What could England and Wales learn from Scotland’s approach to justice?

A study of the impact of a presumption against custodial sentences of three months or less in Scotland

Manon Roberts and Callum Tipple

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1. Executive summary

In February 2011, Scotland introduced a presumption against custodial sentences of three months or less. This study aims to evaluate the impact of the presumption on Scotland’s reoffending rates and prison population, and to explore whether similar reforms could and/or should be replicated in England and Wales.

Summary of findings

There has been little evaluation of the impact of the presumption against custodial sentences of three months or less. Rob Allen’s blog, ‘Unlocking potential: Six months to go’, which provided a brief review of the presumption’s impact (in the context of proposed reforms in England and Wales), concluded that the presumption has had little to no effect on sentencing decisions in Scotland, and “so Scotland may not provide the best model” for replication in England and Wales.

Our own study suggests that while Allen’s scepticism about the impact of the presumption is broadly justified, the question is a nuanced one and not straightforward to untangle. The presumption has correlated with a number of positive trends in Scotland since its introduction in 2011, most notably:

- a decline in the reoffending rate;
- a decline in the overall prison population;
- a decline in the number of short custodial sentences handed out; and
- an increase in the use of community sentences.

However, these trends need to be interpreted in a broader context. For example, most of these declines had begun before 2011, apart from the overall prison population, which had previously been increasing. While it is likely that the presumption played a small role in the falling prison population, this is likely to have been outweighed by broader factors relating to shifts in the number of offenders coming before the courts. Moreover, with respect to the use of very short custodial sentences (less than 3 months), the impact of the presumption appears to have been mixed, at best. It appears to have had a negative effect on women offenders (with a growth in the proportion of custodial sentences of under 3 months since 2011) and only a modest effect on the proportion of such sentences handed out to male offenders.

The impact of the presumption also needs to be interpreted alongside a number of wider criminal justice and public policy reforms (see chapter 3 for more detail), including a greater focus on problem solving justice in Scotland, which is likely to have incentivised judges to reduce the use of custody in favour of community sentences.

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1 Rob Allen (2019). Unlocking Potential: Six months to go. Available at: https://reformingprisons.blogspot.com/2019/01/six-months-to-go.html?m=1
Conclusion

These caveats notwithstanding, given that the positive trends have continued following the introduction of the presumption (its impact on women offenders aside), particularly the continued decrease in the number and proportion of <3 month sentences given to male offenders and the decline in the overall prison population following years of growth, the weight of the evidence suggests that the presumption is likely to have had a modest impact. However, it is not possible to delineate to what extent the presumption specifically has contributed to these continued positive trends, compared to other, potentially more significant factors, such as the large decline in the number of people coming before the courts.
2. The justice system in Scotland

In order to set recent reforms to the Scottish justice system in context, it is important to first consider how the system lends itself to outcomes that might differ from those reached in England and Wales.

Criminal court system

Within England and Wales, magistrates’ courts may usually only impose sentences of a maximum of six months’ imprisonment.\(^2\) This may rise to twelve months in the case of multiple either-way offences, or if the case is subsequently escalated to the Crown Court as an indictable offence. As a result, ‘short sentences’ are almost exclusively given out by a single criminal court.

In contrast, the Scottish court system involves two levels of criminal court that are permitted to deliver sentences of under twelve months in length.\(^3\) The sheriff courts are the principal criminal courts, and may hear a case by ‘solemn’ or by summary procedure. If the former, the sheriff (a trained professional judge) must sit with a jury, and can impose sentences of up to five years’ imprisonment or an unlimited fine. If the latter, the sheriff sits alone in a bench trial, and can impose sentences of up to twelve months’ imprisonment, or a £10,000 fine.

Furthermore, lay magistrates assisted by legally-qualified clerks offer judgements in the Justice of the Peace Court, a criminal court sitting locally under summary procedure. Justices of the Peace (JPs) may impose custodial sentences of up to sixty days in length, or a fine of up to £2,500, for various non-serious crimes including breach of the peace (though the awarding of custodial sentences by JPs is incredibly rare, according to Anne Pinkman of the Prison Reform Trust).

