

Ms Helen Wiseman and Ms Gloria Larman, Shine for Kids

Larman: We're going to be talking about what happens to kids when a parent is sentenced. In this presentation, Helen and I will refer to sentencing in terms of incarceration. The impact of non-custodial sentences on children, whilst meriting some examination, will not be covered in this paper today.

The imprisonment of a parent causes a chain of adversity for children who experienced parental imprisonment. First, the child undergoes the trauma of witnessing their parent's crime and arrest. These children, along with the offender's entire family, are then disrupted in many psychosocial aspects through the judicial sentencing process.

Children face a host of social and demographic adversities while their parent is incarcerated. Finally, when their incarcerated parent is released these children's lives are again disrupted as the offender is integrated back into the family, and society as a whole. The effects of incarceration of the parent on each child [last] a lifetime for them.

In the words of one imprisoned mother who gave evidence to a New South Wales Legislative Council Standing Committee on Social Issues, "my son changed from a twelve year-old little boy who loved fishing, surfing, watching movies on a Friday night, to a complete street boy, who managed to look after himself on the streets. His personality has completely changed; he may be fourteen now, but he has changed from an innocent little boy to a twenty year-old minded criminal. His personality has changed from a soft natured little boy to a child that just continually breaks the law." I knew and worked closely with this child and mother, and the current system did fail this twelve year-old boy; he slipped through all the gaps in the system.

According to the 2006 [study] Children and Unintended Victims of the Legal Process, a Victorian study, although many departments and agencies come into contact with children at various stages of their primary carer's legal process, responses to their situation remain quite inconsistent and very ad hoc in nature. In some cases it was documented, but these inconsistencies have resulted in laws enacted in some courts being directly contravened in others, rights that are recognised in some courts being completely acknowledged [sic] in others and police officers unaware that they are breaching child protection laws to comply with criminal laws.

In all cases, these inconsistencies result in the unfair and unacceptable treatment of children whose primary carer's have been imprisoned. At the end of the discussion paper, it concluded with, "It is not the intention of the law to punish innocent people for crimes another adult has committed. It is not the intention of the Victorian legal system to damage the lives of the children it touches. It is, however, unintentionally, the end result."

In the last three years, there have been four major studies conducted in Australia, focused on children of prisoners. These studies all reach the same broad conclusion: children of prisoners are particularly disadvantaged and vulnerable. What is the size of the issue? How many children of prisoners are there across Australia? The answer is, we still don't know.

Today, there's no systematic way of reporting on the number of children who are affected by parental imprisonment. One study in New South Wales, conducted in 2002 by Dr Simon Quilty, found in Australia approximately 38,000 children experienced incarceration each year, while [14,500] children have lost a parent to prison at some stage in their childhood. This is more than the number of children on care and protection orders in Australia, and more than the number in out-of-home care.

He further estimated that these figures represent almost five percent of all children in Australia. In the UK, recent estimates put that figure as 7% of their population, and in the United States 14% of the nation's children either have, or had, a parent in prison. Further then, Quilty estimated that 20% of all indigenous children are affected by parental incarceration.

As we know, the imprisonment rates are on the increase, so it would now be expected that the number of children affected has also increased. In the absence of systematic statistical reporting, children of prisoners are often referred to as the 'invisible population'.

So, what are the impacts on these children? When a parent is sentenced to gaol, a child's life is particularly destabilised. Research consistently reports that children experience a range of psychosocial problems during parental imprisonment, which can include depression, hyperactivity, aggressive behaviour, withdrawal, regression, clingy behaviour, sleeping problems, eating problems; they run away, truancy, poor school grades and delinquency. In the Sixties, the eminent psychiatrist John Bowlby laid the foundations for attachment theory, which holds that the bonds formed between children and their parents up to the age of three were fundamental to the way that they would form relationships throughout their life.

It is notable that 60% of the estimated 60,000 children in New South Wales who have experienced parental imprisonment did so before they were five years of age. The standing committee's report, "Children of Imprisoned Parents", stated:

"Our research evidence has revealed that separating a child from his or her primary carer can have a profound and destructive effect on the child. A child whose parent goes to prison has committed no offence. A premise adopted by the Committee's members throughout this enquiry, is that children should not be punished or unnecessarily disadvantaged for the wrongdoing of their parents.

