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Children of prisoners: ‘orphans of justice’?

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The ever-increasing number of women being remanded or sentenced to custody has put the debate concerning female offenders back on the political agenda. Shortly before the 2013 summer recess, the Justice Select Committee published the findings of its inquiry into women offenders. A principal conclusion of the parliamentary committee was that the justice system does not recognise nor address the particular features and profile of the female offender. One significant feature, which is overlooked in the spotlight on the woman’s criminal behaviour, is that many of these women are mothers. A third of women prisoners are single mothers, with sole care and responsibility for dependant children (*‘Reducing Re-Offending by Ex-Prisoners’*, The Social Exclusion Unit, 2002) and 85% of all women prisoners have reported prison as the first significant separation from their child (D Caddle and D Crisp, *‘Imprisoned Women and Mothers’* [1997] *Home Office Research Study* 162).

Parental imprisonment inevitably impacts on a child’s welfare and development and Baroness Corston found the consequences of maternal imprisonment on children to be ‘nothing short of catastrophic’ (*The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System’*, 2007). It should be noted that paternal imprisonment has detrimental consequences for children. This article however looks at the implications of maternal imprisonment, particularly where the mother is the sole primary carer.

There is no statutory requirement on any of the agencies concerned with child welfare, nor the various branches of the criminal justice system, to collect or report data on the children of mothers in prison.

A Ministry of Justice review concluded that these children are ‘an “invisible” group’ (*Children of Offenders Review* (MoJ, 2007)). Available data is patchy but a broad picture of the care and welfare arrangements for children post-maternal imprisonment can be gleaned from a number of sources. Only 5% of children remain living in their own home (*‘Justice for Women’* (The Prison Reform Trust, 2000)), 9% are cared for by their biological father (The Corston Report, above) and 12% of children go directly into local authority care following sentence (*‘Women in Prison’* (HM Inspectorate of Prisons, 2005)). The majority of children therefore appear to be cared for in the first instance within family kinship networks. There is a significant possibility however that these children may not remain within the extended family long term. Grandparents may be too old, ill or disabled to cope. Sibling carers may be too young or emotionally immature. Financial pressure from ‘another mouth to feed’ may tip the balance and aggravate existing hardship to crisis point. In the absence of proper research, not enough information is known about how many initial kinship care arrangements breakdown with the child entering the care system further down the line.

Parent-child separation is profoundly traumatic in any circumstances but particularly so when the estranged parent is the primary carer. The evidence indicates a strong association between parental imprisonment, particularly maternal, and adverse outcomes for children. Children with imprisoned parents have been shown to display what may broadly be described as high levels of ‘antisocial’ behaviour. A child may feel emotions of anger, distress, confusion or fear following separation, which can translate into defiance,

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destructive and attention-seeking behaviour. A meta-analysis of five research studies exploring the association between parental imprisonment and anti-social behaviour in children found the average odds ratio was 3.4, indicating that parental imprisonment, compared with no history of parental imprisonment, approximately trebles the risk for antisocial-delinquent behaviour in children (J Murray and D P Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 *Crime and Justice: A Review of Research* 133–206). Home Office research echoes this with 44% of mothers reporting problems with their children's behaviour following imprisonment (D Caddle and D Crisp, 'Mothers in Prison', Home Office Research, Development and Statistics Directorate, Research Findings No 38, 1997). This study also noted a gender differential in that children of imprisoned mothers tended to have serious emotional and behavioural problems whereas the children of male prisoners experienced relatively minor problems.

Of children with a parent in prison 30% suffer from mental health disorders such as self-harm or depression compared with 10% of the general population (Reducing Re-Offending by Ex-Prisoners', above). Mothers in prison report the devastating effect separation has on their children's sense of security. One woman, a single mother of young children, said 'it has particularly affected my eldest son as he constantly talks about police, prisons and mummy being taken away. He is now being seen by our local mental health service' (R Epstein, 'Mothers in Prison: The Sentencing of mothers and the rights of the child' (2012) Special Issue: Research Report, *Coventry Law Journal*).

