

# **The Impact of Sentencing and Other Judicial Decisions on the Children of Parents in Conflict with the Law**

**Implications for Sentencing Reform<sup>1</sup>**

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## **Executive Summary**

*The situation of children whose parents are involved in adult criminal proceedings is emerging as a pressing public policy concern. There is a growing body of empirical evidence recognizing the adverse effects for dependent children both as direct and indirect victims of their parents' criminal behaviour and in relation to criminal justice decisions about their parents, especially when a court is remanding or sentencing a parent who is a primary or sole caregiver to custody. At the same time, the empirical research shows that both formal and informal support and interventions can mitigate the negative effects of such an adverse experience on children, especially when activated early in the criminal justice decision-making process. In this report, we highlight the growing influence of an evolving international legal standard establishing a yet to be fully defined requirement for criminal courts to systematically recognize and consider the best interests of a child when sentencing a parent or a legal guardian as a specific and independent legal consideration in order to mitigate foreseeable and avoidable harms to the child. We also examine how selected, mainly common law, countries, including Canada, are interpreting and applying this standard in their domestic policy and laws and review some of the innovative child and family focused criminal justice practices that are being adopted in various jurisdictions. Finally, we briefly discuss the implications of these various developments for sentencing reform in Canada and point to some opportunities for Canadian legal and institutional reforms to move forward on this important child and family rights issue.*

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## Introduction

The situation of children whose parents are involved in adult criminal proceedings is emerging as a pressing public policy concern globally and in Canada.<sup>2</sup> There is a growing body of empirical evidence recognizing the adverse effects for dependent children both as direct and indirect victims of their parents' criminal behaviour and in relation to criminal justice decisions about their parents, especially when a court is remanding or sentencing a primary or sole caregiving parent to custody. The children of parents who are in conflict with the criminal law often end up in the care of the state and are at greater risk of victimization and criminal involvement. For these children, their parents' predicament is often a disruptive and potentially a traumatic experience that can affect their development and social adaptation.<sup>3</sup>

The effects of a sentencing or other judicial decisions on people other than the offender are sometimes referred to as "collateral consequences"<sup>4</sup>, "collateral damage"<sup>5</sup>, or "third party impact". There is a wealth of research demonstrating that these decisions can have a significant, even traumatic impact upon the offender's dependent children. Judges must balance numerous factors when making sentencing decisions, generally encompassing the protection of the public, the seriousness of the offence, and the personal circumstances of the offender. Should the probable impact of a sentence on the offender's dependants be a significant factor to be weighed with these other factors in the process of sentencing? More specifically, when a court is sentencing a parent, should it always consider the best interests of a dependent child?

When courts consider the probable hardship of a custodial sentence for the children of offenders, should this be as a form of mitigating factor or as a justification for a form of

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<sup>2</sup> For the purposes of this paper, we define 'children' as being a minor or dependent child under the age of 18 years, consistent with Article 1 of the United Nations *Convention on the Rights of the Child*. While recognizing that persons under 18 years of age may have children, we define 'parents' as being adult persons over the age of 18 years and as including parents, legal guardians and/or caregivers who have sole or primary caregiving responsibility for a minor or dependent child or children. We also use the terms 'incarceration' and 'imprisonment' interchangeably encompassing various forms of custody or detention of an adult parent in relation to arrest, remand and/or sentencing at the local, regional and national levels.

<sup>3</sup> See, e.g., the CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) Study, which recognizes living with an imprisoned household member as one of seven types of adverse childhood experiences. Available at: <https://www.cdc.gov/violenceprevention/acestudy/about.html>

<sup>4</sup> J Hagan and R Dinovitzer, 'Collateral Consequences of Imprisonment for Children, Communities, and Prisoners', *Crime and Justice*, 26, 1999, pp 121-162.

<sup>5</sup> L Feig, 'Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois', *Advocates' Forum*, 2015, pp.13-24.

leniency or mercy, or should other considerations intervene? Arguing that some offenders deserve leniency because of personal circumstances is not the same as arguing that certain individuals should be afforded a measure of compassion because their sentence could cause harm to others. Leniency is perhaps not the best way to approach or to characterize such an exercise of judicial discretion. In a context where judges enjoy a considerable amount of discretion in crafting an appropriate sentence, is it possible for them in appropriate circumstances to craft sentences that mitigate the negative impact of a custodial sentence on the offenders' children?<sup>6</sup>

### **Impact on Children**

There are situations where the removal of a dangerous or chaotic parent from the family home has a positive, protective effect for the affected children. However, children also can be adversely affected at all stages of a parent's involvement with the criminal justice process, from the point of arrest to the time of reintegration into the community following release.<sup>7</sup> The children are affected in many ways, including immediate and long-term emotional, psychological, financial, material, physical and social impacts. In some cases, the children may be exposed to trauma because they witness their parents' arrest or may find themselves in the care of state agencies. In others, the loss of a working parent or a parent who pays child support means reduced financial stability, or a need to move to a different home, or to a different school. The parent-child relationship typically comes under strain and the distress caused by the parent's situation, especially imprisonment, and the responses of others to it, especially when they prove stigmatising, can cause children to become isolated, angry, insecure or scared, and in some cases develop physical or mental health problems.<sup>8</sup>

Many of the children of incarcerated parents find themselves in public care. According to a joint report by the British Columbia (BC) Public Health Officer and the BC Representative

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<sup>6</sup> The issue of leniency or compassion extends also to the administration of the sentence. For example, in the USA, the amended guidelines of the Federal Bureau of Prisons concerning compassionate Release/Reduction in Sentence program (Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)) allows a compassionate release to be considered for prisoners whose children are cared for while in prison by a family member who becomes unable to continue to care (death, serious illness, serious incapacity). Available at: [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf)

<sup>7</sup> For a review of some of this abundant literature, see, e.g., A McCormick, H Millar, G Paddock, *In the Best Interests of the Child: Strategies for Recognizing and Supporting Canada's At-Risk Population of Children with Incarcerated Parents*, University of the Fraser Valley, British Columbia, 2014, at pp. 3-15. Available at: [http://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents\\_Amended.pdf](http://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents_Amended.pdf)

<sup>8</sup> There are many studies showing the high risk of antisocial behaviour and poor mental health outcomes among children of prisoners as compared to children without imprisoned parents. However, it is hard to determine whether parental imprisonment causes an increase in risk for children or whether this increased risk can be explained by the presence of other disadvantages in these children's life. See: J Murray, D P Farrington, I Sekol, R F Olsen. *Effects of Parental Imprisonment of Child Antisocial Behaviour and Mental health: A Systematic Review*, Campbell Systematic Review, 2009, at p. 4.

for Children and Youth, Indigenous children and children in government care, are most vulnerable to being victimized or becoming involved in crime.<sup>9</sup> Despite the strength and resilience of many of these children, the shame and stigma associated with their parents' crime and incarceration may cause them to feel isolated or rejected.

Arrest, adjudication and incarceration do not affect all families equally. Children in families already at a disadvantage due to other factors are likely to face significant challenges when a primary caregiver is incarcerated.<sup>10</sup> Moreover, there is growing international recognition that parental criminal justice system involvement, including imprisonment, disproportionately affects Indigenous and minority children, and other marginalized groups (e.g., children of immigrants).<sup>11</sup> Regardless, many families are negatively affected from the moment a parent, especially a primary or sole caregiver of a child is arrested until and even after a parent's release from imprisonment.

A growing body of empirical research shows that both formal and informal support and interventions can mitigate the negative effects of such an adverse experience on children.<sup>12</sup> As McCormick, Millar and Paddock have suggested, "... supportive programs and services should activate immediately upon the arrest and/or remand of a parent to custody, and should continue through the duration of his/her remanded or sentenced incarceration and into post-release".<sup>13</sup> Likewise, in 2013, a report of the British Columbia Public Health Officer recommended the development of programs designed to provide support for vulnerable populations, including Indigenous children and youth in government care and children whose

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<sup>9</sup> Representative for Children and Youth and Office of the Provincial Health Officer, *Kids, Crime and Care: Health and Wellbeing of Children in Care: Youth Justice Experience and Outcomes, Joint Special Report*, Victoria, Province of British Columbia, 2009, at pp. 4, 7, 13. Available at: [https://www.rcybc.ca/sites/default/files/documents/pdf/reports\\_publications/kids\\_crime\\_and\\_care.pdf](https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/kids_crime_and_care.pdf)

<sup>10</sup> See, e.g., the Princeton Columbia Fragile Families and Child Wellbeing Study examining some of the findings on parental incarceration and child wellbeing in fragile families (defined as families with unmarried parents who are considered to be at an elevated risk for family breakup and poverty in comparison with traditional families). Major findings include that children with incarcerated parents face increased economic instability, significant family and residential instability, and heightened aggression. Available at: <http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/researchbrief42.pdf>

<sup>11</sup> See, e.g., D Cullen, *Briefing Paper: Children of Incarcerated Parents Minorities in Criminal Justice Systems*, Prepared for the 8<sup>th</sup> session of the UN Forum on Minority Issues, November 2015, Quaker United Nations Office, 2016. Available at: [http://www.quono.org/sites/default/files/resources/Briefing%20Paper\\_%20Children%20of%20Incarcerated%20Parents\\_Minorities%20in%20criminal%20justice%20systems%20UPDATED\\_2016%2008%2016%20.pdf](http://www.quono.org/sites/default/files/resources/Briefing%20Paper_%20Children%20of%20Incarcerated%20Parents_Minorities%20in%20criminal%20justice%20systems%20UPDATED_2016%2008%2016%20.pdf)

<sup>12</sup> On potential protective factors and strengthening children's resilience based on an empirical assessment of the mental health effects of parental incarceration for children in four European countries, see, e.g., AD Jones and AE Wainaina-Woźna (eds), *COPING: Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health*, University of Huddersfield, 2013. The study identifies the innate characteristics of the child, family stability, and the ability of a child to maintain a relationship with an imprisoned parent as key resilience factors. Available at: <http://childrenofprisoners.eu/wp-content/uploads/2013/12/COPINGFinal.pdf>

<sup>13</sup> McCormick, Millar, Paddock, pp. iv, 18.

parents or guardians have been involved in the criminal justice system.<sup>14</sup> Ideally, the goal is to strengthen the protective environment offered by a community to the children affected by their parent's conflict with the law. The criminal justice system can also play an important role in that process, for example by recognizing and considering the best interests of the child when making decisions about parents with dependent children or by adopting family-focused policies and practices.<sup>15</sup>

### **Impact of Decisions**

Currently, at each point in the criminal justice process—arrest, remand, sentencing, imprisonment and post-release—adult defendants are considered and treated primarily as individuals, with limited attention to their role as parents or to their dependent children unless the child is a direct victim of their parents' criminal behaviour. The impact of criminal justice decisions on children of parents in conflict with the law is not always sufficiently considered. In particular, the principle of the best interests of the child as a primary consideration in all decisions that directly and indirectly affect children is not always explicitly considered. Indeed, children who are indirectly affected by their parents' criminal justice system involvement have typically been described as being 'invisible' or as collateral victims and as falling between government departments with limited policy or statutory interest in their rights and wellbeing.<sup>16</sup>

As Flynn, Naylor and Arias observed, courts can play a role at several important intervals.<sup>17</sup> They make decisions about whether a parent is granted bail and allowed to return home, with or without conditions, or is remanded in custody. Subsequently, if the person is found guilty, they then make sentencing decisions, including whether to incarcerate the parent. In other instances, courts make decisions in situations where the parent fails to comply with the conditions of their release on bail or the conditions attached to a community-based sentence. There is generally a lack of child-specific or family-focused guidelines to inform these decisions.<sup>18</sup> Yet, there is a growing body of empirical evidence that preserving the family environment and maintaining family relations, when not detrimental to the safety and wellbeing of a child, can produce positive outcomes not only for the child (reduced state

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<sup>14</sup> Office of the Provincial Health Officer, *Health Crime and Doing Time: Potential Impacts of the Safe Streets and Communities Act (Former Bill C-10) on the Health and Wellbeing of Aboriginal People in BC, Special Report*, Victoria, Province of British Columbia, at p. 43. Available at: <http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/health/aboriginal-health-directorate/health-crime-2013.pdf>

<sup>15</sup> Feig, pp. 13-26.

<sup>16</sup> See, e.g., C Flynn, B Naylor, P F Arias, 'Responding to the Needs of Children of Parents Arrested in Victoria, Australia. The Role of the Criminal Justice System', *Australian and New Zealand Journal of Criminology*, 49(3), pp. 351-369, at p. 352.

<sup>17</sup> *Ibid*, p. 355.

