

Supplementary evidence on the sentencing of primary carers from Women in Prison

I would like to thank the committee for the opportunity to provide oral evidence for the inquiry on women in prison. As agreed in the oral evidence session, I am pleased to direct you to some of the evidence base from organisations which have analysed data on pre-sentence reports and academics who have undertaken research on the sentencing of primary carers.

The evidence hereafter will highlight research which has found inconsistency in the information provided to sentencers and the application of existing case law and guidelines in sentencing processes.

a. Quality and consistency of pre-sentence reports (PSRs)

In the evidence session it was highlighted that the quality and consistency of PSRs is variable and judges may not have the necessary information about a woman being a primary carer. A primary means through which sentencers can be informed of dependent children is through a pre-sentence report. Sentencing legislation directs that sentencers must obtain a PSR for all cases unless they deem it to be unnecessary.¹

Regularity of PSRs

Evidence from HMPPS shows a decline in PSR volumes over the past decade.

- In 2010, pre-sentence reports were received for 62% of all court disposals reducing to 53% in 2018. Therefore, almost half (47%) of sentences which result in a custody or community order have no new PSR prepared to inform the sentence.²
- Similarly, the Centre for Justice Innovation (2018)³ found that there had been an increase in the number of sentences being passed without a new PSR, with a 22% fall in the total number of new PSRs produced between 2012/13 and 2016/7 and an increase in the number of community and custodial sentences.
- There is a lack of data to disaggregate these figures according to gender and in answer to a parliamentary question in 2019, the Government could not say how many women in England and Wales had been imprisoned without a PSR.⁴

Delivery methods of PSR reports

There are three delivery methods of pre-sentence reports. Oral reports or fast delivery reports are both usually delivered on the same day as the court hearing by the court duty probation officer whilst standard delivery reports require more detail and are delivered after an adjournment of up to 15 days in order to obtain additional information.

¹ Sentencing Act [2021] <https://www.legislation.gov.uk/ukpga/2020/17/group/SECOND/part/3/chapter/1/enacted>

² HMPPS (2021) The Target Operating Model for probation services in England and Wales, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959745/HMPPS_-_The_Target_Operating_Model_for_the_Future_of_Probation_Services_in_England_Wales_-_English_-_09-02-2021.pdf

³ Centre for Justice Innovation (2019) The changing use of pre-sentence reports https://justiceinnovation.org/sites/default/files/media/documents/2019-04/cji-changing-use-psr-briefing_wip-1.pdf

⁴ House of Lords written question HL17746, 9 September 2019 <https://questions-statements.parliament.uk/written-questions/detail/2019-09-05/HL17746>

- A research and analysis bulletin from HM Inspectorate of Probation (HMIP) (2020)⁵ found that the recent shift towards oral PSRs with a focus upon speed and timeliness has had an impact on the quality of information provided to courts. In 2018/2019 58% of reports were orally delivered, rather than written (twice as many as in 2012/2013) whilst 39% were fast delivery reports and only 3% standard delivery reports.
- HMIP found that when an oral report was delivered, inspectors were less likely to judge that the pre-sentence information and advice was sufficiently analytical and personalised to the service user.
- HMIP also found that a consequence of the majority of reports being delivered on the same day was that information requested from other agencies, including the police and children's social care services was 'often not shared in the time necessary to be included in the reports.' With fewer PSRs being completed, and many reports being written on the day of the hearing, critical information about the impact on children may not be captured.⁶
- It is also important to recognise that some women may be uncomfortable about sharing information about their family circumstances, and can be fearful as to the consequences of disclosing information about their children to statutory services.⁷

Information on dependent children

In 2001 the Court of Appeal held that sentencers must acquire information about dependent children and that if the court does not have sufficient information about the likely consequences of the separation, the court is obliged to ask for further information to balance this against the seriousness of the offence.⁸

- Research by Dr Shona Minson found that in 2015/2016, many sentencers were not aware of the existence of this authority and had not been conducting this balancing exercise, nor had they been requesting pre-sentence reports in all cases involving primary carers.⁹
- The Farmer Review for women recognised the potential for inconsistency and recommended for written PSRs to be mandatory for all primary carers before a custodial sentence is passed and for this to include accurate information on relationships and the impact of custody on family ties.¹⁰
- As mentioned in the oral evidence, we are aware that the Ministry of Justice, HMCTS and the Probation Service are piloting an 'Alternative Delivery Model' to increase the number of cases which receive pre-sentence reports from 53% to 75% and aims to achieve only 10% of PSR delivery as standard delivery reports, 40% as written short format reports and 50% delivered in oral format. Women are specified as one of three priority cohorts that have been identified to receive 'higher quality reports on the

⁵ HM Inspectorate of Probation (2020) The quality of pre-sentence information and advice provided to courts, <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2020/08/2020.04-The-quality-of-pre-sentence-information-and-advice-provided-to-courts.pdf>

⁶ Prison Reform Trust (2018) What about me? <http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf>

⁷ *ibid*

⁸ *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151

⁹ Minson, S. (2020) Maternal Sentencing and the Rights of the Child

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809467/farmer-review-women.PDF

day.’¹¹ We await the findings from the pilots but we are disappointed that the pilot focuses on delivering written fast delivery reports for women produced on the same day rather than full standard pre-sentence reports which would enable more time for information to be sought in relation to children and the impact of a sentence on them.

b. Inconsistency in the application of guidelines in sentencing

In our oral evidence we highlighted that the sentencing guidelines and Court of Appeal and Supreme Court authorities are not applied consistently and that the impact of a sentence on dependent children is not always fully considered.

