

Prison Reform Trust submission in response to consultation by Mary Fee MSP on her proposed Bill to require a court to have regard to impact of parental custody on welfare and wellbeing of offender's children

Support for children (Impact of parental imprisonment) (Scotland) Bill consultation

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The Prison Reform Trust's main objectives are:

- Reducing unnecessary imprisonment and promoting community solutions to crime
- Improving treatment and conditions for prisoners and their families

Supported by the Pilgrim Trust, the Prison Reform Trust is running a three year programme to reduce women's imprisonment across the UK. With support from the Porticus Trust, we are undertaking a project on the sentencing of mothers with a view to promoting better outcomes for women offenders and their children. To that end, this response focuses on mothers in the criminal justice system, though the proposals would also benefit fathers. The Prison Reform Trust is a member of the Families Left Behind campaign, led by PACT and Barnardos, calling for more to be done to ensure the wellbeing of any children or other dependents when a custodial sentence has been imposed. In conjunction with the Soroptimists UK we have also recently published the report of our inquiry into provision for women in contact with the criminal justice system, [*Transforming Lives: Reducing Women's Imprisonment*](#). A key finding of the Scotland country report drawing on the information they gathered on the state of women's justice¹ was the detrimental impact of imprisonment on women and families and the need for more community-based alternatives on Scotland. We welcome the opportunity to respond to this consultation and hope you will consider the evidence in that report as part of our response.

¹ Prison Reform Trust (2014) Transforming Lives- reducing women's imprisonment London: PRT

Key stats:²

- The women's prison population in Scotland increased by two-thirds (66%) in the ten years after 2002-3.
- In 2013-14, 1,205 custodial sentences were given to females - 75% were for non-violent crimes e.g. shoplifting, fraud, drug offences and crimes against public justice.³
- Three quarters (76%) of females sentenced to imprisonment in 2013-14 received sentences of six months or less, compared to two-thirds (66%) of males.⁴
- Two-thirds of women in prison in Scotland have children under the age of 18. Most were caring for their children prior to their imprisonment.⁵
- Only 9% of children whose mothers are in prison are cared for by their father in her absence.
- For 8 out of 10 children, it's the first time they have been separated from their mum for more than a day or so.
- Research suggests a particularly marked intergenerational impact of maternal imprisonment on children.
- Maintaining contact with children for women in prison is made more difficult by the distance that many are held from their home. More than half (57%) of women in prison in Scotland said people visiting them experienced particular problems, (reasons cited included distance, cost and lack of transport), whilst only 38% of mothers were receiving visits from their children.⁶
- More than half (56%) of female prisoners report losing their tenancy/accommodation when they came to prison – loss of housing has particular ramifications for women with dependent children, and can make it even harder for them to regain custody of their children on release.⁷

Introduction:

We welcome the focus this proposed Bill brings to the problems caused by the imprisonment of parents and the impacts on the families left behind. There has been a marked shift in the debate over women's imprisonment in recent months, with commitments from the Scottish Government to reducing women's prison population, the successful campaign against building a new women's prison in

² Unless otherwise stated, all stats taken from the Bromley Briefing Prison Factfile Autumn 2014 available at

www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Factfile%20Autumn%2014.pdf

³ Table 10b, Criminal proceedings in Scotland 2013-14 Edinburgh: Scottish Government available at www.gov.scot/Resource/0046/00469253.xls

⁴ Table 10b, Criminal proceedings in Scotland 2013-14 Edinburgh: Scottish Government available at www.gov.scot/Resource/0046/00469253.xls

⁵ Scottish Prison Service (2013) Female offenders 2013 14th Survey Bulletin Edinburgh: SPS

⁶ Scottish Prison Service (2013) Female offenders 2013 14th Survey Bulletin Edinburgh: SPS

⁷ Scottish Prison Service (2013) Female offenders 2013 14th Survey Bulletin Edinburgh: SPS

Scotland, and commitments to improve responses to female offenders in all the main political parties' manifestos in the run up to the general election. The Conservative Party commits to "*exploring how new technology may enable more women with young children to serve their sentence in the community*"⁸, specifically acknowledging the need in this area. The proposed Bill is helpful in prompting discussion of an important dimension of the reforms needed in this context.

