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# Children of (Alleged) Offenders: Revised Draft Framework for Decision-Making

*by Holly Mason-White and Helen F. Kearney  
Foreword by Rachel Brett and Oliver Robertson*

English

Français

Español

## Foreword

Around the world, children are affected when a parent goes into prison. Their relationships can change and come under strain, both with the incarcerated parent and with others. They can experience the stigma and shame of being associated with a prisoner. They may have to change their home, school and friends because of parental imprisonment. They may become poorer, with the family having less income and more prison-related costs. Their education may suffer and long-term prospects be at risk. And their attitudes towards the criminal justice system may be permanently affected by having a parent taken away.

Children of incarcerated parents, like children in general, are all individuals. Each will have a different experience of and response to parental imprisonment, and the unique situation of each child should be considered in all interactions with them and decisions that affect them. However, they should in all cases be considered and their rights upheld, in particular their right not to be discriminated against because of the actions of their parent, their right to be consulted and heard in decisions affecting them, and their right to have their best interests be a primary consideration in all matters that affect them.

The Quaker United Nations Office (QUNO) Geneva has been working on this issue since 2003, as part of its wider work on women in prison and children of prisoners. Taking a child rights approach, we have commissioned research, drawn together information from around the world and produced publications covering general and specific aspects of the issue. Our approach is that the child is an individual with their own rights and needs, not just an add-on to their parent.

In the course of our work, we have become acquainted with some of the groups and organisations in many countries working with and for children of prisoners. Many of these came together at the UN Committee on the Rights of the Child's Day of General Discussion 2011, which had as its topic 'children of incarcerated parents'. This event, the first substantive discussion of the issue by any part of the UN system, generated unprecedented engagement and attendance, with around 200 participants on the day and over 50 written submissions made in advance. These can be viewed at: [http://www2.ohchr.org/english/bodies/crc/discussion2011\\_submissions.htm](http://www2.ohchr.org/english/bodies/crc/discussion2011_submissions.htm).

This revised draft Framework is a comprehensive exploration of the relevant child rights issues throughout the criminal justice process, from a parent's arrest or detention to release following imprisonment. Rather than trying to provide detailed answers to every issue raised, we hope to alert criminal justice and other professionals to the issues so that they can develop their own context-specific solutions. To aid this, we have included examples of potential good practice throughout, as well as relevant international and regional standards in the annexe.

Not all sections of the Framework will be relevant to everyone; it is designed in a user-friendly colour format to be easy to navigate so that different readers can select those stages of the process that are most appropriate for them. We

hope you find it useful. As the Framework is still in draft, we welcome hearing any comments, suggestions, examples of good practice or other feedback.

The high quality of this Framework is due to the diligence and talent of its authors: Helen F. Kearney and Holly Mason-White. Together with other QUNO staff, past and present, working on this programme, they have helped to raise awareness of children of prisoners internationally and provide ideas and guidance on how their rights and needs can best be met.

Rachel Brett and Oliver Robertson



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# INTRODUCTION

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# Preliminary Notes

## 1.1 Note on the structure of the framework

This Draft Framework for Decision-Making focuses on the criminal justice system. While many of the provisions are relevant to other forms of detention, such as immigration or mental health, this Framework aims to apply to children whose parents are accused or convicted of criminal offences.

Part one provides an introduction and an overview of the human rights framework relevant to the children of the incarcerated, based on the UN Convention on the Rights of the Child (CRC).

Part two is divided into eight sections; Data-collection and information-sharing; Arrest; Decisions on pre-trial measures; Pre-trial detention; Trial and sentencing; Imprisonment - children inside (living in prison with a parent) and children outside (separated from an incarcerated parent); and Release and reintegration. At the beginning and throughout each section, reference is made to the relevant articles of the CRC.

### **Good practice**

Brief examples of good practice are also included, i.e. positive consideration through legislation, policy and practice by States, courts and local organisations or institutions that demonstrate different ways in which the issues can be addressed. These will appear in text boxes to distinguish them from the issues to consider.

Part three provides a comprehensive picture of existing specific standards on chil-

dren of incarcerated parents, highlighting where they are mentioned in documents such as the Resolutions of the UN Human Rights Council, UN Guidelines on Alternative Care and the African Charter on the Rights and Welfare of the Child.

There are issues raised here that require further, more detailed consideration. These include:

- Alternatives to the criminal justice system (such as drug courts or restorative justice systems) and the issues that arise in relation to children of parents in these contexts.
- The differential impacts of particular crimes and sentences.
- The situation of non-resident foreign prisoners.
- Children with disabilities (physical, cognitive, mental, sensory, emotional, developmental or a combination of the above).

## 1.2 Note on the definition of 'Child'

This document uses the definition of the child stated in the Convention on the Rights of the Child (CRC), Article 1:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Unless an age group is specified, the words 'child' or 'children' in this document refer to all those up to the age of eighteen. Children of all ages who have a parent in prison will have specific and similar needs. At the same time, the age and developmental stage of the child affects the kind of provision and consultation that is relevant.

For ease of reading, the singular 'child' has been favoured throughout the text rather than 'child(ren)'. It should be remembered that the (alleged) offender may well have more than one child.

Finally, we should be aware that children in the criminal justice system may also be parents.

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## Introduction

Millions of children worldwide are affected by parental detention and imprisonment. This paper proposes a 'Framework for Decision-Making' in relation to children of prisoners and (alleged) offenders. It is primarily informed by the human rights provisions that are relevant to the children concerned. It has three core aims:

- to raise awareness of the impact of the public authorities' actions on children throughout the criminal justice process - from arrest or detention to release following imprisonment;
- to highlight the services that should be provided;
- to provide guidance, based on the UN Convention on the Rights of the Child (CRC), on how to address the best interests of the child.

Parental involvement with the criminal justice system has profound impacts on children. Until quite recently, these impacts have been largely neglected.<sup>1</sup> The fact that the number of affected children is still unknown is testimony to the extent of this neglect. Most countries fail to record information about dependent children when collecting information about an (alleged) offender at every stage of the process. See chapter 4 (Data collection and information sharing). Over-incarceration is a global phenomenon, with increasing rates of imprisonment affecting a disproportionately high number of women. This means that more and more children around the world are likely to be affected by parental incarceration.

In general terms, research suggests that paternal imprisonment tends to be less directly disruptive to a child's life since it is more common for the child to be already living with the mother and to continue to do so. However, it regularly leads to a loss

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<sup>1</sup> Alison Liebling and Shadd Maruna, *The Effects of Imprisonment*, (Willan Publishing), 2005:16.

of family income. When the mother is imprisoned, the child often moves to another primary carer, which usually entails moving house, moving to a new school with consequent loss of contact with extended family, friends and community networks.

Children of incarcerated parents will not experience and respond to parental incarceration in the same way. Prisons and the societies in which they exist vary, and the provision for affected children also varies, both within the criminal justice system and in the wider society. Moreover, children are individuals and their experiences depend on a wide range of more or less personal factors, including the child's age, level of maturity, individual developmental needs, family background and current environment, relationship with their parent(s), the nature of the offence and sentence, whether it is the father or the mother who is in conflict with the law, the wider family circumstances (especially with regards to alternative care) their socio-economic circumstances, cultural context and country(ies) of residence and citizenship.

The child's need for special care and protection has been widely-recognised in international and regional human rights instruments.<sup>2</sup> The UN CRC is the specific treaty that sets out the civil, political, economic, social, and cultural rights of children. It requires states to undertake all appropriate legislative, administrative and other measures necessary for the fulfilment of the rights that it recognises.

The CRC is the most widely ratified human rights instrument in the world.<sup>3</sup> But ratification alone is not enough. For the CRC to really advance the rights and well-being of the children of the incarcerated, human rights ideas need to be picked up and used in local contexts, by everyone who is directly or indirectly concerned with a parent's involvement with the criminal justice system (the children and parents themselves, police, prison staff, social workers, teachers, psychologists, doctors, nurses etc.)

