
European Journal of Parental Imprisonment

Child impact assessments and sentencing





Children of Prisoners Europe

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Editor
Hannah Lynn

Children of Prisoners Europe (COPE) is a pan-European network of non-profit organisations working on behalf of children separated from an imprisoned parent. The network encourages innovative perspectives and practices to ensure that children with an imprisoned parent fully enjoy their rights under the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights, and that action is taken to enable their well-being and development.

The European Journal of Parental Imprisonment is a bi-annual publication that seeks to broaden the study of issues relevant to children affected by parental incarceration and meet a burgeoning interest in the development, implementation and evolution of entitlements, policies and practices that promote their well-being. With a view to fostering new perspectives for children with imprisoned parents, the journal features contributions by eminent scholars and experts in the fields of child rights, child welfare, criminal and social justice, psychology, penal affairs and other disciplines; published articles do not necessarily represent COPE's opinions. Selected articles are editorial screened but not peer-reviewed. The editor is committed to reasoned ideological diversity and welcomes suggestions for special issues and contributions.

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Assessing the impact on a child when their parent is imprisoned: some ethical questions

Kate Philbrick, OBE
Former COPE president

“Aligning oneself with a just cause does not guarantee just action.”

Alain Bouregba, founder of the COPE network

The 1989 UN Convention on the Rights of the Child (UNCRC) introduced a universal obligation in all countries ratifying the Convention to consider the impact on children in decisions about parental incarceration, detailing rights based on agreed ethical principles for making decisions which affect a child’s well-being.¹

A child has the right to:

- not suffer discrimination, and be protected from discrimination irrespective of the child’s or his or her parent’s or legal guardian’s race, [...] or other status, including the activities of the parents (Article 2);
- have their best interests be a primary consideration in all actions concerning them (Article 3);
- be given guidance by their parents and family; (Article 5)
- survival and development (Article 6.2);
- live with their parents unless separating them is in the best interests of the child (Article 9.1);
- have regular contact with their parents if they are separated from them (unless this is contrary to the child’s best interests) (Article 9.3);
- an opinion and for it to be listened to and taken seriously in all matters affecting the child, including judicial and administrative proceedings either directly, or through a representative or appropriate body (Article 12).

These ethical principles affect all children. When a parent goes to prison, this impacts children in close contact or living with the parent. Arguably, shame and stigma occur when any child knows a parent has gone to prison; only those directly affected by the removal of a close parent are considered here.

The state brings a person to trial because they have been accused of committing a crime, which is considered a harm to the state; and this may impact their children when courts imprison the parent pre-trial or on sentence. Traditionally, states implicitly have accepted as justifiable any damage arising from imprisonment for certain proven crimes, or in remand cases to reduce the threat of further crimes or absconding, for

¹ This obligation is explicitly incorporated into national law in several European states.

example. They assume that the benefit to society—and to the prisoner him- or herself—outweighs any resulting damage to society, the prisoner and their children. Ethically, if the child’s best interests are a primary consideration—and it is known that many children with parents who are detained in state custody suffer as a result—children must be considered alongside the state’s needs in an attempt to limit these adverse effects.²

State bodies enforcing law have a direct issue with the parent who has done the state harm: how, within the mesh of individual rights and needs within a family, will the child’s rights be considered if the parent does not want the child involved? There may be problems in collecting data if the person on trial does not reveal to whomever is responsible for collating this information that they have offspring; only those children declared will be considered and yet all children’s interests are relevant. Separation by custody on remand before trial (rather than on sentence) may be more psychologically damaging to children as their parents have no time to prepare them and there is even less time to find out what children are involved and what the impact of imprisonment on them is likely to be. Not informing authorities about children is common among parents on arrest and trial who are not themselves able to come to terms with what is happening, who lack the words to explain to their children or indeed the understanding or belief that it is in their child’s best interests to be involved or to come under state surveillance.³ For information to be freely given, the prospective prisoner needs to trust the person they are giving information about their children to, and be confident that this information will be well used. Despite cogent arguments for individual freedom and data protection

² UNCRC Article 13 mentions that the exercise of the right to freedom of expression may be subject to certain restrictions, e.g., for the protection of national security or of public order, thus implying that the other principles or rights are not subject to this restriction. The principles of the Committee on the Rights of the Child (CRC) adopted in the South African Constitution were upheld in Constitutional Court case of *S v M* in 2007, where a primary caregiver was not given a custodial sentence because of caring responsibilities for the children. For a recent review of the literature on the impact of imprisonment, see: Weaver, B. & Nolan, D. (2015) *Families of prisoners: A review of the evidence*. Glasgow: Centre for Youth and Criminal Justice. Two earlier studies highlighted the particular impact of the court process itself using quotes from young people affected. See also: Brown, K. (2001) *No-one’s Ever Asked Me: Young People with a Prisoner in the Family*. London: Action for Prisoners’ Families; and Families Outside (2001). *Teenagers with a Family Member in Prison*.

³ In one case, a child died when a mother was arrested and remanded because no one else knew of the child’s existence.

rights, in light of the vast quantities of information gathered by the state on all individuals, ironically maybe “big brother’s” knowledge about the existence of a remanded person’s children could here be well used.

Other ethical issues arise, not only with respect to children affected by parental incarceration, but also to prisoners, communities and society as a whole. If parents declare and cite their offspring to gain a more lenient approach from the courts, is this “instrumentalising” children? Is it equitable that a person with a child who commits a crime can benefit from alternatives to custody, whereas a person without a child receives a custodial sentence? Furthermore, how can the risks to the security of society by not imprisoning someone be responsibly weighed against the risks of harm caused to a child by imprisoning their parent? Perhaps only those committing crimes for which the state can find no alternative to incarceration should ever be imprisoned. If, as a general rule, children’s interests are paramount, then, if potential prisoners are parents and caregivers, this needs to be taken into account. Less radically, children’s interests need to be considered in determining where and how the sentence takes place, to allow for child-parent contact.

Once children have been identified, how should any assessment of their well-being and the impact of the impending incarceration on them be conducted? If the parent has not told the child about their possible imprisonment, then who, if anyone, has the right to let the child know? Is it ethical to inform the child directly if it is the parent’s information to share and if divulging this information could damage the child’s relationship with their parent? Rather, should those working with the parent seek to encourage and enable them to talk to the child?

If children have not heard directly about the incarceration from their imprisoned parent or other

caregivers, how can the impact be assessed? How anyway can any impact be assessed without giving rise to discrimination? Can a social worker—or more universally, and therefore more “normally”, the school or nursery—involved in the assessment, undertake it discreetly? Significant data protection safeguards are required, as is careful training.

The web of individual family, state and child needs involved in assessing the impact of imprisonment on children needs further ethical reflection: deliberation must be given as to how to highlight and consider this group of children without further stigmatising them and exacerbating their difficulties.

Despite the difficulties outlined above, and given the ethical imperative of making children’s best interests a primary consideration, perhaps courts need to be braver about making judgments and imposing sentences which keep parents and children close, either at home caring directly for their children or ensuring that they are imprisoned in conditions close to home which allow the child-parent relationship to be fostered and supported. For this, the existence of any impact on children ideally will be taken into consideration at the

time of sentencing; failing that at the very least by the authority deciding where and how the prisoner will live and parent from during their sentence.

Do children also need to be heard in any decisions that affect them, as their parents’ incarceration undoubtedly does? How can this happen without children explicitly feeling discriminated against, given that they are involved in this because of their parent’s actions? How can children be given the opportunity to provide statements without being manipulated or influenced in any way? Should this be done by the impact assessor giving the child’s voice to the court, and how could we ensure that this is authentically done?

The web of individual family, state and child needs involved in assessing the impact of imprisonment on children prior to impending custody needs further ethical reflection: deliberation must be given as to how to highlight and consider this group of children with “unusual life experiences” without further stigmatising them and exacerbating their difficulties.



Principles for considering defendants' children at sentencing

The Honourable Eleanor L. Bush
Judge, Family Division
Allegheny County Court of Common Pleas

The following is an extract of the article "Not ordinarily relevant? Considering defendants' children at sentencing" by Eleanor Bush, published in Federal Probation in March 1990.¹ The article, originally published in the context of American penal and sentencing law, discusses the relevance of offender characteristics, specifically the fact that a defendant has children, in determining whether a sentence should be given outside the Federal sentencing guidelines. Bush explores the rationale for considering children when sentencing a parent as well as offering guidance in using the rationale and principles to guide departures from the guidelines. Some specific references to American law have been removed to make the article more accessible to international readers.

The following principles should guide a judge in their closer examination of the circumstances of a case against a parent. The principles are organised within an overall framework that first sets underlying structural principles, next provides guidance as to when to consider the consequences of sentencing for the children, and then offers guidance as to how to consider the children.

Structural principles

- 1) Respect [the need] to impose sentences that are "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.²
- 2) Sentence to avoid harm to innocent parties. [... To] the greatest extent possible, the burden imposed by a sanction should be shaped so as to fall only on the defendant.
- 3) Sentence to avoid breaking up families.
- 4) [The incarcerative or non-incarcerative] stage of decision-making constitutes the most important point at which to consider the effects of sentencing on the children.
- 5) When imposing an incarcerative sentence, consider the defendant's children when selecting the form of incarcerative sentence and when determining its length.

¹ Bush, E. (1990). Not ordinarily relevant? Considering defendants' children at sentencing. *Federal Probation* 54(1), 15.

² 18 U.S.C.A. section 3553(a) (West Supp. 1988).

When to consider the effects of sentence on the dependents

Assessing the crime - The judge should first assess the crime to determine whether or not the consequences of the sentence for the children will enter into the [...] decision. [Wheeler's] research [...] revealed that judges consistently thought about harm, defined as the consequences of the offence; the blameworthiness of the offender [...]; and the consequence of the sanction chosen.³

In general, if severity on either the harm or blameworthiness dimensions is very high, then the assessment of that dimension will drive the [...] decision.

[...] If neither the harm nor the blameworthiness dimension is particularly severe, then no single dimension will drive the [...] decision, and assessment of consequences for the defendant's children should be considered and weighed in making the [...] decision.

Another general proposition [is] that when specific deterrence has been achieved, the judge will give great weight to considerations of consequence in choosing the sanction.

In addition to these general propositions, the following principle, specifically related to dependency, can be gleaned from judicial practice:

- 6) When the defendant has committed the crime to satisfy pressing family needs, consider consequences in making the dispositional decision. Need motive underlying a crime tends to establish mitigated blameworthiness. Incarcerating the defendant in such cases will usually impose a further harm on a troubled family that needs support.

Assessing the defendant's prior record - The guidelines give great weight to the defendant's prior criminal record. This proposal does not require elimination of this factor. In some cases a lengthy record will weigh against considering consequences for the children in determining disposition. A long record may relate to the sincerity of the defendant's own claim of concern for the children. A judge might legitimately wonder why parents who care for their children would subject themselves repeatedly to the risk of court-imposed separation from the children.

³ Wheeler, S., Mann, K., & Sarat, A. (1987). *Sitting in Judgement: The Sentencing of White Collar Offenders*, Ch. 5 at 47 (unpublished manuscript available in Yale Law School Library).

[...] [The] judge must then consider the type of consequence implicated by the defendant's situation. The underlying structural principle counsels the judge to avoid breaking up the defendant's family. [...] The following principles guide the process of identifying and weighing the consequences [...] for the defendant's children.

7) Sentence to avoid depriving children of parental care. One judge articulated a rationale for this principle. He feels that to deprive a child of a parent is a serious action that imposes costs not only on the child, but on society as well.

This principle covers a range of possible deprivations. When a judge incarcerates a parent, the children may live with the remaining parent, may stay temporarily with relatives or friends, or may stay in a foster placement. In some cases incarceration of a defendant may later form grounds for termination of the defendant's parental rights.⁴ Thus, the judge should be aware that what appears to be a temporary forced separation may in fact become permanent. Any separation of child from parent potentially carries serious consequences for the children.⁵ However, the consequences probably become progressively more serious as the circumstances move across the range set out above. Thus, where incarceration will result in a foster placement of the defendant's children, that circumstance should weigh heavily against incarceration. Judges also should be wary of underestimating the consequences of incarcerating a parent when relatives or friends are willing to care for the children. Judges often feel reassured to know that such arrangements exist. However, the research on the effects of incarceration on offenders' children belies the stability of these care arrangements.⁶

8) Value care provided by fathers as highly as care provided by mothers. Some judges interviewed stressed their special regard for maternal care in their sentencing decisions. Research confirms the judges' comments.⁷

Such special regard for maternal care may reflect stereotypes more than it does reality. Sack's research⁸,

⁴ See Stanton, A. M. (1980). *When mothers go to jail*. Lexington, MA: Lexington, p.3.

