

# Women in the criminal justice system: A better response to vulnerability

BRIEFING PAPER

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This paper discusses some of the issues facing women in the criminal justice system, and what policymakers can do to ensure a system that better responds to the circumstances and needs of female offenders.

## KEY POINTS

- There is widespread consensus that the criminal justice system does not at present work well for female offenders or wider society.
- The Government's female offender strategy, which promises earlier intervention, lower prison numbers and better conditions in custody, has been welcomed by experts and advocates as a step in the right direction.
- However, the specifics and implementation of the strategy attract some disagreement, with questions over whether the system can:
  - Be more ambitious in its efforts to reduce the female prison population.
  - Do more to avoid criminalising abuse victims.
  - Reduce unnecessary arrests of women.
  - Better support upstream prevention.
  - Take more symbolic action to give the issue greater priority.

## IMPLICATIONS FOR POLICY

Moving forward, government, policymakers and practitioners should focus on:

- Raising the profile of women in the criminal justice system, and signalling a stronger commitment to meeting their needs.
- Building confidence that investment in the prison estate will not lead to greater use of custody.
- Improving training and procedures throughout the system to make it easier for women to disclose abuse.
- Supporting initiatives to reduce unnecessary arrests.
- Investing in upstream intervention and improving collaboration between services.

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## FOREWORD FROM THE SPONSOR

Last year, civil rights and social justice protests highlighting injustices served as a catalyst for change, sparking important conversations about race, discrimination and social inequalities globally. Around the world, one of the most systemic barriers to social justice is the mistreatment of certain groups within criminal justice systems.

Research into the ways women, ethnic minorities and low-income people experience criminal justice reveals a broken system. These groups do not receive equal treatment or obtain equitable outcomes when compared to white people, high-income individuals, or men, which is unacceptable.

In England and Wales, for example, over half the women in prison report having suffered domestic violence, with 53% of women reporting having experienced emotional, physical, or sexual abuse as a child. Low-income individuals are more likely to end up in court and more likely to be convicted. Ethnic minorities are more likely to be charged, convicted, and imprisoned than white people. The UK population is 16% ethnic minority, but ethnic minorities make up 22% of people arrested and 27% of people in prison. These figures point to a criminal justice system that is not delivering equal justice for all.

AIG is committed to making a positive difference in the communities where our employees live, work and serve our customers by supporting organizations that help create a more resilient future for individuals, families and communities. AIG's commitment to criminal and social justice reform is a central part of our global corporate citizenship agenda and a key pillar of our Pro Bono Program.

Racial and social injustices continue to plague societies. A more equitable future requires a commitment to action from governments, businesses and society as a whole. AIG's pro bono support for social justice causes will enable us to make a meaningful difference in the lives of those most in need of legal and related support.

This is why we are delighted to be working with the highly respected Social Market Foundation (SMF) on this series of events and publications. We are also excited to be supporting the work of the three NGOs who are partnering with SMF on this series – the Centre for Women's Justice, EQUAL and LawWorks. By convening far-reaching conversations about inequities in the criminal justice system and ways to remove them, SMF is making a valuable contribution to the cause of social justice in the UK.

Tackling injustice is one of the biggest challenges of our time – in the UK and across the world. Our goal is to have these discussions and the published expert reports to follow not only inform the debate, but also serve as a call to action.

### **Lucy Fato**

Executive Vice President, General Counsel & Global Head of Communications and Government Affairs

## ABOUT THIS PROJECT

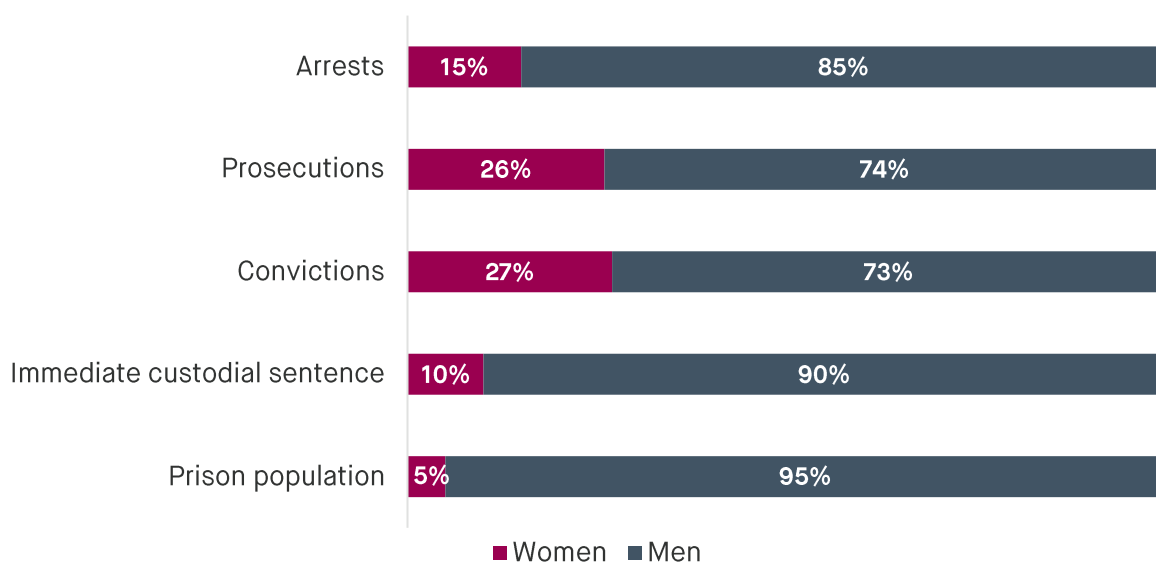
This briefing paper is based on a seminar organised by the Social Market Foundation in May 2021, as part of the *Justice in the Balance* project we are undertaking in partnership with AIG. The event, held under Chatham House rule brought together senior policymakers and experts in the criminal justice system, and the position of women in it specifically. The names of those who attended are private, but participants included members of the Government. While this paper anonymously reports some of the views expressed by seminar participants, the conclusions and recommendations made here are those of the SMF authors alone.

