

Imprisoning mothers: Where do children's rights come in?

Women in prison

Most women are imprisoned for less serious, non-violent offences. In England and Wales, nearly 60 per cent of sentenced women in prison serve sentences of six months or less, some in custody for very short periods. Despite the courts' power to suspend sentences of 24 months or less, there remains an overuse of short custodial sentences for women. One in four women sent to prison in 2016—more than 1,500—were sentenced to 30 days or less; 300 of them were put in prison for under two weeks¹. Use of pre-trial remand in custody for women is high, with 40 per cent of women entering prison on remand². This overuse of imprisonment for women on remand or convicted of minor offences raises issues of human rights for both women and children.

The effects of parental imprisonment

National and international studies have demonstrated the negative effects on children of having a parent in prison³. The multinational EU-funded study 'Children of prisoners: Interventions and mitigations to strengthen mental health' on the mental health of children of prisoners across four European countries found that a majority of children reported adverse effects⁴.

1 Merrick, R. (2017, 27 December). 'Women hit hardest by "shameful" short prison sentences, new figures reveal'. *The Independent*. Retrieved from <https://www.independent.co.uk/news/uk/politics/women-prison-sentences-short-jailed-periods-less-month-inmates-minor-offences-children-labour-a8124896.html>.

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

3 Murray, J. Farrington, D.P, Sekol, I. (2012). 'Children's antisocial behavior, mental health, drug use and educational performance After Parental Incarceration'. *Psychological Bulletin* 138(2), 175-210.

4 Robertson, O. (2015). 'Child rights: Some long-term perspectives'. *European Journal of Parental Imprisonment* 1. Children of Prisoners Europe, Paris, 22-23.

Rona Epstein & Claire Powell

Coventry University Law School
King's College London

A recent study from L. Baldwin and R. Epstein (2017), 'Short but not sweet: A study of the impact of short custodial sentences on mothers and their children', highlighted the significant negative impact on children whose mothers served short periods in prison⁵. Shona Minson's study 'Direct harms and social consequences: An analysis of the impact of maternal imprisonment on dependent children' revealed the far-reaching consequences of maternal imprisonment for dependent children⁶.

The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is the specific international instrument intended to secure children's rights. It was adopted in 1989 and entered into force in 1990. Article 3 (1) of the UNCRC reads as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The principle of the best interests of the child must be applied if a parent is incarcerated, as parental incarceration infringes upon the right of the child to parental care⁷. The UN Committee on the Rights of the Child has indicated that the best interests of the child of a defendant or an imprisoned parent must be considered carefully and independently by 'competent professionals and taken into account in all decisions related to detention, including pre-trial

5 Retrieved from <https://www.dora.dmu.ac.uk/xmlui/handle/2086/14301>.

6 Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067687.

7 Liefwaard, T. (2015). 'Rights of incarcerated parents: Towards more procedural safeguards'. *European Journal of Parental Imprisonment* 1. Children of Prisoners Europe, Paris, 13-15.

detention and sentencing, and decisions concerning the placement of the child’.

The UK Supreme Court

Lady Justice Hale cited the need to consider the best interests of the child in a Supreme Court case in 2011 concerning deportation of a mother of young children⁸. She stated: ‘For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC’:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The UNCRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- a. the best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
- b. the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).

The European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950

The crux of the UNCRC is the principle of the best interests of the child. The ECHR, however, protects the child’s interests through the right to respect for private and family life. Article 8 of the ECHR states that everyone has the right to respect for private and family life. Under Article 8 (2), any interference with this right must be in accordance with the law, in pursuit of one of the legitimate aims provided for in Article 8 (2), and must be ‘necessary in a democratic society’. Imprisonment of a father or mother entails the forcible separation of a child from their parents and therefore impacts on the child’s Article 8 rights. Sentencing courts are required to obtain information on dependent children and then conduct a balancing exercise weighing the Article 8 rights of potentially affected children against the seriousness of the parent’s offence.



