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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**

Families Outside, Scotland (UK)

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Families Outside is a national independent charity in Scotland that works solely on behalf of children and families affected by imprisonment. We do this through provision of a national freephone helpline for families and for the professionals who work with them, as well as through regional support, delivery of training, and development of policy and practice.

Families Outside 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 imprisonment of a close family member – usually a parent or carer, but arguably the imprisonment 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 imprisoned 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 imprisonment relates to the person who is in prison; 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 sent to prison? 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 imprisonment. Imprisonment 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. Article 107 of the Criminal Justice (Scotland) Act 2016[[4]](#footnote-4) required Scottish Ministers to record whether someone in prison had children, and if so, to gather enough information on these children (names, addresses, dates of birth) to notify the Named Person (usually the Head Teacher of the child’s school). This would then enable the Named Person to conduct an assessment of the impact the imprisonment would have on the child and ensure required support was put in place.

Article 107 was never implemented, due to controversy in relation to information sharing and the role of the Named Person,[[5]](#footnote-5) but the question remains: does a child with a close family member in prison have a voice in the sharing of this information?

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.[[6]](#footnote-6) Without data that at a minimum gives a robust and accurate number of children who are affected by parental imprisonment, State Parties will struggle to ensure discrimination does not occur.

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.[[7]](#footnote-7) 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. However, Families Outside 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.

***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 goes to prison; 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 goes to prison 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 imprisonment 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, 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 we 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.*

The campaign progressed as far as a Parliamentary petition but was overturned in the belief that adequate legal protections were already in place. In our experience, this has not been the case in practice.

***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 imprisonment 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 imprisonment 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. 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, 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***

In our experience, the default position tends to be for Governments and prison authorities to use the GDPR legislation as an excuse not to collect personal information about children due to the need for ‘explicit’ consent from people in prison and their wider family. However, in Scotland, this goes against the policy of Getting It Right for Every Child (GIRFEC)[[15]](#footnote-15) and taking a Whole Systems Approach (WSA), in accordance with the Children and Young People (Scotland) Act 2014.[[16]](#footnote-16) Families Outside believes that, at a time when data collection on a whole range of activities is increasing, we must shift the balance and do more to support families who come in to contact with the criminal justice system.

The child’s right to privacy when a parent or other close family member goes to prison 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.legislation.gov.uk/asp/2016/1/section/107/enacted [↑](#footnote-ref-4)
5. *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* July 2016; https://www.bbc.co.uk/news/uk-scotland-scotland-politics-49753980 [↑](#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.unodc.org/documents/justice-and-prison-reform/Nelson\_Mandela\_Rules-E-ebook.pdf [↑](#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)
15. https://www.gov.scot/policies/girfec/ [↑](#footnote-ref-15)
16. https://www.legislation.gov.uk/asp/2014/8/contents [↑](#footnote-ref-16)