

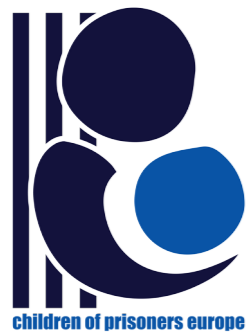
# Keeping children in mind

Moving from 'child-blind' to child-friendly justice  
during a parent's criminal sentencing

*"Children should be part of sentence planning"*

– A., age 12





Children of Prisoners Europe (COPE) is a pan-European network of non-profit organisations working on behalf of children separated from an imprisoned parent. The network encourages innovative perspectives and practices to ensure that children with an imprisoned parent fully enjoy their rights under the United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, and that action is taken to enable their well-being and development.

Children of Prisoners Europe is a non-profit organisation registered in France under French Association law 1901.

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## Foreword

*Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.*

— Justice Albie Sachs, *S v M*, Constitutional Court of South Africa (2007)

No publication should be entitled Keeping children in mind—this should be a truism, a given, with the best interests of children kept in mind at all times, whoever, wherever, whatever the domain; the UN Convention on the Rights of the Child is the most widely ratified human rights treaty in history. Yet for some domains—children impacted by the sentencing of a primary carer at risk of imprisonment being one of them—this awareness, let alone more active consideration, is not a given. Nearly one third of judges surveyed in one case study in the present toolkit, as you will read, deemed the best interests of children ‘irrelevant’ in sentencing decisions concerning their parents. Children facing separation from parents in criminal courts are treated differently from those facing separation from parents in family courts. Why this differential treatment, construed by many as discriminatory in and of itself?

This toolkit explores this question, not only highlighting the need for sentencers to account for children’s best interests but also including concrete provisions for how these best interests can be put into practice towards making Justice Albie Sachs’ landmark decision in *S v M* a reality for a greater number of children. It looks at various internal jurisdictions, underscoring some of the challenges inherent in promoting change, while pointing to valuable ways forward for raising further awareness among sentencers of the repercussions on dependent children when a primary carer is incarcerated. This toolkit is one small step towards ensuring that prison is a measure applied only as a last resort and fostering truly preventive action on behalf of children across Europe.

Liz Ayre

Executive director, Children of Prisoners Europe

# Executive Summary

**F**rom the moment of a parent's arrest, children have to cope with the effects of the criminal justice process, and can be vulnerable to social isolation, stigma and shame. This toolkit is intended as a resource for sentencers, child's rights advocates and practitioners to provide critical perspectives and tools for avoiding 'child-blind justice'<sup>1</sup> and, through the application of international and regional child's rights standards, moving towards a conception of 'child-friendly justice' that includes children with imprisoned parents. It highlights the implications of the 1989 United Nations Convention on the Rights of the Child (UNCRC) and Council of Europe Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, emphasising, 'without prejudice to the independence of the judiciary', the importance of the best interests of the child, including the need to consider alternatives to imprisonment for primary caregivers<sup>2</sup>. South Africa's 2007 Constitutional Court *S v M* ruling is the landmark application of these principles in case law, hinging on the 'best interests principle' as stated in Article 3.1 of the UNCRC.

This toolkit also presents guidelines for effective engagement with sentencers on matters relevant to children. Stakeholders will be able to:

- \* Understand what sentencers can or are required to do when confronted with the sentencing of a primary caregiver, and provide sentencers with relevant information;
- \* Be mindful of the importance and challenges associated with judicial discretionary power;
- \* Take into consideration adversarial and inquisitorial legal procedures; legal definitions of parenthood; separation during pre-trial detention; indeterminate sentencing standards and their relation to judicial discretion; and use of Best Interests of the Child Assessments.

Children of Prisoners Europe (COPE) is dedicated to protecting the rights of the estimated 2.1 million children who have a parent in prison in Council of Europe countries on any given day. COPE's vision—that every child be guaranteed fair, unbiased treatment, protection of his or her rights and equal opportunities regardless of social, economic or cultural heritage—includes in it the assumption that each of these children should be afforded their rights as individuals. This is the stance that Keeping children in mind applies to the realm of sentencing. Every child, and every child's rights and opportunities, should be kept in mind during the sentencing of a parent in conflict with the law.

<sup>1</sup> The term 'child-blind justice' was first used by Adele Jones in a paper of the same name presented at the March 2017 conference of the International Coalition of Children with Incarcerated Parents (INCCIP) in Rotorua, NZ.

<sup>2</sup> CM/Rec(2018)5 builds on the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).

## Contents

<b>Chapter 1 Why this toolkit</b>	7
*1.1 The importance of sentencing reform for children with imprisoned parents	8
*1.2 Who is this toolkit for?	11
*1.3 Goals and basic principles	11
<b>Chapter 2 Children's best interests and the sentencing process</b>	13
*2.1 <i>S v M</i> South Africa: A case study in centring the child's best interests	14
*2.2 The principle of the best interests of the child	14
*2.3 The significance of <i>S v M</i> for child's rights	16
<b>Chapter 3 Engaging with sentencers</b>	19
*3.1 Foreword to Chapter 3	20
*3.2 Shona Minson: Engaging with sentencers	20
*3.3 Heleen Lauwereys: Judicial discretionary power and the role of the child's best interests in Belgian sentencing law and practice	23
*3.4 Adversarial legal processes and child's rights protection	27
<b>Chapter 4 Key sentencing considerations</b>	29
*4.1 Who is a 'parent'?	30
*4.2 Detention prior to sentencing	31
*4.3 Indeterminate sentencing standards and judicial discretion	33
*4.4 Best Interests of the Child Assessments	35
<b>Appendices</b>	37
<b>Appendix I</b> Important terms and definitions	38
<b>Appendix II</b> Key standards and jurisprudence protecting children's rights	41
<b>Appendix III</b> Suggested further reading	51

# Chapter 1

Why this toolkit



## \* 1.1 The importance of sentencing reform for children with imprisoned parents

The urgency of addressing the ways in which parents are sentenced within Europe's criminal justice system derives from concerns about the fundamental well-being of their children. Child psychologists, social workers, researchers and other child welfare professionals are in consensus that the imprisonment of a parent can have long-lasting adverse consequences on the lives of children when they are not supported, and that reasonable steps should be taken to help mitigate the harm of child-parent separation<sup>3</sup>. Given this context, the sentencing of a parent is a singularly crucial moment in the criminal justice process for intervening in the future of the child of a parent who is in conflict with the law. Steps should be taken not only to consider the child during the sentencing decision, but also to place the best interests of the child at the front and centre of the legal procedure and, when custody is the only alternative, to devise sentences that have minimal impact on children.

**“Scientists now know that chronic, unrelenting stress in early childhood caused by abrupt separation from caregivers, extreme poverty or parental depression, for example, can be toxic to the developing brain in the same way as witnessing violence changes brain architecture. Parents are most often the buffers from this stress, and the attribution is centred on the developing child.”**

—Ann Adalist-Estrin<sup>7</sup>

From the moment of a parent's arrest, children are affected by the criminal justice process and can be vulnerable to social isolation, stigma and shame—to say nothing of having to cope with separation from an incarcerated parent. Most children grieve the absence of their parent. Without adequate support, the separation can have a range of ill effects, from separation anxieties, feelings of abandonment and internalised stigmatisation to what has been described as ‘distress’, ‘disruption’, ‘deprivation’ and ‘developmental effects’<sup>4</sup>. One study led to the inclusion of parental imprisonment on a list of ten Adverse Childhood Experiences (ACEs) that can adversely impact children, namely physical, emotional and sexual abuse<sup>5</sup>, physical and emotional neglect, mental illness, violence towards a mother, divorce and substance

abuse<sup>6</sup>. Findings from the EU-funded COPING Project revealed that children with imprisoned parents have a 25 to 50 per cent greater risk of mental health problems than children in the general population, especially among children older than eleven years of age. It gave clear evidence that the preservation of family relations through open communication with caregivers, sustaining relationships with imprisoned parents, and support from extended family were fundamental to mitigating risks and fostering resilience in children, as were a number of coping strategies that can provide the basis to better support children and young people who have a parent in prison.

The discussion of the sentencing of a parent cannot be had without mention of the growing rate of imprisonment among women. According to the World Prison Brief, the number of women and girls in pre-trial detention or serving a prison sentence has increased an estimated 53 per cent since 2000 (2017 data), a rise that cannot simply be explained by the rise of global population<sup>9</sup>. Women are more likely than men to be imprisoned for non-violent offences and tend to follow ‘common pathways into crime’<sup>10</sup> through abuse, trauma, mental health difficulties and poverty, which compound with imprisonment to increase overall vulnerability<sup>11</sup>. Women are also more likely than men to be the sole or primary caregiver of young children, and more likely to be imprisoned at a greater distance from home, as a function of proportionally smaller women's prison populations and thus fewer detention facilities<sup>12</sup>. These considerations taken together imply an increase of children affected by the incarceration of a mother, which heightens the urgency of finding solutions to sentencing mothers; the UN Special Rapporteur on Violence has gone so far as to publish a report stating that ‘it is crucial to develop gender-specific sentencing alternatives and to recognise women's histories of victimisation when making decisions about incarceration’<sup>13</sup>.

**“Why does incarceration negate the parent's importance to the child in the eyes of the world? If parents are the buffers from toxic stress, shouldn't people be doing everything they can to help keep those parent-child bonds? Because the guilt I feel about needing my dad when everyone says I am better off without him feels like a conflict of loyalty that is killing me inside...”**

—E., age 19<sup>8</sup>

<sup>3</sup> A brief note on language: any mention of ‘imprisonment’ in this toolkit refers to any kind of detention associated with the criminal justice system, beginning with detention in police custody, to pre-trial detention and detention during trial, to the service of a sentence in detention facilities including jails, prisons and penitentiaries. For more in-depth definitions of some of these terms and others, see Appendix I.

<sup>4</sup> Millar, H., & Dandurand, Y. (2018), ‘The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities’, *Criminal Law Forum* 29, 232.

<sup>5</sup> Felitti, V.J. et al. (1998), ‘Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study’, *American Journal of Preventive Medicine* 14(4), 245-258.

