33] (including ten of the 16 women; an additional two women used a syringe and were separately matched in a subsequent process). These 166 constituted the matching sample.

Sentencing outcomes were examined for men and women within each of these groups. Outcomes were compared on the basis of type of sentence imposed, with a particular focus on the immediate custodial sentences (imprisonment and youth justice centre orders).[34] For those people who received an immediate custodial sentence, analysis continued with an examination of the length of their total effective sentence.[35]

Findings

Table 2 shows the number of men and women who were categorised into each group and the number who received an immediate custodial sentence.[36]

Table 2: The number of people in each group and the number given an immediate custodial sentence

Group number	No. men in group	No. men given immediate custody	No. women in group	No. women given immediate custody
Group 1	13	7	4	3[37]
Group 2	43	36	1	1[38]
Group 3	58	49	–	–
Group 4	–	–	–	–
Group 5	19	17	3	2[39]
Group 6	11	6	2	2[40]
Group 7	6	5	–	–
Group 8	6	–	–	–

33 People who were not able to be classified into one of these groups had used a weapon other than a gun or a knife.

34 The Council's statistical report on armed robbery showed that 70% of charges of armed robbery that were sentenced in 2006–07 and 2007–08 received a sentence of imprisonment, with a further 11% being sentenced to detention in a youth justice centre. These two immediate custodial orders therefore account for the majority of sentences imposed for this offence.

35 When imposing a sentence for multiple charges the court imposes a 'total effective sentence' that aggregates the sentence imposed for each charge and takes into account whether the sentences are to be served concurrently (at the same time) or cumulatively.

36 Immediate custodial sentence includes imprisonment, partially suspended sentence, youth justice order and combined custody and treatment order.

37 *R v Baddack* [2007] VCC (Unreported, Pullen J, 19 September 2007); *R v Maher and Kelevitz* [2007] VCC (Unreported, Howard J, 9 February 2007); *R v Spiteri* [2006] VCC (Unreported, Jenkins J, 27 November 2006).

38 *R v Thompson* [2008] VCC (Unreported, Wood, J, 18 March 2008).

39 *R v Bajada* [2008] VCC (Unreported, Hannan J, 26 June 2008); *R v Hayes and Jorgensen* [2008] VCC (Unreported, Williams J, 22 January 2008).

40 *R v Beach* [2007] VCC (Unreported, Hannan J, 15 October 2007); *R v Orbach* [2007] VCC (Unreported, Lawson J, 5 June 2007).

Given the very low number of women in the groups, it is not meaningful to compare the proportion given immediate custodial sentences. But it is useful to compare the length of sentence that was imposed on those men and women who were sentenced to imprisonment or to a youth justice centre order.

Table 3 presents the average length of the total effective term of imprisonment (or youth justice centre order) for men and women in each of the four relevant groups.

Table 3: Average length of total effective term of imprisonment for men and women in each group

Group number	Average total effective term (months)—men	Average total effective term (months)—women
Group 1 (no priors, young, knife)	imprisonment—36 months youth order—22 months	imprisonment—18 months youth order—13 months
Group 2 (priors, young, knife)	imprisonment with other priors—32 months imprisonment with armed robbery priors—51 months	imprisonment with other priors—33 months
Group 5 (priors, adult, gun)	imprisonment with other priors—64 months imprisonment with armed robbery priors—72 months	imprisonment with other priors—27 months
Group 6 (no priors, adult, knife)	imprisonment—38 months	imprisonment—27 months
Additional group[41] (priors, adult, syringe)	imprisonment with other priors—33 months imprisonment with armed robbery priors—72 months	imprisonment with other priors—30 months imprisonment with armed robbery priors—30 months

While the results must be interpreted with caution due to the very low numbers of women who could be matched, the figures show that there remain substantial gender differences in sentencing outcomes for armed robbery (as measured by the length of the immediate custodial sentence), even when holding plea, prior convictions, age and weapon type constant.

41 *R v Karnakowski* [2007] VCC (Unreported, White J, 9 February 2007); *R v Naden* [2006] VCC (Unreported, Howie J, 24 July 2006).

Case analysis

For *young first offenders* sentenced to imprisonment for armed robbery with a knife, the average length of total effective sentence over the two-year period was twice as long for the men (36 months) as for the one woman (18 months). A similar disparity was found for the men (22 months) and for the two women (13 months) sentenced to a term in a youth justice centre.

Both of the women sentenced to a term in a youth justice centre were under the influence of drugs at the time of the offence, and both were influenced in their offending by their (male) co-defendants. Both had undergone drug rehabilitation and had stopped their drug-taking by the time of sentencing. For both, rehabilitation was seen as a primary purpose of sentencing. Finally, one of the women had a young son and the other was pregnant at the time her sentence was imposed.

The woman sentenced to a term of imprisonment presents an interesting case study in gender discrepancies in sentencing. She and her male co-defendant had planned the attack on the home of a drug dealer, demanding drugs from the victim and money to purchase more drugs. Both were drug addicted at the time of the offence. The judge noted that the two defendants were 'equally culpable offenders, playing different, but equal roles' in the offence.[42] Despite these similarities, the judge noted that the woman had given evidence against her accomplice and had better prospects of rehabilitation than he had, given that she was (slightly) younger and a first offender. Her co-defendant, on the other hand, had an extensive criminal history, with 136 prior convictions and 10 prior episodes of imprisonment, along with many other sanctions. At the time of the offence he was serving a suspended sentence. Ultimately, she was sentenced to a term of imprisonment of 18 months (with a nine-month non-parole period) while he—classified by the judge as a serious serial offender—was sentenced to a term of 42 months, with a non-parole period of two years.

In this case, therefore, similarities in culpability in the current case were clearly less determinative of the sentences ultimately imposed than were the vastly different criminal histories of the offenders. In this instance, then, the significant discrepancy between the two co-offenders was arguably warranted.[43]

No differences in average sentencing outcomes were found for *young recidivist offenders* who committed their crimes with a knife when their prior convictions involved offences other than armed robbery. For this group, the men (32 months) and the single woman (33 months) were sentenced alike. While the woman in this group did not have prior convictions for armed robbery, the difference in sentencing outcomes is stark for men with an armed robbery prior conviction (51 months) compared with men with a prior conviction for some other offence (32 months). Clearly the presence of a repeat offence of the same kind has had some influence on the length of sentence imposed. Given the serious nature of armed robbery (with its maximum penalty of 25 years' imprisonment—second only to life imprisonment), this is not surprising.