Without underestimating the importance of a child's location and situation as factors influencing their experiences, there are some things that every child needs and some things that should not happen to any child. The incorporation of human rights principles and documents can provide those working for child welfare and social justice with *a clear, encompassing and global set of guidelines*.

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<sup>2</sup>See, for example, Article 24 of the International Covenant on Civil and Political Rights: 'Every child shall have the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state'; Geneva Declaration on the Rights of the Child, 1924; The Universal Declaration of Human Rights in 1948; The Declaration on the Rights of the Child adopted by the General Assembly, 1959; the International Covenant on Civil and Political Rights (Articles 23 and 24); the International Covenant on Economic, Social and Cultural Rights (Article 10) as well as the statutes of the specialised agencies and organisations concerned with children.

<sup>3</sup>As of November 2011, every country in the world had ratified, accepted or acceded, except the United States and Somalia. However, the cases of some States parties, the Convention is subject to far-reaching reservations. For Comments on this by the Committee on the Rights of the Child, see their General Comment 5 (General Measures of Implementation for the Convention on the Rights of the Child: Articles 4, 42 and 44 (6)), paras. 13-16, 3 October 2003.

There are many good and innovative practices around the world related to children of (alleged) offenders, often developed locally but applicable far more widely. This Framework attempts to provide a forum in which to share information. The authors welcome input from interested parties on the content, structure and format of this Draft Framework. We especially welcome comments, feedback and examples of good practice from countries that have not yet been included. The authors are Australian and British, respectively, and any omissions or apparent geographical biases result from limitations in our own knowledge and experience, and those of our correspondents.

This Framework attempts to provide some clarity on the issues that may arise and therefore need to be considered at each stage of the process, from arrest through to imprisonment and release. The importance of child rights should underpin all thinking and all policy development for the children of (alleged) offenders.

When the issues in this Framework are adequately addressed, the human rights of these children will be increasingly fulfilled. This disadvantaged and neglected group will receive support for their own safety and well-being to improve, and this in turn will contribute to breaking the cycles of social exclusion and intergenerational contact with the criminal justice system.

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## The child rights framework

By introducing a child rights perspective, this Framework for Decision-Making will attempt to put affected children at the centre of public authorities' concerns. There are child rights standards in place, but they are often overlooked. This description of the child rights framework will focus on the UN CRC (the specific treaty that sets out the civil, political, economic, social and cultural rights of children). Section Three of this Framework will give a more comprehensive picture of existing specific standards relevant to the children of (alleged) offenders.

The CRC only makes explicit mention of the children of incarcerated parents in Article 9(4). Other regional child rights documents treat the issue in more depth.<sup>1</sup>

However, the CRC does contain a number of rights and principles that are directly relevant to the situation of these children. Most notably:

**Article 2:** Non-discrimination<sup>2</sup>

**Article 3:** Best interests

**Article 9:** Right to regular contact with parents from whom the child is separated

**Article 12:** Right to be heard

**Article 16:** Right to privacy and family life

**Article 19:** Right to protection from any physical or psychological harm or violence

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<sup>1</sup>The African Charter on the Rights and Welfare of the Child, for example, devotes Article 30 to the children of imprisoned mothers.

<sup>2</sup>States parties assume an obligation to respect and ensure the rights set forth in the Convention 'without discrimination of any kind', including discrimination based on the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members (Article 2.2).

The concept of 'best interests' is the broad principle underlying the CRC.

Article 3.1 provides:

'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'.

With regards to children affected by parental contact with the criminal justice system, the Committee for the Rights of the Child has recommended that '[W]here the defendant has child caring responsibilities' the principle of the best interests of the child should be 'carefully and independently considered by independent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child.'<sup>3</sup>

**The following articles of the CRC are also relevant**

Right to birth registration, especially for children born to an imprisoned mother, including where the mother is a foreign national; (Art.7); Right to family contact and reunification, especially for children whose parents are born in another State, including where the parents are imprisoned foreign nationals (Art.10); Parental involvement in upbringing and development (Art.18); Alternative care (Art.20); Adoption, including where parental rights are terminated as a direct or indirect result of imprisonment (Art.21); Special needs of the disabled child (Art.23); Resources available to and needed by the children (Art. 26); Adequate standard of living (Art.27) Education (Art. 28 and Art.29); Leisure (Art.31); Economic exploitation (Art.32); Use or trafficking of illicit drugs (Art.33); Deprivation of liberty, for children living in prison with a parent (Art.37).

The Committee has addressed a range of issues relating to children of prisoners during States' reporting processes and in its Concluding Observations. They consider the situation of babies living in prison with their mother and the inadequacy of such environments. Some also refer to vulnerability of non-imprisoned family members caused by the detention of a parent, or to situations of children in detention, which could be understood to include children detained with parents.<sup>4</sup> The Committee has made it clear that alternative care for children who are separated from their imprisoned mother should allow the child to 'maintain personal and direct contact with the mother who remains in prison.'<sup>5</sup>

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<sup>3</sup>Consideration of Reports submitted by States Parties under Article 44 of the Convention. Concluding Observations, Thailand, 17th March 2006, CRC/C/THA/CO/2, Para. 48.

<sup>4</sup>Examples can be found for: Burundi, September 2010 (CRC/C/BDI/CO/2, paras. 62-63); UK, September 2008 (CRC/C/GBR/CO/4, paras.26-27, 44-45); Ethiopia, September 2006 (CRC/C/ETH/CO/3, paras. 49-50); Iran, January 2005 (CRC/C/15/Add.254, paras. 51-52); Philippines, May 2005 (CRC/C/15/Add.259, paras. 53-54); Sudan, September 2010 (CRC/C/SDN/CO/3-4, paras. 62-63); Thailand, March 2006 (CRC/C/THA/CO/2, paras. 47-48) and others.

<sup>5</sup>Thailand, March 2006 (CRC/C/THA/CO/2, para.48).

Children of incarcerated parents are directly mentioned at Article 9, CRC (the child's right to frequent and regular contact with his or her parent/s). From a legal perspective, the right to contact is more frequently acknowledged with regards to the right to respect for family life of the prisoner; it implies a right to have contact with one's children during detention, under certain conditions. While this paper stresses the importance of the child's rights perspective, a child's well-being is enmeshed in the well-being of the families, households and communities in which he or she lives. This fact is acknowledged in the various instruments which protect the right to family life for both parents and children, even when separated from each other by divorce, migration or detention.<sup>6</sup>

It is important to note that ties between arrested or incarcerated parents and their children and families have been linked to a number of positive outcomes for the prisoners and the wider criminal justice system. These outcomes include reduced disciplinary problems when in custody, reduced mental health problems both during imprisonment and after release, greater likelihood of family reunification and reduced recidivism. The protection of the family life of (alleged) offenders is highly relevant to this Framework. However, children are not merely 'ties' to be maintained in order to facilitate offender management and reintegration. They are autonomous individuals with their own rights and needs. International human rights instruments also require that this issue be addressed from *a child rights perspective*.

### 3.1 To what extent are the best interests of the child currently taken into account when sentencing a parent?

The principle of the child's best interests has been interpreted widely by States. 'The lack of legislative guidance has in many cases led to courts themselves establishing and developing substantive criteria for the determination of a child's best interests.'<sup>7</sup> Around the world, some jurisdictions take the impacts on the children into account when sentencing parents (e.g. Egypt, India, and New Zealand). Others (e.g. England and Wales, Chile) leave the decision to the individual judge's discretion. The stages of parental involvement with the criminal justice system where the child's best interests are most frequently overlooked are arrest and pre-trial detention.

#### **Good practice**

In **Egypt**, if both parents receive prison sentences, it is possible to serve them consecutively so that there is always one carer available for the chil-

<sup>6</sup>See the UN International Covenant on Civil and Political Rights (ICCPR), Article 23; the UN CRC, Article 3.2, which refers to the duties of parents towards their children, and the relevant provisions of the regional human rights instruments.

<sup>7</sup>Jean Tomkin, *Orphans of Justice*, QUNO, 2009:5.