Whether children of imprisoned parents are at greater risk of offending behaviour is an area in need of closer research. A US report found maternal imprisonment to 'significantly' predict offspring offending ('Children of Prisoners- Maintaining Family Ties', Children's and Families' Services SCIE Guide 22, April 2008). Poverty, uncertain housing, strained care arrangements and poor emotional well-being inevitably impact on the child's educational motivation and perhaps unsurprisingly many children of prisoners have an increased likelihood of becoming

long term NEET's: Not in Education, Employment or Training ('Unlocking Value: How we all benefit from investing in alternatives to prison for women offenders', new economics foundation, 2008).

Added to the social cost for the children themselves, there is a concomitant economic price for wider society. A child in care who has multi-faceted needs that require repeated intervention from the health, education and youth justice professionals is extremely costly. A 2011 study analysed the unit costs of four sample children accommodated by the local authority for an 18-month period. Case study A examined the costs of a child with no additional needs and found the total expenditure to be £59,930. Case study B was a child with emotional and behavioural problems and the costs were £66,020. Case study C concerned a child with emotional and behavioural difficulties and offending behaviour. The costs totalled £366,004. Case study D looked at a child with disabilities, emotional and behavioural difficulties plus offending behaviour. The costs were £546,640 (L Curtis, 'Unit Costs of Health and Social Care 2011', Personal Social Services Research Unit, University of Kent, 2011). A quick back of the envelope calculation of the annual costs of imprisoning a woman with three children who are in local authority care and who suffer emotional behavioural and offending problems is simply staggering.

We have a sophisticated domestic framework for the safeguarding and protection of children's legal rights and welfare and the international framework provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) and the UN Convention on the Rights of the Child 1989 guarantees this further. In all actions taken by a public body, the interests of any relevant child must be a primary consideration. Therefore, when the criminal court determines the sentence of a mother and is considering a term of imprisonment, thereby effecting the forcible separation of mother and child, the child's legal rights are engaged and the criminal court has a duty to consider the best interests and welfare of the child.

