

Response to the Scottish Sentencing Council consultation on the sentencing process

September 2019

Established by the Commissioner for Children and Young People (Scotland) Act 2003 in accordance with United Nations Principles, the Commissioner is fully independent of the Scottish Government and is responsible for promoting and safeguarding the rights of all children and young people in Scotland. The Commission has powers to review law, policy and practice and take legal action to protect rights.

I. Introduction

We welcome the Scottish Sentencing Council (SSC) approach to developing their guidelines in order to promote greater consistency and increase public knowledge and understanding of the sentencing process. While we understand the SSC has already consulted and adopted the first set of guidelines on the principles and purposes of sentencing and will consult on a third set related to sentencing young people, this paper covers some issues that are interrelated to the first set of guidelines.

On a daily basis, criminal courts throughout Scotland impose sentences on offenders. Sentencing has a significant impact on children of incarcerated parents. Their rights under the United Nations Convention on the Rights of the Child (UNCRC) are affected by the criminal action of their parent and by the state's response to it when administering justice. Children of prisoners become the invisible victims of the errors of their parent and of our criminal justice system. This has been a longstanding concern for the office of the Commissioner which first reported the issue to the Scottish Parliament in 2008.¹

The impact of parental imprisonment on children are wide reaching and affect every area of their lives, including trauma, change of carer, change of home, stigma and shame, 'confounding grief' and increased likelihood of criminal offending, mental health problems and substance addiction.² As well as the emotional loss of contact

¹ Marshall, Kathleen, Scotland's Commissioner for Children and Young People (2008) Not seen, not heard, not guilty: the rights and status of the children of prisoners in Scotland.

² See for example, Loucks, N., Prison Without Bars: Needs, Support and Good Practice for Work with Prisoners' Families Research conducted for Tayside Criminal Justice Partnership and Families Outside, 2004. Available at www.familiesoutside.org.uk; Buist, M., More Than a Box of Toys. Edinburgh: Scottish Forum on Prisons and Families, and Save the Children, 1997 and Murray, J., Farrington, D. (2008) Effects of Parental Imprisonment on

with a parent or significant carer, children may suffer from financial disadvantage. It is however important to recognise that child-parent relationships are not always positive and healthy. Therefore, some children may benefit and experience relief where they have been abused or neglected by the imprisoned parent.

It is estimated that around 27,000 children experience the imprisonment of a parent each year in Scotland³ but the true figure is not known as there isn't proper mechanisms for identifying them. Statistics from the Prison Reform Trust indicate that 63% of prisoners in the UK have children. The lack of accurate statistics is in itself a problem. As the prison population continues to increase, so too do the numbers of children and young people affected by parental imprisonment. Worryingly these children's rights and voices are not properly considered in the sentencing process. We should not forget that children with imprisoned parents are entitled to the same rights as all children.

To date there are no separate guidelines on addressing the sentencing of parents. We consider that clear guidance is necessary.

This response covers a key point: the best interest of the child should be at the forefront of the sentencing guidelines. Measures that ensure child protection, including respect for the child's best interests, family life and privacy are integral to this. This should guide the penal process from the start of detention and after release. This paper provides six recommendations, which adopt a human rights based approach to sentencing.

Recommendations

- Sentencing guidelines should explicitly and clearly reference the best interest of the child and the UNCRC.
- Guidelines on the sentencing process need to be accessible, adequate and sufficient for children.
- Sentencing decisions should take account of the rights of children affected by the imprisonment of their parents.
- When a custodial sentence is expected, one way to consider the rights and best interests of any affected children should be to consider alternatives to detention, if appropriate and reasonable, especially in the case of a parent who is a primary carer.

Children. In Tonry, M. (Ed.), *Crime and Justice: A review of research* (vol 37.) (pp.133-206) Chicago, IL; University of Chicago Press.

³ McGillivray, C. (2016) *Rendering them visible: a review of progress towards increasing awareness and support of prisoners' families*. Edinburgh: Families Outside.

- Social Enquiry Reports must identify and assess the rights implications of a sentence for the children of a sentenced parent.
- Multi-disciplinary expert groups, involving children with imprisoned parents, should be established in order to assess how children experience parental imprisonment, and to suggest improvements to current policies and practices.

