

The rights of children when their parents are in conflict with the law



Children whose parents are in conflict with the law are an invisible and often highly vulnerable group. By issuing this briefing, Penal Reform International (PRI) hopes to draw attention to the challenges they face and to encourage more effective implementation of their rights. It first considers the international and regional standards in place to protect children whose parents are in conflict with the law and then examines how their rights are affected at every stage of criminal proceedings. It concludes with some recommendations.

1. Introduction

Children are confronted with a host of challenges when a parent or caregiver is in conflict with the law. They have to contend with the break-up of their family and may need to be placed in alternative care. They may be more vulnerable to violence, abuse, neglect and exploitation as a consequence. The loss of a primary caregiver may result in financial hardship leading to difficulties in accessing health and education services. They may experience discrimination and stigma as a result of their parent's status as a suspect, defendant or convicted prisoner. In certain circumstances they may end up living with their mother in detention facilities. The rights of these children remain largely unacknowledged within criminal justice systems and they fall through the cracks created by inadequate social welfare provision, lack of clarity in law and policy as to how to respond to them, and wholly inadequate protection for children living in prisons—almost always with their mothers.

2. International and regional human rights standards protecting the rights of children whose parents are in conflict with the law

The UN Convention on the Rights of the Child (CRC) has many provisions of direct relevance including: the right not to be discriminated against (Article 2); the best interests of the child as a primary consideration in all actions affecting children (Article 3 (1)); the right

to survival and development (Article 6); and to be registered immediately after birth (Article 7). Other articles of relevance include the rights to: be told where a parent is being held following arrest (Article 9); be heard in judicial and administrative proceedings which affect them (Article 12); protection against abuse (Article 19); 'special protection and assistance' from the state when temporarily or permanently deprived of family environment (Article 20); health (Article 24); periodic review of placements (Article 25); and education (Article 28).

The UN Committee on the Rights of the Child has considered different aspects of the rights of children whose parents are in conflict with the law at various stages during States' reporting processes and in Concluding Observations; for example for Thailand they have considered the inadequacy of the conditions for babies living in prisons and have recommended that the best interests of the child should be considered when sentencing defendants who have child caring responsibilities. In 2011, the Committee held a Day of General Discussion on the issue of 'Children of Incarcerated Parents' and produced a series of detailed recommendations.¹ The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and the UN Guidelines for the Alternative Care of Children both also contain a number of important provisions relevant for this group of children.

The African Charter on the Rights and Welfare of the Child (ACRWC) is a vital complement to the provisions of the CRC and jurisprudence of the Committee on the Rights of the Child. Article 30 of the ACRWC lays out

¹ Report And Recommendations of the Day of General Discussion on "Children Of Incarcerated Parents" Committee on the Rights of the Child, 30 September 2011

a number of provisions ensuring ‘special treatment’ for pregnant women and mothers who are accused or convicted of criminal offences; it states ‘the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.’

The preamble of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty (Inter-American Principles) provides that ‘Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, paediatric, and nutritional services, in order to protect the best interest of the child’. The Inter-American Principles also provide for maintaining regular contact with the families and children of parents who are separated as a result of a custodial sentence.

3. How children’s rights are affected when their parents are in conflict with the law

● *At the point of arrest*

An arrest which involves removing a parent from the family home may be witnessed by a child and they may subsequently be left without their sole or primary carer. Arrests should be conducted in such a way that the best interests of any affected children are taken into account.

● *If a child needs to be placed in appropriate alternative care*

The State is responsible for ensuring appropriate alternative care when a child is permanently or temporarily deprived of his or her family environment as, for example, when a primary carer is deprived of their liberty. The process of identifying alternative care should begin, ideally, immediately following arrest. Whether such care is appropriate should be decided on a case-by-case basis and grounded in the principle of the best interests of the child.² Anecdotal evidence suggests that children whose primary care giver is incarcerated may be taken care of by the remaining parent or their extended family but that the State does not always play an active role in providing them with ‘special protection and assistance’ in conformity with their obligations under the CRC.

● *When pre-trial detention and sentencing measures are being decided*

Judges rarely consider a defendant’s caring responsibilities when determining pre-trial measures or passing sentence. Nor do they take into account the fact that childcare responsibilities may be an indication that alleged offenders are less likely to abscond and that pre-trial detention may not therefore be necessary. Parents are often kept away from their children for unnecessarily long periods of time owing to over-use of pre-trial detention. Lack of alternatives to post-sentence imprisonment, restrictions on parole and delays in appeals also contribute to long post-trial detention periods.

States parties to the ACRWC must ensure that non-custodial sentences are always considered first for pregnant women and mothers of young children and they must establish alternatives to detention for them. The Charter does not contemplate that women who are pregnant or mothers may never be sentenced to imprisonment but it is clear that as a matter of sentencing law and policy, there should be a presumption in favour of a non-custodial sentence. The Preamble of the Bangkok Rules also emphasises that, ‘when sentencing or deciding on pre-trial measures for a pregnant woman or a child’s sole or primary caretaker, non-custodial measures should be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent.’ UN General Assembly Resolution 63/241 provides that States should give priority consideration to non-custodial measures when sentencing or deciding on pre-trial measures for a child’s sole or primary carer, subject to the need to protect the public and the child and bearing in mind the gravity of the offence.

