

A Background Paper

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The Effects of Parental Imprisonment on Children: Sentencing Factors, Guidelines and Options

Well, I don't really think the court concerns itself with the impact on the children. It concerns itself with the impact on the defendant. The process is about punishing the person who commits a crime.... I'm just aware of the age-old principle: the children don't do well without their mother, and really, she had to go to jail for something pathetic.

Solicitor¹

Purpose

The aim of this literature review is to identify issues and difficulties faced by the children of prisoners in Victoria, and to investigate to what extent these are taken into account by the courts, and the corrective and sentencing legislation. The review also looks briefly at the relevant international law provisions and analyses to what extent, if any, the provisions should be adopted into the Victorian sentencing legislation.

It should be noted that this topic is capable of a very wide discussion, and many considerations are beyond the scope of this review due to word limit constraints. Thus the focus is limited to Victorian sentencing legislation and judicial attitudes towards the

¹ Quoted in Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of the Legal Process* Discussion Paper (2006) 44.

impact of parental imprisonment upon the (dependant) child/ren of the defendant and suggested reforms to the legislative regime.

Methodology

Research undertaken for this literature review includes studies, reports and discussion papers. The research focus has been primarily on Australian literature supplemented by some overseas literature from the United States.

Sentencing: purpose, factors and the common law.

Purposes of Sentencing

Punishment, it is said, is an essential component of the criminal justice system.² While the discussion of theories of punishment goes well beyond the parameters of this literature study it is interesting to note that many of the accepted purposes of sentencing are derived from theories of punishment. Indeed, punishment is the first purpose of sentencing identified in section 5(1) of the Victorian *Sentencing Act 1991*. Punishment as a purpose to be taken into account in sentencing is followed by deterrence, rehabilitation, denunciation, community protection and some combination of some or all of these.

Factors and guidelines

Victoria

Under section 5(2) of the Victorian sentencing legislation the court must have regard to various 'guidelines' including at what stage the offender pleaded guilty, mitigating factors, and the previous character of the defendant. There are no references to the affect of sentencing on dependant children.

The factors taken into account in a determination of a sentence in Victoria are limited to only three. These three factors are outlined in section 6 of the *Sentencing Act 1991* (Vic):

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.

These factors are a non-exhaustive list of only three matters that a court may take into in sentencing an offender, to the extent that they are relevant and known to the court.

Section 97(1) of the *Sentencing Act 1991* (Vic) allows the court to call for a pre-sentence report relevant to the sentencing of the offender. This function may reveal the effect of a sentence on the offender's dependants. However, this report must be requested and it is not clear how often this occurs or in what circumstances. Cuts in the availability of legal

² Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 133.

aid and the capacity of defendants to have these types of reports done is a significant issue, especially given the typical dependence on legal aid for many of these offenders.³

Under section 31 of the *Corrections Act 1986* (Vic) a prisoner who is a parent may make a request to the Secretary to the Department of Justice to have his/her child live in the prison with him/her as long as it is in the best interests of the child, and the 'good order or security of the prison is not threatened' by the child living there. Rule 37 to 41 of the *Corrections Regulations 1998* (Vic) attaches various rules and conditions to section 31. Permission for the child to live in the prison may be revoked at any time, and the living arrangement is reviewed annually.

Obviously, this option may not be a desirable one, even for the parent of the child. As one imprisoned mother noted, referring to her refusal to make an application to the Correctional Services Commissioner for her nine-year-old son to stay with her, 'he hadn't done anything wrong. I was the one doing jail, not him. I thought he needs to keep his interests, kinder and all that. It's all girls in here and officers in uniform. It's not a good environment for kids'. 'Ann' was serving a six month term of imprisonment for shoplifting and breaching her community order.⁴

Finally, the *Victorian Sentencing Manual* (Judicial College of Victoria, 2005) has a section entitled 'hardship of sanction' which provides that:

Claims of hardship of a sanction to an offender are commonly associated with submissions about hardship to the offender's family or other dependants. Such submissions may be successful, but *they face a more onerous burden* than where it is the hardship to the offender that is relied upon.