<sup>18</sup> *Ibid*, p. 360.

intervention, increased positive adjustment), but also for the parent (reduced recidivism, increased employment prospects) and for the state (increased cost savings associated with community based alternatives instead of prison or the reduced replication of programs and services).<sup>19</sup> However, an emphasis on alternatives to imprisonment, assumes that such alternatives are available and can be used, that judges are aware of what the alternatives are, and that such alternatives are appropriate and effective for offenders and promote the safety and wellbeing of their children.<sup>20</sup>

## Structure of the Report

This report is based on various consultations, a review of the literature, and an analysis of the relevant legislation and jurisprudence in selected countries. It contains four sections. The first section highlights the growing influence of an evolving international legal standard. That standard establishes a yet to be fully defined requirement for criminal courts to systematically recognize and consider the best interests of a child when sentencing a parent or a legal guardian as a *specific* and *independent* legal consideration in order to mitigate foreseeable and avoidable harms to the child.<sup>21</sup> The second section examines how selected, mainly common law, countries, including Canada, are interpreting and applying this standard in their domestic policy and laws. The third section reviews some innovative child and family focused criminal justice practices adopted in various jurisdictions. A final section briefly discusses the implications of these various developments for sentencing reform in Canada and points at some opportunities for Canadian legal and institutional reforms to move forward on this important child and family rights issue.

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<sup>19</sup> Feig, p. 17.

<sup>20</sup> Imposing a duty on a sentencing court to routinely inquire about dependent children and consider the best interests of a child when their parents are sentenced to prison presupposes there are alternatives to prison and that these alternatives are safe and effective. As the Kimberly Rogers case suggests, this assumption may not always be accurate. Rogers was convicted of welfare fraud and sentenced to a six month conditional sentence, 18 months probation, and restitution, but tragically died of a prescription drug overdose while eight months pregnant during her house arrest in extreme summer temperatures. See: DE Chunn and SAM Gavigan, 'From Welfare Fraud to Welfare as Fraud: The Criminalization of Poverty, in G Balfour and E Comack (ed), *Criminalizing Women: Gender and (In)Justice in Neoliberal Times (2nd edition)*, Halifax: Fernwood Press, 2014, pp. 217-235.

<sup>21</sup> On the anticipated harms to children associated with parental incarceration, see, e.g., T Lerer, 'Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System', *Northwestern Journal of Law and Social Policy*, 9(1), 2013, pp. 23-57, at p. 27 who argues three sets of harms, including those to children, to society based on future criminogenic risk, and the disparate impacts of prison on minority children. See also the comments of Mr. Justice Sachs in *S v. M.*, (CCT 53/06) [2007] ZACC 1, para 35 on the duty of a sentencing court to acknowledge the interests of children based on averting avoidable harm and unnecessary suffering to children.



## Applying the Principle of the Best Interests of the Child in Judicial Decisions about the Parents

An array of international norms and standards are increasingly interpreted to affirm that criminal courts should explicitly consider the best interests of the child in all decisions affecting the child, extending to decisions about their parents or primary caregivers in adult criminal proceedings, especially in relation to remand and sentencing decisions. In particular, the *United Nations (UN) Convention on the Rights of the Child*<sup>22</sup> and the *UN Guidelines for the Alternative Care of Children*<sup>23</sup> provide a strong international legal foundation to argue that domestic criminal courts are obligated to routinely and independently consider the best interests of a dependent child when a parent is involved in criminal justice proceedings.<sup>24</sup>

The *Convention on the Rights of the Child (CRC)* does not explicitly address the rights of children whose parents are in conflict with the law other than article 9(4) which recognizes a child's right to information about the whereabouts of a detained, imprisoned, exiled, deported, or executed parent unless contrary to the child's well-being.<sup>25</sup> However, among several other applicable rights and protection provisions,<sup>26</sup> article 3(1) of the *Convention*,

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<sup>22</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989. See especially L Lundy, U Kilkelly, B Byrne, and J Kang, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries, conducted on behalf of UNICEF*. Centre for Child Rights, School of Education, Queen's University Belfast, 2012, at pp. 71-75 for a discussion of Canada's implementation of the *CRC*. On the legislative and judicial recognition of child rights in these various domains, see also N Bala, and C Houston, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada*. Family, Children and Youth Section, Ottawa: Department of Justice Canada, 2015. Available at: <http://www.justice.gc.ca/eng/rp-pr/other-autre/article12/index.html>

<sup>23</sup> UN General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, 24 February 2010, A/RES/64/142. Available at: <http://www.refworld.org/docid/4c3acd162.html> [accessed 28 December 2016], Guidelines 48 and 82.

<sup>24</sup> See especially the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the rationale for article 30 (children of imprisoned mothers) of the *African Convention on the Rights and Welfare of the Child*. The ACERWC opine: "Article 30 is informed by the fact that children of incarcerated parents/primary caregivers may find a number of their rights violated as a result of this incarceration. When a criminal court detains a child's parent, the court reshapes the child's family just as much as a family law court issuing an order of custody, adoption, or divorce, and as a result, children's best interests need to have a primary role in such circumstances. As a result, there is often an acute need for special treatment, and support services, which will vary depending on the child's particular family circumstances and the stage of the criminal proceedings." ACERWC *General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On "Children Of Incarcerated And Imprisoned Parents And Primary Caregivers"*, 2013, para 7. Available at: [http://www.acerwc.org/download/general\\_comment\\_on\\_article\\_30\\_of\\_the\\_acrwc\\_english/?wpdmdl=8597](http://www.acerwc.org/download/general_comment_on_article_30_of_the_acrwc_english/?wpdmdl=8597).

<sup>25</sup> Article 9(3) of the *CRC* is also important emphasising the right of a child who is separated from their parent 'to maintain personal relations and direct contact with their parent on a regular basis' unless contrary to the child's wellbeing. This right has been invoked to argue for a child's right to visit a parent in prison.

<sup>26</sup> These potentially include: article 2 (non-discrimination), article 3 (best interests), article 5 (parental guidance), article 6 (survival and development), article 7 (registration, name, nationality, care), article 8

“principle of the best interests of the child”,<sup>27</sup> specifically contemplates that the best interests of the child shall be a primary consideration in all state actions that affect the child, including those undertaken by courts of law. In its general comment on article 3(1), the Committee on the Rights of the Child expressed the opinion that the principle applies to ‘children affected by the situation of their parents in conflict with the law’ and indicated that, in its view, the reference to ‘courts of law’ extends to criminal court proceedings matters with a direct or indirect impact on children.<sup>28</sup> The Committee also indicated that when a parent or primary caregiver commits a criminal offence, alternatives to detention should be considered on a case-by-case basis, “... with full consideration of the likely impacts of different sentences on the best interests of the affected child or children”.<sup>29</sup>

In addition, article 2 of the *CRC* presumably protects a child against discrimination based on the alleged or assessed criminal status of their parent, while article 12 relating to the child’s ‘right to be heard’ likely encompasses criminal courts considering the direct or indirect views of the child in situations where a court is remanding or sentencing their parent to imprisonment.<sup>30</sup> Moreover, article 20 of the *CRC* pertaining to children deprived of their family environment, especially if read together with guideline 48 of the *UN Guidelines for*

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(preservation of identity), article 9 (separation from parents), article 12 (respect for the views of the child), article 16 (right to privacy), article 18 (parental responsibilities, state assistance), article 19 (protection from all forms of violence), article 20 (children deprived of family environment), article 21 (adoption), article 25 (review of treatment in care), article 26 (social security), article 27 (adequate standard of living).

<sup>27</sup> Article 3(1) provides “1. 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”.

<sup>28</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Right of the Child to Have His Or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14. Available at: [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) [accessed 18 July 2016], para 28.

<sup>29</sup> *Ibid*, para 69 in relation to preserving the family environment and maintaining family relations. See also UN Committee on the Rights of the Child (CRC), *Report And Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”*, 30 September 2011, para 30, which forms the basis of this interpretation. Since 2005, the Committee has increasingly addressed the situation of children of incarcerated and administratively detained parents as part of its concluding observations, either as a standalone item or in relation to the best interests of the child, early childhood development, separation from parents, children deprived of a family environment, birth registration and nationality, or as the children of migrant workers. *Inter alia*, these now more than 50 concluding observations, 40 of which were made in 2010 or after, have instructed domestic courts to consider the best interests of the child principle when remanding or sentencing a parent to custody, emphasizing the use of alternative sanctions where possible and appropriate. A database of these concluding observations is available at: <http://www.crcip.com/all.php>.

<sup>30</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013)*, paras 43-45, 53-54 and UN Committee on the Rights of the Child (CRC), *Report And Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”*, para 41. See also J Tobin, ‘Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children’, *Melbourne University Law Review*, 33, 2009, pp. 579-625 at pp. 588, 605.

*the Alternative Care of Children*, arguably requires a criminal court to ensure that appropriate alternative care arrangements are in place when remanding or sentencing a primary or sole carer with dependent children to imprisonment.<sup>31</sup> More generally, both the *International Covenant on Civil and Political Rights*<sup>32</sup> and the *International Covenant on Economic, Social and Cultural Rights*<sup>33</sup> recognize the family as the fundamental social unit that is entitled to social and state protection.

United Nations bodies such as the General Assembly<sup>34</sup> and the Human Rights Council<sup>35</sup> have adopted several resolutions directly addressing the situation of children affected by their parents' criminal justice system involvement, including in matters of sentencing. Collectively, these resolutions have stressed the importance of UN member states:

- (1) prioritizing non-custodial measures when remanding or sentencing a pregnant woman or a dependent child's sole or primary caregiver to imprisonment, subject to the seriousness of the offence, the need to protect the public, and an assessment of the wellbeing of the child;
- (2) recognizing, promoting and protecting the rights of a child affected by parental incarceration, especially to have their best interests be an important consideration in

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<sup>31</sup> Specifically, guideline 48 provides that when a child is to be deprived of a sole or main carer because of a sentencing decision, non-custodial sentences should be used where possible and appropriate following an assessment of the best interests of the child. See also UN Committee on the Rights of the Child (CRC), *Report And Recommendations of the Day of General Discussion on "Children Of Incarcerated Parents"*, para 42.

<sup>32</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, article 23(1).

<sup>33</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, article 10(1).

<sup>34</sup> The six UN General Assembly resolutions include: A/RES/68/147 Resolution adopted by the General Assembly on 18 December 2013 [on the report of the Third Committee (A/68/452 and Corr.1)] 68/147, Rights of the child, paras 56-57; A/RES/67/166 Resolution adopted by the General Assembly on 20 December 2012 [on the report of the Third Committee (A/67/457/Add.2 and Corr.1)] 67/166. Human rights in the administration of justice, preamble, para 19 and para 21; A/RES/65/213 Resolution adopted by the General Assembly on 21 December 2010 [on the report of the Third Committee (A/65/456/Add.2 (Part II))] 65/213. Human rights in the administration of justice, paras 11-12; A/RES/64/146 Resolution adopted by the General Assembly on 18 December 2009 [on the report of the Third Committee (A/64/435 and Corr.1)] 64/146. Rights of the child, para 15; A/RES/63/241 Resolution adopted by the General Assembly on 24 December 2008 [on the report of the Third Committee (A/63/426)] 63/241. Rights of the child, para 47; A/RES/58/183 Resolution adopted by the General Assembly on 22 December 2003 [on the report of the Third Committee (A/58/508/Add.2)] 58/183. Human rights in the administration of justice, para 15.

<sup>35</sup> The five UN Human Rights Council resolutions include: A/HRC/25/L.10, Human Rights Council, Rights of the Child, Access to Justice, 25 March 2014, paras 5-7 and which explicitly recognizes the children of incarcerated parents as a vulnerable group; A/HRC/RES/19/37, Human Rights Council, Resolution, Rights of the Child, 19 April 2012, para 68-69; Resolution 10/2, Human rights in the administration of justice, in particular juvenile justice, A/HRC/10/RES/2, Adopted 25 March, 2009, para 12; Resolution 7/29, Rights of the child, A/HRC/7/RES/29 Rights of the Child, adopted 28 March 2008 para 33.

decisions affecting them and not to be discriminated against because of the actions or alleged actions of one or both of their parents; and,

(3) paying greater attention to the effects of parental imprisonment on children.

The UN Human Rights Council<sup>36</sup> and the Council of Europe<sup>37</sup> have both explicitly recognized children whose parents are in conflict with the law as a vulnerable group of children. Similarly, the Office of the UN High Commissioner for Human Rights has recognized the adverse, gendered and racialized effects of parental, especially maternal, imprisonment on children. The gendered effects of maternal imprisonment were also recently highlighted in relation to the UN General Assembly's Sustainable Development Goals adopted in 2015, vis-à-vis promoting inclusive societies and access to justice (Goal 16), ending poverty and ensuring that the children of offenders are not being drawn into a cycle of crime and poverty (Goal 1), and achieving gender equality, particularly in relation to gender-specific circumstances being considered in sentencing (Goal 5).<sup>38</sup>

### **The Bangkok Rules**

The *UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* ('*Bangkok Rules*') prioritize non-custodial measures when criminal courts are sentencing a pregnant woman or a dependent child's sole or primary caretaker where possible and appropriate, with custodial sentences to be limited to serious and violent offences or offenders who represent some danger, "after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children" (emphasis added).<sup>39</sup> The *Bangkok Rules* also encourage states to develop gender-specific sentencing alternatives;<sup>40</sup> ensure that women are not separated from their families without due consideration to their background and family ties;<sup>41</sup> and authorize their sentencing courts to consider a range of mitigating factors when sentencing women offenders, including a women's caretaking responsibilities.<sup>42</sup> As well, the *Bangkok Rules* provide that women sentenced to prison should be afforded an opportunity to make childcare

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<sup>36</sup> UN Human Rights Council. A/HRC/25/L.10, Rights of the Child, Access to Justice, 25 March 2014, para 5(a).

