

Title	Weighing in the balance: Reflections on the sentencing process from a children's rights perspective
Authors	Donson, Fiona;Parkes, Aisling
Publication date	2016-09-14
Original Citation	Donson, F. and Parkes, A. (2016) 'Weighing in the balance: Reflections on the sentencing process from a children's rights perspective', Probation Journal, 63(3), pp. 331-346. doi: 10.1177/0264550516649575
Type of publication	Article (peer-reviewed)
Link to publisher's version	http://journals.sagepub.com/doi/abs/10.1177/0264550516649575 - 10.1177/0264550516649575
Rights	© The Author(s) 2016. This accepted manuscript version is reprinted by permission of SAGE Publications. The published version is available at http://journals.sagepub.com/doi/abs/10.1177/0264550516649575
Download date	2023-09-27 18:35:43
Item downloaded from	https://hdl.handle.net/10468/5291

Weighing in the balance: Reflections on the sentencing process from a children's rights perspective

Fiona Donson

University College Cork, Ireland

Aisling Parkes

University College Cork, Ireland

Abstract

A substantial body of research now exists indicating that parental imprisonment can produce multiple negative effects on dependent children. While the criminal justice system can respond to this post-imprisonment through positive interventions, an important question arises as to whether courts should take into account the impact of imprisonment on the children of offenders at the point of sentencing. The recognition of children's rights in many jurisdictions has prompted courts to develop approaches that take account of these important third party considerations. This article will explore how the courts of South Africa and England/Wales have made space for the rights of children of offenders within the sentencing process and consider whether Ireland might adopt such an approach. Central to this process is how relevant information regarding dependent children can best be presented to the sentencing court. The article will therefore examine the potential introduction of child impact statements into the Irish sentencing process, and the extent to which Probation Officers are suited to adapting their current pre-sanction report role to include child impact information.

Keywords

Sentencing, probation officers, children of prisoners, children's rights, pre-sentence reports, child impact statements

Corresponding Author:

Fiona Donson, University College Cork – Law School of Law University College Cork, Ireland.

Email: f.donson@ucc.ie

Introduction

Conventionally, criminal justice systems have paid little attention to children of offenders. Where they are considered, it is largely post-sentence in relation to prison visits or in the context of supporting reintegration post-release. However, at the point of sentencing, families remain sidelined, at best considered as a collateral feature of the offender. In some jurisdictions, there are indications of a shift in approach. For example, in Ireland, research relating to the impact of imprisonment on children of offenders is emerging (Breen, 2010; IPRT, 2012; Donson and Parkes, 2012; O'Malley, 2015); while the Irish Prison Service and Irish Probation Service have both made moves to formally support families of prisoners and develop new practices to facilitate change.

This article will consider the extent to which the courts, when deciding on the punishment of an offender, give formal recognition to the impact of incarceration on an offender's children. It will interrogate how courts might best be facilitated in acknowledging the rights of such a vulnerable and largely invisible group of children in a transparent, consistent and above all, proportionate fashion. Current practice shows that the Irish courts regard these matters, where relevant, simply as relating to the offender in the form of mitigation. However, given the discretionary nature of the process, and a lack of engagement with a clear (children's) rights framework, the approach is likely to be inconsistent across courts and unsupported by guidance. Finally, the question of how information can be effectively presented to the courts will be examined, this includes the use of Probation Officer prepared pre-sentence reports and alternative more child-right oriented approaches; this will shine a light on the underlying tension between offender mitigation and the adoption of a child rights oriented approach in this area.

Sentencing and third party information

The criminal justice system's disregard of the impact of a custodial sentence on children of offenders stems in large part from the traditional focus of the criminal law which, as Lerer notes 'has four purposes: retribution, incapacitation, deterrence and rehabilitation. It is considered axiomatic that the needs of third persons should have no relevance in these determinations' (2013: 27). The focus of the court at this stage of the process is generally described as being binary in nature, excluding third party harms other than as personal mitigation (Lerer, 2013: 44) and engaging only with two actors in the form of the State and the accused/offender (Conway, 2010: 222). Personal mitigation, through which children are considered as a 'condition' of the offender, allows the court a discretion to consider whether something might alleviate the severity of a sentence. Such mitigation is either provided by the offender's lawyer or in a more structured way by pre-sentence reports prepared by

probation officers; neither lawyer nor probation officer is tasked with the responsibility of speaking for the child in this context.

In some jurisdictions such as South Africa and England/Wales, this orthodoxy has been subject to challenge with varying degrees of success. This shift, in large part operates as a result of the human rights frameworks within these jurisdictions. Nonetheless, experience from these jurisdictions illustrates that adding another element for consideration to an already complex sentencing process is challenging for both the courts and the criminal justice professionals who work within the system, including probation officers, who may be called upon to provide information concerning children and families of offenders.

