

## Management of pregnant women and primary carers of young children through the criminal justice system in England and Wales

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### Introduction

The tragic death of an infant, following an unsupported birth in a prison cell at HMP and Young Offenders Institute (YOI) Bronzefield<sup>1</sup>, in September 2019, followed nine months later by a stillbirth at HMP and YOI Styal has focussed attention on the potential vulnerability of pregnant women and their babies in custody. Up until then there had been no stated concern by the Ministry of Justice in relation to the risks of housing pregnant women in the prison estate and the first recognition of the potential vulnerability of this cohort was in response to the spread of COVID-19 Pandemic.<sup>2</sup> Prior to these deaths, Prison Service inspection reports of the prisons in the female estate that provide Mother and Baby Unit (MBU) facilities failed to ring alarm bells, indicating that this provision had been 'steadily improving'. The most recent reports identified maternity services as 'impressive' at Bronzefield (2019)<sup>3</sup>, and the MBUs in both Peterborough (2018)<sup>4</sup> and New Hall (2019)<sup>5</sup> as 'excellent', with the provision of appropriate ante-natal and post-natal care.

In contrast a report published by Abbott in 2019 on the management of perinatal women in custody painted a very different picture, pointing out that births in cells were not isolated incidences.<sup>6</sup> She identified many worrying failures to provide adequate support to these women, restating some of the basic failures that were outlined some 13 years earlier by the scoping review carried out by Edge.<sup>7</sup> It is therefore appropriate that resultant enquiries on these deaths focus on whether management of their mothers complied with current prison service and healthcare regulations, whether these losses of life were preventable and on lessons that can be learnt in relation to the future management of pregnant women in custody.<sup>8</sup>

However, the important key question omitted from the resultant enquiries was why these women were in custody at such a critical time in their pregnancies; particularly in relation to the first case where the mother was on remand and thus had not, at the time of birth, been found guilty of a

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<sup>1</sup> Young Offender Institutes in the UK hold prisoners between the ages of 18 and 21.

<sup>2</sup> With a stated intent of releasing all pregnant women and mothers (with babies), from Mother and Baby Units, who did not present a risk to the public.

<sup>3</sup> HM Chief Inspector of Prisons (2019) *Unannounced Inspection of HMP and YOI Bronzefield*. Carried out in November to December 2018.

<sup>4</sup> HMP Inspector of Prisons (2019) *Unannounced Inspection of HMP and YOI Peterborough*. Carried out in August - September 2017.

<sup>5</sup> HM Chief Inspector of Prisons (2019) *Unannounced Inspection of HMP New Hall*. Carried out in February – March 2019.

<sup>6</sup> Abbott, I (2019) *The Incarcerated Pregnancy: An Ethnographic Study of Perinatal Women in English Prisons*. NHS research publication.

<sup>7</sup> Edge, D. (2006) *Perinatal Healthcare in Prison*. A Scoping Review of Policy and Provision on behalf of the Prison Health Research Network, Department of Health.

<sup>8</sup> To date the results of these enquiries have not been published.

criminal offence. This article is an attempt to answer this question by looking at how women are processed through the criminal justice system - from point of arrest to release and completion of supervision requirements and - identifying the potential impact of current service provision and decision making on them, their pregnancies and children.<sup>9</sup> It also attempts to move the focus from the impact of sentencing decisions, as evidenced in the *Female Offender Strategy* (2018)<sup>10</sup>, the resultant *Women's Policy Framework 2018*<sup>11</sup> and the JCHR report on *The right to family life: children whose mothers are in prison 2019*<sup>12</sup> to a wider overall perspective. After looking at the scale of the problem it therefore examines the key elements of arrest and initial court appearances, bail applications, sentencing decisions, time in custody, access to Mother and Baby Units (MBUs), the punishing impact of remand in custody, post release supervision and licence recalls.

To do this evidence is drawn from relevant publications, data published by the Ministry of Justice, casework data and court observations from previous research and evaluation work of non-governmental organisations, carried out in prisons and courts by the author between 2010 and 2019. The intent was also to present a fuller picture of individual case management from data gathered through interviews with women who had or were experiencing custody whilst pregnant or had given birth in the last two years and with relevant others involved with management of their cases. However the COVID pandemic meant that gathering such information, particularly in the custodial estate, was no longer feasible.