<sup>37</sup> Council of Europe Strategy for the Rights of the Child (2016-2021), 2013, para 13.

<sup>38</sup> R Allen, *Global Prison Trends*, London: Penal Reform International, 2016, pp. 5-7.

<sup>39</sup> UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, Rule 64. 6 October 2010, A/C.3/65/L.5. Available at: <http://www.refworld.org/docid/4dcbb0ae2.html> 64.

<sup>40</sup> *Ibid*, rule 57.

<sup>41</sup> *Ibid*, rule 58.

<sup>42</sup> *Ibid*, rule 61.

arrangements and appear to anticipate deferred or suspended sentencing options based on an assessment of the best interests of a child.<sup>43</sup>

### **The UN Declaration on the Rights of Indigenous Peoples**

The effects of parental incarceration on Indigenous children is a particularly important consideration for Canada in view of the ongoing inter-generational trauma and other adverse effects associated with a history of colonization and forcible state separation of children from their parents by means of residential schools and the child welfare system,<sup>44</sup> and in view of the Truth and Reconciliation Commission Calls to Action.<sup>45</sup>

Indeed, for countries like Canada, Australia, New Zealand, and the United States that have exceptionally high and disproportionate rates of Indigenous persons who are remanded in custody and/or sentenced to imprisonment, many of whom are parents, the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* is likely relevant to the rights of Indigenous children in their parents' adult criminal proceedings if such children are to be forcibly separated from their parents due to state-imposed imprisonment.<sup>46</sup>

### **Regional Standards**

At the regional level, the *African Charter on the Rights and Welfare of Children (ACRWC)* article 30 on 'Children of Imprisoned Mothers', which was adopted by the Organization of African Unity in 1990, specifies that African member states "... should provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of breaking the law".<sup>47</sup> In relation to sentencing, article 30.1 specifically provides that African states should always first consider a non-custodial sentence when sentencing mothers with children. Additionally, Member states should establish and promote alternative treatment measures for women offenders and emphasize the restorative aims of punishment.<sup>48</sup>

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<sup>43</sup> Ibid, rule 2.

<sup>44</sup> See especially the comments of Madam Justice Ross in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, at para 15 who recognizes this tenet in relation to the circumstances of Aboriginal mothers who face higher rates of incarceration and a history of familial dislocation due to state action.

<sup>45</sup> *Truth and Reconciliation Commission of Canada: Calls to Action*, Winnipeg, Manitoba, 2015, available at [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf). See especially the Calls to Action on child welfare (actions 1-5) and justice (actions 25-42 and in particular actions 30-32).

<sup>46</sup> Consider the recognition in preambular paragraph 13 of "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child" and operative provisions contained in articles 7, 8, 9, 21 and 22 of the Declaration.

<sup>47</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>48</sup> Ibid. Article 30.1 paras a, b, f.

In its general commentary on article 30, the African Committee of Experts on the Rights and Welfare of the Child (the ‘ACERWC’) provided a comparatively expansive interpretation of article 30, including its definition of ‘mother’, which extends to children affected by the incarceration of their sole or primary caregiver so as to encompass fathers and other caregivers (including extended family members) who have custody of the child.<sup>49</sup> According to the ACERWC, Article 30 is envisaged as encompassing all stages of criminal proceedings, from arrest through to release and reintegration, and not just sentencing a parent or carer to imprisonment.<sup>50</sup> The ACERWC has been equally clear there is a state obligation to create and implement laws and policies to ensure the best interests of the child are a primary consideration throughout the criminal justice process, whether the child is affected directly or indirectly by state actions.<sup>51</sup> Member states are expected to ensure there are available alternatives to incarceration for expectant prisoners and prisoners with children and that courts prioritize non-custodial measures in sentencing, subject to the seriousness of the offence and the need to protect the public and the child.<sup>52</sup> State parties should also consider the views of the child, whether directly or indirectly, and give due weight to those views, extending to providing children with an opportunity to take part in sentencing procedures and if necessary to have legal representation or a guardian to ensure their participation.<sup>53</sup>

In relation to implementation of Article 30, the ACERWC has affirmed the judicial sentencing guidelines developed by the South African Constitutional Court in *S v M* in 2007 setting forth a five part test, calling on Member states to review and amend their sentencing procedures accordingly.<sup>54</sup> The ACERWC is also monitoring state parties’ implementation of article 30, for example observing in it concluding observations for South Africa that it should “... extend special treatment for mothers taking into account the best interest of the child

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<sup>49</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On “Children Of Incarcerated And Imprisoned Parents And Primary Caregivers”* 2013, para 13.1. Available at: [http://www.acerwc.org/download/general\\_comment\\_on\\_article\\_30\\_of\\_the\\_acrwc\\_english/?wpdmdl=8597](http://www.acerwc.org/download/general_comment_on_article_30_of_the_acrwc_english/?wpdmdl=8597)

<sup>50</sup> *Ibid*, para 11.

<sup>51</sup> *Ibid*, paras 7, 22-23.

<sup>52</sup> *Ibid*, para 24(a), 41-49.

<sup>53</sup> *Ibid*, para 24(d), 30-32.

<sup>54</sup> *Ibid*, para 36. The sentencing court guidelines stipulate that: “(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so; (b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered; (c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, 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; (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child; (e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose”.

beginning from arrest, up to the ultimate conviction, sentencing, imprisonment and reintegration phase of the criminal justice system”.<sup>55</sup>

Relevant European standards include the *Charter of Fundamental Rights of the European Union* article 7 “Respect for private and family life” and article 24 rights of the child (including protection and care for their wellbeing, a child’s right to be heard, to have their best interests be a primary consideration, and to maintain a relationship and have direct contact with their parents),<sup>56</sup> along with the *European Convention on Human Rights* (ECHR) article 8 “Right to respect for private and family life”.

While not directly addressing the rights of a child to family life, the European Court of Human Rights evidently has interpreted the *ECHR* article 8 right to afford prisoners some protections in maintaining familial contacts and relationships.<sup>57</sup> On the other hand, domestic criminal courts in England and Wales have been willing to directly consider a child’s right to family life when a parent is being criminally sentenced and the appellate courts have developed a range of judicial guidance on this issue.<sup>58</sup> In addition, several European Parliament resolutions and recommendations expressly acknowledge the gendered and adverse effects of imprisonment for women and their children and advocate the use of community based alternatives to prison.<sup>59</sup> In 2014, the European Parliament explicitly recognized children of imprisoned parents in its resolution 2014/2919(RSP) on the 25<sup>th</sup>

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<sup>55</sup> Concluding recommendations by the African committee of experts on the rights and welfare of the child (ACERWC) on the Republic of South Africa initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child, para 60. Available at: [http://www.acerwc.org/download/concluding\\_observations\\_south\\_africa/?wpdmdl=8754](http://www.acerwc.org/download/concluding_observations_south_africa/?wpdmdl=8754)

<sup>56</sup> See, e.g., R. Wolleswinkel, ‘Child rights in post-Lisbon Europe, what about children of imprisoned parents?’ *European Journal of Parental Imprisonment: An Evolving Child Rights Agenda*, Spring 2015, at p. 7.

<sup>57</sup> See especially M van der Meij, *Children of Prisoners and Human Rights: The Forgotten Victims*, LLM in International and European Public Law International Law and Human Rights, Tyilburg University, 2013, at pp. 11, 14. Available at: <http://arno.uvt.nl/show.cgi?fid=132394>

<sup>58</sup> See especially Rona Epstein who has published a series of research articles on sentencing and child rights in the UK, including R Epstein, ‘Mothers in Prison: The Sentencing of Mothers and the Rights of the Child’, *Coventry Law Journal: Special Issue Research Report*, 2012. See also F Donson and A Parkes, ‘Changing Mindsets Changing Lives: Increasing the visibility of children’s rights in cases involving parental incarceration’, *International Family Law*, 4(6), 2012, pp. 408-413; S Minson, *Mitigating Motherhood: A study of the impact of motherhood on sentencing decisions in England and Wales*, London, The Howard League, 2014; S Minson, R Nadin, R. and J Earle, *Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children: A Discussion Paper*, London, Prison Reform Trust, 2015. Available at: [http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing\\_mothers.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf)

<sup>59</sup> See, e.g., European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0102+0+DOC+XML+V0//EN>

Anniversary of the UN *CRC*, calling on the Commission “... to assess the impact of detention policies and criminal justice systems on children”.<sup>60</sup>

In the Americas, the Organization of American States has focused some attention on the best interests of the child and a child’s separation from their parents more generally in relation to the *American Convention on Human Rights* (especially articles 17 and 19 concerning protection of the family and special human rights protections for children and adolescents).<sup>61</sup> More recently, the Inter-American Commission on Human Rights received a petition about the situation of children of persons deprived of their liberty highlighting the many ways that deprivation of liberty impacts children.<sup>62</sup> Within this context, the Special Rapporteur for Children’s Rights has emphasized the need for alternative sentencing options for prisoners with children.<sup>63</sup>

## National Policies and Legislation

In accordance with these international and regional standards, and alongside common law principles and recognized mitigating factors in sentencing, countries like Australia, Canada, England and Wales, New Zealand, South Africa, and the United States of America (USA) have adopted varying legislative and judicial approaches to recognizing the best interests of the child or family rights when remanding and/or sentencing a dependent child’s parent or primary caregiver to imprisonment. However, policy guidance in these matters tend to be seen as non-binding and is not always followed consistently by the courts. It is therefore often suggested that a statutory requirement should be established for criminal justice decision-makers, especially at the levels of arrest, remand decisions and sentencing, to routinely enquire about and consider the effects of incarceration on dependent children.<sup>64</sup> As well, there is still a search for comprehensive multidisciplinary, evidence-based policies

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<sup>60</sup> *European Parliament resolution on the 25th anniversary of the UN Convention on the Rights of the Child* (2014/2919(RSP)). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0285+0+DOC+XML+V0//EN>, para 13.

<sup>61</sup> For example, Organization of American States (OAS), *The Inter-American Commission on Human Rights (IACHR), The Rights of the Child in the Inter-American System* (second edition), OEA/Ser.L/V/II.133, Doc. 34, 2008. See also, the OAS/IACHR/UNICEF report on the *Rights of Boys and Girls to a Family. Alternative care. Ending Institutionalization in the Americas*, in particular at 66-76 on the best interests of the child as interpreted and applied in the Americas, OEA/Ser.L/V/II. Doc. 54/13, 2013. Available at: <https://www.oas.org/en/iachr/children/docs/pdf/Report-Right-to-family.pdf>

<sup>62</sup> A Flynn-Schneider, *Human Rights Brief, Situation of Children of Persons Deprived of Liberty in the Americas* 28 October 2015, para 3. Available at: <http://hrbrief.org/hearings/children-deprived-of-liberty-in-the-americas/>

<sup>63</sup> *Ibid.* para 5.

<sup>64</sup> See, e.g., Flynn, Naylor, and Arias, at p. 364; Feig, at p. 17.



centered on the rights of the child and the need to strengthen the resilience of offenders and their children.

## Australia

In Australia, appellate courts recognized the common law principles of ‘excessive hardship’ and ‘mercy’ as mitigating factors in sentencing since the late 1970s and there is a considerable body of case law and a number of authoritative decisions on the excessive (family/dependents) hardship principle.<sup>65</sup> There is also some federal and state level legislative recognition of the hardship caused to an offender’s children by imprisonment as a mitigating factor in exceptional circumstances reducing the severity of the sentence. Specifically, for Commonwealth or federal offences, section 16A(2)(p) of the *Federal Crimes Act*, 1914, as amended in 1990, legislatively *requires* courts to take into account the ‘probable effect’ of any sentence on a family or dependents where this information is ‘relevant and known to the court’.<sup>66</sup> Both the Australian Capital Territory (ACT) and South Australia have enacted similar legislative ‘probable effect’ provisions for state-level offences.

Nothing in s.16A(2)(p) or in its equivalent in South Australia or the Australian Capital Territory suggests that the effect of the sentence on an offender’s family or dependants must be exceptional to be taken into account. However, the wording and elements of the *Federal Crimes Act* 16A(2)(p) provision (‘probable effect’, ‘where relevant and known’) have been interpreted by the courts as requiring cogent evidence of extreme hardship and as operating alongside the common law principle that any hardship suffered by a defendant’s family and dependants can only mitigate a sentence in ‘exceptional circumstances’, such as a single parent leaving a child without parental care or in relation to disabled or ill dependent children.<sup>67</sup> As well, whether the provision carries any weight at all depends on the objective seriousness or gravity of the offence and the circumstances of each case. For example, in *Markovic v. The Queen*<sup>68</sup>, the Victorian Court of Appeal was specifically asked to consider

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<sup>65</sup> See T Hannon, *Children: Unintended Victims of Legal Process – A review of policies and legislation affecting children with incarcerated parents: Discussion Paper*, Flat Out Inc. and the Victorian Association for the Care and Resettlement of Offenders, Melbourne, Victoria, 2006, at pp. 41-52; A Larsen, ‘Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment’, *Australian Journal of Gender and Law*, 1(1), 2012, 21-42, at 28-37; T Walsh and H Douglas, ‘Sentencing Parents: The Consideration of Dependent Children’, *Adelaide Law Review*, 37, 2016, pp. 135-161. The courts evidently use the principle of ‘mercy’ in cases where excessive hardship cannot be established.

