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**Consultation Response to the Mandate of the Special Rapporteur for the UN Human Rights Council on children’s right to privacy**

International Coalition for the Children of Incarcerated Parents September 2020

The International Coalition for the Children of Incarcerated Parents (INCCIP) is a national network that aims to see the wellbeing of children with an incarcerated parent addressed in all nations and at all levels of society. Our mission is to gather, collaborate with, and support a diverse range of like-minded organisations and individuals to promote and achieve the wellbeing of children with an incarcerated parent more effectively. INCCIP’s purpose is:

* To work with the children with an incarcerated parent(s) to give them voice in national and international fora;
* To be a global community of people and organisations who come together to consider and act to reduce the negative effects of parental incarceration on children; and
* To support people around the world who work to initiate good policies and practices by:
  + Engaging with global decision makers, nation states, justice systems, and children’s rights organisations to improve the lives of children with parents who are in detention;
  + Supporting research across national and state boundaries; and
  + Working with our members to enhance community responses.

INCCIP welcomes the opportunity to comment on the Mandate of the Special Rapporteur in relation to children’s right to privacy. Our focus is on the experience of children who are vulnerable due to the incarceration of a close family member – usually a parent or carer, but arguably the incarceration of any close family member impacts upon a child’s right to privacy. This consultation response flags up the specific issue of children with an incarcerated parent or other close family member, outlining the unique position they are in regarding considerations of privacy and child protection.

***General Data Protection Regulations***

Under the European General Data Protection Regulations (GDPR), permission from the owner of the personal data must be sought in order for this information to be collected or shared, unless there is a wider issue of personal protection, public interest, or legislative requirement. When a close family member goes to prison, the question is to whom this information belongs. The fact of incarceration relates to the person who is incarcerated; however, this fact has a direct impact on the family left behind and has been identified as a potential child protection issue.[[1]](#footnote-1)

The question is whether child protection outweighs the right to privacy in such cases and what the implications of this might be. What is the impact of mandatory reporting laws, for example? Should people be forced to reveal the fact that a family member has been incarcerated? This may be for the most benevolent of reasons – for example to ensure that support is available for a child who has experienced considerable trauma as a result of the arrest and incarceration. Incarceration of a household member is one of ten Adverse Childhood Experiences (ACEs) proven to increase the risk of poor longer-term outcomes,[[2]](#footnote-2) and children who experience this are five times more likely to experience other traumas as well.[[3]](#footnote-3)

The temptation is therefore to overrule the right to privacy in the interest of child protection. Rule 7f of the UN Standard Minimum Rules for the Treatment of Prisoners 2015 (the Nelson Mandela Rules) requires the names of family members including children, their ages, location, and custody or guardianship status to be recorded for every person entering prison.[[4]](#footnote-4) The Rule does not then specify whether this information can be shared or aggregated in any way; indeed, it does not state the purpose of recording this information at all.

In general, INCCIP is of the view that this information could go a long way in ensuring that children who are affected by parental imprisonment are supported and protected through education, health, and other agencies that may otherwise never know the home circumstances. However, we are also aware of how such information might be misused. In China, for example, the fact of a parent’s incarceration goes on a child’s record and remains there for life. Such a practice deliberately labels a child due to the actions or status of the parents, carrying negative consequences throughout the child’s life. This is in contrast to rulings elsewhere, such as in the South African Constitutional Court, which declared that:

*Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them…. The sins and traumas of fathers and mothers should not be visited on their children.[[5]](#footnote-5)*

Further, Article 2 of the United Nations Convention on the Rights of the Child requires State Parties to ensure that no child is discriminated against in any circumstance, including due to the status of the parent(s).[[6]](#footnote-6) Without data that at a minimum give a robust and accurate number of children who are affected by parental incarceration, State Parties will struggle to ensure that discrimination does not occur.

