

Submission to the Justice Committee for Evidence Sessions with the Director of Public Prosecutions and the Lord Chief Justice of England and Wales (21/22 May 2020)

Women in prison under Covid-19: Issues for charging, remand and sentence

The current situation in prisons

The government has expressed 'cautious optimism' that measures in place to prevent transmission of Covid-19 in our prisons are proving effective. However, it is clear that this comes at a cost. 'Compartmentalisation' and social distancing is being achieved, as far as that is possible, through heavily restricted regimes, involving the cancellation of all social visits, and the stopping of almost all education, training and employment. Time out of cell for all prisoners is significantly curtailed with very limited opportunity for exercise and association. Conditions are consistent with, or very close to, international definitions of solitary confinement (22 hours or more alone each day).¹ Worryingly, Public Health England's (PHE) advice to the government suggests that restrictions will have to continue into next year if the virus is to be contained and managed.²

Women in prison during Covid-19 restrictions

As Baroness Corston identified in her pivotal report in 2007, the impact of imprisonment on women and those they usually care for is particularly harsh. It follows that during the current emergency, women remanded and sentenced to prison are likely to experience particular difficulties and challenges. Women who are imprisoned tend to be a highly vulnerable group. Many have pre-existing physical health needs that make them particularly at risk should they contract Covid-19. As of 12 May 2020, two women and 19 men had died from natural causes that may have been exacerbated by Covid-19.³ So far women have accounted for almost 10 per cent of deaths when women are only four per cent of the current prison population, and in the general population women are thought to experience less severe symptoms than men.

Many women in prison also have pre-existing mental health difficulties that will be exacerbated by lack of contact with their support networks and by solitary confinement. Almost half of all women in custody experience anxiety and report previous attempts to take their own life.⁴ The prevalence of self-injury amongst women in prison, even under normal conditions, is five times that in the male estate.⁵ Separation from children, without the possibility of social visits will be a source of extreme anxiety to many women, as they are unable to parent, or have contact with, their children at this worrying time. In addition to the immediate risks, maintaining good family relationships is particularly key for women's rehabilitation.⁶ The government recognise in the Female Offender Strategy (2018) that short prison sentences for women under normal conditions are generally counter-productive. Under the current regime they are likely to be even more damaging to women, their families and their efforts at desistance in future.

Additionally, PHE's advice to the government identifies the greatest risks for secondary outbreaks arising in prisons with a 'high population turnover'. Most female remand prisons would fall into this category – the average length of stay in Bronzefield Prison, for example, is three weeks. PHE warn about the escalation of risk for prisoners and the wider community should the courts return to 'nearer normal levels of activity'.

¹ United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules"), General Assembly Res 70/175, 17 December 2015, <https://undocs.org/A/RES/70/175>

² Government Legal Department letter dated 28 April 2020 <https://howardleague.org/wp-content/uploads/2020/05/Governments-response-letter-to-Bhatt-Murphy-Howard-League-and-PRT.pdf> para 67.

³ Parliamentary Question, HC Deb, 13 May 2020, cW, <https://www.theyworkforyou.com/wrans/?id=2020-05-04.42881.h&s=Lucy+Frazer#g42881.r0>

⁴ Equal Treatment Bench Book, p149.

⁵ Ministry of Justice (MOJ) (2020) *Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to March 2020 Assaults and Self-harm to December 2019*.

⁶ *The Importance of Strengthening Female Offenders' Family and other Relationships to Prevent Reoffending and Reduce Intergenerational Crime*, by Lord Farmer, June 2019.

Lucy Frazer QC MP, in response to questions in the House on 27th April, made reference to the various strands of work to prevent people coming unnecessarily into prisons, including 'good mechanisms in place in relation to bail' and 'good offers in relation to non-custodial orders'. Indeed community organisations continue to provide services for women despite the difficulties. Detailed information is needed for prosecutors, judges and magistrates, so that they can take into account the particularly vulnerable position of women at this time and ensure all available resources are utilised effectively to divert women from prosecution and prison.

What information has been provided to prosecutors, judges and magistrates about the particular impact of the current prison conditions on women, the envisaged length for which the Covid-19 restrictions will be in place, and mechanisms to support non-custodial measures?