II. Legal and Policy Framework

- *United Nations Convention on the Rights of the Child 1989*: the right to family life (article 16); to benefit from the guidance of a parent (articles 5 and 14); to know and be cared for by parents (articles 7 and 8); and to be separated from parents only where that is in the child's interests (article 9). Article 3.(best interest of the child).
- *Human Rights Act 1998* incorporating the European Convention on Human Rights (ECHR) - Article 8: the right to respect for family life.
- *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010)*.
- *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.
- *Human rights based approach*: A rights based approach puts human rights principles and standards at the heart of policy; empowers both rights holders and duty bearers to achieve their rights; enables meaningful involvement and participation of all key stakeholders and ensures clear accountability mechanisms.

III. Children's voice

"In 2016, my Dad was sentenced to 4 years in prison. Over the last 3 years I have learned a lot. A lot of complicated language is used in the sentencing guidelines, not only is it not child-friendly, it's hardly public friendly.

I have the right to look at the process my Dad went through to understand better what was going on and what was happening. I recommend child-friendly versions of these guidelines as it's hard explaining such complex language to young children who have got a parent in prison and they have the right to know.

My voice, and the voice of many other children, are not considered at all during the sentencing process, the UNCRC states that we have rights to express our

views and opinions, and not have adults make the choices for us without consulting us. I also believe privacy is extremely important, especially in regard to the family of the person on trial. Information of our house numbers, our names, our ages, should not be shared with the public regardless of what crime the parent has been convicted of. It puts us in danger which is the complete opposite of the safeguarding rights we, as children, are entitled to.

I believe that from the sentencing process, we should be given support, not weeks or months down the line.”

Eilidh-Jane Carroll.

IV. Children’s rights in respect of a parent who is being sentenced: a rights based approach:

Human rights principles and standards at the heart of the guidelines

There are number of rights that are directly impacted by the imprisonment of a parent. Children’s rights are more fully set out in the 1989 United Nations Convention on the Rights of the Child, which the UK ratified in 1991. It is particularly important to build policies in the penal system that protect the child development and family reunification, where appropriate

Children have the same human rights as anyone else and this includes Art. 8 of the ECHR and Art. 16 of the UNCRC protecting the right to family life and Art. 2 of the UNCRC protects against discrimination. Art. 3 of the UNCRC is even more specialised and crucial as it requires that all actions concerning children undertaken by courts of law give primary consideration to their best interests. Art. 12 of the UNCRC, requires that children should be given the opportunity to be heard in all matters affecting them.

Furthermore, the UNCRC proclaims the child’s right to benefit from the guidance of a parent in Arts. 5 and 14 and to know and be cared for by parents in Arts. 7 and 8. Article 9 acknowledges that the separation might be caused by an action of the state, such as the imprisonment of a parent. Where that happens, the child should be given information about where the parent is, unless that would be against the child’s interests.

And, in all cases of separation, the Convention upholds the child’s right “to maintain personal relations and direct contact ... on a regular basis, except if it is contrary to the child’s best interests”. (article 9.3). It is important to note the importance of fathers as well as mothers. Children’s rights extend to contact with both, where that is in their interests.

Some human rights have limitations, for example the right to respect for private and family life can be interfered with if it can be shown to be authorised by law,

necessary to achieve a legitimate end and the action is proportionate. The deprivation of family life through imprisonment may be justified if it can be shown that the benefit gained from imprisonment is so great as to justify the interference with this right. However, imprisonment has notable consequences for the children of those in prison and the wider community. The act of separating a mother or a father from a very young child has a significant impact on the child's development.⁴ The more serious the interference the more compelling the justification must be.

The UNCRC requires courts of law to give serious consideration, and serious weight, to the rights of the children. This framework should be reflected both in the guidelines and sentencing decisions. That is why UNCRC incorporation in Scots law is so important to ensure that its principles and provisions are widely and systemically applied across Scotland, including in legal and administrative proceedings.

A key part of this is that sentencing guidelines reflect the best interest of the child in the content of those guidelines, thus promoting respect for the rights of the child and consistency across courts in Scotland. This is crucial as a court must have regard to any relevant sentencing guidelines when sentencing an offender. If a court decides not to follow the guidelines, the judge must state the reasons for that decision.

The right of children to access information falls within the general framework of human rights and UNCRC. This right is closely linked with the child's right to express views and have them taken seriously under Article 12 (UNCRC). Access to clear and adequate information is therefore particularly important for children's participation in holding their government accountable. The sentencing process itself is not always fully understood by the public, including children and young people. It is therefore our recommendation that a guideline on the sentencing process needs to be accessible, adequate and sufficient for children.

Recommendation 1.

Sentencing guidelines should explicitly and clearly reference the best interest of the child and the UNCRC.

Recommendation 2.

Guidelines on the sentencing process need to be accessible, adequate and sufficient for children.