## BACKGROUND CONTEXT

### Women in the criminal justice system

Women account for 15% of arrests, just over a quarter of arrests and convictions, 10% of custodial sentences and 5% of the total prison population of England and Wales. Figure 1 shows that they are in the minority at every stage of the criminal justice system. Yet the routes by which they enter the system, the causes of their offending and the experiences and consequences they face from prosecution are often quite different to men. That is why the Government has adopted a distinct female offender strategy, recognising the challenges and vulnerabilities women often face, an approach broadly endorsed by experts.

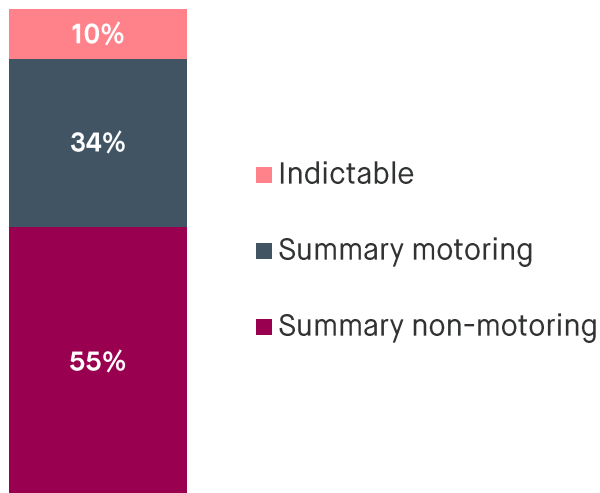
**Figure 1: Gender split by stage of criminal justice system, England and Wales 2019**



Source: Ministry of Justice, *Statistics on Women and the Criminal Justice System 2019*

Around a third of prosecutions of women in England and Wales are for motoring offences, and just under a third for TV licence evasion (Figure 2). The overwhelming majority of women's interactions with the criminal justice do not result in custody: only 10% are prosecutions are for indictable offences.

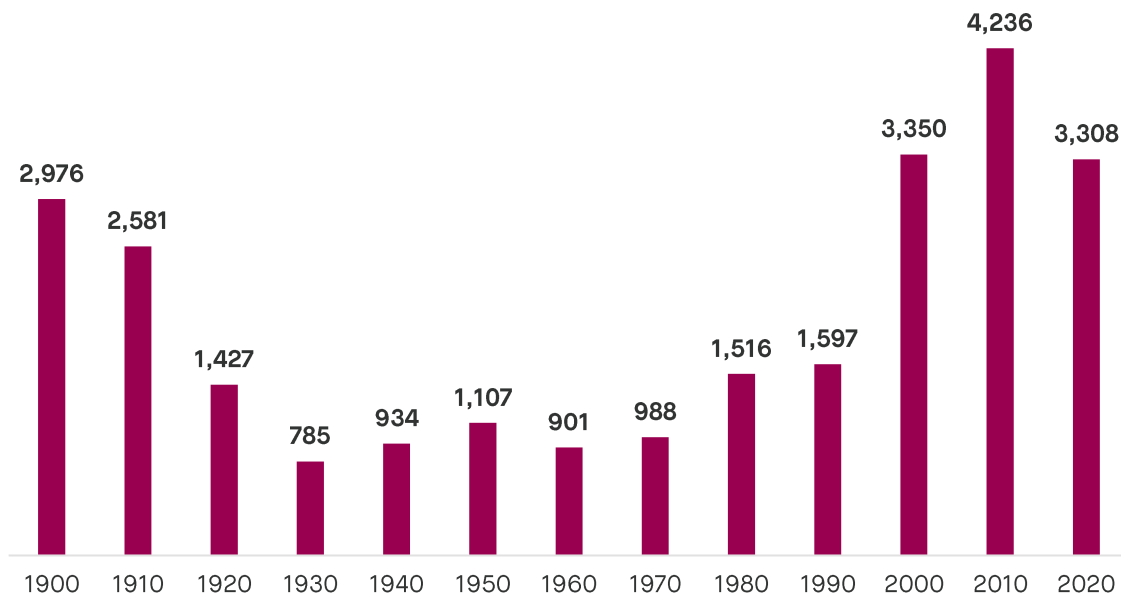
**Figure 2: Breakdown of proceedings at magistrates' courts against women by offence type, England and Wales 2019**



Source: Ministry of Justice, *Statistics on Women and the Criminal Justice System 2019*

However, the focus of our seminar was primarily on the minority of women at risk of prison. As Figure 3 shows, the female prison population remains high by historical standards, having risen dramatically in the 1990s and 2000s.