### **The scale of the problem**

According to the World Prison Brief England and Wales, together with Scotland, have the highest rates of imprisonment in Western Europe.<sup>13</sup> Barnardo's estimate that 200,000 children are affected by this<sup>14</sup> and there is ample evidence of the damaging impact on their long-term health and well-being, as documented by Beresford, Loucks and Raikes.<sup>15</sup> Although the imprisonment of fathers can have huge detrimental consequences, as Murray and Murray (2010) point out:

The impact of maternal imprisonment (and resulting separation) is likely to be much greater and more likely to result in insecure attachment and psychopathology in children, as mothers are often the sole or main care-giver.<sup>16</sup>

The practical repercussions for the majority of children, who are not then cared for by co-residential fathers after their mother's imprisonment, also means that very few remain their own home.<sup>17</sup>

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<sup>9</sup> Recognising that some of these procedures also impact on men, who are carers, and their children.

<sup>10</sup> Ministry of Justice (2018) *Female Offender Strategy*

<sup>11</sup> Ministry of Justice (2018) *Women's Policy Framework*.

<sup>12</sup> Joint Committee on Human Rights (2019) *The right to family life: children whose mothers are in prison*.

<sup>13</sup> World Prison Brief (2020). [https://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field\\_region\\_taxonomy\\_tid=14](https://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field_region_taxonomy_tid=14) Accessed June 2020

<sup>14</sup> Barnardo's (2020) [https://b.barnardos.org.uk/what\\_we\\_do/our\\_projects/children\\_of\\_prisoners.htm](https://b.barnardos.org.uk/what_we_do/our_projects/children_of_prisoners.htm)

<sup>15</sup> Beresford, S, Loucks, N, and Raikes, B. (2020) *The health impact on children affected by parental imprisonment*. *BMJ Paediatrics Open* 2020; Volume 4 Issue 1.

<sup>16</sup> Murray, J. and Murray, L. (2010) *Parental incarceration, attachment and child psychopathology*. *Attachment and Human Development*, 12(4): 289-309.

<sup>17</sup> In the 2008 report *11 Million*, by the Children's Commissioner for England and Wales, this was stated to be as low as 5%.

As evidenced in the publication by Glove in 2019,<sup>18</sup> strong evidence is also growing of the short and long term impact of environmental factors and maternal stress on foetal development, birth outcomes and early development and therefore how critical the first 1001 days of a child's life, from conception to 2 years of age, are to his or her long term health and wellbeing.

The fact that a disproportionate number of women who have been arrested are from a disadvantaged sector of society, where poverty, insecure accommodation, substance misuse and experience of abuse is more prevalent, means that appropriate support is even more critical in preventing negative outcomes for the next generation. As pointed out by NHS Scotland<sup>19</sup> the use of drugs, alcohol and tobacco before and during pregnancy are major risk factors for miscarriage, pre-term delivery, maternal and infant death and NHS Clinical Guidance states that women who misuse substances, and their infants, have better outcomes if they access antenatal care early and if they attend treatment programmes consistently throughout pregnancy.<sup>20</sup> Effective procedures therefore need to ensure that such women can access effective consistent perinatal care and specialist support and movement in and out of prison has an inevitable impact on this. This is equally true in relation to mental health issues, accepting that the complex mental health problems presented by many of these women can initially occur or worsen pre and post-birth.

In terms of scale, in June 2020 Ministry of Justice statistics showed that the female prison population for England and Wales stood at 3,255.<sup>21</sup> There is no mandatory national recording of numbers with dependent children and their ages for women entering prison. However some indication of this is given in terms of data requested from prisoners in the context of Inspections; with 61 per cent of all prisoners at Bronzefield,<sup>22</sup> and 53 per cent of convicted prisoners and 58 per cent remand prisoners at Peterborough<sup>23</sup> stating they had children under the age of 18. The figures are however likely to be higher, bearing in mind the reluctance of some prisoners to disclose this information.

There is a similar dearth in the collection of statistics in relation to numbers of prison receptions per annum of those who are pregnant, at what stage in their pregnancy they were arrested and released and their pregnancy outcomes. The first audit of numbers pregnant in custody, requested in parliament in November 2019, following the death of the new-born at Bronzefield, gave a figure of 47. This data would have been gathered in the context of a snapshot of known pregnancies in what is a very fluid population. A more realistic picture of the scale of the problem was given by data presented to a Parliamentary Enquiry in 2019, by the Royal College of Midwives,<sup>24</sup> which stated that:

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<sup>18</sup> Glove, V. (April 2019) *The Effect of Prenatal Stress on Child Behavioural and Cognitive Outcomes Start at the Beginning*. Institute of Reproductive and Developmental Biology, Imperial College London.

<sup>19</sup> NHS Scotland (2020) <http://www.maternal-and-early-years.org.uk/topic/pregnancy/substance-use-and-misuse-in-pregnancy>

<sup>20</sup> NHS (2020) *Clinical Guidance for Management of Substance Misuse in Pregnancy* <https://hgs.uhb.nhs.uk/wp-content/uploads/Substance-misuse-in-> Accessed August 2020.