Central to this complexity is the concern of the court to balance the underlying principles of sentencing and the desire to ensure equality of treatment within the decision-making process. The inclusion of additional actors, such as children of offenders, complicates this process. It also leads the courts to worry about the use of children as a “get out of jail free” card for offenders who also happen to be parents. However, understanding the question of impact as a separate children’s rights component – associated with the dependent child not the offender parent – can, it is argued, alleviate some of the equality concerns. In addition, the practice of considering impact, in jurisdictions such as South Africa and England/Wales, illustrates that the very existence of dependent children does not equate to an automatic non-custodial sentence. Rather, it requires the court to consider additional elements, most often where an offender is at the custodial threshold, i.e. where the court has a variety of options available to it, one of which is imprisonment.

It is against this traditional sentencing process that core human rights requirements should be factored in which dictate that where decisions are being made which directly impact on children, the best interests of those children should be considered and their voices should be factored into the decision-making process. As we discuss in the next section, a decision as to whether a parent should go to prison or not is one which directly affects a child’s life and one which can have long term implications.

The rights of children affected by parental imprisonment: a neglected reality

Until relatively recently, children affected by parental imprisonment have been accurately described as ‘the invisible victims of crime and the penal system’ (Scharff-Smith, 2011: 6). While the UN Convention on the Rights of the Child 1989 (UNCRC) does not make specific reference to children affected by parental imprisonment, the holistic nature of the UNCRC means that it contains ample protections for this vulnerable group of children. Indeed, the Convention’s four guiding principles,

which are substantive rights themselves, must be read in tandem with each of the other provisions contained within the UNCRC. These include: non-discrimination (Article 2), the best interests principle (Article 3), the right of the child to life, survival and development (Article 6) and the right of the child to express views (Article 12). Each of these principles is central to ensuring the implementation of children's rights including the rights of children of incarcerated parents.

Beyond the general principles, there are a number of provisions that merit consideration in the context of sentencing. Article 9(1) points to the fact that children should not be separated from their parents except where it is necessary to ensure their best interests are protected. Furthermore, Article 9(3) highlights the fact that where children are separated from their parents, it is vital that they maintain personal and direct contact with both parents on a regular basis. Thus, these are vital considerations for any sentencing judge. The extent to which children are appropriately informed about their parent's incarceration is another important consideration in this regard. Articles 13 and 17 protect the child's right to information. Indeed, in order to effectively exercise their right to be heard, children must be adequately informed about the circumstances surrounding that decision.

The general principles enshrined within Articles 3 and 12 are of particular importance in the context of sentencing. Article 3 provides that '[i]n all actions concerning children, whether undertaken by ... courts of law, ...the best interests of the child shall be a primary consideration'. Thus, since a decision concerning the sentence imposed on the child's primary caregiver is being taken by a court, this requires that the best interests of the child be balanced against any other relevant factors.

Article 12 provides that a child, once capable of forming views, has a right to express those views on all matters affecting him or her, including the incarceration of a parent, with due weight being afforded those views in accordance with the age and maturity of the child. This would suggest that the views of a child should be considered, directly or indirectly, when a decision is being made which concerns his or her parent's freedom, a decision that will inevitably bear a significant impact on the life of the child (Boudin, 2011: 84). However, in reality, the views of children of offenders are rarely if ever considered, let alone given due weight in relation to the sentencing decision as we will discuss below.

At regional level, Article 8 of the European Convention on Human Rights 1950 (ECHR) establishes a right to private and family life, which applies to both adults and children. The provision is not absolute and any interference must be justified on the basis of interests such as public safety. However, the European Court of Human Rights has stated that the balancing of competing interests needs to include the best interests of the child (*Johansen v Norway* [1996] ECHR 31).

Providing information on children before the sentencing court

Recognising the fact that a court, when sentencing a parent, is in a position to negatively impact on the rights of children is an important step in changing the dynamic of the sentencing process. Once the court acknowledges the need to undertake an assessment of the rights of affected children, whether as a free-standing best interests assessment, or in relation to their right to family life, the courts perspective alters. This does not mean that there is a presumption against the imprisonment of parents. Clearly, the rights of children must be balanced against competing elements such as punishing the offender parent, protecting society, and achieving appropriate sentencing aims.

The decision of the Constitutional Court of South Africa in the case of *S v M* (2008 (3) SA 232 (CC)) is particularly instructive in this regard, signalling the potential for a 'changed mind set' in this area. In South Africa, sentencing operates under a 'triad consisting of the crime, the offender and the interests of society' as set out in *S v Zinn* (1969 (2) SA 537 (A) 540G). The significance of the *S v M* decision lies in the fact that it largely reworked the sentencing framework, making space for the rights of affected children to be introduced into the decision-making process. This children's rights focus is based on section 28 of the South African Constitution which provides that the best interests of the child are 'of paramount importance in every matter concerning' them. Since a sentencing decision is a matter affecting the children of an offender, the existence of such children should be included as an independent factor to be considered where more than one appropriate sentencing option is available to the judge.