**Figure 3: Annual average female prison population, England and Wales**



Source: House of Commons Library, *Prison population statistics*; Ministry of Justice, *Offender management statistics quarterly*.

There is a widespread belief that the system as presently constituted does not work for such women. Re-offending rates are extraordinarily high: 56% of adult women released from a custodial sentence commit another offence within a year. The figures are even worse for women on shorter sentences – 71% of those released after serving

less than 12 months re-offend within a year.<sup>1</sup> Conditions and safety within prisons have come in for much criticism: one seminar participant referred to an “epidemic of self-harm”. The incarceration of women is more likely to have effects on their families. 60% of imprisoned mothers were living with dependent children prior to their imprisonment.<sup>2</sup> That feeds concerns about the impact on those children separated from their mothers, not least the possibility of increasing the risk of offending among younger generations.<sup>3</sup>

One explanation for these failures is the inability of the criminal justice system to adequately account for and respond to the challenges and difficulties faced by the women it encounters. In his foreword to the female offender strategy, then Justice secretary David Gauke presented vulnerability as both a cause and a consequence of crime, yet perversely “Coming into contact with the criminal justice system, and in particular custody, can undermine the ability of women to address the issues that have caused their offending”.<sup>4</sup> Participants in our seminar were scathing of the status quo:

**“I don’t think we can overstate how dreadful the current picture is...The reality is absolutely appalling, what happens to women and what happens to their children”.**

*SMF seminar participant*

A 2019/20 survey of women in prison found that<sup>5</sup>:

- 71% say they have mental health problems
- 48% consider themselves to have a disability
- 46% report entering prison with a drug problem
- 28% report entering prison with an alcohol problem
- 35% had worries about housing

Encouragingly, a substantial proportion of female prisoners say they are receiving support for at least some of their issues. Three-quarters of those reporting drug or alcohol problems said they had been given help with their problems from the prison, although only 28% said it was easy to see mental health workers and 39% said that the quality of mental health service was good.<sup>6</sup>

A particular issue, discussed at length in the seminar, was domestic abuse. Almost 60% of assessed female offenders in custody or supervised in the community have experienced domestic abuse.<sup>7</sup> A recent study found that 78% of women in Scottish prisons had received serious head injury, and that these women were more likely to have been domestic abuse victims.<sup>8</sup> Serious head injuries can increase the risk of criminal offending by impairing judgement and self-control.<sup>9</sup>

## **The female offender strategy**

In response to these problems with women’s criminal justice, in 2018 the Government issued the female offender strategy.<sup>10</sup>

It set out three priorities:

1. To reduce the number of women entering the criminal justice system
2. To reduce the number of women in prison, especially on short sentences
3. To improve conditions for those in custody, with a specific focus on reducing rates of self-harm and suicide.

On the first priority, the Government promised earlier intervention to address vulnerabilities, with funding for community provision and domestic abuse services. Recognising the fact that women are more likely to be prosecuted for low-level non-violent offences, the Government pledged to promote non-criminal procedures. These include liaison and diversion services, with clinical staff at police stations to provide assessments and referrals to treatment and support; out of court disposals with stricter conditions (e.g. attendance at rehabilitation services) and retail-based diversion, whereby shoplifters are referred to women's services rather than the police.

The second priority was framed as a reaction to the problem of short sentences. Around three-quarters of women receiving custodial sentences are given less than a year in prison, and half less than three months.<sup>11</sup> As mentioned above, these can be hugely disruptive to women and families and offer limited opportunity for rehabilitation or addressing problems (and hence have high recidivism rates). Moreover, they are typically for modest offences – around half of short sentences are for shoplifting.<sup>12</sup>

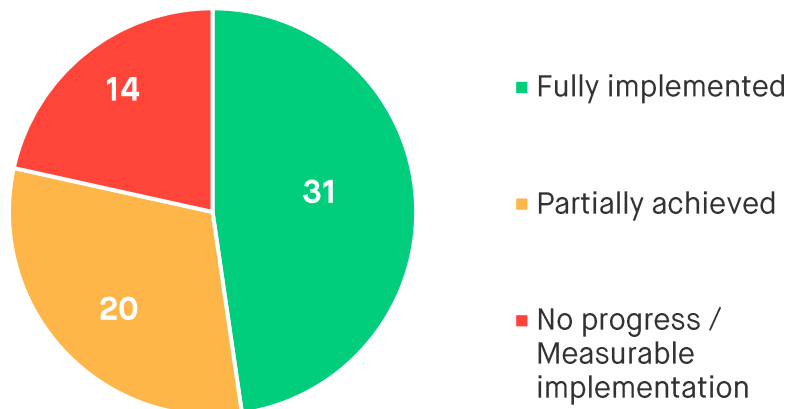
In response, the Government pledged to reduce the use of custodial sentences, and to promote community sentences in their places. It promised better community options, including residential women's centres, greater use of community sentence requirements and pilots of electronic monitoring. In particular, it sought to increase the number of community orders mandating mental health, alcohol and drug treatment to better reflect the prevalence of those issues among female offenders. The Government also set an objective of improving pre-sentencing reports to ensure that they fully capture the necessary contextual information on an offender.