⁵ See Goldstein, J., Freud A., & Solnit, A. J. (1979). *Beyond the best interests of the child*. p.31-34.

⁶ See Stanton *op.cit.*, pp.39, 120; and Rosenkrantz, L. & Joshua, V. (1982, Jan/Feb). Children of Incarcerated Parents: A Hidden Population. *Children Today*, p.3.

⁷ A sentencing study of New York lower criminal court showed mothers received greater consideration than fathers at sentencing; see Daly, K. (1987). Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment. *Social Forces* 66(152), 163-65.

⁸ Sack., W. H. (1977). Children of Imprisoned Fathers.

for instance, highlighted the harm that resulted to children deprived of paternal care because of incarceration.

9) When the children have special needs that demand the defendant's attention and care, sentence so that the defendant can continue to meet those needs. Occasionally a judge must sentence someone who has a seriously ill child, or a child with extraordinary emotional or mental problems. Such circumstances establish that an exceptional degree of hardship for the children is likely to result from incarceration of the parent. The judge generally should not incarcerate in such cases. If the judge finds that incarceration is necessary, she should endeavour to fashion a sanction that will allow maximum opportunity for the defendant to continue meeting the child's needs.

10) Sentence to avoid jeopardising a family's means of financial support. One judge suggested that the important question is whether or not the family will "fall apart" if deprived of financial support that the defendant had provided. [...] This principle recognises that loss of financial support in a poor or disadvantaged family can destroy the family and have serious consequences for the children.

How to consider the effects of sentence on the dependents

The judge who has embarked upon consideration of the defendant's parental responsibilities needs principles that define how those responsibilities should be viewed and what impact they should have upon the choice of sanction. The following principles offer assistance in evaluating the merit of a defendant's claim for consideration and in assessing the available types of sanctions.

Assessing the Parent-Child Relationship - "Good" families receive greater consideration from judges than do "bad" families. The following principles are designed to aid in the identification of families that deserve the judge's consideration.

11) Define "family" expansively. Judges may tend to define a "family" based on their own experience or on the stereotypical nuclear family. Such a definition may be too narrow when looking at families from diverse classes, races or cultures. [...] A psychiatrist suggests defining a family in terms of the functions it performs for its members rather than in terms of its particular configuration.⁹

12) Refrain from questioning defendants' parenting

Psychiatry 40(163).

⁹ Comments by Mercer Sullivan and Dr. Richard Dudley at the New York City Bar Association Criminal Justice Retreat, 1 December 1989.

skills in the absence of concrete evidence. The interviews revealed that many judges who consider the impact of their sentences on offenders' dependents evaluate the parent-child relationship at least as an implicit part of their decision-making process. Such evaluations present problems, because Federal judges are neither social workers, family court judges nor state agents empowered to evaluate family environments. In the absence of experience and the absence of the informational and evaluative resources that a family court routinely accesses, Federal judges are likely to rely on their subjective views about what constitutes a "good" parent or a "good" family.

[...] The judge must have evidence that a family situation is "bad" for the children before deciding that the family does not merit preservation. Examples of adequate evidence might include conviction for an offence that physically harmed the dependents, recent [...] court adjudications of neglect, or a history of state involvement with the care of the children (i.e., previous foster care placements). A prior criminal record should not cause a judge to question the defendant's parenting skills.

13) When the defendant committed the crime in the presence of the children, the parent-child relationship may deserve less consideration than in other cases. [...]

This principle accepts the judge's underlying premise that direct exposure to crime is bad for a child. [...]

Assessing the sincerity of the defendant's claim

14) Carefully scrutinise circumstances in which the defendant may be invoking parental responsibilities as a ploy to obtain leniency. [...]

Whenever the defendant argues that incarceration will jeopardise the family's financial support, the judge will want to know whether or not the defendant in fact supports the family. A defendant who does not actually provide the support claimed does not deserve credit for providing it.

Sometimes a defendant's life circumstances will have changed between the time of commission of the crime and the time of sentencing. Defendants may have married and have had children during the intervening period. Defendants may be pregnant at the time of sentencing.

What should the judge do if the defendant "acquired" dependents in order to obtain leniency? It seems unfair to penalise the children because of their parents' questionable motives, yet it seems unfair to "reward" the parents for opportunistic behaviour. If the court is convinced that the defendant acquired family responsibilities as a ploy, then concern for the consequences of sentencing upon the dependents should

carry much less weight than it ordinarily might. [...] *Assessing incarcerative options* - Once the judge has decided [in favour of incarceration] she must choose an appropriate sanction. When imposing an incarcerative sanction, the judge must decide upon the length and can decide upon the form that the sentence will take. Consideration of the impact of the sentence upon the dependents may affect both of these decisions.

15) When selecting an incarcerative sentence, choose that sanction which best allows for maintenance of the parent-child relationship. Judges should take advantage of existing options regarding the forms of incarcerative sentences and should shape them to take account of parents' needs.

For example, a parent who cares for children could serve a sentence intermittently from 9-5 on weekdays. Prison work release programmes can be defined to allow regularly scheduled release time to care for children. Spouse co-defendants can serve their sentences consecutively. Perhaps service of a single parent's sentence could be postponed until the child started school or grew old enough to bear a period of separation from the parent. Finally, a judge can search out those situations in which children can reside with their parents during the parent's confinement.¹⁰

16) Consider the "child's sense of time" when determining the length of an incarcerative sentence. The younger the children, the shorter the period of separation they can bear. A judge can legitimately consider such limits in determining the length of an incarcerative sentence.

17) When incarcerating a parent, ensure that care arrangements for the children have been made. [...] Since the need for care flows from the judge's sentencing decision, it seems appropriate for the judge to involve herself in ensuring that care exists.

Assessing non-incarcerative options

18) When structuring non-incarcerative sentences, consider the burden the sanction imposes upon the family. When judges choose non-incarcerative sentences to achieve the benefits provided by keeping a family together, they should structure the sentences so those benefits can indeed be achieved. [...]

The Honourable Eleanor L. Bush is now a judge with the Family Division of the Allegheny County Court of Common Pleas. She currently chairs a local committee on children of incarcerated parents.

¹⁰ Prisons generally do not allow such arrangements; See Boudouris, J. (1985) *Prisons and Kids: Programs for Inmate Parents*, pp.7-8. However, some halfway houses accept parents and their children.

Child impact statements and the Irish Probation Service

Interview

The Irish Probation Service, an agency of the Department of Justice, is a national service with over 200 probation officers based in all prisons across the country. Its main role is to provide services to the courts and work with offenders in the community and in prison. The goal of the service is to help achieve a safer and fairer Ireland by: ensuring court orders are implemented; reducing the risk of harm to the public; reducing the likelihood of reoffending; and making good the harm done by crime. The work of the Probation Service for the courts can be broken down into two areas: assessments for the courts and supervision of offenders on orders given by the courts (probation and community service).

Assessments for the courts take two main forms: the pre-sanction reports and the victim impact report. The pre-sanction reports are provided by the Probation Service after a defendant has been found guilty of an offence. In these non-binding reports, probation officers consider the offender's suitability for a non-custodial sentence; any underlying causes of the offending behaviour and the likelihood of any future offending, taking into account relevant factors that can include considerations of the offender's personal or family life where these relate to past or future behaviour. The Probation Service, in a limited number of circumstances, also provides victim impact reports when specifically requested to by the courts. Unlike pre-sanction reports, these reports, which are only conducted with the consent of the victim, are provided to assess the level of harm that has been caused to the victim by the offender's criminal conduct. The emphasis of these reports is not the history of the crime or the behaviour of the offender but rather focusses on exploring the harm done to the victim and helping victims to express that harm, whether it be physical, psychological, emotional, sexual or economic harm.

The following is an extract of an interview with Vivian Geiran, director of the Irish Probation Service, conducted by Hannah Lynn.

Does the Probation Service supply victim impact reports without the court's request?

The vast majority of the time the initiative comes from the court. The court can be prompted by others—typically defence lawyers—but the ultimate request does come from the court. In comparison to the many thousands of offender assessment reports that the Service completes, fewer than one hundred victim impact reports are requested in any one year and these are

Vivian Geiran
Director
Irish Probation Service

mainly limited to sexual and violent offences. Many victim statements are carried out by the police or prosecuting lawyer. Other channels might be the professionals working directly with the victim, such as counsellors.

How are pre-sanction reports used? How do the courts view them?

Significant research has been carried out into pre-sanction reports in Scotland.¹ Research is also being carried out into the views of judges in relation to pre-sanction reports in Ireland.² Judges do often request the reports, indicating that judges see the value in them, even if they do not have a legislative base. The purpose of pre-sanction reports is in assisting the court in its decision-making function. This is the main function of the Probation Service in relation to sentencing. The Probation Service pre-sanction reports specifically focus on the factors that may have influenced offending and the factors that need to be addressed in order to reduce the risk of reoffending. They look at the offender's suitability for a community-based sanction. The Service's role is not in arguing for or against prison sentences; it is in assessing whether an offender is suitable for a community-based sanction. The supplying of these statements is not automatic: the presiding judge may or may not request a pre-sanction report. A lawyer may contact the Probation Service for an opinion, but the official request for a report always comes from the judge.

What information is included in the reports?

This depends on a variety of factors, including the type of report. The reports asking the Probation Service to assess the offender's suitability for community service tend to be very short, around one page. Brief information about the offender's background may be included, particularly if they have a previous history with the Probation Service. Otherwise, this particular report focusses on the suitability for the offender for community service. The impact on the child could be inserted here but the report remains very short and information is only included if relevant to the suitability assessment.

We are currently trying to adapt reports depending on

¹ See Tata, C., Halliday, S., Hutton, N., McNeill, F. (2007). *To Inform and Advise: The Interpretation and Use of Pre-Sentence Reports in the Sentencing Process*. Paper Presented to the 20th Annual Conference of the International Society for the Reform of the Criminal Law.

² Bourke, A. (2013, October). Pre-Sanction Reports in Ireland: An Exploration of Quality and Effectiveness *Irish Probation Journal* 10.

gender-specific considerations with respect to women. Some of these considerations and issues may be related to family, others not. It's worth bearing in mind that at this stage, the judge has more or less already decided on the verdict: our role is confirming the suitability of the offender to carry out community service.

The second report, the probation report, is typically longer. This report is focussed on the offence and the offending. It focusses on what led to or contributed to the offence; the history of the offender; any offending patterns and offence pattern analysis. Information is also included as to whether the offender is aware of the impact on the victim, as well as information on the offender's background (family, employment, education, financial situation, accommodation, their interests, their associates and peers, any mental health or addiction issues). The report underlines the issues needing to be addressed if the risk of reoffending is to be reduced. It will also list the so-called "protective factors" that might help the offender reduce their risk of reoffending and these could be linked to their family situation; whether or not they have a close relationship with their children or whether or not they are the primary caregiver.

Some judges probably feel they already receive the necessary information about child impact in the pre-sanction reports. I think they would be open to receiving it in a more systematic, concrete manner, however. Perhaps this aspect could be made clearer.

Would child impact statements provide a more effective picture?

Both theoretically and practically, child impact statements would be a positive addition. However, if it were the Probation Service's role to include these assessments, they would most likely have to be integrated into one of our existing report formats. The judiciary, on the whole, wants the sentencing process to be faster, not slower, and so we would be reluctant to add yet another type of report into the mix. It's also a question of resources: we do not currently have the resources to add another report. However, we could deal with the issue if it were incorporated into our existing reports. Another idea might be to involve Tusla, the Child and Family Agency.³ I see value in the court asking them for a statement (in cases where they are already working with a family).

Could this be systematic for all cases involving parents? How do you think courts might regard them?

We have good contact with the judiciary and I believe they would be open to discussing the idea. It would be helpful to open dialogue with the judiciary about this. We would need to show that any policy changes are in line with good practice. With a working group in place there would be scope for developing and updating our policy on the preparation of pre-sanction reports. As mentioned, we do already consider these aspects, so it isn't an impossible task. Any professionals who are working with the child or their family would be well-placed to advise on the child's situation. If they were to be formalized, the statements could be based on the format of the Probation Service victim impact reports.

Who would be the right body to draw up such statements? How (if at all) should the children be involved?