Court of Appeal decisions

Dr Minson (2019) analysed sentencing transcripts from Crown Court hearings between 2003 and 2011 in which mothers received custodial sentences and found that the defendant’s carer status was not brought to the attention of the judge or acknowledged by the judge in all sentencing hearings.¹² In 33 cases in which mothers appealed their sentences to the Court of Appeal between 2003-2011, for 21 of the 27 cases where the sentence was reduced on appeal, child dependents were mentioned as a reason for the reduction, which indicates that the Court of Appeal believed that proper weighting was not given to a woman’s dependants in the lower courts at the time of sentencing.

Crown Court sentencers’ awareness of relevant mitigating factors and Court of Appeal and Supreme Court authorities

In separate research based on interviews conducted with 20 Crown Court sentencers in 2015/2016, Dr Minson found inconsistent understandings of the duty to consider the impact of any sentence delivered upon dependent children, and incomplete and misinformed understandings of the consequences of children of maternal imprisonment.¹³ For example, on factors relating to personal mitigation which influenced them in sentencing decisions, 50% of the Crown Court sentencers did not mention the factor ‘sole or primary carer for dependent relatives’ or make any mention of family or dependents. Dr Minson also found there was varied knowledge and understanding about relevant Court of Appeal and Supreme Court authorities on dependent children and how these should be applied. Some judges did not think that there were any case law or sentencing guidelines on the issue.

Her analysis concludes that there is a body of case law which should lead judges to consider dependent children in sentencing decision, but not all judges are aware of this requirement. In addition, even when judges understand their duty to do so, they do not always have sufficient knowledge about the consequences for children of maternal imprisonment to properly weigh that factor against other factors in sentencing decisions. It is important to highlight that since this research, and in response to some of the issues raised by it, the Sentencing Council has introduced a new sentencing guideline ‘General Guideline: Overarching Principles’¹⁴ which included an expanded explanation for the mitigating factor ‘sole or primary carer for

¹¹ <https://www.gov.uk/guidance/pre-sentence-report-pilot-in-15-magistrates-courts>

¹² Minson, S. (2019) Maternal Sentencing and the Rights of the Child

¹³ *ibid*

¹⁴ <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

dependent relatives.’ Whilst this is welcome, there is concern that this expanded explanation is hidden within the general guideline rather than being set out in a separate guideline which may limit its effectiveness to increase judicial awareness.

Application of guidelines

It is important to recognise that ‘sole or primary carer for dependent relatives’ is still only a factor which *may be considered* in mitigation rather than a factor which *must be considered* in mitigation. The section of the sentencing guidelines simply directs the sentencer to ‘identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point’.¹⁵ It is therefore incorrect to say that if the guidelines were applied correctly there would be no issue, as even ‘correct’ application leaves the possibility for a sentencer to choose not to consider the impact on child dependents.

In the case of *R v Petherick*, the Court of Appeal [2012] established various relevant principles, including that for cases on the ‘cusp of custody’ there is a need to consider whether the impact on children may make a sentence disproportionate.¹⁶ Despite this, a qualitative study by Lucy Baldwin and Rona Epstein (2017) found several women reported that their role as carer was not given consideration by the magistrates’ courts¹⁷ despite all women having served short sentences of less than eight months.

Obligations towards dependent children

Research by Prison Reform Trust has found that children reported feeling invisible throughout the process and have said they would have liked the magistrate or judge to have taken their feelings, and the impact of a sentence on them, into account when making their decision.¹⁸ The Judicial College worked with Dr Minson to create training resources for sentencers, an indicator that they were fully supportive of the need to consider child dependents and that they understood that sentencers were not fully aware of their duties to do so. The ‘Safeguarding Children when Sentencing Mothers’ film and briefing paper are available to all sentencers, but are not mandatory training, so despite best efforts, many sentencers remain unaware of their obligations towards dependent children.

As raised in oral evidence, there is a gap in the collection and publication of data on primary carers in the criminal justice system, how the impact on children is taken into account and how this influences sentencers decisions. What the available evidence suggests, as referenced above, is that status as a primary carer and consideration of the impact on children is inconsistently taken into account in practice.

¹⁵ See Sentencing Council offence specific guidelines for reference <https://www.sentencingcouncil.org.uk/offences/crown-court/item/theft-from-a-shop-or-stall/>

¹⁶ This principle was later embedded in the 2017 Sentencing Council guideline on the imposition of community and custodial sentences <https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf>

¹⁷ Baldwin, L. and Epstein, R. (2017) Short but not sweet: A study of the impact of short custodial sentences on mothers & their children <https://www.nicco.org.uk/userfiles/downloads/5bc45012612b4-short-but-not-sweet.pdf>

¹⁸ Prison Reform Trust (2018) What about me?

<http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf>

This is why we, and the academics whose work we rely upon above, support proposals to bring existing obligations onto statute which would make judicial consideration of the impact on dependent children mandated, whilst still protecting judicial discretion on how this information would influence sentencing. Dr Minson has kindly offered to send the Justice Committee relevant research details referenced above from her book 'Maternal Sentencing and the Rights of the Child' if this helps to assist the committee and the inquiry.

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