The consultation paper notes previous (unsuccessful) attempts to legislate on this and makes clear it is "*not seeking to address the issue of sentencing decisions*". The Cabinet Secretary for Justice's recent announcement cancelling the planned new women's prison at Inverclyde and the First Minister's stated commitment to reducing women's imprisonment⁹ suggest the political environment has shifted and that the time to address sentencing decisions is now. We therefore recommend broadening the proposal to bring court decision-making into scope. Distinguishing consideration of the needs of children and young people from the sentencing decision-making process is unhelpful, not least because under both the UN Convention on the Rights of the Child (Article 3) and the European Convention on Human Rights (Article 8), the rights of dependent children are engaged when courts sentence mothers.¹⁰ In addition, the UN Bangkok Rules state:

"...when sentencing or deciding on pretrial 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...women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties".¹¹

Deferring investigations into the needs of dependents, and what impact a decision to impose a custodial sentence on a parent will have, until after a custodial sentence has been passed risks reinforcing the idea that courts don't need to ask about dependents before sentencing, because this will be dealt with later. As the consultation document notes, "*Criminal Justice Social Work Reports are not mandatory and are only used in a minority of cases*" and there are also questions over the quality and completeness of information included in them and the extent to which they are considered during sentencing decision-making.

In England and Wales, for example, sole or primary caring responsibilities are recognised in sentencing guidelines as a personal mitigation factor, meaning the

⁸ <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>

⁹ www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9739&mode=pdf

¹⁰ Minson, S. (2014) *Mitigating motherhood – A study of the impact of motherhood on sentencing decisions in England and Wales* London: Howard League

¹¹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) UN Resolution 201/16 available at www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf

court can take the needs of dependents into account when determining sentence. Responding to consultations by the Sentencing Council in England and Wales, we have recommended taking account of the specific needs of women at the very outset of the sentencing process, as opposed to at mitigation, and have called for the introduction of an overarching guideline aimed at determining whether the offender has dependent children, whether they have sole or primary care responsibilities and how the child's rights and interests will be taken into consideration, as required by the European Convention on Human Rights and the UN Convention on the Rights of the Child as well as by a number of UK court judgements. Alternatively, courts could be required to investigate the impact of a custodial sentence on dependents where there is a real prospect of one being imposed. However sentencing courts choose to exercise their duties, it is vital they take account of the rights and best interests of dependent children at the earliest opportunity.

We understand a Scottish Sentencing Council will be established by October this year and we look forward to discussing with the Council Chair our recommendation for an overarching guideline on sentencing women to ensure their specific needs, and their caring responsibilities, and the needs of their dependents are properly considered by the court.

Question 1: Do you support the general aims of the proposed bill?

We support the proposed bill's intention of improving identification of, and support for, children of imprisoned parents but are concerned that the proposal in its current form does not go far enough to keep families together. In many cases, the best way to protect and support children whose mothers are at risk of custody is to enable women to serve their sentences in the community whilst caring for their dependents. As the consultation makes clear, children of imprisoned parents are at increased risk of experiencing poor mental health, becoming NEET (not in education, employment or training) and of involvement in the criminal justice system.¹² Whilst support for children whose parents are in prison is important, in most circumstances it will be a poor substitute for remaining in the care of their parent, and cannot significantly mitigate the damage caused by enforced separation due to imprisonment. This is particularly true for children affected by maternal imprisonment, as they are more likely to have been living in single-parent families, and to leave the family home upon their mother's imprisonment.¹³ A survey of women in prison in England found that three quarters (77%) reported their children living with another family member (as opposed to their father), compared to 10% of male prisoners, whilst an earlier study found that the majority of children affected by

¹² Commission on Women Offenders (2012) Commission on women offenders Edinburgh: Scottish Government

¹³ Prison Reform Trust (2014) Why focus on reducing women's imprisonment? London: PRT

maternal imprisonment were in kinship care, compared to 2% of male prisoners.¹⁴ As noted above, few women who are imprisoned are violent offenders and there is a strong case to be made for reducing the use of custody for relatively minor offences.