<sup>6</sup> Jones, A. D., & Wainaina-Woźna, A. E. (Eds.) (2013), *Children of Prisoners: Interventions and mitigations to strengthen mental health* [COPING Project], University of Huddersfield, UK.

<sup>7</sup> Adalist-Estrin, A., ‘The Impact of Trauma on Children in Child Welfare Systems’, talk delivered at Pennsylvania Children's Roundtable Summit, April 2015, Seven Springs, Penn., USA.

<sup>8</sup> *Children of Incarcerated Parents Discussion at the White House* (October 8, 2014), remarks by Ann Adalist-Estrin.

<sup>9</sup> Walmsley, R. (2017), ‘World Female Imprisonment List: Women and girls in penal institutions, including pre-trial detainees/remand prisoners’ (fourth edition), World Prison Brief and Institute for Criminal Policy Research, 2.

<sup>10</sup> Millar, H., & Dandurand, Y. (2018), 235; see also, Children of Prisoners Europe (2018), ‘Establishing Baselines: Data collection towards better safeguarding children with a parent in prison’, Montrouge, FR, 12.

<sup>11</sup> Baldwin, L. (2015), ‘Mothering from Prison: Understanding mothers and grandmothers, a prison perspective’, in *Mothering Justice: Working with mothers in criminal and social justice settings*, Baldwin, L. (Ed.), Waterside Press: Sherfield on Loddon, UK.

<sup>12</sup> Millar, H., & Dandurand, Y. (2018), 235.

<sup>13</sup> In ter Vrugt, P. (2018), ‘Innocent, forgotten and punished: Rights of children of imprisoned mothers in the Netherlands’ (Master's thesis, Maastricht University, Department of Criminal Law and Criminology), 52.

Yet the act of sentencing a parent is at the same time a singularly complex moment for a judge balancing numerous considerations, among those the gravity of the offence and the public's safety. Weighing the rights of the child against the implications of the offence—what one judge has called a 'balancing exercise'<sup>14</sup>—is central to the question of sentencing a parent. Judges, politicians and advocates alike are diligent in their assurances to the public that the consideration of children's right to contact with a parent does not imply a weakening of laws or amount to a 'get out of jail free card'. As Justice Albie Sachs of South Africa wrote in his 2007 judgement on the landmark *S v M* case,

*'The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children [...] 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>15</sup>.

Central to the 'balancing exercise' of sentencing a parent is a tension that underlies the issue of parental imprisonment at not only the judicial level, but also among politicians, legislators, prison and social work practitioners and those advocating



on behalf of children with an imprisoned parent: the bifocal consideration and treatment of 'criminal justice' cases and 'civil cases' and the separate codes and procedures that they entail. This difference can be seen in family court divorce cases and custody battles, 'which determine the issue of forced parent-child separation after lengthy litigation involving detailed consideration of evidence from child welfare professional and the parents', and which often give children space to express their opinions, desires and needs<sup>16</sup>.

This double standard opens onto two fundamental questions: Why are children of prisoners treated differently in relation to those facing separation from a parent as a result of divorce, and does this differential treatment represent 'discrimination or punishment'<sup>17</sup>?

<sup>14</sup> *R (on the application of P and Q) v Secretary of State for the Home Department* (EWCA Civ 1151, 2001) in Epstein, R. (2014), 'Mothers in prison: The sentencing of mothers and the rights of the child', Howard League What is Justice? Working Paper 3, Howard League for Penal Reform, UK, 6.

<sup>15</sup> *S v M* at 35.

<sup>16</sup> Reed, C., (2014), 'Children of prisoners: 'Orphans of justice?'' *Family Law*, 69 in Donson, F., & Parkes A. (2016), 'Weighing in the balance: Reflections on the sentencing process from a children's rights perspective', *Probation Journal*, 63(3), 11; see also, Millar, H., & Dandurand, Y. (2018), 234.

<sup>17</sup> The language of 'discrimination or punishment' originates in Article 2 of the UNCRC. The question above, and its relevance to Article 2, is the crux of Shona Minson's recent book, *Maternal Sentencing and the Rights of the Child* (in publication), Palgrave Socio-Legal Studies: London.

## \*1.2 Who is this toolkit for?

Awareness of the need to focus on the impact that sentencing decisions have on children when a primary carer is at risk of imprisonment is reaching critical mass in some European contexts—particularly in the UK, thanks in part to the expertise and advocacy work being done by Shona Minson and others. COPE has created this toolkit as a response to this rising tide of awareness and in the interest of providing practitioners, sentencers and advocates for child's rights with multiple entry points for understanding and affecting the sentencing process.

Specifically, this toolkit is geared towards the following:

- \* Sentencers and lawyers (judges, justices, magistrates, barristers and prosecutors);
- \* Non-governmental child's rights advocates and practitioners, including those working with and for children with imprisoned parents or those otherwise in conflict with the law;
- \* Advocates for sentence reform.

Information on the following topics can be found throughout this toolkit. If you are looking for information on...

- \* The importance of sentencing reform for children with imprisoned parents, see page 7.
- \* The principle of the best interests of the child and the sentencing process, see page 14.
- \* Engaging with sentencers, see page 19.
- \* Additional sentencing considerations, see page 29.
- \* Standards and jurisprudence underpinning sentencing reform, see Appendix II.

## \*1.3 Goals and basic principles

Goals:

- \* To motivate decision-makers to eliminate the practice of 'child-blind justice'<sup>18</sup>, where the harm that may be inflicted on a child as a result of judicial and penal decisions is neither foreseen, acknowledged nor remedied by the system;
- \* To raise awareness among practitioners and sentencers of the importance of considering the best interests of the child in sentencing processes where children are involved, as well as to raise awareness of international child's rights guidelines and examples of child-friendly legal precedents;

- \* To provide advocates for children with imprisoned parents with critical perspectives for framing the issue of sentencing, as well as guidance and tools for approaching and working with judges;
- \* To create more child-friendly legal procedures that follow child's rights guidelines and build on principles and best practices including those outlined in case law; to work towards implementing purposeful programmes and relevant supports for children of imprisoned parents through multi-sectoral collaboration .

#### Basic principles :

- \* Every child should be guaranteed protection of his or her rights, equal opportunities, and fair, unbiased treatment, regardless of social, economic or cultural heritage or the status of their parent .
- \* Children with imprisoned parents should not be treated as a homogeneous group ; each child responds to separation from a parent as a result of their conflict with the law in different ways.
- \* Children with imprisoned parents, as well as their caregivers, incarcerated and formerly incarcerated parents, should have a central role in identifying any problems these children may face and designing the solutions to these problems ; collaboration between all stakeholders is essential to multisectoral progress in protecting the rights of children.

## Chapter 2

### Children's best interests and the sentencing process



### \*2.1 *S v M* South Africa: A case study in centring the child's best interests

Perhaps the most important and well-known criminal case in which the rights of children took centre stage is South Africa's 2007 Constitutional Court case *S v M*<sup>24</sup>. After the conviction of a single mother of three children on multiple charges of fraud, for which she received a sentence of up to four years of imprisonment before release on correctional supervision, Judge Albie Sachs overruled the judgement on the grounds that insufficient consideration had been given to her role as primary caregiver.

After the conviction of a single mother of three children on multiple charges of fraud, for which she received a sentence of up to four years of imprisonment before release on correctional supervision, Judge Albie Sachs overruled the judgement on the grounds that insufficient consideration had been given to her role as primary caregiver.

Invoking the principle of the best interests of the child, the court established the importance of centring the rights of children—in and of themselves and regardless of their parents' actions—as opposed to considering children as third-party interests or 'personal circumstances of the criminal'<sup>25</sup> in court proceedings.

South African law operates on precedent set in the case *S v Zinn* (1969), which advanced a sentencing formula based on a 'triad consisting of the crime, the offender and the interests of society'<sup>26</sup>, what can be understood as a logical extension of the widely accepted four purposes of criminal law: retribution, incapacitation, deterrence and rehabilitation<sup>27</sup>. Following this template for sentencing procedure, the defendant, M, was convicted at the Regional Court and sentenced upon appeal by the High Court, which led to her imprisonment for a period of eight months before her appeal was received by the Constitutional Court. According to the *amicus curiae* appointed to the case by the Constitutional Court, both Regional and High Courts paid 'scant attention' to the fact of the defendant's position as primary caregiver of multiple young children<sup>28</sup>.

### \*2.2 The principle of the best interests of the child

The Constitutional Court's consideration of the effect of imprisonment on a defendant's children represented a landmark shift towards an inclusion of children's rights language in South Africa's triadic sentencing formula, namely the principle of the best

interests of the child, which informed the court's ruling in *S v M*. The principle of the best interests of the child—what the UNCRC calls a 'rule of procedure', both a legal principle and a fundamental, 'self-executing right [that] may be invoked before a court'<sup>29</sup>—is not a formal document but a broadly accepted and widely debated legal standard. Enshrined as a right in Article 3.1 of the UNCRC (1989), this principle states:

*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.*

One of the defining features of the principle of the best interests of the child—and the aspect that can make its application in courts such a conundrum—is its dual nature as simultaneously indeterminate (the best interests of every child are subjective) and non-discretionary (as set out in the UNCRC, 'the best interests of the child shall be a primary consideration')<sup>30</sup>. Thus, while the application of the best interests principle is and must be subjective to the situation of each child, this indeterminacy contributes to the fact that children's best interests may be manipulated<sup>31</sup> or altogether ignored. Despite this complexity, the principle can play a direct role in the development of legal codes that inform sentencing decisions, specifically what the Council of Europe has called the 'deontological, ethical and procedural rules' related to the best interests of the child<sup>32</sup>.

The principle of the best interests of the child appears in nearly identical language in the African Charter on the Rights and Welfare of the Child (1990)<sup>33</sup>, as well as the Constitution of the Republic of South Africa (1996), wherein 'a child's best interests are of paramount importance in every matter concerning the child' (28[2], emphasis added). It is notable that this language of paramountcy, introduced in the United Kingdom's Children Act of 1989 as the 'paramountcy principle'<sup>34</sup>, became a point of consideration

<sup>29</sup> Cardona Llorens, J., 'Presentation of General Comment No. 14: strengths and limitations, points of consensus and dissent emerging in its drafting' in Council of Europe, *The best interests of the child: A dialogue between theory and practice*, Sormunen, M. (Ed.), (2016), 17.