The Human Rights Act 1998 (HRA)

In the UK, the HRA obliges all public bodies, including courts, to comply with the rights contained in the European Convention on Human Rights. When courts sentence a mother with care of a dependent child, the Article 8 rights of the child are engaged. It is clear from both the UN Convention on the Rights of the Child and the European Convention on Human Rights that the rights and best interests of the child must be a primary consideration when a court of law is considering a decision which may cause separation from a parent due to incarceration.

A leading case in the Court of Appeal

R (on the application of P and Q) v Secretary of State for the Home Department ([2001] EWCA Civ 1151) was a Court of Appeal case concerning the prison rule providing that babies in a Mother and Baby Unit had to leave the unit at the age of 18 months. Two mothers, P and Q, challenged the inflexible application of that rule. Giving the judgment of the Court, Lord Justice Phillips stated that, in sentencing a mother with dependent children, the child’s rights have to be weighed against the seriousness of the offence in a ‘balancing exercise’. Thus magistrates and judges must:

- a. acquire information about dependent children;
- b. balance the Article 8 rights of the child against the seriousness of the mother’s offence.

These principles were confirmed in *R v Petherick* [2012] EWCA Crim 2214, where Lord Justice Hughes stated: ‘First, the sentencing of a defendant inevitably engages not only her own Article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children’.

Research on sentencing

Recent research explored to what extent, if at all, the required balancing exercise, as set out by Lord Justice Phillips in the case of *P and Q*, is performed in the English sentencing courts and whether the courts are complying with the Human Rights Act in this respect. Seventy-five cases of the imposition of custody (suspended and immediate) on mothers who care for a dependent child were studied⁹.

In the sentencing remarks, there was no evidence of any specific consideration of the Article 8 rights of the child. There was wide variation in how dependent children appeared to be considered in sentencing, with the stress on the welfare of children rather than

⁹ 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>.

⁸ *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4.

on the child's rights. In some cases, the court made no mention at all of the accused's children. In others, the courts alluded to the trauma and misery caused to the children, but blamed the defendant, did not consider the rights of the children and did not appear to impose an alternative or reduced sentence¹⁰.

Training the judges

Shona Minson of University of Oxford¹¹ produced training materials, launched in February 2018, which 'highlight the need for all criminal justice professionals involved in sentencing to ensure that children's welfare is safeguarded and their rights observed when their primary carer is sentenced'¹². There are four training films: for the judiciary, legal professionals, probation staff and defendants.

Separation of mother and child due to maternal imprisonment

For mothers with children aged under 18 months, there is the possibility of a joint stay in a prison Mother and Baby Unit (MBU)¹³. However, unless a woman gives birth during her prison sentence and moves straight to an MBU, she will be separated from her young child for a period of time whilst she is on remand and/or when first sentenced because she cannot apply for an MBU place until she is imprisoned. Decisions for MBU placement are made by social services, with prisons only occasionally overriding decisions¹⁴. Mothers with previous social services involvement, drug and alcohol addictions and mental health difficulties are generally excluded from MBUs in England and Wales; thus most mothers in prison are not eligible for MBUs. Indeed, research shows that mothers on MBUs are not, in fact, representative of women in the wider prison population¹⁵.

10 Epstein, R. (2018). 'The imprisonment of mothers harms the interests of their children'. *Transform Justice*. Retrieved from <http://www.transformjustice.org.uk/the-imprisonment-of-mothers-harms-the-interests-of-their-children>.

11 See Minson, S., Nadin, R., Earle, J. (2015). 'Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children'. Prison Reform Trust, London; Minson, S. (2017). *Who cares? Analysing the place of children in maternal sentencing decisions in England and Wales* (Doctoral dissertation). University of Oxford.

12 Minson, S. (2018). 'Safeguarding Children when Sentencing Primary Carers'. Retrieved from <https://shonaminson.com/information-for-primary-carers-facing-sentencing-in-the-criminal-courts/>.

