Children and the sentencing of parents: report on discussion event with Scottish Sentencing Council

Edinburgh, 06 March 2017

ATTENDEES

Scottish Sentencing Council:	Lady Dorrian QC, the Lord Justice Clerk (Chair) Lord Turnbull (Judicial Member) Sheriff McFadyen (Judicial Member) Summary Sheriff Allan Findlay (Judicial Member) John Scott QC (Solicitor Member) DCC Iain Livingstone (Lay Member) Professor Neil Hutton (Lay Member)
Secretariat to the Council:	Graham Ackerman (Secretary) Carmen Murray (Policy Officer) Eileen Grant (Principal Legal Officer) Andrew Bell (Principal Research Officer) Michael Wilson (Administrative Officer)
Attendees:	Professor Nancy Loucks (Families Outside) Tam Baillie (Children and Young People's Commissioner in Scotland) Juliet Harris (Together Scotland) Yvonne Donald (Prison Reform Trust) Rachel Brett (Children of Prisoners Europe) Dr Shona Minson (Oxford University) Hon. Judge McFarland (Judicial Member, Sentencing Group for Northern Ireland) Paul Conway (Secretary, Sentencing Group for Northern Ireland)

Purpose and outcomes

1. The purpose and outcomes for the discussion event were circulated to all attendees in advance, as follows:

"To increase the Council's and other attendees' awareness and understanding of:

i. what rights children may have in respect of a parent who is being sentenced;

ii. *whether the court would consider it to be mitigation for an offender to have caring responsibilities;*

iii. *the practice in other jurisdictions in relation to children and the sentencing of parents;*

iv. *whether the court has a role in ensuring support for dependants when a custodial sentence is imposed on a particular offender; and*

v. *how information from the discussion event might be disseminated to the wider public by the Council, or reflected by the Council in guidelines or otherwise."*

Presentations

2. Each of the non-Council attendees introduced themselves briefly and provided an overview of the interests of their respective organisations. In particular, Rachel Brett provided an overview of international and regional standards in relation to the sentencing of parents, as well as state practice, and Dr Shona Minson provided a presentation[1] which was informed by her recent PhD research which analyses the place of children in maternal sentencing decisions (in England and Wales) and her previous Masters research which explored the impact of motherhood as mitigation in criminal sentencing. Dr Minson also provided an overview of the characteristics of the women's prison population.

Discussion

3. Following the introductory presentations, an open discussion under each of the purposes and outcomes took place, which is summarised below. It should be noted that the views expressed here are not necessarily those of the Scottish Sentencing Council.

I. What rights do children have in respect of a parent who is being sentenced?

4. There was lengthy discussion in relation to whether there is a distinction between the

[1] This is available alongside this report on the Scottish Sentencing Council website at scottishsentencingcouncil.org.uk

rights of a child as opposed to the best interests of the child in sentencing of parents, with reference to Article 8 of the European Convention of Human Rights (ECHR), Articles 2 (protection against discrimination), 3 (best interests of the child as a primary consideration) and 12 (child's right to be heard) of the United Nation's Convention on the Rights of the Child (UNCRC), and relevant case law including:

- the South African Constitutional Court case of S v M (CCT 53/06) [2007] ZACC 18 in which Justice Albie Sachs referred to the 'three legged stool' of offence, offender and community, becoming a 'four legged stool' when considering the interests of an affected child (there being specific provision within the Constitution that required the interests of an affected child to be "the paramount consideration"):

- *ZH (Tanzania) v SSHD* [2011] UKSC4, albeit relating to deportation, in which the Court of Appeal considered the correct approach to the Article 8 position of dependent children; and

- *R v Rosie Lee Petherick* [2012] EWCA Crim 2214 where the Court of Appeal, when considering an appeal against sentence of four years and nine months' imprisonment imposed on a single mother of a two year old child for causing death by dangerous driving, gave guidance on the effect of the sentencing exercise of the rights of the offender's dependent children or other family members under Article 8.

5. Attendees' opinions differed with regards to rights of the child versus best interests of the child in sentencing, with comment made that both concepts are subtly different. It was agreed that it might be helpful to look at the sentencing of parents with regard to the latter, for the purposes of the current discussion, rather than adopting a purely rights based approach.