The woman in this case had appeared a number of times before both the Magistrates' Court and the Children's Court, and had previously received youth supervision orders, youth training centre orders and fines. She had been physically abused by her boyfriend and had borderline intellectual capacity. Nonetheless, her extensive prior contact with the courts resulted in a sentence that was almost identical to the average sentence of the men who had previous convictions for offences other than armed robbery.

For *adult recidivist offenders* who were sentenced to imprisonment for armed robbery with a gun, and who had prior convictions for other offences, the average length of total effective sentence over the two-year period was more than twice as long for the men (64 months) as for the two women (27 months). While there were no women in this group who had prior convictions for armed robbery, sentences for men with prior armed robbery convictions (72 months) were again longer than for those men with prior convictions for other offences.

42 *R v Maher and Kelevitz* [2007] VCC (Unreported, Howard J, 9 February 2007) 22.

43 On the question of parity between co-defendants, Justice Kirby has said: 'Due allowance will be made for their respective criminality. Due allowance will also be made for their differing antecedents, personal circumstances and mitigating factors'. *R v Postiglione* (1997) 189 CLR 295, 339.

For both women, drug addiction played a role in their offending. Both women had children; one was the sole carer of an autistic child and was also pregnant with another child. Both had been in abusive, violent relationships and had suffered from depression.

For the pregnant woman, the judge considered that her good prospects of rehabilitation and her ongoing grief at the loss of a child to SIDS (that would have made imprisonment especially onerous), warranted a sentence of 18 months in prison. But for the other, who was already serving a term of six years for a conviction on culpable driving charges, the judge considered that 'in all the circumstances you should be viewed as equally culpable' as her co-defendant.[44] Despite this quest for parity, the judge mitigated his view somewhat by noting that the woman had suffered a severe injury when she had been shot by her co-offender during the incident and therefore had ongoing physical and psychological problems that would be exacerbated by an extended stay in prison. Her original sentence was a four-year term of imprisonment, two years of which were to be served concurrently with the six years. However, this sentence was subsequently reduced by one year on appeal, on the ground that she was suffering constant pain from her wound and that her health had deteriorated dramatically since the incident.[45] Her co-defendant, who had no serious prior convictions, cooperated extensively with police, showed significant remorse and held good prospects for rehabilitation, was originally sentenced to a total effective term of imprisonment of seven years, which was subsequently reduced on appeal to six and a half years. Clearly both the sentencing judge and the appeal judges considered that her severe injury was a significant mitigating factor.

Average sentencing outcomes also differed for *adult first offenders* who committed their crimes with a knife, with the six men receiving longer average terms of imprisonment (38 months) than the two women (27 months).

Both of the women had drug addictions and significant psychological disorders, with one also having a gambling addiction. She had been raped by her brothers at an early age and suffered from post-traumatic stress disorder, becoming addicted to valium. The judge felt that a long term of imprisonment would increase her risk of self-harm after previous attempts at suicide. Given her tenuous state, she was sentenced to a term of 24 months. The other woman had multiple physical problems and her prospects of rehabilitation were good, as she had undergone drug treatment. Although her co-defendant was the instigator of the incident, her involvement was as 'an active, willing participant and could not be described as minimal'.[46] Nonetheless, her psychological condition and her drug addiction decreased her moral culpability and moderated the need for deterrence. She originally received a term of imprisonment of four years, which was subsequently reduced on appeal[47] to two years and six months due to a significant deterioration of her many physical illnesses. Her co-defendant, with 57 priors and poor prospects of rehabilitation, was sentenced to a total effective sentence of seven and a half years.

44 *R v Hayes and Jorgensen* [2008] VCC (Unreported, Williams J, 22 January 2008) 13.

45 *Hayes v The Queen* [2010] VSCA 170 (Unreported, Buchanan and Bongiorno JJA, 1 July 2010).

46 *R v Orbach* [2007] VCC (Unreported, Lawson J, 5 June 2007) 30.

47 *R v Orbach* [2007] VSCA 166 (Unreported, Buchanan and Weave JJA, Kaye AJA, 23 August 2007).

Finally, the two recidivist adult women who received a term of imprisonment for armed robbery using a syringe were each sentenced to a term of 30 months. The length of their imprisonment terms did not vary according to whether their prior convictions had been for armed robbery or for other offences. Thus there was no difference in outcome based on the nature of the prior conviction. It is unclear why this might be, given that there was a substantial difference in the length of the sentence for men in other groups based on whether their prior conviction was for armed robbery or for some other offence. In contrast to the women in this final group, the length of the sentence for the men in this group who had a prior conviction for an offence other than armed robbery (33 months) was half the length of the sentence for those whose prior conviction was for armed robbery (72 months). When comparing men and women whose prior convictions were for armed robbery, the difference is stark: the length of the sentence for men (72 months) was more than double that of women (30 months).

Differences in sentencing outcomes between men and women were therefore found for three of the main four groups—for *young first offenders*, for *adult first offenders* and for *adult recidivist offenders*—and for the additional group in which the weapon was a syringe. The scale of the difference in these groups was substantial, with average terms for men being about twice as long as those for women.

Evidence from other studies shows that men and women are often treated differently by the courts. This matched sample analysis, although very small and using only a handful of factors, appears to support previous work on this question by providing some evidence of differential sentencing outcomes for men and women.

The use of this matched sample is valuable in allowing an analysis of the factors that seem to be related to gender differentials in sentencing outcomes. With an offence as serious as armed robbery, the lack of variation between men and women in sentence type is not surprising: there is little scope for sentences other than an immediate custodial one, which is reflected in the data. But there is more room for discretion and variation in the length of the total effective sentence imposed. The data from this small matched sample have shown us that, controlling for (holding constant) the key factors of plea type, prior convictions, age and weapon type, there still appear to be differences in sentencing outcomes for some groups of offenders, with women receiving shorter sentences than men.

The matched sample analysis suggests that the reasons for this difference often revolve around issues of the offender's psychological disorder and prior victimization experiences,[48] drug abuse[49] and primary child-care responsibilities.[50] These factors can constitute a valid basis for a shorter sentence than might otherwise be the case.

48 There is limited authority on the effect of prior victimization on mitigation, but it is common for matters in the offender's personal history to be taken into account in mitigation of sentence.