In *S v M*, the court considered what the appropriate sentence would be for a single mother of three children who had been found guilty of fraud. The defendant was the sole caregiver and the court concluded that it would be unconstitutional for the sentencing court to impose a prison sentence upon her without first having considered the impact of the sentence on the children. Sachs J stated

The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. (*S v M*: para 33)

He went on to articulate a clear step-by-step process that the court should follow where children are likely to be affected:

1. the court should establish whether the convicted person is a primary carer;
2. the court should establish the effect on children of a custodial sentence;
3. if on the *Zinn* approach, a custodial sentence is appropriate, the court must 'apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated' (*S v M*: para 36);

4. where the appropriate sentence is non-custodial, then the court should bear in mind the best interests of any children in coming to its decision regarding the sentence to be imposed;
5. where there is a range of possible sentences, the court 'must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose' (*S v M*: para 36).

Information on M and her children was presented to the Constitutional Court through reports prepared by a *curator ad litem*. This mechanism allows for a representative to be appointed by the court to independently represent the best interests of the child. It has become particularly significant in the pursuit of children's rights protections before the South African Constitutional Court (Boezaart, 2013). Justice Sachs was highly critical in the case of *Christian Education South Africa v Minister of Education* (2000 4 SA 757 (CC)) where a *curator ad litem* was not appointed in a challenge to the prohibition on corporate punishment in schools:

The children concerned were ... in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, *neither was able to speak in their name*. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure

A *curator ad litem* provides an independent voice for the children whose rights are being examined by the courts in accordance with Article 12 UNCRC, and is independent of pre-sentence mitigation. The latter serves a different purpose before the court. However, without a clear legislative framework or practice direction requiring the court to make such an appointment in all relevant cases, there is the potential for an inconsistent approach to occur.

Reported cases post-*S v M* indicate that there has been some progress in changing the sentencing court mindset in South Africa. In *S v S* (2011 (7) BCLR 740 (CC)) the majority of the Constitutional Court restated the approach but restricted the *S v M* protection to primary carers because of the nature of section 28 of the Constitution. More broadly, Carnelley highlights that at the lower court level the *S v M* guidelines have been consistently considered prior to sentencing (2012: 109). This has not always resulted in non-custodial sentences being handed down, but it has made a difference in how courts carry out their sentencing task:

... it is evident that the courts have been sensitised to the interests of the children when sentencing the primary caregiver. Where the information before the court is inadequate, the

court will request the necessary information and where imprisonment is inevitable, the courts ensure that the welfare of the children is looked after, including making suitable alternative arrangements, either through mobilisation of State machinery or through the family (Carnelley, 2012: 110).

Creating a space for considering child impact in sentencing in Ireland

The discussion of the *S v M* case is used to demonstrate the potential for courts to make space for the consideration of children's rights in sentencing. Each jurisdiction has its own sentencing approach as well as its own (children's) rights framework. It is acknowledged that Sachs J judgment cannot automatically be transposed into the Irish system. The Constitutional protection afforded children's rights which underpins *S v M* is much stronger in South Africa than in the Irish context. However, change is possible within the Irish legal context; it may come from the courts via a judgment or through the development of a legislative or practice change requiring consideration of impact. In the section below, the particular aspects of the Irish sentencing system that might affect possible options for change are considered.

Ireland has a largely 'unstructured sentencing system' (O'Malley, 2006: 53) with the courts exercising a wide discretion. Indeed any move towards the development of sentencing guidelines has been extremely limited (O'Malley, 2014). Inconsistency in sentencing practices across the Irish Courts system has been problematic (Maguire, 2010) as has a lack of consensus regarding the aims and principles framing sentencing, their relative significance and the manner in which they should be implemented (LRC, 2000: 45). The Law Reform Commission has voiced concern in relation to the operation of the custody threshold and the last resort principles in Irish sentencing practice which it described as being 'ill-defined and difficult to interpret' (LRC, 2000: 46). While typically cases sitting at the cusp of custody are examined from the perspective of mitigation and aggravation, relating to the offenders personal circumstances including risk factors and other characteristics, the custody threshold is significant in relation the rights of affected dependents. The lack of a clearly defined and consistent approach in this regard ultimately leads to wide variations in practice that not only affects offenders, but can also have a seriously adverse impact on their children.

Another key concern from a children's rights perspective, is the fact that the Irish sentencing system over-relies on prison as a punishment (Healy, 2005; IPRT, 2009) with a high proportion of offenders being sent to prison for short sentences and a somewhat limited use of community-based sanctions (O'Hara, 2015: 23). This may limit the courts options where impact on dependent children may tip the balance in favour of a non-custodial sentence.

