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Response to	Right to family life: children whose mothers are in prison
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1. Whether human rights considerations are adequately articulated in current sentencing guidelines and practice?

The sentencing guidelines state that if an offender is “sole or primary carer for dependent relatives” then this can be considered as personal mitigation. In relation to the imposition of custody, whether this would result in a disproportionate outcome due to impact on dependants has to be taken into account. However, children are not named as specific holders of rights that would make them distinct from other dependants.

Human rights considerations are generally clearly understood by magistrates, but the MA appreciate that more training and explicit reference in guidelines would be useful, especially in relation to the rights of the child in the context of sentencing decisions. Unless they have received more specialised training through sitting in either youth or family jurisdictions, sentencers in adult criminal court are not experts in the rights of the child. This may well result in limited understanding and appreciation of the relevant complexities of the appropriate law and practice, especially how these rights should be considered within the context of sentencing decisions.

In general, the rights of the child within adult criminal court are referenced through Article 8 of the Human Rights Act, which is the right to a family life. There is no specific training on the United Nations Convention on the Rights of the Child (UNCRC), associated general principles and other soft law which are universally accepted as the appropriate legal framework for ensuring the rights of children are fully respected. This means there is no training on many of the complicated issues linked to ensuring the full expression of child rights. For example, the distinctions between taking a paternalistic approach and maximising autonomy of a child; the distinction between rights of the parental figures or primary carers and their associated responsibilities; and the interaction and co-dependency of parental and child rights.

There are also possible issues in relation to practice in relation to ensuring the rights of dependent children are respected and protected, including how to balance their rights, what approach should be taken in considering best interests and how to ensure children are heard where appropriate.

The current training and guidance provided to sentencers in adult criminal court focuses on the need to balance different rights, however how to deal with the rights of the child within this framework is not fully explored. Article 3 of the UNCRC states that the best interests of the child should be the primary consideration for all actions concerning children. However basic training on human rights may only describe the balancing of rights, without looking at how the primacy of child rights should be interpreted in the context of sentencing parents. Obviously any decision must be proportion, but how the best interests of children should be balanced with sentencing principles (in accordance with the law) is an important decision which is not covered in detail either in the current guidelines or training.

A particular concern is in relation to the rights of a child as set out in Article 12 of the CRC, which states that children who are capable of forming their own views should be provided with the opportunity to be heard in judicial proceedings which will affect them, and their views be given due weight. The importance of this right has been underlined in academic writing, most recently in an edited book called 'Rewriting Children's Rights Judgements', which stated this right was particularly important given children's 'limited ability to assert their rights through other democratic processes'.¹ Information about the views of children about a possible sentence, as well as possible impacts on their lives if a primary carer is given an immediate custodial sentence, is currently provided by the primary carer themselves, rather than either directly from the child/children or someone specifically representing their views. There is currently no provision for children to be heard directly by a sentencing court, and it may be challenging to allow this, although it should be noted that child witnesses can be accommodated using special measures if necessary. However it would also be possible for children to be interviewed by specialist professionals, who can then ensure their views are represented to the National Probation Service (NPS) when writing a Pre-Sentence Report. In some cases, professionals such as support workers or CAFCASS officers may already be involved in representing the views of the children.

There is a direct link to ensuring there is an opportunity for children who may be impacted by sentencing decision to be heard and said opportunity affecting the outcome, as sentencers will have the necessary information to make the right decision. However there are other likely benefits. These include the development of children as autonomous individuals and the positive effect of participation on children fully understanding both the process, and how a decision was made. For those cases where custody is unavoidable, it would be important for children affected to understand why their rights had to be disrupted and be able to trust that the decision was fair. Allowing fair and effective participation can increase confidence in the decision, as well as greater understanding.

Another issue identified by academics was a presumption by judges to see children not as holders of rights but rather as objects of concern. This can be linked to situations where the best interest and welfare tests are conflated. In fact, they refer to two distinct approaches: the welfare test is arguably a paternalistic approach which focuses on the protection of children but does not necessarily encourage the full expression of rights, as the best interest test does by considering children as rights holders. So there can be a tendency for judges to side-line children and primarily consider the perspective of parents instead. Sentencing decisions which

¹ Edited by Stalford, Hollingsworth & Gilmore (2018)

rely on information gathered from primary carers on the likely impact of custody on their children would be a key example of this.

2. Should there be a stronger presumption against custodial sentences for mothers (or other primary carers) with dependent children?

The importance of interpreting how the impact on children should be balanced with sentencing principles, but it is also important to ensure sentencers are provided with sufficient information to make sentencing decisions. The MA notes that currently women may be reluctant to give details to probation officers about caring responsibilities. Hopefully work such as the videos produced by Dr Shona Minson will raise awareness about the issue. However, it might also be useful to look at possible changes to practice to ensure that there is sufficient time and space for this information to be sought from mothers and other primary carers. This would involve making sure that probation interviews with defendants are in a suitable environment and carried out in a way that encourages mothers to discuss personal issues and concerns about their children.

It might also be worth considering whether input from social services or other agencies may be necessary to enable the NPS to present a full report to sentencers on the possible impact of a sentence on children. In order to ensure that the rights of any children are fully respected, the impact of a custodial sentence on not only their right to a family life, but also their rights as set out in the CRC – for example relating to education and development rights - should be considered.

It is also vitally important that all sentencers and probation staff have a better understanding of this issue from a rights of the child standing. For example, the CRC Article 12 sets out the right of children to participate in decisions that affect them. This is a complex issue, which should involve considering not just the age and maturity of the child, but the decision being made. The autonomy of the child, and their right to develop as an individual, is also important.

It is also an important issue that currently sentencing decisions do not take account of what the situation would be if an offender was given a custodial sentence in terms of continuing contact with dependants. For example, where the offender is to be held will impact on opportunities for continued contact.

3. Whether children whose mothers (or other primary carers) are in prison are protected by the current legislative and guidance framework for safeguarding and promoting the welfare of children?

It must be acknowledged that there are situations where an offence is so serious that custody is the only option, even taking account of the impact on children or dependants. In those situations, it is important that attention is paid on how to maximise the expression of child rights.

The MA is aware of concerns about problems with mother or primary carers in relation to contact arrangements, and it is resolve problems.

4. What are the most appropriate non-custodial sentencing options for mothers?

If the non-custodial option is to minimise negative impact on children, then minimising change and maximising positive contact must be key.

There are potential issues relating to the use of secure residential centres as a sentencing option (whether a mother is required to remain at the centre or is there for treatment), as it may be inappropriate for children to stay with them, even if this facilitates continued direct contact. However, contact can still be maximised if the mother is geographically close to children, making contact easier.

From a child rights perspective, no change to home and access to education will minimise negative impact – so any options that allow the primary carer to remain in the home would be preferable.

Possibly, looking at use of Electronic Monitoring to restrict liberty without change to the lives of any children may be an option.

The MA would also like to take the opportunity to reiterate comments made in recent consultations relating to probation in relation to the lack of robust community options that are gender-specific, that can impact on the alternative to custody options available to sentencers. We have raised concerns have been raised about the availability of appropriate community options for women offenders in particular.² It would also be useful to consider the impact of available community options on dependent children: for example research has shown that probation offices are also not good places to take children so there may be negative impacts on children whose primary carer has to attend supervision appointments at probation offices.

5. How data about this group should be collected and shared.

² See <https://www.magistrates-association.org.uk/news/female-offender-strategy>;
<https://www.magistrates-association.org.uk/news/future-probation-services-0>