

# Evidence on the sentencing of mothers for the All Party Parliamentary Group Inquiry into the Sentencing of Women

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The submission relies on data collected as part of the research I conducted for the ESRC funded study 'Who Cares? Analysing the place of children in maternal sentencing in England and Wales', University of Oxford, 2017. I am willing to provide additional evidence to the Inquiry if requested.

## Introduction and Overview

This paper provides an outline of the duties of a sentencing court to consider dependents when sentencing a mother/ primary carer and then summarises the findings from research I undertook with 20 Crown Court judges on their consideration of dependent children within maternal sentencing decisions. It sets out why the findings on Crown Court practice lead to concerns about the sentencing of women in Magistrates courts, before submitting that to produce real change in the sentencing of women, particularly those who are mothers, the following are necessary:

1. A Sentencing Guideline on the sentencing of primary carers which includes the necessity for a court to have a pre-sentence report prepared in every case in which a primary carer is before the court for sentencing and a presumption against short custodial sentences
2. If Magistrates wish to impose a custodial sentence the decision must be referred to a Crown Court judge

## The duties of the court to consider dependent children when sentencing women who are primary carers

The courts are bound by Sentencing Guidelines and case law. Every sentencing guideline published since the 2011 Sentencing Guideline on Assault has included in the list of '*Factors reducing seriousness or reflecting personal mitigation*' the characteristic, '*Sole or primary carer for dependent relatives*'. The 2017 '*Imposition of Community and Custodial Sentences: Definitive Guideline*' makes specific reference to the impact of imprisonment on dependents: '*For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.*' It goes on to say that the factors indicating that it may be appropriate to suspend a custodial sentence include when, '*Immediate custody will result in significant harmful impact upon others*'.

The following principles on the sentencing of parents have been established by case law:

1. The criminal sentencing of a parent engages the Article 8 right to respect for family life of both the parent and the child. Any interference by the state with this right must be in response to a pressing social need, in pursuit of a legitimate aim, and in proportion to that aim. The more serious the intervention the more compelling the justification must be - the act of separating a mother from a very young child is very serious. *R(on the application of P and Q) v Secretary of State for the Home Department [2001] EWCA Civ 1151 paragraphs 78 and 87*
2. The welfare of the child should be at the forefront of the judge's mind. *ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department [2011] UKSC4 paragraphs 25 and 26*

3. It is the court's duty to make sure that it has all relevant information about dependent children before deciding on an appropriate sentence. *R v Bishop [2011] WL 84407 Court of Appeal*
4. There is no standard or normative adjustment for dependent children but their best interests are a 'distinct consideration to which full weight must be given'. *R v Petherick [2012] EWCA Crim 2214 paragraph 19*
5. In a case which is on the threshold between a custodial and non-custodial or suspended sentence a child can tip the scales and a proportionate sentence can become disproportionate. *R v Petherick [2012] EWCA Crim 2214 paragraph 22*
6. It may be appropriate to suspend a custodial sentence when the person being sentenced is the parent of dependent children. *R v Modhwadia [2017] EWCA Crim 501*

In addition, legislation, conventions and international agreements which the UK has agreed, confirm the need for courts to consider the impact of a sentence on a defendant's children. The **Human Rights Act 1998** Article 8 gives everyone a right to family and private life and that right is not removed from child (or parent) as a consequence of the parent's criminal offending. The **United Nations Convention on the Rights of the Child 1989** provides that no child should be discriminated against or punished because of the status or activities of their parents (Article 2), and a child's best interests should be considered in all proceedings concerning a child (Article 3). The **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules') 2010**, to which the UK is a signatory, state: '*Non-custodial sentences are preferable for women with dependent children, (unless the offence is serious or violent or the woman represents a continuing danger). Even then, a custodial sentence should only be given after considering the best interests of the child, and ensuring that appropriate provision has been made for the child.*'

## Summary of Research Findings

**Despite the duty for the courts to consider child dependents when sentencing mothers, the duty is unknown, misunderstood and misapplied in many cases, and a possible reason for this is the poor or non-existent communications channels within the judiciary and magistracy**

The transcripts of 33 cases from mothers appealing against sentence in the Crown Court to the Court of Appeal 2003-2011 were analysed. In 21 of the 27 cases in which sentence was reduced on appeal, the child dependents were mentioned by the Court of Appeal as a reason for the reduction, indicating the lower courts had not given the factor sufficient weight in their sentencing decision (Epstein, 2012; Minson, Condry, 2015).