There would be some practical issues involved if we were to start compiling new reports: the possibility of contradictory statements as well as delays to the sentencing process. In terms of who is best placed to draw up the statement, the Probation Service would not be against involving an external body (such as child and family social workers), provided

the time taken to file such a report was limited. As regards involving children in the process, I am open to persuasion, but personally more inclined not to have children directly involved.

You have said that alternative measures to imprisonment should be the first response, where possible. In what sort of case might the consideration of the views and best interests of the child tip the balance in favour of an alternative measure to imprisonment for a parent?

There are three broad categories of offenders facing sentencing. At one end of the spectrum are offenders who are not at risk of being sent to prison at all. At the other end are offenders who have committed crimes so serious that the Probation Service is not going to change the outcome of the trial. In the middle are offenders who fall in between the two categories and it is here that the judge will actively look for reasons to give them a community-based sanction or a prison sentence. An offender's family circumstances and background may be one of the factors that might tip the balance in

We should be doing more to actively harness and foster good relationships between offenders and their children. [...] investment in family, peers and the community is crucial in helping reduce reoffending.

³ <http://www.tusla.ie>

these middle-ground cases in favour of a community-based sanction and so incorporating the impact on the child would be positive from the Probation Service's perspective.

Do offenders' lawyers play a role in raising the question of child impact at sentencing hearings?

Lawyers have a critical role to play. Often it is the lawyer who is first made aware of the family circumstances of the offender. In many cases, if the lawyer does not bring this up, the judge would not be aware, so, yes, they do play a crucial role.

How would you suggest lobbying groups proceed with recommendations for child impact statements in Ireland?

The Irish Prison Service is doing a lot to promote parenting support within prison and to promote child-parent contact. Groups such as COPE, IPRT and jurists

such as Fiona Donson and Aisling Parkes at University College Cork/St Nicholas Trust have done great work in the field of child impact statements already. The critical issue of awareness-raising is already underway. I believe it is an issue that can only be received positively. No one on any side of the justice system wants the children to suffer alongside their parents. I think research needs to be encouraged and facilitated, and lawyers and the judiciary should be contacted and engaged in dialogue. They are open to the issue and would be particularly receptive to legislative evidence as well as individuals in legal professions who advocate for the issue. The involvement of both the Probation Service and the Prison Service will help too.

We should be doing more to actively harness and foster good relationships between offenders and their children. As an Irish probation officer's Masters thesis recently pointed out, investment in family, peers and the community is crucial in helping reduce reoffending. It is great to have the COPE network concretising this work at the international level.

Whose rights? What impact? The potential for the development of child impact statements in the Irish criminal justice system

Dr Fiona Donson
Faculty of Law
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In a recent insurance fraud case, Dublin Circuit Court suspended the one year prison sentence of a mother of two. Judge Nolan included in his reasons for not imposing an immediate prison sentence the fact that "somebody had to look after the children".¹ Such cases fleetingly point to the potential for non-custodial sentences to be used to mitigate the harm that can be inflicted on children when parents are convicted of a criminal offence. However, as in most criminal justice systems, the Irish Courts are not required to systematically consider the impact of a prison sentence on the family and children of an offender, and no formal legal mechanism exists for that type of assessment. The questions as to whether—and how—child impact statements might be introduced in Ireland have to be understood in the context of its criminal court culture and practice.

Ireland has been described as having an "unstructured sentencing system".² The courts exercise wide discretion at sentencing and steps towards the development of

sentencing guidelines have been extremely limited³, despite concerns being voiced regarding inconsistency in sentencing practice.⁴ A recent Law Reform Commission consultation paper criticised sentencing practice, noting that there appeared to be no agreement on the aims of the sentencing process and the principles that frame it, and an "absence of anything remotely approximating to a consensus on who should be sent to prison and why they should be sent there."⁵ This unstructured approach is, however, being changed in small ways. In particular, the Court of Criminal Appeal has, since 2014, begun to deliver sentencing decisions containing more general guidance directed at the lower courts.⁶ This is a welcome development; however, any

3 In *The People (DPP) v. Tiernan* [1988] IR 250, the Irish Supreme Court refused to establish sentencing guidelines in a rape case on the basis that it would not be appropriate for an appeal court "to appear to be laying down any standardisation or tariff of penalty for cases." See O'Malley, T. (2014) *The Role of the Prosecutor at Sentencing in the Aftermath of People (DPP) v Z (2014)*. Retrieved from https://www.dppireland.ie/filestore/documents/PAPER_-_Tom_OMalley_BL_-_2014.10.18.pdf

4 Maguire, N. (2010). Consistency in Sentencing. *Judicial Studies Institute Journal* 14.

5 Law Reform Commission Consultation Paper, (2011). *Mandatory Sentences*. Retrieved from <http://www.lawreform.ie/fileupload/consultation%20papers/cp66.htm>

6 O'Malley, T. (2014, March 31). A quiet revolution occurred this

1 RTE (2015, November 26). Couple sentenced after Facebook photos foil fraud. RTE news. Retrieved from <http://www.rte.ie/news/2015/1126/749384-ivory-ward-court/>

2 O'Malley, T. (2006, 2nd ed.) *Sentencing Law and Practice*. Dublin: Thomson Round Hall, p.53.

move towards a more developed understanding of sentencing in Ireland needs to include a consideration of the families and children of offenders, including the possible adoption of child impact statements.⁷

Historically, criminal justice systems have taken little direct interest in the family and children of offenders. In Ireland, research relating to the impact of imprisonment on children of offenders has been limited until recently.⁸ At the state level, both the Irish Prison Service and Irish Probation Service formally recognise the need to support families of prisoners and are developing new practice to implement change.⁹ However, at the point in the system at which people are deprived of their freedom—the courts—there remains little research or formal recognition of the impact of sentencing on families.

A first step in considering the role the courts might play in this area can be found in an appeal level case which engages with the need for the sentencing judge to consider the impacts of a prison sentence on children of offenders. In *Director of Public Prosecutions v. Counihan*¹⁰, the Court of Criminal Appeal heard a challenge brought by the Director of Public Prosecutions that a suspended sentence imposed for offences relating to serious sexual abuse was unduly lenient. In sentencing the offender, the trial judge had taken into consideration the hardship likely to be suffered by his three children, all of whom had special needs.¹¹ Weighing the seriousness of the

offence and the harm done to the victim against the interests of the offender’s family, the judge concluded that imprisonment would “impose extreme hardship” on the children and imposed a suspended sentence.

In examining the decision, the Court of Criminal Appeal adopted a starting point which regarded the issue of the impact on the child as a mitigating factor when sentencing the offender, noting the “strong case [...] made in mitigation because of the family obligations and the needs of the children.”¹² The court did not recognise the children as being independent rights holders to be considered separately to their father, adopting instead the traditional approach of regarding the impact on children as an extraneous factor in sentencing. Such an approach leaves no space for any evaluation of the rights of the child; the court remains focussed on the offender in the traditional binary set up of our adversarial system.¹³

Despite this offender oriented approach, the Court of Criminal Appeal did take the opportunity to reflect, for the first time in the jurisdiction, on the role of family impact in the decision to impose a prison sentence. Disappointingly, the court failed to directly engage with how the balancing of competing interests—victim impact, public interest in justice and security and the offender’s family—can be achieved, focussing instead on the particular facts of the case at hand. The court did acknowledge its responsibility to consider the rights of the children, accepting that “the question [as to] whether imprisoning him would interfere with the rights of the children under the Constitution or the European Convention of Human Rights” was a legitimate question for consideration and that “[i]f the result of measures taken by the court would jeopardise the children’s rights, it would not be permissible to apply or enforce them.”¹⁴ However, on the facts of the case before it, the court disagreed with the sentencing judge, finding that a suspended sentence was not appropriate on the basis of the circumstances facing the family. In particular, it noted that many families of imprisoned people have to face major disruption

month: sentencing guidelines were introduced. *The Irish Times*.

7 Loureiro, T. (2009). *Child and Family Impact Assessments in Court: Implications for Policy and Practice*. Edinburgh: Families Outside. Throughout this article, I will refer to such assessments as “child impact statements”, clearly different models can be adopted and there is a strong argument to be made for a wider “family impact statement” model to be adopted. However, this is outside the scope of this discussion.

8 Research is now being undertaken and data is emerging which can inform practice particularly in relation to the prison system. In addition, key voluntary sector organisations such as Bedford Row and St Nicholas Trust are central to the provision of services. For examples of research, see: Breen, J. (2010) Secondary Effects of Imprisonment: The New Direction of Prison Research. *Irish Probation Journal* 7(46); Donson, F., & Parkes, A. (2012) Changing Mindsets, Changing Lives: increasing the visibility of children’s rights in cases of parental incarceration. *International Family Law* 4; O’Malley, S., & Devaney, C. (2015) Maintaining the mother-child relationship within the Irish Prison system: the practitioner perspective. *Child Care in Practice*.

9 This shift was in large part initiated by the publication of a report by the 2012 Irish Penal Reform Trust “Picking up the Pieces”: The Rights and Needs of Children and Families Affected by Imprisonment. Retrieved from http://www.iprt.ie/files/IPRT_Children_of_Imprisoned_Parents2.pdf

10 [2015] IECA 76

11 The negative impact of his detention on remand on one of his autistic children was presented as evidence of the likely

harm an extended prison sentence would do to the family in the long term.

12 [2015] IECA 769, para 9.

13 Codd, H. (2008). *In the Shadow of Prison: Families, Imprisonment and Criminal Justice*. Oxford: Routledge. This approach is reminiscent of the traditional court view of the rights and interests of victims in the trial process. Recent slow change by the courts to adopt a position that provides space for victims’ rights/needs to be taken into account has not been easy for the courts but is identifiable as opening up space for competing interests within the criminal justice system. See: Doak, J. (2008). *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Oxford: Hart Publishing.

14 [2015] IECA 769, para 10.

and problems in coping with children and dependent adults¹⁵ and that supports were already in place to assist this particular family.

The Coughlin decision is therefore a mixed result for those concerned with the need for sentencing judges to consider offenders' families. Encouragingly, it acknowledged the need for a sentencing judge to consider the impact of imprisonment upon the children of an offender. However, the lack of discussion by the Court of Criminal Appeal as to how that impact might be assessed and the underlying rationale for it, beyond a passing reference in the judgment to child rights and the Article 8 right to family life in the European Convention on Human Rights, is disappointing. Experience from other jurisdictions shows that clear direction to lower courts and a structured decision-making process is essential to ensure that the consideration of offenders' families is carried out in a systematic and consistent manner.¹⁶

In Ireland, the structures by which information can be introduced to the court reinforce the perspective of children as mitigating factors, given that the main method is through pre-sanction reports. Prepared by the Probation Service, they are designed to inform the sentencing decision from the particular focus of the offender, including matters such as previous offending behaviour and risks of reoffending. Information relating to family is captured in the third content component of such reports under the heading "relevant offender background and circumstances". The newly revised *Probation Service Policy and Procedures for the Preparation of Pre-Sanction Reports for Courts*¹⁷ makes direct reference to family/marital circumstances, even noting that the role of parenthood for women may require particular consideration. However, this background information primarily relates

¹⁵ *Ibid.*, para. 14.

¹⁶ See the experience of England and Wales, where Court of Appeal decisions have formally set out the need to take the impact of imprisonment on children into account yet even directions from higher courts have failed to translate into a formal and consistent approach at the sentencing level. See Epstein, R. (2014). *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*. Howard League: What is Justice? Working Paper 3; Minson, S., Nadin, R., & Earle, J. (2015). *Sentencing Mothers: Improving the sentencing process and outcomes for women with dependent children*. Prison Reform Trust.

¹⁷ Internal Irish Probation Service Policy Document (2014, July) *Reduce re-offending to create safer communities. Policy and Procedures for the Preparation of Pre-Sanction Reports for Courts*.

to the "pro-social or anti-social influence of the relationship on the offender and how that impacts on the risk of re-offending".¹⁸ Questions have been raised within the probation context as to what the purpose of such information is. It could relate to a justification for leniency, in line with traditional social work approaches to probation work, or to risk assessment, relating to the more modern dimension of probation.¹⁹ The wording of the Probation Service policy along with the shift in criminal justice practice to greater emphasis on risk aversion would suggest it fits more along the lines of this latter dynamic.

In considering whether Ireland could develop child impact statements, it seems clear that it is certainly possible if key players within the criminal justice system have the will to do so.