49 While drug addiction is not normally mitigatory, it may be relevant to assessment of moral culpability and may also be relevant in considering an offender's prospects of rehabilitation, making this sentencing purpose a more significant one than would otherwise be the case.

50 Child-care responsibilities in and of themselves do not mitigate sentence; however, a sentence may be mitigated on the basis of particular hardship caused by serving a sentence of imprisonment if an offender is, for example, pregnant or has dependent children.

Summary

The literature on gender disparities in sentencing outcomes has tended to focus on the question of whether gender differences are 'a thing of the past'. Researchers have tried to understand whether gender plays an independent role in court decision-making processes and whether there is pervasive discrimination or bias against men based purely on their gender.

The preponderance of research identifies a gender discrepancy in court outcomes, with women often receiving shorter sentences in the courts. The data from Victoria are consistent with the research on sentencing outcomes, in particular with regard to the type of sentence—women in Victoria are far less likely than are men to be sentenced to a term of imprisonment for the same type of crime—but also in terms of the length of sentence, with women on average being sentenced to shorter terms of imprisonment than men.

But the questions posed earlier remain: do these data prove that women receive preferential treatment in the Victorian courts? Are these discrepancies indeed unwarranted, or are there perhaps legitimate, legally valid explanations for them?

Court decision-making is an extremely complex process that, by necessity, must involve the synthesis of multiple, often contradictory features of the offence and the offender. Gender is but one of a number of legitimate factors that will be considered by sentencers as they work to reconcile the many, varied purposes of sentencing.

Detailed, qualitative analysis undertaken by Daly has shown how a range of legitimate factors considered by judges in sentencing vary for men and women. In her analysis of pre-sentence reports about the offender that are presented to the court, Daly found that women's biographies more often than men's showed evidence of 'blurred boundaries' between victimization and criminal behaviour. With such a perspective on women's offending, women's crimes were often rendered less blameworthy, more a product of troubled lives than of a chosen course of action. Perhaps as a result of these pre-sentence reports, in their sentencing remarks the judges in Daly's New Haven study expressed greater optimism about women's potential for reform (Daly, 1995, p. 165).

On reading the details of each case, Daly concludes that differential sentencing outcomes for men and women could be explained by differences in both the seriousness of their offences and in their varying biographies that led to some of the men being seen as more blameworthy. She notes that 'traditional disparity studies may well give the misleading impression that women are favoured in criminal court' (Daly, 1994, p. 254)—the long-held assumption of gendered leniency in the courts may be a misconception.

Instead of women receiving preferential treatment, their particular circumstances and biographies tend to lead sentencers to see women as less dangerous, less culpable and more amenable to reform—all of which are legitimate and proper considerations in determining a sentence. Indeed, Daly concludes: 'Allowing for gender-linked criteria is not the same as assuming that men's and women's natures differ … It is to assume that some features of men's and women's lives may differ and ought to be acknowledged in sentencing' (Daly, 1994, p. 270).

This conclusion is echoed by Steffensmeier and his colleagues, whose work with sentencing judges in Pennsylvania found that judges see women as less dangerous, less culpable and more repentant. Thus differential sentencing was seen by the judges as justified due to differences in blameworthiness and as sensible in that women were more likely than men to have childcare responsibilities or to have physical or mental health problems that would be difficult to manage in prison (Steffensmeier, Kramer and Streifel, 1993).

Thus while the bulk of the accumulated evidence points to a continued disparity in sentencing outcomes for men and women, particularly in the decision to incarcerate, this disparity may well be warranted and not indicative of any pervasive 'bias'. In addition to genuine gender differences in the frequency and gravity

of offending, women offenders are also more likely than men to have a history of psychiatric illness, to have been traumatized by physical or sexual victimization in childhood or early adulthood, and to have a history of substance abuse. Thus the disparities seen in data on sentencing outcomes are likely to be a reflection not of bias, but of legitimate yet gender-linked characteristics.

Data from the Victorian courts, and from the small matched sample analysis, appear to support this broader literature and provide some evidence, in the Victorian context, that is consistent with much of the research in this field.

In summary, the effect of gender on sentencing decisions is not direct; rather, it acts indirectly via two paths: via gender differences in offending behaviour; and via the individual biographies of women that see a greater proportion of women coming before the court with a constellation of characteristics that creates legitimate mitigating circumstances. It is these indirect effects of gender that lead to disparities in sentencing outcomes. But it is these differences in men's and women's offending and in their biographies that mean that these disparities may not be unwarranted: the combination of factors such as family responsibility, mental illness, childhood abuse and trauma, and family violence creates a greater level of complexity in the reasons behind women's offending, differentiating it from that of men.

The preponderance of physical and mental health problems among women offenders is clearly seen when considering corrections data and examining the varying profiles of men and women in prison.

Gender differences in prison statistics

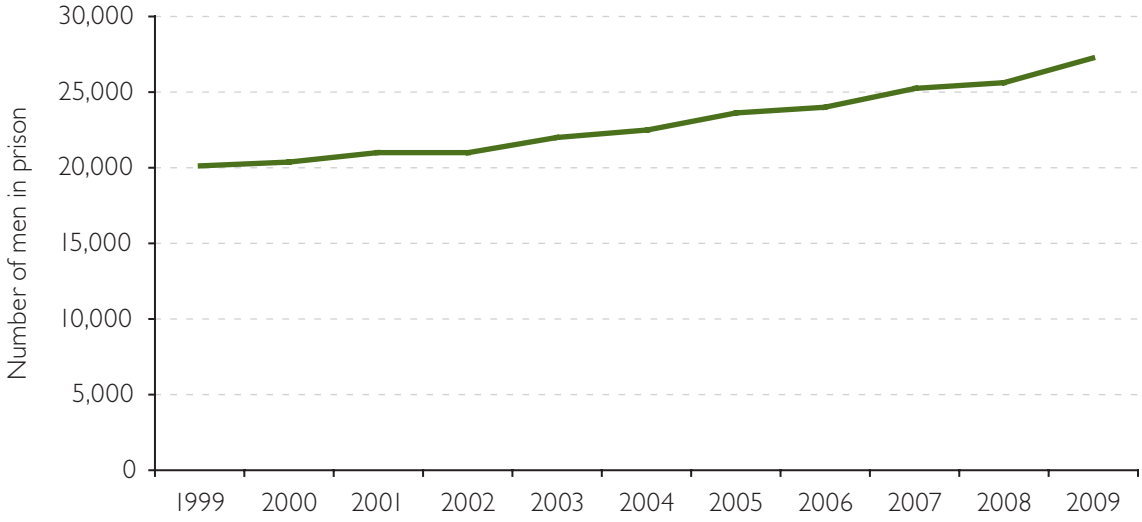
The number of women in prison in the United States first exceeded 100,000 in 2003. The rapid growth of women's incarceration—at nearly double the rate for men over the past two decades (404% versus 209% since 1985)—is disproportionately due to the war on drugs: in 2003 women in prison were far more likely than men to be serving a sentence for a drug offence (29% of women versus 19% of men) or a property offence (30% of women versus 20% of men) and far less likely than men to be serving a sentence for a violent offence (35% of women versus 53% of men) (The Sentencing Project, 2007, p. 2).