<sup>21</sup> Ministry of Justice (2020) *Prison Population Statistics 12<sup>th</sup> June 2020*. Ministry of Justice (2020) *Prison Population Statistics 12<sup>th</sup> June 2020*. This compares with 3,774 twelve months previously and the reduction may be resultant on the COVID-19 pandemic.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Royal College of Midwives (2019) (CMP0008) *Evidence given to Parliamentary Enquiry on Rights to Family Life*.

Around 600 women receive antenatal care in prison and 100 women give birth in custody every year in England.

The following section of this article attempts to identify the key procedures within the criminal justice system that contribute towards this.

### **Arrest and Initial Court Appearances**

Following arrest and before being formally interviewed by the police the arrestee has the right to legal aid and is given the opportunity to contact her own solicitor or be offered the services of a duty solicitor. This right to free legal advice continues at the first court appearance, after which it is dependent on evidence provided in relation to receipt of state benefits or income status, to ensure that she is within the eligible bracket. This means that for some women who appear at court, whose residential status means they are not eligible for state benefits and who cannot provide evidence of income, there is no formal provision of legal aid past this stage.<sup>25</sup> This service is provided by specific legal firms in each location and the majority of women observed in court and interviewed in previous research had been supported by duty solicitors of whom they had no prior knowledge, who were different at these two stages and the arrestee had no say as to whether this representative was male or female.

Input and support is also provided at police stations and magistrates courts by the NHS Liaison and Diversion teams who have a specific focus on female arrestees where there is evidence of mental health or substance abuse problems. However, as outlined in their Service Specification in 2019,<sup>26</sup> this does not currently include identifying and offering support to women who may be pregnant or caring for a young infant.

After the police interview the woman can be held in police custody or released on police bail, pending her first court appearance at which the charges will be formally placed and, if appropriate, she will be asked to enter a plea. Before this hearing she will have a meeting with her solicitor, who will have received a briefing at court that morning on the case from the Crown Prosecution Service (CPS). If she has been remanded in custody this meeting will take place in the cells area. Court observations in 2019, carried out by the author in the context of evaluating support services by a third sector organisation, evidenced duty solicitors working under pressure, representing a number of defendants on different cases in one day and often not able to meet with all their clients before court hearings commenced at 10 or 10.30 a.m. She was advised that this was exacerbated by delays in arrival of prison escort vehicles. Scheduling of some cases was adjourned until the afternoon and observing interviews with support workers it was apparent that some women held in the cells were experiencing high levels of stress, with no update on what was happening, who was going to represent them and when they would be seen.

This critical initial meeting with their solicitor, which is time pressured, needs to focus on the charge and evidence presented by the CPS. The potential for developing trust and sharing of information in relation to personal issues, such as childcare responsibilities or pregnancies, is thus limited. As

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<sup>25</sup> This can be particularly detrimental to members of the Traveller and Roma community.

<sup>26</sup> NHS England (2019) *Liaison and Diversion Service Specification* Nov. 2019

outlined by Keefe and Dixon,<sup>27</sup> for women who may have had involvement with social services in the past, willingness to share such information may also be limited due to an inherent fear that revealing their status as mothers to the authorities might result in their children being removed. Where interpreter support is also needed this may again impede the development of trust.

This initial court hearing may be the first of many, depending on the type of offence, the plea and likely sentencing outcome, as magistrates can only sentence up to six months for a single offence. The CPS will thus identify the case as summary; meaning that it can be heard and sentenced at the magistrates court, either way; where there is a guilty plea that can be tried summarily or by indictment to the Crown Court or indictable; meaning that it is so serious that it can only be dealt with at the Crown Court.<sup>28</sup>

### **Bail applications**

Of equal importance on the first day of the hearing - assuming the case is not concluded - is the decision as to whether to grant bail. Despite the fact that, as outlined in the Bail Act 1976, there is a *prima facie* right to bail; a bail application has to be made. As outlined by Cape and Smith<sup>29</sup> in their report on the Practice of Pre-trial detention in England and Wales:

Courts devote little time to pre-trial detention hearings, caused in part by high case-loads and lack of resources, with bail hearings taking 5 minutes or less in 86% of cases and bail being granted in less than one in three contested cases.

Where bail is granted this is normally subject to provision of evidence of place of residence, financial sureties and reporting instructions. This report also points out that, following a refusal to grant bail, subsequent requests can then be made at following court hearings. However the onus is then on the defence to provide additional relevant material to have this changed and, because defendants remanded in custody are not normally produced in person in court for review hearings, there is limited scope for them to impact on this decision.