Remand decision-making

Prior to the lockdown the number of women being remanded into prison to await trial or sentence was a growing problem. On 31 December 2019, the number of women held on remand had increased by 21 per cent on the previous year (to 568).⁷ There is also good evidence that remand was being used unnecessarily, with 63 per cent of women remanded into custody in magistrates' courts in 2018 not going on to receive a custodial term, and 9 in 10 women on remand being of low to medium risk of serious harm.⁸ Under international law decision-makers are under a duty to consider the rights of children affected by remand decisions, just as by sentencing decisions, and to take into account the impact on any dependent child, and their best interests, in making the decision.⁹ In the vast majority of cases remanding women into custody at this time would, for themselves and their families, represent a disproportionate response to any risk they may pose.

Prosecutors when deciding whether or not to resist bail should be advised to take into careful consideration the severe impact of remand on women and their families at this time. They must also be encouraged to ensure that the defence and the court have taken advantage of available bail information schemes. Judges and magistrates must be encouraged to ensure that any decision to remand to custody is subject to anxious scrutiny in light of the conditions in prisons and the community. In particular, remand for a woman's 'own protection' (under the Bail Act 1976) should not be considered at this time. We understand no guidance has been provided to judges and magistrates in respect of remand decision-making.

What guidance has been provided to prosecutors and members of the judiciary in relation to remand decision-making under Covid-19 restrictions?

Sentencing decisions

We welcome the salient reminder to judges and magistrates from the Lord Chief Justice and his judicial colleagues in *R v Manning*¹⁰ that they should keep in mind that the impact of a prison sentence is likely to be more severe during the current emergency than it would otherwise be.

Sentencers should be encouraged to avoid at all costs sending women to prison at this time. This is especially pressing in the case of pregnant women and mothers. The severe impact of the current prison conditions on women and their families will affect whether, for those on the cusp of custody, a prison sentence is a proportionate response to their offending. For a woman at risk of custody the power to defer sentence¹¹ to enable her to engage with support or treatment in the community should be considered, where appropriate. Where custody is unavoidable, the possibility of suspending the sentence, in suitable cases, should also be considered. The prospect that immediate custody will result in significant harmful impact to others is a factor indicating that suspension may be appropriate.¹² Such an approach will be particularly important as the courts return to more usual levels of activity, to prevent numbers in women's prisons rising to dangerous levels.

Have members of the judiciary received any guidance in respect of how to approach sentence for women in particular under Covid-19 restrictions?

**The Howard League for Penal Reform
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⁷ MOJ (2020) Offender management statistics quarterly: July to September 2019, 30 January 2020.

⁸ Female Offender Strategy 2018, MOJ.

⁹ Article 3 of the UN Convention on the Rights of the Child, Article 8 European Convention on Human Rights.

¹⁰ [2020] EWCA Crim 592 at para 42.

¹¹ Under the Power of the Criminal Courts (Sentencing) Act 2000 section 1.

¹² See Sentencing Council Guideline: Imposition of Community and Custodial Sentences.

Submission to the Justice Select Committee for Evidence Session on Coronavirus (COVID-19): The impact on prison, probation and court systems in the youth justice system (2 June 2020)

The Howard League's legal work with children in prison and our key concerns

The Howard League has continued to run its confidential telephone advice service, which is available to all children and young people in custody, and to provide legal representation, throughout the Covid-19 pandemic. In May 2020, the Howard League published *Children in prison during the Covid-19 pandemic* and, with Garden Court Chambers, a practitioner's guide, *Ending the detention of unsentenced children during the Covid-19 pandemic*. Both publications are on-line at www.howardleague.org.

The experiences of children in prison during this period raise serious concerns and beg three key questions:

1. Why are children not being released from custody under the Covid temporary release schemes?
2. What safeguards are being employed to protect children in solitary confinement and what is being done to bring it to an end?
3. What are the plans to resume meaningful education for children in custody?

The evidence suggests that these questions need to be addressed urgently in view of the serious risk of harm to children in prison under current regimes.