The rapid increase in the rate of incarceration and the number of women in prison has not been confined to the United States. In the United Kingdom the women's prison population has tripled in the last decade. Between 1993 and 1998 the average population of women in prison rose by almost 100 per cent, compared with a rise of 45 per cent for men (Home Office, 1999: cited in Worrall, 2000, p. 10). Of significant concern has been the increase in the number of women on remand: between 1995 and 2005 there was an increase of 105 per cent in the number of women remanded into custody, compared with a 24 per cent increase over this period for men (Hanks, 2007, p. 2). This increase in the number of women remanded and sentenced to prison has not been a result of an increase in women's offending but instead has arisen due to harsher sentencing practices. A 2003 report found that women were seven times more likely to be sent to prison for a comparable offence than they were 10 years earlier (Hough, Jacobson and Millie, 2003: cited in Hanks, 2007, p. 2). The Home Office's annual report, Statistics on Women and the Criminal Justice System, showed that, while the number of women coming before the courts increased between 1994 and 2002, the proportion dealt with by the Crown Court (the court that deals with more serious offences) remained relatively stable. Thus the greater use of custody for women was not due to increases in the seriousness of women's offending but instead was driven by more severe responses to the less serious offences that women tend to commit (Home Office, 2003, p. 21).

Similar changes in the use of imprisonment for women have been found in Australia, with the rate of incarceration for women having increased substantially over the last two decades, far faster than the rate of increase for men. This rapid rise has been the subject of much investigation as researchers attempt to understand the drivers behind this phenomenon.

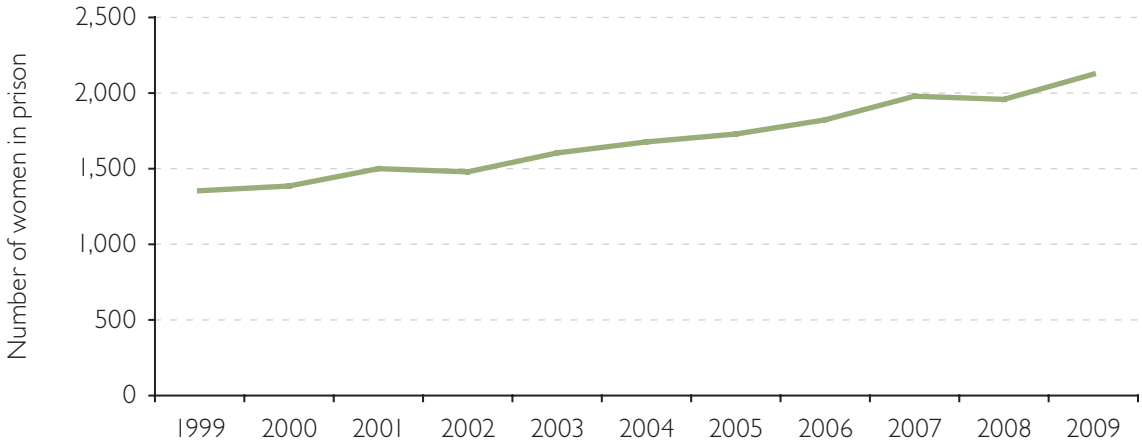
Figures 29 and 30 (page 52) present the numbers of men and women in prison in Australia over the ten years to 2009.

Figure 29: Number of men in prison, Australia, 30 June 1999 to 30 June 2009



Source: Australian Bureau of Statistics (2009)

Figure 30: Number of women in prison, Australia, 30 June 1999 to 30 June 2009

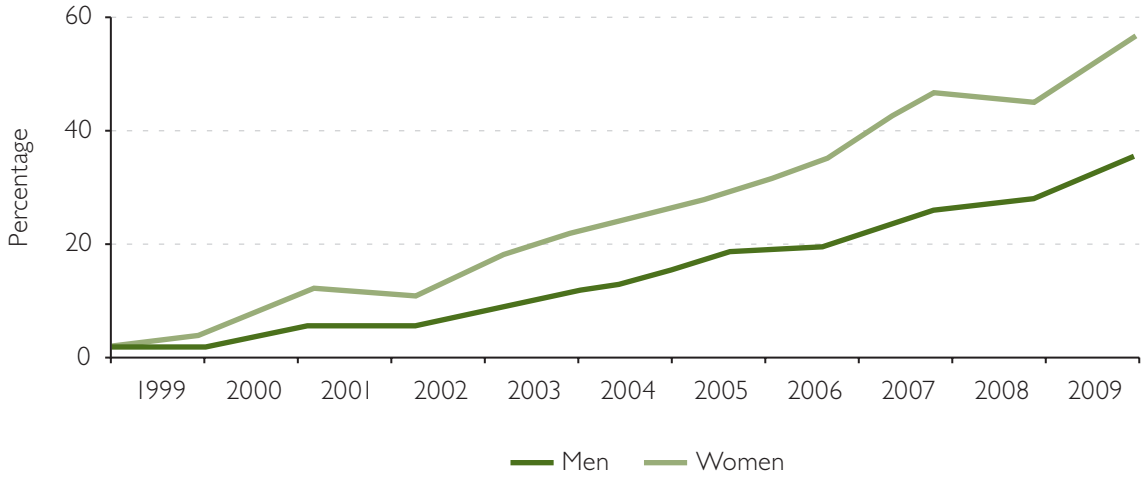


Source: Australian Bureau of Statistics (2009)

Data collected by the Australian Bureau of Statistics show how this increase has affected the number of women in prison in Australia. Over the last decade the overall number of prisoners in Australia increased from 21,538 to 29,317 (36%). But while the number of male prisoners increased by 35 per cent (from 20,181 to 27,192) over this period, the number of female prisoners increased by 57 per cent (from 1,357 to 2,125).