To make custody better, the Government said it would address self-harm and suicide in prisons, make it easier for offenders to stay in contact with their families, develop a 'trauma-informed' approach to working with women and invest in education and training.

### **Progress on the female offender strategy**

Three years on from the publication of the female offender strategy, progress has been patchy. The Prison Reform Trust identified 65 concrete pledges in the strategy and has evaluated the delivery of each of them (Figure 4). Just under half, 31, have been fully delivered. But on almost a quarter – 14 – there has been no progress or measurable implementation.

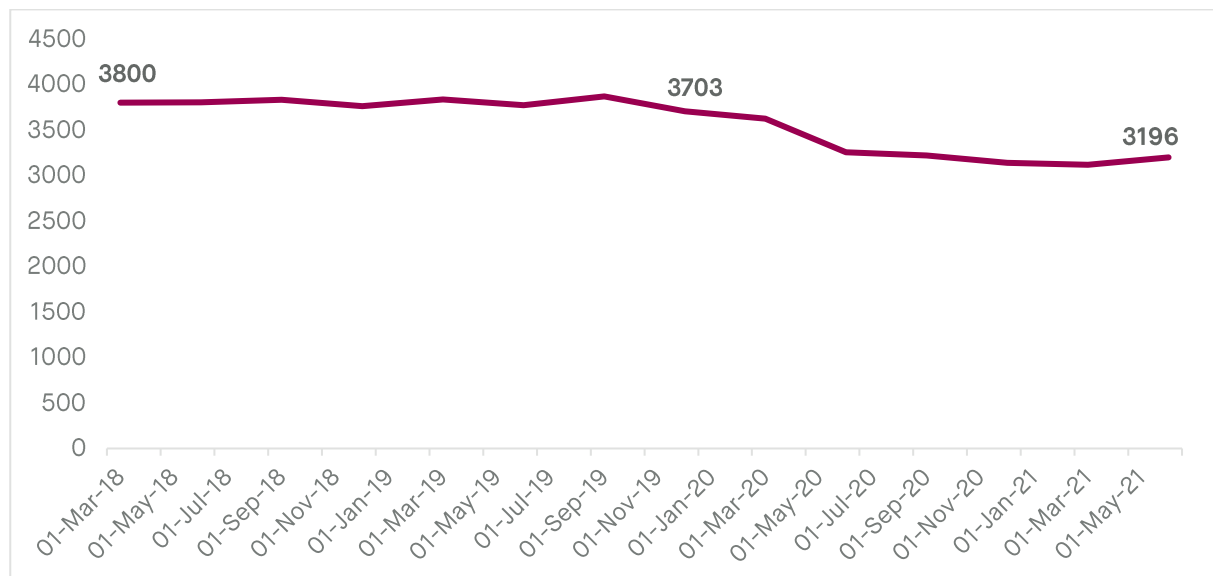
**Figure 4: Prison Reform Trust Evaluation of Female Offender Strategy Pledges**



Source: Prison Reform Trust, Implementation Matrix

The key headline pledge of the strategy was on prison numbers. In the foreword, David Gauke said: “Today there are 3,850 women in our prisons. I want to see this fall, with fewer women in prison for short sentences”. By March 2021, the number of female prisoners had fallen by around 650 (Figure 5). However, most of this decline appears to be the result of backlogs in the criminal justice system due to the pandemic. Prior to COVID-19, there were still over 3,700 women in prison in England and Wales.

