



Scotland's Commissioner  
for Children & Young People

**UN Committee on the Rights of the Child, 58th Session  
Day of General Discussion 2011: 'Children of Incarcerated Parents'**

**Submission from Scotland's Commissioner for Children and Young People  
August 2011**

**Introduction**

1. Scotland's Commissioner for Children and Young People welcomes the United Nations Committee on the Rights of the Child's decision to dedicate its 2011 Day of General Discussion to the rights of Children of Incarcerated Parents.
2. The rights and welfare of the children of prisoners has been an issue of concern to the Commissioner, and his predecessor, for a number of years. The issue was first brought to the previous Commissioner's attention by a child who spoke to her about the problems resulting from the imprisonment of the child's parent. This sparked significant activity in the office, leading to the publication of three reports over a four-year period, and a substantial amount of work with the Scottish Prison Service, Parliamentarians, the Scottish Government, and NGOs working with the children and families that are affected.
3. The comments that follow are based on this work, which is briefly summarised below. They will be most relevant to the day's second theme *Children left 'outside' when their parent is imprisoned*, simply because this has been the main focus of the Commissioner's work on this issue. This paper then identifies four groups of issues affecting the children of prisoners in the experience of this office. It concludes by making five recommendations which the Commissioner respectfully proposes to the Committee for consideration.

*Not Seen. Not Heard. Not Guilty.*

4. In 2008, Scotland's first Children's Commissioner Prof. Kathleen Marshall published *Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland*. It found that '[t]he children of prisoners are the invisible victims of crime and the penal system. They have done no wrong, yet they suffer the stigma of criminality. Their rights to nurture are affected both by the criminal action of their parent and by the state's response to it in the name of justice.'<sup>1</sup>
5. The report recognised that the issues affecting the children of prisoners are not about support for children or prison visiting alone; they have to be understood – and solutions developed – in the context of the wider picture of the criminal justice system, such as the major increase in the prisoner population in Scotland, the lack of a consistent mechanism to highlight the rights and needs of children of offenders to inform the judiciary's decision-making, and the need for community disposals to be available to offenders with childcare

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<sup>1</sup> Scotland's Commissioner for Children and Young People (2008), [\*Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland\*](#) (hereafter '*Not Seen, Not Heard Not Guilty*') p. 8.

responsibilities. It made 28 recommendations aimed at changing criminal justice debates, improving support for children, enhancing children's access to and experience of contact with their imprisoned parent, and making children's views and best interests visible in decisions about the imprisonment of a parent.

#### *Justice Albie Sachs Lecture*

6. Following on from the report, the office organised a lecture by Justice Albie Sachs of the South African Constitutional Court, about his landmark judgment in a case concerning the rights of children whose mother faced a prison term<sup>2</sup>. Unbeknownst to each other, as Justice Sachs pointed out at the lecture in Edinburgh in 2009, the authors of the Scottish report and the South African judgment reached 'almost identical' conclusions despite operating '[i]n a totally different legal setting, in a totally different social setting, in a totally different historical setting'.<sup>3</sup>

#### *Perspectives of Children and Young People with a Parent in Prison*

7. The report of a small study on the impacts of parental imprisonment on children and young people<sup>4</sup> was jointly published by the Commissioner and Families Outside<sup>5</sup> in 2010 highlighted that the imprisonment of a parent can have traumatic effects on children's development, health (including mental health issues, such as depression and post-traumatic stress), and behaviour. It identified significant gaps in the support that is available to children of prisoners, and reiterated that children's best interests need to be at the forefront of decision-making in the criminal justice system.

#### *Not Seen. Not Heard. Not Guilty – Review 2011*

8. A recent review<sup>6</sup> of the 2008 report restated the imperative to systematically and holistically address the rights and needs of the children of prisoners, pointing out that parental imprisonment interferes with the rights of children of prisoners in a number of ways. It found that while substantial progress had been made for the children of prisoners in a number of areas, there has not (yet) been the culture change which is required in the Scottish Prison Service, and the criminal justice system more widely. It called for more, better coordinated action across key sectors such as criminal justice, the Judiciary, children and family services, and others to address the significant problems faced by the children of prisoners, recognising that while every actor involved with those children may make a positive difference, there is no single-agency solution to the profound and complex issues faced by this group of children.

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<sup>2</sup> [S v M \[2007\] ZACC 18](#).

<sup>3</sup> Justice Albie Sachs, [Lecture on the Rights of the Children of Prisoners](#), Edinburgh, 24 June 2009.

<sup>4</sup> Loureiro, Tânia (2010), [Perspectives of Children and Young People with a Parent in Prison](#) (hereafter 'Perspectives'), Edinburgh: Scotland's Commissioner for Children and Young People & Families Outside. Hard copies of this report will be made available at the Day of General Discussion.