<sup>30</sup> *Ibid.*, 12.

<sup>31</sup> The UN Committee on the Rights of the Child 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], para. 34. noted that the indeterminacy of the best interests principle 'may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant'.

<sup>32</sup> Council of Europe, *The best interests of the child: A dialogue between theory and practice*, 5.

<sup>33</sup> Organisation of African Unity [African Union], African Charter on the Rights and Welfare of the Child [OAU Doc. CAB/LEG/24.9/49] (1990).

<sup>34</sup> Alternatively referred to as the 'welfare principle', section 1(1) of the UK's *Children Act 1989*, S. 108(2) states, 'When a court determines any question with respect to, a) the upbringing of a child; or, b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.'

<sup>24</sup> *S v M* 2008 (3) SA 232 (CC).

<sup>25</sup> *S v M* at 29.

<sup>26</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

<sup>27</sup> *S v M* at 10; see also Kadish, S.H. et al. (2012), *Criminal Law and its Processes: Cases and Materials* (9th ed.) and Campbell, A.W. (2012), *Laws of Sentencing*, § 2:1 in Lerer, T. (2013), 'Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System', *Northwestern Journal of Law & Social Policy* 9(1), 27

<sup>28</sup> *S v M* at 98.



in Justice Sachs's judgement of *S v M*, wherein he referred to the language of paramountcy as more 'emphatic' and 'notably stronger' when compared to the UNCRC's language of maintaining the best interests of the child as 'a primary consideration'<sup>35</sup>.

### \*2.3 The significance of *S v M* for child's rights

The significance of the *S v M* judgement was in the incorporation of this language in South Africa's sentencing formula, that the consideration of the best interests of the child 'should become a standard preoccupation of all sentencing courts'<sup>36</sup>. Justice Sachs included directives for sentencing in future cases in which children are concerned, namely that the court should:

- \* Determine if a defendant is a primary caregiver;
- \* Use those means available to the court (direct questioning of the defendant, evidence procured by the prosecution, etc.) to discern the parenting status of the defendant and what effect imprisonment would have on the child;
- \* Ensure that the child receives adequate care when a case clearly requires a custodial sentence according to the *Zinn triad*;
- \* Determine an appropriate sentence if the sentence is clearly non-custodial; and,
- \* Consider the paramount importance of considering the best interests of the child if a range of sentences would be appropriate according to the *Zinn triad*<sup>37</sup>.

The court further found that the failure of the Regional and High Courts to adequately assess the best interests of the child—Justice Sachs judged that the sentencing courts 'misdirected themselves by not paying sufficient attention to constitutional requirements'<sup>38</sup>—provided grounds for leave to appeal of the original sentence, as *M* did twice before the case was passed to the Constitutional Court. Brett (2018) notes that this stipulation encourages prosecutors and courts to ensure thorough assessments of the best interests of the child, and encourages that judges not only consider this information, but also document those details as having been taken into account.



35 *S v M* at 25.

36 *Ibid.*, at 33.

37 *Ibid.*, at 36; see also, Donson, F., & Parkes, A. (2016), 6-7.

38 *S v M* at 48.

Ultimately, given that the defendant had previously served a portion of the original prison sentence, and that, 'further imprisonment would in all probability impose more strain than the family could bear, with potentially devastating effects on the children'<sup>39</sup>, the majority judgement commuted the defendant's sentence for additional jail time to a non-custodial sentence of correctional supervision, including community service and—with a nod to theories of restorative justice—repayment of fraudulently earned funds through direct encounter with those she defrauded. And ultimately, Justice Sachs's judgement echoed the sentiment of compromise expressed in the aphorism of the 'balancing exercise':

*No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives...In situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can*<sup>40</sup>.

Another significant element in the case of *S v M* was its thorough assessment of the child's best interests (see Chapter 4.4). Information concerning the best interests of the children related to the case was furnished by a *curator ad litem* appointed by the court, and was supplemented by a social work report from the amicus curiae as well as multiple reports from a team of social workers at the South African Department of Social Development. The judgement in *S v M* did not include prescriptive directions that would require courts to appoint a *curator ad litem* or similar caseworkers to future cases, suggesting that it would be at the discretion of future courts on how to seek information about children's best interests via external appointees<sup>41</sup>. Yet the judgement was unequivocal in its conviction that, 'a truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned'<sup>42</sup>.

The judgement in *S v M* did not include prescriptive directions that would require courts to appoint a *curator ad litem* or similar caseworkers to future cases, suggesting that it would be at the discretion of future courts on how to seek information about children's best interests via external appointees.

39 *Ibid.*, at 54.

40 *Ibid.*, at 20.

41 Donson, F., & Parkes, A. (2016), 6-7.

42 *S v M* at 24.

## Chapter 3

### Engaging with sentencers



### \*3.1 Foreword to Chapter 3

What follows in Chapter 3 of this toolkit are two pieces that are the result of surveys conducted with sentencers in two different European contexts. The first is authored by Dr Shona Minson, a British Academy Post Doctoral Fellow at the Centre for Criminology at the University of Oxford; the second is written by Heleen Lauwereys, LL.M, a Doctoral Researcher at the Institute for International Research on Criminal Policy and the Human Rights Centre, both at Ghent University. The third section of this chapter can be thought of as a discussion piece that considers adversarial and inquisitorial legal systems and the effects of these different systems on the approach to child's rights.

### \*3.2 Shona Minson: *Engaging with sentencers*

The following briefing sets out two issues that lawyers, NGOs and other criminal justice professionals need to address with sentencers in order to ensure that they properly engage with the impact a sentence of imprisonment will have on any children of the defendant. It is based on the author's experience of working with the judiciary in England, Wales and Scotland.

**I. Sentencers cannot act outside the parameters of their jurisdiction. It is therefore critical that those seeking to engage with sentencers understand whether they are permitted or required to consider the impacts of any sentence on a dependent child when sentencing a parent.**

The parameters of a sentencers' jurisdiction will be determined and influenced by a number of different things, not all of which will apply in every country:

- \* National case law;
- \* Statutory legislation;
- \* European case law;
- \* Sentencing guidelines;
- \* National Memorandums of Understanding or other non-statutory instruments;
- \* Council of Europe recommendations; and,
- \* International conventions in particular with respect to children, the UNCRC.

The Articles of the UNCRC which have particular relevance for the sentencing of parents are:

**Article 2:** Non-discrimination: The State has a duty to protect a child from punishment or discrimination which they suffer as a consequence of the status or activities of their parents.

**Article 3:** In all actions concerning a child the child's best interests must be a primary consideration of the court or administrative body.

**Article 12:** In all matters affecting the child, the child has a right for their views to be heard and for such views to be given due weight in accordance with the age and maturity of the child.

**Article 20:** A child has a right to special assistance from the State if separated from their parent.

With regard to the Article 2 rights of children, if a contrast can be drawn with another situation where a child is separated from their parent by the State, in which the State gives full and proper consideration to the best interests of the child, this can be useful in compelling sentencers to do the same. In the English context this contrast has successfully been drawn with the family court practice.

Council of Europe Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States concerning children with imprisoned parents was adopted on 4 April 2018. The sections relevant to the sentencing of parents of dependent children are set out in full below:

1. Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions which may affect them. Measures that ensure child protection, including respect for the child's best interests, family life and privacy shall be integral to this, as shall be the measures which support the role of the imprisoned parent from the start of detention and after release.

2. Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

12. Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them.

**Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions which may affect them.**

The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.

If the relevant case law, legislation, guidelines, recommendations or conventions establish that a sentencer should consider the impact of a sentence on dependent children, it should not be assumed that all sentencers will know and understand their duty. It is therefore essential to provide sentencing decision makers with the relevant case law citations, or draw their attention to the legislation, national sentencing guidelines, recommendations or relevant convention articles.

**II. If sentencers can or should consider the rights of a child when a parent is being sentenced, they will have to consider the impact of any sentence on a dependent child. It should not be assumed that they will have any understanding of these impacts and it is therefore important that they are provided with information about these impacts for proper consideration in their sentencing decisions.**

Three different levels of information may prove useful to sentencers in these situations:



1. European and international academic research has found that parental imprisonment has been linked to problems including trauma and loss, social exclusion and increased vulnerability, financial stress, disrupted attachments, internalising behaviours (depression, anger, distress), externalising behaviours (anti-social behaviour, criminal activity, drug and alcohol abuse), disrupted schooling, difficulties with social situations and death before the age of 65<sup>43</sup>;

2. National data on the consequences of parental imprisonment on children will provide local context to any sentencing decisions, e.g. the distance a parent will be held from home if imprisoned, the cost of visits to prison, the type of support which is or is not offered to children whose parents are imprisoned;

<sup>43</sup> See Parke & Clarke-Steward, 2001; Travis & Waul, 2004; Miller, 2006; Comfort, 2007; Dallaire, 2007a, 2007b; Children's Commissioner for Scotland, 2008; Murray & Farrington, 2008; Nesmith & Ruhland, 2008; Barnardo's, 2009; Dallaire & Wilson, 2010; Hissel et al., 2011; Raikes & Lockwood, 2011; Sampson, 2011; Smith & Gampell, 2011; Wakefield & Wildeman, 2011; Arditti, 2012; Johnson & Easterling, 2012; Flynn, 2013; Morgan, 2014; Wakefield & Wildeman, 2014; Dennison & Smallbone, 2015; Flynn, 2015; Minson & Condry, 2015; Minson et al., 2015; Dennison & Besemer, 2018; Oldrup & Frederiksen, 2018; Van de Weijer et al., 2018; Masson, 2019; Minson, in publication.

3. Information about the impacts of parental imprisonment on the individual child or children whose parent is being sentenced. Ensure that the court have information on the following matters:

- \* the names and ages of the children;
- \* the plan for their care if their parent is imprisoned including the suitability of prospective carers in terms of finances, age and health;
- \* whether siblings will be separated as a consequence of parental imprisonment;
- \* whether their education will be disrupted by parental imprisonment;
- \* any particular health or emotional needs of the children; and,
- \* whether the children will be able to visit their parent if they are imprisoned.