From the research I conducted with Crown Court judges I suggest there are four factors influencing the lack of consideration of dependents in women's sentencing decisions.

### **1. Judges do not take a consistent view on the relevance of dependents as a factor in mitigation**

When asked to list factors which might mitigate sentence only 10 out of 20 judges mentioned dependents as a possible mitigating factor

When asked directly if a defendant's caring responsibilities *could* be considered as a mitigating factor all judges said yes

18 judges believed it would sometimes be relevant and 9 judges said it's a factor in determining sentence length. 3 judges said it could usually be ignored.

When asked to give all mitigating factors a number between 1 and 10, the higher the number the more relevance it would have in a sentencing decision, 'sole or primary carer for dependent relatives', was the only factor on the list of mitigating factors to be allocated both 1 and 10.

## **2. *Judicial understanding of the Guidelines and case law which set out the duties of the court in relation to considering dependents in sentencing decisions is limited and at times incorrect***

Each judge was asked the question '*Do you know of any sentencing guidelines or authorities which you would follow when determining the weight that should be given to a defendant's primary or sole caregiving status?*'

- 3 did not believe the sentencing guidelines contained any guidance on the consideration of dependents in sentencing
- 3 knew of no Court of Appeal or Supreme Court authorities on this point
- 2 knew of authorities but believed that they do not apply in every case
- 3 knew of authorities and believed them to mean children *should not* be a factor which mitigated in favour of a shorter or non-custodial sentence
- 12 knew of authorities and understood the need to balance impact on the family with other factors in the case, and 2 of the 12 named the leading authority of R v Petherick
- 11 judges asserted that they use their own judgement to determine the relevance of dependents to sentencing
- 1 judge said the welfare of the child should be at the forefront of every judge's mind.
- No judge said the duty was on the court to ensure they had sufficient information to undertake the correct balancing exercise (R v Bishop [2011])
- 3 judges regarded consideration of dependent children as being contrary to justice
- 4 judges believed that the consequences on dependent children are entirely the responsibility of the mother and therefore the court does not need, nor should it try, to reduce the harms which might be suffered by the children
- 1 judge took the view that being a parent makes the offender more culpable

## **3. *Common misconceptions hindered a judge's willingness to make appropriate enquiries about children and to properly understand how their mothers' sentence would affect them***

- 'Only some children' are negatively impacted by the imprisonment of their mother
- Only young children are negatively affected
- As young children can go to Mother and Baby Units there is no need to consider the impacts of sentence upon them.
- A mother's worth to their child is linked to her offending behavior
- A child's socio-economic status determines their future potential and those from lower income brackets suffer less harm when their mother is imprisoned.
- Every woman before the court has someone who can look after her children for an extended period of time. Those who claim otherwise are 'blackmailing the court'
- If someone in the family takes on the care of the child whilst the mother is in prison the child will not suffer any negative impacts<sup>1</sup>

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<sup>1</sup> There is a huge body of academic research literature which can be drawn upon to demonstrate why these are misconceptions, but space constraints mean it has not been cited in this paper.

The majority of those interviewed thought that only a small subset of children suffer harm: those who are taken into local authority care, the very young, or those who have a 'good' mother. Other than separation from siblings and the loss of their parent these judges did not seem to be aware of the breadth and depth of the consequences for children. They made no reference to issues of education, behavioural problems, attachment issues, overcrowded housing, unsuitable carers, anxiety, stigma or stress. With the exception of a single judge, none of the judges mentioned the kin caregivers at all in their analysis of harms or consequences. There was no recognition whatsoever among this group of sentencers that an incredibly heavy burden is placed on kin caregivers. None of the judges gave any thought to the appropriateness of the caregivers, and even when asked directly about financial difficulties they might face they took the view that that was irrelevant. These findings were of course based on interviews with a small sample of judges, but they raise important questions about the secondary stigmatisation of prisoner's children by the judiciary

#### ***4. Judges do not request a Pre-Sentence Report as a matter of course when sentencing primary carers***

The interpretation of mitigation is determined by a judge's own knowledge and understanding, and judges with a greater understanding of the impact of maternal imprisonment on families are more likely to make enquiries about child dependents through the mechanism of pre-sentence reports. When a pre-sentence report is prepared, even if the judge does not agree with the recommendations of the report the defendant's motherhood is more likely to mitigate the sentence (Minson, 2013).