<sup>5</sup> Families Outside is a Scottish NGO that supports the children and families of people involved in the criminal justice system.

<sup>6</sup> Scotland's Commissioner for Children and Young People (2011), [Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland – Review 2011](#) (hereafter '2011 Review'). Hard copies of this report will be made available at the Day of General Discussion.

## Key Areas of Concern

9. The Commissioner's recent work relating to the children of prisoners grouped the office's main concerns under four themes:
  - I. The rights of children in criminal justice debates;
  - II. The rights and status of children in decision-making about parents who offend;
  - III. Support for children of prisoners;
  - IV. Contact and visiting during parental imprisonment.

### I. The rights of children in criminal justice debates

10. There has to be a recognition by political actors, the Judiciary and other stakeholders in the justice system that criminal justice is not dispensed in isolation from other spheres of society. Decisions about criminal justice policy and institutions have effects not only on those who are directly involved in the system, but also on others, including the children and families of offenders. The Commissioner's work in Scotland highlighted a number of relevant areas of policy and practice where the best interests of children are not currently a primary consideration in decision-making, some of which are highlighted below:
11. An estimated minimum of 16,500 children in Scotland are affected by parental imprisonment in each year – however, there is no official figure, simply because no one is counting. Professionals working with the children and families affected confirm that the lack of data about how many children are affected and who they are is a barrier to adequate and timely support for children<sup>7</sup>.
12. The effects of criminal justice policy on children's rights is often only highlighted by the Commissioner and children's NGOs after legislation is introduced or a policy announced, rather than routinely considered in the process of policy-making from the outset using Children's Rights Impact Assessments<sup>8</sup>. This is problematic given the commitment entered into when the UK ratified the UNCRC in 1991 to comprehensively implement its provisions.
13. Scotland has an imprisonment rate of 158 per 100,000 population, one of the highest in Europe<sup>9</sup>. The prisoner population has risen by over a third between 2000-01 and 2009-10<sup>10</sup> and is projected to rise further. Although in line with an international trend<sup>11</sup>, the increase in the female prisoner population in Scotland – reportedly around 87% in the last decade alone<sup>12</sup> – is particularly worrying. High prison populations and overcrowding are detrimental to family contact and visiting, and therefore to the fulfillment of children's right to maintain contact with their imprisoned parent under article 9 (3), as the former Chief Inspector of Prisons for Scotland suggested when he referred to 'the nine evils of overcrowding'<sup>13</sup>.
14. Developments in the prison estate can impact on the children of prisoners. A move towards more local, 'community-facing' prisons has been urged but is yet to materialise. Long

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<sup>7</sup> 2011 Review, p. 14.

<sup>8</sup> Ibid, p. 12f.

<sup>9</sup> Scottish Government (2010), *Statistical Bulletin, Crime and Justice Series: Prison Statistics Scotland 2009-10*, p. 10.

<sup>10</sup> Ibid, p. 11.

<sup>11</sup> McIvor, Gill & Burman, Michele (2011), *Understanding the Drivers of Female Imprisonment in Scotland*, Glasgow & Stirling: Scottish Centre for Crime & Justice Research, pp. 9ff.

<sup>12</sup> Figure from the Scottish Prison Service.

<sup>13</sup> HM Chief Inspector of Prisons for Scotland (2007), *Annual Report 2006-07*, Edinburgh: Scottish Executive, p. 5.

distances between a child's home and the prison where their parent is held are a further barrier to maintaining contact<sup>14</sup>.

## II. The rights and status of children in decision-making about parents who offend

15. There is currently no requirement on judges in Scotland to take the rights and wellbeing of an (alleged) offender's children into account in decisions about remand/bail or sentencing. A recent attempt to amend the law in this regard was defeated in Parliament, despite the (then minority) Scottish Government's welcome backing for this initiative. Decisions about home leave and Home Detention Curfew<sup>15</sup> require to take account of children only in relation to child protection matters, rather than more holistically in terms of the overall impact of the entry/return of a prisoner to the family home<sup>16</sup>. Given the potentially grave effects of these decisions on children's lives, the Commissioner considers that the current law, policy and practice does not meet the requirements of articles 3 and 12 of the UNCRC.
16. Following a welcome recent revision of practice guidance on pre-sentence Criminal Justice Social Work Reports, this now prompts the inclusion of information about the likely effects of a custodial sentence on the offender's family, including any children. Questions concern whether the family home may be in jeopardy, the economic impact and whether the offender is the sole breadwinner, and impacts on caring responsibilities in respect of children. However, nothing in the guidance would lead report writers to consider other important issues in the child-parent relationship, such as the nature and strength of attachments between child and parent(s), and the potential emotional and developmental effects of parental imprisonment on the child<sup>17</sup>.
17. Current guidance is not clear as to whether pre-sentence report writers and judges may consider childcare responsibilities a barrier to community disposals. There is a risk that this may make it more likely for an offender who is a parent to be given a custodial sentence<sup>18</sup>.
18. The Commissioner recommended that a Child Impact Assessment be routinely conducted prior to sentencing, in order to highlight relevant positive and negative effects of different sentencing options on an offender's children<sup>19</sup>. This would both inform sentencing decisions and alert children's agencies to any support needs of the child, and where the parent is imprisoned could include an assessment of possible care arrangements. This should include the views of the child, and consider the child's best interest in the round<sup>20</sup>.