Vivian Geiran, director of the Irish Probation Service, correctly acknowledges that judges in Ireland are likely to feel that they already receive information about offenders' children via these pre-sanction reports (see interview, p.8). Yet it is not clear how this information is then used by the court. What is clear, however, is that it is not considered as a separate

issue focussed on the children's rights. Vivian Geiran also highlights that the impact on children could be made clearer and the information delivered in a more systematic way. Yet the Probation Service alone is not in a position to resolve the question of what the information is used for, even if they are able to make it more accessible for the judge. This is an issue that also needs input from the courts and, ideally, for policymakers at the level of the Department of Justice to develop a legislative basis for such a process.²⁰

While the systematic assessment and delivery of impact assessments could certainly be developed through pre-sanction reports, particularly given that most reports in the jurisdiction operate on a non-statutory basis and so therefore are at the discretion of the court, the difficulty remains that pre-sanction reports are focussed on the offender. The probation officers preparing them are also primarily tasked with working with the offender. The process is not focussed on the children and family beyond their influence on the offender. Leaving the presentation of child impact information in this space potentially prevents the decoupling of the issue of child impact from offender mitigation, maintaining the status quo approach

¹⁸ *Ibid.*, p.13.

¹⁹ Bourke, A. (2013) Pre-Sanction Reports in Ireland: an Exploration of Quality and Effectiveness. *Irish Probation Journal* 10, p.76.

²⁰ The recent discussion around the proposed "Support for Children (Impact of Parental Imprisonment (Scotland))" Bill would be useful in this regard. For information on the Scottish Proposal, see: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/86482.aspx>

which quite clearly fails to achieve the purpose of child impact assessment.

In considering whether Ireland could develop child impact statements, it seems clear that it is certainly possible if key players within the criminal justice system have the will to do so. However, this involves a shift in thinking both in the courts and at the policy development level. The benefit of child impact statements is that they have the potential to deliver information to the court from the child’s perspective, allowing the court to make a decision on sentencing that includes a consideration of the best interests of any children affected.²¹ To effectively meet this requirement, the information provided to the sentencing judge needs to go beyond the current pre-sanction report. Given that the Irish legal system already allows for victim impact statements and reports²² to be presented to court, there is clearly potential for this to be introduced

21 This would fit better into the requirements of Article 3 of the UNCRC which requires that the best interests of children of offenders be systematically taken into account when a parent is sentenced to imprisonment and conforms with the 2011 recommendations of the Committee on the Rights of the Child: “The Committee emphasises that in sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).” CRC, (2011). *Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents”*, Recommendation 30. Retrieved from <http://www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCDGDRReport.pdf>

22 The Criminal Justice Act 1993 section 5, as amended by the Criminal Procedure Act 2010 section 4, provides for both a victim impact statement (an account in the victim’s own words of the effect that the crime has had on them) and a victim impact report, prepared by the Irish Probation Service at the request of a judge.

in practice, although it would require a significant shift in criminal court culture.

Very positively, Vivian Geiran, director of the Irish Probation Service, accepts—in his interview on page eight—the benefits of such child impact statements. He does, however, highlight one of the possible blocks to implementation—the concerns within our criminal justice system relating to efficiency. Resistance from the courts could certainly come, not from a view that children should not be considered, but from our current crime control approach to criminal justice, which would resist changes that would be seen as making sentencing more complex and inefficient. From a child rights perspective, this would be an unacceptable prioritising of efficiency over rights compliance, but in practice it should not be underestimated as a powerful block to court-initiated action in this area.

The recent work of both the Probation Service and Prison Service in Ireland to develop supportive programmes for families of offenders is an excellent example of how criminal justice systems can adapt to implement positive change. We need now to push for that change to become embedded in all parts of our criminal justice system. Priorities for changing approaches must include the sentencing process and this requires the courts to be open to change. In addition, discussions as to how impact can be effectively considered by the court will need the engagement of the child welfare agency, which could play a critical role in ensuring the impact of parental imprisonment on children is consistently raised. Achieving change in this area, particularly given the context of the Irish courts’ approach to sentencing, will be a challenge, but a first step has been taken through the Court of Criminal Appeal’s judgment in the Coughlan case.



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The case of *S v M*¹ has been a landmark case in the sentencing of parents which established principles that continue to be applied and developed in South African courts. The case has also had regional and international impact on this area of law.

The Constitutional Court case of *S v M* in 2007 involved the sentencing of a primary caregiver of minor children who had committed fraud amounting to approximately 1,900 euros. The appellant had originally been sentenced to four years' imprisonment. After establishing various principles regarding the sentencing of a primary caregiver (described below), the court set the original sentence aside and sentenced the appellant to a non-custodial sentence of house arrest, community service and a suspended sentence of four years.

The court considered how the child's best interests should be considered in sentencing the primary caregiver of the child. The court confirmed that the ordinary sentencing considerations of the personal circumstances of the accused, the interests of the community and the nature of the crime should be weighed up and balanced in deciding on a sentence.² However, in addition to this, the child's best interests must also be considered. The court emphasised that this should be a separate consideration, and not merely viewed as one of the personal circumstances of the accused.³ It also found that, where both custodial and non-custodial sentences were an option, the child's best interests should be a primary consideration and this should weigh in favour of a non-custodial sentence.

The court said that to view consideration of children's best interests as allowing parents to escape the consequences of their actions is a mischaracterisation of the issues at stake.⁴ The court found that there was need for a shift in the "judicial mind-set" and that the sentence least damaging to the children should be selected from a range of options. The court went on to direct that where a crime was so serious as to warrant only a custodial sentence, the courts nevertheless had a duty to consider the child's best interests and to ensure arrangements were made for the child to be placed in suitable alternative care.⁵

1 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC)

2 *Ibid.*, at 10.

3 *Ibid.*, at 18.

4 *Ibid.*, at 34.

5 *Ibid.*, at 28.

Impact of *S v M* in sentencing cases

The impact of *S v M* and the principles which that case established continue to be observed in the sentencing procedure in South Africa. In certain cases involving the sentencing of primary caregivers, sentences have been set aside or the sentencing procedure was sent back to the previous court in order for the child's best interests to be given proper attention. In cases where the crimes were too serious to justify non-custodial measures, the accused was placed in custody but provisions were made for the child's care and in some cases, where warranted, the sentences reduced.

The courts have also distinguished between the sentencing of primary caregivers and the sentencing of co-parents, such as in the case of *MS v S*.⁶ The court found that the child's mother was not the only primary caregiver, as the child's father was still living in the household with the children and was able to make suitable arrangements for their care. In a lengthy dissent, Khampepe J set out her view that the approach set down in the *S v M* judgment should still be applied in a case where a primary caregiver is the main, but not the sole, caregiver. The majority judgment in favour of the custodial sentence was considered a setback by South African child law academics.⁷ Nevertheless, the courts do appear to have largely applied the *S v M* principles in practice. However, where the primary caregiver's role can be fulfilled by a co-caregiver, a custodial sentence will not be mitigated.

The *S v M* judgment has had a significant impact on sentencing procedures by South African courts. Seventeen judgments have applied the approach set out in *S v M*. Most of these were appeals.

In several fraud or theft cases, where mothers were found to be primary caregivers, the sentences were set aside and were either remitted back to the lower courts for proper attention to be paid to the best interests of the child or the sentences were reduced on appeal.

6 *MS v S* (Centre for Child Law as Amicus Curiae) 2011 (2) SACR 88 (CC).

7 Skelton, A. & Courtenay, M. (2012) *The Impact of Children's Rights on Criminal Justice*. 1 SACJ 180.

In two cases of serious assault, primary caregivers' sentences were set aside and the matters remitted back to be sentenced by the court in accordance with the procedure in the *S v M* judgment.⁸

In three Supreme Court of Appeal cases pertaining to theft or fraud, the appellants were found not to be sole primary caregivers, but were co-parenting with their partners in the same household.⁹ These cases are in line with the reasoning of the Constitutional Court in *MS v S* (Centre for Child Law as Amicus Curiae).¹⁰

In some cases, the court found that the crimes were simply too serious for a non-custodial sentence to be a possible option, but in several of these, the court nevertheless made arrangements to ensure the safety and proper care of the children. For example, the case of a father convicted of culpable homicide and causing the death of his children's mother, who was allowed time to make arrangements for the children's care¹¹; and the case of two women who were convicted of murder, where the court ordered the Department of Social Development to monitor the children's care.¹²

The courts have also emphasised the importance of considering the child's best interests upon sentencing the primary caregiver, whereby failure to do so is considered a "grave misdirection", as occurred in the recent case of *De Villiers v S* in the Supreme Court of Appeal.¹³ In this case, a primary caregiver had been convicted of fraud amounting to approximately 94,500 euros and sentenced to eight years in prison with three of those years suspended. The sentencing court had failed to give adequate weight to the children's best interests, which the appeals court considered sufficient reason to review the appellant's sentence. In this case, the court considered the crime serious enough to warrant a custodial sentence but mitigated its impact on the children by reducing the years of incarceration to three years, and allowing the appellant to be eligible to apply for parole after ten months of serving her sentence. The court coupled this sentence with an order that the appellant be given four weeks before starting her sentence in order to make her own alternative arrangements for the children's care.

⁸ *S v Londe* 2011 (1) SACR 331 (ECG); *S v Ranoha* (363/2011) SAFSHC 20 (23 February 2012).

⁹ *Piater v S* (743/13) [2014] ZASCA 142 (SCA); *S v Chetty* 2013 (2) SACR 142 (SCA); *S v EB* 2010 (2) SACR 524 (SCA).

¹⁰ 2011 (2) SACR 88 (CC).

¹¹ *Lorimer v S* (A 57/2009) ZAWCHC 47 (18 March 2010).

¹² *S v Kutumane and Another* (A709/2007) ZAWCHC 95 (12 December 2007).

¹³ *De Villiers v S* (20367/2014) ZASCA 119 (11 Sept 2015).

Regional and international developments

Both regional and international instruments have also drawn inspiration from the principles outlined in *S v M*, further strengthening child rights in this area. Following a UN day of general discussion on children of incarcerated parents in 2011, the CRC highlighted the case of *S v M*. On 19 April 2012, a resolution was adopted by the Human Rights Council (HRC) calling upon states to emphasise non-custodial measures when sentencing primary caregivers, taking into account the normal sentencing considerations as well as the best interests of the child.¹⁴

The African Committee of Experts on the Rights and Welfare of the Child issued their first General Comment in 2013¹⁵, which quoted the *S v M* judgment and confirmed that the child's best interests must be the "primary consideration"¹⁶ in matters where the child's parents are incarcerated. The general comment further stated that such a situation required "special treatment" and framed the application of Article 30 of the African Charter on the Rights and Welfare of the Child (ACRWC) regarding the sentencing of primary caregivers based on the guidelines set out in *S v M*.

Impact of *S v M* beyond sentencing cases

The principles established in *S v M* have been applied beyond the sentencing context, namely in the bail procedure. In *S v Peterson*¹⁷, the court found that the accused being a primary caregiver constitutes an exceptional circumstance whereby the accused may be released on bail according to the Criminal Procedure Act. While the accused in this case was found not to be a primary caregiver, the court nevertheless ensured that the child was adequately cared for. This therefore extended the principle of considering the child's interests despite the accused not being a primary caregiver.¹⁸ On 13 November 2015, the Durban High Court ordered the immediate release of a breast-feeding mother who was being held awaiting trial on an assault charge.¹⁹ Although no judgment was written due to the urgency of the matter, this is evidence of a new impact of *S v M* beyond sentencing cases.

¹⁴ Resolution adopted by the HRC at its 19th session "Rights of the Child" 19 April 2012: A/HRC/RES/19/37 at 69. See United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2011.

¹⁵ Comment No. 1: (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers".

¹⁶ Article 4 of the ACRWC.

¹⁷ *S v Peterson* (2008) 2 SACR 353 (C).

¹⁸ *Ibid.*, at 180-181.

¹⁹ See: <http://www.sowetanlive.co.za/news/2015/11/16/breast-feeding-mother-wins-release-from-prison-to-care-for-child>.

Child and family impact assessments: key achievements in Scotland

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Parental imprisonment can have tremendous consequences on children, with negative effects sometimes so strong that children never recover from them.¹ In Scotland, two thirds of women and half of men in prison have dependent children.² An estimated 27,000 children are affected every year by the imprisonment of a parent.³ This means that in Scotland each year, more children experience a parent's imprisonment than a parent's divorce.⁴ Bearing in mind the detrimental consequences parental imprisonment can have on a child⁵, we must give special attention to children's views and enable them to be heard.⁶

Following the 2007 landmark *S v M*⁷ case in the South African Constitutional Courts, which required the judiciary to take into account the impact of a prison sentence on a parent's children, child rights organisations and other interest groups in Scotland have been questioning how the impact of custody on family can be assessed and taken into account. This article outlines the current debate in Scotland and the various attempts to introduce child and family impact assessments at key stages in the criminal justice process. It describes the current options for assessing

impact and the recent efforts to influence legislation on this, as well as views of other professionals.