Beyond this, problem-solving courts are an intrinsic part of the Scottish legal system,\(^4\) with four courts located in major cities: the Glasgow Drug Court, the Aberdeen Problem-Solving Approach, the Edinburgh Alcohol Problem-Solving Court, and Forfar Problem-Solving Court. Dealing with offenders liable to be imprisoned but suffering from vulnerability, these courts offer further alternatives to magistrates through sentences including Community Payback Orders (CPOs). Whilst such courts do exist within England and Wales, they are far more limited in number and scope.

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\(^2\) Courts and Tribunals Judiciary. Magistrates’ Court. Available at: https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/

\(^3\) Scottish Courts and Tribunal Service. The Courts: Introduction. Available at: https://www.scotcourts.gov.uk/the-courts/

Attempts to draw lessons from recent Scottish reform over to the equivalent system in England and Wales must be aware of the implications arising from a different criminal justice system and culture. In particular, reforms to sentencing in Scotland take effect through both qualified and experienced sheriffs, and unqualified but advised JPs, both with the ability to pass sentences of limited length. In contrast, this ability falls almost entirely on unqualified but advised lay magistrates within England and Wales.

**Public services**

A focus on the renewal of public services has been at the heart of government strategy since the Christie Review of 2011,\(^5\) which set out the need for genuinely modern public services that are fit for the 21st century. In its response,\(^6\) the Scottish government promised to reform public services through four key pillars:

1. Decisive shift towards **prevention**
2. Integration of public services at local level through better **partnership**
3. Investment in people through **workforce development**
4. Sharp focus on improving **performance**

In particular, the government pledged to introduce a series of funds to improve disadvantaged communities and target reoffending, and to further integrate public services through improvement of Community Planning Partnerships and the completion of the “Making Justice Work” programme, bringing justice providers together to improve outcomes. These measures fit within a broader suite of policies designed to equalise service and assist the most vulnerable, many of which (including a redesigned performance framework for public services) were achieved through the Community Empowerment (Scotland) Act 2015.


Community Empowerment Act (Scotland) 2015

“A Bill for an Act of the Scottish Parliament to make provision about national outcomes; to confer functions on certain persons in relation to services provided by, and assets of, certain public bodies; to amend Part 2 of the Land Reform (Scotland) Act 2003; to enable certain bodies to buy abandoned or neglected land; to make provision for registers of common good property and about disposal and use of such property; to restate and amend the law on allotments; to enable local authorities to reduce or remit non-domestic rates; and for connected purposes.”

This bill was designed to drive agency and improvement in local Scottish communities, strengthening the voice of local people in public decision-making procedures (including the justice system). Part One of the bill requires Ministers to develop and publish a revised performance framework for public services, in conjunction with local communities, and with regular reporting processes. Subsequent sections of the legislation allow for participation requests by community bodies in the action of public authorities, and enable Ministers to require public authorities to promote public involvement in decision-making procedures.

These measures have direct relevance for criminal justice agencies and providers, as service-users and community bodies could begin to exert increased influence over issues including sentencing at local level.

Furthermore, the introduction of minimum unit pricing for alcohol on 1st May 2018 may have reduced demand on the criminal justice system connected to vulnerability. Research from the University of Sheffield (April 2016) found that minimum pricing of 50p per unit would lead to a fall in hospital admissions of 2,000 per year within twenty years.

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7 Community Empowerment (Scotland) Act 2015. Available at: http://www.legislation.gov.uk/asp/2015/6
8 The Community Empowerment (Scotland) Act 2015 - A summary (February 2015). Available at: https://www.gov.scot/binaries/content/documents/govsco/publications/factsheet/2017/02/community-empowerment-scotland-act-summary/documents/4cc21e07-7e8a-416b-8b8f-6ee6b45a6749/4cc21e07-7e8a-416b-8b8f-6ee6b45a6749/govsco%3Adocument
3. Recent reforms to Scottish justice system

Despite important divergence in the operation of the criminal court system, Scotland possesses a similar criminal justice context to England and Wales. The same problems that have affected England and Wales historically have proved similarly difficult for Scotland, amongst which are:

- **A high prison population:** The average daily prison population rose from 5,868 to 8,179 between 2000-01 and 2011-12, since when it has been falling (now standing at 7,464).\(^\text{10}\) Until 2013, Scotland had the highest per capita prison population in Western Europe, higher even than England and Wales.\(^\text{11}\)
- **Stubborn reoffending rates:** Though the overall reconviction rate has decreased over the past decade, the proportion of offenders going on to reoffend still stands at 27 per cent.\(^\text{12}\)