A model for including consideration of a convicted person’s care-giving roles can be found in the South African Constitutional Court case *S v M* (2007).³ The judgment identified a 5-point method:

1. The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
3. If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is

² See the UN Guidelines for the Alternative Care of Children at Paras 48 and 82

³ *S v M* 2008 (3) SA 232 (CC). This case concerned a woman, who was the primary caregiver to three children and who had been convicted of a series of frauds and was facing imprisonment. The woman was sentenced to a period of correctional supervision and the sentence included community service and paying back to victims instead of a custodial sentence which would have negatively affected her child.

necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
5. Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

Subsequently, the 2011 case of *MS v S*⁴ narrowed the scope of this provision, limiting it to single primary caregivers only.

● *When a child is separated from a parent who is in detention*

Where imprisonment of a primary caregiver is unavoidable there should be follow-up by social welfare services to ensure children ‘outside’ have their rights protected and are not subject to social exclusion or discrimination. The Indian state of West Bengal, for example, has a law that if a detained person has dependent children studying in school or college, the State government will help pay for the child to continue going to school.⁵

It is important for a child to maintain contact with their parent provided it is in their best interests and does not raise protection concerns.⁶ However, prison buildings are often remote and inaccessible for children visiting parents. This is a particular challenge for detained mothers since many countries have a limited number of facilities for female detainees. If a decision is taken to imprison a parent/primary caregiver then the relevant authorities should first establish where the child is living in order to have the parent sent to a facility within suitable travelling distance of the child’s home. Furthermore, consideration should be given to circumstances where the parent is a foreign national, and they require assistance in maintaining contact with children in their home country through telephone, email or written correspondence.

● *At the moment of release*

A prisoner’s caretaking responsibilities should also be taken into account at the point of determination on early and temporary release and this is recognised in the Bangkok Rules. However, the impact of release

on children is often ignored and children’s input is not sought. Actively involving children in considerations about the progression of a parent’s sentence and preparations for release, such as through sentence planning when it exists, would be one way of doing this.

● *When it is in a child’s best interests to remain in prison with their primary caregiver*

If alternatives to detention are unavoidable then there may be circumstances when it is in the best interests of a child to be imprisoned with his or her mother or primary caregiver. Nearly all countries have some provision for babies and young children to remain in prison with their mothers usually with an age cut off point ranging from around two to four. Given the serious implications for children of living inside a prison, the possible alternatives to a child being placed in a detention facility should be stringently assessed on an individual basis and in accordance with the UN Guidelines for the Alternative Care of Children. In many countries it is not feasible to establish mother and baby units which are of a sufficient standard to protect the rights of children living in them.

When it is decided that it is in a child’s best interests to live in prison with his or her mother then States parties have the same obligations to respect, protect and fulfil their rights as they do to any other child in their jurisdiction. On admission to prison the number and personal details of children accompanying their mothers should be recorded. If a baby is born whilst his or her mother is in prison then the birth must be registered in accordance with Article 7 of the CRC. During the time they spend in prison, children should be provided with good quality health care and their development should be monitored by specialists in child development. The environment provided for the child’s upbringing should be as close as possible to that of a child outside prison, with a nursery staffed by specialists who can take care of the child while separated from his or her mother. When children who accompany incarcerated parents to prison can no longer be accommodated there (for example, where they reach the maximum age allowed in law or regulation), alternative arrangements must be made that consider and reflect the child’s best interests.

Children living in prison should never be treated as prisoners themselves. They should not be subjected to disciplinary punishments. In principle they should be free to leave the prison and participate in outside activities, in compliance with security considerations.

4 MS v S 2011 (2) SACR 88 (CC)

5 HAQ Centre for Child Rights, written submission to the Day of General Discussion On “Children Of Incarcerated Parents”, UN CRC Committee (2011) cited in Robertson, O *Collateral Convicts: Children of incarcerated parents Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011*, Quaker UN Office (2012)

6 UN Guidelines for the Alternative Care of Children at Para 82.

The Bangkok Rules state that punishment by close confinement or segregation should not be applied to pregnant women, women with infants and breastfeeding mothers in prison. Disciplinary sanctions for women prisoners should not include a prohibition of family contact, especially with children.

- *The death penalty and pregnant women and mothers of young children*

Under international human rights law, the death penalty may not be imposed on pregnant women; several instruments also provide that a death sentence shall not be imposed on mothers of young children, for example, Article 30 of the ACRWC and Article 4 of the Protocol on the Rights of Women in Africa.

4. Recommendations

- States should create and implement law and policy to ensure that the best interests of the child are a primary consideration in relation to all actions that may affect children whose parents are in conflict with the law. This should take effect at all stages of judicial and administrative decision-making including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community.
- Efforts should be made to avoid sending primary caregivers to pre-trial detention or to impose a sentence of imprisonment. This means a person's caring responsibilities must be identified prior to deciding on pre-trial measures, passing sentence or determination on early and temporary release. It also means that viable alternatives to detention must be developed where they are lacking.

- In situations where children are, or may, be placed in alternative care, the UN Guidelines for the Alternative Care of Children should be followed at all stages.
- If, as a last resort, children are detained with their caregivers, then they have the same rights as any other child and should not be disadvantaged:
 - ▶ In all situations affecting children living in prison, before, during and after their time in prison, their best interests must be a primary consideration.
 - ▶ Children living in prison are not prisoners and should not be treated as such.
 - ▶ Independent monitoring mechanisms for children in detention such as National Human Rights Institutions can play an important role in protecting them.
- There should be effective co-ordination mechanisms within government between relevant ministries and departments which have responsibility for children whose parents are in conflict with the law including the ministries of justice, interior, social welfare, health, education etc.
- Statistics about these children should be routinely and consistently gathered by relevant agencies to help develop policy and practice.

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