<sup>66</sup> See, e.g., Commonwealth Sentencing Database, Effects on Offenders Family or Dependents. Available at: [https://njca.com.au/sentencing/principles-practice/general\\_sentencing\\_principles/s16a\\_specific\\_relevant\\_factors/dependants/](https://njca.com.au/sentencing/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/dependants/)

<sup>67</sup> See, e.g., A Renieris, *The Effects of Parental Imprisonment on Children: Sentencing Factors, Guidelines and Options, A Background Paper*, Clinical Legal Education placement at the West Heidelberg Community Legal Service, La Trobe University Law School, 2006, pp. 2, 4. See also Larsen, pp. 25-35.

<sup>68</sup> (2010) 30 VR 589 (“*Markovic*”).

the “circumstances in which an offender can legitimately seek to cause hardship to members of his/her immediate family or other dependants”. In this case, the court observed that imprisonment almost inevitably causes hardship for dependants and that, since this is to be expected, hardship must have an exceptional character in order to have an impact on the sentence. In some other cases, it has been held that even if exceptional circumstances are not present, the effect of the sentence on the offender’s children could still attract leniency under the court’s residual “mercy discretion”.<sup>69</sup>

Still, it is noteworthy that in some of these cases the courts are considering the UN *CRC* article 3(1) principle of the best interests of the child as a relevant circumstance in accordance with legislative sentencing guidelines that permit judges to consider “any other relevant circumstance”.<sup>70</sup> Moreover, the Australian Law Reform Commission, along with some Australian academics, has advocated that the effects of sentences for sole or primary caregivers with dependent children should routinely be a significant consideration “without the need to establish exceptional circumstances”.<sup>71</sup> As well, some state-level sentencing councils are attentive to gendered differences in sentencing outcomes, especially in relation to women who are sole caregivers for dependent children.<sup>72</sup>

## Canada

In addition to applicable penalty provisions for specific offences, Canadian sentencing policy includes legislative guidance on the purpose and principles of sentencing—extending to restorative justice aims—and emphasis on proportionality as a fundamental principle of sentencing.<sup>73</sup> Moreover, in terms of sentencing principles, Canadian courts are legislatively required by section 718.2(e) of the *Criminal Code* to consider imprisonment as a last resort for all offenders, with particular reference to the circumstances of Indigenous offenders. At

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<sup>69</sup> E.g., *R v. Carmody* (1998) 100 A Crim R 41, 45. See also the discussion in Walsh and Douglas, pp. 139-141.

<sup>70</sup> See especially Walsh and Douglas, pp. 152, 154 who analysed 85 reported appellate sentencing decisions (2000-2014) pertaining to hardship on a defendants children. The principle of the best interests of the child has been considered in a situation where there was no alternative carer and in relation to pregnant and breastfeeding mothers. See also Larsen, pp. 34-35.

<sup>71</sup> *Ibid*, p. 139.

<sup>72</sup> See, e.g., State of Victoria, Sentencing Advisory Council, 2010, at pp. 4, 15-16, 39-40, 46-49, 56. Available at <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf>

<sup>73</sup> *Criminal Code*, RSC 1985, c C-46, section 718.1. Canadian sentencing policy is set forth by part XXIII of the *Criminal Code* and includes legislative guidance on alternative measures (section 717), the purpose and principles of sentencing (section 718), and a range of sentencing options (sections 730-745). In Canada, over the past ten years, judicial sentencing discretion has been to some extent legislatively constrained by the expansion of offences with mandatory minimum sentences, restrictions on the use of conditional sentences, and limitations on the amount of credit for time served in pre-trial detention. Several of these legislative restrictions have been constitutionally challenged and overturned by the courts.

the same time, Canadian sentencing policy on mitigating factors does not expressly recognize the ‘excessive hardship on dependents’ principle (Australia) or include a list of enumerated factors including family ties (some American states). While criminal sentencing courts may consider a defendant’s dependent children as a mitigating factor,<sup>74</sup> the available jurisprudential evidence suggests that criminal courts do not *routinely* consider the potential effects of a parent’s carceral sentence on their dependent children.<sup>75</sup> There are also cases where the court has refused to take a defendants’ caregiving obligations in mitigation.<sup>76</sup>

Caregiving obligations and the principle of the best interests of a child have been judicially considered in relation to Canada’s remedial sentencing provisions, encompassing section 718.2(e) of the *Criminal Code* and related trial and appellate jurisprudence, to address the historical and intergenerational legacies of discrimination and disadvantage experienced by many Indigenous and black persons.<sup>77</sup> In the renowned *Gladue* (1999) decision concerning whether section 718.2(e) of the *Criminal Code* applied to an Indigenous woman living off-reserve who had killed her common law spouse, the Supreme Court of Canada in recounting the judicial history of the case recognized trial level mitigating factors, including that Gladue had two dependent children. At the same time, it is noteworthy that the trial court largely discounted Gladue’s pregnancy with a third child at the time of her sentencing, which was treated as a neutral factor.<sup>78</sup> In the *Hamilton and Mason* (2003) case, the Ontario Superior

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<sup>74</sup> Section 718.2(a), *Criminal Code*.

<sup>75</sup> *R. v. Hamilton*, 2003 CanLII 2862 (ON SC) at para 197 noting the cases: *Regina v. Scott*, [1996] O.J. No. 3419 (C.A.), *Regina v. Wellington*, *supra* at 476-7; *Regina v. Hadida*, [2001] O.J. No. 843 (C.A.) at para 2; *The Queen v. Bunn* (2000), 140 C.C.C. (3d) 505 (S.C.C.) at 517; *Regina v. Aranguren and Others* (1994), 99 Cr. App. R.347 (C.A.) at 353; *Regina v. Holub and Kufirin* (2002), 163 C.C.C. (3d) 166 (Ont. C.A.) as cases involving mitigation of sentence directly referring to the impact of parental incarceration on children. See also the legal factum prepared by West Coast LEAF as an intervener in the Supreme Court of Canada *Lloyd versus the Queen* case challenging the constitutionality of mandatory minimum sentences in relation to the hypothesized negative gender effects for women at 23, which identifies three cases in which caregiving obligations have been considered: *R. v. Hamilton*, 2003 CanLII 2862 (ON SC); *R. v. Wellington*, [1999] OJ No 569 (CA); and *R. v. Bunn*, 2000 SCC 9.

<sup>76</sup> See, e.g., *R. v. Estrella*, [2011] O.J. No. 6616 (OSCJ), at para 16.

<sup>77</sup> Various Supreme Court of Canada decisions such as *R v Gladue* (1999) and *R v Ipeelee* (2012) have clarified and expanded this sentencing obligation and the applicable principles, or so-called Gladue factors, that sentencing—and now in some provincial/territorial jurisdictions bail— courts are required to consider. On the application of Gladue factors to bail proceedings, see, e.g., J. Rogin, *The Application of Gladue to Bail: Problems, Challenges and Potential*, A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Law, Graduate Program in Law, York University, Toronto, Ontario, 2014.

<sup>78</sup> *R. v. Gladue* [1999] 1 S.C.R. 688, para 15. In view of Canada’s troubling history of forcibly separating Indigenous parents and children through state-imposed Indian residential schools and child welfare policies, with profoundly adverse, including inter-generational, consequences for the affected child or children, it is intriguing how little emphasis was placed on Gladue’s child caring responsibilities and that there was no separate consideration of the best interests of her children. Neither the Gladue principles nor Gladue reports appear to specifically reference the best interests of Indigenous children affected by their parents’ potential incarceration. Instead, Gladue factors and Gladue reports seem to focus more on the personal background and systemic factors that have brought the Indigenous defendant before the court (criminogenic risk factors such as

Court expressly recognized the differential circumstances—including, racial and gender bias and poverty—of black women offenders operating as transnational drug couriers, many of whom are single parents, stating that: “As a general rule, the sentencing function should take account of the best interests of an offender’s wholly dependent children.”<sup>79</sup> However, it remains unclear whether the 2003 *Hamilton and Mason* judgment will influence other courts to consider the best interests of dependent children affected by maternal (or paternal) incarceration since the trial judge was severely criticized on appeal for leading the evidence on systemic discrimination and overstepping the bounds of a sentencing court.<sup>80</sup>

Also directly relevant to the rights of children in their parents’ criminal proceedings, the best interests of the child was a significant legal consideration in a 2013 BC Supreme Court decision, *Inglis versus British Columbia (Minister of Public Safety)*, successfully challenging the province’s unilateral cancellation of a residential mother-child program at a provincial correctional centre for women.<sup>81</sup> The constitutional challenge, asserting unjustifiable infringements of section 7 (right to life, liberty and security of the person), section 12 (cruel and unusual punishment), and section 15 (equality) *Charter* rights, was brought by two former inmates (Amanda Inglis and Patricia Block) and their children on behalf of themselves and other provincially incarcerated women.<sup>82</sup> The court found that the province’s decision to cancel the program unjustifiably violated the plaintiffs’ section 7 rights to security of the person and section 15 equality rights.<sup>83</sup>

*Inter alia*, Madam Justice Ross concluded that the concept of the best interests of the child, both as a matter of applicable international law and domestic child welfare legislation, was

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prior residential school experiences, adoption or experiences in the child welfare systems) as opposed to protective or resilience factors associated with desistance from crime, including whether the offender has dependent children and primary caregiving obligations. Additional systematic analysis of the extent to which parenting obligations and the interests of dependent children are considered in Gladue reports and Gladue-related bail and sentencing proceedings would be beneficial.

<sup>79</sup> *R. v. Hamilton*, 2003 CanLII 2862 (ON SC) at para 197. The two women defendants in this case were the primary caregivers and sole providers for six children between them. For an in depth analysis of the Hamilton and Mason cases, see especially C. Murdocca, *To Right Historical Wrongs: Race, Gender and Sentencing in Canada*, Vancouver: UBC Press, 2013.

<sup>80</sup> *R v. Hamilton et al.* Ontario Court of Appeal, 72 O.R. (3d) 1, [2004] O.J. No. 3252. The Hamilton case raises a question of whether defence or intervener led evidence on systemic discrimination and sole caregiving may be accepted. Notably, though, the Ontario Court of Appeal has recognized the legitimacy of remedial sentencing to address the systemic discrimination experienced by black Canadians in other cases (*R. v. Borde*, 2003 4187 (ON CA)).

<sup>81</sup> The *Inglis* decision, affirming the section 7 and 15 rights of incarcerated mothers and their children, is not only important as a matter of domestic law, but is promoted by research and advocacy organizations such as the Quaker United Nations Office and Prison Reform International as an international best practice in relation to the judicial recognition of the rights of children of incarcerated parents.

<sup>82</sup> *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, paras 1-3.

<sup>83</sup> *Ibid*, paras 10-17.

contextually important for the case. She observed that the provincial government could not “sidestep the principle that in all state actions concerning a child, the best interests of the child shall be a primary consideration.”<sup>84</sup> In particular, the court concluded that the interests of mothers and infants to remain together is an aspect of security of the person (for both the mother and the child in relation to the benefits of staying together and the risks of separation, including potential state apprehension of a child through closure of the program) and that a decision to cancel the mother-baby program cannot be based on a blanket exclusion and removed from an individualised process of determining the best interests of the child.<sup>85</sup> The court also found provincially sentenced mothers and their babies to be members of a vulnerable and disadvantaged social group, with cancellation of the program contributing to further disadvantage of the group, noting in particular the experiences of Indigenous women and their children in relation to overrepresentation in prison and a history of cultural dislocation imposed by the state.<sup>86</sup> In the *Inglis* case, the court was presented with extensive evidence on the adverse effects of maternal-child separation, including expert opinion evidence on the principle of the best interests of the child.<sup>87</sup>

As has been done in other jurisdictions like Australia and England and Wales, systematic analyses of Canadian sentencing proceedings (including pre-sentence and Gladue reports) and reported trial and appellate sentencing decisions are needed to ascertain the extent to which child caring obligations or the interests of dependent children are considered in mitigation. This extends to problem solving courts (Indigenous courts, domestic violence courts, mental health courts, drug treatment courts, and community courts) where there may be more information available to the court or greater latitude for the court to consider the child caring obligations of parents and/or the interests of their dependent children in relation to the therapeutic aims of such courts. We also know that in Canada parents who are involved in the criminal justice system and their dependent children are frequently involved in concurrent legal proceedings (e.g., criminal law, family law, civil law, child protection proceedings) and we need to better understand these intersections and their implications for information sharing and integrated case management between typically “siloes” systems of law.<sup>88</sup> This includes better understanding the risks of information sharing (including the potential violations of privacy rights), particularly for parents with dependent children who

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<sup>84</sup> Ibid, paras 7-9, 364-371.