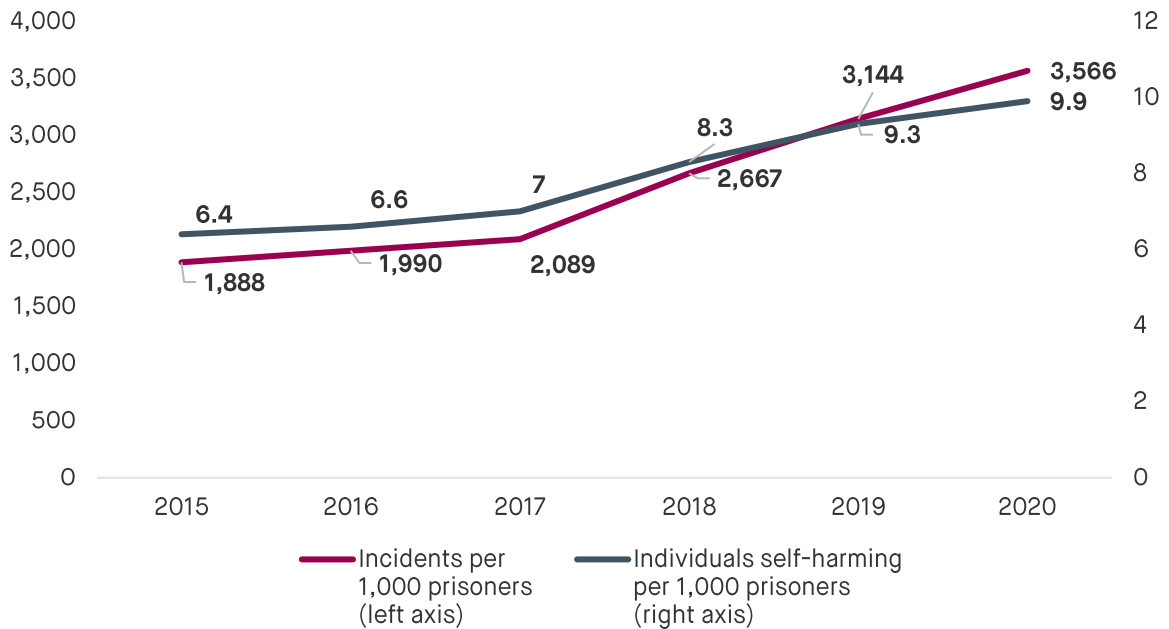
**Figure 5: Number of female prisoners in England and Wales, 2018-21**



Source: Ministry of Justice, Offender management statistics quarterly

Rates of self-harm, however, have gone in the wrong direction, with a significant increase in the number of both individuals self-harming and self-harm incidents per 1,000 prisoners.

**Figure 6: Rates of self-harm in women’s prisons in England and Wales, 2015-20**



Source: Ministry of Justice, *Safety in Custody Quarterly*

## KEY CHALLENGES TO ACHIEVING A CRIMINAL JUSTICE SYSTEM THAT WORKS BETTER FOR FEMALE OFFENDERS

Participants in our seminar identified a number of issues and challenges for the Government to address in order to achieve the vision set out in the female offenders strategy, of a criminal justice system that better responds to the needs and circumstances of women. This section starts with the headline commitment to reduce prisoner numbers and ‘works backwards’ through the criminal justice process, discussing issues around prosecution and trial, arrest, upstream diversion from criminal justice and overarching prioritisation.

### Should efforts to reduce prison numbers be more ambitious?

Perhaps the most contentious issue was whether the Government is doing enough to reduce custodial sentences and prison numbers. In particular, many people were alarmed by the Ministry of Justice’s announcement in January 2021 that 500 new prison cells are to be built in women’s prisons. At face value, this appears to be in tension with the Government’s objective of reducing the number of women in prison. However, the Government insists that there is in fact no contradiction because the purpose of the new cells is to improve prison conditions rather than to increase capacity. The ambition is to “transform the estate, take buzzwords like trauma-informed care and turn that into something which means something”. Additional investment is intended to reduce sharing of cells, enable overnight visits with children,



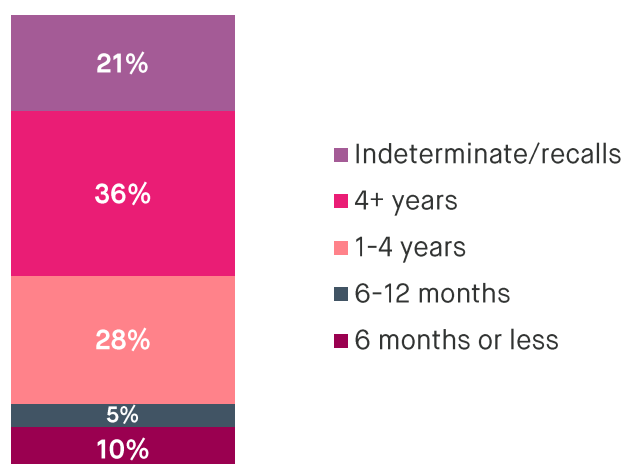
create ‘breakout spaces’ for prisoners to interact and allow for ‘open conditions’ in closed prisons to avoid women having to be moved and uprooted as they progress through their sentence. The increase in cells, it is hoped, merely represents a temporary “bulge”, before older, less suitable parts of the prison estate are “pensioned off”.

Such claims were met with a certain amount of scepticism. As one participant put it, prisons “are like motorways, if you build them, they get used”. On this view, expanding prison capacity sends the wrong message and by alleviating pressure on the system, it encourages greater use of custodial sentences. Without a firmer commitment to replacing older cells, people were reluctant to take the Government’s word that the expansion will eventually pass: “It’s not in place of, there’s not any evidence you’re going to close any cells”.

More generally, many participants were keen to push the Government to be more ambitious in its efforts to reduce female prisoner numbers. In some government communications, there is a tendency to play down the significance of the headline prison population.