### Good practice (cont.)

dren.<sup>8</sup> The Egyptian public prosecutor's office is allowed to delay proceedings against women who are at least six months pregnant until two months after delivery.<sup>9</sup>

In **Italy**, mothers can spend a part of their sentence in home detention, as long as they have already served one third of their sentence, are assessed to be at very low risk of committing further offences and have children under 10 years old.<sup>10</sup> Furthermore, pregnant women or those with children under 6 can only be placed in pre-trial detention in exceptional circumstances.<sup>11</sup>

Since QUNO began working on these issues in 2003, important progress has been made at national levels towards considering the rights of the child when arresting, detaining and sentencing parents.

In 2007 the Constitutional Court in South Africa made a landmark ruling in the case of *S v M* (CCT53/06), where it addressed the precise question of the application of the best interests of the child by a court when sentencing the primary carer of minor children. The Court ruled that the ruling must be applied and set out guidelines to 'promote uniformity of principle, consistency of treatment and individualisation of outcome', namely:

- The sentencing court should find out whether a convicted person is a primary carer whenever there are indications that this might be the case.
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary carer, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the carer is incarcerated.

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<sup>8</sup>This is subject to some restrictions: both parents must be first-time offenders, they must not be sentenced for the same crime, they must have a known residence, neither should be sentenced to more than one year in prison and the child(ren) must be under 15 years old (Oliver Robertson, *Children Imprisoned by Circumstance*, QUNO, 2008:35.)

<sup>9</sup>Laws relating to pregnant women (alleged) offenders are influenced by Sharia jurisprudence, and in particular a hadith in which the prophet Muhammad says that 'if a woman is to be executed, she should not be killed until she delivers what is in her belly if she is pregnant, and until she cares for her child. If she committed or commits adultery she should not be stoned to death until she delivers what is in her belly and raises the child' (Oliver Robertson, *Children Imprisoned by Circumstance*, QUNO, 2008:15).

<sup>10</sup>Associazione Comunità Papa Giovanni, written submission to Day of General Discussion, 2011:4.

<sup>11</sup>As above, 2011:4.

- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.<sup>12</sup>

This ruling set a precedent which requires all South African Courts to give specific consideration to the best interests of the child when sentencing a primary carer. If the proposed imprisonment will be detrimental to the child, a non-custodial sentence must be favoured, unless the case is so serious that it would be inappropriate.

Where there is an alternative to prison, the court must be satisfied that the children's needs will be met and that measures are in place to do so. In the *S v M* (and again in *MS v the State*) the Constitutional Court appointed a curator *ad litem* for the children who investigated and reported on their behalf.

Two points are particularly worth making. First, the failure to take account of the best interests of the child, or failure adequately to do so, is cause for leave to appeal. Therefore, the prosecution (and not only the defence) have good reasons for ensuring that it happens. Secondly, the process entails an individual assessment by social workers, and it is clear from the third point set out by the Constitutional Court that if the decision is to send the offending parent to prison, the court still has a duty to consider the situation of the children, which may entail not only their physical care but also their emotional and psychological well-being (for example, by ensuring that they receive counselling if deemed appropriate).<sup>13</sup>

Important developments have also been made in the Indian state of Gujarat. In October 2011, the Gujarat High Court ordered that the state support the family of a prisoner because the imprisonment had caused them 'untold misery and deprivation without any fault on their part.'<sup>14</sup>

Since 2009, in Argentina, women with children under 5 can spend their sentence in home detention, enabling them to continue caring for their children in their familiar

<sup>12</sup>A legal definition of the paramountcy principle is given in *S v M*. According to the Court, the principle 'read with the right to family care, requires that the interests of children who stand to be affected (by a decision) receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.' *S v M* (CCT53/06)

<sup>13</sup>A further issue here is whether caring responsibilities are only considered if the individual is the primary carer. For example, if a parent had weekend custody of children would this be taken into account? The Constitutional Court in *S v M* used a gender-neutral term and did not restrict primary caregiver to 'single primary caregiver'. In the 2010 case *MS v S*, a mother faced a short prison sentence for fraud but the Court held that *S v M* did not apply because MS was married and lived with her husband. The Court ruled that *S v M* applies only to single primary caregivers and that the husband could care for the children.

<sup>14</sup>'*HC directs govt to take care of families of poor prisoners*', Times of India, Ahmedabad, 31/10/2011.

environment. Judges (who are responsible for investigations, arrests and guiding the police in Argentina) are obliged to check if arrestees have dependent children and, if so, they must ensure the provision of immediate childcare.<sup>15</sup> The care arrangements are then re-considered at court, where there is the opportunity for children to voice their opinions. Both the arrested parent and the new carers are interviewed by court social workers and given the opportunity to confirm the arrangements or change their minds.<sup>16</sup>

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<sup>15</sup>Silvia Zega, oral intervention at Day of General Discussion 2011

<sup>16</sup>Silvia Zega, Argentinian Appeals Court, written submission to Day of General Discussion 2011 and oral intervention, Working Group 2.

# DATA COLLECTION AND INFORMATION SHARING

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## Data collection and information sharing

The number of children affected by parental involvement with the criminal justice system is still unknown. Most countries neglect to take details of dependent children when recording information about an (alleged) offender at every stage of the process, especially at the points of arrest and pre-trial detention. In order to address the needs of these children, it is clear that decision-makers should better understand the groups affected.

Estimated statistics include:

- Up to 2,800,000 children of prisoners in the USA, or 2.3% of all American children.<sup>1</sup> 1 in 15 black children has a parent in prison, compared to 1 in 42 Latino children and 1 in 111 white children.<sup>2</sup>
- 800,000 children separated from an imprisoned parent in the European Union, with 980 infants living in prison with imprisoned parents.<sup>3</sup>
- A recent New Zealand prison census indicates that around 26% of males and 47% of female prisoners had dependent children prior to their imprisonment, with 35% of female prisoners and 12% of male prisoners being sole caregivers for their children.<sup>4</sup>

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<sup>1</sup>Glaze and Maruschak, 2008, *Parents in Prison and their minor children* Washington: US Bureau of Justice Statistics.

<sup>2</sup>National Resource Center on Children and Families of the Incarcerated, written submission to the Day of General Discussion 2011:1.

<sup>3</sup>EUROCHIPS, based on *Council of Europe Annual Penal Statistics*, France, 2000.

<sup>4</sup>In Action for Children and Youth Aotearoa Incorporated, written submission to the Day of General Discussion 2011:2.

- 2,135 children living with 1,774 mothers in prison in India in 2008, an almost 50% rise in four years.<sup>5</sup>
- In the UK, children of incarcerated parents are 'a large vulnerable group two and a half times the number of children in care and six times the number on the Child Protection Register, but they are invisible.'<sup>6</sup>

Moreover, many more children are impacted by the incarceration of another close family member, such as a grandparent, aunt, uncle or sibling.

### **Good Practice**

#### **Council of Europe**

A resolution of the Parliamentary Assembly of the Council of Europe calls on States to 'record the number, ages and locations of the prisoner's children and the children's carer immediately upon arrival at the prison (regardless of whether the prisoner is male or female) and make such information publicly available'.

*Parliamentary Assembly of the Council of Europe's Resolution 1663 (2009) of 28th April 2009 on Women in Prison, para.8.3*

As experienced social workers point out, the arrest and/or incarceration of a parent can be an opportunity to intervene in the lives of families who are already experiencing difficulties, to offer support in order to preserve and strengthen family ties.<sup>7</sup> It is also an opportunity to inform children and families of their options and the support that is available to them. They may not know their rights (even more likely if they are from lower socio-economic groups or foreign nationals), and their involvement with an institutionalised system such as the police can be an opportunity to provide such information.

There are clear benefits to a multi-agency approach and improved communication between the different actors working with and around the affected children (prison staff, police, social workers, teachers, youth workers, psychologists etc.). However, the collection and sharing of information on the children of (alleged) offenders inevitably raises other human rights issues. The child or the parent may not wish to reveal or share the information with other agencies and doing so against their will

<sup>5</sup> HAQ Centre for Child Rights, written submission to Day of General Discussion 2011:2-3.

<sup>6</sup> 2007, Study by UK government, in Action for Prisoner's Families, written submission to the Day of General Discussion 2011.