<sup>85</sup> Ibid, paras 10-17.

<sup>86</sup> Ibid, para 15.

<sup>87</sup> Ibid, paras 260, 276, 288-289, 301.

<sup>88</sup> This issue of multiple and overlapping court proceedings has been addressed at various BC Justice Summits, including the fifth BC Justice Summit, Recommendations 5-7. Available at: <https://www.justicebc.ca/app/uploads/sites/11/2016/03/FifthJusticeSummitReport.pdf>. See also D Martinson and M Jackson, *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts*, FINAL Research Report, Research Project – Canadian Observatory on the Justice System’s Response to Intimate Partner Violence, 2016, at pp. 16-27 and 33-47. Available at: <http://www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>

choose not to disclose that they have a child or children to avoid stigmatization or state apprehension and potential involuntary termination of their parental rights.<sup>89</sup>

## England and Wales

In England and Wales, the ‘care of dependent children’ is a well-established mitigating factor in sentencing, especially if sentencing a sole carer to prison.<sup>90</sup> Since 2011, there has been increasing national policy-level recognition of a defendant’s responsibility as a ‘sole or primary carer for dependent relatives’ as a potential mitigating factor, which is being directly incorporated in sentencing guidelines for a growing number of criminal offences including assault, drugs, burglary, robbery, theft, as well as fraud, bribery and money laundering offences.<sup>91</sup> The Equal Treatment Bench Book that provides guidance to judges and magistrates on implementing the *Equality Act* of 2010 also recognizes the significant adverse effects of custodial sentences on children and references Sentencing Guideline recommendations that sentencing judges be aware of the differential impacts of sentencing and imprisonment on women and men, especially in relation to caregiving responsibilities.<sup>92</sup> Much like in Australia and Canada, there is also a legal presumption that prison is to be used as a last resort and only for the most serious offences in situations where an alternative sanction cannot be justified.<sup>93</sup>

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<sup>89</sup> See J Koshan, ‘Investigating Integrated Domestic Violence Courts: Lessons from New York’, Osgoode Legal Studies Research Paper Series: Paper 53. Koshan identifies increased information sharing among differing justice sectors and service providers through integrated domestic violence courts as a very real concern for victims of domestic violence who may be “...more susceptible to losing their children through child protection proceedings, and to other negative family law outcomes”, including exposing children to formal apprehension in “neglect” situations when a spouse / partner does not leave a domestic violence situation (at p. 9). Available at: <http://digitalcommons.osgoode.yorku.ca/olsrps/53/>.

<sup>90</sup> See, especially, the work of Rona Epstein who has published a series of research articles on sentencing and child rights in the UK, including R Epstein, Mothers in Prison: The Sentencing of Mothers and the Rights of the Child. *Coventry Law Journal* (December 2012): Special Issue Research Report. See also F Donson and A Parkes, ‘Changing Mindsets Changing Lives: Increasing the visibility of children’s rights in cases involving parental incarceration’, 4(6) *International Family Law*, 2012, 408-413; S Minson, *Mitigating motherhood: A study of the impact of motherhood on sentencing decisions in England and Wales* London, The Howard League, 2014.

<sup>91</sup> See, e.g., U.K. Sentencing Council, *Assault: Definitive Guideline*. Available at: [http://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)

<sup>92</sup> Judicial College (2013), *Equal Treatment Bench Book*, para 46. The Equal Treatment Bench Book (p. 224) also refers to the Sentencing Guidelines provision that: “Sentencers must be made aware of the differential impact sentencing decisions have on women and men including caring responsibilities for children or elders ... and the disproportionate impact that incarceration has on offenders who have caring responsibilities if they are imprisoned a long distance from home”. Available at: [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)

<sup>93</sup> S Minson, R Nadin, and J Earle (2015). *Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children: A Discussion Paper*, 2003 Prison Reform Trust, citing Section 152(2) of the *Criminal Justice Act*. Available at:

Since 2000, the appellate courts for England and Wales have agreed to consider a child's *ECHR* Article 8 right to family life as being engaged when sentencing a parent, with the right applying equally to a mother or father. In commenting on the jurisprudence on this Article 8 obligation to consider the interests of a dependent child and the consequences of a custodial sentence on family life, Minson, Nadin and Earle summarize a set of four guiding principles emerging from the case law, including:

(1) The sentencing of a parent for a criminal offence engages the right to family life of both the parent and the child (...); (2) Any interference by the state with a person's right to family life must be in response to a pressing social need, and proportionate to the legitimate aim pursued; (3) The more serious the interference the more compelling must be the justification, and it cannot be much more serious than the act of separating a mother from a very young child; (4) Non-custodial sentences are preferable for women with dependent children, with custodial sentences to be considered when the offence is serious or violent or the woman represents a continuing danger. Even when that is the case, a custodial sentence should only be given after considering the best interests of the child or children, whilst ensuring that appropriate provision has been made for their care.<sup>94</sup>

There is also judicial guidance on how courts should apply these principles; for example, sentencing courts should balance the impact of a sentence on a dependent child against the need to punish the offender, and the court should ask for additional information about a defendants' primary caregiving responsibilities if the information before it is insufficient.<sup>95</sup> As well, in a threshold case, the impact of a custodial sentence on a dependent child can shift the balance to a non-custodial or suspended sentence based on an assessment of the principle of proportionality.<sup>96</sup>

Notwithstanding superior and appellate court direction on the *ECHR* right to family life in relation to considering the interests of dependent children when sentencing their parents, various academics and advocacy organizations observe that both magistrates and crown courts are inconsistently applying the applicable sentencing principles to defendants with children. This inconsistent application has prompted calls for clear legislative guidance to

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[http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing\\_mothers.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf), citing Section 152 (2).

<sup>94</sup> Ibid, p. 10. These cases include: *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 (Admin) in the High Court; and *R v Petherick* [2012] EWCA Crim 2214; *R (on the applications of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151; *R v Bishop* [2011] WL 84407 Court of Appeal; *ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department* [2011] UKSC 4 *On appeal from: [2009] EWCA Civ 691*.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid, at pp. 10-11.

the courts to investigate the caregiving responsibilities of defendants and consider such responsibilities in custodial and non-custodial sentencing.<sup>97</sup>

## **New Zealand**

In New Zealand, legislative and jurisprudential measures have attempted to address high rates of Indigenous (Māori) incarceration.<sup>98</sup> In 2002, New Zealand introduced a new *Sentencing Act* that directs sentencing courts to take an offender's personal, family, whanau, community, and cultural background into account when imposing a rehabilitative sentence, as part of the principles of sentencing.<sup>99</sup> When appearing before a sentencing court, section 27 of the *Sentencing Act* also permits an offender to request the court to hear witnesses who can speak on their behalf on these five factors; how these five factors are related to the commission of the offence; any restorative processes that are available or have been used to resolve issues related to the offence, including those that involve the offenders' family; how available family, whanau and community support may prevent further offending by the offender; and how these five factors may be relevant in relation to possible sentences.<sup>100</sup> Still, as Jeffries and Stenning observe, despite being operative for more than ten years, there has been little systematic assessment of the use or effect of these provisions.<sup>101</sup> Moreover, the provisions are not specific to minority or disadvantaged offenders, but apply to all convicted offenders.<sup>102</sup> It thus remains unclear whether having dependent children—and considering their interests in relation to possible sentences for a Māori or non-Māori parent—might intersect with these provisions.

## **South Africa**

South Africa has received international attention for its landmark 2007 *S v M* Constitutional Court ruling on the duty of a sentencing court to recognize and consider the best interests of a child in relation to sentencing their primary or sole caregiver to prison.<sup>103</sup> A confluence of factors arguably were influential in this judgment, including, firstly, constitutional protection of the paramountcy of the best interests of the child conjoined with constitutional protection of a right to family or parental care; secondly, application of the *ACRWC*, including Article

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<sup>97</sup> See, e.g., R Epstein, 'Sentencing mothers: the rights of the child and the duties of the criminal courts', *Contemporary Social Science: Journal of the Academy of Social Sciences*, 8(2), 2013, pp. 130-140, at p. 139; Minson, Nadin and Earle, at pp. 12-18.

<sup>98</sup> S Jeffries and P Stenning, 'Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries', *Canadian Journal of Criminology and Criminal Justice*, 56(4), 2014, pp. 447-494, at pp. 474-477.

<sup>99</sup> Section 8(i). The *Act* can be consulted at: <http://www.legislation.govt.nz/act/public/2002/0009/latest/versions.aspx>

<sup>100</sup> Jeffries and Stenning, pp. 476-477.

<sup>101</sup> *Ibid.*, p. 477.

<sup>102</sup> *Ibid.*

<sup>103</sup> *S v M* (CCT 53/06) [2007] ZACC 18.



30 (children of imprisoned mothers); thirdly, child rights advocacy and intervention as *amicus curiae* by the Centre for Child Law of the University of Pretoria; fourthly, the appointment of a guardian (curator) *ad litem* in constitutional court challenges, including to represent the children in this case; and finally the gradual development of case law on the role of the sentencing court in relation to ensuring that appropriate alternative care arrangements for children are in place.<sup>104</sup>

In *S v. M* the Constitutional Court of South Africa directly addressed the role of the courts in considering the paramountcy of the best interests of the child when sentencing a primary caregiver of dependent children to imprisonment. In this case, a recidivist 35-year-old single mother who was the sole and main care provider for her three boys aged 8, 12 and 16 pleaded guilty to multiple counts of fraud and theft and was sentenced to four years direct imprisonment. This sentence was imposed despite submissions by the defendant's lawyer for correctional supervision, resulting in a constitutional challenge of the child's right to parental care (section 28(1)(b)) and the best interests of the child (section 28(2)).<sup>105</sup> The main constitutional question before the Court was whether the sentencing court had paid "sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?"<sup>106</sup> In considering the duties of a court when sentencing a primary caregiver with dependent children, Mr. Justice Sachs, in his majority judgment for the Court, allowed the appeal and substituted a suspended sentence for the balance of the sentence (45 months) and a correctional supervision order for three years combined with restitution.<sup>107</sup> In his judgment, Mr. Justice Sachs stated:

Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.<sup>108</sup>

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<sup>104</sup> A Skelton, 'Severing the Umbilical Cord: A Subtle Jurisprudential shift Regarding Children and their Primary Caregivers', *Constitutional Court Review*, 1, 2008, pp. 351-368, at pp. 363-367; E Coetzee, 'Can the Application of the Human Rights of the Child in a Criminal Case Result in a Therapeutic Outcome', *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 13(3), 2010, pp. 125-154, at pp. 136-139.

<sup>105</sup> *Ibid*, paras 2-9.

<sup>106</sup> *Ibid*, para 1.

<sup>107</sup> *Ibid*. para 77.

<sup>108</sup> *Ibid*, para 35.

Mr. Justice Sachs also outlined guidelines for the courts to follow, which the ACERWC adopted in their *General Comment No. 1*.<sup>109</sup>

In a subsequent constitutional challenge in *S v. S* in 2011,<sup>110</sup> the Centre for Child Law, again intervening as amicus curiae, unsuccessfully sought an expanded definition of ‘primary caregiver’ to include someone (in this instance a married person) who is a main but not a sole caregiver. While reaffirming the central role of the best interests of the child as an independent consideration when sentencing a primary carer, the Constitutional Court found that where satisfactory alternative care arrangements can be made; there is no reason not to sentence a mother to prison.<sup>111</sup>

In assessing South African jurisprudential developments since the landmark *S v M* case, Skelton and Mansfield-Barry observe that the judgment has had a considerable impact on South African sentencing courts. Specifically they note that 17 judgments have now applied the *S v M* approach mainly at the appellate level, including courts recognizing appellants who are co-parenting and courts ensuring that arrangements are in place for the safety and proper care of children when a custodial sentence is the only appropriate option.<sup>112</sup> In addition to also influencing international and regional instruments, they further note that the *S v. M* principles now extend beyond sentencing to South African bail proceedings.<sup>113</sup>

### **United States of America**

In comparison with the other five countries, the United States is arguably least well positioned to have its sentencing courts consider the *CRC* article 3 best interests of the child principle when sentencing parents with dependent children given that the USA has not ratified the *Convention*. As well, the USA has adopted a highly structured approach to sentencing via mandatory sentencing guidelines and other punitive sentencing policies, such as mandatory minimums, over the past forty years at both the federal and state levels.

In the USA, there is some state-level legislative recognition of family ties in bail and sentencing.<sup>114</sup> However, several in depth legal and empirical analyses of ‘downward

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<sup>109</sup> Ibid, para 36.

<sup>110</sup> *S v S* (CCT 63/10) [2011] ZACC 7, paras 34-35.

<sup>111</sup> Ibid, paras 59-66.