### **Magistrates**

My study focused only on the sentencing practices of the Crown Court but as 61 per cent of women entering prison in 2015 were serving sentences of less than six months duration (MOJ, 2016) it is likely that many women in prison are sentenced in the Magistrates Courts. The MOJ Statistics on Women and the Criminal Justice System 2015 found that 'women are more likely to be found guilty in the magistrates' court, yet 'Further analysis showed that females were significantly less likely to be committed for trial to the Crown Court compared with males for triable either way offences.' So although women are more likely to be found guilty if they are tried in a magistrates court they are less likely to elect Crown Court trial when they have the opportunity. There is no evidence as to why this is, but I suggest it may be that because women are more likely to have caring responsibilities they don't want to incur further delay in their case being heard and they think it will be faster to have the hearing in the magistrates court. This then increases their risk of being found guilty. Of the appeals made by women from the Magistrates Courts to the Crown Court in 2015, 45-47% of the appeals were allowed (Statistics on Women and the Criminal Justice System, Ministry of Justice, 2015). In answer to a question asked by labour in December 2017 and reported in the Independent with comment by Phillip Lee MP, we know that 55% of women imprisoned in 2016 were sentenced to less than 3 months in prison and 1 in 4 women were sentenced to less than one month in prison.<sup>2</sup>

All of the Crown Court judiciary I interviewed said that they rarely sentenced anyone to less than 12 months as they felt that a non-custodial sentence could be imposed instead of what they regarded as a 'short' term of imprisonment. Crown Court judges told me they are expected to consider the suspension of

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<sup>2</sup> <https://www.independent.co.uk/news/uk/politics/women-prison-sentences-short-jailed-periods-less-month-inmates-minor-offences-children-labour-a8124896.html>

all sentences which are shorter than two years imprisonment. I am concerned that because the magistrates only adjudicate on less serious criminal offences which carry a maximum of six months imprisonment on a single summary count, or 12 months on two or more either way offences, their interpretation of an offence which is 'so serious' that only custody is appropriate is subjective, and they consider the seriousness of the offence within the range of offences which they see in the Magistrates Court. A Crown Court judge does not perceive an offence which attracts a six-month term as 'serious' and this creates a significant sentencing dichotomy which should not exist. Given the potentially devastating consequences of even a 'short' sentence of imprisonment for women and their families, I contend that the sentencing powers of magistrates should be adjusted in order to align Magistrates Court sentencing with Crown Court sentencing practices.

### **My own experience of Judicial communications**

In 2017 I was funded to make information films for all criminal justice professionals involved in the sentencing of mothers. These films 'Safeguarding Children when Sentencing Mothers' were made in collaboration with the Judicial College, the Magistrates Association, the National Probation Service, the Criminal Bar Association and with the support of the Economic and Social Research Council and the Prison Reform Trust. The films and briefing papers contain an explanation of the Sentencing Guidelines and case law and explain more fully the impacts of maternal imprisonment on children. The Judicial College invited me to speak to judges on the issue and the films are on their internal Learning Management System. Despite the Judicial College approval of these resources the National Probation Service has had feedback from its staff that magistrates have told them that they do not know of these resources and these matters (dependent children) are not for them to consider in sentencing. The Judicial College are working to address this misunderstanding, but this example suggests that with the exception of memorandums from the Lord Chief Justice or the Chair of the Sentencing Council, as evidenced in recent days re. suspending sentences, the only way to communicate something clearly to all sentencers is to contain it in a Sentencing Guideline. Without such a codified document there is a high likelihood that information is missed, misinterpreted or misunderstood.

### **Conclusion**

Sentencers are not only permitted but are in fact *expected* to consider the impact on child dependents when a mother is sentenced in the criminal courts. The research conducted with 20 members of the Crown Court judiciary found that those judges did not sentence mothers according to those principles, instead they used their discretion and made assessments of the impacts based on an incomplete and misinformed understanding of the Guidelines and case law, and of the consequences for children of maternal imprisonment.

### **Recommendations**

- 1) There should be a Sentencing Guideline on the sentencing of primary carers which includes a direction that in such circumstances a pre-sentence report should be obtained and there should be a presumption against a custodial sentence.
- 2) In order to stem the flow of women sent to prison for less than 6 months, and in response to the high percentage of successful appeals by women from Magistrates decisions, Magistrates should not have the power to impose sentences of imprisonment on women without referral to a Crown Court judge.

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