13 'Prison life: Prison pregnancy and childbirth in prison'. Retrieved from <https://www.gov.uk/life-in-prison/pregnancy-and-childcare-in-prison>.

14 Powell, C. (2018). *Mother-infant separations in prison: Problematising attachment theory in policy and practice* (Unpublished doctoral dissertation). Middlesex University, London.

15 Birmingham, L., Coulson, C., Mullee, M., Kamal, M., & Gregoire, A., (2006). The mental health of women in prison mother and baby

Whilst all separations from children are acknowledged as 'traumatic' for mothers in relevant prison policy, there are few details as to how mothers and children should be supported in England and Wales¹⁶. Interviews with prison staff in England revealed that MBUs had detailed procedures to support mothers following a joint stay in an MBU¹⁷. However, staff were concerned that once women returned to the main prison, the impact of separation was no longer acknowledged. In addition, they pointed out that women who arrived into prison separated from their children and who did not have the opportunity to access an MBU were even less likely to receive any support.

This lack of support is reflected in findings that separation from children is reported to be the leading cause of self-harm and suicide for women in prison¹⁸.

The severe impact of separation on mothers' mental health is clear throughout the literature¹⁹. This has serious implications for a mother's ability to parent her child on release from prison or to regain custody of her children. Previously imprisoned mothers reported that the lack of housing and rehabilitative support on release from prison made it more difficult for them to recover their children²⁰. Prison staff expressed frustration that mothers' prison sentences were sometimes used by violent partners as an opportunity to gain custody of the children and prevent further contact with their mothers. Furthermore, staff felt that social services did not provide adequate support and, in some cases, prevented children from visiting their mothers in prison. Any period of time without visits might be used to support placing children in local authority care, resulting in permanent separations of children from mothers, even if prison sentences are short.

Short prison sentences to end?

The Ministry of Justice is considering banning prison sentences of less than six months, following Scotland's example. This would require legislation, and we cannot be confident that such a reform will in

units. *Journal of Forensic Psychiatry and Psychology* 17, 393-404.

16 Powell, Marzano, L., & Ciclitira, K. (2017). Mother-infant separations in prison: a systematic attachment-focused policy review. *Journal of Forensic Psychiatry & Psychology*, 28(2), 274-289.

17 Powell, C. (2018).

18 Department of Health & Home Office & Ministry of Justice (2017). 'Preventing the deaths of women in prison: Initial results of a rapid information gathering exercise by the Independent Advisory Panel on Deaths in Custody'.

19 Gregoire, A., Dolan, R., Birmingham, L., Mullee, M., & Coulson, D. (2010). The mental health and treatment needs of imprisoned mothers of young children. *Journal of Forensic Psychiatry & Psychology*, 21(3), 278-392.

20 Powell, C. (2018).

fact take place. Nevertheless, it is a hopeful sign that this discussion has been opened.

Conclusion

Ultimately, the impact of imprisoning women on remand or on short sentences for minor convictions has far-reaching implications for children. Only 5 per cent of children with a mother in prison stay in the family home and they face a range of negative outcomes²¹. The best interests of both mothers and children would be met if Corston's

(2007) recommendations were implemented²². In particular, her call for custodial sentences only for serious and violent offences would immediately reduce the number of mother-child separations, avoiding any infringements of children's rights and unnecessary suffering of both women and children. Whilst the possible ban of short sentences is a hopeful sign, in the meantime sentencers have a responsibility to safeguard children and uphold their rights through the required balancing exercise to ensure fewer children's lives are disrupted by maternal imprisonment.

21 Dallaire, D.H., Zeman, J.L., & Thrash, T.M. (2015). 'Children's Experiences of Maternal Incarceration, Specific Risks: Predictions to Psychological Maladaptation'. *Journal of Clinical Child & Adolescent Psychology*, 44(1), 109-122.

22 Corston, B.J. (2007). *The Corston report: The need for a distinct, radically different, visibly-led, strategic, proportionate, holistic, woman-centred, integrated approach*. London: Home Office.