<sup>112</sup> A Skelton and L Mansfield-Barry, ‘Developments in South African Law Regarding the Sentencing of Primary Caregivers’, *European Journal of Parental Imprisonment (Child Impact Assessments and Sentencing)*, Winter 2015, pp. 14-15.

<sup>113</sup> Ibid, p. 15.

<sup>114</sup> See, e.g., USA, Alabama Criminal Procedure Rule 7.2 on family ties permitting a court to take into account the age, background and family ties, relationships and circumstances of the defendant, available at: [http://judicial.alabama.gov/library/rules/cr7\\_2.pdf](http://judicial.alabama.gov/library/rules/cr7_2.pdf); USA, Florida 2013 Statutes 903.046 requiring a court to consider a defendant’s family ties, length of residence in the community, employment history, financial

sentencing departures based on family ties' suggest that 'family ties' are not ordinarily relevant in allowing a departure from mandatory federal and state sentencing guidelines, with departures limited to 'extraordinary circumstances' and with wide juridical variation in what constitutes extraordinary circumstances.<sup>115</sup> For example, the courts have not usually viewed circumstances in which a parent has been a sole caregiver and had a sick dependent child or a dependent child with a disability as an 'extraordinary circumstance'. Like the Australian sentencing courts' in interpreting the common law and legislative 'hardship to dependents' principle, there seems to be an expectation by American courts that parental imprisonment will bring about some level of disruption to a family up to the point of family disintegration.<sup>116</sup> In this regard, the courts have not generally viewed sentencing a sole or primary caregiver to imprisonment resulting in the formal or informal care of a child as exceptional.<sup>117</sup>

However, with state and federal guidelines being ruled advisory in 2004 and 2005, and especially post 2007, there was growing optimism that the American courts would be willing to consider 'family ties' more frequently, although to date there is limited evidence the courts have been willing to do so because of a fear of reversal on appeal.<sup>118</sup> According to Lerer, only eight states have adopted legislation or guidelines expressly permitting sentencing courts to consider 'hardship to dependents' and these states evidently have not uniformly applied this principle in practice with widely varying interpretations of what constitutes extraordinary circumstances.<sup>119</sup>

At the same time, there have been a number of scholarly legal commentaries persuasively arguing the constitutional relevance of dependent children as a factor in sentencing (based on freedom of association and a due process liberty interest as the legal bases for a child's

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resources, and mental condition when determining whether to release the defendant on bail with or without conditions. New South Wales, Australia has a comparable provision in its *Bail Act*, 1978 (s.32.1). Moreover, in Fiji, the High Court has been willing to consider the best interests of the child principle in bail proceedings for a parent in certain circumstances. See *Devi v The State*, [2003] FJHC 47 and *Yuen v The State*, [2004] FJHC 247.

<sup>115</sup> See especially S Abramowicz, 'Rethinking Parental Incarceration', *University of Colorado Law Review*, 82, 2011, pp. 793-875, at pp. 817-823; TL Leinwand, 'Family Matters: The Role of "Family Ties and Responsibilities" in Sentencing', *Stanford Journal of Criminal Law and Policy*, 2, 2015, pp. 63-84, at pp. 68-74. But see also Y Dandurand, *Exemptions from Mandatory Minimum Penalties: Recent Development in Selected Countries*. Ottawa: Department of Justice Canada, who observes that parents with dependent children in the context of 'substantial assistance departures has led to reduced sentences for some offenders facing mandatory minimum penalties in the USA.

<sup>116</sup> Abramowicz, 2011, p. 818, FN 100.

<sup>117</sup> *Ibid*, pp. 817-823, see especially p. 821.

<sup>118</sup> *Ibid*, pp. 824-835.

<sup>119</sup> Lerer, p. 48.

right to a relationship with their convicted parent in the context of criminal law).<sup>120</sup> Such commentaries have also argued the growing intersections between family and criminal law utilising the construct of immediate and future third party harms.<sup>121</sup> As well, there has been high level political recognition and growing judicial interest in the adverse effects of parental imprisonment on children at both the state and federal levels in what appears to be an increasingly receptive policy environment focusing on ‘smart’ or evidence-based sentencing reforms as discussed below in relation to the Washington State Parenting Sentencing Alternative.<sup>122</sup>

## **Innovative Practices**

In addition to legislative and/or judicial guidance to the courts, a number of jurisdictions are developing innovative practices to ensure that the best interests of a child or family rights are considered and addressed in criminal justice proceedings. However, most of these interventions have yet to be empirically assessed (formally evaluated) for their impact and effectiveness.

### **Declarations of Principle and Guidelines for Legal Service Providers**

#### ***Children of Incarcerated Parents Bill of Rights***

In 2003, the San Francisco Partnership for Incarcerated Parents (SFPIP) developed a *Children of Incarcerated Parents Bill of Rights* recognising the rights of a child to be kept safe and to be informed at the time of a parent’s arrest; to be heard in decisions that are made about the child and to be considered in decisions that are made about a parent; to be well cared for and supported in a parent’s absence; to communicate with and to stay emotionally and physically connected with an incarcerated parent; not to be discriminated against; and to a lifelong relationship with a parent.<sup>123</sup> The *Bill of Rights* has been legislatively adopted by two American states (California and Hawaii)<sup>124</sup> and is promoted internationally as a potential

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<sup>120</sup> C. Boudin, ‘Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship’, *The Journal of Criminal Law and Criminology*, 101(1), 2011, pp. 77-118, at pp. 105-112, 118.

<sup>121</sup> See especially S Abramowicz, ‘Beyond Family Law’, *Case Western Reserve Law Review*, 63(2), 2012, pp. 293-379.

<sup>122</sup> Abramowicz, 2011, at p. 835.

<sup>123</sup> San Francisco Children of Incarcerated Parents Partnership (2003). *Bill of Rights*. <http://www.sfcipp.org/>

<sup>124</sup> Feig, p. 17.

good practice.<sup>125</sup> The *Bill of Rights* is also promoted online as a tool for educators and criminal justice service providers.<sup>126</sup>

### ***Model Policy of the International Association of the Chiefs of Police***

In 2014 the International Association of the Chiefs of Police (IACP) adopted an evidence-informed Safeguarding Children of Arrested Parents Model Policy.<sup>127</sup> The model policy calls on law enforcement agencies to ensure they train their personnel to identify and effectively respond in developmentally appropriate ways to children whose parent is arrested, irrespective of whether the child is present or not during the arrest. Based on empirical evidence of the immediate and long-term adverse effects to children of a parents' arrest, a main aim of the policy is to minimize trauma and address the physical, social and emotional safety and wellbeing of children during and immediately following the arrest of a parent.

The model policy outlines procedures for: (1) inter-agency coordination and training between the police, child welfare agencies, and other partner organizations; (2) pre-arrest planning, including training emergency communication centers to inquire if a child is present, for police to consider the presence of children in planning arrest and search warrants and, if children are present, to arrange for child welfare authorities to attend; (3) making an arrest with varying procedures depending on whether a child is or is not present; (4) determining appropriate placement of a child including parental involvement in this decision and protocols to ensure the safe placement of a child; (5) interacting with a child in developmentally appropriate ways; (6) booking a parent; for example, providing an arrestee an opportunity to make or plan for alternative care arrangements; (7) follow-up visits to ensure the ongoing safety and wellbeing of the child; and (8) documenting the identity, biographical information, special needs and physical location of children.<sup>128</sup>

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<sup>125</sup> Available at:

[http://www.quino.org/sites/default/files/resources/Written%20Statement\\_Children%20of%20incarcerated%20parents](http://www.quino.org/sites/default/files/resources/Written%20Statement_Children%20of%20incarcerated%20parents)

<sup>126</sup> Available at: <http://extension.missouri.edu/4hlife/documents/tools/children.pdf>

<sup>127</sup> The model policy was an initiative of the Deputy Attorney General and White House Domestic Policy Council and sponsored by the Bureau of Justice Assistance. The policy is available at: <https://www.bja.gov/Publications/IACP-SafeguardingChildren.pdf>

<sup>128</sup> Ibid, at pp. 8-22.

At least three American states (California, New Mexico and Pennsylvania) have instituted child sensitive arrest policies.<sup>129</sup> Additional suggested strategies include the co-location of police and child protection services, which California has implemented.<sup>130</sup>

### ***Interagency Protocols***

In Australia, the state of Victoria has established a potentially similar practice in the form of a general protocol between their child protection agency and the police. The protocol requires the police to consider reporting a ‘child in need of protection’ to the child protection authorities in various circumstances, including abandonment or parental incapacitation, which is viewed as providing some direction to police officers responding to parents who are in contact with the criminal justice system.<sup>131</sup>

In 2014, an Italian child rights NGO, Bambinisezasbarre, entered into a two-year (2014-2016 and resigned in 2016) Memorandum of Understanding to ensure and protect the rights of children of imprisoned parents. *Inter alia*, article 1 (Decisions and practices concerning judicial orders, judgments and sentences) encourages judicial authorities to take the rights and needs of minor children of arrested and detained persons with parental responsibilities into account and to prioritize alternative measures to pre-trial detention.<sup>132</sup>

### **Child and Family Impact Statements**

In terms of getting information about dependent children to a sentencing court, two American cities (San Francisco and New York City) and one state (New York state) have experimented with child or family impact statements<sup>133</sup> as part of pre-sentence investigation reports developed by probation departments.<sup>134</sup> One probation department (San Francisco) has a dedicated family impact section, another has integrated the family questions into its pre-sentence report template (New York City), and the third has integrated the family impact as

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<sup>129</sup> Feig, p. 15 and B Peterson, J Fontaine, E Kurs, and L Cramer, *Children of Incarcerated Parents Framework Document: Promising Practices, Challenges, and Recommendations for the Field*, Urban Institute, June 2015. Available at: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf>

<sup>130</sup> Ibid, p. 364.

<sup>131</sup> Flynn, Naylor, and Arias, p. 354.

<sup>132</sup> Article 1: Decisions and practices concerning judicial orders, judgments and sentences. A summary of the Memorandum of Understanding is available at: <http://childrenofprisoners.eu/cope-database/memorandum-of-understanding/>

<sup>133</sup> L Cramer, B Peterson, E Kurs, and J Fontaine June 2015, *Toolkit for Developing Family Impact Statements Children of Incarcerated Parents Project*, Washington, DC: Urban Institute, June 2015, at p. 3. Available at: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>

<sup>134</sup> See also the Osbourne Association, *Family Impact Statements: Considering the Needs of Children in Criminal Justice Decision-Making about their Parent*. Available at: [http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet\\_Osborne.pdf](http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet_Osborne.pdf)

part of its pre-sentence training (New York State).<sup>135</sup> The child and family impact statements include questions about a defendant's dependent children and the defendant's family role and responsibilities. The family impact statements aim to minimize trauma to children in relation to the adjudication, detention and sentencing of their parent by ensuring that public defenders, prosecutors, judges and probation officers make family-informed sentencing and supervision decisions. The family impact statements also aim to improve judicial decision-making by identifying how various sentencing and supervision options may affect a defendant's child or children.<sup>136</sup> While not yet formally evaluated, some key challenges observed with the development of these statements, include probation officer resistance to the new practice and confusion between family and victim impact statements.<sup>137</sup>

In addition to the child or family impact statement approach, one American state (Oklahoma) has legislatively prescribed that its district court judges routinely inquire if a defendant who is being sentenced to imprisonment is a sole caregiver for dependent children and whether there are adequate alternative care arrangements in place.<sup>138</sup> If a parent has not made care arrangements or the judge perceives such arrangements to be inadequate, the judge is required to refer the case to social services.<sup>139</sup> As noted above, English and South African court decisions suggest a similar obligation on the part of a sentencing court to inquire about a defendant's sole caregiving status for dependent children and to ascertain whether alternative care arrangements are in place when sentencing a sole caregiver to prison. In this regard, the available empirical evidence on how varying adult criminal justice proceedings affect a parent's capacity to make alternative care arrangements should inform such policies. For example, Flynn, Taylor and Arias have observed that parents facing imprisonment often face the dual challenges of limited time and a lack of preparation in making child care arrangements, especially in what may be chaotic or crisis circumstances such as arrest or remand.<sup>140</sup>

Other avenues to ensure that courts consider a child's interests and/or family impact in the process of adjudicating and sentencing parents with dependent children might include child

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<sup>135</sup> Cramer, Peterson, Kurs and Fontaine, p. 3.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid, pp. 10-11.