While the absolute number of women in Australian prisons remains far below the number of men in prison, the higher rate of increase for women is further evidence of the increase in severity of sentencing practices for women seen in the data presented earlier, which is undoubtedly at least partly responsible for the increasing number of women in prison in both Victoria and in Australia as a whole.

Figure 31: Percentage change in prisoner numbers for men and women, Australia, 30 June 1999 to 30 June 2009



Source: Australian Bureau of Statistics (2009)

The rapid increase in the number of women in prison over the last decade is of particular concern when considering the typical profile of women in prison. In the United Kingdom, studies have documented the considerable degree of support required by women in prison, with extremely high levels of mental illness and drug and alcohol abuse, and a high proportion having been the victim of serious crime and sustained sexual and domestic violence (Hanks, 2007, p. 2). Such co-morbidity of substance abuse and psychological disorders was clearly seen in the matched sample analysis presented above.

Loxley and Adams (2009) cite studies from the United Kingdom, the United States and Australia that have consistently found that the majority of women prisoners have grown up in state care or difficult family circumstances and many have lived in poverty; few have completed their high school education or have access to legitimate employment opportunities; many have a history of victimization, having experienced physical and/or sexual abuse as adults or children; many are single parents and rely on government benefits; and many have a history of drug abuse (Loxley and Adams, 2009, p. 3). These background difficulties are compounded by the frequent presence of mental health problems such as depression: a recent census of all women in prison in Victoria (Tye and Mullen, 2006) that included clinical interviews found that 84 per cent of the women met the criteria for a mental disorder in the year prior to interview. The most prevalent disorders were drug use disorder (57% of women); major depression (44%); post-traumatic stress disorder (36%) and personality disorders—women in prison had a significantly greater likelihood of meeting the twelve-month diagnostic criteria than women in the community (Tye and Mullen, 2006, p. 266).

In the most recent data to be released, research conducted by the Australian Institute of Health and Welfare (2010) shows that 57 per cent of women prisoners have at some point been diagnosed with a mental illness, compared with 35 per cent of men. At the time of screening, 28 per cent of women were on mental health medication compared with 17 per cent of men. In a related vein, 31 per cent of women had a history of self-harm compared with 16 per cent of men. Women prisoners are also far more likely than men to have a history of chronic health problems such as asthma and arthritis (Australian Institute of Health and Welfare, 2010, pp. 26–42).

Gender differences in prison statistics in Victoria

Trends in the levels of women's imprisonment in Victoria have tended to mirror those seen in other jurisdictions. In the period from 1995 through 2003, the number of women in Victoria's prisons rose dramatically: from 116 women in 1995 to 281 women in 2003. This represented a much faster increase in the women's prison population than in the men's—almost triple the growth seen in the men's prison population.[51]

From 2004 to 2008 the number of women in prison remained fairly stable. However, 2009 saw a sudden increase once again, with the women's prison population reaching an all-time high in 2009.

Despite the faster increase in the number of women in prison, the vast majority of prisoners are men: on 30 June 2009 there were 4,068 men and only 282 women in Victoria's prisons.

Over the same period the proportion of the total prisoner population accounted for by women increased from 4.7 per cent in 1995 to 7.5 per cent in 2003, while the rate of imprisonment for women increased from 6.6 women per 100,000 adult women to 14.3 per 100,000. On 30 June 2009 women accounted for 6.5 per cent of all prisoners in Victoria, and had an imprisonment rate of 13.2 per 100,000 adult women, compared with a rate of 198.3 per 100,000 for men.

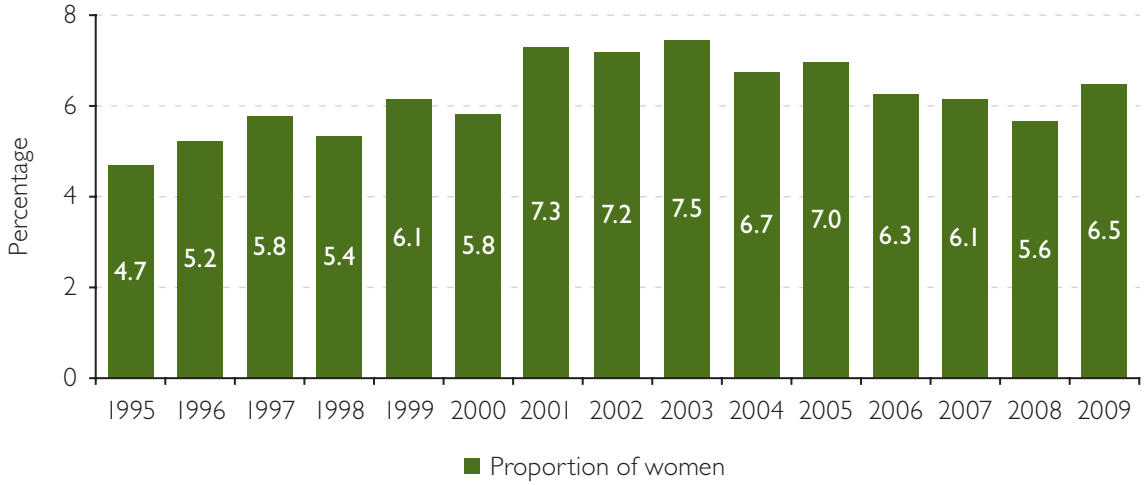
Both the proportion of women in the prison population and the imprisonment rate show a similar trend to the number of women in prison: an increase through 2003 before decreasing and leveling off between 2004 and 2008, with a sudden increase once again in 2009.

Figure 32: Prisoner population (number), 30 June 1995 to 30 June 2009

Source: Corrections Victoria Statistical Profile of the Victorian Prison System

51 Although data presented here refer mainly to the census of prisoners taken on 30 June each year, patterns seen in men's and women's reception data in Victoria are very similar.

Figure 33: Female proportion of total prisoner population (percentage), 30 June 1995 to 30 June 2009



Source: Corrections Victoria Statistical Profile of the Victorian Prison System

Figure 34: Imprisonment rate (per 100,000 adults), 30 June 1995 to 30 June 2009

Source: Corrections Victoria Statistical Profile of the Victorian Prison System

Clearly, then, men and women have very different likelihoods of being in prison. This is likely due to the nature of women's offending (including their offence types and their criminal histories), as well as to the differential sentencing practices seen in the data above.