The traditional approach of the Irish criminal courts to sentencing is however, slowly changing. Since 2014, the Court of Criminal Appeal (CCA) has been delivering sentencing decisions providing general guidance to the lower courts (O'Malley, 2014). This is a welcome development and it is hoped will not only ensure improved consistency in sentencing, but it may result in a more transparent principled approach being developed. The recent inclusion of children's rights within the Irish Constitution (Article 42A) and the growing recognition of the need to respond to the needs of children of prisoners in some areas, suggest that such change should be possible.

DPP v Counihan: A step towards considering impact?

A first step in considering the potential role the Irish courts might play in this area can be found in the recent CCA decision - *Director of Public Prosecutions v Counihan* ([2015] IECA 76) – which engages with the question of whether the sentencing judge should consider the impact of a prison sentence on the children of offenders. This case centred on a claim of undue leniency by the Director of Public Prosecutions (DPP) in relation to a suspended sentence imposed for serious sexual offences. The sentencing Judge had considered the hardship likely to be suffered by the offender's children, all of whom had special needs. Weighing the seriousness of the offence and the harm done to the victim against the interests of the family, the judge had concluded that imprisonment would 'impose extreme hardship' on the children.

In examining the sentencing decision, the CCA regarded the issue of the impact on the children as a mitigating factor associated with the offender noting the 'strong case ... made in mitigation because of the family obligations and the needs of the children' (*Counihan*: para 9). The court did not recognise the children as being independent rights holders to be considered separately to their father.

Despite this offender-oriented approach, the decision is significant in that the court accepted that the potential impact of imprisonment on the children should be considered at the point of sentencing. Unfortunately, the court did not directly engage with the balancing of competing interests: the punishment of the offender; victim impact; public interest in justice and security; and the offender's family; instead focussing on the particular facts of the case at hand. The court did acknowledge its responsibility towards the children accepting that 'the question whether imprisoning him would interfere with the rights of the children under the Constitution or the European Convention of Human Rights' was a legitimate question and that '[i]f the result of measures taken by the Court would jeopardise the children's rights, it would not be permissible to apply or enforce them' (*Counihan*: para 10). However, on the facts of the case, the CCA found that a suspended sentence was inappropriate. It is unclear from the judgment how it was informed of the details of the children's situation. It appears that no independent mechanism such as a guardian *ad*

litem was utilised to put forward the position of the children and no mention is made of regarding any pre-sanction report prepared by the Probation Service.

The *Counihan* decision is therefore a mixed result for those concerned with the need for sentencing judges to consider the rights of children of offenders. Encouragingly, it acknowledged the need for a sentencing Judge to consider the impact of imprisonment upon the offender's children. However, the lack of consideration as to how that impact might be assessed and the underlying rationale for it is disappointing.

A balanced approach? Developments from England and Wales

The development of a structured balancing exercise whereby the rights of dependent children are considered at the sentencing stage has developed through the case law of England/Wales following the enactment of the Human Rights Act 1998, which incorporated Article 8 rights to family life from the ECHR into domestic law. In *R v Rosie Lee Peterick* ([2012] EWCA Crim 2214 at para 17), the Court of Appeal (CA) addressed the importance of Article 8 ECHR rights in the sentencing process:

Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart-rending effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be turned upside down by crime.

The CA went on to set out the approach to be taken by the court in balancing the sentencing process with the Article 8 requirements (*Rosie Lee Peterick*: para 18). The court must consider whether:

1. there was any interference with family life in accordance with Article 8
2. that interference is in accordance with the law and in pursuit of a legitimate aim
3. the interference is proportionate. To do this, the Court needs to consider the balance between the legitimate sentencing objectives on the one hand against the Article 8 rights of dependent children on the other.

The court highlighted that it is in threshold cases, where the court is considering both custodial and non-custodial options, that the rights of dependent children make what would otherwise have been a proportionate sentence become disproportionate (*Rosie Lee Peterick*: para 20).

Significantly, the court distinguished between claims concerning the right to family life and the question of mitigation of sentence. As this article has noted, mitigation relates to the offender's circumstances and is not a free-standing rights claim. In this regard, the court states that 'in a case

where custody cannot proportionately be avoided, the effect on children ... might ... afford grounds for mitigating the length of sentence, but it may not do so' (*Rosie Lee Peterick*: para 24).