Research in Scotland

In 2008, Scotland's Commissioner for Children and Young People (SCCYP)⁸ published the report "Not Seen, Not Heard, Not Guilty", recommending the use of child and family impact assessments at the point of sentence. This report led to other research more focussed on the impact of imprisonment on children of incarcerated parents. SCCYP's follow-up report in 2011 reiterated this recommendation.

In 2009, Loureiro explored the use of child and family impact assessments in court.⁹ The report concluded that it is crucial to assess the impact of parental imprisonment on children and that judges should take this into account in relation to their decisions on a case by case basis, always considering the consequences to the children in accordance with Article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC). Interviewees agreed that assessments should highlight children's needs in order for the court to be able to address them and that existing court reports were not enough to identify and address the impact of parental imprisonment on children.¹⁰

Following this work, research to explore the views and experiences of children and young people who have

1 Robertson, O. (2007) *The impact of parental imprisonment on children*. Geneva: Quaker United Nations Office.

2 Scottish Prison Service (2011 and 2013) *Scottish Prisoner Survey 2011 and Scottish Prisoner Survey 2013*. Edinburgh: Scottish Prison Service.

3 Estimate from Scottish Government Justice Analytical Services (2012) following a Freedom of Information request from Prof Chris Holligan, University of the West of Scotland (a figure extrapolated from the Scottish Prison Service Prisoners Survey 2011, *op cit.*).

4 Loucks, N. (2009) *Children of imprisoned parents*. Paper presented at the Cross Party Group on Children and Young People, Edinburgh, Scotland.

5 See for example: Johnston, D. (1995a) Effects of parental incarceration and (1995b) The care and placement of prisoners' children. In Gabel, K. & Johnston, D. (Eds.), *Children of incarcerated parents*. New York: Lexington Books, pp.59-88 and pp.103-123; Simmons, C. W. (2003) *California law and the children of prisoners*. California Research Bureau: California State Library; Payne, W. C. (1997) The Child and Prison. *Prison Service Journal* 113, 42-43; Parke, R. & Clark-Stewart, K. A. (2002) *Effects of parental incarceration on young children*. Unpublished manuscript. Retrieved from <http://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children>

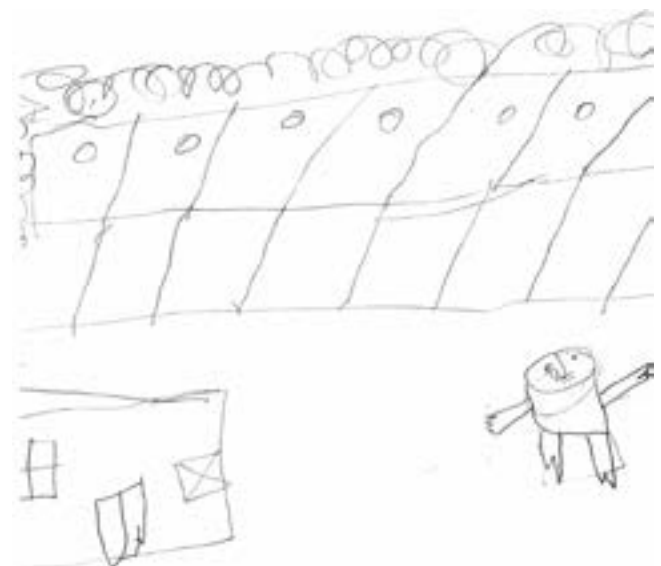
6 Marshall, K. (2008) *Not seen. Not heard. Not Guilty. The rights and status of the children of prisoners in Scotland*. Edinburgh: Scotland's Commissioner for Children and Young People (SCCYP).

7 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC). For more information on the case, see pages 14-15.

8 Marshall, K. (2008). *Op cit.*, 6.

9 Loureiro, T. (2009) *Child and family impact assessments in court: implications for policy and practice*. Edinburgh: Families Outside.

10 *Ibid.*



had a family member sent to prison was developed.¹¹ Parental imprisonment leaves a long-lasting mark on children and young people's lives¹², and most children who participated in the research expressed concerns about the imprisoned parent. They mentioned the importance of the judge listening to their opinions and most of them believed that it would have made a difference to the sentence if they had had the chance to express their feelings to the judge. The research concluded that children's views should be taken into consideration, as stated under Article 12 of the UNCRC.

A set of tools to be used when conducting child and family impact assessments was then developed on behalf of the Scottish charity Families Outside by two social work students from the Netherlands¹³, but these have not yet been tested more widely in practice. This lack of evidence is commonplace. The Urban Institute in the United States notes that:

Although family impact statements appear to hold promise for mitigating some of the trauma children face when their parents are involved in the justice system, no empirical studies on the topic have been done. Data also are lacking about how many children are affected by pre-sentence investigations, so it is impossible to determine the full scope of the problem.¹⁴

Nevertheless, probation services across the United States are beginning to introduce child and family impact assessments specifically to inform sentencing—the opposite approach to developments in Scotland (see below).

Despite these recommendations and research, the Justice Committee of the Scottish Parliament rejected the introduction of child and family impact assessments

The case successfully argued that the deportation and imprisonment of a single mother who had breached a probation order would have a disproportionate impact on the right to family life and act against the best interests of the child.

in 2010. Similarly, the Angiolini Commission on Women Offenders¹⁵ in 2012 did not include child and family impact assessments as a recommendation, in the belief that court reports fulfilled this role.¹⁶ However, the courts began to make decisions that took the impact on children into account. The case of Slovakia v Denise Srponova (January 2013, unpublished) successfully argued that the deportation to Slovakia and imprisonment of a single mother who had breached a probation order would have a disproportionate impact on the right to family life under Article 8 of the Human Rights Act and act against the best interests of the child under Article 3.1 of the UNCRC. The case of Stuart Gorrie v PF Haddington (2014) went to appeal partly on the basis that the court reports had not taken adequate consideration of the impact of a single father's imprisonment on his teenage son. No standard means of taking these circumstances into account are in place, however, so such cases remain exceptional.

Key achievements from the Scottish government

Following the publication of the concluding observations of the UN Committee on the Rights of the Child in 2008¹⁷ and SCCYP's report in 2008 recommending the use of child and family impact assessments in court¹⁸, progress has been made to change Scottish policy and practice. The Scottish government now publishes an annual report entitled "Do the Right Thing", which outlines progress towards the implementation of the UNCRC, and has started to support Together Scotland¹⁹ in publishing reports regarding the UK's progress on this. In 2011, Minister for Children and Young People in Scotland, Aileen Campbell, stated that the government's commitment to child rights should be included in the development, planning and review of all policies, legislation and services.²⁰ Later

11 Loureiro, T. (2010) *Perspectives of children and young people with a parent in prison*. Edinburgh: Scottish Commissioner for Children and Young People and Families Outside (SCCYP).

12 *Ibid.* p. 1.

13 Van Haaften, G. & Sijtsma, C. (2011) *Child punishment: The other side of the coin of parental imprisonment*. Unpublished thesis assignment.

14 Cramer, L., Peterson, B., Kurs, E. & Fontaine, J. (2015) *Toolkit for Developing Family Impact Statements: Children of Incarcerated Parents Project*. Retrieved from <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>

15 <http://www.gov.scot/Resource/0039/00391828.pdf>

16 Personal correspondence with the Commission on Women Offenders

17 Committee on the Rights of the Child (2008) *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*. Retrieved from <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

18 *Ibid.* 6.

19 Together Scotland (Scottish Alliance for Children's Rights) is an organisation of children's charities in Scotland that work together in order to improve consciousness, understanding and application of the UNCRC.

20 The Scottish Government (2012) *Do the right thing. Progress report 2012*. Edinburgh. Retrieved from <http://>

that year, the government announced a consultation for a Children and Young People Bill²¹ (now the Act of 2014) in which the government showed its intention to develop legislation, including a “child rights impact assessments” process. With Together Scotland and SCCYP, the government also established the Scottish Children’s Rights Implementation Monitoring Group (SCRIMG) to develop progress and implementation of the UNCRC in Scotland.²²

In 2011, the UNCRC held a Day of General Discussion focussing on children of incarcerated parents and recommended the use of child impact assessments for both custodial and non-custodial sentences.²³ In 2012, Together Scotland, SCCYP and Families Outside gathered support from other Member States to highlight the issues faced by children of prisoners to the United Nations’ Universal Periodic Review of Human Rights (UPR).²⁴ The UPR stated that the UK government needs to “take all measures necessary to fully implement the [UN]CRC”²⁵ and therefore must “establish child rights impact assessments, promoting a systematic approach to considering the UNCRC throughout government, in all legislation and decision-making”.²⁶ It also recommended that “the best interests of the child [be] taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of the child”²⁷ and that the UK

There is still considerable work to be done in order to guarantee that children’s rights cease to be overlooked and to ensure that their voices are heard. Development of child and family impact assessments over the coming months will be an important step towards rectifying this gap.

www.gov.scot/Resource/0039/00392997.pdf

21 The Scottish Government (2011) *A Scotland for Children: A Consultation on the Children and Young People Bill*. Edinburgh. Retrieved from <http://www.gov.scot/Resource/0039/00396537.pdf>

22 Scottish Children’s Rights Implementation Monitoring Group (SCRIMG). Retrieved from <http://www.togetherscotland.org.uk/resources-and-networks/scrimg/>

23 Robertson, O. (2012) *Collateral Convicts: Children of incarcerated parents. Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011*. Geneva: Quaker United Nations Office

24 The UPR is used by the Human Rights Council to examine the human rights situation in all Member States of the United Nations.

25 United Nation Human Rights Council (2012) Annex one: 110.10. Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland. UNHRC

26 Together Scotland (2013) *Universal Periodic Review. Children’s rights recommendations: Priorities for Government*. Retrieved from <http://www.togetherscotland.org.uk/pdfs/UPR%20Scottish%20mid-term%20report%20JH.pdf>

27 United Nation Human Rights Council (2012) Annex one:

should use the child and family impact assessments for custodial and non-custodial sentences, starting at the moment of the arrest through to the prisoner’s release.²⁸ The UK government agreed to these recommendations but has yet to implement them in full.

Through the Children and Young People (Scotland) Act 2014, Scottish Ministers now have the obligation to take into account children’s views and to promote public awareness and understanding of children’s rights.²⁹ Furthermore, from June 2015, the Scottish government started to use a “child rights and well-being impact assessment” to evaluate how government policies regarding the impact on children and young people have been achieved.³⁰

Examples of good practice

In spite of the non-obligation requirement regarding the application of impact assessments for children of prisoners, there are some examples of good practice in Scotland worth mentioning. Scottish charity Circle has been providing

information to sheriffs about the possible consequences for children when their parents go to prison. According to the (then) manager of Circle’s Families Affected by Imprisonment project, this information has been well received. Another example of good practice comes from a sheriff who allowed a mother to return home in order to make arrangements for her child before serving her prison sentence³¹—something agreed to under the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) 2010³², but not yet widely implemented in the UK.

In early 2015, Mary Fee MSP (Member of Scottish Parliament), with support from Barnardo’s Scotland,

110.96. Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland. UNHRC

28 *Ibid.* 25.

29 Children and Young People (Scotland) Act 2014. Retrieved from http://www.legislation.gov.uk/asp/2014/8/pdfs/asp_20140008_en.pdf

30 The Scottish Government (2015) *Child Rights and Well-being Impact Assessment (CRWIA)*. Retrieved from <http://www.gov.scot/Topics/People/Young-People/families/rights/child-rights-wellbeing-impact-assessment>

31 Currie, G. (2011, March 4) Sent home to warn daughter she’s off to jail. *The Scottish Sun*.

32 United Nations (2010) *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*. Retrieved from <http://www.ohchr.org/Documents/ProfessionalInterest/BangkokRules.pdf>

Families Outside and the NSPCC (National Society for the Prevention of Cruelty to Children), drafted a proposal for the “Support for Children (Impact of Parental Imprisonment) (Scotland)” Bill. This proposal was accompanied by a consultation, which received 102 responses.³³ The Bill aimed to support and improve outcomes for children of imprisoned parents. Mary Fee proposed the Bill for courts to consider—after sentencing—the impact of a custodial sentence on children and to ensure that children with a parent in prison receive appropriate support.³⁴ Only by proposing an assessment after sentencing were politicians willing to consider the use of child and family impact assessments—to take these into consideration before sentencing was deemed an interference with the independence of the judiciary. This is despite the fact that defence agents already include similar information as a case for mitigation during the course of a trial, and that the guidelines published by the Sentencing Council for England and Wales³⁵ specifically identify “caring responsibilities” as a mitigating factor. Developing

practice in the US also provides an interesting contrast to the reservations in Scotland about child and family impact assessments prior to sentence, as noted above.