If resources are provided on this topic for sentencers, it is also good practice to provide the same information to other criminal justice professionals involved in the sentencing process, e.g. advocates and those who prepare reports for the court so that all are aware of the need to consider the impact of adult sentences on dependent children.

### **\*3.3 Heleen Lauwereys: Judicial discretionary power and the role of the child's best interests in Belgian sentencing law and practice**

These interviews were conducted as part of the author's doctoral research on the role that the principle of the best interests of the child has when sentencing parents and primary caregivers in the Belgian context<sup>44</sup>.

*A 26-year-old woman with Polish roots, the pregnant mother of a two-year-old child, has difficulty making ends meet with her part-time employment in a cleaning company and has few connections in Belgium. She was found guilty of importing a small amount of cannabis from the Netherlands into Belgium for the personal use of a friend. The prosecutor sentenced her to one year of imprisonment and a 1000 euro fine. Which sentence would you impose?*

Seventeen Belgian criminal law judges were asked to impose a sentence in this and two other scenarios, in addition to answering open questions. The analysis of the interviews shows that little explicit attention is given to children and their best interests in the sentencing decision. Judges are very often unaware of the defendant's

<sup>44</sup> Ghent University, Institute for International Research on Criminal Policy. For further publications on the role of the child's best interests in the sentencing decision (in Belgium), see [biblio.ugent.be/person/000170872570](http://biblio.ugent.be/person/000170872570).

children and their interests. Judges also have different perceptions of how children are impacted by a sentence, and whether and how these impacts are relevant in the sentencing decision.

### The principle of the best interests as a symbolic constitutional right

Belgium has ratified the CRC and has included a provision on the child's best interests in the Belgian constitution. However, the highest courts in Belgium disagree as to whether Article 3(1) of the UNCRC and Article 22bis(4) of the Belgian Constitution should be the basis on which decisions are made about individual children, on

the grounds that the best interests of the child are too vague to provide a basis for individual rights, and given that a specific provision on the child's best interests would be needed in relation to the proceedings in order to apply it. The Belgian criminal code does not include a specific legal obligation for criminal courts to consider the child's best interests when sentencing parents and/or primary caregivers.

**The Belgian criminal code does not include a specific legal obligation for criminal courts to consider the child's best interests when sentencing parents and/or primary caregivers.**

Change may be coming, however. In the proposal for a new criminal code, which is currently under debate in the parliamentary commission on justice, a provision is included that would require judges to consider the impact of the sentence on the accused, his or her environment and the community at large (although no particular child's rights language is used, it is clarified that the 'environment' of

the accused includes family)<sup>45</sup>. The explanatory text to the proposal clarifies that the judge should determine which sentence holds the least negative consequences for all parties involved, according to the sentencing goal(s) set forth. If two different sentences can make for the same result, the sentence with the smallest negative impact should be chosen<sup>46</sup>.

**If two different sentences can make for the same result, the sentence with the smallest negative impact should be chosen.**

Though currently the criminal code does not enforce these obligations, Belgian judges have significant discretionary power in sentencing, and can tailor individual sentences to the offence committed, the circumstances of the case and the personal circumstances of the defendant. This discretionary power allows judges to also take into account the child's best interests in the determination of the appropriate sentence type and the suspension of both conviction and sentence.

<sup>45</sup> Voorstel van wet tot invoering van een nieuw Strafwetboek, Boek 1 en Boek 2, Parl. St. Kamer (2018-19), 54-3651/001.

<sup>46</sup> Ibid., 116.

### Multi-method interviews with judges

Simply being given the option of considering the child's best interests in the sentencing decision does not of course mean that judges necessarily do this in practice. To investigate whether and how criminal law judges interpret and apply the best interests of the child, qualitative interviews were conducted with seventeen correctional judges (five women and twelve men) who are seated in different Flemish judicial districts. The judges were invited to participate in a study regarding mitigating circumstances in general. The interview consisted of three parts, in which open-ended questions and case scenarios were used.

The interviews started with a general question to discuss which personal mitigating circumstances the respondents normally consider, if they are considered at all. The respondents were then asked to impose a sentence in three fictitious scenarios in which the theoretical defendant had at least one minor child, and to give their reasons out loud to reveal their thought processes. All respondents were presented with the same fictitious scenarios, which explained the offence committed and the case context in a few paragraphs. The fictitious character of the cases allowed the inclusion of a number of potentially relevant variables in the cases relating to the nature and severity of the offence, the general profile of the parent and the family situation. After the assessment of the sentencing scenarios, the concrete focus of the research was shared with the respondents, and open questions in relation to the role of the best interests of the child in the sentencing decision were asked. Only after the assessment of the scenarios were the judges informed about the specific focus of the study on the child's best interests.

Five of the seventeen judges deemed the best interests of the child irrelevant in the sentencing decision and indicated that they would not consider them. Although the other judges responded that they do consider children in the sentence decision, the analysis of the interviews shows that this does not necessarily mean that they consider the impact of the sentence on children. In many cases, children are considered as an indicator in the assessment of the risk to reoffending and the chances of rehabilitation, or to determine whether the accused would be in fact able to execute a sentence, as in the case of a pregnant woman sentenced to community service. Not only those judges who oppose a best interests consideration, but also those judges who do find it relevant, gave several arguments against the consideration of the child's best interests generally or in individual cases. Among those were the following responses:

**In many cases, children are considered as an indicator in the assessment of the risk to reoffending and the chances of rehabilitation, or to determine whether the accused would be in fact able to execute a sentence, as in the case of a pregnant woman sentenced to community service.**

*'I find, however sad it is for the children and the family, that this person knew this at the time of the offence, and that he should actually own up to the consequences.'*

*'I don't find it okay, to have a child be born in that context [prison], but my colleagues said, well, actually we don't think so because it is rather easy to have a baby and then you escape'.*

*'You can also say that someone who has children, we will treat differently than someone who does not have children'.*

**These counterarguments show that judges still have difficulty applying the principle of the child's best interests in a sentencing context, as it may go against their sense of equality and justice.**

These counterarguments show that judges still have difficulty applying the principle of the child's best interests in a sentencing context, as it may go against their sense of equality and justice. Only seven judges mentioned the children of the offender when asked about the general mitigating circumstances at the start of the interview. Likewise, children were not always mentioned, or mentioned in scant detail, during the assessment of the sentencing exercises. Even though judges may find

the child's best interests relevant or even important when asked about it, this survey found the child's best interests to be an unlikely consideration in the usual sentencing practice of the majority of the respondents.

It is also interesting to see how judges deconstruct the child's best interests in sentencing. The judges offered different levels of insight into the impacts of different sentences on children and had varying opinions about whether these impacts would be relevant in a sentencing context. While many judges acknowledge that the separation of parent and child during imprisonment may cause emotional problems and may even be traumatising, some judges also find it to be irrelevant in sentencing, and downplay the potential seriousness of the impact: 'If the child is not in danger, and it is purely about the child missing his dad, then I won't follow that easily'. Judges appeared to be more concerned about younger children, assuming older children would be affected less by parental imprisonment. A number of male judges indicated they are more inclined to consider the impact of a sentence imposed on a mother, as a more important figure in a child's life. The child's disabilities, personality and views were only mentioned once by different respondents. The judges also indicated that they receive insufficient information on the children and the potential impact of a sentence on their best interests for a proper assessment to be made:

*'But the role of the children in the sentencing decision is so personal; it has to do with the nature of the offence [...]. It sometimes also has to do with the extent to which the parent involved, has done it for his children'.*

How the child's best interests do or should impact the sentencing decision was unclear from the study, as there were inconsistencies not only between respondents, but also in the determination of different cases by the same respondent. Respond-

ents indicated that their mandate is to impose an adequate sentence for the individual defendant, in light of the sentencing goals they want to realise. The specific circumstances of the case, like the severity of the offence and the criminal record of the parent, can lead to the decision that an impact on the child's life and well-being will not mitigate the sentence. This analysis reveals that the best interests of the child are not easily reconciled with the aims of criminal law and the various sentences; it is unclear to judges what weight should be attributed to the child's best interests in determining the adequate sentence in order to allow the sentence imposed to realise the goals set forth. The circumstances surrounding a case can vary to such a great extent that this decision needs to be tailor-made to each case.

The analysis of these interviews demonstrates how judges deal with the sentencing decision and the role the child's best interests do or can play in this context. Not only the question of whether judges consider the child's best interests is relevant here; what is especially interesting is how they interpreted and applied the principle in their sentencing practice. The results have raised some specific questions and issues in the application of the best interests of the child. The interviews show that there is a need for more research on the impact of sentences more generally in light of the assumptions of the judges. The results of such studies should be shared widely among the relevant professionals involved in the criminal justice system. Finally, the demonstrated lack of information on the children in individual cases should be addressed by examining the ways in which pre-sentence reports or more specific child impact statements can be used.

### \*3.4 Adversarial legal processes and child's rights protection

Some commentators argue that, when a primary caregiver is in conflict with the law, the oppositional structure of adversarial legal proceedings, conducted notably in common law countries including the UK, Ireland and the US, is detrimental to positive outcomes for children<sup>47</sup>. Even though practitioners in adversarial jurisdictions generally remain adamant in supporting this structure, significant voices, including prominent jurists within those systems, have called for less conflict-driven, more inquisitorial approaches to resolving matters that impact families<sup>48</sup>.

These arguments find support in research. In her work on adversarial proceedings related to divorce and custody, legal scholar Janet Weinstein cites numerous ways in which the nature of those proceedings negatively impacts all involved, including by

<sup>47</sup> For example, Kieran McGrath argues that 'the adversarial legal system, because of its reliance on conflict, is an unsuitable one for dealing with childcare proceedings' in 'Protecting Irish children better: The case for an inquisitorial approach in childcare proceedings', *Judicial Studies Institute Journal* 5(1) (2005), 149.