## III. Support for children of prisoners

19. The available international and Scottish/UK evidence strongly suggests that the children of prisoners are a vulnerable child population, and are likely to have substantial support needs. As the Committee points out in the *Guidelines for Participants*, there is a tension between the child's right to adequate support and their right to privacy in the context of information sharing between agencies. Practitioners inform the Commissioner's office that children are frequently not aware of the fact that their parent is imprisoned, which further

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<sup>14</sup> 2011 Review, p. 14f.

<sup>15</sup> Home Detention Curfew is a scheme under which certain prisoners may be released on licence early, subject to conditions including electronically monitored movement restriction conditions.

<sup>16</sup> 2011 Review, pp. 15ff.

<sup>17</sup> Ibid, pp. 17ff.

<sup>18</sup> Ibid, p. 19f.

<sup>19</sup> *Not Seen. Not Heard. Not Guilty*, p. 27.

<sup>20</sup> 2011 Review, p. 17.

complicates matters, as does the stigma associated with criminality and imprisonment that attaches to children who – it has to be emphasised – have done no wrong<sup>21</sup>.

20. Given the gravity of the potential developmental, health and educational effects on children affected by parental imprisonment<sup>22</sup>, a preventative approach to supporting the children of prisoners is preferable to one that seeks to intervene once a child has come to the attention of agencies because of, say, poor attendance and/or attainment at school, behavioural issues, mental health concerns, etc. This would be in line with the general direction of social policy in Scotland at present.
21. However, early, adequate and effective intervention presupposes that relevant children's agencies are aware that a child's parent is at risk of being imprisoned, or has been imprisoned. The Commissioner's work in this area found that information sharing between relevant agencies (i.e. criminal justice agencies, and children's and education agencies) is inadequate, and this presents additional barriers to the early provision of support to children. Children and Families Social Work services may feel that they have 'no business' in places like prison visitor centres (where they exist). Children of prisoners were described as an 'invisible population' in Scotland's schools, a situation that hinders the provision of appropriate support under Scotland's Additional Support for Learning framework. This is despite a children's services policy framework that emphasises the need for coordination and joint working between all relevant agencies, including 'adult' agencies such as criminal justice services, with the aim to support *all* children<sup>23</sup>.

#### **IV. Contact and visiting during parental imprisonment**

22. Visiting a parent in prison can be a bewildering and emotionally turbulent experience for children, although their individual experiences vary greatly<sup>24</sup>. Prison is not an environment that lends itself to being 'normalised' for children, but it is possible to remove practical and other barriers to family contact and prison visiting. Children's best interests need to be considered in everything about prison that affects children.
23. Practical barriers to children visiting parents in prison include the challenge of the prison estate's physical fabric (nearly half of Scotland's prisons are over a hundred years old and may be hard to physically adapt to the needs relating to family contact); not all prisons are close to the communities they serve, resulting in long distance travel for children and families; a lack of privacy at prison visits; and a lack of information for families, particularly child-appropriate information<sup>25</sup>.
24. In Scotland some practical issues have been addressed: there are now visiting times available outwith school hours; Family Contact Officers work with prisoners and children and families to improve family contact during imprisonment, which is a positive development, although their roles are not delivered to an equitable standard across the prison estate; Child-focused or 'bonding' visits – longer visits during which the child and the prisoner are allowed to move around the visiting room and play – are now available in most prisons in addition to family events throughout the year<sup>26</sup>. However, it is understood that child-focused visits are not normally available to remand prisoners, although the Scottish Prison Service's policy does not make that distinction.

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<sup>21</sup> Ibid, p. 21f.

<sup>22</sup> *Perspectives*, pp. 25-28 and 36-41.

<sup>23</sup> *2011 Review*, pp. 21ff.

<sup>24</sup> *Perspectives*, p. 24f.