The question is whether a child with a close family member in prison has a voice in the sharing of this information, as per Articles 3 and 12 of the UNCRC.[[7]](#footnote-7)

***Purpose of data collection***

Ann Adalist-Estrin, Director of the National Resource Center on Children and Families of the Incarcerated in the United States, highlights the need for the purpose of data collection and information sharing to be clear[[8]](#footnote-8): is this to ‘give’, such as to provide families with information and support when someone is incarcerated; or is it to ‘get’, such as to gather information for research – or indeed for more mercenary ends, such as to gain wider circulation of a story in the media?

Gathering and sharing information in order to ‘give’ something to children when a close family member is incarcerated arguably supports children’s rights to special care and assistance when deprived of their family environment, as per Article 20 of the UN Convention on the Rights of the Child[[9]](#footnote-9); the right to information, as per Articles 9, 13, and 17 of the UNCRC; and the right to support under Article 6 of the Council of Europe (2018) Recommendations regarding children with imprisoned parents.[[10]](#footnote-10) There is however a real risk that gathering information that exposes the fact of a close family member’s incarceration without the family’s consent risks breaching Article 2 of the UNCRC in relation to discrimination based on the status of a parent; Article 16 of the UNCRC in relation to the right to privacy; and Article 55 of the 2018 Council of Europe recommendations regarding exposure by the media.

In Scotland, INCCIP member Families Outside instigated a ‘No Address in the Press’ campaign specifically to highlight the harm being done to families when the address of the person convicted in court was published in the media.[[11]](#footnote-11) This was in response to the experience of the families they support, which revealed that families were being attacked and their homes vandalised. One mother refused to let her teenage son out of the house after his brother – who looked very similar – had his photograph and address published in the media following his imprisonment. Another mother commented that:

*The address that my children stay at was also printed, even though the person convicted was not living here at the time. I have small children, and it doesn’t take much to find a place nowadays. My kids are victims too and should have the same protection.*

Some countries such as Norway are more prescriptive in preventing information from being published when this may be detrimental to a child. We have not however found such protections to be routinely in place internationally.

***General principles***

A child’s right to privacy when a parent or other close family member goes to prison raises a number of ethical questions. Whose information is it? What is the balance between the right to privacy and the need for support or child protection? Is it in the best interest of the child to enforce mandatory reporting in order to assess what the impact of the incarceration may be? Or should families have the freedom to choose to seek support and information themselves? Does the family’s right to privacy stretch to collusion in secrets to ‘protect’ the child, saying that daddy’s working away or mummy’s in hospital, when all available research shows that telling children the truth in an age-appropriate way helps the child cope better?[[12]](#footnote-12)

The stigma and shame of incarceration can make families withdraw and difficult to identify, and families in this position rarely seek support or draw attention to themselves when they are struggling. Whether attempts to identify children in this position and to share this information with others breaches their right to privacy can often depend on how this is done: who is asking? When are they asking? What are they asking? How are they asking, and for what purpose? What will be done with the information?

Where families are stigmatised or targeted, they have good reason to fear exposure and to protect their right to privacy. Previous negative experience with state involvement also has a bearing on their willingness or otherwise to share information. Unfortunately, this reticence can place children at serious risk. INCCIP and Children of Prisoners Europe (COPE) colleague Relais Enfants Parents Romans (REPR), Switzerland, shared their experience of a mother who was remanded to prison, leaving her 2-year old daughter behind.[[13]](#footnote-13) Afraid of state intervention, she left a message for a neighbour to look after the child. Unfortunately, the neighbour did not receive the message, and the child died of dehydration. Not only do questions about children need to be asked routinely and systematically, but also the people being asked need to have confidence in what is being asked and why. If people do not believe their right to privacy will be respected, or that the sharing of private information will be abused.

***Preliminary research***

With these questions in mind, INCCIP member Families Outside engaged student intern Ahlke Bitting for a short-term exploratory project on families’ perspectives on the right to privacy when someone goes to prison.[[14]](#footnote-14) Contrary to what we expected, every single family member who participated said they wanted their information to be shared with relevant criminal justice agencies so that they did not have to keep repeating their stories. In turn, however, they wanted these agencies to share information with them – explanation of systems, what to expect, and what support was available. The families universally believed that agencies such as the police, prosecutors, courts, prisons, and social work teams should all have designated staff to liaise with families and keep them informed. Their desire for information and involvement overshadowed their desire for privacy, for themselves and for their children.