Figure 7 shows that the vast majority of women in prison are on longer sentences, and only 15% face less than a year inside. For that reason, the female offender strategy admitted that “we recognise that diverting women who might otherwise be serving short custodial sentences to the community will not necessarily equate to significant reductions in the female prison population in the short term”.<sup>13</sup>

**Figure 7: Female prison population by length of sentence, England and Wales 2019**

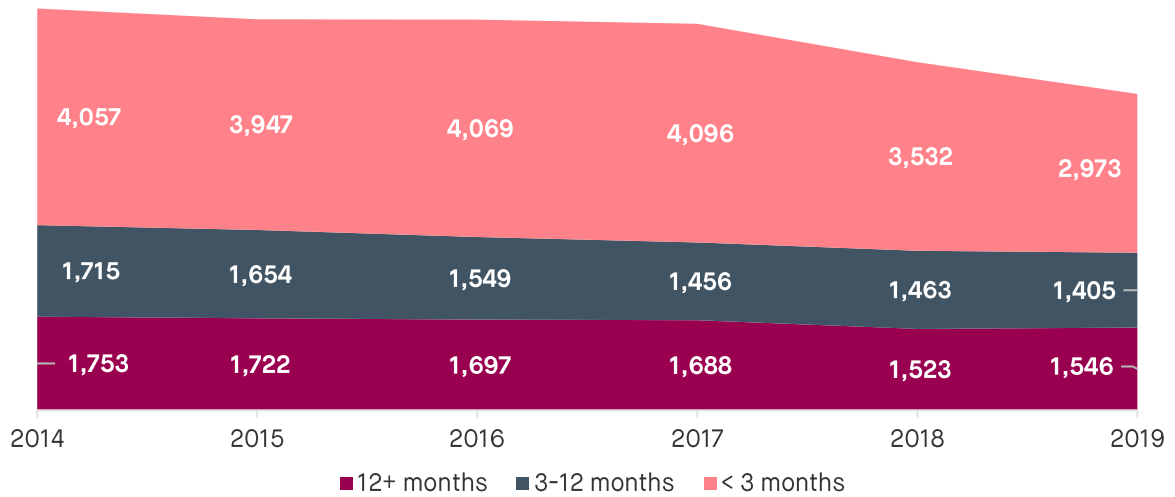


Source: Ministry of Justice, *Statistics on Women and the Criminal Justice System 2019*

There were two responses to this line of argument. On the one hand, some people accepted that this meant that the overall *stock* of women in prison is not the best indicator of success. However, they argued that instead this means there should be great focus on the *flow*, or “throughput” i.e. closer attention should be paid to the number of custodial sentences handed down. On that front, certainly prior to the pandemic, it appeared that progress was being made. The total number of custodial sentences given to women fell by 18% between 2017 and 2019, and the number of

sentences of less than three months fell by over a quarter, having been fairly flat in the previous few years (Figure 8).

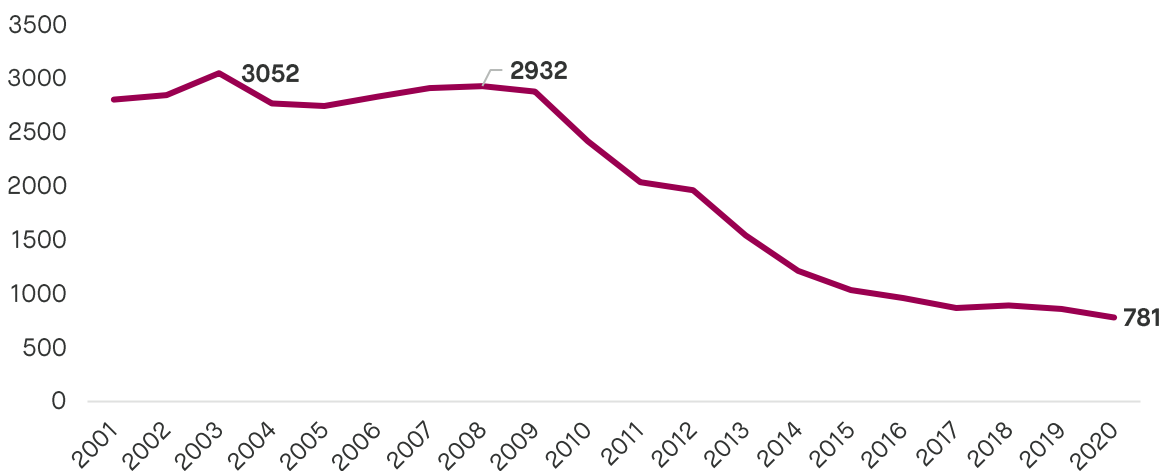
**Figure 8: Custodial sentences to women by length of sentence, England and Wales 2014-19**



Source: Ministry of Justice, Sentencing data tool

At the same time, some participants argued that efforts to reduce the use of custody should be extended to women on longer sentences as well. It was observed that the female prison population in the Thatcher era was closer to 1,000, and that it should be achievable to push towards those sorts of levels again. Parallels were drawn with the concerted and effective efforts to reduce the use of child imprisonment. As Figure 9 shows, the number of under 18s in custody has fallen by three-quarters since 2008. This trend reflects government targets as well as legislation imposing duties on courts to explain why they are rejecting alternatives to custody, sending a clear signal that imprisonment is a last resort.<sup>14</sup> Government action thus far on women in prison seems weaker by comparison.