<sup>48</sup> This was put forward by one former Lord Chief Justice in the United Kingdom, for example, in comments on the need for reform of the British judicial system. See 'Inquisitorial system may be better for family and civil cases, says top judge', *The Guardian*, 4 March 2014, [www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas](http://www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas), accessed 18 November 2019.

forcing litigants into fixed and often extreme, antagonistic positions, creating barriers to information sharing and excluding relevant third parties from the proceedings. Weinstein notes that, '[f]rom the perspectives of the children and the parents, the adversarial process does not promote healthy family functioning'<sup>49</sup>. It stands to reason that adversarial approaches likely also lead to negative outcomes for children impacted by the administration of criminal justice. This point is implicit in the reasoning of *S v M* (South Africa, 2007), where the court noted that, in the sentencing of convicted persons who are also primary caregivers, the prosecution's 'normal adversarial posture should be relaxed when the interests of children are involved'<sup>50</sup>.

As the work of researchers like Heleen Lauwereys shows, the prevalence of 'child-blind' criminal justice<sup>51</sup> occurs regardless of whether cases are judged in adversarial or inquisitorial legal proceedings—a reality that complicates the notion of centring the best interests of the child in criminal courts and compels stakeholders to work with sentencers to raise awareness and promote change. If decision-makers are to 'promote positive parenting' in sentence-planning in line with Council of Europe Recommendation CM/Rec(2018)5<sup>52</sup>, they must consider the nature of the legal procedures under which courts operate. Stakeholders, especially those in common law jurisdictions, must find ways to incorporate non-adversarial approaches that adequately take into account the best interests of the children involved<sup>53</sup>.

<sup>49</sup> Weinstein, J. (1997), 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System', *University of Miami Law Review* 52(79), 134.

<sup>50</sup> *S v M* at 36(2).

<sup>51</sup> Jones, A., 'Child Blind Justice', 2017.

<sup>52</sup> Article 44 of Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents reads, 'In order to promote positive parenting, consideration shall be given in sentence planning to include programmes and other interventions that support and develop a positive child-parent relationship'.

<sup>53</sup> Weinstein J. (1997), 159-160.

## Chapter 4

### Key sentencing considerations



### \*4.1 Who is a 'parent'?

As courts consider cases where defendants are either parents—or in the role of parents—to young children, the question arises as to how to define that role in legal terms. In *S v M*, the defendant was a single mother of three and defined as the children's 'primary caregiver'—'simply put, the person with whom the child lives and who performs everyday tasks'<sup>54</sup>. The importance of this terminology is that while in some cases there may be other people to take care of a child in the case of parental

Subtle shifts in language surrounding parenthood and caregivers can amount to fundamental changes in the experience of a child.

imprisonment, it is generally against the best interests of the child to separate them from a primary caregiver. Part of the importance of this language, therefore, lies in preserving as best as possible a degree of regularity in the lives of children. Subtle shifts in language surrounding parenthood and caregivers can amount to fundamental changes in the experience of a child.

Similar to using the language of the 'primary caregiver', there has been a move, notably in American child law discourse, towards use of the term 'psychological parent' to expand the definition of parenthood past its traditional definition. This idea comes from a much vaunted book in the realm of child law from 1979, *Before the Best Interests of the Child*, in which the authors define the 'psychological parent' as the caregiver who, 'on a continuing day-to-day basis through interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs'<sup>55</sup>. This approach functions as an umbrella term that can be open to grandparents, step-parents and legal guardians outside the family, expanding the terms of care past the defined confines of either biological or adoptive parenthood.

Mothers tend to be the foremost guardians for their children, so the question of sentencing primary caregivers tends to imply the sentencing of a mother.

Mothers tend to be the foremost guardians for their children, so the question of sentencing primary caregivers tends to imply the sentencing of a mother. Importantly, certain standards, namely the UN Bangkok Rules and the African Charter on the Rights and Welfare of the Child (see Appendix II), include rigorous language expressly concerning the imprisonment of mothers, as noted in the

review of international and regional standards above. Although on the whole the language of the majority of international and regional standards does not differentiate between mother and father—choosing instead to refer to 'parents' and 'primary caregivers', cases in which a child or children of a male defendant play a role in the sentencing of their father are few and far between. Partly this is simply because

<sup>54</sup> *S v M* at 28.

<sup>55</sup> Goldstein, J., Freud, A., & Solnit, J. (1979), *Before the Best Interests of the Child*, New York: Free Press in Lerer, T. (2013).

fathers less frequently take the role of primary caregiver. There has been one case in Norway in which a father's prison sentence was delayed to allow time to arrange for his child's care; ultimately the boy's grandfather assumed the role in lieu of him being placed in foster care<sup>56</sup>, but this represents the exception not the rule.

### \*4.2 Detention prior to sentencing

Consideration of the familial context of a parent who comes into contact with the law should begin as soon as police intervene to arrest someone, and continue throughout the parent's encounter with the legal system and its institutions, from court to prison to post-release<sup>57</sup>. In the context of parental sentencing, consideration of the best interests of the child during pre-trial or remand detention is essential<sup>58</sup>. Detention prior to trial can have devastating effects on families, many of whom live precariously to begin with—people living in poverty are inevitably overrepresented in pre-trial detention because of inability to post bail—and children may bear the brunt of the trauma of initial separation, especially if the parent is the sole caregiver and arrangements are not made for the care of the child.

In the context of parental sentencing, consideration of the best interests of the child during pre-trial or remand detention is essential.

Many criminal justice systems have demonstrated an overreliance on pre-trial detention, a phenomenon that researchers have found tends to manifest 'punitive and risk-averse penal policies, while also...reflecting massive inefficiencies, disorganisation and under-resourcing of judicial systems and processes'<sup>59</sup>. Baldwin and Epstein (2015) have suggested that high rates of remand detention for women in the UK—one study showed that 71 per cent of women on remand in the Magistrates Court and 41 per cent in the Crown Courts were not ultimately convicted for crimes<sup>60</sup>—can be accounted for by a mindset among judges that defendants lead chaotic

<sup>56</sup> Brett, R. (2018), 'Best Interests of the Child when Sentencing a Parent: Some reflections on international and regional standards and practice', Families Outside: Edinburgh, UK, 7.

<sup>57</sup> There have been concerted efforts towards assessing the familial situation of those in conflict with the law upon first contact by the police, beginning with training for child-friendly policing practices and the development of standards for policing when a child may be involved, as well as assuring that children receive appropriate care after a parent's arrest. For further information, see 'Children of Imprisoned Parents' (2011), The Danish Institute for Human Rights, Children of Prisoners Europe, University of Ulster and Bambiniszabarre (2011) and 'Police, Judges & Sentencing: Arrests, Trials & Children's Rights' (2013), Children of Prisoners Europe, Justice for Children of Prisoners Newsletter(3).

<sup>58</sup> In this toolkit, the terms 'pre-trial detention' and 'remand detention' are used interchangeably to indicate detention before trial, during trial or in the period leading up to sentencing. See Appendix I for an explanation of these terms.

<sup>59</sup> Jacobson, J., Heard, C., & Fair, H. (2017), 'Prison: Evidence of its use and over-use from around the world', Institute of Criminal Policy Research: London, 2.

<sup>60</sup> 'Revealed: The wasted millions spent on needless remand' (18 August 2014), The Howard League for Penal Reform, [howardleague.org/news/needlessremand](http://howardleague.org/news/needlessremand), accessed 6 December 2014.



lives that impede their following bail conditions, and that somehow remaining in detention will improve their access to services and lodging<sup>61</sup>. The overuse of remand detention has also reflected discriminatory practices, for instance in the detention of Roma prisoners in Hungary<sup>62</sup> and Bulgaria<sup>63</sup>, where the assumption that Roma detainees pose a flight risk has led to lengthy pre-trial detention periods and swollen prison rates.

In the Netherlands, pre-trial detainees account for 30 per cent of the prison population, a notably higher rate compared to other Western European countries, which suggests the under-use of non-custodial sentencing and a punitive approach to people in conflict with the law<sup>64</sup>. Peggy ver Trugt of the University of Maastricht has produced thorough and recent research on the remand detention of Dutch women, which shows that as many as 57.5 per cent of women under arrest were placed in pre-trial detention until their appearance in court, with another 35 per cent either placed on remand and released before trial or kept in police custody for three to six days. Only 12.5 per cent of women were arrested and released. None of

the women in the survey were allowed contact with their child(ren) directly following their arrest; some were denied contact for several months<sup>65</sup>. A similarly worrying trend of over-reliance on pre-trial detention occurs in Scandinavia, notably Sweden, Norway and Denmark—three criminal justice systems that have in many other respects been seen as models of a rehabilitative approach to incarceration. A 2017 report estimates that as much as one quarter of the Swedish prison population are pre-trial detainees, with an



<sup>61</sup> Baldwin, L., & Epstein, R. (2015), 'Short but not sweet: exploring the impact of short sentences on mothers', *European Journal of Parental Imprisonment* 2, 21.

<sup>62</sup> Roma compose roughly 40 per cent of the Hungarian prison population (Tóth & Kádár, 2013) while accounting for an estimated 7.49 per cent of the general population (Council of Europe, 'Estimates and official numbers of Roma in Europe', 2012). Since the rise of the far-right Fidesz party in Hungarian politics since 2010, Hungarian NGOs and monitoring organisations have noted a recent rise in brutality against Roma suspects, as well as generally degrading prison conditions, violence against and among prisoners, and an increase in the length of pre-trial detention. The U.S. State Department issued a 2015 report detailing social exclusion and discrimination against Roma, including the 'intimidation of civil society bodies and systematic erosion of the rule of law' (in Jacobson, J. et al., 2017).

<sup>63</sup> Research from the Bulgarian Helsinki Committee (2017) suggests a heavy over-representation of Roma among prisoners in Bulgaria: despite an estimated national Roma population of 9.94 per cent (Council of Europe, 'Estimates and official numbers of Roma in Europe', 2012), the share of Roma among newly arrived detainees was higher than 50 per cent. One organisation estimated that some 80 per cent of imprisoned women at Sliven Prison (the only women's facility in Bulgaria) are Roma (for further information, see 'Roma & Traveller Children with a Parent in Prison: A follow-up report with case studies and recommendations' [2018], Montrouge: Children of Prisoners Europe).