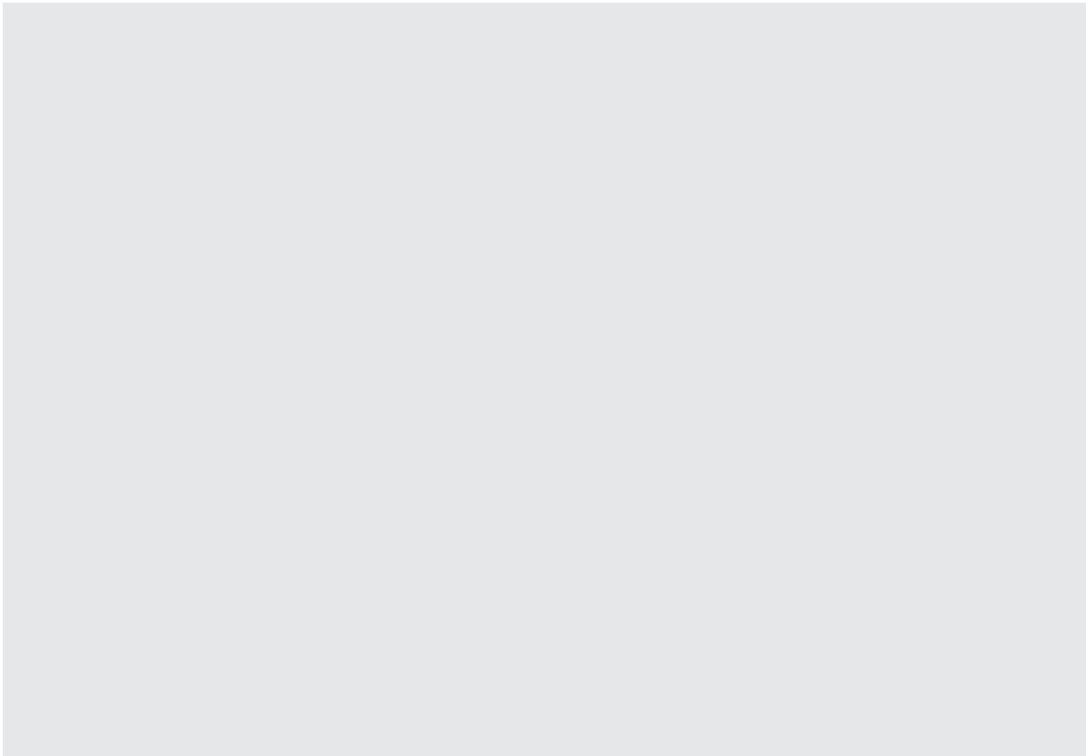
Case-law

So, how does the criminal court balance the competing and equally legitimate interests of punishment, deterrence, public protection and rehabilitation of the woman offender with the needs, interests and welfare of her children? The Court of Appeal gave guidance in the case of *R v Rosie Lee Petherick* [2012] EWCA Crim 2214. The defendant, a single mother of a 2-year-old child who had no contact with his father, pleaded guilty to causing death by dangerous driving and driving with excess alcohol. She was sentenced to 4 years and 9 months in custody. Sentence was appealed on the grounds that the court had failed to properly consider the Art 8 rights of her child. The Court held the correct approach to sentence is a three stage test: First, is there an interference with family life? Secondly, is it in accordance with the law and in pursuit of a legitimate aim? Thirdly, is the interference proportionate, given the balance between the legitimate sentencing objectives of

sentencing against on the other the Art 8 rights of dependent children.

To properly determine whether the sentence contemplated is or is not a proportionate balance between the child's best interests and Art 8 rights and criminal sentencing objectives, the Court of Appeal gave this guidance. The sentencing court must be fully informed about the domestic circumstances of the dependent children and how the proposed sentence may impact on their welfare. In borderline, cusp of custody, cases where the relevant interests are finely balanced, the interference with innocent children's Art 8 rights may tip the scales and an otherwise proportionate custodial sentence becomes disproportionate. Where a custodial sentence cannot proportionately be avoided, the impact and devastation a custodial sentence will have on the child provides grounds for mitigation, the extent of which will vary in the circumstances.

A 2012 research study analysed the sentences of 75 women, all of whom were mothers with children under the age of 18 living with them ('Mothers in Prison: The



Sentencing of mothers and the rights of the child', above). The sentences imposed were 51 sentences of immediate imprisonment, 19 suspended sentences, three custodial sentences reduced to a Community Order following appeal and two Community Orders. In none of the cases reviewed, including those before the Court of Appeal, were the Art 8 rights of the child explicitly stated as being considered in the sentencing exercise. In the 19 cases of suspended sentence, the sentencing judge made reference to the devastating effects a custodial sentence would have on the children of the mother and this might be interpreted as the court undertaking a consideration of the child's rights and balancing the welfare and Art 8 rights of the child against the seriousness of the offence.

In seven cases, the sentencing remarks made no reference at all to the defendant's dependent children. It was unclear how much information if any the sentencing judge had been provided with regarding the dependent children's welfare. In one case concerning benefit fraud, defence counsel expressly stated that the defendant had three young children and a custodial sentence would leave these children without a parent. The judge made reference to the children saying 'you have problems often around families and I have some sympathy for your own individual circumstances'. He went on to say 'you fit the guidelines exactly. I am afraid I cannot do anything else than to give you five months imprisonment immediately'. Another defendant, a single mother of four children aged 19, 9, 7 and 5, convicted of misfeasance in public office, was sentenced without the court hearing any evidence at all about the likely impact on her children or what arrangements would be made for their welfare in the event of a custodial sentence. The sentencing judge declined the assistance of a pre-sentence report saying, 'I am asked to adjourn sentence for a pre-sentence report. I am bound to say that I do not consider that a pre-sentence report would assist me.' It is striking to note the contrast between the family courts which determine the issue of forced parent-child separation after lengthy litigation involving detailed consideration of evidence from child welfare professionals and the parents and the criminal courts which appear so

casually to effect the same process yet without the detailed consideration of the implications for the child.

Post-maternal imprisonment, there is no obligation on the professionals within the criminal justice system to alert the relevant child welfare practitioners as to the existence of newly vulnerable children. A representative of Children's Services of a local authority commented in the Children of Offenders Review, 'I could have up to 2,000 children of prisoners in my area and I didn't even know about them' (above). The problem is compounded by a lack of coherent policy toward children of offenders. The Department of Children, Schools and Families states in its guidance that children of prisoners are a vulnerable category yet Local Safeguarding Children's Boards do not recognise them as such. It is unlikely therefore that these vulnerable children are targeted as potential children in need. Many no doubt remain under the radar, undetected, until circumstances reach crisis point.