**Figure 9: Average monthly youth (under 18) custody population in England & Wales**



Source: Ministry of Justice, Youth Justice statistics: 2019 to 2020

## Can we do more to prevent the criminalisation of domestic abuse victims?

A second major point of controversy in the seminar was the way that domestic abuse victims are treated in the criminal justice system. As noted above, there is evidence to suggest a majority of women in prison have experienced some form of domestic abuse. Again, some participants were extremely critical of the way the system currently operates. According to one, “women are very poorly served by the criminal justice system, and many cases are essentially miscarriages of justice”.

In a recent analysis of murder cases involving women that killed their abusers, only 7% resulted in acquittal.<sup>15</sup> There is evidence that such context is not adequately accounted for in legal proceedings. Understanding of the nature of violence against women and girls, and how phenomena like coercive control work can be limited among prosecution services, defence lawyers and the judiciary, and so proceedings can be influenced by misconceptions and stereotypes. Lawyers can lack the necessary time and training to build up trust, and so disclosure of abuse can come too late. Perversely, sentencing can disadvantage women – for example, taking use of a weapon to be an aggravating factor, when it may simply reflect the relative size and strength of women compared to men.<sup>16</sup>

Such considerations motivated a campaign to add an amendment to the Domestic Abuse Bill that would provide a statutory defence for women driven or compelled to commit a crime as a result of domestic abuse.<sup>17</sup> Many participants supported such an amendment, not only because of its direct impact on the criminalisation of women, but also because of its broader symbolic significance in terms of how women should be treated within the system.

However, the Government has rejected the proposed amendment. It argues that victims of domestic abuse should have adequate legal resources to defend themselves, even if these are not used effectively enough at present. For example, coercive or controlling behaviour in intimate or familial relationships was made an offence in the Serious Crime Act 2015.<sup>18</sup> There was some objection raised that strengthening protections for female defendants could be counterproductive if conviction becomes too difficult and public faith in the system is undermined.

There was some debate in the seminar over whether the criminal justice system’s understanding of abuse is improving or not. Some participants expressed optimism that the high-profile Sally Challen case<sup>19</sup> might be a “high watermark”, and that understanding of these issues should only improve from here on. Others were more wary, noting that “we’ve been here before many times”. Concerns were voiced about the level and quality of training received by the judiciary, as well as the capacity of different elements of the criminal justice system to handle such matters carefully and sensitively. The growing use of pre-sentencing reports was generally welcomed as a positive development.

## How to reduce unnecessary arrests?

Another topic of discussion was how to reduce the number of women entering the criminal justice in the first place as a result of being arrested. The All Party

Parliamentary Group on Women in the Penal System has analysed data from five police forces, finding that 40% of arrests of women resulted in no further action.<sup>20</sup> That implies that thousands of women may be arrested each year for no good reason, wasting police resources.

Participants in the seminar called for greater use of diversionary schemes and referral to women's services in place of arrest. As noted above, the Government has endorsed liaison and diversion teams, as well as retail-based approaches. In the seminar, there was particular interest in Norfolk and Suffolk constabularies' "ring before you bring" scheme, under which officers making arrests must call a custody sergeant and explain why non-custody options would not be appropriate.<sup>21</sup> Introducing this pause in the process, and offering explicit encouragement to avoid arrests could help reduce the number of women detained.

### **What opportunities are there to better support upstream intervention?**

There was a general consensus among contributors that "prevention is better than cure". Consequently, the Government's investment in community provision, such as women's centres and rehabilitation charities, was widely welcomed. In January 2021, the Government announced a further £2 million in funding for such organisations, to top up the £5 million initially pledged in the female offender strategy.<sup>22</sup> However, some felt that this was too small, especially in comparison to the size of the investment in the prison estate announced at the same time.

It is important to emphasise that upstream intervention encompasses a broad range of areas that are not immediately linked to criminal justice: drug and alcohol treatment, mental health services, educational inclusion and debt support, to name just a few. While there is recognition that the Ministry of Justice only has limited jurisdiction over these areas, it would be good to see its involvement 'at the table' to ensure policies are 'joined up'.

In particular, it was argued that "the need for cross-sectoral collaboration is immense", with failures of coordination between healthcare, mental health, drug and alcohol and housing services. For example, one participant said that "the people I've spoken to have huge problems trying to get prisoners that are incredibly unwell into healthcare because healthcare can refuse to accept them in a way prisons can't". In that regard, the December 2020 *Concordat on Women in or at risk of contact with the Criminal Justice System* is an encouraging development, seeking to improve partnership working to embed a gender- and trauma-informed approach to dealing with the needs of women.<sup>23</sup>

### **Could the Government better signal the priority of the issue?**

A final overarching point relates to the relative profile and salience of the issue of women in the criminal justice system. As we have seen, though significant areas of disagreement persist, there is actually a fair amount of consensus on how to address some of the problems facing women in the criminal justice system, and certainly that the female offender strategy represents a good starting point. However, some participants suggested there is a sense that the strategy lacks momentum, or at least

that it requires continued agitation and support to ensure the Government follows through. For example, the female offender strategy has been mentioned just 19 times in parliament in 2021 so far.<sup>24</sup>

As one participant put it, “People don’t know about a lot of this stuff, and bluntly, I just don’t think they care enough about it”, and as a result it’s an issue where “you have to grind out better cooperation upstream, you have to get more focus on this, you have to ensure that you’re winning the battle with Treasury to get more money”. That implies a need for ongoing advocacy efforts by charities and non-governmental organisations (as well as think-tanks like the SMF). It also suggests a need for stronger, louder or more symbolically resonant action from the Ministry of Justice to demonstrate its commitment to its position. That could take the form of media work, high-profile speeches or concrete targets. But at least some participants thought that a legislative opportunity had been missed, and that the proposed amendments to the Domestic Abuse Bill would have sent a clear message in terms of the Government’s desire to avoid criminalising victims of abuse.