Empowerment of rights holders and duty bearers to achieve their rights

⁴ See *R(on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151. See also South African Constitutional Court case of *S v M* (CCT 53/06) [2007] ZACC 18 which discusses the interests of an affected child and the specific provision within the Constitution that the court is required to consider.

Today, it is clear that physical separation of a parent and child has both short and long term impacts on children.⁵ There is a clear acknowledgement amongst judges that an offender having caring responsibilities is relevant to sentencing. *In ZH (Tanzania) (FC) Appellant v Secretary of State for the Home*,⁶ the UK Supreme Court made very clear that the welfare of the child should be at the forefront of the judge's mind.

There are also numerous examples where the sentencing judge failed to observe these principles in respect of children and their separation from their carer. In *R v Bishop*, the appellant, notwithstanding his caring commitments for five children aged between five and 13 years, was sentenced to two consecutive sentences of imprisonment.⁷

This data could be interpreted to show a lack of consistency in how this issue is treated in sentencing decisions and highlights the need for further clarity and guidance to judges. There are different approaches to take forward these considerations. One is by considering the rights of the child at the same time as taking account of factors relating to the offence, offender and impact on the community or two by considering the child's rights and welfare as separate to those of the offender. The South African courts adopt an approach that considers four things in sentencing decisions: the offence, the offender, the community and the dependents.⁸

It is paramount that sentencing judges give proper consideration in a sentence of detention or imprisonment to the rights of the children of offenders. This is consistent with the UNCRC. There is a lack of consideration of, and serious weight given to the rights of the children in the sentencing decision at the moment. This requirement should be embedded in the guidelines, to ensure that it is done in a consistent and systematic manner across Scotland.

Recommendation 3.

Sentencing decisions should take account of the rights of children affected by the imprisonment of their parents.

Enabling meaningful involvement and participation of all key stakeholders

Whether the sentencing judge would necessarily be aware of a dependent child when sentencing a parent is an important question that can be addressed by taking a right based approach to sentencing.

⁵ See for example Howard K, Martin A, Berlin LJ, Brooks-Gunn J. Early mother-child separation, parenting, and child well-being in Early Head Start families. *Attach Hum Dev.* 2011;13(1):5–26. doi:10.1080/14616734.2010.488119

⁶ [2011] UKSC 4

⁷ [2011] EWCA Crim 1446.

⁸ *M v The State* [2007] CCT 53/06 ZACC 18

While the information available concerning a child can differ vastly between courts, there is a need to ensure relevant information is available when courts are making sentencing decisions. This may be provided by a new mechanism in a form of cross-jurisdictional standardisation of information concerning children or by an existing mechanism available to the court today.

The sentencing judge could use the Social Enquiry Report (SER) to focus on identifying and assessing rights implications for the children of the sentenced parent as one aspect of the SER. Reports can be requested by the court for any case prior to sentencing. SER are also used to assist with sentencing decisions in some specific circumstances.⁹

SERs could be undertaken in a more consistent manner, and where it is safe to do so, include an interview with the children of a sentenced parent to ensure their views and welfare are not excluded from the sentencing process.

In practice this means that when a custodial sentence is anticipated one way to consider the rights and best interests of any affected children is to consider alternatives to detention, if appropriate and reasonable, especially in the case of a parent who is a primary caregiver. It is crucial that the judiciary examine the possibility of a reasonable suspension of pre-trial detention, the prison sentence and the possible replacement of it with community sanctions.

Sentence planning could also play a role to promote positive parenting and include programmes and other interventions that support and develop a positive child-parent relationship during imprisonment. This not only minimise the impact of imprisonment on their children but prepares parents and their children for family life after release.

Recommendation 4.

Social Enquiry Reports must identify and assess the rights implications of a sentence for the children of the sentenced parent.

Recommendation 5.

When a custodial sentence is anticipated, one way to consider the rights and best interests of any affected children should be to consider alternatives to detention, if appropriate and reasonable, especially in the case of a parent who is a primary caregiver.

A key aspect of a rights based approach is the empowerment of duty bearers (and right holders) to deliver their obligations under human rights law. Therefore, the steps recommended in this paper should be accompanied by further judicial training, which should be developed in conjunction with children and young people.

⁹ E.g. Courts must consider a report before: Imposing a sentence of detention on a person aged 16 – 20 (Section 207(4)) and (Section 203(1) of the 1995 Act.

Recommendation 6.

Multi-disciplinary expert groups, involving children with imprisoned parents, should be established in order to assess how children experience parental imprisonment, and to suggest improvements to current policies and practices.