Following the Schedule 11 amendments to the Bail Act 1976, implemented with the Legal Aid Sentencing and Punishment of Offenders Act 2012,<sup>30</sup> some of the exceptions to the presumption that bail should be granted will not apply where there is no real prospect of the defendant receiving a custodial sentence if convicted. If there is a real prospect of custody, the Court must then consider the risks of granting bail, such as the commission of further offences, failing to surrender to the court and interfere with witnesses. Conditions can then be suggested to meet these, such as residence, reporting to the Police Station and not to contact certain witnesses.

The main arguments observed in court hearings by the author for refusing bail have been statements by the CPS that the offence is so serious that it passes this first threshold and that there

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<sup>27</sup> O'Keefe, C. and Dixon, L. (2015) *Enhancing Care for Childbearing Women and their Babies in Prison*. Hallam Centre for Community Justice & Action for Prisoners' and Offenders' Families.

<sup>28</sup> Factors that need to be taken into account in management of either-way offences are outlined in Schedule 3 of the Criminal Justice Act 2003.

<sup>29</sup> Cape, E. and Smith, T. (2016) *The Practice of Pre-trial Detention in England and Wales*, UWE Bristol.

<sup>30</sup> With the exemption of matters relating to extradition proceedings and convicted adults.

is a risk of absconding due to lack of community ties, particularly for those without UK nationality, irrespective of residential status.<sup>31</sup> The author has observed no evidence of these arguments being contested by the defence through provision of information in relation to dependent children registered as local schools or pre-school care, or for those who are pregnant, registration with local ante-natal care services.

Equally worrying is the assumption of *the real prospect* of a custodial sentence, which in many cases is not subsequently validated. Figures for 2016 show that 60 per cent of women remanded in custody by Magistrates' courts and 41 per cent remanded in custody by the Crown Courts did not receive a custodial sentence.<sup>32</sup> Of equal significance is the fact that Ministry of Justice Data for 2019 show that 10 per cent of those remanded in custody by the Magistrates courts and 13 per cent of those remanded by Crown Courts were subsequently acquitted. This sudden withdrawal of freedom, where bail has been refused, has a huge impact on women who are pregnant and on their children and there is no compensation where there is no finding of guilt or a resultant non-custodial sentence.

It is of note that in the latest Thematic Inspection on the work of Probation Services in courts in 2017,<sup>33</sup> that although two of the service requirements outlined were bail services and bail accommodation and support service (BASS), delivery of these were not evaluated as the whole focus was on evaluation of Pre-Sentence Reports and Enforcement Procedures. Indeed court observations would seem to indicate that prioritisation of these two areas of work impacts on attendance in courtrooms where bail decisions were being made, so that any involvement is reactive rather than proactive.

Prison service statistics for the female estate reported for April to June 2018 thus show a worryingly high number of women denied bail (571) with 41 per cent of all first prison receptions for those on remand, resulting in a population where 14 per cent are not yet convicted.<sup>34</sup> The percentage of those denied bail is even higher for non UK nationals, of whom 25 per cent are remand prisoners and the overall percentage of all women on remand has continued to increase between 2018 and 2020. This is reflected in the population breakdown of prisons and YOIs such as Bronzefield with a catchment area of 95 courts and the largest capacity within the female estate, where 35 per cent of its population are on remand. There is no total annual figure for numbers of first receptions for those on remand, but with a high turnover of 71 per cent within six months one can conclude numbers are high.

Once in custody the Bail Information Officer should then seek to identify and advise those who may be bailable and provide them with the facilities to make an application,<sup>35</sup> but Cape and Smith

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<sup>31</sup> The Policing and Crime Act 2017 requires the defendant to declare their nationality at the start of proceedings.

<sup>32</sup> Hansard (2017) House of Commons question 119151, answered 20<sup>th</sup> Dec. 2017

<sup>33</sup> HM Inspectorate of Probation (2017) *The Work of Probation Services in Courts*. June 2017

<sup>34</sup> <http://www.govuk/government/collectives/offender-management-statistics-quarterly-prison-population> April-June 2018.

<sup>35</sup> In compliance with Prison Service Order 6101.

describe these services as *patchy*.<sup>36</sup> Where pregnancies are first identified in the context of prison healthcare checks, which is not an unusual occurrence, one might conclude that this change of personal circumstances would warrant a new bail application or review. However no evidence has been identified of such applications having been made.

As evidenced by Ministry of Justice Criminal Court Statistics (April to June 2019),<sup>37</sup> the period in custody from the date of Listing in a magistrates court to Completion at the Crown Court was on average over five weeks where a guilty plea has been entered and 24 weeks for a non-guilty plea. The impact of the COVID pandemic on delaying court hearings has resulted in increased completion times over the last 12 months and the impact of lengthy remands in custody with no social visits from family cannot be overestimated.