The consequences of doing nothing, and accepting that parents must be punished for their actions, have far reaching consequences not only for the individual child but for the whole of society.

Research indicates that the impact [on] children who have a parent imprisoned is so extensive that alternative strategies to imprisonment must be implemented for all but the most serious offenders."

These statements are echoed through all reports that have been undertaken concerning children of prisoners.

Women are less likely to have their children being cared for by a co-parent or other family member. The children are less likely to be in [the] continuous, stable care of one household. Women are more likely to have their children separated and cared for by

different carers, less likely to have their children brought on regular visits by another family member, and less likely to have letters and telephone calls from their children. Although there are various workable options for women to be with their child while serving a sentence, it is an underutilised option within most states of Australia.

For children of indigenous prisoners, the effects of parental incarceration can be particularly devastating. Aboriginal people's incarceration is intergenerational; it is not uncommon for generations of the same family to have experienced incarceration and for parents and their children to be incarcerated all at the same time. Issues surrounding the incarceration of Aboriginal people are complex, and not just merely linked to offending behaviour. Involvement by Aboriginals in the criminal justice system, and penal system, is related to discrimination, poverty, disadvantage and the disruption of Aboriginal culture.

Incarceration is almost a social norm for indigenous Australians. Aboriginal children, with all the health and welfare disadvantages they already face, see prison as a normal life experience, which is a reflection on the state of the social injustice that these children face, in all aspects of their lives. The consequences of doing nothing, and accepting that parents must be punished for their actions, have far reaching consequences not only for the individual child but for the whole society.

Wiseman: As Gloria has just indicated, the research indicates that the impact on children who have a parent in prison is so extensive that alternative strategies to imprisonment must be implemented. Current sentencing laws in Australia provide little scope to take into account the likely impact of a custodial sentence on the children.

For example, Section 21(a) of the New South Wales Crimes and Sentencing Procedure Act list a number of mitigating factors in determining whether to take on a non-custodial or custodial sentence. Now, those mitigating factors are very much offender-specific; they don't take into account the child of the offender. What can be done is, the court is permitted to take into account any other objective or subjective matters that affect the relative seriousness of the offence.

The guidance on subjective matters that may be taken into account [is] contained in the New South Wales Sentencing Bench Book. Hardship and family dependants are included amongst those subjective factors, and the Bench Book states:

“The general principle is that hardship to family and dependants is an unavoidable consequence of custodial sentence and is not a mitigating consideration, unless such hardship is wholly, highly or truly exceptional.”

It's only where the circumstances are highly exceptional, and where it's inhumane to refuse to do so, that hardship to others in sentencing can be taken into account, and that's citing RV Edwards. Now, when discussing what that means, the effects of hardship to others of a prison sentence, Professors Fox and Freiburg comment:

“The defender must produce cogent evidence to establish that the imprisonment would impose exceptional hardship on the family, one which is considerably more severe than normal for the family where the father is imprisoned.

The circumstances may be regarded as exceptional if the imprisonment of a parent leaves children without parental care or if a dependant will suffer overwhelming hardship because of imprisonment of the offender.

Where all the features of the case point to a custodial sentence, and there is evidence of extreme hardship, a court may take into account the extraordinary features of the case by suspending the sentence of imprisonment. Alternatively, the sentence may be shortened, or a non-parole period decreased.”

[T]he case of RV concerned a twenty-one-year-old female drug courier. She’d recently given birth to a little baby and was breastfeeding at the time of sentencing. [In this] case, instead of a full-time custodial sentence, which might otherwise have applied, the sentencing judge imposed a suspended sentence of imprisonment, partly because of his concern for the welfare of the little baby.

On appeal, it was considered that there was a lack of evidence which would assist the court in determining the probably effect of the various sentencing options upon the person’s family or dependants.

