****

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

Children of Prisoners Europe (COPE)

September 2020

*Children of Prisoners Europe (COPE) is an EU-funded centre of expertise and trans-European network made up of non-governmental organisations, members of prison services, academics, individuals and other stakeholders working with and on behalf of children with imprisoned parents. COPE provides a rights-based action-oriented policy framework that pools EU, Council of Europe and UN action, while promoting national-level action in Europe on the rights and needs of the estimated 2.1 million children with imprisoned parents (Council of Europe-47) under one umbrella. The core purpose is to highlight good practice at European and international levels, advocate for positive change on behalf of children with imprisoned parents, promote the development of cross-agency, multidisciplinary support systems, and share good practice between its members, thus benefiting more children on a broader level.*

COPE is grateful for the opportunity to comment on the Mandate of the Special Rapporteur with respect to children’s right to privacy. It has contributed to the drafting of the Council of Europe Recommendation of the Committee of Ministers to the member States on children with imprisoned parents[[1]](#footnote-1). COPE actively promotes the implementation of the Recommendation’s principles and articles, in all of the work that the network carries out and to all stakeholders working on behalf of children who have a parent in prison.

Relevant articles include:

Basic Principle 1

*Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions which may affect them. Measures that ensure child protection, including respect for the child’s best interests, family life and privacy shall be integral to this, as shall be the measures which support the role of the imprisoned parent from the start of detention and after release.*

Article 21

*Measures should be taken to ensure that the visit context is respectful to the child’s dignity and right to privacy, including facilitating access and visits for children with special needs.*

Article 23

*Any security checks on children shall be carried out in a child-friendly manner that respects children’s dignity and right to privacy, as well as their right to physical and psychological integrity and safety. Any intrusive searches on children, including body cavity searches, shall be prohibited.*

Article 55

*Information provided to, and by, the media should not violate the right to privacy and protection of children and their families, including data protection rules, and any media reporting should be carried out in a child-friendly manner.*

***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 or public interest. When a parent goes to prison, the question is to whom this information belongs. The imprisonment itself relates directly to the individual who is incarcerated; yet the fact of the imprisonment is relevant to children in its impact on them, in their need for support; and their vulnerability to potential child protection issues.[[2]](#footnote-2)

Imprisonment of a parent is one of ten Adverse Childhood Experiences (ACEs) proven to increase the risk of poor longer-term outcomes,[[3]](#footnote-3) and children who experience this are five times more vulnerable to experiencing other traumas as well.[[4]](#footnote-4)

The balance between children’s rights to privacy and need for support and protection, and parents’ rights is hard to determine and raises many complex questions:

* Do issues of child protection and child support outweigh the right to privacy in such cases? If so, what are the repercussions?
* Should there be mandatory reporting laws and if so, what are the repercussions?
* Should people be forced to reveal the fact that a parent has been sent to prison? This may be for the most benevolent of reasons — for example to ensure that support is available for a child who may have experienced considerable trauma as a result of the arrest and imprisonment.
* Rule 7f of the UN Standard Minimum Rules for the Treatment of Prisoners 2015 (the Nelson Mandela Rules) requires the names of children, their ages, location, and custody or guardianship status to be recorded for every person entering prison.[[5]](#footnote-5) 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.
* Does a child with a parent in prison have a voice in the sharing of this information?