While Mary Fee’s Bill has yet to be lodged, she worked closely with Barnardo’s, Families Outside, and the NSPCC to pass an amendment to the current Criminal Justice (Scotland) Bill to ensure child and family impact assessments are conducted and their inclusion in the Bill is a promising new avenue. Scotland’s First Minister Nicola Sturgeon assured the government’s “full consideration” of proposals for assessments to be carried out on children and young people who have a parent in prison.³⁶ In spite of recognition that Scottish laws must comply with the UNCRC, there is still considerable work to be done in order to guarantee that children’s rights cease to be overlooked and to ensure that their voices are heard.³⁷ Development of child and family impact assessments over the coming months will be an important step towards rectifying this gap.

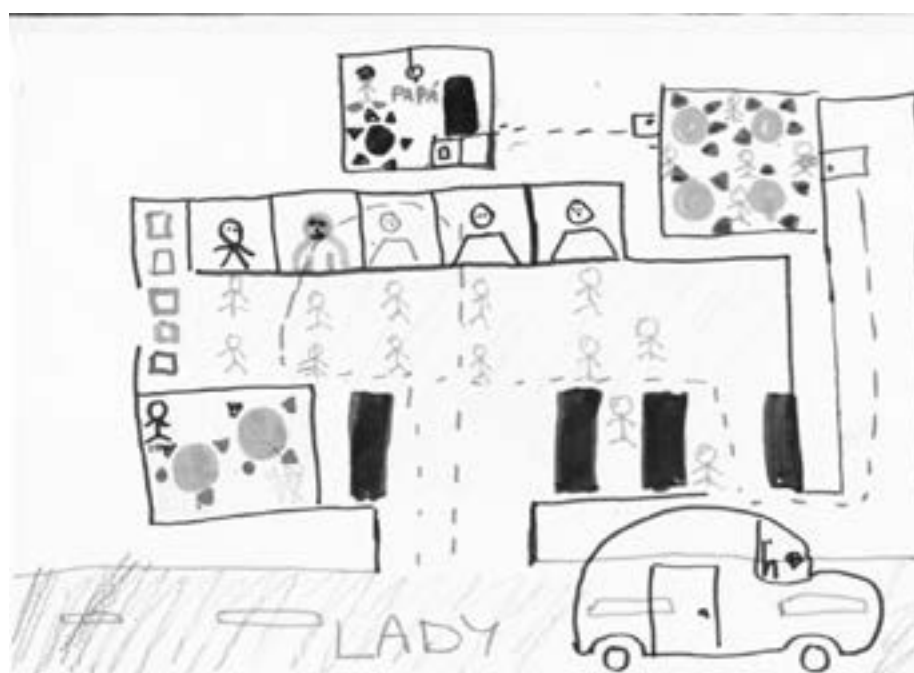
33 Fee, M. (2015) *Support for Children (Impact of Parental Imprisonment) (Scotland) Bill*. Retrieved from [http://www.scottish.parliament.uk/S4_MembersBills/Consultation_Document_\(Website\).pdf](http://www.scottish.parliament.uk/S4_MembersBills/Consultation_Document_(Website).pdf) and <http://maryfeemsp.com/2015/09/07/update-on-marys-private-members-bill-support-for-children-impact-of-parental-imprisonment/>

34 *Ibid.*

35 <http://www.sentencingcouncil.org.uk/the-magistrates-court-sentencing-guidelines/>

36 The Herald Scotland (2015) *Nicola Sturgeon vows to consider Labour’s family impact assessment proposals*. Retrieved from http://www.heraldscotland.com/news/13712312.Nicola_Sturgeon_vows_to_consider_Labour_s_family_impact_assessment_proposals/

37 SCCYP (2015) *Submission to the Joint Committee on Human Rights Inquiry into the UK’s compliance with the United Nations Convention on the Rights of the Child*. Retrieved from http://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_Scottish_Children’s_Commissioner_200315.pdf



Short but not sweet: exploring the impact of short sentences on mothers

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In England and Wales in 1995, 6,000 children were affected by maternal imprisonment. This figure is now closer to 20,000 children a year and, of those children, five per cent remain in their own homes, nine per cent are cared for by their fathers and fourteen per cent are placed in the care of the Local Authority.¹ What happens to the remaining unaccounted for children and how they fare requires a great deal more research. However, what is known is that many are displaced and cared for by extended, informal family networks—the majority of which were already facing multiple challenges in relation to poverty and disadvantage. We know that 66 per cent of women in prison are mothers of children under eighteen. This figure, however, is not an accurate reflection, as it fails to include mothers of children over eighteen and grandmothers. Grandmothers have often been “invisible in both research and literature pertaining to women and imprisonment”² and as such the devastation and disruption caused to often already vulnerable families when a grandmother goes to prison is underexplored.

The imprisonment of mothers (and grandmothers) has been described as having “wreaked havoc on family stability and children’s well-being”.³ The multinational EU-funded study “Children of prisoners: interventions and mitigations to strengthen mental health” found that a majority of children reported being negatively impacted by the imprisonment of a parent.⁴ This is not a new finding: that prison is damaging and ineffective has been accepted for over thirty years amongst academics, researchers, practitioners and women prisoners and children themselves.

1 Baldwin, L., Ed. (2015) *Mothering Justice: Working with Mothers in Social & Criminal Justice Settings*. Hampshire: Waterside Press.

2 *Ibid.*

3 Convery, U. & Moore, L. (2011) Children of imprisoned parents and their problems. In P. Scharff-Smith, & I. Gampell (Eds.), *Children of imprisoned parents*. University of Ulster and Bambinisenzasbarre, The Danish Institute for Human Rights, Denmark, European Network for Children of Imprisoned Parents; Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*. London: Home Office

4 Robertson, O. (2015) Child rights: some long-term perspectives. In H. Lynn (Ed.), *An evolving child rights agenda. European Journal of Parental Imprisonment*, 1, 22-23. Children of Prisoners Europe

Prevalence and sentencing patterns

During a twelve-month period ending June 2014, some 9,204 women entered custody in England and Wales via remand or sentence despite the fact that UK law states that prison should be used as a sanction only when the offence is “so serious” that neither a fine nor a non-custodial sentence can be imposed.⁵ The vast majority of convicted women in prison are serving time for non-violent, low level offences (such as fraud, theft, non-payment of fines and council tax default), despite it being illegal for sentencers to impose incarceration in such cases (unless as a “last resort”⁶). The All Party Parliamentary Group (2015), in relation to custody, found that 77 per cent of women were sentenced to less than twelve months, 71 per cent less than six months and 52 per cent less than three months. Use of pre-trial remand for women is particularly high, with 40 per cent of women entering prison without a conviction in any twelve-month period.⁷ The Howard League suggests that 71 per cent of women remanded in the Magistrates

Courts and 41 per cent remanded by Crown Courts do not go on to receive a custodial sentence⁸, thus raising the question of the appropriateness of remand in custody in the first instance.

Internationally, there are wide-ranging differences in relation to the sentencing of parents, particularly of mothers, with some countries such as Norway and Denmark choosing to only very sparingly and reluctantly sentence mothers to custody. Colombia, Turkey and Finland, for example, routinely allow children to live in prison with their mother (and sometimes father) until the child is as old as six. Other countries, such as Iceland and China, defer a custodial sentence until a mother has finished breastfeeding or following a recent birth or, in the case of Spain and Venezuela, until the child reaches

5 All Party Parliamentary Group on Women in the Penal System (2015) *Report on the Inquiry into Preventing Unnecessary Criminalisation of Women*. The Howard League for Penal Reform.

6 Epstein, R. (2011) Sentencing in Council Tax Defaults. *Criminal Law and Justice Weekly*, 175, 609-610.

7 All Party Parliamentary Group on Women in the Penal System, *op cit.*

8 Howard League (2014) *Revealed: The wasted millions spent on needless remand*. The Howard League for Penal Reform. Retrieved from <http://www.howardleague.org/needless-remand/>

the age of three. In Italy, mothers with children up to age ten are permitted in some circumstances to serve their sentence with their children at home or other alternative settings than prison. Even within the UK there are variations: in England, mother and baby units (MBUs) are rarely more than 50 per cent occupied—with high rejection rates—whereas in Scotland, MBUs are most often full with high acceptance rates.⁹

Impact of remand in custody and short sentences

For many mothers and grandmothers, the impact of custody has already been experienced during remand. Many find themselves facing poverty, debt, unemployment, homelessness and loss of custody of their children. Baldwin, in her research “Mothers Confined: A Study of the Emotional Impact of Custody on Mothers and Grandmothers”¹⁰, recounts the experience of one mother sentenced to a community order following a three-week remand period. A positive result perhaps, but during the relatively short remand period the woman was made homeless and her son was taken into care. As a consequence, the young mother’s substance misuse spiralled downward and she ultimately returned to prison and never regained custody of her son. This is not an isolated case: the continued use of both short sentences and remand in relation to mothers who commit less serious, non-violent crimes will result in devastation to ever more families. Magistrates are often reluctant to remand women on bail due to a belief that women misusing substances (around 50 per cent of female offenders) lead lives “too chaotic” to facilitate compliance with bail conditions, or a belief that custody will facilitate access to support services otherwise unavailable to women and mothers or due to a lack of female residential bail hostels.¹¹ Sentencers are required to adhere to “overarching sentencing principles” that ensure any custodial sentence or custodial remand passed is both “just” and “proportionate”.¹² We ask: when a remand in custody for a minor public order offence and non-payment of a fine has the consequence of a mother losing her home and her child, a child losing their mother, how can this be deemed “just” or “proportionate”?

Aside from the psychological and emotional cost of maternal incarceration, the financial cost of a basic female prison space in the UK falls around £56,500pa. The cost of taking one child into the care of the Local Authority falls between just under £40,000pa for a

child without additional behavioural or emotional needs and up to £364,500pa for a child with multiple needs. This is notwithstanding the cost of re-housing, supervision on licence (now a minimum of twelve months in the UK) and other rehabilitative services, as opposed to £1,360-£2,800 for a holistic women’s centre-based intervention or community order.

Why does the incarceration of mothers prevail and what are the alternatives?

In light of overwhelming evidence to suggest that custody for mothers is best avoided where possible, particularly when the “collateral damage” to mothers, children and their families can arguably be just as devastating for short sentences as it can be for long, why do magistrates continue to sentence mothers to custody? Baldwin states simply: “because they can”, suggesting that as long as sentencing frameworks provide magistrates with relative autonomy and discretion, then sentencing—as well as being inconsistent—will lean towards more punitive responses.

In her research “Mothers in prison: The sentencing of mothers and the rights of the child”¹³, Epstein found that none of the 75 sentencers in her study formally accounted for the rights and needs of the child or the potential impact of a custodial sentence on dependent children despite being required to do so, as per European Court of Human Rights (ECHR) guidelines.¹⁴ Epstein found that sentencers failed to undertake the required “balancing exercise” in relation to dependent children, and that sentencing decisions in relation to mothers were inconsistent.¹⁵ It would appear that the ongoing failure to adhere to guidelines and persistence to sentence mothers to custody—despite this often resulting in the afore-mentioned disproportionate, additional punishment of losing homes and children—goes essentially unchallenged in part because of the independence of the judiciary.

In recognition of the harm caused by ineffective custodial sentencing on mothers and their children, together with a recognition that it is morally, socially and economically beneficial for society, the Scottish Justice Minister Michael Matheson has pledged a “whole system change” in relation to women, mothers and incarceration. Matheson demonstrated his commitment to progressive and informed change by halting plans to expand a women’s prison in Scotland, further stating his intention to focus on smaller, more

9 Abbott, L. (2015) A Pregnant Pause; Expecting in the Prison Estate. In L. Baldwin (Ed.), *Mothering Justice: Working with Mothers in Criminal and Social Justice Settings*. Hampshire: Waterside Press.