In 2001, there was the Western Australian case of *v. The Queen*, and that also involved a trial of a woman for drug-related offences. Now, in this case the offender actually had four children who were actually living with her. Sentence of eight years, with a non-parole period of over three years, was imposed.

On appeal, it was noted that the sentencing judge did not say how he took into account the effect of the sentencing on the children, or make any inquiry about the fate or future of the children. Counsel for the applicant at the time did not proffer any such information, and this was considered a failure by Counsel to obtain information necessary so that the court could be properly informed.

The judge said, “In my opinion, the learned judge should have taken steps to obtain the necessary information by calling for a pre-sentence report.” Now, pre-sentencing report was obtained by the Court of Criminal Appeal in this case, and this stated the following:

“The middle children appear closely bonded in that, whilst they offer a degree of support to each other, they miss their mother and their home. They struggle with unresolved issues of anger, abandonment, grief and uncertainty. The youngest child is left to his own devices for much of the time. He lacks nurturing, and he appears detached. It is said that the welfare of the children appears critical, with intervention by the authorities imminent. The children may well be placed in State care; the possibility of a Vietnamese foster family becoming available is remote.”

Notwithstanding these circumstances in the pre-sentence report, Justice Pigeon disallowed the appeal on the basis that the sentencing judge did take into account the probably effect the sentence would have on the applicant’s family, and that this had caused His Honour to reduce the sentence. However, in the same case Justice noted:

“It was obvious from the pre-sentencing report that the youngest child in particular was being very badly affected by his mother’s imprisonment. This is to be expected. In

my view, it's not an appropriate response to this family's situation to say, as the courts have said in the past, that the offender 'should have thought have that beforehand'.

The children are innocent of any wrongdoing, and should not be so gravely disadvantaged. Their rights are most important in a case like this, as young children in society are to be protected as far as possible, and every effort should be made to ensure they are not deprived of parental care."

Happily, the appeal was allowed in this case, but these two cases illustrate, I think, the difficulty in determining situations where the hardships of family dependents is sufficiently exceptional to prevent a custodial sentence. It's probably useful at this point to turn to the United Nations Convention on the Rights of the Child. Article Three requires that, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The difficulty is, how do you interpret that?

In 2005, the United Nations Committee on the Rights of the Child noted, in relation to reports submitted by the Australian government, that the Committee recommends that, "the State party, Australia, strengthen its efforts to ensure effective implementation of the general principle of the best interests of the child in Article Three in all legal provisions, as well as in judicial and administrative decisions that have an impact on children", and in connection with imprisoned parents in Australia the Committee makes the following observations: "Whilst the Committee notes the efforts undertaken by the government to tackle this issue, including the Prisoners and Families Program, it is concerned that a considerable number of children have one parent in prison", and, as Gloria highlighted, indigenous children are significantly over-represented in this group.

The United Nations has already expressed concern about the impacts of parental imprisonment in Australia. So, what to do? At the 2006 Sentencing Conference, Justice Terry Connolly of the Supreme Court of ACT observed the following – and I'm sure many of you will have some sympathy with what he's saying. He says:

"To some degree the criminal justice system is a coercive mechanism, that supplants expensive institutional and social change. It seems that when the carrot is too expensive we make do with the stick. Unfortunately, coming in at the end point severely restricts the options available to a sentencing judge. At that point, proportionality of sentence is all that we are able to address."

Prevention is certainly better than cure, but sentencing laws and practice must play a role. Be clear that real change can only happen at the government policy and, probably, society level but an important priority is the expansion of community based sentencing and diversion schemes, particularly in relation to treatment for drug offences, as those two cases I highlighted earlier illustrated, and particularly for women.

The expansion of community based sentencing options does require substantial funding. It can't happen in isolation; there needs to be programs and support structures in place to enable offenders undertaking those programs to have a good chance of succeeding.

Equally important is the ability of disadvantaged offenders to actually get access to those programs; often the criteria can be very restrictive. Alternatives to remand, I guess, have also critical importance, given that success and progress while on bail is most likely to lead to a non-custodial sentence.