The guidance provided in this case as to how impact is considered is of critical importance to ensuring consistency in practice. It might therefore be expected that a change of mindset in the sentencing courts in England/Wales would follow. However, research indicates that in practice this has not happened. Epstein, who reviewed 75 cases where mothers were sentenced to imprisonment, found the operation of the balancing exercise in sentencing courts to be 'inconsistent' at best (2014: 15):

A balancing exercise is a vague phrase with no clearly defined set of procedures. Given the vagueness of the concept, the fact that sentencers have considerable discretion in terms of sentencing generally, and the absence of any guidelines, there is an obvious risk of a large degree of inconsistency in judicial attitudes and practice in this area.

In fact, she discovered that sentencers routinely failed to carry out any balancing exercise along the lines set out in the case law. Where the children were considered, Article 8 was rarely if ever mentioned with a more paternalistic 'welfare' approach to children being taken rather than a rights-based approach. Indeed, she highlights that courts have taken a traditional mitigation approach in this area and stresses that '[m]itigating factors, such as the effects of imprisonment on children, relate to the defendant and not directly to the article 8 rights of the child' (Epstein, 2014: 24).

These findings are an important reminder that even in the face of guidance from the CA a consistent rights-oriented approach is not guaranteed. The reasons for this are varied and well documented (Minson, 2015). They include a 'lack of familiarity' with the decisions of higher courts at the lower court level, an ongoing concern about discrimination in sentencing on a gendered basis, and a belief that allowing children to 'mitigate' against prison produces a situation where dependent children are perceived as a "'get out of jail free" card' (2015: 12).

One important practical factor identified by both Minson (2015) and Epstein (2014) is that sentencers often appear to have insufficient information before them to allow them to carry out an effective balancing exercise even if they wished to do so. Speaking of the England/Wales experience Minson *et al* note (2015: 12):

The quality, depth and availability of pre-sentence reports are variable, as is the quality of legal representation, and it seems that judges may not always obtain information that would enable them to make a decision in which the child's best interests can be properly considered.

Clearly effective training and systematic information provision both in relation to CA decisions and child impact is essential to translate the appeal court's direction into practice. The question of how best to inform the Courts on child impact is the subject of the remainder of this article.

Child impact statements

One method of ensuring that information concerning vulnerable children is systematically considered by the court is the creation of a Child Impact Statement (CIS), also known as Child Impact Assessments. As discussed above, information concerning the children and family of the offender is often presented in an inconsistent manner to the court as part of the regular sentencing process. For example, in England/Wales, Epstein found that in just under 10% of the sentencing decisions she reviewed, no reference was made to the defendant's children at all; in one example the judge openly refused to have information about four dependent children presented before the court concluding that it would be of no assistance (2014: 17).

As Reed highlights, there is a striking difference between the approach taken by sentencing courts to decisions that result in family separation with that of family courts 'which determine the issue of forced parent-child separation after lengthy litigation involving detailed consideration of evidence from child welfare professional and the parents...' (Reed, 2014: 72). It is noteworthy that, analogous to sentencing decisions, children are not direct parties to family law cases. Yet over time it has become well accepted that it is vital that such decisions are made in the best interests of these children with their views being considered seriously. This lack of engagement with the impact of sentencing decisions on dependent children stems, in large part, from the traditional focus of the sentencing court, which excludes third party harms other than as personal mitigation (Lerer, 2013: 44). A similar approach is found in Ireland, though to date it is largely undocumented.

It is argued that it is incumbent upon the courts to consider the impact of imprisonment on families in light of international human rights norms. The courts have already watered down the traditional binary approach to sentencing. Mitigation provides the court with a discretionary power to consider the harm that a prison sentence may have on children of offenders; while victim participation in the criminal court illustrates the potential for the creation of a space for other third parties within the process.

Even if it is accepted that the rights of children should be considered at sentencing stage, the question remains as to how this can be effectively achieved within the existing adversarial process. There are two options which exist within the family courts which could be effectively utilised within the criminal justice context: (1) through a court report or child impact statement (CIS) or 2) through a Guardian Ad Litem (GAL). The first option of a court report may involve the Probation Service adapting current pre-sanction reports to take into more clearly the impact of a sentence on dependent children. However, such court reports are not necessarily child-focused given they primarily relate to mitigation and risk factors in offenders as will be discussed below. The CIS is an alternative option which is already used in some jurisdictions including California and Arkansas (Osborne Association, 2012). Research carried out in Scotland on the potential use of Child or Family Impact Statements in sentencing courts concluded that there were definite advantages to their adoption, not least the fact that they are able to provide judges with an understanding of the potential impact of decisions on an individual's family (Loureiro, 2009: 2).

Child impact statements in Ireland?