6. There was discussion around whether Article 3 of the UNCRC is engaged when sentencing parents of children in Scotland; reference was made to the case of *R v Rosie Lee Petherick* (mentioned at para 4 above) which raised the question of

whether Article 3 was engaged in such cases in England and Wales. The court in that case (at paragraph 25) found it difficult to imagine that the sentencing of an adult with children could properly be seen as a decision "concerning children" for the purposes of the UNCRC, and noted that Article 9 of the UNCRC makes clear that separation of a child from a parent can occur as a result of imprisonment. In any case, the court in that case found it unnecessary to resolve that question, because ultimately the case could be decided on Article 8 ECHR grounds.

7. Discussion also focused upon the engagement of Article 8 ECHR and the balancing exercise between the best interests of the child and the legitimate aims of sentencing, with particular reference to those cases on the cusp of custody and whether the best interests of the child could tip the balance.

8. Consideration was given, in the context of the best interests of the child, to whether the lack of practical arrangements for the care of the child is a relevant consideration when a custodial sentence is to be imposed and whether this could affect the type of sentence imposed.

9. Whether there is scope in different types of disposals available to take account of the effect of the sentence upon children directly affected was also discussed, with particular reference to community payback orders; for instance, could a CPO potentially be used to require a parent to address any adverse effects on their children?

II. Does the court consider it to be mitigation for an offender to have caring responsibilities?

10. There was an acknowledgement amongst attendees that an offender having caring responsibilities is relevant to sentencing. However, discussion reflected a divergence in opinion as to how caring responsibilities should be treated in sentencing.

11. Some attendees expressed the view that caring responsibilities also covered emotional attachment by the child to that parent, and those responsibilities should therefore be treated as a mitigating factor during the sentencing process. The emerging body of evidence of emotional attachment forming in the early years of a

child's development was referred to.

12. Other attendees expressed the view that caring responsibilities should be taken account of at the same time as taking account of factors relating to the offence, offender and impact on the community. In particular, it was suggested that there was a danger that if treated otherwise, caring responsibilities could be regarded as a "get out of jail free card", giving parents an unfair advantage.

13. Alternatively, some suggested that as the child's rights and welfare are separate to those of the offender, these should be reflected in an entirely separate stage of sentencing rather than as a mitigating factor.

14. Specific reference was made to the Court of Appeal's decision in *R (on the application of P) v Secretary of State for the Home Department* [2001] 1 WLR 2002*,* when the Court of Appeal indicated that a sentencing judge should, consistently with Article 8 ECHR, have at the forefront of his or her mind the consequences for children if their sole carer was sent to prison and consider whether, on balance, the seriousness of the offence justifies the separation of child and carer. Reference was also made to the case of *R v Bishop [2011] EWCA 1446,* in which the appellant, notwithstanding his caring commitments for five children aged between five and 13 years throughout the week, was sentenced to two consecutive sentences of imprisonment. The Court of Appeal, in allowing the appeal, referred to the sentencing judge failing to observe these principles in respect of children and their separation from their carer.

III. What is the practice in other jurisdictions?

15. There was general discussion of the approach taken in other jurisdictions, based largely on the presentations made at the start of the meeting.

16. In particular, reference was made to data collected from courts in England and Wales between 2003 and 2011 and the reduction of sentence on appeal of 21 out of 27 cases from the lower courts - child dependants not being given proper weighting was cited as one of the reasons for reduction. Some attendees expressed concern that this data could be interpreted to show a lack of consistency in how child dependants are treated in sentencing decisions.

IV. Does the court have a role in ensuring support for dependants when a custodial sentence is imposed?

17. Attendees accepted that an unfortunate consequence of a custodial sentence might be the absence of any adequate arrangements in place for a dependent child's care at the time of sentencing. One attendee commented that there is an assumption made that other carers will become available if a parent of a dependent child is imprisoned, but that this is a dangerous and false assumption to make. The rationale for this assertion was that although an alternative carer will make his or herself available, this is not always in the best interests of the child, with some family situations becoming harmful for that child after the parent's imprisonment.

18. Some attendees also expressed the view that it is the responsibility of the state to make the necessary provision for the care of a dependent child when their parent faces imprisonment, rather than the court. Others commented that they considered there was a gap at present in terms of who takes ownership in such situations. A concern was expressed by some that, currently, there may be no responsibility taken by the state, the courts, or any other agency.

19. One attendee proposed that, although the court does not take responsibility for the child, it could be more proactive concerning the impact on the child insofar as seeking the relevant information from agencies – for instance, asking what arrangements had been made in relation to the ongoing care of the child – and that this alone might be an important role for the court in prompting the relevant agencies to take action.