From observations of case management in a busy London magistrates' court in 2019 it was apparent that bail decisions for women were routinely made without requests for information in relation to dependent children or pregnancies. Even where evidence could have been or indeed was produced, there were court outcomes which appear not to have been influenced. For example in two cases observed, where children of the defendant were in the public court area outside of the court room, the duty solicitor did not raise this to contest the decisions to refuse bail. In a third case where the Bench was advised that the mother was eight months pregnant, bail was finally granted with conditions of financial sureties. However they could not be met on that day and the traumatised woman was thus remanded in custody.

In previous research carried out by the author,<sup>38</sup> there were a number of cases where children, including babies who were being breastfed, were separated from the mother and taken into care at the point of arrest; bail was again refused. Long delays in accessing places in MBUs then meant that by the point of reunification breast milk had dried up, and the mother and child were inevitably traumatised by this process. There were similar negative repercussions resultant on insufficient time given at point of arrest to try and arrange alternative family carers and, where there were two or more children, the siblings were separated between the appointed carers. Equally unacceptable were delays in advising mothers where the children had been taken and establishing prison visits for their children. All of these impacted on the mental stability of the mothers and the long term wellbeing of the children in question, as observed when meeting some member of the research cohort group with their children, post release.

### **Time in custody**

There are currently 12 HMPs and YOIs used for women and female young offenders imprisoned in England and Wales; those with the largest capacity holding women who are on remand as well as those who are sentenced. All are located in England and despite the fact that a high percentage of women in custody are from the London area, since the closure of Holloway, none are based within the capital; the nearest being HMP and YOI Bronzefield based in Ashford, Middlesex. None are easily accessed by direct public transport, impeding visits from family and friends who would offer key

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<sup>36</sup> Ibid.

<sup>37</sup> Ministry of Justice (2019) *Criminal Court Statistics quarterly report April-June 2019*.

<sup>38</sup> Hales, L. and Gelsthorpe, L. (2012) *The Criminalisation of Migrant Women*

support in the community for a woman who was pregnant or caring for a young child.<sup>39</sup> Once sentenced, the woman might well be moved to another prison within the female estate.<sup>40</sup>

On entering prison, in addition to the uncertainties of their ongoing case, for those not yet sentenced, pregnant women face many additional challenges, as outlined by Abbott's detailed ethnographic study of perinatal women in custody.<sup>41</sup> These include managing the risks of living in unspecialised prison wings whilst pregnant, management of their births, hospital appointments and access to appropriate medical support, uncertainties about whether they should or will be able to keep their babies and access places on MBUs (as discussed below), and resultant fears of disclosing mental health issues.

### **Access to mother and baby units**

Within the female estate there are currently five MBUs, with capacity for 64 mothers and 70 babies. As pointed out in the study by O'Keefe and Dixon<sup>42</sup> these places were underutilised in 2015 and there is no evidence that this has changed. Some of the factors behind this are identified in research carried out by Gregoire et al.<sup>43</sup> This includes reluctance to apply, (due to factors such as length of sentence and inevitable separation), the view that prison was not the right environment for their child and the fact that their child was already in the care of social services.

Evidence of the potential impact of imprisonment on pregnant women and their children supports the view that whenever possible this should not happen to a woman who is pregnant or has a baby under the age of two years. However of equal concern is the manner in which some decisions are made by the court on the day, with no adjournment in relation to remands in custody, imposition of an immediate unexpected custodial sentence or recall on licence. This gives the mother no time to decide on what is then in the best interests of her children, leaves no potential for contact or negotiation with potential carers, or explanations by the mother to her children as to what is happening.

In addition to this, if the intent is to try and keep a young child with their mother, there is the false assumption that a place on an MBU will be immediately accessible. This is not the case as there is a formal procedure for applying and being considered for places on MBUs which can only start once the woman is in custody. This includes satisfying the MBU Admissions Board that this mother would not present a risk to her own or other babies on the unit and consideration of factors such as mental health and misuse of drugs. The timings of these boards, before which necessary medical and psychiatric reports, drug tests etc. need to be accessed, cause inevitable delays. It is therefore critical that, as recommended by the Joint Committee on Human Rights in 2019,<sup>44</sup> decisions regarding custody are adjourned to prevent the traumatic separation of mothers and their babies.

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<sup>39</sup> During the preparation of this report all visits were suspended due to the COVID-19 pandemic.

<sup>40</sup> Unless allocated a place to a specific MBU.

<sup>41</sup> Ibid.

<sup>42</sup> O'Keefe, C and Dixon, L (2015) *Enhanced Care for Childbearing Women and their Babies in Prison*. Hallam Centre for Community Justice.