In considering whether CIS could be introduced in Ireland, two issues need to be addressed. Firstly, could such statements be adopted? In a sense this appears relatively straightforward – legislation could be introduced by the state to ensure that CIS are produced where the court or criminal justice professionals, such as Probation Officers, could identify the fact that children of the offender are likely to be affected by a custodial sentence. This was attempted in Scotland in 2010 when the *Criminal Justice and Licensing (Scotland) Bill* was debated. A proposed amendment to require courts to consider an offender's responsibilities to care for children was introduced but later removed by the Scottish Parliament's Justice Committee who considered that pre-sentence Social Enquiry Reports were sufficient (Fee, 2015).

More complex is whether the balancing of competing rights within sentencing can be adopted by the courts – this relates to the need for a mindset change as identified by Sachs J in *S v M*. It is worth considering the fact that Irish courts already do this in the context of family law proceedings which are also adversarial in nature. Although the courts consideration of the voices of children where parents are divorcing or separating is something which the courts are still grappling with, there is a level of acceptance that the innocent victims in such cases should be heard. This may be due to the fact that the potential suffering of these children is more obvious and the courts cannot ignore their rights. This is now bolstered by the fact that the Irish Constitution protects the best interests of these children as well as their voices under Article 42A. Unfortunately, the wording of the provision is limited in scope and fails to take account of decision-making processes outside of adoption, guardianship, custody and access. Thus, the wording is not comparable to South Africa's

paramountcy principle that supported the *S v M* judgment. However, the more general provisions within Article 42A might offer some scope for considering children's rights in the sentencing context but it remains to be seen how ambitious the judiciary will be in this regard. In addition, while Ireland is a signatory to the ECHR albeit with a limited transposition of those rights into domestic law with the enactment of *European Convention on Human Rights Act 2003*, we have yet to see the courts articulate an approach to the Article 8 right to family life in the domestic courts. The protection afforded ECHR rights in Ireland is on a much lesser scale than that given in England/Wales. The judgment of the CCA in *DPP v Coughlin* discussed above acknowledged Article 8 ECHR and suggests its future potential but does not offer any structured approach to its use in sentencing decisions. Without a judgment indicating a dramatic change in culture towards a children's rights-based approach, it remains unlikely that the courts will adopt a structured rights approach.

The second question regarding impact statements is more functional in nature – how best could these be adopted? In Ireland, the structures by which information can be introduced to the court reinforce the perspective of children as mitigating factors. Pre-sanction reports are prepared by Probation Officers and are designed to inform the sentencing decision-maker. However, the report can only be requested by the sentencing judge, although the prosecution and defence lawyers may suggest that such a report may be useful to the court. The reports are focused on issues concerning the offender including matters such as previous offending behaviour and the risk of reoffending (O'Donovan, 2008).

Similar to court reports in family law proceedings, it is argued that pre-sanction reports are not an optimal method by which child impact information can be introduced to the court. While the reports have served a number of different purposes over the years, initially relating to the moral reform of the offender, more recently assessing the offender as to whether they are in need of incarceration as a sanction or whether they can work within the community (bifurcation) (Quigley, 2014: 64), they remain resolutely focused on the offender.

Under the current system, information concerning the offender's children is captured in the third part of the pre-sanction report as 'relevant offender background and circumstances'. The revised *Probation Service Policy and Procedures for the Preparation of Pre-Sanction Reports for Courts* makes reference to family/marital circumstances, noting the role of parenthood for women, which may require particular consideration. However, this information remains of a background type, primarily relating to the 'pro-social or anti-social influence of the relationship of the offender and how that impacts on the risk of re-offending' (Probation Service Policy, 2015: 13). As with Court reports prepared for family law proceedings, the mechanism is far from ideal in terms of allowing the court to hear the voice of the child; the report is not child-focused and the information is ultimately

diffuse. Furthermore, it is unclear what the purpose of background information is. It could relate to a justification for leniency in line with traditional social work approaches to probation work, or to risk assessment, relating to the more modern dimension of probation (Bourke, 2013: 76).

There are also reservations as to whether Probation Officers as the most suitable information gatherers re child impact. Recent changes to the Irish Probation Service organisational structures have been described by Quigley as being 'now more aligned with Culture of Control and New Penology characteristics' (Quigley, 2014: 65-6) and containing a more modernised management system with a value for money ethos (Cotter, 2015: 179). Loureiro, in examining the potential role of similarly placed Criminal Justice Social Workers in Scotland, reported analogous concerns that their training focuses them on the offender and not the family – 'they are not experts in family function' (Loureiro, 2009: 36). The focus of the Probation Service on the offender and a lack of expertise in relation to family and children impact might ultimately be problematic in this area when combined with its increasing crime control oriented culture.