Conclusion

It is clear that children of prisoners, particularly those whose parent is the sole carer, suffer adversely when their parent is imprisoned. The issue arises at the point of sentence where the differing objectives of the parallel criminal justice and child welfare systems collide. Matters are not assisted with an absence of a comprehensive policy thereafter for the welfare and care arrangements for the child during the term of parental imprisonment. The children are the collateral casualties who fall between the two systems. The following measures are suggested to bridge the objectives of each system.

- (1) The child's interests be represented during criminal sentence by a court appointed Guardian ad litem together with a specialist family lawyer. The Guardian would prepare a detailed report setting out the child's circumstances and relevant welfare matters to enable the court to fully consider the child's rights and properly undertake the balancing exercise set out in *Petherick*. This would also assist the judiciary maintain consistency in approach to the rights of the child during parental sentencing.

- (2) In the event that the court determines that a custodial sentence is proportionate and necessary, the criminal court or the Guardian should be required to make a formal notification to the relevant social services that there are children within their duty of care whose welfare may be at risk as a result of their mother's imprisonment.
- (3) Children of prisoners must be formally recognised as a potentially 'at risk' group. At the point of sentence, the child's rights and well-being should be proactively considered and monitored. There is an absence of official data concerning the dependent children of female offenders and this conspires to allow these vulnerable children to pass away unnoticed. An obligation to systematically collect and monitor data on children of prisoners ought to be imposed on the police, courts, probation service and prison estate as the parent passes through the criminal justice system.
- (4) Where a welfare concern arises as a consequence of sentence, for example, the ability of grandparents to adequately care for the child, the criminal court should be empowered by statute, along similar lines to that conferred upon the family courts by s 7 and s 37 of the Children Act 1989, to direct that the local authority undertake a welfare investigation. Any welfare concerns requiring judicial intervention thereafter would be dealt with on application to the family courts following usual procedure. The Guardian would act as a bridging link between the criminal and civil legal systems to ensure that the welfare of the child does not fall unnoticed between the two justice systems.
- (5) The UK is a signatory to the 2010 UN Rules for the Treatment of Women Prisoners (The Bangkok Rules). Rule 64 provides that non-custodial sentences shall be preferred for mothers with children and custodial sentences only considered where the offence is serious or violent, or the offender is dangerous and the children's welfare has been properly provided for. This principle ought to be at the heart of sentencing mothers and primary carers, particularly in circumstances where sentencing guidelines put the case on the cusp of custody. There should be a preference against short custodial sentences where the effects of the sentence can be disproportionately devastating for the child. If the offending behaviour attracts a sentence measured in days or weeks then priority must be given to the rights of the child to weigh more heavily in the balance. Sentencing policy in England and Wales should look to more constructive solutions for the sentencing of primary carers with dependent children. In Italy for example, there are statutory mechanisms to allow mothers of children aged less than three years to remain under house arrest as an alternative to prison (J Tomkin, 'Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned', (Quaker United Nations Office, 2009)). The Sentencing Council has recently included being a primary carer of children as mitigation relevant to the personal circumstances of the offender in the 2011 sentencing guidelines for assault. It is respectfully submitted that dealing with relevant children as mitigation for the offender is not the same as a detailed consideration of the child's rights and welfare.
- (6) The sentencing judge is currently obliged to give reasons for reaching the sentence passed and set out what factors have been considered. This duty could be enhanced in cases involving dependent children requiring an additional duty to set out how the judge has approached the rights of the child and what role this has played in the sentence reached. As with the giving of reasons for the sentence, this measure will provide clarity and greater consistency in approach toward the rights of the child in the criminal sentence.
- It seems counter-intuitive in these times of economic austerity and cuts to suggest measures which add to the burden on the justice system. Yet the disproportionately adverse impact of parental imprisonment on children, together with the staggering

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economic costs, mean a little investment designed to bridge the parallel family and criminal justice systems is a price worth paying.