<sup>43</sup> Gregoire, A., Dolan, R., Birmingham, L., Mullee, M. and Coulson, D. (2010) *The mental health and treatment needs of imprisoned mothers of young children*. *The Journal of Forensic Psychiatry & Psychology*, 21(3): 378.

<sup>44</sup> Ibid.



Over one third of applications for MBU places are finally refused and this may well increase the number of children removed post birth from women who have issues of substance misuse or mental health, where the decision in the community might have been that it was in the interests of the child to remain with the mother, provisional on engagement with appropriate support.

### **The punishing impact of remands in custody**

As mentioned above from the initial remand in custody to trial and/or sentencing the woman may spend many months in custody. During this time the stigma of being a prisoner applies equally to those who have been charged with an offence and those who have been found guilty and sentenced to imprisonment. One area where this is evident is in relation to hospital visits for antenatal care where, as noted by Abbott, the use of handcuffs and restraints identifies any women with prison escort staff as a *criminal* to other hospital visitors and medical staff.<sup>45</sup>

A number of cases have been recorded where this period of waiting has meant that those who were in the first or second trimester of their pregnancies at point of arrest gave birth before their trial or sentencing.<sup>46</sup> In one such case by the time the court found there was no case to answer and the defendant was to be released, she had spent 13 months in custody and her baby was five months old. In a second case the mother, suffering depression and stress in relation to her imprisonment, developed the dangerous condition of pre-eclampsia. The resultant hospitalisation, prior to birth, delayed the trial date to the point that, with a finding of guilt, the court concluded that she had already served the likely maximum sentence and she was again released from court. In a third case the defendant suffered a miscarriage in the second trimester, resulting in severe depression and her inability to emotionally manage visits from her child in care.

For all these women this remand period was one of extreme anxiety and, for those with children in the community, what they expressed as guilt in relation to their perception of *failing* as mothers. The unpredictability in relation to progress of the court case was talked about as more punishing than a fixed prison sentence, with inevitable impacts on their mental state and potential damage to the wellbeing of the foetus. This anxiety was often exacerbated by inconsistency in legal representation, limited face to face contact to try and understand what was happening with their cases and the fact that for those who went to trial at the Crown Court - being represented by barristers with whom the first contact was sometimes in the court cells area prior to their appearance.

For those who had been resident on MBUs before trial or sentencing, attending court also meant taking their baby with them and waiting with that child in an unlocked room in the cells area, with no specialist facilities. In these cases a social worker was accessed to care for the child whilst the mother was in the court room, but timing of these hearings did not take account of the stress for both mother and child of a long day at court and time taken travelling between prison and the court.

### **Sentencing decisions**

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<sup>45</sup> Ibid.

<sup>46</sup> A typical pregnancy lasts for 40 weeks. The three stages, each of approximately 3 months are referred to as the *first*, *second* and *third trimesters*.

As set out in the Criminal Justice Act (2003) the five key goals of sentencing are punishment of the offender, reduction of crime, reform and rehabilitation of the offender (for example drug or alcohol rehabilitation), protection of the public and to make the offender give something back (such as compensation payments).

This Act also states that custodial sentences should be imposed for the most serious offences where neither a fine alone nor a community sentence can be justified for the offence. They can also be imposed where the offender is considered to present a risk to the public. However statistics produced by the Ministry of Justice on women in the criminal justice system in 2018,<sup>47</sup> show that the majority of those in custody are not high risk in terms of the seriousness of offence or risk they present to others, with 36 per cent sentenced for theft, 19 per cent for summary (non-motoring offences) and 13 per cent for breach of a court order. Lengths of sentences within this database reinforce the conclusion that those sentences do not meet the above criteria in terms of seriousness of offence or risk to the public, with 55 per cent of the prison sentences shorter than three months and 68 per cent less than six months.

In terms of reform and rehabilitation, re-offending statistics evidence how ineffective short sentences are. The limited impact of rehabilitation work over a short time in custody can be further hindered when allocation to specific programmes only start once sentenced, for those who have spent considerable time on remand. As pointed out in Minson's 2020 briefing paper on Women in Prison:<sup>48</sup>

Despite the Government's own Female Offender Strategy 2018, which made clear the need for women to be diverted from custody, women continue to be sentenced to very short periods of custody.

Pre-Sentence Reports can be requested by the Bench prior to making a final sentencing decision and it is apparent that information on the defendant's circumstances and identification of appropriate support provision within the community has the potential to increase the likelihood of a community based option. However the author has observed a number of cases where the Bench has stated that a custodial sentence was inevitable and they could see no purpose in adjourning the sentence to gather additional information. Hopefully the new sentencing guidelines and implementation of the amendments to the Police, Crime, Sentencing and Courts Bill, as outlined in the final section of this report, will ensure that for those who are pregnant or with dependent children this can no longer be the case.