Despite the far lower number of women in the Victorian prison system than men, the increase seen through 2003 led to significant work on the part of the Victorian Department of Justice to understand the increase, based on broad social and economic factors present in both Australia and in many other western countries. In Victoria, some of these factors were thought to include (Victorian Department of Justice, 2005, p. 7):[52]

- an increase in the number of women entering prison for serious violent offences and drug offences, leading to longer sentences for women;
- an increase in the use of remand for women;
- a decrease in the use of imprisonment as a last resort—an increase in the number of women sentenced to prison who had not previously been sentenced to a community-based order; and
- an increase in the number of women sentenced to short terms of imprisonment (less than one month).

In order to tackle this increase in the number and proportion of women in prison, Corrections Victoria implemented a new integrated strategy aimed at reducing women's offending and reoffending. Known as 'Better Pathways', the program was originally designed as a four-year strategy to address the increase in women's imprisonment, running from July 2005 to June 2009. Its focus was on diverting women from prison custody and breaking the cycle of women's reoffending.

The strategy contained a number of initiatives to address the complex range of unmet support and treatment needs that are linked to women's offending and reoffending. In particular, the strategy acknowledged women's needs in terms of their substance abuse, mental illness, experience of sexual assault or intimate partner violence, poor physical health and limited support networks. It also acknowledged the differences between men and women who come into contact with the criminal justice system, such as the lower frequency and seriousness of women's offending, that women's crimes are more often motivated by poverty or substance abuse, that more women have experienced sexual and physical abuse that can shape their offending, and that women's offending is more likely to have been influenced by the complex interaction of mental illness, substance abuse and trauma (Victorian Department of Justice, 2005, p. 9).

Providing evidence for the Better Pathways approach was an analysis of the profile of needs of the women's prisoner population. While both men and women in the Victorian prison system experience a range of complex needs, women tend to present with greater and more complex needs that are more directly linked to their offending behaviour.

Women in Victorian prisons are far more likely than men to have injected illicit drugs (62.8% of women compared with 43.5% of men). Their levels of mental illness are greater: 31.9 per cent of women have been diagnosed with a psychiatric illness compared with 26.1 per cent of men, while 33.6 per cent of women and 26.0 per cent of men have attempted suicide. Women are substantially more likely to have experienced childhood sexual abuse (36.3% of women compared with 23.1% of men) and to have been in two or more violent relationships (53.1% of women compared with 26.3% of men). Women are also more likely to have been the primary carer of dependent children prior to their imprisonment, and are less likely to have a partner to look after the children while they are in prison.[53]

52 According to documentation created by the Victorian Department of Justice (2005), this situation would continue unabated if no intervention were taken: 'Overall, the evidence shows that the rate of women's imprisonment is outstripping that of men, and in line with national and international trends, our female prisoner population is on a sustained growth curve that has no indication of slowing without intervention'.

53 Unpublished data made available by Corrections Victoria. Corrections Victoria advises that, in the time since the development of the above evidence base, the female prisoner population continues to exhibit the high prevalence of complex needs as identified above.

It was the confluence of all these factors—the high degree of co-morbidity of mental illness, trauma and substance abuse among women offenders—that was seen to be crucial in understanding the needs of women in Victoria's prisons and that lay the foundation for the development of Better Pathways.

For several years the Better Pathways strategy seems to have been effective: the number of women in prison fell from its high of 281 in 2003 to 238 in 2008. Over the same period the proportion of the total prisoner population accounted for by women fell from 7.5 in 2003 to 5.6 in 2008, while the rate of women's imprisonment fell from 14.3 women in prison per 100,000 women to 11.4 per 100,000 women.

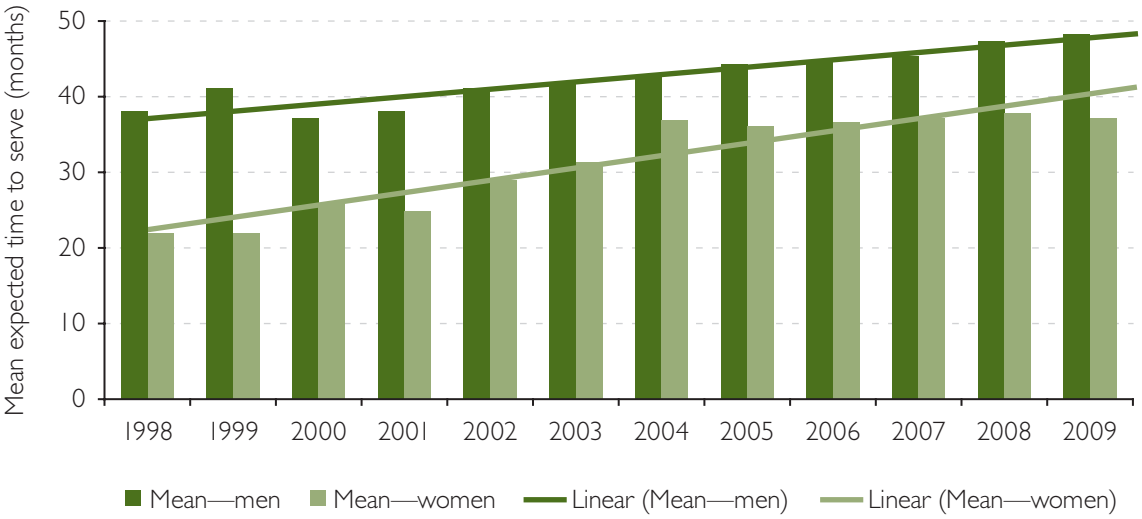
But data for 2009 show a turnaround to this success story, as the total number of women, the proportion of women in the prison population and women's imprisonment rates have all risen once again.

Notwithstanding any intervention aimed specifically at reducing women's rate of imprisonment, substantial gender differences remain within the Victorian prison system. Two factors in particular are likely to contribute to the characteristics of the women's prison population: the length of sentences imposed and the offence(s) for which they were imposed.