However, a series of recent reforms have been passed in the Scottish Parliament in an attempt to improve criminal justice outcomes. These include:

- A presumption against short prison sentences in Scottish courts (being extended from three to twelve months in 2019) *(Criminal Justice and Licensing (Scotland) Act 2010)*
- Establishment of Community Justice Scotland, with responsibility for probation delivery given back to local areas *(Community Justice (Scotland) Act 2016)*
- Reforms to the operation of criminal courts *(Courts Reform Act (Scotland) 2014)* and the introduction of new offences *(Domestic Abuse (Scotland) Act 2018 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016)*

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\(^{11}\) Eurostat, Prison capacity and number of persons held. Available at: [https://ec.europa.eu/eurostat/web/crime/data/database](https://ec.europa.eu/eurostat/web/crime/data/database)

Box 1. Justice portfolio dashboard, Scottish Government

**VISION:** Our vision is of a justice system that contributes positively to a flourishing Scotland, helping to create an inclusive and respectful society, in which all people and communities live in safety and security, individual and collective rights are supported, and disputes are resolved fairly and swiftly.

<table>
<thead>
<tr>
<th>NATIONAL OUTCOMES</th>
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<th>NATIONAL OUTCOMES</th>
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<tbody>
<tr>
<td>We live our lives safe from crime, disorder and danger.</td>
<td>We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.</td>
<td>Our public services are high quality, continually improving, efficient and responsive to local people’s needs.</td>
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<table>
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<tr>
<th>JUSTICE OUTCOMES</th>
<th>JUSTICE OUTCOMES</th>
<th>JUSTICE OUTCOMES</th>
</tr>
</thead>
<tbody>
<tr>
<td>We experience low levels of crime</td>
<td>We experience low levels of fear, alarm and distress</td>
<td>We are at low risk of unintentional harm</td>
</tr>
<tr>
<td>We have high levels of confidence in justice institutions and processes</td>
<td>Our public services are fair and accessible</td>
<td>Our institutions and processes are effective and efficient</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Our public services respect the rights and voices of users</td>
</tr>
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**Presumption against custodial sentences of less than three months**

Coming into force in February 2011, the Scottish government passed legislation in 2010 through the Criminal Justice and Licensing (Scotland) Act to introduce a presumption against custodial sentences of less than three months in duration. Beyond being supported by subsequent research commissioned by the Scottish government, restrictions of sentences of this length had been proposed in Reform Scotland’s 2008 pamphlet “Power to Protect”. This report argued for a full ban on such sentences, with a further ban on prison sentences of less than six months while automatic release was still in force (subsequently abandoned through the Prisoners (Control of Release) Act of 2015). In turn, such sentences should (it was argued) be replaced by community sentences, or longer sentences with genuine opportunities for rehabilitation.

After consultation, the Scottish government chose not to prohibit such short sentences, but instead to introduce a presumption against their use apart from in the most necessary circumstances, with preference given to Community Payback Orders (CPOs). The Scottish National Party’s Programme for Government for 2017/18 committed to extending that presumption against sentences of up to twelve months in duration — a change that received
85 per cent support in a public consultation. The stated rationale behind the promise suggested that the presumption has been instrumental in reducing reoffending (rather than reducing the prison population), and that a further extension (with safeguards for victims of domestic abuse) would improve reoffending rates further. Coupled with this promise was:

"…continuing the development of the new estate for female offenders, with far greater community focus and support for these offenders and their families, who often have complex needs."

According to Anne Pinkman (Prison Reform Trust), the presumption against sentences of up to twelve months is likely to be passed through an amendment prior to Easter 2019; however, some are concerned about the likelihood of such an extension being coupled with sufficient and meaningful investment in community justice.

Other examples of reform

Criminal Justice Act 2016

“A Bill for an Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.”

The landmark Scottish criminal justice reform bill of 2016 set out new provisions across a range of agencies in response to Lord Carloway and Sheriff Principal Bowen’s respective reviews into criminal law and procedure, and sheriff and jury procedure. On arrest and custody, the maximum period a suspect may be held for questioning was reduced to twelve hours, and the right of access to a solicitor was extended to all suspects held in custody, amongst other measures.

For trials by solemn procedure, moves to improve preparation for sheriff and jury cases were imposed, and the qualifying limit for a jury majority was increased to two-thirds for a guilty verdict. On sentencing, the maximum sentence for statutory offences involving knives/weapons was increased to five years. Furthermore, provisions were made for a statutory aggravation for people trafficking, and for improved use of video links between prisons and courts.