20. A question was raised around whether the sentencing judge would necessarily be aware of a dependent child when sentencing a parent. There was an acknowledgement amongst attendees that the information available concerning a child can differ vastly between criminal and civil cases, with a far more child-centric approach taken in the latter (in family law cases, it was noted that children are generally considered to be at the centre of the process). It was suggested that some form of cross-jurisdictional standardisation of information concerning children may be necessary.

V. How might information from this event be disseminated to the wider public by the Council, or reflected in guidelines or elsewhere?

21. It was agreed that a short note of this meeting could usefully be published on the Council's website, highlighting the topics discussed and key points for further consideration.

22. The majority of attendees welcomed the possibility of a guideline addressing sentencing of parents, agreeing that this would be the best way forward to ensure consistency.

23. It was suggested by some that further judicial training in this area might also be useful in promoting consistency, particularly with regard to highlighting relevant issues, research, and existing case law.

24. Comment was also made that significant reform work is ongoing within the criminal justice system at present and that this may be a practical time to promote joined up working and to highlight some of the issues discussed – for instance, with regard to the availability of information about children when courts are making sentencing decisions.

Conclusion

25. The Council agreed to consider the issues raised in the course of discussion in taking forward the development of future guidelines. In particular, taking into account the specific points noted above, further consideration may be warranted in relation to the following areas:

- how caring responsibilities should be taken into account during the sentencing process – whether as a mitigating factor, a factor to be considered alongside other offender and offence specific factors, or at a separate stage altogether;

- to what extent such responsibilities should influence sentencing decisions, particularly where separation of a child and their primary carer is a possibility;

- how other jurisdictions have addressed this issue and the potential applicability of these approaches to Scotland; and

- whether there may be a role for the court in seeking additional information about children who may be affected by sentencing decisions, including whether any provision has been made for their care and welfare.

ATTENDEE BIOGRAPHIES

Prof. Nancy Loucks

Nancy is the Chief Executive of Families Outside, a national Scottish voluntary organisation that works on behalf of families affected by imprisonment. Prior to this she worked as an Independent Criminologist, and in 2012 was appointed as Visiting Professor at the University of Strathclyde's Centre for Law, Crime and Justice.

Rachel Brett

Rachel is a Fellow of the Human Rights Centre, University of Essex, and a member of the Advisory Committees of Human Rights Watch Children's Rights Division. She is an individual member of COPE (Children of Prisoners Europe) and was part of the 3-year EU funded COPING project researching mental health and resilience of children of prisoners.

Yvonne Donald

When this event was held, Yvonne worked for the Prison Reform Trust (PRT) as the Programme manager for Reducing Women's Imprisonment in Scotland & Northern Ireland**.** Prior to working with PRT, she held various roles in equality education for both third sector organisations and the Scottish Government.

Dr Shona Minson

Shona has practised criminal and family law and undertaken research at the Centre for Criminology, University of Oxford, which analyses the place of children in maternal sentencing decisions in England and Wales. She is also part of I-Hop Academic/ workforce development task force - an initiative to bring together resources and those with an active interest in the children of prisoners.

Juliet Harris

Juliet is the Director of Together (Scottish Alliance for Children's Rights) and leads the organisation in promoting and monitoring the implementation of the UN Convention on the Rights of the Child across Scotland. This includes, among other things, working with

Together's membership of over 300 children's organisations and professionals to produce an annual State of Children's Rights report.

Tam Baillie

When this event was held, Tam was the Children and Young People's Commissioner. He took up this post in 2009 after working as a manager and practitioner with children and young people for over 30 years. The Commissioner has a duty to promote and safeguard the rights of children and young people in Scotland under the age of 18 (and those under 21 if they have ever been in the care of, or looked after, by a local authority).

His Hon Judge David McFarland, Judicial Member, Sentencing Group for Northern Ireland

Judge McFarland has been an ex officio member of the Lord Chief Justice's Sentencing Group, firstly as the Judicial Studies Board (JSB) Tutor Judge and then as the Presiding County Court Judge, since the Group's creation in 2010. He was Tutor Judge for the JSB for Northern Ireland from 2002 to 2012, and was appointed the Presiding County Court Judge and Recorder of Belfast in 2012.

Paul Conway, Secretary, Sentencing Group for Northern Ireland

Paul has been the Secretary to the Lord Chief Justice's Sentencing Group since its creation in 2010. He was appointed a Deputy District Judge (Magistrates' Court) in June 2010 and has worked as a Principal Legal Officer, and a public prosecutor.