The average estimated time to serve for women prisoners increased between 1998 and 2004 (from 22 months to 37 months), before leveling off for the period through June 2009. Despite the steady average expected time to serve since 2004, the increase over the whole period is a steeper increase than for men (as indicated by the trend line in the figure below). While women's average estimated time to serve remains below that for men, the gap between the two groups has decreased over time: in 1998 men's average estimated time to serve was 38 months, compared with women's 22 months, but by 2009 the gap had shrunk, with men's average estimated time to serve being 48 months and women's 37 months.

Despite this convergence, and despite the substantial increase in the women's prisoner population and rate of imprisonment seen in 2009, it is clear that women prisoners are serving substantially shorter terms of imprisonment than are their male counterparts.

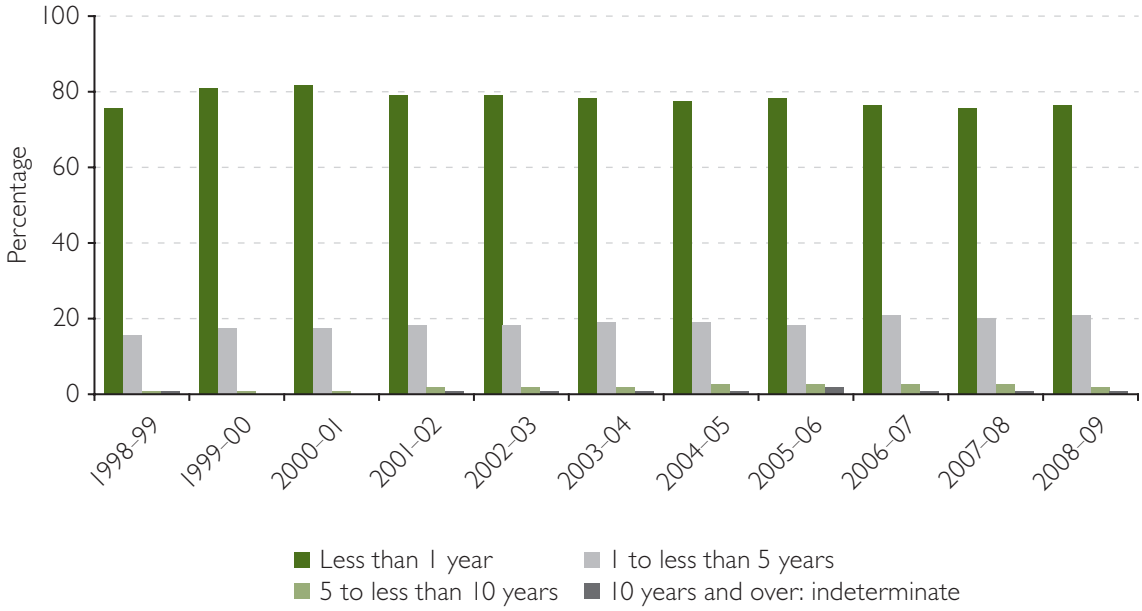
Figure 35: Average expected time to serve, 30 June 1998 to 30 June 2009



Source: Corrections Victoria Statistical Profile of the Victorian Prison System

These average times to serve are based on census data, which may over-represent serious offences (for which offenders are imprisoned longer and who therefore are more likely to be counted in the 30 June census). However, similar results are found in data on estimated time to serve for offenders who are just entering prison, with women being slightly more likely than men to be serving a short sentence of imprisonment of less than one year (82% of women versus 77% of men).

Figure 36: Estimated time to serve on reception for male offenders, July 1998 to June 2009



Source: Corrections Victoria Statistical Profile of the Victorian Prison System

For both men and women, the proportion with an estimated time to serve of one to five years has increased since 1998–99. However, the increase is more striking for women, rising from 6.4 per cent of offenders in 1998–99 to 15.4 per cent in 2008–09, while the percentages for men increased from 15.8 per cent to 20.6 per cent over the same period.

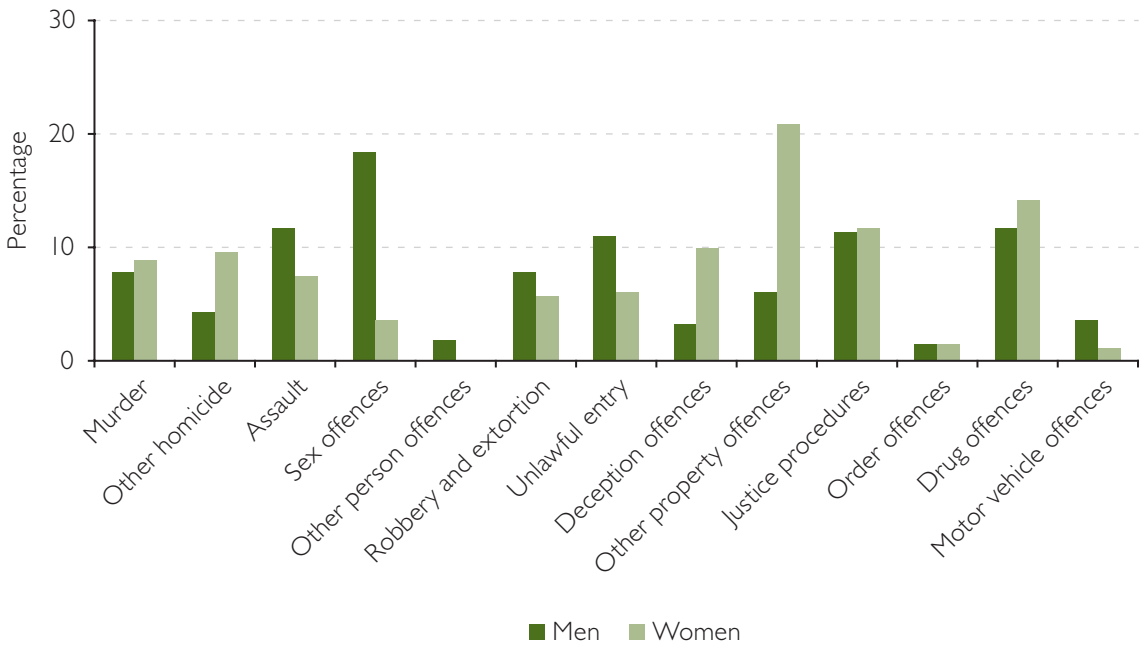
Figure 37: Estimated time to serve on reception for female offenders, July 1998 to June 2009

Source: Corrections Victoria Statistical Profile of the Victorian Prison System

The lower average terms of imprisonment for women are likely due to several factors, including the nature of their offending and their frequent lack of prior imprisonment episodes.