<sup>138</sup> USA, Oklahoma, 2014, Title 22, section 22-20, Criminal Procedure, Incarceration of single custodial parents - Child placement. Available at: [http://oklegal.onenet.net/oklegal-cgi/get\\_statute?99/Title.22/22-20.html](http://oklegal.onenet.net/oklegal-cgi/get_statute?99/Title.22/22-20.html)

<sup>139</sup> See 22 OK Stat § 22-20, 2014, available at: <http://law.justia.com/citations.html>

<sup>140</sup> Flynn, Naylor and Arias, p. 355.

legal advocates<sup>141</sup> and/or views of the child reports.<sup>142</sup> However, it is equally important to consider the complexities of gathering and sharing additional information on children through available or specialized court-mandated processes in relation to potentially contributing to further costs and delays in the legal process. In this regard, some of the available empirical research on the impact of integrated domestic violence courts has identified distinct mandates, differing legal standards and procedures, and varying types of legal expertise in criminal versus family and child protection matters as impediments to information sharing.<sup>143</sup>

Notably, the issue of non-disclosure by parents (child and family privacy rights) remains a critical concern in relation to unwanted child apprehension and placement into formal care and/or resulting in the involuntary termination of parental rights. Indeed, the idea that a court should be presented with more information about children and the parenting duties of a defendant in order for the court to make a decision that considers the best interests of the child may also involve delays that might lead to unnecessarily prolonged pre-trial detention and greater disruption in a child's life.

### **Child and Family Focused Sentencing Policies and Practices**

One of the most interesting initiatives to emerge to date are 'family-focused sentencing alternatives' that seek to expand sentencing options in the form of community-based alternatives for non-violent offenders with minor children to facilitate family preservation and involvement. Preservation of family ties and parent-child involvement are perceived as likely to increase the resilience of both the parent (reduced recidivism, increased employment prospects) and the child (reduced state intervention, increased positive adjustments), while also achieving cost savings for the state (diverting children from state care and reducing the costs associated with community supervision rather than incarceration).<sup>144</sup> Some American cities and states are developing family focused sentencing alternatives commensurate with

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<sup>141</sup> Child advocates can take a number of forms, but might extend to family justice centers or child advocacy centers that support children that are being used in other contexts, especially domestic violence. See, e.g., Department of Justice Canada, *Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, Volume I*, at pp. 141-145. Available at: <http://www.canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/mlfvc-elcvf.pdf>

<sup>142</sup> See, e.g., Bala and Houston, pp. 12-25.

<sup>143</sup> See, e.g., Martinson and Jackson, at pp. 19-22, 33-47.

<sup>144</sup> KL Eitenmiller, 'Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon', *Oregon Law Review*, 92, 2014, pp. 755-781, at p. 779; Feig, p. 18; CM Agular and S Leavall, 'A Statewide Parenting Sentencing Alternative Program: Description and Preliminary Outcomes', *Smith College Studies in Social Work*, 87(1), 2017, pp. 78-93, at pp. 79-80.



guidelines for fair and effective criminal sentencing.<sup>145</sup> Other countries are developing variations of some of these policies and practices as well.

In the American context, child and family focused sentencing alternatives seek to build on an offender's existing family support system, broadly defined, and emphasise maintaining parent-child relationships where beneficial for the child.<sup>146</sup> Such alternatives are multidisciplinary; initiated by corrections, members of the judiciary, health and social services, and education agencies.<sup>147</sup> They are strengths-based, seeking to balance crime severity and public risk with individual and family strengths, while simultaneously addressing challenges within a family through intensive supervision and support in the community. Additionally, they are evidence informed in relation to the known 'collateral consequences' of imprisonment for children and families and extending to expert opinion that *early intervention* in the criminal justice process is most effective.<sup>148</sup>

A particularly promising American initiative is Washington State's Parenting Sentencing Alternative law for eligible nonviolent inmates with minor children.<sup>149</sup> The statewide Parenting Sentencing Alternative consists of a Family Offender Sentencing Alternative (FOSA), which is a court-mandated sentencing alternative that allows a judge to waive a potential prison sentence and impose one year of intensive community supervision and support for eligible parents with custody of dependent children instead of prison.<sup>150</sup> The law also consists of a Community Parenting Alternative (CPA), which is a prison-based, early release option consisting of electronic home monitoring and intensive community supervision and support for a one-year period to strengthen family bonds and assist with

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<sup>145</sup> Feig, p. 16; Agular and Leavall, p. 78.

<sup>146</sup> Feig, p.16; Agular and Leavitt, p. 80.

<sup>147</sup> In the American context, the Department of Justice National Institute of Corrections Interagency Working Group on Children of Incarcerated Parents is playing a pivotal role in guiding family-focused criminal justice reforms.

<sup>148</sup> Ibid.

<sup>149</sup> The state law (*Substitute Senate Bill 6639*) is available at: <http://lawfilesexternal.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/6639-S.PL.pdf>. See Agular and Leavitt at pp. 79-81 for a comprehensive overview of the program's design, implementation and assessment.

<sup>150</sup> Agular and Leavitt, at pp. 81-82.

offender reintegration.<sup>151</sup> Both the FOSA and the CPA represent a ‘strengthening the families’ model that uses five protective factors to promote child and parental resilience.<sup>152</sup>

There are strict and differing eligibility criteria for the two program options. Offenders eligible for the FOSA must be facing more than one year imprisonment as a possible sentence; cannot have a prior criminal history for felony sex or violent crime; must formally agree to information sharing between the child welfare and corrections systems (including on matters of previous substance abuse and mental health); and, must be a parent or legal guardian with substantial custody of a dependent child.<sup>153</sup> There is an intensive screening process for applicants involving potential court-mandated screening for chemical dependency and risk assessment, together with interviews, reference checks and home investigations.<sup>154</sup> In making a decision to accept an offender into the FOSA program, the court is expected to balance a range of factors, such as the seriousness of the offence, the appropriateness of the alternative for the offender, and the safety and needs of the victim, the child, the public and the offender.<sup>155</sup>

A core principle in guiding such decisions is the best interests of the child, defined as a parenting arrangement that “‘best maintains a child’s emotional growth, health and stability, and physical care’”.<sup>156</sup> In imposing the 12 months community custody supervision, the court may attach a range of conditions from chemical dependency and mental health treatment to parenting and life skills classes. The department of corrections may also impose conditions.<sup>157</sup> The program is highly regimented—for example, involving bans on weapons, alcohol and drugs in the home and requiring participation in family dinners, parents reading to their children and assisting their children with homework—and participants are closely monitored.<sup>158</sup> Consistent failure to meet community supervision conditions may result in

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<sup>151</sup> Ibid, pp. 83-84.

<sup>152</sup> Ibid, p. 81. For a more in depth discussion, See S Leavell, Program Administrator, Washington State Department of Corrections, *Washington’s Parenting Sentencing Alternative: A strengths-based approach to supervision, Justice Strategies*, 10 February 2015. Available at: <http://www.justicestrategies.net/coip/blog/2015/02/washington-s-parenting-sentencing-alternative-strengths-based-approach-supervision>

<sup>153</sup> Ibid, pp. 81-82, Table 1: Parenting Sentencing Alternative Eligibility Criteria.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid, p. 82.

<sup>156</sup> Ibid, p. 80. This definition roughly accords with how Canada defines the best interests of the child principle in Canadian federal (e.g., immigration, criminal) and provincial/territorial child protection, adoption, and family law. Data on file with the authors.

<sup>157</sup> Ibid, p. 82.

<sup>158</sup> Ibid, pp. 82-83.

revocation of the community sentence and imposition of the original prison sentence, with no credit for time served during the alternative sentence.<sup>159</sup>

In view of its intensive supervision and support model, the Parent Sentencing Alternative is more expensive than traditional community-based supervision.<sup>160</sup> However, some of the preliminary evidence on the effectiveness of the program—in relation to decreased reliance on formal state care for affected children (diversion from state care and return of children from state care to their families), lower violation and recidivism rates for participating parents, and increased overall cost effectiveness—appears promising.<sup>161</sup> Other American states and countries such as Australia and England have also developed community-based sentencing alternatives, including residential treatment alternatives, for mothers with dependent children.<sup>162</sup>

Other child and family-focused sentencing-related interventions include legislatively prescribed deferred or suspended sentencing options for pregnant women or primary caregivers with minor dependent children in a number of countries (e.g., Algeria, China, Italy, Kazakhstan, Norway, Russian Federation, Sweden, and Ukraine).<sup>163</sup> Some American states (Hawaii, New York,<sup>164</sup> New Jersey<sup>165</sup>) have enacted laws requiring correctional authorities to place or transfer incarcerated parents with minor children to facilities close to their families to maintain family bonds. Notably, the New York law is based on evidence that maintaining or strengthening family bonds leads to desistance from crime and lower

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<sup>159</sup> Ibid, p. 82.

<sup>160</sup> Eitenmiller, p. 779, observed that the program is about \$7,000-8,000 (USD) more costly than standard community supervision.

<sup>161</sup> Ibid. Feig, p. 17. See also Agular and Leavell, at pp. 84-89, who describe the results of their impact assessment on the outcomes of the CPA component of the program in reducing recidivism.

<sup>162</sup> See, R Moshenka, *International Good Practice: Alternatives to Imprisonment for Women Offenders*, Prison Reform Trust. Available at: <http://www.prisonreformtrust.org.uk/portals/0/documents/international%20good%20practice%20final.pdf>

<sup>163</sup> Examples of these laws include: Algeria: Law No. 04-05 of 2005: articles 16 & 17, which allows for postponement of a sentence for parents with dependent children under 24 months and pregnant women in certain circumstances; Italy: Law n. 62 of 21 April 2011 (Articles 1, 3) limiting remand and sentenced custody for pregnant women and women with children under six years of age and providing for early forms of release into home detention for sentenced mothers; Russian Federation: *Criminal Code of the Russian Federation* Article 82(1), Deferral of Serving a Punishment, which provides for postponement of punishment for a convicted pregnant woman, a woman with a child under fourteen 14 years of age, and a man who is a sole carer for a child under fourteen years of age until the child reaches the age of fourteen.

<sup>164</sup> USA, New York State Senate Bill S1474 (2015-2016 legislative session): An act to amend the correction law. The full text of the bill is available at: <https://www.nysenate.gov/legislation/bills/2015/S1474>

<sup>165</sup> USA, New Jersey: *Strengthening Women and Families Act* (A 4197/S1347). Summary information is available at: [http://216.119.93.24/detail/news.cfm?news\\_id=842](http://216.119.93.24/detail/news.cfm?news_id=842)

recidivism rates. Denmark<sup>166</sup> and Poland<sup>167</sup> have similar types of laws or legal principles on the right of a parent to serve their sentence close to family.

Countries like Australia have provided national policy guidance to federal and state correctional authorities to ensure that parents with minor children are provided opportunities to arrange for childcare in relation to remanded and sentenced custody.<sup>168</sup> Another major initiative in the USA has been state-level efforts (e.g., Washington State<sup>169</sup> and Nebraska<sup>170</sup>) to legislatively restrict the involuntary termination of parental rights for the children of imprisoned parents in response to the federal *Adoption and Safe Families Act*.<sup>171</sup>

In addition to the foregoing, there are a range of other court and non-court mandated innovative practices that are being trialed in various countries encompassing case management or legal advocacy programs for parents or their children during criminal proceedings and extending to assisting with re-entry from prison (such as the San Francisco Public Defender Children of Incarcerated Parents program and the Chicago Legal Advocacy for Incarcerated Mothers program); parenting classes in prison; prison-based mother-child programs;<sup>172</sup> child and family contact or visitation programs in prisons, increasingly extending to practices that are child friendly and that use of technology; prison-based early release or re-entry programs that are designed to reconnect parents with their children;<sup>173</sup>

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<sup>166</sup> Summary information is available at: <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php#denmark>

<sup>167</sup> M Bastick and L Townhead, *Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, Quaker United Nations Office, 2008, p. 38. Available at: [http://www.peacewomen.org/assets/file/Resources/NGO/HR\\_Prisoners\\_QUNO\\_2008.pdf](http://www.peacewomen.org/assets/file/Resources/NGO/HR_Prisoners_QUNO_2008.pdf)

<sup>168</sup> *Australia Standard Guidelines for Corrections in Australia*, Revised 2012. Available at: [http://aic.gov.au/media\\_library/aic/research/corrections/standards/aust-stand\\_2012.pdf](http://aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf)

<sup>169</sup> The Washington State, *Children of Incarcerated Parents Law* (2013), HB1284, 2013-14 applies to incarcerated parents and to parents in residential substance abuse treatment programs. It grants courts the discretion to delay termination when a parent ‘maintains a meaningful role’ in the child’s life. Available at: <http://lawfilesexxt.leg.wa.gov/biennium/2013-14/Pdf/Bills/House%20Passed%20Legislature/1284-S.PL.pdf>

<sup>170</sup> The Nebraska: Neb. Rev. Stat. § 43-292.02(2) (Reissue 2004) limits termination when the sole reason for termination is parental incarceration. Available at: <http://nebraskalegislature.gov/laws/statutes.php?statute=43-292.02>

<sup>171</sup> The *Adoption and Safe Families Act* requires states to seek termination of parental rights when a child has been in foster care for the past 15 of 22 months.

<sup>172</sup> For a global inventory of these laws in 97 countries, see Library of Congress: <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php#denmark>.