This may not be the case for all families, and those who have had less positive, less trusting relationships with the state may be more hesitant to be identified. This requires further exploration but raises important questions about mandatory data collection and reporting compared to more consensual approaches.

***Conclusions***

At a time when data collection on a whole range of activities is increasing, we must shift the balance and do more to support children and families when someone comes into contact with the criminal justice system. The child’s right to privacy when a parent or other close family member is incarcerated raises a number of ethical questions, often with conflicting priorities. As such, this situation provides an important case study for considerations of a child’s right to privacy. More research is required to understand the perspectives of children, young people, and their families in relation to this issue and how their interests are best protected in line with the 2018 Council of Europe recommendations regarding children with imprisoned parents and with the UN Convention on the Rights of the Child. We commend this issue for the consideration of the Special Rapporteur and commit to offering whatever support we can to identifying a way forward.

1. https://www.crestadvisory.com/post/children-of-prisoners-fixing-a-broken-system [↑](#footnote-ref-1)
2. Felitti, Vincent J, Anda, Robert F, Nordenberg, Dale, Williamson, David F, Spitz, Alison M, Edwards, Valerie, Koss, Mary P, and Marks, James S. 1998. “Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults.” *American Journal of Preventive Medicine* 14(4), 245-258. [↑](#footnote-ref-2)
3. Turney, K. (2018) “Adverse childhood experiences among children of incarcerated parents.” *Children and Youth Services Review* 89, 218-225. [↑](#footnote-ref-3)
4. https://www.unodc.org/documents/justice-and-prison-reform/Nelson\_Mandela\_Rules-E-ebook.pdf [↑](#footnote-ref-4)
5. S v M (2007) Constitutional Court of South Africa. *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007). [↑](#footnote-ref-5)
6. https://downloads.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf?\_adal\_sd=www.unicef.org.uk.1597140360559&\_adal\_ca=so%3DGoogle%26me%3Dorganic%26ca%3D(not%2520set)%26co%3D(not%2520set)%26ke%3D(not%2520set).1597140360559&\_adal\_cw=1596716964410.1597140360559&\_adal\_id=a2a78a19-b795-4761-8f44-24bf4fbb0412.1596716964.3.1597140357.1596716964.56c41c82-6004-4f34-b621-0136e1165c53.1597140360559&\_ga=2.221778843.2030880991.1597140356-339403836.1582731365 [↑](#footnote-ref-6)
7. https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [↑](#footnote-ref-7)
8. Adalist-Estrin, A. (2018) “Responding to the Needs of Children and Families of the Incarcerated: 12 Guiding Principles”*.* In L. Gordon (ed)., *Contemporary Research and Analysis on the Children of Prisoners: Invisible Children*. Newcastle upon Tyne: Cambridge Scholars Publishing, 100-115. [↑](#footnote-ref-8)
9. https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [↑](#footnote-ref-9)
10. https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438 [↑](#footnote-ref-10)
11. https://www.familiesoutside.org.uk/noaddressinthepress/ [↑](#footnote-ref-11)
12. # Jones, A., Gallagher, B., Manby, M., Robertson, O., Schützwohl, M., Berman, A.H., Hirschfield, A., Ayre , L., Urban, M. and Sharratt, K. (2013) *COPING: Children of Prisoners, Interventions & Mitigations to Strengthen Mental Health*. http://www.hud.ac.uk/research/researchcentres/acc/projects/coping-children-of-prisoners/

    [↑](#footnote-ref-12)
13. Plenary discussion, Children of Prisoners Europe conference, ‘*No-one’s ever asked me’: Hearing the voices of children affected by parental imprisonment*. Royal Botanic Garden, Edinburgh 16 May 2014. [↑](#footnote-ref-13)
14. Bitting, A. (2019 unpublished) *Perspectives of Families of People in Prison on Information Sharing: A Qualitative Study*. Edinburgh: Families Outside. [↑](#footnote-ref-14)