Although the fact that a defendant is responsible for a child has, in some cases, contributed to a reduced sentence of a non-custodial type or a reduction in length, the Full Court of the Supreme Court (as it was then) consisting of Young CJ, Murray and Southwell JJ held a different view. In *R v Zampaglione* their honours stated:

The fact that a prisoner is the mother of a young child may mean that a prison sentence will have a more devastating effect upon her than it would have upon others. But where the sentence must on any view be substantial *that consideration cannot be given very much weight*. A sentence otherwise thought appropriate in such a case cannot be reduced in order to allow mother and child to be re-united during the child's early years.⁵

In a more recent case the Victorian Court of Criminal Appeal has stated that 'the offender cannot shield herself under the hardship she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors'.⁶

³ Australian Children's Rights News, *Remember the Children of Prisoners* Position Paper (2000) 12.

⁴ Kathy Evans, 'Babies Behind Bars', *Sunday Age* (Melbourne) 7 October 2001, 16.

⁵ (1981) 6 A Crim R 287, 310.

⁶ Quoted in Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of the Legal Process* Discussion Paper (2006) 45.

Given that this type of approach prevails at the higher court level it is argued that sentencing legislation should be amended to direct courts to take into account the impact of imprisonment on the child of the defendant as at present the court will only more readily consider this factor, it seems, where grave consequences are evident.⁷

Other Jurisdictions

Commonwealth

At the Federal level section 16A(2) of the *Crimes Act 1914* (Cth) sets out 13 factors that a court *must* take into account, to the extent they are relevant and known to the court. Section 16A(2)(p) of that Act lists ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants’ as one of those factors.

It is argued in this literature review that the Victorian sentencing legislation should be amended to reflect the same.

However, some courts have read section 16(2)(p) of the Commonwealth legislation down to allow consideration of this factor only in exceptional circumstances. For example in *R v Edwards* Gleeson CJ cited with approval the following statement by Wells J in *R v Wirth*⁸:

It seems to me that courts would often do less than their clear duty...if they allowed themselves to be much influenced by the hardship that prison sentences which from all other points of view were justified, would likely to cause to those near and dear to prisoners.

But...the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So...hardship likely to be caused by a sentence of imprisonment under consideration should be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhumane not to do so.⁹

It is argued here that the court should always be able to take into account the probable effect that any sentence or order under consideration would have on an offender’s dependant/s. The Victorian sentencing legislation should be amended to include the probable effect of the imprisonment of offenders on their dependants and should make it clear that a court should have regard to that factor whether or not the circumstances are exceptional.¹⁰ In Discussion Paper 70 the Australian Law Reform Commission (ALRC) made this exact argument, in the context of the sentencing of federal offenders. The Commonwealth Director of Public Prosecutions opposed the proposal on the basis that it would compromise an even-handed approach to sentencing. Sisters Inside Inc, however,

⁷ Ibid 47.

⁸ (1976) 14 SASR 291, 295-296.

⁹ (1990) 90 A Crim 510, 516-517

¹⁰ Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70 (2005) 13-14.

strongly supported the proposal stating that a majority of imprisoned women (85%) are caregivers and the effect of incarceration is ‘a destabilising and emotionally traumatic experience’.¹¹

Under the *Children, Youth and Families Act 2005* (Cth) the court may make a permanent care order where the child’s parent has not taken care of the child for a period of at least six months. This creates a further implication for imprisoned parents and their children as, for example in the VACRO study, only one of the fifteen mothers interviewed served less than six months.¹²

New South Wales

In New South Wales, the mother of a young child can apply to the Commissioner of Corrective Services for a local leave permit enabling her to serve her sentence with her child in an appropriate environment, such as her home.¹³

Australian Capital Territory

Section 33(1)(o) of the *Crimes (Sentencing) Act 2005* (ACT) directs the court to take into consideration the probable effect that any sentence or order would have on any of the offender’s family or dependants.

The common law

The common law allows for the impact of the offence or the impact of a sentencing option on the offender to be considered by a court (without requiring exceptional circumstances as the Commonwealth legislation does). Whether the impact on a child is considered by the court will impinge upon the court’s sentencing discretion. The court may or may not attach relevance and weight to the factor.