***The need for data***

CM/Rec(2018)5 highlights the lack of accurate systematic records of the number of children with parents in prison worldwide, presenting challenges to evaluating the number of children affected and in turn, to ensuring adequate resources are in place to support their needs[[6]](#footnote-6). This paucity of data on children with imprisoned parents has presented challenges to evaluating the number of children affected and in ensuring adequate support systems and policies are in place to meet their needs; significantly, a lack of baseline data presents obstacles in evaluating the impact and effect of support systems. If data that *is* recorded when a parent goes to prison is not made available, but remains for example in personal dossiers, this route to identifying and remedying children’s needs is closed. How can the right to privacy and the need for child protection be balanced? Does a child with a parent in prison have a voice in the sharing of this information? A distinction needs to be made between collecting data for policy and planning purposes (anonymised and publicly available) both broadly and for the prison administration, for security, safety and child protection policy and practice; and collecting data in relation to specific prisoners and children so as to allow children to be taken into account in decision-making. The latter includes for example, whenever a parent is detained, paying particular attention to allocating them to a facility close to their children, as per the general principles of CM/Rec (2018)5; providing information to families about transfers and illnesses; and ensuring that regular contact between children and imprisoned parents is maintained as per UN CRC Article 9 and that children receive adequate support.

Gathering and sharing information in order to ‘give’ something to children when a parent goes to prison arguably supports children’s rights to special care and assistance when deprived of a parent, as per Article 20 of the UN Convention on the Rights of the Child[[7]](#footnote-7); 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 Recommendation CM/Rec (2018)5.[[8]](#footnote-8) There is however a real risk that gathering information that exposes the fact of a parent’s imprisonment without family 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 the Articles of the Council of Europe Recommendation CM/Rec(2018)5 cited above.

***Impact of pandemic***

COVID-19 and its impact on the suspension of in-person visits by children to their parents in prison have made issues around children’s privacy even more salient given the greater use of virtual means of child-parent communication in addition to telephone calls. Most telephone and video calls from prisons to families are recorded, thus raising issues around recording discussions between children and parents. Should they be recorded? If they are recorded, on what basis, who has access to the recording and how long are recordings kept? In short, doesn’t the act of recording conversations violate the child’s right to privacy, as per GDPR regulations? Some countries see recording conversations as incorporating a child protection mechanism into exchanges. How can prison regimes balance this aspect with children’s right to privacy in terms of defining best practice on safeguarding children and their privacy? In Italy, for example, authorities do not have the right to record conversations between prisoners and their children, although they do have the right to observe communications.

***Ownership of information and the passage of time***

Other key questions include “to whom does the information belong” and who *controls* the data? If it is legitimate for public administrations to control and dispose of such data in the interest of the child, what happens when the situation changes and the child grows up or the parent is released from prison? What does the controller do with the data? Should the data be wiped out? Once grown-up, should the former children be granted access to any personal files and data? Controllers are likely to be private companies. Again, for what duration are they allowed or required to keep such data? Who has access? How are the data protected against intrusion? Greater transparency on surveillance and the relevant rules and obligations are crucial, for the purposes of developing child-protective measures and guidelines.

***Social media***

It is important to also point out the risks involved with sharing of data/information via *social media*. The risk of damaging the child’s privacy and interests is very high. This may particularly affect children with parents in prison who can be subject to bullying on social media , Social media operators (Facebook and others) should be forced to take a risk-based approach to their duty of care and exercise extra due diligence in these matters. Relevant appropriate legislation needs to be developed, as “voluntary” systems have proven time and again to be woefully insufficient.

***In conclusion***

We thank the Special Rapporteur for this opportunity to highlight these important issues and we commit to being involved in teasing out these complex issues in different fora, providing any kind of support in the development of measures and guidelines that further protect children’s privacy and dignity and support their lives as children entitled to the same freedoms as other children.

1. https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438 [↑](#footnote-ref-1)
2. https://www.crestadvisory.com/post/children-of-prisoners-fixing-a-broken-system [↑](#footnote-ref-2)
3. 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-3)
4. Turney, K. (2018) “Adverse childhood experiences among children of incarcerated parents.” *Children and Youth Services Review* 89, 218-225. [↑](#footnote-ref-4)
5. https://www.unodc.org/documents/justice-and-prison-reform/Nelson\_Mandela\_Rules-E-ebook.pdf [↑](#footnote-ref-5)
6. Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, Explanatory Memorandum, para 13. [↑](#footnote-ref-6)
7. https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [↑](#footnote-ref-7)
8. https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438 [↑](#footnote-ref-8)