While there are some offence types with similar proportions of men and women in prison, others stand in stark contrast. Men predominate in offences such as assault (11.8% of men versus 7.5% of women), sex offences (18.5% versus 3.5%) and unlawful entry with intent (burglary) (11.0% versus 6.0%), while women most commonly appear in prison with property offences (including theft) (21% of women versus 6.1% of men) and deception offences (10.0% versus 3.1%).[54]

Figure 38: Proportion of prisoners with each most serious offence by offence type, 30 June 2009



Source: Corrections Victoria Statistical Profile of the Victorian Prison System

54 Similar patterns are found in receptions data, with men more likely to enter prison for assault, sex assault and burglary convictions and women more likely to enter prison for theft and deception offences. For both census (2009) and reception (2008–09) data, women were also slightly more likely than men to have a most serious offence of a drug offence or an offence against justice procedures.

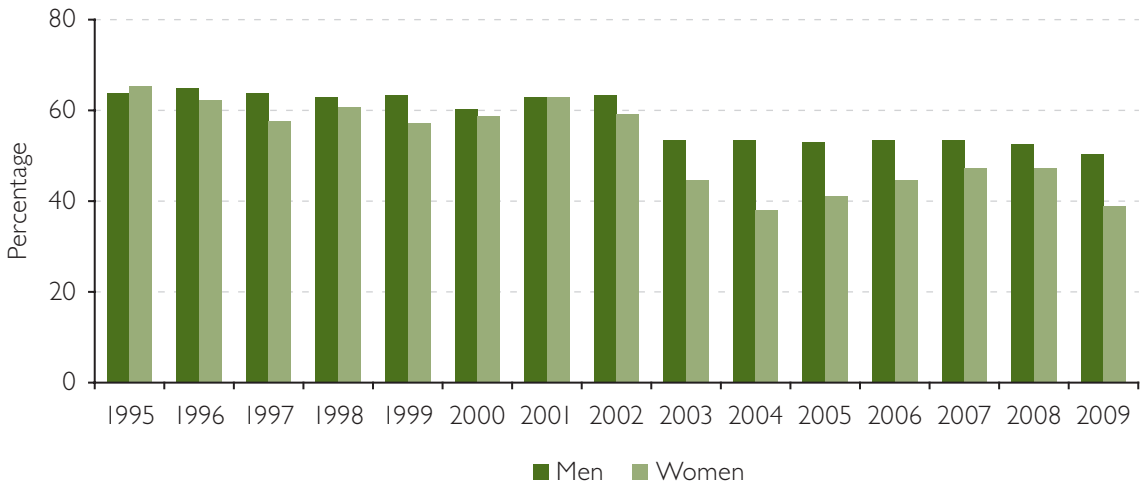
While the data do not allow for comparison between men's and women's seriousness of offending within offence types, clearly women prisoners counted in the annual prisoner census have been imprisoned for different types of offending than have men: women are most likely to be in prison for property, drug and justice procedure offences, while men are most likely to be in prison for sex offences, assault and drug offences.

Women prisoners are also less likely than men to have a prior imprisonment episode. This is relevant to the sentences that women receive as criminal history is typically a strong predictor of sentencing outcome in the courts.

Over the period from 1995 to 2009 the average proportion of women with a known prior episode of imprisonment was 52.4 per cent, compared with 58.4 per cent for men. In June 2009 the proportion of women with a prior history of imprisonment was 39.0 per cent, compared with 50.5 per cent for men. This may be further evidence of sentencing practices becoming more severe, as courts are sending more first-time offenders to prison.

These differences in criminal histories, coupled with differences seen in offence seriousness, are likely to play a major role in the gender discrepancies seen in the Victorian prison statistics.

Figure 39: Prisoners with known prior imprisonment, 30 June 1995 to 30 June 2009



Source: Corrections Victoria Statistical Profile of the Victorian Prison System

Summary

Clearly the profile of men and women in prison is substantially different. Consistent with the research evidence, Victorian data show that women tend to be sent to prison for shorter periods, likely a reflection of their less serious offending in terms of both the nature of the crime itself (tending to be property crimes rather than crimes against the person) and their less serious prior criminal history (with women being less likely to have been imprisoned before). However, the severity of sentencing practices for women has recently increased substantially, particularly in the higher courts.

Conclusion

Despite the lack of a single, definitive study to understand gender discrepancies in sentencing outcomes, the preponderance of research in the field clearly shows that gender has an effect in all the stages of the criminal justice system over and above other relevant factors. For the most part, Victorian data are consistent with those reported from other locations both in Australia and internationally.

The preponderance of evidence in the research, and the data from the Victorian analyses, together lead to several conclusions:

- Women have different patterns of offending than do men, with less serious offending in terms of both the nature and the frequency of criminal behaviour.
- Women sentenced in the Victorian courts are less likely than men to receive an immediate custodial sentence and are more likely than men to receive an order that is served in the community.
- When women are sentenced to prison, their terms of imprisonment are shorter than are those for men.
- Women's sentences are shorter as they are more likely than men to have a constellation of factors that can validly reduce the length of a sentence.

Behavioural explanations for these gender discrepancies—based upon women's criminal careers—are supported by the majority of research in the field. Women have less serious criminal histories than do men, with fewer prior convictions and less serious previous and current offending.

But in addition, a second explanation is supported by the research: that the biographies of female offenders vary systematically from those of men. Contributing to their blurred status as both victims and offenders, women are more likely than men to have a history of factors, often causally inter-related, such as mental illness, physical or sexual victimization in childhood or early adulthood, and a history of substance abuse. Women are also more likely than men to have primary caregiver status.

Thus the effect of gender on sentencing is not direct, but travels via two distinct paths: via gender differences in offending behaviour; and via the individual biographies of women that see a greater proportion of women coming before the court with a constellation of characteristics that creates legitimate mitigating circumstances.

It is the indirect effect of the preponderance of a constellation of factors that can validly result in shorter sentences that leads to disparities in sentencing outcomes for men and women in the criminal courts, disparities that appear warranted and that are not immediately indicative of any pervasive 'bias'.

Thus the disparities seen in sentencing outcomes for men and women are a reflection not of bias, but of legitimate yet gender-linked characteristics: differences are evident because of factors *associated with* being female, not because of gender *per se*.

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