Also, this is largely a process that relies on the barrister to produce the relevant material. Again, the author submits that the factor should be incorporated into the Victorian sentencing legislation and should be a factor that the court *must* take into account. Of course the weight attached to this factor should remain a matter for the court.

Background and the impact of parental incarceration on children

Statistics and the types of offences committed

Few formal Australian studies have been conducted in this area to ascertain statistical information regarding the children of prisoners.¹⁴ There is also a lack of information on what happens to these children while their parents are in prison. It has been found that

¹¹ Sisters Inside Inc, Submission to the 2005 Inquiry of the Australian Law Reform Commission on Sentencing of Federal Offenders (2006) 27.

¹² Above n 1, 103.

¹³ *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.

¹⁴ Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents* (1997) 6.

perhaps up to 85 per cent of female prisoners in Australia are mothers of dependant children.¹⁵ These children tend to be young, a large proportion of which are under six years of age. A number of juveniles in detention are parents.¹⁶

In Victoria it has been found that approximately 3,000 children at any one time have a parent, who acts as the primary carer of the child, in prison. Victorian prison population as at 30 June 2000 consisted of 2,970 male prisoners and 183 female prisoners. By 30 June 2004 the male prison population had increased by 13.8% to 3,380, while the female prison population increased by 33.3% to 244.¹⁷

According to the Australian Institute of Criminology statistics, most female offenders were sentenced for non-violent crimes in 2003-2004. Female offenders mainly commit fraud/deception and theft offences.

The effects on children of parental imprisonment

Numerous studies show that the incarceration of a parent, most likely a mother, is devastating to children.¹⁸ Children of prisoners are at a high risk of negative health outcomes and are at an increased risk of offending later in life.¹⁹ Quilty states that children from low socio-economic backgrounds, children who experience family disruption, and children who are separated from their parents at an early age all face significantly increased short-term and long-term mental health risks.²⁰ He states that these factors are commonly found in children of prisoners and may explain much of the mental and physical health problems documented in these children.

More generally, imprisonment can effect children behaviourally and emotionally by creating fear, sadness and anxiety in the child, confusion, regressive behaviour, anger and guilt, shame and isolation and a belief that the child did something wrong that caused the parent to leave.²¹ The development of the child may also be effected, especially younger children. Normal developmental stages and growth can be influenced by the traumatic experience of parental imprisonment which may result in the child experiencing learning difficulties and showing signs of maladaptive and/or aggressive behaviour.²² Children

¹⁵ 'Women in Prison: Where are we Going?' (1997) 2 *Themis* 15.

¹⁶ Rosemary Woodward, 'Families of Prisoners: Literature Review on Issues and Difficulties' (Working Paper No 10, Australian Government Department of Family and Community Services, 2003) vii.

¹⁷ Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of the Legal Process* Discussion Paper (2006) 17.

¹⁸ Bernadette O'Connor, 'Creating Choices – Or Just Softening the Blow?' (1996) 8(2) *Current Issues in Criminal Justice* 145.

¹⁹ Simon Quilty et al, 'Children of Prisoners: A Growing Public Health Problem' (2004) 28 *Australian and New Zealand Journal of Public Health* 339.

²⁰ Simon Quilty, 'The Magnitude of Experience of Parental Incarceration in Australia' (2005) 12 *Psychiatry, Psychology and Law* 256.

²¹ Victorian Association for the Care and Resettlement of Offenders, *Doing it Hard: A Study of the Needs of Children and Families of Prisoners in Victoria* Discussion Paper (2000) 5.

²² *Ibid* 5.

experience a disruption in their care, and sometimes multiple placements in foster care or other placements. Children of prisoners may also experience social stigmatisation.

The effect of parental imprisonment on a child is a dynamic process that may have short and long-term effects.²³ The process may have an affect on the child as at the point of arrest and separation,²⁴ during the period of imprisonment, and at the point of reunion after the parent is released from prison (negative or positive).²⁵

Children of prisoners are more likely than other children to be imprisoned themselves. The consequence of ignoring these children is to 'reinforce the generational cycle of crime and disadvantage in which they are enmeshed'.²⁶ Short and long term social and economic benefits will result if adequate recognition of these children is not provided. It therefore should be a government priority to protect these children from the consequences of parental imprisonment.