10 Baldwin, L. (unpublished) *Mothers Confined: A Study of Mothers, Grandmothers, Emotion and Prison*. PhD. De Montfort University.

11 Hedderman, C. & Gunby, C. (2013) Diverting women from custody: The importance of understanding sentencers’ perspectives. *Probation Journal*, 60(4), 425–438.

12 Sentencing Guidelines Council, (2004) *Magistrates Court Sentencing Guidelines*.

13 Epstein, R. (2012) Mothers in Prison: the Sentencing of Mothers and the Rights of the Child. *Coventry Law Journal (Special Issue: Research Report)*. Retrieved from <http://www.makejusticework.org.uk/wp-content/uploads/Mothers-in-Prison-by-Rona-Epstein.pdf>

14 European Convention on Human Rights (1953), Article 8. See: *Olssen v Sweden* (No 1) (1988) 11 EHRR 259.

15 Epstein, R. (2012) Mothers in Prison. *Criminal Law and Justice Weekly*, 176, 670–671; and Epstein, R. (2013) Mothers Behind Bars: The Rights of the Child, *Criminal Law and Justice Weekly*, 177, 531–532.

effective alternatives to custody. Obviously this has to be part of a wider agenda to address inequality and social justice, but the intention is clear: change is beginning to take shape in Scotland and the rest of the UK must surely follow.¹⁶

Baldwin has outlined specific proposals which would “immediately and significantly” reduce the number of mothers sentenced to custody.¹⁷ These proposals include the obligation that, in the case of mothers (or fathers) with dependent children (or any defendant with dependent responsibility), sentencers are mandatorily required to request a pre-sentence report (PSR). Additionally, a referral would be made to a Guardian ad Litem by the probation officer with a view to securing an independent report focussed on any needs or care provisions of the dependent children. This would then be used to inform the court, much in the same way a psychiatric report would, thereby assisting the sentencer in undertaking the “balancing exercise”. For this, Baldwin suggests a standard four-week period of adjournment to facilitate report- and information-gathering.

Such a delay to proceedings could provoke resistance. However, the assessment would facilitate proper investigation into what arrangements or referrals might need to be made for the children, while providing valuable evidence to assist the sentencer in making a truly informed and balanced decision (for which they

16 Baldwin, L. (2015) *Mothers Confined: Proposals for change with particular reference to Mothers and Custodial Sentences*. Halsbury Law Exchange. Retrieved from <http://www.halsburyslawexchange.co.uk/mothers-confined-part-2-time-for-action/>; and Baldwin, L. (2015) Rules of Confinement: Time for Changing the game, *Criminal Law and Justice*, 10(179), 195-197. Retrieved from <http://www.criminallawandjustice.co.uk/features/Rules-Confinement-%E2%80%93Time-Changing-Game>

17 Baldwin, L. (2015) (Ed.) *Mothering Justice: Working with Mothers in Criminal & Social Justice Settings*. Hampshire: Waterside Press.

would be accountable). The delay would also allow the probation officer or PSR author time to consider alternatives to custody and conditions for a community order, should the sentencer eventually be minded to consider a non-custodial option. Baldwin suggests this process could easily be built into magistrates’ training and sentencing frameworks and would be subject to monitoring with measures of accountability.¹⁸

Baldwin further suggests that even where a custodial sentence is likely, this mandatory period of adjournment would facilitate preparations for the care of dependents.¹⁹ Furthermore, it would eradicate circumstances where mothers not expecting a custodial sentence may not have prepared for the impending separation, perhaps leaving children in the informal care of friends or neighbours. The suggested proposals, despite the additional delay and apparent immediate cost, would therefore be for the greater good of all parties involved, especially the children.

Over 66 per cent of women in custody are mothers of children under 18. A consequence of these reforms would be a reduction in the number of mothers entering custody, which would be of financial, emotional, and psychological benefit to mothers, their children and to society, both in the short and longer term.

Our forthcoming research relating to the imposition of short custodial sentences on women (particularly mothers and grandmothers) aims to shed light on the circumstances surrounding mothers sentenced to custody. We hope to explore the impact on the mothers and their children and families with a view to generating recommendations for positive change and ultimately to justify not only a reduction in the number of short custodial sentences but to significantly reduce the imposition of any custodial sentences on mothers.

18 *Ibid.*

19 *Ibid.*



Swedish children's rights lacking when sentencing their parents

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A child's best interests as well as the child's right to be heard in relation to criminal procedures against their parents are sensitive issues. Several potentially conflicting legal principles are at play. According to the 1989 United Nations Convention on the Rights of the Child (UNCRC), a child's best interests (Article 3) as well as the right to be heard (Article 12) are cornerstones of child rights. These two principles are, in conjunction with the principle of non-discrimination (Article 2) and the States Parties' obligation to implement the rights outlined in the Convention (Article 4), the fundamental principles of the UNCRC. From a criminal law perspective, however, the principles of individual and general deterrence demand a response to crimes regardless of the family situation of the offender. In this article, the scope for applying the principles of the best interests of the child and a child's right to be heard when their parents stand trial under Swedish law is discussed. The importance of the child's right to be heard in the Swedish legal system has recently been underscored by the United Nations Committee on the Rights of the Child (CRC).¹

Imprisonment versus expulsion

The Swedish debate on the scope of the best interests of the child in regard to criminal sentences against their parents has focussed not so much on the incarceration as on the expulsion of non-Swedish citizens as a criminal sanction. The underlying assumption seems to be that a child could reasonably keep in touch with a parent in a Swedish prison but not with an expelled parent. In cases where the parent of an underage child risks expulsion as a consequence of a criminal sentence, the law states that the principle of the best interests of the child has to be taken into account, although it does not have to be the primary consideration when balancing the different interests at stake. Concretely, this implies that a parent convicted for serious crimes could be expelled regardless of their family situation.

As a consequence of the regulations on expulsion, the Swedish Social Board's obligation to assist the Swedish Prison and Probation Service by supplying information to a criminal court as regards contact between the accused and his or her underage children does not explicitly cover Swedish subjects but is limited to non-citizens.² In practice, however, this information should be supplied by the consideration of the "social

situation" of a Swedish citizen. It seems reasonable to believe that the defence lawyer will inform the court if an accused citizen has dependent children. Generally, a criminal court thus would be informed, or could find out, if a defendant had children.

Discretion to ensure child rights?

Given that the court will generally know informally whether a defendant has children in cases relating to Swedish citizens, the question arises as to what extent the court in a criminal case against a parent has discretion to consider the best interests of the child and the right of the child to be heard, even when the parent does not risk expulsion. These two principles have different, although overlapping connotations. The best interests of the child have been defined as a substantive right, an interpretative legal principle and a rule of procedure.³ The right to be heard assures, to every child capable of forming his or her own views, the right to express those views freely in all matters and, in particular, in any judicial or administrative proceedings affecting the child. The views of the child should be given due weight in accordance with the child's age and maturity (General Comment No. 12, CRC).⁴ In short, according to the UNCRC, the child has the right to be heard but the court has discretion to balance the wishes as well as the interests of the child with other interests at stake.

The UNCRC and its fundamental principles are not currently implemented in the Swedish Penal Code. The Penal Code (Ch. 29, Sec. 5), however, does state that the court may, if there are "special grounds", impose a less severe punishment than that prescribed. It could be argued that the best interests of the child constitute such a special ground to be taken into account as a mitigating factor.⁵ On the other hand, the victimisation of a child by their parent's crime is an explicit aggravating factor in the Swedish Penal Code.

Special legal representative: insufficient?

The principle of the child's right to be heard, however, is not reflected in Swedish criminal law unless a child is the victim of a crime committed by their parent. If a

³ CRC/C/GC/14.

⁴ CRC/C/GC/12 Retrieved from <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

⁵ Borgeke, M. (2012). *Att bestämma påföljd för brott*. Norstedts Juridik.

¹ CRC/C/SWE/CO/5.

² Sw. Lag (1991:2041) om särskild personutredning i brottmål, m.m.) Sec. 6

parent or guardian is suspected of a crime against an underage child, a special legal representative should, according to special enactment, be appointed to protect the rights of the child.⁶

It is questionable whether the appointment of a special legal representative—in the comparatively few cases when they are appointed—is an adequate measure to meet the rights of the child to be heard according to the UNCRC. The special legal representative is not obliged to talk to the child, nor follow the instructions of the child. For example, they are able to compel a child, against their wishes, to undergo medical examinations. Instead, the representative tends to side with the prosecutor.⁷ I would argue that the appointment of a special legal representative is not sufficient to meet the requests of the UN Committee on the Rights of the Child in its last Concluding Observations on Sweden.

No right to be heard

In other criminal cases against a parent, the child's right to be heard is neither reflected in the Penal Code, nor in legal practice. The lack of possibilities for the child to be heard in criminal cases appears to be in stark contrast to the recommendations of the UN Committee on the Rights of the Child's Concluding Observations on Sweden in 2015. The Committee stresses the importance of implementing the child's right to be heard:

In the light of its General Comment No. 12 (2009) on the right of the child to be heard, the Committee recommends that the State party take measures to strengthen that right in accordance with Article 12 of the Convention and to ensure the effective implementation of legislation recognizing the right of the child to be heard in relevant legal proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle.⁸

Discussions on the child's right to be heard in criminal proceedings are often focussed on juvenile justice, not on criminal proceedings against their parents. The General Comment No. 12, however, underlines the broad scope of the article:

The Committee emphasises that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody,

care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.⁹

The Convention does not specify if the expression “any relevant judicial proceedings” covers criminal (or other) proceedings against a parent. It could, on the one hand, be argued that family life and a child's dependency on his or her parents implies a closeness that legitimises the hearing of a child in any legal process a parent is engaged in. This, on the other hand, could be considered as too far reaching, at least in a society like Sweden where individualism is highly regarded.

One way of reconciling these perspectives would be to look into the likely impact of a parent's verdict on a child's life. The Swedish Supreme Court took just such an approach when it ruled on the seizing of the family home in cases involving children.¹⁰ According to the verdict of the Supreme Court, the best interests of the child imply that assets other than the family home should as far as possible be seized. A similar use of child impact assessments in criminal cases against parents would be one way to reconcile the aims of criminal proceedings with the aim of the CRC. The assessment could focus on the impact of imprisonment on the child's everyday life; for example, they could consider if the accused parent is: a) the child's sole caregiver, b) if the criminal acts were directed against the child or other members of the family (i.e., domestic violence) and c) if the criminal acts were directed against individuals or institutions outside of the family.

In the words of the Committee, the criminal process against a parent must in most cases be regarded as “relevant” from the child's perspective in that it does affect the child's everyday life. The fact that the possibility to accommodate for the best interests of the child is limited and that the child's right to be heard is non-existent according to relevant national legislation is obviously problematic. It remains to be seen if the upcoming incorporation of the UNCRC into national Swedish legislation will change the reality for children of prisoners. A change of attitudes in the Swedish legal system would in all likelihood demand an authoritative ruling from the Swedish Supreme Court.

⁶ The Act (no. 1999:997) on Special Representative for Children (Sw. Lag om (1999:997) om särskild företrädare för barn).

⁷ Uppsala District Court Ruling 2010-04-20, T 4350-07.

⁸ CRC/C/SWE/CO/5.

⁹ CRC/C/GC/12

¹⁰ The Supreme Court Ruling. NJA 2013 s. 1241.

Children's well-being prior to paternal incarceration

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 Enforcement, Amsterdam

Empirical evidence about the vulnerability of children whose fathers are facing incarceration is limited. The majority of studies on this topic focus on the well-being of children whose fathers have already been incarcerated. Information on children's difficulties before their father's arrest may be important in defining the legal framework for these children's rights. More insight into the support that is needed when their father is in pre-trial detention will help to develop policies that reduce the collateral effects of parental imprisonment. The study currently being carried out by the authors was set up with the aim of examining the well-being of children before their fathers' incarceration in an attempt to fill this gap.

We used data from the Dutch Prison Project, a unique forthcoming, longitudinal data collection among male pre-trial detainees in the Netherlands, and their families. The project targeted male pre-trial detainees who had entered a Dutch detention facility between October 2010 and March 2011, were born in the Netherlands, and were between 18 and 65 years old.¹ For the current study, we restricted our focus to 366 fathers who reported on the well-being of their 571 children. The conditions of multiple life domains of these children were assessed: fathers completed questionnaires to provide pre-incarceration information on life circumstances, family situation, their children's physical and mental health issues, school performance and delinquent behaviour.