However, this is not to say that Probation Officers have no role to play in this process. As noted above, Probation Officers could act as a key referral point in the creation of impact statements. Baldwin and Reed both take inspiration from *S v M* and suggest that at the point of a pre-sentence report, a referral could be made to a guardian *ad litem* by a Probation Officer with a view to securing an impact report. The latter could therefore 'be used to inform the court, much in the same way a psychiatric report would be, thereby assisting the sentencer in the undertaking of the balancing exercise' (Baldwin, 2015: 9). In relation to sentencing, Reed highlights that such an approach would 'enable the court to fully consider the child's rights' and 'also assist the judiciary [to] maintain consistency in approach to the rights of the child during parental sentencing' (Reed, 2014:72).

The advantage of removing the assessment process from the Probation Officer to a specialised advocate is rooted in the idea of separating the CIS from the pre-sanction report which is focused on factors specific to the offender. If the situation of dependents is parceled up in the offender's information, that information may continue to be treated as personal mitigation and not free standing rights. Moreover, the information pertaining to children in the report is at risk of being subsumed into other information contained in the report. At the heart of the change being advocated, is the idea that the court is required to balance this additional factor, at least where a) there are dependent children and b) where the court regards itself as having both custodial and non-custodial sentencing options.

However, while the preference is to have details concerning impact on children presented to the court via a separate CIS, a proposal to use the guardian *ad litem*, a mechanism regularly used in

family law cases, would likely prove problematic in the Irish context at the present time. As currently constituted, the guardian *ad litem* system lacks statutory regulation and is inconsistent in practice (McWilliams, 2010). In 2014, plans for reform of the system were announced ‘with a view to introducing a “more regulated and sustainable provision”’ (Gartland, 2014). That reform has thus far not taken place; although Government consultation paper on the issue has been criticised for focusing cost reduction rather than improving the service (Hough, 2015). Thus, parallel reform of the system would need to be enacted in order to best facilitate clear representation of the interests of this group of vulnerable children.

Conclusion

The critical question for consideration here is whether our commitment to children’s rights in Ireland is a genuine one to the extent that it permeates all aspects of legal decision-making affecting children. There is no doubt that this requires a fundamental shift in thinking both in the Courts and at policy level. The latter changes must be underpinned by raising awareness in society of the importance of supporting children of offenders during a very difficult time in their lives.

The systematic assessment and delivery of CIS could be developed through pre-sanction reports, particularly given that most reports in Ireland operate on a non-statutory basis and are thus at the discretion of the court. However, the difficulty remains that these reports, along with the Probation Officers preparing them, are very much focused on the offender. The process fails to consider the impact of imprisonment on the offender’s children and family independent of the offender. This prevents the decoupling of the issue of child impact from offender mitigation, maintaining the status quo approach which fails to achieve the purpose of undertaking child impact assessment.

From a practical point of view, the benefit of child impact statements lies in their potential to deliver child-specific information to the court which can facilitate a sentencing decision that includes consideration of the best interests of the offenders’ child(ren) and is thus, Article 3 UNCRC compliant. To effectively meet this requirement, it is clear that the information provided to the sentencing judge needs to go beyond the current pre-sanction report. Given that the Irish legal system already allows for victim impact statements and reports to be presented to court, there is clearly potential for this to be introduced in practice.

More challenging is the move to ensure that courts engage with an assessment of this impact on a children’s rights-oriented basis. Providing the information through a CIS goes a long way to triggering this process in a consistent and more transparent fashion. However, so long as the court remains rooted in its bilateral approach, the full impact on this vulnerable group of children will not be adequately assessed and their rights allowed to go unprotected. The shift in thinking, the changed

mindset advocated by Justice Sachs, is not an easy one. It represents both a different perspective but also a major challenge in what is already a complex balancing exercise between competing rights. Treating offenders who have children more favourably is not what is being advocated here, it is something much more fundamental than that. Viewing parental imprisonment through the eyes of a child demands a complete shift in thinking on the part of the decision-maker, one that is grounded in children's rights but also future focused.