<sup>7</sup> *Children of Arrested Parents: Strategies to Improve their Safety and Well-being*, California Research Bureau, Claire Nolan, 2003:19.

could violate the right to private and family life. The child and/or parent may be concerned about stigmatisation and discrimination or the fear that sharing information could lead to the parent losing custody of or access to the child. There are also cases where the child's right to information may conflict with the parent's right to privacy, such as where the arrested or detained person does not want their family to be informed of their whereabouts.

These issues raise questions about levels of sensitivity and awareness of the parties involved. One study in the UK found that children whose parents had been incarcerated were directed by their school teachers towards information and guidance for children whose parents had either died or separated.<sup>8</sup> Awareness-raising for all interested groups will contribute to the breaking down of stigmatisation and discrimination.

#### 4.1 Issues to consider

- Is information about support for children and families, such as support groups, helpline numbers and website information, available and displayed in every place where they come into contact with the criminal justice system? e.g. lawyers' offices, police stations, court holding cells and on judge's benches.
- Is it available in other places children and families frequent, including schools, youth clubs and children's centres, as well as in prison for newly arrived prisoners?
- Is information in a child-friendly format and in the language(s) the affected children know?
- Is information/guidance/training available for all those working with affected children?<sup>9</sup>
- Is the child's right to privacy respected by all those working with him or her?
- Is the parent's right to privacy respected?
- When reporting on a parent's (alleged) crime, do the media respect the child's right to privacy and avoid sensationalism?

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<sup>8</sup>Julia Morgan, Plymouth University, oral intervention at Day of General Discussion 2011.

**(cont.)**

- Are the different actors working with and around the affected children (prison staff, police, social workers, teachers, youth workers, psychologists etc.) aware of and sensitive to the child's needs, including their right to privacy?

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<sup>9</sup>There are many excellent resources available, often free of charge. In the UK, Action for Prisoners' Families have worked with the National Offender Management Service to produce a series of publications for different professionals working with prisoner's families. See <http://www.prisonersfamilies.org.uk/publications/> for guidance for Children's Centres, GP Surgeries and Health Centres, Health Visitors, Magistrates, Midwives, Police, Probation, Schools, Social Workers, Youth and Community Workers.

# THE ARREST

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## The Arrest

A child in the United States reported:

‘I was nine when my mom got arrested. The police came and took her. I was trying to ask them what was going on and they wouldn’t say, and then everything went so fast. I guess they thought someone else was in the house. They arrested her and just left us there. For two or three weeks, I took care of my one-year-old brother and myself. I knew how to change his diapers and feed him and stuff...’<sup>1</sup>

An expanding body of research examines the effects of parental incarceration on children, but this usually begins from the point of sentencing. Little attention has been given to the effects of arrest itself. The arrest raises important policy and practice concerns. We must consider: 1) the children’s immediate safety, 2) their emotional responses and 3) their subsequent care and well-being.

### 5.1 Human rights standards

In addition to the general principles of best interests, non-discrimination and right to be heard, which should be kept in mind throughout, specific human rights provisions are applicable to the arrest situation.

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<sup>1</sup>Neil Bernstein, *All Alone in the World, Children of the Incarcerated*, (The New Press, New York), 2005.

## 5.2 Right to respect for family life, Right to be free from torture and inhuman and degrading treatment or punishment

An arrest that involves an unnecessary display of force can constitute a violation of the child's right to respect for private and family life and possibly his/her right to freedom from inhuman and degrading treatment.

For example, the case of *Klaas v. Germany* at the European Court of Human Rights.<sup>2</sup> The application concerned the allegation that the mother was physically assaulted and seriously injured by police officers in front of her eight year old daughter. Because of the police officers' alleged use of excessive force against her mother in her presence, the daughter claimed that she too had suffered inhuman and degrading treatment contrary to Article 3 of the ECHR, as well as a violation of her right to respect for private and family life under Article 8.<sup>3</sup>

In 1992, the European Human Rights Commission found:

The use of force against a mother in the presence of her minor child amounts to a negative experience with considerable repercussions on the child's state of mind. The Commission, having regard to the [daughter's] uncontested statement that she watched major parts of her mother's forcible arrest and noting that she suffered considerably from what she had seen, finds that there was also an interference with the [daughter]'s right to respect for private life.<sup>4</sup>

In circumstances where the use of force against the parent is less extreme than to constitute 'inhuman and degrading treatment', the parent should nevertheless not be humiliated in front of the child.

## 5.3 States parties' duty to ensure the child care and protection

A child being left without care or supervision when a parent is arrested is clearly unacceptable.<sup>5</sup> Article 3.1 (best interests) of the CRC, cited above, is directly relevant.

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<sup>2</sup>*Klaas v. Germany*, European Court of Human Rights, Application no. 15473/89, 22nd September 1993.

<sup>3</sup>In this case, the Court found that the facts were disputed, that the admitted injuries sustained by the first applicant were consistent with either her or the police officers' version of events (that she had injured herself resisting arrest) and therefore found no violation of either Article 3 or Article 8. The court held that since the facts on which Mrs Klaas relied were not established, her daughter's complaints were likewise unfounded.

<sup>4</sup>*Klaas v. Germany* Commission report, 21st May 1992. Annexed to Klaas judgement, Series A269, 117.

<sup>5</sup>According to the CRC, everyone under the aged of eighteen has the right to care and protection. Small children should clearly not be left unattended, but States also have the responsibility to ensure that older children are cared for and provided for when their primary carer is removed.

In addition, 3.2 (States Parties undertake to ensure the child protection and care), 20.1 and 20.3 of the CRC should be considered.

Article 20.1 states:

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

And Article 20.3:

Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

See 8.6.

#### 5.4 Right to information concerning the whereabouts of the absent members(s) of the family

In the case of the detention or imprisonment of one or both parent(s) Article 9.4 of the CRC provides:

(...) that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

This Article stipulates State duties towards both child and the parent - the State should ensure that the child is informed when the parent is arrested (and when the parent is moved from one prison to another or even executed), and the State should also ensure that the detainee or prisoner is informed of the child's situation and care arrangements.

## 5.5 Planning the arrest

The first step should be to consider whether or not children are likely to be affected by the planned arrest. This may not be possible if the arrest must take place immediately.

**The child's immediate safety:** There is scant international research concerning police handling of arrested parents' children. In most countries, police receive little or no training.<sup>6</sup> According to a Danish Institute for Human Rights questionnaire, only 24% of the responding police officers felt that they had received a good education in handling children as relatives in connection with an arrest, and all other respondents selected 'Children as relatives played a very small or no role at all in my training.'<sup>7</sup> Police themselves have expressed the need for guidance, speaking of how difficult it can be to separate parents from their children.<sup>8</sup>

### Good Practice

#### United States of America

Guidelines and Protocols: In California the state-wide Commission responsible for establishing standards and training protocols for police departments has developed guidelines for keeping children safe when a parent is arrested. They have published training topics for use by law enforcement agencies and created a training DVD that is mandated for inclusion in all peace officers' training.

(Jessica Nickel, Crystal Garland and Leah Kane, *Children of Incarcerated Parents: an Action Plan for Federal Policymakers*, New York: Council of State Governments Justice Center, 2009:10).

### Good Practice

#### India

The Indian Code of Criminal Procedure requires police officers to tell relatives what has happened and where the arrested person is being detained.<sup>9</sup>

<sup>6</sup> *Children of Imprisoned Parents*, The Danish Case Study, Danish Institute of Human Rights, 2011:64

<sup>7</sup> As above, 2011:65.

<sup>8</sup> Peter Scharff-Smith, Danish Institute for Human Rights, oral intervention at Day of General Discussion, September 2011.