The results suggest that children of incarcerated fathers, when compared to children in the general population, experience more adverse life circumstances in various major life domains before their fathers enter the criminal justice system. The children in the Dutch Prison Project displayed more physical and mental health issues, greater academic problems and they often showed behavioural problems and delinquent behaviour. These results are in line with other studies reporting poorer well-being of children of imprisoned parents prior to the incarceration of the latter.² In

addition, paternal absence due to imprisonment can cause further decline of the well-being of children.³ As vulnerable children must be protected from further damage to their development caused by their parent's imprisonment, it is important to consider children's pre-existing adverse life circumstances in parental sentencing processes. In this way, prisoners' children would be treated with more consideration and judges may be more inclined to take account of the importance of a father's presence at home and to consider alternative forms of sentencing.

Mental health

Fathers with a lower socioeconomic status report significantly lower levels of their children's internalising problem behaviour than mothers in the general population.⁴ Our study shows that father-reported internalising problem behaviour (e.g., anxiety and depressive behaviour) was relatively prevalent in children in the current sample. School-age children in particular showed rather high levels of internalising behaviour (nine per cent). These results are in line with earlier studies showing that children whose fathers have already been incarcerated display many risk factors for the development of health problems.⁵ This may be explained by the fact that prisoners—who have a higher incidence of mental health related problems than is found in the general public—often already suffer from similar kinds of health problems in the pre-incarceration period, coupled with the fact that parental mental health problems may affect children's

marijuana use, depression, and poor academic performance. *Criminology*, 50(1), 255-302. Wildeman, C. & Western, B. (2010). Incarceration in Fragile Families. *Future of Children*, 20(2), 157-177.

3 See: Hagan, J. & Dinovitzer, R. (1999). Collateral Consequences of Imprisonment for Children, Communities, and Prisoners. *Crime & Justice*, 26, 121-162. Murray, J. (2005), *op cit*.

4 Duhig, A.M., Renk, K., Epstein, M.K. & Phares, V. (2000). Interparental Agreement on Internalizing, Externalizing, and Total Behavior Problems: A Meta-analysis. *Clinical Psychology: Science and Practice*, 7(4), 435-453.

5 See: Glaze, L. & Maruschak, L. (2008). *Parents in Prison and Their Minor Children*. Bureau of Justice Statistics. Mumola, C. J. (2000). *Incarcerated Parents and Their Children*. Bureau of Justice Statistics Special Report. Bureau of Justice Statistics Special Report. Murray, J. (2005), *op cit*. Schnittker, J. & John, A. (2007). Enduring stigma: The long-term effects of incarceration on health. *Journal of Health and Social Behavior*, 48(2), 115-130.

1 Dirkzwager, A. J. E. & Nieuwebeerta, P. (2014). *Prison Project: Codeboek en Documentatie*. Leiden: Universiteit Leiden, NSCR.

2 Murray, J. & Farrington, D. P. (2005). Parental imprisonment: effects on boys' antisocial behaviour and delinquency through the life-course. *Journal of Child Psychology and Psychiatry*, 46(12), 1269-1278. Murray, J., Loeber, R. & Pardini, D. (2012). Parental involvement in the criminal justice system and the development of youth theft,

mental health issues both through biological factors and environmental factors (e.g., insufficient parenting and lack of attention for children).⁶

Physical health

Our study suggests that children with fathers who will soon be incarcerated show more chronic childhood medical problems when compared to the general population according to data from the Dutch National Institute for Public Health and the Environment.⁷ Children whose parents were facing imprisonment had considerably higher scores on back and neck complaints, migraine and abdominal pain. This is in line with previous studies that report that a lower socioeconomic status (which is associated with prisoners) is linked to morbidity and inferior life circumstances.⁸ Furthermore, a reduction of financial capacity linked to the imprisonment of a parent may cause a reduction of access to insurance and the availability of medical facilities for a family.⁹

Academic performance

Among other factors, we assessed the academic performance of children whose fathers were facing incarceration. Fathers reported on their children's reliance on special education programmes, as well as on communication problems, emotional and behavioural issues, developmental disorders and physical disabilities. Thirty per cent of the children had learning difficulties prior to their parent's incarceration. Moreover, twelve per cent of the children

6 See: Murray, J. & Farrington, D. P. (2008). The effects of parental imprisonment on children. *Crime and Justice: A Review of Research*, (37)37, 133-206. Van de Rakt, M., Ruiter, S., De Graaf, N. D. & Nieuwbeerta, P. (2010). When Does the Apple Fall from the Tree? Static Versus Dynamic Theories Predicting Intergenerational Transmission of Convictions. *Journal of Quantitative Criminology*, 26, 371-389. Wildeman, C. (2010). Paternal Incarceration and Children's Physically Aggressive Behaviors Evidence from the Fragile Families and Child Well-being Study. *Social Forces*, 89(1), 285-309.

7 RIVM. (2010). *Klachten en kwalen bij kinderen in Nederland*. Den Haag: Rijksinstituut voor Volksgezondheid en Milieu.

8 See: Johnson, E. I. & Waldfoegel, J. (2004). Children of incarcerated parents: Multiple risks and children's living arrangements. In Pattillo, D. W. M. & Western, B. (Eds.), *Imprisoning America: The social effects of mass incarceration* (pp. 97-131). New York: Russell Sage Foundation. Western, B. (2002). The impact of incarceration on wage mobility and inequality. *American Sociological Review*, 67(4), 526-546. Wildeman, C. (2012). Imprisonment and Infant Mortality. *Social Problems*, 59(2), 228-257. Wildeman, C. (2010), *op cit*.

9 Massoglia, M. (2008). Incarceration as exposure: The prison, infectious disease, and other stress-related illnesses. *Journal of Health and Social Behavior*, 49(1), 56-71. Wildeman, C. (2012). Imprisonment and (inequality in) population health. *Social Science Research*, 41(1), 74-91.

attended schools specially designed to educate children using individually planned teaching arrangements and intervention to achieve academic success; this is more than twice as high as the level found in the general population.¹⁰ Children of fathers facing imprisonment are expected to be affected by many factors outside the school environment that influence their academic performance. Studies have shown that many men in prison have attained relatively low formal educational levels. Studies investigating the educational levels among prisoners have shown that 22 per cent of prisoners assessed had not completed any level of education at the moment of arrest, and only ten per cent had completed elementary school or special education.¹¹ Studies have also shown that where levels of parental academic achievement are low, parents' expectations of their children's educational level will also be low, which in turn is found to be related to the children's actual academic performance.¹² Furthermore, low levels of engagement in parenting have been found to predict poor academic achievement; since the level of engagement is generally poorer in lower socioeconomic families, this could explain the low academic performance in the current sample.¹³

Delinquency

The fathers reported that eight per cent of the children included in the study had been arrested at some point, which is a high percentage of children compared to two and a half per cent in the Dutch general population.¹⁴ In addition, the frequency of juvenile detention sentences among the children was high. Fathers reported the rate of their children's juvenile detention as being four times higher than the rate in the general population. Regarding the behaviour of children prior to the

10 CBS (2011). *Jaarboek Onderwijs in Cijfers-Statistics Netherlands*. Den Haag: Drukkerij Tuijtel BV, Hardinxveld-Giesendam.

11 Mol, G. D. & Henneken-Hordijk, I. (2008). *Gedetineerd in Nederland 2007: Een survey onder alle gedetineerden in het Nederlandse gevangeniswezen*. Den Haag: Dienst Justitiele Inrichtingen Nederland.

12 Zhang, Y., Haddad, E., Torres, B. & Chen, C. (2011). The reciprocal relationships among parents' expectations, adolescents' expectations, and adolescents' achievement: a two-wave longitudinal analysis of the NELS data. *Journal of Youth and Adolescence*, 40(4), 479-489.

13 Murray, J. & Farrington, D. P. (2008), *op cit*. Murray, J., Farrington, D. P. & Sekol, I. (2012). Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis. *Psychological Bulletin*, 138(2), 175-210.

14 Laan, A. M. van der, Blom, M., Tollenaar, N. & Kea, R. (2010). *Trends in de geregistreeerde jeugdcriminaliteit onder 12- tot en met 24-jarigen in de periode 1996-2007. Bevindingen uit de Monitor Jeugdcriminaliteit 2009*. Den Haag: WODC Cahier 2010-2012.

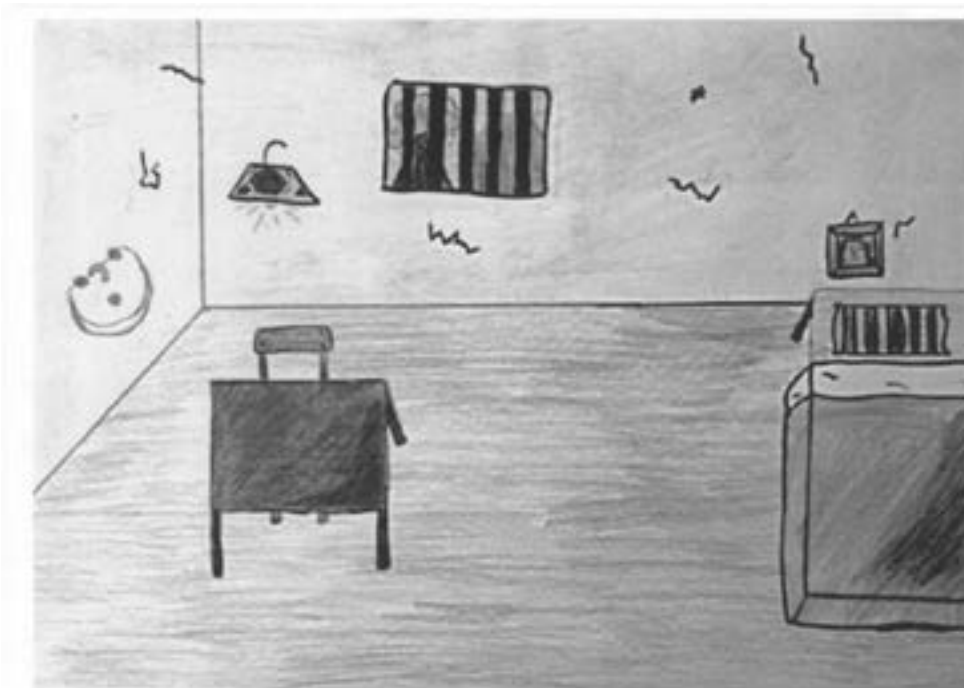
incarceration of their parent, our study found that the children regularly showed signs of externalising problem behaviour (e.g., rule-breaking and aggressive behaviour). School-age children in particular showed rather high levels of externalising behaviour (thirteen per cent), when compared to school-age children in the general population (nine per cent).¹⁵ This was expected, as previous studies had shown that children of fathers with externalising mental health problems are at risk of similar mental health problems themselves through intergenerational transmission¹⁶, and studies have previously demonstrated that prisoners show relatively high levels of externalising mental health problems.¹⁷

15 Verhulst, F. C., van der Ende, J., & Koot, H. M. (1996). *Handleiding voor de CBCL/4-18*. Rotterdam: Erasmus University/Department of Child and Adolescent Psychiatry, Sophia Children's Hospital.

16 See: Van der Rakt, M. et al. (2010), *op cit*. Van Meurs, I., Reef, J., Verhulst, F., & van der Ende, J. (2008). Intergenerational Transmission of Child Problem Behaviors: A Longitudinal, Population-Based Study. *Journal of the American Academy of Child and Adolescent Psychiatry*, 48(2), 138-145.

17 Fazel, S. & Danesh, J. (2002). Serious mental disorder in 23,000 prisoners: A systematic review of 62 surveys. *The Lancet*, 359, 545-550 and Schnittker, J. & John, A. (2007), *op cit*.

In summary, our study suggests that children of fathers facing incarceration frequently suffer from considerable disadvantages regarding their life circumstances and well-being when compared to children in the general population. Fathers reported problems regarding physical and mental health among their children, as well as problems with school performance and delinquency. Our findings point to several recommendations. First, the finding that children already suffer from many adverse life circumstances at the point of incarceration calls for a comprehensive consideration of the well-being of children of fathers who enter the criminal justice system; the instance of parental incarceration might be an excellent opportunity for intervention and the administration of age-appropriate social services. Second, we recommend further research to evaluate special parenting requirements for this unique group of vulnerable children. Third, the development and implementation of appropriate "needs assessments" for families in the sentencing process are necessary. If these were to be introduced, judges may be more inclined to take account of the necessity of a father's presence and support at home. Finally, if children are involved, we recommend a greater use of alternative forms of sentencing such as probation and electronic monitoring.



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