The ALRC's 1988 report on sentencing expressed the view: 'a factor which should carry considerable weight in the sentencing decision is being the mother of a young child. Only in exceptional circumstances, which constitute a real concern for the safety of others, should such a parent be imprisoned'. This same view and other similar views are projected in instruments of international law.

International Law

As above, Principle 6 *United Nations Declaration of the Rights of the Child 1989* provides that, 'a child of tender years shall not, save in exceptional circumstances, be separated from his mother'.

Further, several international instruments recognise the importance of the family as a fundamental unit of society. Article 23(1) of the *International Covenant on Civil and Political Rights* states, for example, that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Article 10(3) provides: 'special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions'.

Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* provides: 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its

²³ R D Parke and K A Clarke-Stewart, 'Effects of Parental Incarceration on Young Children' (Presented at the National Policy Conference, California, 30 January 2002) 3.

²⁴ Sandra Lilburn, 'Arresting Moments: Identifying Risks for Women and their Children from the Time of Police Arrest' (2001) 26 *Alternative Law Journal* 115.

²⁵ Above n 11.

²⁶ Ann Cunningham, 'Forgotten Families – The Impacts of Imprisonment' (2001) 59 *Family Matters* 35, 38.

establishment and while it is responsible for the care and education of dependent children’.

Article 3 of the *United Nations Convention on the Rights of the Child* states, ‘in all actions concerning children, whether undertaken by...courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

The best interests of the child are not a primary consideration in Victorian adult criminal courts, while the needs of the child are given much greater weight in the Family Court. The risks associated with the impact of the parent’s imprisonment are too great to be ignored and not considered in the criminal adult courts. The rights of the defendant and primary victims are, at least to some extent, protected, while the impacts on children are not consistently and thoroughly addressed in the adult criminal courts.

Conclusion

Victoria lacks a thorough legislative system to address the needs of children of defendants at the sentencing stage. The impacts of parental imprisonment are profound and many and effect the thousands of children currently with parents serving a prison term. And, ‘these negative consequences – social, psychological and financial – can extend for long after the prison term has been served’.²⁷

While some positive steps have been taken in Victoria, such as the creation of the Child Safety Commissioner, and the acknowledgment of children in some courts, the law in Victoria needs to take heed of the international instruments that Australia is a signatory to, ratified on behalf of *all* Australian children.²⁸

List of Recommendations

Recommendation 1

That consideration of the needs of children in the sentencing process and that the *Sentencing Act 1991* (Vic) be amended so as to include a provision stating that courts must take into account the probable effect that any sentence or order under consideration would have on any of the person’s dependants. The Act should make it clear that a court should have regard to that factor whether or not the circumstances are exceptional.

Recommendation 2

That imprisonment of parents should be used as a punitive mechanism of last resort, particularly in the case of offenders charged with non-violent offences, since the impact has damaging consequences on children. Increased efforts should be directed at developing and implementing alternative non-custodial sentencing options, such as:

²⁷ Above n 1, 109.

²⁸ Ibid.

- Community service;
- Home detention;
- Periodic detention;
- Griffiths Bonds (as in NSW) which allow an offender to be released from custody while the court assesses their behaviour and capacity for rehabilitation before imposing a sentence;
- Drug rehabilitation programs, and the diversion of non-violent drug offenders from the criminal justice system to drug treatment.

These should be developed and employed by the courts when sentencing women offenders who are mothers. In some cases these could be extended to male offenders.²⁹

Recommendation 3

That sentencing legislation in Victoria be brought in line with international law that Australia is a signatory to.

Recommendation 4

That the *Sentencing Act 1991 (Vic)* be revisited in relation to children of defendants and amended to accord with the *United Nations Charter for the Rights of Children*, the *United Nations Declaration of the Rights of the Child 1989*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*.

Recommendation 5

That members of the judiciary have access to materials and training ‘to enable them to take in account the impact which a custodial sentence of an accused person may have on his or her dependant children’.³⁰

Recommendation 6

That there be greater recognition and research into the impact of imprisonment of a parent on a child.

²⁹ Australian Institute of Criminology, *Women and Crime: Imprisonment Issues*, No. 35 (1992) 7.

³⁰ *Ibid*, xvi.