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15 Ibid.
16 The Times (2019). Plan to scrap short jail terms ‘will falter’. Available at: https://www.thetimes.co.uk/article/planto-scrap-short-jail-terms-will-falter-w8tptvm9
17 Criminal Justice (Scotland) Bill (2015). Available at: https://www.parliament.scot/parliamentarybusiness/Bills/t5155.aspx
Community Justice (Scotland) Act 2016\(^{18}\)

“A Bill for an Act of the Scottish Parliament to make provision about community justice, including establishing a new national body to oversee community justice and introducing requirements in relation to the achievement of particular nationally and locally determined outcomes; and for connected purposes.”

Community justice has been at the heart of recent reforms in the Scottish criminal justice system. The 2016 act introduced a new body, Community Justice Scotland, designed to oversee community justice, assisting those released from custody and managing those convicted of crimes but not committed to custodial sentences. Similarly, responsibility for probation delivery was given back to groups of community justice partners in local authorities, and Ministers were obliged to set out a national strategy (the “National Strategy for Community Justice” (2016)\(^{19}\)) and performance framework (“Community Justice Outcomes, Performance and Improvement Framework” (2016))\(^{20}\) for community justice.

Domestic Abuse (Scotland) Act 2018\(^{21}\)

“A Bill for an Act of the Scottish Parliament to create an offence with respect to the engaging by a person in a course of behaviour which is abusive of the person’s partner or ex-partner; and to make rules of criminal procedure for that offence and also for offences subject to the statutory aggravation involving abuse of partners or ex-partners.”

A new offence was introduced into Scots law through the 2018 Domestic Abuse Act, relying on a specific act satisfying three criteria:

1. “The accused engaged in a course of behaviour which was abusive of the accused’s partner or ex-partner;
2. “A reasonable person would consider the course of behaviour to be likely to cause the partner/ex-partner to suffer physical or psychological harm;
3. “The accused either intended the course of behaviour to cause such harm or was reckless as to whether it would.”

Importantly, though the maximum penalty on solemn procedure is a custodial sentence of fourteen years, the respective maximum penalty on summary procedure is twelve months (the same as in England and Wales). This has the potential to substantially affect the number of offenders given short custodial sentences.

\(^{18}\) Community Justice (Scotland) Bill (2016). Available at: https://www.parliament.scot/parliamentarybusiness/Bills/88702.aspx


Prisoners (Control of Release) (Scotland) Act 2015\textsuperscript{22}

“A Bill for an Act of the Scottish Parliament to end the right of certain long-term prisoners to automatic early release from prison at the two-thirds point of their sentences and to allow prisoners serving all but very short sentences to be released from prison on a particular day suitable for their reintegration into the community.”

The first set of provisions in this act relate to sex offenders serving determinate custodial sentences of four years or more (likely to be the largest group affected),\textsuperscript{23} or other offenders serving such sentences of ten years or more. Whilst the act does not prohibit early release in such cases, any such a release would be at the discretion of the Parole Board.

The second set of provisions allow the Scottish Prison Service to release prisoners up to two days early, in order to facilitate the process of reintegrating offenders into the community. This is designed to ensure ex-offenders can gain the access necessary to key public services, and do not fall back into a cycle of criminality out of economic (or other) need.

Abusive Behaviour and Sexual Harm (Scotland) Act 2016\textsuperscript{24}

“A Bill for an Act of the Scottish Parliament to make provision about abusive behaviour; and to make provision about sexual harm including provision about directions to be given to juries in sexual offence cases and provision about orders to prevent future sexual harm.”

This act introduces a number of new aggravators and orders relating to abusive behaviour and sexual harm, including a civil protection order named the ‘sexual health protection order’ and a specific aggravation that an offence involved domestic abuse. With regards to sentencing, a new offence is introduced that prohibits the disclosure or threat of disclosure of a photograph or film showing a person in an intimate situation, without consent and with intention to cause fear, alarm or distress, or recklessness with regards to such emotions.

Implications

Recent reforms to the Scottish criminal justice system have sought to reduce the size of the prison population, to reduce reoffending, and to encourage early intervention, through better use of local authorities and enhanced provision of community justice. These reforms form part of a conscious effort on the part of the Scottish government to pursue more progressive solutions to criminal justice.