<sup>9</sup> See [http://defensewiki.ibj.org/index.php/India\\_Criminal\\_Defense\\_Manual\\_-\\_Rights\\_of\\_the\\_Accused\\_and\\_Exceptional\\_Circumstances](http://defensewiki.ibj.org/index.php/India_Criminal_Defense_Manual_-_Rights_of_the_Accused_and_Exceptional_Circumstances)

### Issues to consider

- Where is the arrest taking place? What is the time of day? Is it possible to do so away from the children? Is there the option to invite the parent to the police station?
- Are child welfare services contacted prior to arrest in order to ascertain whether there are likely to be children present?
- If so, how many children are involved? What are their ages?
- Is there a history of child protection involvement? This might include exploring specific concerns and/or speaking to a case-worker. What is done with any information obtained?<sup>10</sup>
- Is there another custodial adult available?
- If the children are elsewhere, who might be available to locate them and explain what has happened?
- Where will the children go?
- Who needs to be present or alerted to the fact that children are affected by the arrest? This could include child welfare services, another parent or carer, family member or friend.

## 5.6 If children are present at the time of arrest

Decision-makers should be aware that there may well be other children present, e.g. friends' or neighbours' children.

- What impact does this have on the way in which the arrest is carried out?
- If the arrest is conducted inside a building or home, do police enter forcefully or non-forcefully?
- Is the arrest conducted during the day or at night?
- Is force used against the parent and others present during the arrest?
- Are the child's best interests considered when judging which physical restraint techniques to use? Are handcuffs used?

<sup>10</sup>Mindful that the point of arrest can be an important opportunity for a multi-agency approach, to address wider issues in families with pre-existing difficulties.

**(cont.)**

- Is capsicum spray used? A child's physical reaction is likely to be stronger than that of an adult.<sup>11</sup>
- Are animals such as dogs used in the arrest? They may scare children.
- Do police consider and provide for children present? e.g. Could one arresting officer be specially assigned to focus on the children, take them to another room, explain what is happening, etc.?<sup>12</sup>
- If the situation permits, could the arrested parent be allowed to comfort the child?
- Could the parent be encouraged to cooperate so as not to distress the child?
- Is the situation explained to the child in an age-appropriate manner? This could be a relative, a family-friend, a special police officer in plain clothes, or a specially-trained child advocate? Are there guidelines available?

## 5.7 If there are not children present at the arrest

- Are there children who are likely to be affected by the arrest?
- Has the arrested person crossed borders and been arrested in another jurisdiction, leaving children behind elsewhere?
- Who checks to see whether children are affected - those with official and unofficial caring responsibilities, including the arresting officer?
- How is this done? How can it be ascertained that the arrestee is telling the truth and not hiding the existence of children (for example out of fear that they will lose custody of or access to the child)? What provision is made to address concerns that disclosing the existence of children may lead to their being taken into state care with the likelihood of permanent separation?<sup>13</sup>
- Are child welfare services contacted?

<sup>11</sup>The NYC Civilian Complaint Review Board's report to the Pepper Spray Committee states, 'Pepper spray should not be used against persons who appear to be in frail health, *young children* or women believed to be pregnant (author's italics.).

<sup>12</sup>Potential good practice: In Poland, arresting officers are trained to take the child into another room before arresting the parent (Personal communication, September 2011).

**(cont.)**

- Who is responsible for informing the children? Options could include the arresting officer, a family liaison officer at the police station or child welfare services.
- How are arrangements made to inform children who are not present when the arrest takes place and to meet and escort them home or to an alternative carer?

### **Good practice**

#### **Argentina, United States of America**

In **Argentina**, police officers are obliged to ask each arrested person if they are primary carers. The parent is asked to name someone who they would like to care for their child and the police must take the name, address and signature of the new carers so that they stay in touch with parents and social services. This is considered to be an interim measure - at a later stage both parent and the initial carer have the opportunity to make alternative arrangements.<sup>14</sup>

In the **United States of America**, police arrest protocols have been developed in twenty-five communities. They recognise the constitutional right of the parent(s) to designate the caregiver. This information is documented in the police arrest format.<sup>15</sup>

## **5.8 After the arrest**

Findings from a recent national study of children involved in the United States Child Welfare System suggest that witnessing the arrest of a household member, either alone or in conjunction with the recent arrest of a parent, is predictive of elevated post-traumatic stress symptoms.<sup>16</sup> A report from New Zealand estimates that one

<sup>13</sup>As one High Court Judge from Argentina pointed out, it is often women from disadvantaged backgrounds who find themselves in this position. Unaware of the law and their rights, they worry about losing their children and therefore conceal their existence (Silvia Zega, Juvenile Justice Division of the Federal Court of Appeal in Argentina, oral intervention at Day of General Discussion, September 2011)

<sup>14</sup>Oral intervention at Day of General Discussion September 2011, Silvia Vega, Juvenile Justice Division of the Federal Court of Appeal

<sup>15</sup>Oral intervention at Day of General Discussion, September 2011, Dee Ann Newell, Open Society Institute Fellowship

<sup>16</sup>Susan Phillips and Jian Zhao, *The relationship between witnessing arrests and elevated symptoms of post-traumatic stress*, a study of 1869 children, Children and Youth Services Review, Vol.32, 10, 2010:1246-1254.

in every five children whose mother is arrested witnesses the event.<sup>17</sup>

### Issues to consider

- How are the child's emotional and developmental responses to the event provided for?
- Is the child offered immediate crisis counselling and follow-up mental health services?
- Is contact between parent and child allowed shortly after arrest, so as to allay the child's concerns regarding the parent's safety and well-being?

### Good practice

#### United States

Summary of the Yale University Child Study Center/ National Center for Children Exposed to Violence - Child Development, Community Policing Acute Response and Consultation Services Staffed 24 hours a day by a team of experienced clinicians, the Child Development-Community Policing Programme (CD-CP) is a collaboration between the New Haven Department of Police Services and the Yale Child Study Center. This programme was conceived in the early 1990s to help traumatised children at the scenes of arrest by providing clinicians who can come to the scene of the crime or an arrest to offer counselling or support. New Haven Police refer children to the Yale Child Study Center for parental counselling in the wake of parental arrest and other traumas. At weekly case conferences, police, probation officers, mental health workers, school representatives and child welfare workers meet with clinicians to review cases involving children and police. CD-CP also provide training in child development for New Haven police officers, and Police Supervisors are eligible for fellowship at the Yale Child Study Center.

See: <http://www.ncccv.org/initiatives/scsp/acuteresp.html>

**Webinar:** An Overview of Time of Arrest Policy and Practice, January 2010. Dee Ann Newell, Director, Arkansas Voices for Children. (Former National Justice Fellow for the Bill of Rights for the Children of Incarcerated).

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<sup>17</sup>Liz Gordon, *Invisible Children: A Study on the Children of Prisoners*, 2009:21.

## 5.9 The child's subsequent care and well-being

Not only can the event be traumatic, it can also have important repercussions for the child in terms of their short and long-term care after the arrest. In a Canadian study it was discovered that 83% of detained women surveyed had no time to make alternative care arrangements for their children before entering custody. This experience may well be similar for women elsewhere in the world.<sup>18</sup>

In many jurisdictions, there is no official procedure for childcare when the custodial parent is arrested. One social worker from an organisation based in China described immediate care as depending on 'random goodwill.'<sup>19</sup> The majority of participants in one US study reported that they did not enquire about children who may be left unattended at the time of arrest, and indicated that a significant number of child placements are made informally by officers in the field, at their discretion, and without policies and protocols.<sup>20</sup>

As mentioned above, it is also important to note that parents may lie about the existence of children when first questioned, for fear that they will lose custody of or access to the children. It may be appropriate to ask about children more than once, first at the point of arrest and then again upon arrival at the police station.

### Issues to consider

- Who needs to be present or alerted to the fact that a child's parent has been arrested? This could include another parent or carer, family member, friend or child welfare services.
- What provision is made for the child after their parent has been arrested and/or who is responsible for the child's well-being? This includes assessing the suitability of a temporary carer/guardian, e.g. police background check, child welfare services background check and/or interview and a site inspection of their home.
- Are there different issues to consider depending on whether the arrest takes place at home, as opposed to in a public space (e.g. a park or shopping centre)? If it is conducted at home, who stays with the child until an adult can take charge or escort her or him to another carer? If the arrest is outside the home, who takes the child back to their home or to another carer?
- Who is responsible for keeping the child/carer (individual, agency or institution) informed about what is happening to the parent after the

<sup>18</sup> *Waiting for Mommy*, Centre for Children and Families in the Justice System, 2003:16.