<sup>64</sup> Jacobson, J., Heard, C. & Fair, H., (2017), 22.

<sup>65</sup> ter Vrugt, P. (2018), 43-44.

estimated two thirds of this population subject to 'restrictions' including solitary confinement, which amounts to about one eighth of the entire prison population<sup>66</sup>. The Norwegian justice system appears to have limited its use of pre-trial detention, but restrictions during remand can be similarly harsh; these findings have led to the remark that, 'this severe "Scandinavian way" of treating untried prisoners is not found in most other European countries'<sup>67</sup>.

Numerous children's rights standards call for the consideration of the best interests of the child during pre-trial detention. Following the UN Bangkok Rules, 'women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.' Article 9 of Recommendation CM/Rec(2018)5 from the Council of Europe says, 'enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them.' Italy's 'Memorandum of Understanding' insists that priority should be given 'to measures alternative to pre-trial detention in prison' (see Chapter 3 for full article). And the precedent set by *S v M* (South Africa, 2007; see Chapter 2) had an immediate impact on other cases, such as a 2015 case wherein a breastfeeding mother was allowed immediate bail to reunite with her child<sup>68</sup>.

### \*4.3 Indeterminate sentencing standards and judicial discretion

The tension between determinate and indeterminate sentencing standards is central to the question of advocating for child-friendly sentencing reform. Developments towards determinate sentencing have occurred in order to limit the inconsistencies that come with judicial discretionary power, but in certain contexts this development has led to draconian sentencing standards. In the United States, Federal Sentencing Guidelines developed in the mid-1980's—and mandatory until 2005—mandated the 'general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant' (before the guidelines became advisory, one judge described them as, 'so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep')<sup>69</sup>. The journalist Nell Bernstein noted the following, citing an idea from Sentencing Project founder Marc Mauer:

<sup>66</sup> Smith, P.S., 'Punishment Without Conviction? Scandinavian Pre-trial Practices and the Power of the "Benevolent" State', 4, in Smith, P.S., & Ugelvik, T. (Eds.), (2017), *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare state?*, Palgrave: London.

<sup>67</sup> Ibid.

<sup>68</sup> Skelton, A., & Mansfield-Barry, L. (2015), 'Developments in South African law regarding the sentencing of primary caregivers', *European Journal of Parental Imprisonment* 2, 15.

<sup>69</sup> United States Sentencing Commission, 28 U.S.C.A. § 994 (West, 2006) and Weinstein, J.B. (1996), 'The Effect of Sentencing on Women, Men, the Family, and the Community', 5 *Columbia Journal of Gender & Law* 169, in Lerer, T. (2013), 47.

*The movement away from indeterminate sentencing and toward mandatory minimums reflects a shift in thinking about the purpose of incarceration, from rehabilitation to punishment [...] A sentence intended to rehabilitate [needs] to have some built-in flexibility. Once lawbreakers began to be defined exclusively in terms of their criminal acts, and the function of incarceration came to be seen primarily as deterrence and punishment, such flexibility was no longer required<sup>70</sup>.*

On the other hand, the discretionary power afforded judges when standards and case law precedent for sentencing primary caregivers are non-existent—or, as is the case in the United Kingdom, where Sentencing Guidelines are strong but allow for broad judicial discretion—signifies that disparity in sentencing is rampant<sup>71</sup>. The 2017 addendum to the UK Sentencing Guidelines, ‘The Imposition of Community and Custodial Sentences: Definitive Guideline’, states that, ‘for offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependents which would make a custodial sentence disproportionate to achieving the aims of sentencing<sup>72</sup>. Yet Shona Minson’s research on the discretion of Crown Court sentencers in the UK found that a number of judges were completely unaware that the Guidelines contained provisions for the consideration of children during sentencing, and no single judge stated that the best interests of the child must be a consideration. Further, three judges of those surveyed found the ‘consideration of dependent children as being contrary to “justice”<sup>73</sup>.

**Yet when a judge is attuned to child’s rights dicta and case law precedents, wide discretion can help judges to make an evaluation of the case that appropriately balances the offence with the best interests of the child.**

The judicial discretion that comes with indeterminate sentencing practices is a good indication of the frame in which a judge is functioning. Lucy Baldwin writes that sentencers in the UK continue to sentence mothers to custody simply ‘because they can’, that ‘as long as sentencing frameworks provide magistrates with relative autonomy and discretion, then sentencing—as well as being inconsistent—will lean towards more punitive responses<sup>74</sup>. Yet when a judge is attuned to child’s rights dicta and case law precedents, wide discretion

can help judges to make an evaluation of the case that appropriately balances the offence with the best interests of the child. In his judgement in *S v M*, Justice Albie Sachs wrote,

<sup>70</sup> Bernstein, N. (2005), *All Alone in the World: Children of the Incarcerated* (The New Press: New York & London), 33.

<sup>71</sup> See Chapter 3 for Heleen Lauwereys’ piece on judicial discretion and best interests considerations in Belgian courts, in which she found that five of the seventeen judges that she surveyed ‘deemed the best interests of the child irrelevant in the sentencing decision and indicated that they would not consider them.’

<sup>72</sup> In Minson, S. (in publication), 246.

<sup>73</sup> *Ibid.*, 251.

<sup>74</sup> Baldwin, L., & Epstein, R. (2015), 21.

*A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned<sup>75</sup>.*

What should be necessitated, in other words, is the evaluation of the potential repercussions of the sentencing decision on the dependents of the offender. This is the hinge that suggests the need for an evaluation of the best interests of the child; judges should be mandated to consider the best interests of the children of offenders in a systematic manner, with decisions tailored to each child’s needs.

#### \*4.4 Best Interests of the Child Assessments

Given different names depending on the context, a Best Interests of the Child Assessment—variably referred to as a Child Impact Statement or Pre-Sentence Report, among other things<sup>76</sup>—is a formal report delivered to a sentencing court that thoroughly evaluates the conditions of the child(ren) of a defendant in the face of a possible custodial sentence. UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration emphasises that best interests assessments should be ‘carried out by the decision-maker and his or her staff—if possible a multidisciplinary team—and requires the participation of the child<sup>77</sup>. The same document stipulates the following:

*Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases<sup>78</sup>.*

<sup>75</sup> *S v M* at 24.

<sup>76</sup> Other names include Best Interests of the Child Evaluation, Child Impact Assessment, Pre-Sanction Report. Such assessments have seen standardised implementation especially in refugee and migrant rights settings, where the United Nations High Commissioner for Refugees (UNHCR) makes Best Interests Determinations (BIDs) following initial assessment.

<sup>77</sup> UN Committee on the Rights of the Child General comment No. 14 (2013), para. 47.

<sup>78</sup> *Ibid.*, para. 6c.

The procedures taken in *S v M* (South Africa, 2007; see Chapter 2) again serve as a good example of this procedure. Given the centrality of the defendant's status as primary caregiver in her case for appeal to the Constitutional Court, Justice Albie Sachs called for three independent parties to look into the situation of the children involved: a *curator ad litem*, an *amicus curiae* and several reports from social workers at the South African Department of Social Development. Notably, not only was there a multidisciplinary team of researchers tasked with preparing separate assessments of the defendant's familial situation, but the team included independent researchers unattached to the court, whereas in some contexts this responsibility lies with Probation Service staff<sup>79</sup>.

The integration of Best Interests of the Child Assessments as a required standard sentencing procedure is the foremost recommendation that child's rights experts make regarding child-friendly sentencing reform. The COPING Project recommended

that assessments should ask questions to discern if the defendant is a primary caregiver; what changes would occur to a child's life if their caregiver were to be imprisoned; who will care for the child and where they will live; and, in case a custodial sentence is handed down, whether that residence is within accessible distance to the place of detention to allow child visits<sup>80</sup>. Following Article 12 of the UNCRC, which says, 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'; the COPING Project proposed that children should be consulted as central voices in the assessment of their best interests, something that Norway has standardised in their Sentencing Guidelines<sup>81</sup>.

Ideally, best interests evaluations would come into the hands of sentencers as early as possible in a parent's encounter with the criminal justice system, beginning before the time of arrest but especially when considering pre-trial detention. One

researcher noted that, in the US context, sentencing determinations tend to imitate pre-trial bail determinations, and suggested that Best Interests of the Child Assessments should be carried out when deciding pre-trial sanctions<sup>83</sup>.

#### **NORWAY: PROTECTIVE SENTENCING GUIDELINES FOR MOTHERS**

Norway's sentencing guidelines stipulate that during the sentencing of the caregiver of a child, child welfare services and 'external organisations such as the child's school or day-care centre' should be consulted with by the court in order to determine the best interests of the child. Furthermore, when deemed appropriate, courts are to hear the opinions of children regarding their opinions or preferences towards the sentencing of their caregiver<sup>82</sup>.

<sup>79</sup> See for examples see Minson, S. (in publication), Lerer, T. (2013) and ter Vrugt, P. (2018).

<sup>80</sup> COPING Project, 97.

<sup>81</sup> Paurus, M. (2017), 'International Report on the Conditions of Children of Incarcerated Parents: A Survey of Prison Nurseries', Children of Incarcerated Caregivers: Minneapolis, 38.

<sup>82</sup> Paurus, M. (2017), 38.

<sup>83</sup> Lerer, T. (2013), 46.

# Appendices



## Appendix I. Important terms and definitions

**Adverse Childhood Experiences (ACEs):** Events experienced by a child that are potentially traumatic, stressful or otherwise have the effect of undermining the child's sense of safety, stability, and parental bonding, and which can affect children and young people throughout their lives. The imprisonment of a parent is one such event, commonly cited alongside nine other experiences: physical, emotional and sexual abuse, physical and emotional neglect, mental illness, violence towards a mother, divorce and substance abuse. ACEs have been shown to correlate with multiple health risk factors for several of the leading causes of death in adults later in life, among them physical and mental illness and substance abuse<sup>84</sup>. ACEs can also impact education and future employment. The negative effects of ACEs have been shown to be mitigated with appropriate intervention<sup>85</sup>.