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\textsuperscript{22} Prioners (Control of Release) (Scotland) Bill (2015). Available at: https://www.parliament.scot/parliamentarybusiness/Bills/80130.aspx


\textsuperscript{24} Abusive Behaviour and Sexual Harm (Scotland) Bill (2016). https://www.parliament.scot/parliamentarybusiness/Bills/92672.aspx
That these reforms have been coupled with the introduction of new offences (some involving penalties on summary of under twelve months, on issues including domestic abuse and revenge pornography) may highlight a contradiction at the heart of the current Scottish approach to criminal justice; namely, that new offences are introduced with short sentences under political pressure, whilst the rhetoric continues to oppose these exact same sentences.
4. Impact of recent reforms

Data analysis

Trends in reconviction rates suggest that the presumption against sentences of three months or less has met its principal aim of reducing reoffending.\footnote{Audit Scotland, Reducing Reoffending in Scotland (November 2012). Available at: http://www.audit-scotland.gov.uk/docs/central/2012/nr_121107_reducing_reoffending.pdf} Reconviction rates declined from 29.6 to 27.0 per cent between 2011/12 and 2015/16, with the number of reconvictions per offender dropping from 0.55 to 0.47 (see figure 1). However, as shown in figure 1, this reduction is a continuation of a longer-term trend – reconviction rates have been consistently on the decline in Scotland since 2004/05.

\textbf{Figure 1. Reconviction rates and number of reconvictions per offender (shown on secondary axis) in Scotland between 2004/04 and 2015/16}\footnote{Reconviction Rates in Scotland by Offender Characteristics and Local Authority groups 2004-05 to 2015-16. Available at: https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/ReconvictOffendDatasets/RR1516AT}

An examination of trends in the number and proportions of custodial sentences of three months or less would also suggest that the presumption against such sentences introduced in 2011 has begun to have its desired effect. The number of these types of sentences handed out by the Scottish courts has decreased by 31 per cent since 2011/12, with the number of longer custodial sentences decreasing to a lesser extent in comparison (see figure 2). The decrease in the number of 3-6 month sentences handed out also indicates a lack of up-tariffing as an outcome of the presumption (i.e. sheriffs giving out more custodial sentences of over three months to circumvent the presumption). However, figure 2 suggests this may have happened temporarily, immediately after the presumption was introduced, given the spike in 3 – 6 month sentences observed in 2011/12.

It is important to note that the decrease in custodial sentences of three months or less began before the presumption was introduced in 2011. In fact, the period between 2008/09-2011/12
saw a decrease of 35 per cent in the use of these kinds of sentences, compared to a 31 per cent decrease within the longer period of 2011/12 – 2017/18 (see figure 2).

Figure 2. Number of custodial sentences handed out between 2008/09 and 2017/18, by sentence length

![Figure 2](image)

Given reconviction rates are particularly high for shorter custodial sentences compared to longer sentence lengths (see table 1), the reduction in reconviction rates correlates with the decrease in the use of short custodial sentences, as would be expected, thus supporting the rationale for the introduction of the presumption against custodial sentences of three months or less.

Table 1. Reconviction rates and number of reconvictions per offender associated with different custodial sentence lengths (2015/16 cohort)

<table>
<thead>
<tr>
<th>Custodial sentence length</th>
<th>Reconviction rate (%)</th>
<th>Number of reconvictions per offender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 3 months</td>
<td>58.5</td>
<td>1.26</td>
</tr>
<tr>
<td>3 to 6 months</td>
<td>52.2</td>
<td>1.07</td>
</tr>
<tr>
<td>6 months to 1 year</td>
<td>40.9</td>
<td>0.78</td>
</tr>
<tr>
<td>1 to 2 years</td>
<td>31.1</td>
<td>0.51</td>
</tr>
<tr>
<td>2 to 4 years</td>
<td>24.8</td>
<td>0.38</td>
</tr>
<tr>
<td>Over 4 years</td>
<td>9.2</td>
<td>0.10</td>
</tr>
</tbody>
</table>

The prison population has decreased by 9 per cent since 2011 – 12, equivalent to 715 fewer individuals in custody (see figure 3), also implying that the introduction of the presumption has

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had a positive impact. However, custodial sentences of all lengths have decreased across the board (see figure 2), making it difficult to ascertain to what extent the decrease in the overall prison population is due specifically to sentencers’ reaction to the presumption against sentences of three months or less – particularly given the significant decline seen in the number of 3 – 6 month sentences (31 per cent between 2011/12 and 2017/18).