<sup>19</sup> Koen Sevenants, Morning Tears, oral intervention at Day of General Discussion, 2011.

<sup>20</sup> Claire Nolan, *Children of Arrested Parents: Strategies to Improve their Safety and Well-Being*, California Research Bureau, 2003:1.

**Issues to consider (cont.)**

arrest? Is the arrestee permitted and enabled to do this, if appropriate and if they wish to do so?

- How is the child informed? Are there standard, age-appropriate guidelines on how to discuss the issue with children? Have children themselves been consulted and involved in producing these?
- Who is responsible for keeping the alleged offender informed about the provision for and well-being of the child?
- Is the child's school, or other service providers, informed of the arrest?
- If the parent and/or child wish to have this information withheld is their right to privacy respected? If information is given, how is this used? How do existing procedures use this information when it is provided?
- In countries where this is relevant, how are governmental financial benefits impacted?
- What is the responsibility of the alleged offender to make arrangements for the child, maintain contact with him or her and ensure their welfare? Is the arrestee permitted and enabled to do this, if appropriate and if they wish to do so?
- Is the alleged offender permitted or given any guidance on how to inform their child about what has happened?
- It is common for children to worry about their arrested or incarcerated parent. Is contact between parent and child allowed shortly after arrest?
- Are the children consulted or involved in the decision-making about alternative care arrangements? See 8.6
- Is due regard given to continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background?

DECISIONS ON REMANDING IN  
CUSTODY OR NON-CUSTODIAL  
MEASURES PENDING TRIAL

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## Decisions on pre-trial measures

It is widely acknowledged that the use of pre-trial detention in the world today is excessive and inequitable.<sup>1</sup> In many countries, women are disproportionately represented in the pre-trial detention population. In some countries (such as India, Bolivia and England and Wales) the majority of detained women have not been convicted.<sup>2</sup>

Most female offenders are the sole or primary carer for one or more children. As noted in chapter 2, maternal incarceration tends to be more directly disruptive to a child's life than paternal incarceration. The impacts on these children and their best interests are therefore in urgent need of further consideration.

One of the primary criteria used to legitimise pre-trial detention is the real risk of the suspect absconding before trial.<sup>3</sup> Factors used to determine whether a person is likely to abscond include: whether a person has stable accommodation, whether they have stable employment and whether they are able to provide a financial guarantee. Since most female offenders are from low-income groups, less likely to own or rent accommodation in their own name, less likely to be in permanent, full-time

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<sup>1</sup>Each year, approximately 10 million people will pass through pre-trial detention. Many will stay there for months or even years, in conditions which are often worse than those of convicted prisoners. Of those pre-trial detainees, many will find their charges withdrawn due to lack of evidence, or be acquitted at trial. Others will be found guilty of minor, non-violent offences for which the maximum permitted sentence is either non-custodial or shorter than the time spent awaiting trial. See *The Socioeconomic Impact of Pre-Trial Detention*, UNDP and Open Society Justice Initiative, 2010.

<sup>2</sup>See *Pre-Trial Detention of Women and its impact on their children*, Laurel Townhead, QUNO, 2007:5.

<sup>3</sup>*The UN Standard Minimum Rules for Non-Custodial Measures* (the 'Tokyo Rules') establish the following principle to determine the application of pre-trial detention. First, to overcome the right to liberty, there must be a reasonable suspicion that the individual committed the offence in question. However, this alone is not enough: there must also be reasonable grounds to believe that there is either a danger of their absconding, committing further serious offences or interfering with the process of the trial (Rule 6, Adopted by the General Assembly, December 14, 1990).

employment and less likely to be able to provide financial sureties, this can be a factor in the disproportionate pre-trial detention of women.<sup>4</sup>

The Committee on the Elimination of Racial Discrimination has raised concerns that 'persons held awaiting trial include an excessively high number of non-nationals' and 'persons belonging to racial or ethnic groups, in particular non-citizens - including immigrants, refugees, asylum-seekers and stateless persons (...) vulnerable groups which are particularly exposed to exclusion, marginalisation and non-integration in society.'<sup>5</sup> They note the need to give 'particular attention to the situation of women and children belonging to the aforementioned groups.'<sup>6</sup> This situation of potential multiple discrimination should therefore be kept in mind when considering the needs of children of parents held in pre-trial detention.

#### Issues to consider

- Are non-custodial measures prioritised, particularly where the alleged offender is a parent with day-to-day childcare responsibilities?
- Are caring responsibilities for children taken into consideration as a factor reducing the likelihood of absconding, re-offending, or interfering with witnesses (the legitimate grounds for pre-trial detention)?
- Who is responsible for informing the court or decision-making body of the existence and situation of any children of the alleged offender?
- How is information on the parent's caring responsibilities acquired and verified?<sup>7</sup> Through interviews with the parent, social workers, schools? Perhaps a check list is required?
- How is the child's right to privacy respected throughout this process? Are there, for example, confidentiality agreements? What safeguards are in place to ensure that this responsibility is met? e.g. access to a lawyer.
- How are the best interests of children taken into account in deciding whether the alleged offender should be held in custody pre-trial (and/or during trial)?
- Who carries out the assessment and how? Is it the responsibility of an individual or a panel?
- Is there provision for delayed custody to allow alternative child care arrangements to be made?

<sup>4</sup>Laurel Townhead, *Pre-Trial Detention of Women and its impacts on their children*, QUNO, 2007:5.

<sup>5</sup>Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted 17th August 2005, para. 1.III.2.28.

<sup>6</sup>as above, Preamble.

## Good Practice

### Italy

In **Italy**, pregnant women or those with children under the age of six cannot be placed in pre-trial detention other than in exceptional circumstances. Instead, they are detained at home or in other attenuated custodial institutions.<sup>8</sup>

## 6.1 Non-custodial measures

A major reason for the overuse of pre-trial detention around the world is the failure to provide or use non-custodial alternatives. For example, in Mexico, the Open Society Justice Institute reports that 'pre-trial detention has become the most widely used precautionary measure', suggesting that 'the country's legislation currently contemplates few alternatives for accused persons awaiting trial.'<sup>9</sup>

### Non-custodial alternatives should include:

**Undertakings**, such as to appear before a judicial authority as and when required, not to interfere with the course of justice, or not to engage in a particular conduct (including that involved in a profession or particular employment);

**Reporting requirements**, for example on a daily periodic basis to a judicial authority, the police or other authority;

**Supervision** by an agency appointed by the judicial authority; or **electronic monitoring**;

**Residence** at a specified address, with or without conditions as to the hours to be spent there;

**Restrictions** on leaving or entering specified places or districts without authorisation; on meeting specified persons without authorisation;

**Surrendering documents** such as passports or other identification papers;

<sup>7</sup>In Norway, for example, social protection authorities are represented at the police station and they accompany arresting police on house visits where the alleged offender is known to be a parent.

<sup>8</sup>Associazione Comunità Papa Giovanni XXIII, written submission to the Day of General Discussion 2011:4.

<sup>9</sup>*Myths of Pretrial Detention in Mexico*, Open Society Justice Initiative, 2005:15.

**(cont.)**

Providing or securing **financial or other guarantees** as to conduct pending trial.

From *Pre-Trial Detention of Women and its Impact on Their Children*, QUNO, Laurel Townhead, 2007:4.

These alternatives to custody can be used individually or in combination. For each decision, in the specific circumstances of the individual accused, the impacts on the children should be considered.