<sup>25</sup> *2011 Review*, pp. 24-29.

<sup>26</sup> Ibid.

25. However, most notably in relation to child-focused visits, prisoners' eligibility for these visits is frequently tied to discipline and prisoner behaviour, and a range of conditions are applied across the prison estate, despite the Scottish Prison Service's own policy stating the opposite. This strongly indicates that child-focused visits are seen as a privilege of the prisoner, rather than a key aspect of the fulfillment of the child's right to meaningful contact with his/her imprisoned parent. Supporting family contact and positive child-parent relationships are not (yet) seen as part of the 'core business' of prisons and prison staff, despite the children's rights imperative arising from articles 3 and 9 (3) in particular<sup>27</sup>, and the substantial evidence that positive family contact promotes desistance from offending in the future<sup>28</sup> and better prison discipline<sup>29</sup>.

## Conclusions

26. The children of prisoners are a large, invisible and often highly vulnerable group of children whose rights and welfare are often gravely affected by both their parent's criminality and the state's response to it. The rights of the children of prisoners under the UNCRC are not currently at the forefront of the law, policy and practice relating to offenders who are parents, nor are the complexities of these children's predicament reflected adequately in the design of the mechanisms in place to support children. Promoting and protecting the rights of children of prisoners requires a coordinated response by all relevant agencies, bringing the apparent 'divide' between the criminal justice system and children and family services, and a culture change which elevates the rights and status of children of prisoners so that they will no longer be the 'invisible victims of crime and the penal system'<sup>30</sup>.

27. It is hoped that the very welcome work on this group of children by the UN Committee on the Rights of the Child will help drive improvements for these children by strengthening and raising the profile of the international children's rights imperative, and by continuously pursuing this important set of issues with state parties.

## Recommendations to the UN Committee on the Rights of the Child

Scotland's Commissioner for Children and Young People respectfully suggests that the Committee issue a *General Comment* on the rights of the children of incarcerated parents to aid the promotion and protection of their rights and welfare by state parties.

In this context, the Committee may wish to consider:

1. Reiterating to state parties that the principles and provisions of the UNCRC apply directly to the law, policy and practice relating to the police, the administration of justice and prison services, particularly that the best interest of the child must be a primary consideration in everything they do that affects children;
2. Reaffirming its previous recommendation<sup>31</sup> that state parties should conduct Children's Rights Impact Assessments on all existing and proposed legislation and policy, including on

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<sup>27</sup> Ibid, p. 5 and p. 26.

<sup>28</sup> Discussed in Loureiro (2010), cited above, p. 6.

<sup>29</sup> Coyle, Andrew (2009), *A Human Rights Approach to Prison Management: A Handbook for Prison Staff*, 2<sup>nd</sup> Edition, London: Centre for International Prison Studies & Foreign & Commonwealth Office, p. 103.

<sup>30</sup> Not Seen. Not Heard. Not Guilty, p. 8.

<sup>31</sup> UN Committee on the Rights of the Child (2003), *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, at para 45.

criminal justice, and evaluate the actual impacts of such law, policy and practice on children, with particular regard to the children of incarcerated parents;

3. Urging state parties to ensure that securing the rights and welfare of the children of offenders needs to be at the forefront of judicial and administrative decision-making on pre-trial detention, sentencing and release (including early and temporary release). Conducting Child Impact Assessments in court or as part of pre-sentence reports, which also serve to highlight the child's care and support needs, should be the norm.
4. Exploring good practice examples of non-stigmatising support mechanisms for the children of prisoners in terms of emotional, social and health issues and at school or in other learning environments, with a view to identifying international best practice which can guide other state parties.
5. Restating that state parties are responsible for raising awareness and promoting understanding of the UNCRC among professionals who work with children and young people or those whose work affects them, children and young people themselves and the wider public.

### **About Scotland's Commissioner for Children and Young People**

The Commissioner's office was set up as an independent public body that is accountable directly to the Scottish Parliament under the Commissioner for Children and Young People (Scotland) Act 2003. The current Commissioner is Tam Baillie.

The Commissioner's general function is to promote and safeguard the rights of children and young people, having particular regard to the United Nations Convention on the Rights of the Child. In particular, this involves (a) promoting awareness and understanding of the rights of children and young people; (b) reviewing law, policy and practice relating to the rights of children and young people with a view to assessing their adequacy and effectiveness; (c) promote best practice by service providers; and (d) promote, commission, undertake and publish research on matters relating to the rights of children and young people.

The Commissioner must involve children and young people in the work of his office, and consult them as well as children's organisations on the work the office undertakes, with particular attention to groups of children and young people who may have difficulty in making their views known.

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