Figure 3. Average daily prison population by gender, 2001/01 – 2017/18\(^{29}\)

The impact of the presumption seems more modest when looking at the proportions (rather than absolute number) of different sentence lengths handed out by the courts — whereas sentences of three months or less formed 28 per cent of all custodial sentences handed out by the courts in 2011/12, by 2017/18 this had decreased only marginally, to 27 per cent (see figure 4).

Figure 4. Percentage of custodial sentences handed out between 2008/09 and 2017/18, by sentence length\(^{30}\)


Breaking these numbers down by gender demonstrates that the presumption has had a differential effect on women and men. The female prison population has decreased by 15 per cent since 2011/12, compared to an 8 per cent decrease in the male prison population (see figure 3). However, the proportion of custodial sentences of three months or less given to women offenders has *increased* by two percentage points since the presumption came into effect in 2011 (see figure 5). By comparison, the proportion given to male offenders has decreased by three percentage points (see figure 6). This is particularly surprising given that a higher proportion of women were receiving sentences of this length prior to the presumption being introduced (42 per cent in 2010/11, compared to 34 per cent for male offenders).

**Figure 5.** Women receiving a custodial sentence by length of sentence (percentage), and total number of custodial sentences handed out to female offenders

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These trends raise questions about why the presumption has not had similar effects for both male and female offenders, particularly given the fact that women offenders are more likely to receive a short custodial sentence compared to male offenders. There may potentially be a core group of offenders who reach a cap on the number of community orders that can be given, and for whom custody is the only option; however without further research involving sheriffs, this remains conjecture.

Looking at sentences other than custody, the proportion of community sentences handed out has increased by four percentage points since 2011/12 (see figure 7), implying that the presumption may have had one of its desired effects of increasing the use of community options for offenders. However, this increase correlates with a decrease in the proportion of fines handed out by the courts, rather than with a decrease in the proportion of custodial sentences (which has remained relatively stable both before and after the introduction of the presumption against custodial sentences of three months or less). Looking at the absolute numbers of different sentences handed out (see figure 8), since the presumption against <3 month sentences came into effect, all sentences handed out by the courts have decreased, particularly fines over the past three years.

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33 See figures 5 and 6. In England and Wales, 72% of female offenders received a custodial sentence of 6 months or less in 2017, compared to only 56% of male offenders (Source: Criminal justice statistics quarterly - court outcomes by police force area (2017))
Figure 7. Percentage of people convicted by main penalty (2007/08 – 2017/18) \(^{34}\)

![Figure 7](https://example.com/image1)

Figure 8. Number of people convicted by main penalty (2007/08 – 2017/18) \(^{35}\)

![Figure 8](https://example.com/image2)

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In total, the number of people convicted by the Scottish courts has decreased by 24 per cent since 2011/12, reflecting a decrease in recorded crime of 22 per cent in the same period.36 The number of people proceeded against (for all crimes and offences) also declined by 24 per cent between 2011/12 and 2017/18.37 Consequently, the drop in the number of custodial sentences (short and long) may be a simple reflection of the decline in demand on the Scottish courts, itself a result of a decrease in recorded crime, rather than being due to a change in sentencing behaviours as a result of the presumption (given their proportion as a function of all sentences has not changed). Trends in demand on the courts shows that the number of people convicted was already in decline in the years leading up to the introduction of the presumption (see figure 9). It is therefore plausible that the decrease in court demand could be the main driving factor behind the decrease in prison population.

Yet, this was not the case prior to the presumption, during which time the prison population increased (see figure 3), whilst at the same time both the number of people convicted by the court (see figure 9) and the number of custodial sentences handed out both declined (see figure 8). Contrasting correlations pre- and post-presumption may suggest that the presumption did have an effect on decreasing the prison population; following the presumption, the number of people convicted by the court, the number of custodial sentences handed out and the prison population all declined. However, two factors other than the presumption may have driven the contrasting patterns pre- and post-presumption. Firstly, there was a sharp decline in the proportion of custodial sentences of three months or less handed out prior to the presumption, from 40 per cent of all custodial sentences in 2008/09 to 28 per cent in 2011/12 (see figure 4). In comparison, a much more modest decrease of one percentage point in the proportion of <3 month sentences was observed between 2011/12 and 2017/18. Secondly, a steeper rate of decrease in demand on the courts was observed after the introduction of the presumption (a 24 per cent drop in the number of people convicted between 2011/12 and 2017/18 compared to a 13 per cent decrease between 2008/09 and 2011/12). Therefore, the prison population increase observed before the presumption may be due to a greater proportion of offenders serving longer sentences outweighing the effects of decreased court demand. Following the presumption, a modest change in the mix of sentence lengths would have been outweighed by the impact of the significant decrease in court demand, leading to a decrease in the overall prison population.