#### **Issues to consider**

- Who explains to the child why these measures have been taken? Are guidelines and information available for other adults who may be involved (teachers, youth workers, social workers etc.)?
- Do non-custodial measures take account of the caring responsibilities of the parent and the best interests of the children? e.g. does home curfew take account of any need to take children to or collect them from school?
- Are any infringements of non-custodial conditions checked to ensure that they were not influenced by legitimate child rights considerations? e.g. the need to take a child to a doctor conflicting with reporting to a probation officer.
- Do residence requirements demand that the accused continue to reside at an address where the child or the parent has been subject to abuse?
- How might the provision of financial sureties or an undertaking not to engage in a particular employment impact on the family's financial situation?
- Do the reporting requirements uphold the dignity of the child and their parent, and respect their right to privacy? e.g. where must the parent report? At what time of day?
- Are surveillance techniques being used without the knowledge of the parent or the child?<sup>10</sup>

**Issues to consider (cont.)**

- Who is responsible for carrying out this surveillance? Are they relying on volunteers? Are they properly trained and accredited?<sup>11</sup>

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<sup>10</sup>United Nations Standard Minimum Rules for Non-Custodial Measures('The Tokyo Rules'), 3.12.

<sup>11</sup>It is noted in the Commentary on the Tokyo Rules under 'Fundamental Aims' that community involvement in non-custodial models has the added advantage of improving public understanding.'

## PRE-TRIAL DETENTION

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## Pre-trial detention

Note that 7.1 - 7.2 address the situation where children do not stay in pre-trial detention with their parent.

### 7.1 Care arrangements

#### Issues to consider

- How are children provided for physically, mentally, emotionally, socially and educationally during pre-trial detention of a parent?
- Does the detained parent have a right to decide or be consulted in making arrangements?
- Where do the children stay? With the other parent, carer, family member, state/foster care?<sup>1</sup>
- How will this affect the children's school arrangements?
- How will this affect the children's non-school activities, such as sports, other educational and social activities, and relationships with friends and those providing support and stability etc.?
- How will this affect any medical needs the children may have?
- How will this affect the continuity in the child's upbringing and ethnic, religious, cultural and linguistic background?
- How is it determined that the children will be staying in an appropriate, secure, safe, nurturing environment? This includes if children are staying with family members.

### Issues to consider (cont.)

- Which agency is responsible for carrying out this assessment?
- Will siblings be able to stay together or will they have to be separated during the pre-trial detention?
- How are the arrangements reviewed to ensure that they remain in the best interests of the children? If the arrangements need to be changed, does the detained parent have a right to be involved in making new, alternative arrangements?

### Good practice

#### UK

Helping the child to understand parental incarceration

There are many excellent resources available, often free of charge. **Action for Prisoners' Families** produces DVDs, books, magazines and comics for prisoners and offenders' families, prison staff and practitioners. They have developed an awareness-raising programme for professionals, which is an accredited training programme. They have factsheets for magistrates, health visitors, teachers and/or books and information for schools.

See [http://www.prisonersfamilies.org.uk/Publications\\_and\\_Resources/Home\\_page\\_Publications\\_and\\_Resources\\_Action\\_for\\_Prisoners\\_\\_Families.aspx](http://www.prisonersfamilies.org.uk/Publications_and_Resources/Home_page_Publications_and_Resources_Action_for_Prisoners__Families.aspx)

### Good practice

#### USA

In the USA, some schools operate 'healing circles' using restorative justice techniques. Children involved can talk to each other and the group facilitators about their experiences, watch relevant DVDs together, write their thoughts and feelings in journals and talk to formerly incarcerated parents who are now employed at the school. It has been observed that the perceived shame and stigma that is often associated with having a parent in prison may diminish

<sup>1</sup>In Costa Rica, for example, the children cannot access state care without a *declaración judicial de abandono*, meaning that they have been formally abandoned by their parent(s) and can be adopted. The system is therefore blind to the needs of children of detained parents, who often need only temporary care and should be allowed to maintain relations with the incarcerated parent (Defence for Children Costa Rica, oral intervention at Day of General Discussion, September 2011).

**Good practice (cont.)**

by speaking to other young people in similar situations. On one occasion, the children taking part actually asked for the groups to be widened to include children whose extended family or friends' parents had been incarcerated, recognising that, in some contexts, this is an issue that touches the lives of many children.<sup>2</sup>

## 7.2 Right to Contact

As mentioned above, the CRC states that a child who is separated from a detained parent has the right to maintain contact (Article 9.3). This right is not absolute and may conflict with other issues, but the principle of the child's best interests should guide all decisions.

The situation of pre-trial detainees is often more restricted than that of convicted prisoners. Visiting and family contact is usually highly limited so as to restrict the possibility of prejudicing the trial. This clearly impacts the children of the alleged offender. In many other countries, pre-trial prisoners are classified as maximum security by default. This means that any family visits must take place under maximum security restrictions, which are highly restricted and usually non-contact (in many prisons in the world visits take place through plexiglas and a telephone).

**Issues to consider**

- How is contact maintained between the parent and children (provided that it is in the best interest of the child)? See 9.12
- Is there provision for the child to visit the parent?
- In some countries (such as Sweden, Norway and Denmark) pre-trial solitary confinement is one option for (alleged) offenders. When considering this option, are the child's best interests taken into account? How will the use of solitary confinement affect the number of visits to which the parent and child are entitled? How is it likely to affect the prisoner's mental health (possible negative effects include depression, anxiety and serious mental illness), with future implications for the child?<sup>3</sup>
- How much time passes before the children can visit the parent for the first time?

<sup>2</sup>Dee Ann Newell, The National Policy Partnership for Children of Incarcerated Parents, oral intervention at the Day of General Discussion 2011, Working Group 2.

### **Issues to consider (cont.)**

- Who brings or accompanies the children to visits? If the residential carer cannot take them then who might be available? e.g. social worker, charity volunteer etc.
- Do all under-18s have to be accompanied by an adult or are older children allowed to visit their parent by themselves?<sup>4</sup>
- Are other forms of contact, such as letters, phone calls (in and outgoing), text messages or emails, facilitated? If so, by whom?
- How can it be ensured that children are informed and kept up to date about the parent's situation in an age-appropriate and sensitive way? Are guidelines available?
- Are the child's thoughts, preferences and opinions taken into account when determining alternative care options? In which situations? See 8.6
- How is the parent kept informed about the situation and well-being of the children?
- At what stage are parents informed about arrangements concerning their children?
- Whose responsibility is it to inform the parent about alternative care arrangements? For example a prison officer, social worker, etc.
- What information is available to the parents in prison/detention facility/police custody about care options for their children?
- To what extent are parents involved and consulted when determining alternative short and long term care options for their children? Are they provided with adequate information and advice about the implications of different decisions?
- Does this form part of comprehensive child care guidelines?

### 7.3 Where the child accompanies the parent into pre-trial detention

Note that many of the issues raised at 9.2, where the child lives in prison with the parent, are also relevant here.

- What provision is made for children to stay with their mother or father in pre-trial detention?
- Do appropriate facilities exist for a child to stay in detention with their parent? This includes: sleeping, living and playing space; appropriate bedding, food, the provision of toiletries (e.g. nappies), clothes, and toys.
- How are visits between other family members and the child facilitated?
- What provision is made for the child's interaction with other children (if age-appropriate)? For example does the child interact with the children of other alleged and/or convicted offenders; do they attend a crèche on or off site?
- What provision is made for the child's interaction with the outside world? For example, walks, excursions, attendance at a crèche etc.

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<sup>3</sup>See *The health effects of solitary confinement*, Solitary Confinement, available at [www.solitaryconfinement.org](http://www.solitaryconfinement.org). The UN Basic Principles for the Treatment of Prisoners states 'Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use should be undertaken and encouraged', Principle 7, Adopted and proclaimed by the General Assembly resolution 45/111, 14th December 1990.

<sup>4</sup>Some jurisdictions require that all under-18s visiting an incarcerated relative be accompanied by an adult. As the UK Prison Advice and Care Trust (PACT) pointed out in an oral intervention at the 2011 Day of General Discussion, in practice, this requirement often restricts visits. Older teenagers may resent the need to be accompanied and the other parent may be reluctant to accompany the children on visits if there is ill-feeling between the parent on the outside and the incarcerated parent. Other jurisdictions (such as New Zealand) permit older children to visit unaccompanied, and younger children to visit alone if prison authorities 'are satisfied that there is good reason for the child to visit the prisoner unaccompanied by an adult, and it is in the best interests of the child' (Action for Children and Youth, Aotearoa, written submission to the 2011 Day of General Discussion).