Larman: I'm just going to briefly touch on the work that Shine for Kids does. Shine for Kids is a not-for-profit organisation working currently within New South Wales. Our program is about fostering the development of emotional resilience and social skills for children, working with educational programs, developing therapeutic pathways so that every individual child [can] have positive educational and life experiences, which result in a happy disposition, feelings of self-worth, an ability to connect with others and to identify with appropriate role models.

Our services also seek to provide the means by which family can reduce, alleviate and deal with their immediate impending challenging circumstances, and thereby reduce the conditions that contribute to some of the childhood mental illness, emotional problems, learning difficulties and neglect that they experience.

A range of Shine for Kids programs work on early intervention strategies that are very cost-effective, as they reduce the need for more expensive and more intensive services later on. Shine for Kids services are based also around the principle of what is in the child's best interests.

We have five key areas of programs. We have child and family centres, which provide child-friendly, supportive venues for children, providing emotional support and assistance for children and families, helping them connect with others in the same situation. Those centres are based, at the moment, around five correctional centres. Within those centres we offer case work and contact services, so focusing on building and maintaining positive relationships between the child and their imprisoned parent.

It's really important, when the parent does go to gaol, that the child has every access to the parent that they can possibly get. We run group work programs in the communities and within schools, dealing with the individual situations of groups of children. Mentoring programs for young people [are an] opportunity for children to develop a positive relationship with adults, and then our research and advocacy stream.

I've been working with children of prisoners and their families for the past twenty years. It is time we all take a hard look at what the research, both here and overseas, is really telling us about the future for children of prisoners.

Recently, there were two longitudinal studies using appropriate control groups and standardised measures, [that] showed that parental imprisonment does indeed predict high rates of criminal behaviour, and mental health problems, through the life course, which certainly reinforces what Paul was saying early on, that 43% of children appearing in the juvenile courts have, or have had, a parent in prison. [Regarding] differences in these two studies, whereas in the English study 48% were convicted as adults compared to 14% of boys whose parents were not imprisoned, the same report done in Sweden reported [that 25% of] children of imprisoned parents offended between the age of nineteen and thirty, compared with 12% of children without convicted parents.

The research has concluded that the difference between the studies in Sweden and United Kingdom was that Swedish children may have been protected from the adverse effect of parental imprisonment by more family-friendly prison policies, a welfare-orientated juvenile justice system, an extended social welfare system, and more sympathetic public attitudes towards crime and punishment. I think there are a few lessons there.

Wiseman: As a particularly disadvantaged group, children of prisoners need to be consistently and systematically represented, at both national and state levels. There's a limit to what not-for-profit organisations like Shine for Kids can achieve without support at the government and societal level. As professionals, we are at the front lines of the criminal justice system; we get to see what works, what does work, and where the anomalous outcomes are arising.

Even if you say that current sentencing laws do constrain us we can still make reference to the impact on the kids, [albeit] in pre-trial submissions, pre-sentencing submissions, conference presentations and even, where appropriate, in judgments. It is through our collective professional efforts that we have the ability to make the 'invisible population' visible, one case at a time.

Until the weight of the evidence cannot be ignored and society calls for better responses, significantly more evidence-based research is required, for three reasons: to help judges and magistrates determine the probably effect of incarceration on family and children, to establish a clear association between parental imprisonment and adverse outcomes for children, and also to help society better understand that being tough on crime comes at a high price.

New responses are needed. A pipe dream? Perhaps; without doubt, current Australian sentencing laws do constrain us, but we can be a voice for change. That's one judgment call we can all make.

Fingleton: Thank you. Di Fingleton, Magistrate, Caloundra. Could I also ask Ms Wiseman and Ms Larman, perhaps query: is there not enough sociological evidence submitted on penalty before judges and magistrates? For instance, has your organisation ever been asked by a defence lawyer to provide them with sociological evidence about the impact of sentencing on children? I'd be interested to hear that, because I was taken by the ... I think you said that a judge said that that's because the judge in the lower court wasn't presented with actual evidence of what is so blatantly bloody obvious, that a child [in] those first few years, when they need nurturing, would be affected; [it] is ridiculous – I hope he or she isn't here.