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The crime mix coming before the courts is also important to consider when evaluating this issue. The proportions of different crime types in 2011/12 and 2017/18 (see figure 10) show that the mix of offences proceeded against has not changed significantly since the presumption came into effect. Therefore, assuming the <3 month presumption had no effect on sentencing behaviour, trends in the declining numbers but similar mix of offenders coming before the courts would be predictive of a reduction in the number of sentences handed out, and on the prison population, but not to a change in the proportion of different sentences handed out (as the overall severity of the offences being committed has not changed substantially). These results therefore indicate that the presumption may have had a modest effect on the sentencing behaviours of those working in the Scottish courts – though more so for male offenders than for women offenders.

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It is also important to analyse the numbers remanded to custody when looking at sentencing behaviours, as this represents a different way in which offenders can be sentenced to custody for short periods of time, that may or may not have been affected by the presumption.

Women consistently show a higher proportion of remand custodial sentences as a proportion of all custodial sentences handed out compared to men. The proportion of remand sentences has remained stable for women since 2011/12, at around a quarter. A substantial proportion of women held on remand do not go on to receive a custodial sentence (estimates vary, but range between 30 to 70 per cent).\textsuperscript{40,41} For men, remand sentences have consistently formed around a fifth of all sentences handed out between 2011 and 2018 (see figure 11).

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure11.png}
\caption{Proportion of male and female prison population on remand (2007/08 – 2017/18)\textsuperscript{42}}
\end{figure}


It has been suggested that differences in the use of remand for men and women may be indicative of the difference in underlying needs and vulnerabilities of the two groups, and the gender-specific responses that would therefore be required. For example, Thomas Jackson of COSLA (Convention of Scottish Local Authorities) spoke of how programmes for women offenders require a longer timeframe to see results, which means alternatives to remand must be properly resourced:

“We must understand that if we target more people who face remand, whom we want to shift to bail, we will have to invest appropriately. We need to recognise that we are dealing with individuals who might live in extremely chaotic situations that it will take longer to unpick.”
- Thomas Jackson (COSLA), oral evidence provided to the Scottish Justice Committee

Given the high and stable proportion of women who are in custody on remand, coupled with the stubbornly high proportion of women still being sentenced to custody for three months or less since the introduction of the presumption, it is reasonable to infer either that attitudes of sentencers towards female imprisonment have not radically changed post-presumption, or that there are broader challenges which mean that sentencers are not able to enforce the presumption as they would like to.

Summary

Scottish prison and sentencing data suggests that the presumption against custodial sentences of three months or less has had a modest impact in terms of the reform’s aims; however the picture is not straightforward.

The presumption could be said to have met its primary aim, namely to reduce reoffending, as the proportion of reconvictions has reduced since 2011/12. However, it should be noted that reconviction rates were already on the decline prior to the presumption being introduced in 2011/12.

The decrease in the prison population witnessed since the introduction of the presumption may be more a reflection of a general decrease in demand on the courts (which has been on the decline since 2008/09), as opposed to changes in sentencing behaviours. The observed reduction in custodial sentences of two years or less (rather than three months or less) since 2011/12 also confuses the picture – on the one hand, this could be due to fewer defendants being proceeded against, or on the other hand, could be due to the presumption having a broader effect on sentencing behaviours.

Looking at the changes in proportions of short custodial sentences indicates a more limited impact than when looking at trends in their numbers, with sentences of three months or less

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still forming 27 per cent of all custodial sentences handed out by the courts (compared to 28 per cent in 2011/12). The presumption also appears to have disproportionately impacted sentences handed out to men compared to women, with women offenders seeing an increase in the proportion of <3 month sentences handed out since 2011/12.