**Amicus curiae:** Literally 'friend of the court' (plural, *amici curiae*). A person or entity that provides information, expertise or insight to a court with respect to the ongoing litigation of a case, but that is not a party to that litigation. *Amici curiae* are usually experts or authorities on an issue in the case in which they submit arguments, and can be requested by one of the parties to the case; their arguments are submitted, typically in the form of a report, in order to aid the court in making its decision. The decision of whether to consider an *amicus* brief lies within the discretion of the court.

**Best Interests of the Child Assessment:** An evaluation undertaken in legal procedures, and in other contexts, where decisions are to be made affecting the status of a child or children. This assessment takes into account the particular circumstances of the children involved, balancing various elements to ensure that the outcome of the procedure is most appropriate for their wellbeing. The UN Committee on the Rights of the Child stipulates that such assessments, as well as the best-interests determinations that result from them, are to be administered by decision-makers and their staff, ideally a multidisciplinary team, and that such assessments require the participation of the child<sup>86</sup>.

**Best interests of the child principle:** According to Article 3.1 of the UNCRC, a principle stating that the best interests of the child must be a primary consideration in all decisions affecting children, including those made in courts of law. This principle tends to presuppose an evaluation of the best interests of the child, though it remains widely debated (for further discussion, see section 2.2 of this toolkit).

<sup>84</sup> Felitti, V.J. et al. (1998).

<sup>85</sup> See COPING project and 'Preventing Adverse Childhood Experiences (ACEs): Leveraging the Best Available Evidence', National Center for Injury Prevention and Control (Division of Violence Prevention), Center for Disease Control and Prevention: Atlanta, 2019.

<sup>86</sup> UN Committee on the Rights of the Child General comment No. 14 (2013), para. 47.

**Curator ad litem:** Also known as a *guardian ad litem*, this is an individual appointed by a court to represent the best interests of someone, usually a child or someone else without the legal capacity to make decisions for themselves, during a court case.

**Custodial sentence:** A criminal sanction imposed when the offence committed justifies detention according to a country's criminal code, or when a court finds an offender to pose a risk to the public. These sentences are served either in prison or in some other closed therapeutic or educational institution.

**Determinate sentencing standard:** A standard that prescribes a fixed period of time for prison sentences based on a particular crime or crimes.

**Indeterminate sentencing standard:** A standard that does not specify a fixed period of time for prison sentences applicable to a particular crime or crimes, although there is typically a minimum amount of time that must be served.

**Paramountcy principle:** A principle of law introduced in the Children Act 1989 (UK) stating that in determinations that bear on a child's upbringing, or the administration of a child's property, a decision-maker must hold the welfare of the child as the paramount consideration. The chosen outcome must be that which most benefits the welfare of the child in light of all relevant factors.

**Positive parenting:** As defined in Council of Europe Recommendation Rec(2006)19 on policy to support positive parenting, a conception of parental behaviour, based on the best interests of the child, which promotes the child's development through recognition, guidance and boundary setting in a non-violent setting.

**Pre-trial detention:** Custody of a person accused of committing a crime, who has been denied or is unable to post bail before a trial. Pre-trial detention can include detention during the trial stage. This term is often used interchangeably with Remand Detention.

**Primary caregiver:** A person who takes primary responsibility for a child and who is usually the main provider of care or guardianship to a child.

**Psychological parent:** A person who provides daily interaction, companionship, and interplay with a child, fulfilling the child's psychological and physical parental needs, as well as providing for the child's emotional and financial support<sup>87</sup>.

**Remand detention:** Detention of a person who has been charged with or is on trial for a crime, when that person has not yet been convicted of the crime. As defined in Council of Europe Recommendation Rec(2006)13 on the use of remand in custody,

<sup>87</sup> Goldstein, J., Freud, A., & Solnit, J. (1979).

‘remand in custody’ broadly signifies detention that lasts until a sentence is finalised, including until the conclusion of the final appeals process<sup>88</sup>. This term is often used interchangeably with Pre-Trial Detention, or in certain contexts it can describe the extension of Pre-Trial Detention for additional periods of custody.

**Sentencing guidelines:** Official guidance for courts regarding what sentences should be given for particular crimes, which varies by jurisdiction. They set out considerations the court should take into account, including factors that would either mitigate or increase the severity of the sentence. These factors may include the conduct or culpability of the convicted person, the personal circumstances of the convicted person, including whether or not they are a primary caregiver, or the level of harm suffered by the victim.

<sup>88</sup> Council of Europe Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted 27 September 2006.

## Appendix II. Key standards and jurisprudence protecting children’s rights

<b>A. International standards</b> .....	<b>41</b>
<b>B. Regional standards</b> .....	<b>43</b>
<b>C. Country standards</b> .....	<b>46</b>
<b>D. Some relevant jurisprudence</b> .....	<b>49</b>

### A. International standards

The **UN Convention on the Rights of the Child (1989)** is the universal standard-bearer for children’s rights, providing the broadest and among the most rigorous standards that should be considered during criminal proceedings where the defendant is parent to a child. The following Articles especially outline rules specific to this context:

**Article 3.1:** 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.

**Article 9.1:** States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child [...].

**Article 9.2:** In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

The development of research and greater awareness about children affected by parental imprisonment prompted the **UN Committee on the Rights of the Child**, the governing body of the UNCRC, to release a report in 2006 that included recommendations for sentencers:

The Committee emphasises that in sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)<sup>89</sup>.

<sup>89</sup> United Nations Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on ‘Children of Incarcerated Parents’ [30 September 2011], para. 31.

The UN General Assembly adopted this language in 2009 with its **Guidelines for the Alternative Care of Children Without Parental Care**, including the following conditions:

When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration<sup>90</sup>.

In 2013, the UN Committee on the Rights of the Child published **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)**, which expounds upon the principle of the best interests of the child proposed in Article 3 of the UNCRC:

**Article 6(c):** Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

**Article 69:** In cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied 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.

2010 saw the adoption by the **UN General Assembly of the UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders**, better known as the **Bangkok Rules**, which proposed rules including a stipulation surrounding the sentencing of mothers with dependent children. They are as follows:

<sup>90</sup> Adopted by the UN General Assembly, 18 December 2009, para. 48. The Guidelines go on to include the following conditions related to children born in prison: 'States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.'

**Rule 2.2:** Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

**Rule 58:** [...] Women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives, shall be implemented wherever appropriate and possible.

**Rule 61:** When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds.

**Rule 63:** Decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs.

**Rule 64:** Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and 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.

## B. Regional standards

The foremost European standard for protecting the rights and well-being of children with imprisoned parents was only recently adopted by the Council of Europe. Published in 2018, **Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents** sets guidelines on the European level, however non-binding, for the safeguarding of children's rights during sentencing. What sets this Recommendation apart from broader standards like those mentioned above at the UN level is its recommendation of detailed procedures of child protection in addition to re-articulating children's rights as set out by the UN texts cited above. Among other policies, it suggests that courts should strive



to incorporate specific measures that encourage maintenance of the child-parent relationship, like parenting programmes, when in the interest of the child, and that government agencies should collaborate towards safeguarding children's well-being. The following Recommendations are most relevant to the sentencing process:

2. Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

10. Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.

41. In order to promote positive parenting, consideration shall be given in sentence planning to include programmes and other interventions that support and develop a positive child-parent relationship. Specific support and learning objectives include preserving, and exercising as far as possible, their parental role during imprisonment, minimising the impact of imprisonment on their children, developing and strengthening constructive child-parent relationships, and preparing them and their children for family life after release.

49. The relevant national authorities should adopt a multi-agency and cross-sectoral approach in order to effectively promote, support and protect the rights of children with imprisoned parents, including their best interests. This involves co-operation with probation services, local communities, schools, health and child welfare services, the police, the children's ombudsperson or other officials with responsibility for protecting children's rights, as well as other relevant agencies, including civil society organisations offering support to children and their families.

Recommendation CM/Rec(2018)5 was preceded by the **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice**. Published in 2010, this is an expansive set of guidelines for implementing child-friendly justice at all stages, from the child's interactions with law enforcement to the release of a parent from prison:

3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.

4. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.

17. A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case.

**Article 8** of the Council of Europe's **European Convention on Human Rights** (1998) guarantees the 'Right to respect for private and family life' and has been upheld in certain courts when sentencing a parent, with equal application to mothers and fathers<sup>91</sup>. Specifically, Article 8 stipulates the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The **African Charter on the Rights and Welfare of the Child** provides broad guidance towards the adoption of legislation that considers the best interests of the child. It places specific focus on protecting against a child's separation from a mother:

**Article 1:** In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

*(1) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.*

<sup>91</sup> Millar, H., & Dandurand, Y. (2018), 255.

**Article 19.1:** Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child.

**Article 30:** State Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- a. Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- b. Establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- c. Establish special alternative institutions for holding such mothers;
- d. Ensure that a mother shall not be imprisoned with her child;
- e. Ensure that a death sentence shall not be imposed on such mothers;
- f. The essential aim of the penitentiary system will be the reformation, integration of the mother to the family and social rehabilitation.

### C. Country standards

There has been extensive progress made towards conducting more child-friendly sentencing practices throughout Europe and the world. Some examples of this progress are as follows:

**Italy's 2014 Memorandum of Understanding between the Ministry of Justice, National Ombudsman for Childhood and Adolescence and Bambinisenzasbarre ONLUS** (COPE member, Italy) provided inspiration for the Council of Europe's CM/Rec(2018)5. The Memorandum of Understanding provides guidance on the sentencing of parents in the section 'Decisions concerning judicial orders, judgments and sentences', in which it states:

Judicial authorities will be made aware of the importance of the following provisions and, in particular, will be asked to:

1. Take into account the rights and requirements of the underage children of the arrested or detained person who still has parental responsibility, when a possible precautionary measure is being decided, giving priority to measures alternative to pre-trial detention in prison;
2. Enforce the restrictions imposed on contacts between pre-trial detainees and the external world in such a way as to not violate the children's right to

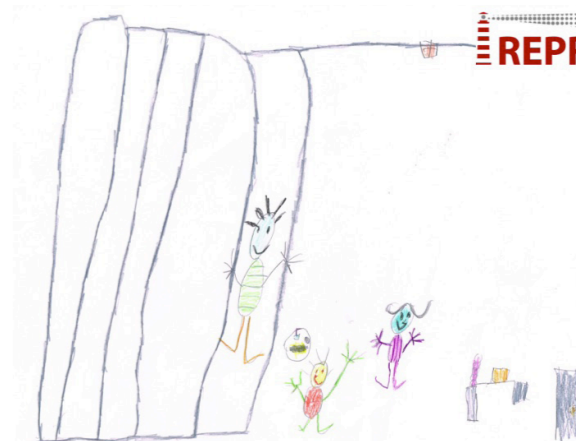
*remain in contact with their parent, as stipulated in the UN Convention on the Rights of the Child;*

3. Choose, in the case of parents of underage children, sentencing measures which take into consideration the child's best interests;

4. Consider the needs of underage children in granting temporary permissions or bonus leaves of absence to imprisoned parents and to commit to implementing them.