We believe the focus of this proposed Bill should be two-pronged – in the first instance, ensuring fewer mothers are imprisoned, thus enabling them to maintain care of their children; in circumstances where custody is unavoidable because of the nature of the offence, ensuring any dependent children are identified and supported at the earliest opportunity.

Question 2: Would you make any changes to the proposed Support for Children (Impact of Parental Imprisonment) Bill and if so, why?

As indicated above, we advocate amending the proposed *Support for Children (Impact of Parental Imprisonment) Bill* to include guidance for the court around sentencing decisions so as to ensure mothers are less likely to be imprisoned where community alternatives are appropriate. This could take the form of a presumption against remanding into custody or imprisoning women with dependent children in favour of community alternatives where the woman poses no risk of harm to the public (a recommendation made in a recent PRT report on reducing women’s imprisonment in Scotland),¹⁵ or deferring sentence to give mothers the opportunity to demonstrate their capacity for compliance with community sentences.

Question 5: Do you think there are any alternatives to Child and Family Impact Assessments?

Improvements could be made to the framework for Criminal Justice Social Work reports and they could be made mandatory in all cases where a defendant has dependent children, with guidance provided on what information should be included, who should be consulted and what options should be considered. The Guidance should refer to the UN Bangkok Rules and relevant national and international law.

Question 8: Is the proposed Bill likely to have any substantial implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

Women are more likely to be single parents than men, with the children of imprisoned women likely to be disproportionately impacted by their mother’s

¹⁴ Cuthbert, C. et al (2014) *An unfair sentence - All Babies count: Spotlight on the criminal justice system* London: NSPCC

¹⁵ www.prisonreformtrust.org.uk/Portals/0/Documents/Transforming%20Lives.pdf

imprisonment - just one in ten children whose mothers are in prison is cared for by their father in her absence.¹⁶ For that reason, primary caring responsibilities should be taken into account before, rather than after, sentencing decisions are made and, where relevant, should support imposing a community rather than custodial sentence.

In addition to this, we wanted to take this opportunity to reinforce the legitimacy of taking a gender-specific approach to sentencing women with primary caring responsibilities. Our recent report *Transforming Lives*, referred to earlier,¹⁷ found that equality law is routinely misinterpreted as requiring a gender-neutral approach.

The Scottish Courts and Tribunals Service are subject to the Public Sector Equality Duty which is clear that treating people equally does not mean treating them the same:

*“The Equality Duty does not require public bodies to treat everyone the same. Rather, it requires [them] to think about people’s different needs and how these can be met.”*¹⁸

The Equality and Human Rights Commission (EHRC) has expressed it thus:

*“The Equality Duty is clear that to eliminate discrimination and advance equality means recognising and taking steps to meet different needs and acting to remove disadvantage. Indeed compliance with the duties set out in the Equality Act 2010 may involve treating some people more favourably than others.”*¹⁹

The principle of equal treatment not meaning the same treatment applies particularly with respect to the problems the proposal in this bill seeks to address, because women are more likely to be primary carers than men. To that end, it is appropriate (and indeed the Bangkok Rules, UNCRC and case law necessitates) that primary caring responsibilities are taken into account as part of the sentencing process.

We look forward to the outcomes of the consultation and would be happy to provide further information if that would be helpful.

Prison Reform Trust
6 May 2015

¹⁶ Prison Reform Trust (2014) *Bromley Briefings Prison Factfile Autumn 2014* London: PRT

¹⁷ Prison Reform Trust (2014) *Transforming Lives- reducing women’s imprisonment* London: PRT

¹⁸ Government Equalities Office (2011) *Equality Act 2010: Public sector equality duty – What do I need to know? A quick start guide for public sector organisations* London: GEO

¹⁹ www.equalityhumanrights.com/sites/default/files/documents/research/rr86_final.pdf