### **Post release supervision and licence recalls**

When a person is sentenced to a fixed prison sentence of 12 months and over they will be released from prison at the halfway stage and subject to licence conditions until the end of their sentence;

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<sup>47</sup> Ministry of Justice (2018) *Statistics on women in the criminal justice system 2017*.

<sup>48</sup> Minson, S. (2020) Centre for Criminology, University of Oxford *Women in Prison and release Measures during the COVID-19 Pandemic*.

with low to medium risk offenders supervised by Community Rehabilitation Companies (CRC) and high risk supervised by the National Probation Service (NPS).<sup>49</sup>

Following implementation of the Offender Rehabilitation Act 2014 (ORA) licence requirements were extended to all prisoners on release from custody, ensuring all those sentenced to periods of imprisonment from one day, to less than 2 years were under supervision for 12 months. This therefore topped up the licence period for those serving shorter sentences and resulted in a dramatic increase in the numbers of short term prisoners being released under inflexible supervision requirements. Many of these women had complex and multiple needs and chaotic lifestyles in relation to issues such as mental health, substance abuse, debt, and unstable housing, all exacerbated by their time in prison, without the resources to help with these issues.

Since the implementation of the ORA the numbers of women being recalled has tripled, with the latest published Ministry figures indicating a 29 per cent licence recall rate, with 1,846 recalls of women to custody whilst on licence in the year ending September 2018.<sup>50</sup> This has meant that at prisons such as Bronzefield 555 receptions in 2018-19 were resultant on licence recall.<sup>51</sup> It also accounts for the fact that at any one time 8 per cent of women in the female estate are there due to licence recall.

A study on licence recall made by the Prison Reform Trust, demonstrates that the initial goal of supervision for all, which was provision of more support, has failed.<sup>52</sup> CRCs and the NPS have been powerless to help with the key issues, particularly housing, debt, abusive relationships and mental health needs. Instead of being in a position of trust with a supervising officer, the relationship was seen one of coercion -with failed appointments - rather than of re-offending or the risk of this, resulting in these recalls.

Of the 24 women who had been recalled and were interviewed by the PRT, three were pregnant at time of recall and one stated that failure to attend one appointment had been due to a hospital visit for a pregnancy scan. This woman stated she was recalled and separated from her daughter shortly after giving birth. There is no evidence in any of these recall decisions of the potential impact on dependent children or risks presented to a pregnancy or birth being taken into account.

### **Post Release Challenges**

Release from prison, particularly during the perinatal period and/or whilst caring for young children or seeking reunification with children in the community is a time of great vulnerability for women. For those whose children are in temporary care, reunification will be dependent on appropriate housing, but accessing this housing will be dependent on current child care responsibilities, so that many women find themselves in an impossible situation. Those whose imprisonment separated

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<sup>49</sup> Contracts with CRCs terminate in June 2021 when the new operating model for the National Probation Service in England and Wales comes into effect.

<sup>50</sup> Various editions of the MoJ offender Management Quarterly Statistics were reported in the House of Commons debate Report (Feb 2019) on the *Recall to Women to Prisons*.

<sup>51</sup> IMB (2019) *Annual Report of the Independent Monitoring Board at HMP and YOI Bronzefield*. For the reporting year 01 August 2018 – 31 July 2019.

<sup>52</sup> Prison Reform Trust (2018) *Broken Trust. The rising number of women recalled to prison*

them from their children will also be facing the emotional challenges of re-establishing this link, where the trauma of past separation can hinder new trust with the mother. For those who have given birth in custody and have older children in the community there is the additional challenge of engaging these children with their new sibling, at a time when many women have a very low feeling of self-worth. Loss of accommodation whilst in custody also inevitably necessitates re-location without support networks and, for older children, changes in schooling. Compliance with supervision requirements, whilst moving between a number of temporary locations and caring for children, is thus very challenging.

### **The way forward and conclusions**

As outlined above the high number of pregnant women and those with young children who enter the prison estate each year is the result of a number of different elements of the criminal justice system from the point of arrest. It is then exacerbated by the revolving door of recall and failure to access long term community support in relation to key issues such as housing, poverty, abusive relationships, mental health problems and substance misuse.

In the overall management of these women there is the potential for better informed decisions, if effective resources were allocated to facilitate completion of *Personal Circumstances Files* from the first contact with the criminal justice system, as recommended by Lord Farmer in his Review for Women in 2019.<sup>53</sup> However, if implemented, it is critical that these women would not be penalised for failure to disclose personal information at the initial stage.