References

- Ashworth A, (2015) *Sentencing and Criminal Justice* (6th ed.). Cambridge: Cambridge University Press
- Boezaart T, (2013) The role of a curator *ad litem* and children's access to the courts. 46(3) *De Jure* (Pretoria)
- Boudin C, (2013) Children of Incarcerated Parents: The Child's Constitutional Right to the Familial Relationship. 101 *The Journal of Criminal Law and Criminology* 77
- Bourke A, (2013) Pre-Sanction Reports in Ireland: an Exploration of Quality and Effectiveness. 10 *Irish Probation Journal* 75
- Carnelley M and Epstein CA, (2012) Do not visit the sins of the parents upon their children: Sentencing consideration of the primary caregiver should focus on the long-term best interests of the child. 25 *South African Journal of Criminal Justice* 106
- Conway V, Daly Y and Schweppe J, (2010) *Irish Criminal Justice: Theory, Process and Procedure*. Dublin: Clarus Press
- Donson F and Parkes A, (2012) Changing Mindsets, Changing Lives: increasing the visibility of children's rights in cases of parental incarceration. 4 *International Family Law* 408
- Easton S and Piper C, (2012) *Sentencing and Punishment: The Question for Justice* (3rd ed.). Oxford: Oxford University Press
- Epstein R, (2014) *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*. London: Howard League What is Justice? Working Paper 3/2014
- Fee M, (2015) Support for Children (Impact of Parental Imprisonment) (Scotland) Bill, Consultation Document
[http://www.scottish.parliament.uk/S4_MembersBills/Consultation_Document_\(Website\).pdf](http://www.scottish.parliament.uk/S4_MembersBills/Consultation_Document_(Website).pdf)
- Gartland F, Reilly to reform child court guardian system. *The Irish Times* July 19, 2014
- Hannah-Moffat K and Mauruto P, (2010) Re-contextualising pre-sentence reports: Risk and race. 12 *Punishment & Society* 262
- Healy D and O'Donnell I, (2005) Probation in the Republic of Ireland: Context and Challenges. 52(1) *Probation Journal* 56
- Healy D, (2009) Probation Matters. *Irish Jurist* Vol XLIV 239-57
- Hough J, Guardian ad litem reforms 'a step backward' says Council of the Bar of Ireland. *Irish Examiner* 17 November 2015
- Irish Penal Reform Trust, (2009) *IPRT Position Paper 5 – Penal Policy With Imprisonment as a Law Resort*. Dublin: Irish Penal Reform Trust

Irish Penal Reform Trust (2012) *Picking up the Pieces”: The Rights and Needs of Children and Families Affected by Imprisonment*. Dublin: Irish Penal Reform Trust

Law Reform Commission, Consultation Report, *Mandatory Sentences*, available online at: <http://www.lawreform.ie/fileupload/consultation%20papers/cp66.htm>

Loureiro T, (2009) *Child and Family Impact Assessments in Court: Implications for Policy and Practice*. Edinburgh: Families Outside

Loureiro T, (2010) *Perspectives of Children and Young People with a Parent in Prison*. Edinburgh: Families Outside

McWilliams A and Hamilton C, (2010) ‘There isn’t anything Like a GAL’: The Guardian *ad Litem* Service in Ireland. 10 *Irish Journal of Applied Social Studies* 31

Maguire N, (2010) Consistency in Sentencing. *Judicial Studies Institute Journal* 14

Minson S, Nadin R and Earle J, (2015) *Sentencing Mothers: Improving the sentencing process and outcomes for women with dependent children*. London: Prison Reform Trust

O’Donovan D, (2008) *Ireland*, in van Kalmthout AM and Durnescu I (eds) (2008) *Probation in Europe*, Nijmegen: aolf Legal Publishers (WLP)

O’Hara K and Rogan M, (2015) Examining the Use of community Service Orders as Alternatives to Short Prison Sentences in Ireland. 12 *Irish Probation Journal* 22

O’Malley S and Devaney C, (2016) Maintaining the mother-child relationship within the Irish Prison system: the practitioner perspective. *Child Care in Practice* 20

O’Malley T, (2006) *Sentencing Law and Practice* (2nd ed.) Dublin: Thomson Round

O’Malley T, (2014) The Role of the Prosecutor at Sentencing in the Aftermath of *People (DPP) v Z*, available online at https://www.dppireland.ie/filestore/documents/PAPER_-_Tom_OMalley_BL_-_2014.10.18.pdf

O’Malley T, A Quiet Revolution occurred this month: sentencing guidelines were introduced, *The Irish Times*, 31 March 2014

Osborne Association (2012) *Family Impact Statements*.

http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet_Osborne.pdf

Probation Service Policy and Procedures for the Preparation of Pre-Sanction Reports for Courts (2015) Dublin: Irish Probation Service

Quigley E, (2014) Pre-sentence Reports in the Irish Youth Justice System: A Shift to Risk-Oriented Practice? 11 *Irish Probation Journal* 63

Reed C, (2014) Children of prisoners: ‘orphans of justice’? *Fam Law* 69

Scharff-Smith P and Gampell L (eds), (2011) *Children of Imprisoned Parents*. Copenhagen: Danish Institute of Human Rights

Sentencing Council of England and Wales, (2011) *Assault: Definitive Guidelines*,
[www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline -
_Crown_Court.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf)

Skelton A and Courtenay M, (2012) The Impact of children's rights on criminal justice. *South African Journal of Criminal Justice* 180.

Case Law

Christian Education South Africa v Minister of Education (2000 4 SA 757 (CC)

Director of Public Prosecutions v Counihan ([2015] IECA 76

Johansen v Norway [1996] ECHR 31

R v Rosie Lee Peterick ([2012] EWCA Crim 2214

S v M (2008 (3) SA 232 (CC)

S v Zinn (1969 (2) SA 537 (A) 540G