Larman: Shine for Kids has never been asked to go before a court in that capacity? In terms of the connection with the courts, we certainly have had orders where we're written in to try and maintain the contact between the child and the parent once they go to prison, but as far as being called to give evidence, no.

Participant A (♀): Just on the issue, as we know, the Family Court [inaudible] children [inaudible] as your organisation considered that the child of a parent about to be sentenced should receive [inaudible].

Larman: They should have, yes. That would be a good solution. A good start.

Participant (♂): Something similar to a victim impact statement, coming from [inaudible 00:33:53].

Participant A (♀): From the victim of the offender, which is a child.

Larman: Yes.

Participant A (♀): You've got to think outside the square, sometimes.

Larman: We do.

McFarlane: Cath McFarlane, New South Wales Sentencing Council. I just wanted to comment on what Gloria was saying about the children of prisoners issue. When I was a young lawyer, just starting out, I tended to try to hand up to the judge and get judicial notice taken of the UN Rights of the Child, and Standing Committee, documents that showed the over-representation of children of prisoners in the delinquency statistics later on. He held it by the corners and said, 'And what do you propose I do with this?'

The person subsequently got a reduced sentence on the basis of her particular child's acute disabilities, that she was the only person equipped and able to provide assistance for, so it worked out, but there's another way of looking at it, that I was just wondering whether judicial officers do much, which is that there have been a number of studies in the US that look at foster care and parental offending to see which comes first, and they've also looked at re-offending by women in particular.

There's a number of very highly regarded studies which have shown that if parents are in custody that they continue their contact with their children, that their reoffending risk drops dramatically, and also that the children's likelihood of reoffending through the juvenile system is also substantially reduced.

So, that's maybe a different way of approaching [the question], 'How do I stop adult re-offending?' is to keep contact with the children.

Participant D (♀): Could I ask Sian [sounds like 00:45:07] and representatives, what is the current state of research on whether having children imprisoned with their mothers and/or fathers, in exceptional circumstances they'd prefer that [inaudible 00:45:23]. It isn't that long ago, with the debtors prisons in England, [that] the whole family went into prison. Obviously, that's a ridiculous suggestion, but having been imprisoned in a half-way house I noticed the humanising effect of having children in prison on the other prisoners. It was delightful to come home from a day's community service and have a little girl say to me 'Swings, again' [inaudible 00:45:54]. A child, or anyone, deprived of a lot of tactile ability, given that [inaudible 00:46:05] I'm joking. I mean, I didn't, but I'm making a joke about it now [inaudible 00:46:11]

Anyway, my point is, what is the research? Is it better to have a child go to prison, have a school prison, or is it better for them to go into care, if they have no one else? I did

experience, because I was in protection for two months in a prison with women because they didn't know what else to do with me ... I saw a woman come back from having a child. She was not allowed to touch that child. Now, that is *bad*. Two-hundred years [inaudible 00:46:44] I thought it was the most inhumane thing I've ever heard of [inaudible 00:46:48] fortunately there were enough other mothers [inaudible 00:46:52] she was helped with her grief, but she had done, or allowed, something terrible to [happen to] her only child. My point is, could you just update this, the researchers on whether it's better for a kid to go to prison [inaudible 00:47:06]?

Larman: I'll take that one. I think there's a dearth of information; [there's] not a lot of research on that particular issue. I think the research is there to say that the first five years of a child's life are so important that it's probably more important than the separation. So, there's the consequences of separating, [which] far outweigh keeping the child in there. I mean, in New South Wales we do have a program where children can be with their mums in prison. Unfortunately, that program's not utilised near well enough as what it should be, compared to the amount of women that go to prison and are separated.

That whole program, I think, needs some research done around it, because I think it is a fantastic program when it's working well and when the women actually get a chance to participate. The problem is, the system itself doesn't allow a lot of women to participate. Does that, sort of, answer ...

Participant D (♀): It's not in a healthy state.

Larman: It's not healthy, yeah. There certainly needs to be more.