Why children should be prioritised under the Covid temporary release schemes

Children in Secure Training Centres (STCs) and prisons fall under the scheme. Yet as of 28 April 2020, none had been released and only ten children were deemed to be eligible over the next three months.¹ The government contends children in secure children's homes are excluded altogether.² The Ministry also appears to justify the reduced likelihood of releases for children on the basis that the custody threshold for children is higher and the risk of harm from Covid is lower.³

The current approach fails to take into account that the severely restricted prison regimes have resulted in the majority of children being held in prolonged solitary confinement; no face-to-face visits; virtually no education or therapy; and difficulties in contacting families and professionals, which makes planning for court hearings and release especially problematic. It is impossible to see how this approach can be reconciled with the welfare principle in section 44(1) of the Children and Young Persons Act 1933 and the best interests principle in Article 3 of the UN Convention on the Rights of the Child. The whole legal basis for the detention of children has fallen away. Children in prison are simply being contained, punished and exposed to harm, contrary to the purpose of the youth justice system.

¹ Parliamentary Written Question no. 41013, 28 April 2020, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-04-28/41013/>

² Parliamentary Written Question no. HL3689, 29 April 2020, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-04-29/HL3689/>

³ Letter from the Government to Bhatt Murphy Solicitors, the Howard League and the Prison Reform Trust, 28 April 2020, at <https://howardleague.org/wp-content/uploads/2020/05/Governments-response-letter-to-Bhatt-Murphy-Howard-League-and-PRT.pdf> (see paras 44 - 54)

Why the prolonged solitary confinement of children in prison must be brought to an end

A report by HM Inspectorate of Prisons (HMIP) in April 2020⁴ stated that time out of cell since the Covid-19 lockdown was just 40 minutes per day at Cookham Wood and around one hour at Wetherby compared with over three hours out of cell for children held at Parc YOI, which holds just over 30 children. All children were eating meals alone in their cells. The internationally accepted definition of solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.⁵ After 15 days, solitary confinement becomes prolonged, which the Supreme Court has noted can cause irreversible psychological harm.⁶ The Supreme Court case highlighted the importance of routine checks and scrutiny both within and outside the prison to safeguard against this harm. Those checks and the external scrutiny are not happening and there is a real risk that hundreds of children will face irreversible harm as a result of this prolonged period of solitary confinement. There appears to be no plan to bring this to an end.

Why there must be a plan to bring back meaningful education for children in prison

No out-of-cell activities or therapies are taking place, except in Parc prison where children are doing some activities as part of education provision. Education has been severely restricted. In Parc prison, children have been receiving two hours of face-to-face education activity every day but in most prisons, children are only getting education sheets or worksheets under the door to be completed in-cell. This is contrary to YOI Rules which require children to receive a minimum of 15 hours a week of education. In 2017, the failure to provide this for a 15-year-old child at Feltham prison was found by the High Court to be unlawful.⁷ Many children in prison have or should have education and health care plans. Children with such plans in the community have continued to be prioritized for education throughout the pandemic. By contrast children with special educational needs in prisons and STCs have not received any face-to-face education. As children in the community start to return to school, the contrast between the treatment of children in prison and the community becomes more stark.

Increased need, reduced support and reduced scrutiny

Children have told the Howard League of their acute anxiety at this time. One child told the Howard League: *"I'm worried because I got grandparents – I'm worried about what will and could happen to them."* Inspectors found that the suspension of visits from friends and family had had *"a dramatic impact"* on many children, a worry that was exacerbated by not knowing how long the situation would last. Inspectors were *"concerned to see limited specialist secondary mental health services for those who needed them"*.

While children in prison have been given additional phone credit, this is typically their only contact with the outside world. The cancellation of all visits means families, social workers, youth offending team workers, lawyers and doctors cannot have face-to-face visits with children. The Inspectorate noted the withdrawal of services, including Barnardo's and one-to-one programmes previously provided by mental health specialists. The absence of external visitors affects children's access to services and support and reduces the opportunities for external scrutiny and therefore has worrying implications for safeguarding.

Howard League for Penal Reform, 28 May 2020

⁴ HM Chief Inspector of Prisons, *Report on short scrutiny visits to Young offender institutions holding children* by HM Chief Inspector of Prisons, 21 April 2020, at <https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/young-offender-institutions/>

⁵ United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, General Assembly Res 70/175, 17 December 2015, at <https://undocs.org/A/RES/70/175>

⁶ *R (on the application of Bourgass and another) v Secretary of State for Justice* [2016] A.C. 384, para. 37

⁷ *R (on the application of AB (A Child)) v Secretary of State for Justice* [2017] EWHC 1694 (Admin)