<sup>173</sup> See, e.g., the US Department of Justice, *Roadmap to Reentry: Reducing Recidivism through Improved Reentry Outcomes at The Federal Bureau Of Prisons*, 2016, at p. 4. In accordance with Principle III (“While incarcerated, each inmate should be provided the resources and opportunity to build and maintain family relationships, strengthening the support system available to them upon release”), the Bureau of Prisons is piloting three initiatives at various facilities, including: video services for visitation (videoconferencing), a children of incarcerated parents program that engages children and their parents in positive youth development

and mentoring and advocacy programs for children affected by parental incarceration or their parents criminal justice system involvement.<sup>174</sup> Finally, several countries such as the USA, Australia, England and Scotland have directed high-level political attention to the situation of children affected by parental criminal justice system involvement. Additionally, over the past decade, international, regional and domestic non-governmental organizations and academic researchers have been very influential in advocating for recognition of the rights, safety and wellbeing of children affected by parental imprisonment in both matters of policy and law.

## Implications for Sentencing Reform

This report started by referencing the growing body of empirical evidence on the known adverse effects for dependent children both as direct and indirect victims of their parents' criminal behaviour and in relation to criminal justice decisions about their parents, especially when a court is remanding or sentencing a parent who is a primary or sole caregiver to custody.

We also acknowledge existing knowledge deficits about how criminal justice proceedings directly and indirectly affect the rights, safety and wellbeing of children whose parents are in conflict with the law and involved in criminal proceedings. We recognize that there is much we do not know about the circumstances of children whose parents are involved in criminal legal proceedings in Canada. Like most countries, we lack empirical knowledge about how many Canadian children are affected by parental criminal justice involvement since our criminal justice agencies do not routinely collect these data.<sup>175</sup>

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activities, and best practice guidance and training for staff on developmentally appropriate ways to interact with children during visitation alongside the creation of child friendly visitation facilities. Available at: <https://www.justice.gov/reentry/file/844356/download>

<sup>174</sup> B Peterson, J Fontaine, E Kurs, L Cramer, *Children of Incarcerated Parents Framework Document Promising Practices, Challenges, and Recommendations for the Field*, Washington, DC: Urban Institute, 2015. Available at: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf>

<sup>175</sup> See, e.g., JA Arditti, 'Family Process Perspective on the Heterogeneous Effects of Maternal Incarceration on Child Wellbeing: The Trouble with Differences. *Criminology and Public Policy*, 14(1), 2015, pp. 169-182 who examines the contradictory evidence and heterogeneous effects of the impacts of imprisonment on children). It is assumed by much of the literature that a prison sentence is the most deleterious criminal justice decision for dependent children. Arguably, the exigent circumstances and trauma connected with a child observing a parent being arrested and continuous disruptions accompanying frequent short sentences or periods of detention due to being remanded to custody are equally, if not more harmful. Having a better understanding of whether shorter or longer periods of incarceration are more disruptive for children or what effects a cycle of parental re-arrest and re-incarceration has is crucial in the Canadian context given a median sentenced custody length of 30 days with most custodial sentences averaging less than six months and only 3% of cases involving a sentence of more than two years in 2013/1014. See, e.g., A Maxwell, 'Adult criminal Court Statistics in Canada, 2013-2014', *Juristat*, Statistics Canada, 2015, at p. 3).

Much of the existing empirical research is descriptive and there is a lack of research examining how varying types of criminal justice decisions (parental arrest, remand, sentencing, imprisonment, and release) affect dependent children, which children are most adversely affected and at which developmental stages. Moreover, community based measures, especially the attachment of conditions to bail, probation and other community supervision orders may also affect an individual's ability to parent and the children themselves. The enforcement of probation conditions or community service orders or conditional sentences becomes an issue (so-called administrative offences) keeping in mind that administrative offences are typically one of the main reasons why adult women find themselves in detention. As well, delays in the trial and sentencing process have consequences for children (e.g., anxiety) and their parents (e.g., it may affect whether the mother can keep custody of her child, or whether she continues to receive financial assistance for her children, as well as the situation of children in alternative care).

Still we think the discussion timely for Canada in view of the Truth and Reconciliation Commission Calls to Action, a federal government mandate to look at bail and sentencing reforms extending to conditional sentences and the gendered effects of sentencing,<sup>176</sup> and in view of the proliferation of problem solving courts, including an Integrated Domestic Violence Court in Toronto.<sup>177</sup>

For Canada, the situation of children whose parents are involved in criminal proceedings also evokes potential constitutional *Charter of Rights and Freedoms* considerations. These include section 7 security of the person (right to preserve and maintain family ties) and section 15 equality rights concerns given that parental criminal justice proceedings tend to disproportionately affect Indigenous and minority children and children whose families are already at a cumulative disadvantage.<sup>178</sup>

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<sup>176</sup> See, e.g., J Roberts, *Sentencing Reform: Lessons from Foreign Jurisdictions and Options for Canada*, Ottawa: Research and Statistics Division, Department of Justice Canada, 2015, at p. 3.

<sup>177</sup> A similar initiative has been advocated for British Columbia. See, J Dalley, "One Family, One Judge: Towards a New Model for Access to Justice for Families Facing Violence in BC", 18 *Appeal*, 2013, pp. 3-19. As well, Special Adviser Grand Chief Ed John has advocated family preservation programs and identified a potential 'safe babies court teams project' in relation to reforming Indigenous child welfare for BC. See, Special Adviser Grand Chief Ed John, *Indigenous Resilience, Connectedness and Reunification: From Root Causes to Root Solutions, A Report on Indigenous Child Welfare in British Columbia, Final Report* [Areas for Focused Action: Area 4: Prevention Services: Keeping Families Connected and Area 5: Reunification and Permanency Planning].

<sup>178</sup> See: *Inglis*, as discussed above. See also the legal factum prepared by West Coast LEAF as an intervener in the Supreme Court of Canada *Lloyd versus the Queen* case challenging the constitutionality of mandatory minimum sentences in relation to the hypothesized negative gender effects for women at 23, which identifies three cases in which caregiving obligations have been considered: *R. v. Hamilton*, 2003 CanLII 2862 (ON SC); *R. v. Wellington*, [1999] OJ No 569 (CA); and *R. v. Bunn*, 2000 SCC 9. The factum is available at: <http://www.westcoastleaf.org/wp-content/uploads/2016/01/Lloyd-factum-Supreme-Court-of-Canada.pdf>

Based on existing international standards, it may be important to create a statutory requirement for criminal courts to inquire routinely whether adult criminal defendants have dependent children, and in instances where a parent is a primary or sole caregiver, to separately consider the effects of remanding in custody or sentencing a parent to a term of imprisonment against the interests, safety and wellbeing of the affected child or children. Ideally, in such situations, a court would consider imposing an alternative sanction to imprisonment when it is appropriate in all of the circumstances and in the parents' and child's best interest to do so. In instances where there is no alternative but to remand a parent in custody or sentence a primary or sole caregiver to imprisonment, the court is likely required to ensure that alternative care arrangements are in place for the dependent child or children, preferably by permitting a custodial parent the time to plan for and make these arrangements.

We are aware of the many complexities—such as multiple and concurrent legal proceedings, information sharing and privacy concerns, and fear about stigmatization and loss of parental rights—associated with criminal courts recognizing and taking the best interests of a child into account when making remand and sentencing decisions about a parent, including that this marks a fundamental shift in practice for criminal courts who have typically have viewed the child through the lens of their parent, if at all.<sup>179</sup> We understand that many parents opt not to disclose they have dependent children due to the associated stigmatization or for fear their children will be apprehended by the state leading to involuntary termination of parental rights.

We are also well aware of the many compelling arguments for and against considering the rights of children when remanding or sentencing their parent to custody.<sup>180</sup> There are many reasons why a child's interests raises very different kinds of issues, especially when a parent is being accused or convicted of a domestic violence or violence against children offence. It might also be argued that it is unnecessary for a sentencing court to separately consider the needs and wellbeing of a dependent child when such interests are already considered in the complex balancing exercise of weighing the offender's personal circumstances (with family ties and the excessive hardship on dependents as a potential mitigating factor in exceptional cases) against the seriousness of the offence and societal interests. Others have argued that there is a lack of theoretical legal rationale in relation to the traditional aims of punishment and the main goals of sentencing (retribution, deterrence, denunciation, incapacitation and societal protection, rehabilitation) and that taking such interests into account actually undermines the fairness and legitimacy of the criminal sentencing process. Some observers have also argued that having a sentencing court take a child's interests into account is

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<sup>179</sup> Feig, p. 20; Skelton, 2008, pp. 363-367.

<sup>180</sup> For a summary of these arguments, see, e.g., D A Berman, 'Addressing Why: Developing Principled Rationales for Family-Based Departures', *Federal Sentencing Reporter*, 13(5), 2001, pp. 274-280; JM Collins, E J Leib, and D Markel, 'Punishing Family Status', *Boston University Law Review*, 88, 2008, pp. 1327-1423; S Abramowicz, 'Rethinking Parental Incarceration'. *University of Colorado Law Review*, 82, 2011, pp. 793-875, at pp. 835-842; Boudin, pp. 112-117.

tantamount to a ‘get of jail free card’ and will encourage more crime by parents or will encourage parentless persons who engage in criminal behaviour to have children to avoid criminal responsibility. Others have suggested that taking the views and best interests of a child into account at the time of sentencing a parent will contribute to further inefficiencies by slowing down, or extending the length of, an already encumbered criminal sentencing process. It has also been proposed that such considerations will contribute to discrimination based on gender and parental status through preferential treatment to those with parenting responsibilities, especially to women who are primary or sole care providers, further contributing to sentencing disparities and a loss of confidence in the criminal justice process.

In all of these respects, a response from the criminal courts likely would need to consider three main questions: (1) whether the courts can deal with the rights of children who are directly and indirectly affected by the criminal proceedings of their adult parent, especially in bail and sentencing decisions involving the potential detention or imprisonment of a parent; (2) the extent to which the impact on a dependent child or children should be a factor in remand or sentencing decisions about a parent; and, (3) how the court can actually or practically take into account an individual’s parental responsibilities and the rights of the child in remand or sentencing. However, such a discussion presupposes that community based alternatives to detention and imprisonment exist and can be used vis-à-vis mandatory minimum sentences and other legislative restrictions that have been imposed on sentencing alternatives in Canada.<sup>181</sup> It also assumes that such alternatives are appropriate and effective for not only the parent and the child, but in ensuring justice for victims and protecting society.

A separate but related point, is the question of how information on the child or family can be brought to the attention of the court, as well as the role of the defence bar and other agencies in doing so. It is no doubt possible to incorporate an assessment of the best interests of the child into presentence investigations and reports (including Gladue reports), bail reports and sentencing submissions. As outlined above, there are different approaches to doing so (e.g., routinizing as part of probation officer training or as part of presentence investigations and reports). Some difficulties may be anticipated, but they are certainly not insurmountable. One of them is the fact, as mentioned previously, that many parents would prefer not to disclose that they have dependent children for fear of potential state interventions in the life of their children.

Pilot projects could be developed to include the inclusion of a family impact statement, where relevant, in presentence reports and Gladue reports. In this regard, family context questions typically might seek information about the number and ages of dependent children and their current living situation, the parents’ status as a primary or sole caregiver, the quality of the parenting child relationship, the financial and emotional needs of the child, and the location

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<sup>181</sup> See, e.g., R Mangat, *More than we can afford: The Costs of Mandatory Minimum Sentencing*. Vancouver: British Columbia Civil Liberties Association, 2014. Available at: <https://bccla.org/wp-content/uploads/2014/09/Mandatory-Minimum-Sentencing.pdf>



of a child's residence. In 2015, section 722.2 of the *Criminal Code* was amended to allow for community impact statements for all offences, so perhaps child and family impact statements could be an extension of these statements.

Integrating a discussion of the relevance of the principle of the best interests of the child into current and ongoing discussions about sentencing reform will be important. This might be particularly pertinent in relation to discussions about the anticipated changes to conditional sentences as an option for sole or primary carers with dependent minor children (i.e., expanding the availability of non-custodial options, including conditional sentences and residential facilities that allow parents to be housed with their children).

Finally, Canadian federal and provincial/territorial policymakers might consider a number of other related initiatives.<sup>182</sup> These include increasing public awareness about the situation of children who are adversely affected by their parents' criminal conduct and involvement in criminal proceedings and the potential social and economic benefits of child and family focused sentencing reforms (e.g., reducing the number of children in foster care, reducing recidivism, saving costs by reducing the number of persons in prison and duplicative programs, and reducing the health, social and economic costs of adverse childhood experiences). Another option is to educate and train legal professionals (probation officers, crown and defence counsel, judges) about the rights, safety and wellbeing of children in relation to criminal justice decisions that involve their parents. A third alternative is to develop clearer guidance or information sharing protocols for legal professionals dealing with parents or caregivers with dependent children who are involved in multiple and concurrent legal proceedings. A fourth possibility is to assess the effects of mandatory sentencing policies for (nonviolent) offenders who are parents with minor children and the effectiveness of community based alternatives for such parents and children. A fifth suggestion is to expand and promote more effective and less expensive community based alternatives for adult parent defendants and offenders with dependent children.

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<sup>182</sup> See, Eitenmiller who proposes some of these initiatives for the USA, p. 780.