Article 145(5) of **France's** Code of Criminal Procedure provides that whenever any defendant has exclusive parental authority over a child under the age of sixteen, the court must evaluate the child's situation before pre-trial detention. This section reads as follows:

Where, during questioning by the investigating judge prior to the transfer of the case to the liberty and custody judge, a person makes it known that he/she has exclusive parental authority over a minor of under sixteen years, who lives with him/her, his/her placement in pre-trial detention may not be ordered unless one of the services or people described in article 8, paragraph 7, has first been mandated to research and propose all measures necessary to prevent the endangering of the minor's health, safety or morals or the serious compromising of his/her education. The provisions of the present Article shall not apply in cases of felony, misdemeanours committed against a minor, or in cases where the obligations of judicial supervision are not respected.



### Arrest and pre-trial measures

**Lithuania** has barred all arrests of pregnant women and people raising a child under the age of three, with due regard for the child's best interests<sup>92</sup>. In the **Netherlands**, police are obligated to execute a 'Child Check' before the arrest of a parent and, upon initial processing at any detention centre, officers must include questions to determine if a prisoner has children and whether arrangements have been made for their care<sup>93</sup>.

<sup>92</sup> Lithuanian Criminal Code, Article 49(6), in 'The United Nations Global Study on Children Deprived of Liberty' (Chapter 10: 'Children living in prisons with their primary caregivers'), Nowak, M. (lead author), 2019, 384.

<sup>93</sup> Verhagen, A., Claes, B., & Elsbeth, K. (2019), 'Children and incarcerated parents: A Dutch perspective on recovery-focused work', *European Journal of Parental Imprisonment* 8, 9.



### Pre-trial detention

On the question of pre-trial detention, **Cambodia** bars the imposition of remand measures for pregnant women or for mothers when suitable alternative care arrangements are unavailable, and **Indian** courts are mandated to take into consideration the familial situation, including the condition of pregnancy, of convicted persons at the time bail is granted<sup>94</sup>. In **Fiji**, bail may be granted when both parents are in custody and alternative childcare is unsuitable<sup>95</sup>.

### Non-custodial sentences

**Scotland's** Criminal Justice and Licensing Act of 2010 legislates that, system-wide, courts should not pass a custodial sentence of three months or less, unless a court is 'of the opinion that no other disposal is appropriate'. A movement to eliminate all sentences of twelve months or less has been proposed and in deliberation since 2019<sup>96</sup>.

A number of countries allow pregnant women and mothers of young children or children with disabilities to serve non-custodial sentences, including **Argentina** (for children under five), **Brazil, Costa Rica, Ecuador, El Salvador, Italy** (for children under ten), **Peru, Mexico** and **Nicaragua**<sup>98</sup>. The same holds true in **Colombia**, where constitutional law extended a prerogative in 2012 to include fathers who serve as primary caregivers<sup>99</sup>. In **Tunisia**, all women who are primary caregivers are theoretically eligible for home detention<sup>100</sup>, and in **Denmark, France, Greece, Italy** and **Ukraine** adjustments can be made to the execution of sentences, including non-custodial measures<sup>101</sup>.

**Greece** allows mothers of children under eight years old who are serving a sentence of up to ten years to serve the sentence, or what remains of it, under home detention<sup>102</sup>. Pregnant women or women with children under three years old detained in **Uzbekistan** are given 'ancillary rights' based on the prison administration's assessment of the fulfilment of their sentence, including serving the finishing the sentence outside of prison and the right to leave prison to make arrangements for their children<sup>103</sup>. Mothers serving sentences in **Norway** can serve in *mødrehjem* (homes for mothers) or rehabilitative institutions, and cases exist where mothers serve a non-custodial sentence or perform community service in lieu of a custodial sentence<sup>104</sup>.

<sup>94</sup> 'UN Global Study on Children Deprived of Liberty', 380.

<sup>95</sup> 'UN Global Study on Children Deprived of Liberty', 381.

<sup>96</sup> 'Final Business and Regulatory Impact Assessment: The Presumption Against Short Periods of Imprisonment (Scotland) Order 2019'.

<sup>97</sup> Paurus, M. (2017), 38.

<sup>98</sup> 'UN Global Study on Children Deprived of Liberty', 382.

<sup>99</sup> Paurus, M. (2017), 38.

<sup>100</sup> 'UN Global Study on Children Deprived of Liberty', 379.

<sup>101</sup> Ibid., 384.

<sup>102</sup> Ibid., 385.

<sup>103</sup> Ibid., 380.

<sup>104</sup> Paurus, M. (2017), 38.

### Suspended sentences

A number of countries allow mothers to serve suspended sentences during the period of a convicted mother's pregnancy (in **Vietnam, Lao PDR** and **Palestine**), after childbirth (up to six months in **Iran**; one year in **Uzbekistan** or one and a half years in **Lao PDR**) or until the child reaches a certain age. In **Kyrgyzstan**, first-time female offenders who are pregnant or who have children under the age of 14 years can receive a suspended sentence<sup>105</sup>. Mothers sentenced in **Norway** have the right to a suspended sentence until the child is of nine months of age<sup>106</sup>. **Croatian** judges have discretion to postpone the sentences of mothers with children younger than six months<sup>107</sup>.

### Postponed sentences

Several countries, including **Algeria, Chad, Netherlands, Sweden** and **Norway**, allow mothers of young children to postpone the service of a sentence for a reasonable amount of time in order to arrange for childcare<sup>108</sup>, and services are postponed for pregnant women and mothers in **Georgia** who have given birth within a year. Service of a sentence can be interrupted in the **Czech Republic** until the child reaches one year of age<sup>109</sup>.

Postponement of a sentence may be possible for a convicted parent if the other spouse is already imprisoned (in **Algeria, Chad** and **Slovenia**), in order to provide continuity for children<sup>110</sup>. Both **Egypt** and **Palestine** allow delayed sentencing for one parent when both a mother and father of a child younger than fifteen years old are sentenced to prison; the same holds true in **Yemen** for parents serving sentences for less than a year without previous imprisonment if their child is under thirteen years<sup>111</sup>.

### D. Some relevant jurisprudence

The decision in **South Africa's** 2007 Constitutional Court case *S v M* remains the standard bearer for cases on the sentencing of primary caregivers (see Chapter 2 of this toolkit for a full analysis), but case law developments in other regional contexts are also worth noting.

In **England and Wales**, precedent set in the 2001 cases *R (on the application of Stokes) v Gwent Magistrates Court* and *R (on the application of P and Q) v Secretary of State for the Home Department* highlighted that courts should perform a 'balancing exercise' in sentencing to weigh interference with a child's right to family life against the

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Brett, R. (2018), 7.

<sup>108</sup> Paurus, M. (2017), 38.

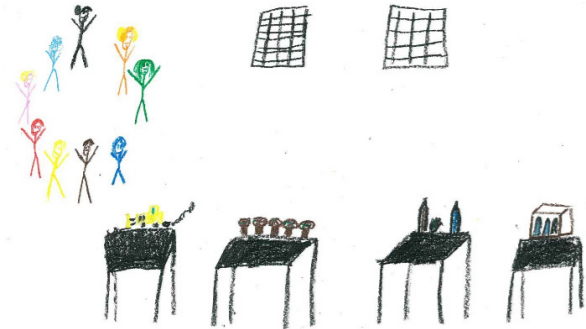
<sup>109</sup> 'UN Global Study on Children Deprived of Liberty', 385.

<sup>110</sup> Brett, R. (2018), 7 and 'UN Global Study on Children Deprived of Liberty', 380.

<sup>111</sup> Paurus, M. (2017), 38 and 'UN Global Study on Children Deprived of Liberty', 381.

seriousness of the offence<sup>112</sup>. The ruling in the 2011 case *R v Bishop*, subsequently affirmed in *R v Petherick* (2012), upheld that criminal courts should take the domestic circumstances of a defendant into account, particularly where ‘the family life of others, especially children, will be affected’<sup>113</sup>, and that courts should accordingly seek information on the likely effects of a custodial sentence on children and balance these effects with the need to punish the offender<sup>114</sup>.

In 2018, **Brazil’s** Supreme Federal Court ruled by majority vote to grant *habeus corpus* to remand detainees who are pregnant women, mothers and teenagers responsible for children under the age of twelve or women and teenagers responsible for people with disabilities<sup>115</sup>.



The High Court of **Malawi** has judged on two occasions, in both *Dickson and Another v Republic* (2007) and *Alasani v Republic* (2015), that the defendants of each case, both mothers of young children, should be released on bail as opposed to being detained with their infants<sup>116</sup>. A similar ruling was made in **Fiji’s** High Court, where an application of UNCRC Articles 3 and 9 in *Devi v The State* (2003) led the court to find that the care of dependents is a relevant consideration in bail decisions<sup>117</sup>.

### Appendix III. Suggested further reading

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113 England and Wales Court of Appeal *R v Petherick* [2012] EWCA Crim 2214 at 20.

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115 This ruling comes with numerous caveats, including its non-application in ‘highly exceptional situations’ or in the case of violent crimes or when children are at risk. See Judgement of Habeus Corpus No. 143.641/SP, Supreme Federal Court of Brazil, 20 February 2018 (in ‘UN Global Study on Children Deprived of Liberty’, 376).

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