The following section evaluates the impact of the presumption and other reforms to the Scottish criminal justice system, as well as their potential applicability to the system in England and Wales.
5. Conclusions

Impact in Scotland

At first glance, overall decreases in both the number and proportion of offenders in Scotland receiving a custodial sentence of three months or less indicate that the sentencing reforms of 2011 have been somewhat effective. Not only has the total prison population decreased, after years of steady increases, but the proportion of <3 month sentences as a proportion of all sentences received by men has dropped from 28 per cent to 25 per cent. Furthermore, as Phil Bowen of the Centre for Justice Innovation signalled, the lack of notable ‘problem cases’ arising as a result of the presumption has given political framing to the Scottish government to implement a more progressive justice system.

In addition, the reconviction rate has decreased from 29.6 to 27.0 per cent between the 2011/12 and 2015/16 cohorts, with the average number of reconvictions per offender dropping from 0.55 to 0.47 during the same period – this has allowed the Scottish government to state that reducing reoffending was the primary aim of the presumption, and therefore to claim it as a success.44

However, this masks a number of broader questions. For example, it remains unclear why the proportion of short sentences given to female offenders has increased in the last year, in the face of a decrease in the proportion given to male offenders, especially given the disproportionate number of women receiving short sentences. The SNP’s Programme for Government 2017-18 includes reference to greater support and community focus for female offenders, but it would be valuable to know if further such plans have been developed, particularly given a presumption against custodial sentences of twelve months or less would mean the vast majority of women currently given a custodial sentence would require an alternative sanction. Likewise, it is unclear to what extent improvements have been driven by the 2011 presumption by alternative reforms (e.g. improvements to public services), or by the significant reduced demand on the courts (24 per cent since between 2011/12 and 2017/18).

Similarly, it is unclear to what extent new offences introduced in the last year either have increased or will increase the number of short sentences awarded, and how this rhetoric fits within the broader ambition of the Scottish government to drive down the prison population.

The apparent success is muddied not only by the lack of impact seen in the female offender cohort and the general decrease in demand on the Scottish courts, but also by the fact that custodial sentences of three months or less were already on the decline before presumption was introduced, and at a faster rate than the decline seen post-preservation. Therefore, the corresponding decrease in reconviction rates (observed well before the presumption was introduced in 2011/12) cannot be attributed to the introduction of the presumption alone.

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Nevertheless, in England and Wales the prison population has remained relatively stable, despite a decrease in the number of people coming before the courts.\textsuperscript{45,46} This suggests that there may be some differences in sentencing decisions between Scotland and England and Wales, but the extent to which these differences can be attributed to the presumption specifically, as opposed to other differences (e.g. a greater focus on problem solving justice) remains unclear.

**Replication in England and Wales**

There are certain differences in the operation of the criminal justice system in Scotland that influence the applicability of lessons regarding presumptions on short sentences; these include the widespread presence of problem-solving courts, the role of legally-qualified sheriffs in place of magistrates, and the commitment to community justice in a highly progressive country. Initial research from Scotland does indicate that the introduction of similar presumptions within England and Wales could help to reduce the reoffending rate, if not to reduce the overall prison population without a broader decline in demand on the courts. However, further work would be necessary to produce a compelling case, accounting for the identified differences in the systems adopted by the areas.

**Summary**

In summary, the introduction of a presumption against custodial sentences of three months or less in Scotland in 2011 has been accompanied by a number of positive trends in the criminal justice system, including a reduction in reconviction rates, a reduction in the number and proportion of short custodial sentences awarded, and a reduction in the prison population. However, these trends were largely consistent in the years prior to the introduction of the presumption, and have simply continued at similar rates since.

As a result, it is unclear to what extent their continuation may be attributed to the presumption as opposed to broader elements in, and reforms to, the criminal justice system itself. This is especially the case given the lack of consistency in its mooted impact on reducing the proportion and number of short custodial sentences awarded to male and female offenders. Nevertheless, though our findings suggest that the presumption is neither necessary nor sufficient for the positive trends observed since 2011, we would not conclude that the presumption has had no effect at all – rather that there are other changes that may have had a greater impact.

\textsuperscript{45} House of Commons briefing paper (June 2018). UK Prison Population Statistics. Available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334

\textsuperscript{46} Ministry of Justice: Criminal Justice System statistics quarterly (December 2017) - Court Outcomes by Police Force Area data tool