In relation to court proceedings there is also the potential for change following the New Sentencing Guidelines that came into force from 1<sup>st</sup> October 2019, which include an expanded explanation for the mitigating factor '*sole or primary carer for dependent relatives*'. As outlined by Minson<sup>54</sup> the key elements of these are that:

- the court should not impose a sentence of imprisonment where the impact on dependants would make a custodial sentence disproportionate to achieving the aims of sentencing
- the court should consider the impact of the sentence length on dependants and whether the sentence can be suspended
- the court should consider the effects on dependants when deciding on the requirements of community sentences
- when the defendant is a pregnant woman: the relevant considerations should include the effect of a sentence of imprisonment on the woman's health and any effect of the sentence on the unborn child
- the court must ensure that it has all relevant information about dependent children before deciding on sentence (in accordance with the case of R v Bishop [2011])
- the court should consider whether proper arrangements have been made for dependent children when imposing a custodial sentence, and consider adjourning sentence in such cases in order for proper plans to be in place for children

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<sup>53</sup> Lord Farmer (2019) *The Importance of Strengthening Female Offender Family and other Relationships to Prevent Reoffending and Reduce Intergenerational Crime*. Ministry of Justice.

<sup>54</sup> Minson, S. (2019) <https://shonaminson.com/2019/10/01/new-sentencing-guideline-in-force-from-1st-October-2019/>

- the court should ask the National Probation Sentence to address the defendant's caring responsibilities and the impact of any sentence on the care of their dependants in a Pre-Sentence Report.

This is taken further by the report published on 14<sup>th</sup> May 2021 by the Joint Committee on Human Rights on *Children of mothers in prison and the right to family life* report: *The Police, Crime, Sentencing and Courts Bill* <sup>55</sup> which tables 4 key amendments requiring;

1. a sentencing judge to have a copy of a pre-sentence report considering the impact of a custodial sentence on the dependent child, when sentencing a primary carer of a child
2. a sentencing judge to state how the best interests of a child were considered when sentencing a primary carer of a dependent child
3. a sentencing judge to consider the impact of a custodial sentence on a child when sentencing a primary carer of a dependent child
4. a judge to consider the impact of not granting bail on a child, when determining, in criminal proceedings, whether to grant bail to a primary carer of a dependent child

Additional clauses also include reference to the best interests of the baby where the woman is pregnant (in amendment 2), and the inclusion of the unborn child in amendments 3 and 4 and there was a request for the Secretary of State to collect and publish data on the number of prisoners who are primary carers of a child and the number of children who have a primary carer in custody.

These proposed changes in the law have the potential to finally ensure an appropriate focus on the impact of sentencing and bail decisions on dependent children, including those not yet born. However evidence gathered suggests there is still a need to focus on the impact of current service provision and decision making at all stages of the criminal justice system. This should include Liaison and Diversion provision, legal support, management of those whose pregnancy is first identified whilst in prison, assessment procedures for Mother and Baby units, and licence supervision with service provision to meet the complex needs of these women, thus reducing the risk of recall. Finally, where there is evidence of non-compliance with licence conditions, appropriate consideration of alternatives to recall for those who are pregnant or have dependants. Until this happens there will continue to be unjustifiable risks to foetal and maternal health during pregnancies, birth outcomes and to the short and potentially long term health and wellbeing of newborn babies and children of women who continue to end up in the custodial estate.

### **Postscript**

At the time of going to print on 22<sup>nd</sup> July 2021 the Government published its response to the Joint Committee on Human Rights First Report on *Children of mothers in prison and the rights to family life: the Police, Crime, Sentencing and Courts Bill*. Unfortunately none of the four key proposed amendments to the PCSC Bill were accepted as necessary. In brief there was no move in relation to the requirement for a pre-sentence report when sentencing a primary carer, arguing that there is already sufficient guidance in relation to this and improvements in delivery. Nor was there acceptance of the obligation on the sentencing judge to state how he/she considered the consequences for the child in the sentencing remarks, on the basis that statutory duty by virtue of

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<sup>55</sup> <https://committees.parliament.uk/publications/5846/documents/66463/default/>

section 52 of the Sentencing Code is sufficient. Equally worryingly was the response that it was considered as 'not necessary' for courts to be under a further explicit statutory obligation to consider the welfare of offenders' children when sentencing, in view of existing case law and sentencing guidelines. Finally the amendment in terms of making the welfare of a child a distinct consideration in determining bail for a primary carer was again considered not necessary, arguing that the court already has to balance the aims of custody against the impact this can have on family life and any dependants. However the Government response did point out that work is being carried out on the Basic Custody Screening Tool to facilitate collection of more robust data on a national level of parental responsibilities for those in custody.