At the same time, there were some participants that were wary of drawing too much public attention, for fear of unhelpfully politicising the issue and encouraging populist response. While “discussion with the system, within the Government, would be a very good thing” because of the failure to share knowledge ‘up the chain’, “when we’ve had large public debates on crime and punishment, it tends not to end well”

## IMPLICATIONS FOR POLICY

Our seminar raised a number of challenges and issues to be addressed in order to produce a criminal justice system that works better for women. In particular, we believe Government, policymakers and practitioners should focus on the following:

1. **Raising the profile of women in the criminal justice system, and signalling a stronger commitment to meeting their needs.** There is a notable level of consensus, at least in terms of the initial steps that ought to be taken – reflected in broad support for the female offender strategy. However, the momentum of reform needs to be sustained to ensure the issue does not fall off the agenda. That requires the Government to do more and to highlight what it is doing, through things like events and high-profile speeches. It needs MPs to maintain pressure by raising female offenders in parliament, and advocates and researchers doing the same from outside. It means engagement and advocacy from other elements of the criminal justice system and public services more broadly – police, judiciary, prisons, probation, social work, public health and local authorities.
2. **Building confidence that investment in the prison estate will not lead to greater use of custody.** The Government insists that additional prison cells are intended to improve conditions in custody, not to encourage greater use of prisons. It could defuse scepticism of such claims by explicitly promising to close obsolete cells and thus committing to limits on the overall size of the estate.
3. **Improving training and procedures throughout the system to make it easier for women to disclose abuse.** There are some grounds for optimism that the

criminal justice system is slowly improving in its sensitivity and understanding of abuse. However, more needs to be done to ensure police, prosecutors, judiciary and lawyers are appropriately trained to make it easier for women to disclose abuse and for such context to be given due consideration. The 20,000 new recruits to the police could be used as the vanguard for a more gender-informed policing approach.

4. **Supporting initiatives to reduce unnecessary arrests.** The Government, alongside police forces and other stakeholders, should continue to explore diversionary projects, as well as schemes like Norfolk and Suffolk police’s “ring before you bring”, and attempt to scale these at a national level.
5. **Investing in upstream intervention and improving collaboration between services.** More resources for women’s centres and charities that work with victims of abuse and offenders would certainly be welcome. Improving communication and cooperation between different police, healthcare, local authorities and education would also help. However, the Ministry of Justice should also consider its role in promoting further upstream interventions such as investment in drug and alcohol treatment, mental health services, education and debt management.

## ENDNOTES

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<sup>1</sup> Ministry of Justice (2018), *Female Offender Strategy*.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ministry of Justice (2020), *Women and the Criminal Justice System 2019*.

<sup>6</sup> Ibid.

<sup>7</sup> MoJ, *Female Offender Strategy*.

<sup>8</sup> McMillan, T. et al (2021), Associations between significant head injury and persisting disability and violent crime in women in prison in Scotland, UK: a cross-sectional study, *The Lancet Psychiatry* 8:6.

<sup>9</sup> Ibid.

<sup>10</sup> MoJ, *Female Offender Strategy*.

<sup>11</sup> MoJ, *Women and the Criminal Justice System 2019*.

<sup>12</sup> MoJ, *Female Offender Strategy*.

<sup>13</sup> Ibid.

<sup>14</sup> National Association for Youth Justice (2020), *The state of youth justice 2020*.

<sup>15</sup> Centre for Women's Justice (2021), *Women Who Kill*.

<sup>16</sup> Ibid.

<sup>17</sup> <https://www.centreforwomensjustice.org.uk/dabill>

<sup>18</sup> Home Office (2015), *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*.

<sup>19</sup> <https://www.justiceforwomen.org.uk/sally-challen-appeal>

<sup>20</sup> All Party Parliamentary Group on Women in the Penal System (2020), *Arresting the entry of women into the criminal justice system*.

<sup>21</sup> <https://howardleague.org/blog/protocols-to-reduce-the-prosecution-of-children-in-care/>

<sup>22</sup> <https://www.gov.uk/government/news/extra-funding-for-organisations-that-steer-women-away-from-crime>

<sup>23</sup> Ministry of Justice (2020), *The Concordat on Women in or at risk of contact with the Criminal Justice System*.

<sup>24</sup> <https://hansard.parliament.uk/search/Contributions?startDate=2021-01-01&endDate=2021-09-21&searchTerm=%22female%20offender%20strategy%22&partial=False>