# TRIAL AND SENTENCING

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## Trial and Sentencing

Human rights standards are applicable to the trial and sentencing. As noted above, the child has the right to maintain personal relations and direct contact with the parent, where it is in the child's best interests (Art. 9.3). This should be kept in mind when considering non-custodial options and, if a custodial sentence has been deemed appropriate, on the decision regarding the correctional institution in which the parent is placed.

The child's right to be heard is especially relevant.

Art.12 (1) provides:

'(T)he child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child...'

This right should be kept in mind throughout proceedings.

### 8.1 When is it in the child's best interests to attend the trial?

#### Issues to consider

- Are the children themselves victims or witnesses to the alleged offence?
- Who would accompany the child to the trial? (guardian, social worker, court family liaison officer, etc.)

### Issues to consider (cont.)

- What are the child's views or feelings on whether they should attend? Are attempts made to facilitate child participation, where appropriate? e.g. by making the court and proceedings more child-friendly.
- What is the nature of the alleged offence and evidence being presented? Is it appropriate for the child to attend, taking into account their age and developmental stage?
- Is the child informed/ counselled in preparation for trial? If so, by whom? Is there age-appropriate guidance available to explain the process?
- Does the trial conflict with the child's school hours?
- If it is deemed inappropriate for the child to attend the trial but the current primary carer is attending, are provisions for childcare made available?

## 8.2 Trial

- Is there routine checking to see whether the person being sentenced has caring responsibilities for children, at all stages of the process? Whose responsibility is it to check?
- How is the factual basis for this information ascertained? For example, evidence could first be gathered from the parent and then from other relevant and informed sources such as social worker(s), probation officers, school, etc.
- How are the judge/ sentencing court/ officials made aware of this information during the trial? Who presents the information?
- How are the best interests of the child taken into account when sentencing a carer? Are the options feasible, as opposed to theoretical and suited to the particular needs of each individual child and family?

### 8.2.1 Issues to consider

- What effect could a custodial sentence have on the child, taking into account their age, level of maturity and developmental needs?
- Is the parent the primary carer?

**(cont.)**

- If so, then who else is available to take care of the child? e.g. the other parent, a member of the extended family, a friend, or state care. See 8.6
- Are caring responsibilities only considered if the accused is the primary carer? For example, if a parent had weekend custody of children would this be taken into account?<sup>1</sup>
- What effect will imprisonment have on the financial resources available to support/care for the child?<sup>2</sup>
- What impact will imprisonment have on the governmental financial benefits to which the child and family are entitled? (in countries where this is relevant)<sup>3</sup>
- How will the imprisonment affect the child emotionally? (This is more difficult to assess - professional guidance from a psychologist, child counsellor or social worker may be necessary.)
- If a custodial sentence is given, will the child be offered psychological support, e.g. counselling or group work, if this is seen to be necessary?
- Is it feasible/ethical/legal for children themselves to present evidence on how the parent's sentencing might affect them? And where children are victims or witnesses of the offence?
- Could the use of 'impact statements' be appropriate? In some countries (such as the UK, Finland, the US and Australia), the victim of a crime provides an impact statement for consideration by the judge. Perhaps the child could provide a similar impact statement when parents are sentenced? This could even be taken at the point of custody, rather than sentencing, so that it could encompass the impact of care arrangements.
- Are there other court-appointed agents assigned to gather information and present evidence on the case, such as court authorities, child welfare services or a child psychologist?
- Is priority given to non-custodial sentencing options?<sup>4</sup>
- What information does the judge have available to him/ her about appropriate non-custodial options?

## 8.3 Alternatives to Imprisonment

### **Alternatives to imprisonment should include:**

**Probation**, where the offender is still in society but must report to a probation officer. This may also involve community service, mandatory residence in a specified hostel, and other restrictions such as staying away from a prescribed area.

**Fines and Compensation orders**, where the offender pays money directly to the victim.

**Conditional (or Early) Release**, where restrictions are imposed on the offender's activities and contacts.

### **Electronic monitoring**

**Suspended sentence**, where the defendant is convicted of a crime and sentenced, but the judge does not enforce the penalty either unconditionally discharging him or her of all restraints, or on the condition that the defendant meets certain requirements. If the sentenced party fails to meet the requirements specified, then the suspended sentence may be enforced.

**Community Sanctions and measures**, where the offender must do unpaid community work, usually together with a rehabilitation programme.

**Drug and alcohol rehabilitation** to reduce the number of prisoners convicted for drug-related offences: decriminalisation (although not an alternative to imprisonment as such) and diversion of offenders to institutions other than prison services.

<sup>1</sup>In the case of *S v M*, cited above, the South African Constitutional Court used a gender-neutral term and did not restrict primary caregiver to 'single primary caregiver'. In the 2010 case of *MS v S*, a mother faced a short prison sentence for fraud but the Court held that *S v M* did not apply because MS was married and lived with her husband. The Court ruled that *S v M* applies only to single primary caregivers and that the husband could care for the children. There was one significant dissent. See <http://www.saflii.org/za/cases/ZACC/2011/7.pdf> accessed 10 December 2011.

<sup>2</sup>In the most comprehensive study of prisoners' wives to date, Pauline Morris found that the most common problems reported when a husband was imprisoned were the worsening of employment and financial situations (Morris, 1965, in Murray, *The Effects of Imprisonment*, 2005). Loss of income is aggravated by extra expenses such as telephone calls (especially if prisoners call collect, as in the US), prison visits and sending money to imprisoned relatives (Sharp and Marcus-Mendoza, 2001, in Murray, 2005). This clearly impacts on dependent children.

<sup>3</sup>Decision-makers should consider other, less immediately obvious financial impacts. In the UK, for example, there have been cases where home insurance has been invalidated by the imprisonment of a parent.

<sup>4</sup>The UN 'Tokyo Rules', cited above, emphasise that imprisonment should be considered a last resort and that all countries should work to promote non-custodial measures.

**Alternatives to imprisonment should include: (cont.)**

**Restorative Justice**, a theory of justice in which ‘the victim and the offender and, where appropriate, other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from a crime, generally with the help of a facilitator’. From United Nations Office for Drugs and Crime, *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series, New York: United Nations Publications, 2006:7.

**Pre-Court proceedings**, a range of alternatives where offenders may be dealt with by police instead of sent for trial.<sup>5</sup>

These alternatives to imprisonment can be used individually or in combination. It should not be assumed that any non-custodial option is automatically a better option from a child rights perspective. For each decision, in the specific circumstances of the individual accused, detailed consideration should be given to the impacts of the sentence on the child concerned. Decision-making should be guided by the principle of the child’s best interests.

**Issues to consider**

- If a range of sentences are appropriate and available, what weight does the principle of the best interests of the child carry?
- In cases of suspended sentence or probation, where residence in a specified location is required, is the environment appropriate for children to accompany their carer?
- Is there an option of a deferred sentence until the child reaches a certain age or developmental stage (for example when they are weaned)? Or suspended sentence subject to conditions such as caring for the child until a certain age and not re-offending?
- As at 6.1
- Do any non-custodial measures take account of the caring responsibilities of the parent and the best interests of the children (e.g. does home curfew take account of any need to take children to or collect them from school)?
- Are any infringements of non-custodial conditions checked to ensure that there were not legitimate child rights considerations for them (e.g.

<sup>5</sup>From *Alternatives to Imprisonment*, Matt Loffman and Faye Morten, Quaker Council for European Affairs, 2010:9-14.

#### Issues to consider (cont.)

the need to take a child to a doctor conflicting with reporting to a probation officer)?

- Do residence requirements demand that the offender continue to reside at an address where the child or the parent has been subject to abuse?
- How might the provision of financial sureties or an undertaking not to engage in a particular employment impact on the family's financial situation?
- Do the reporting requirements uphold the dignity of the child and their parent, and respect their right to privacy? e.g. where must the parent report? At what time of day?
- Are surveillance techniques being used without the knowledge of the parent or the child?<sup>6</sup>
- Who is responsible for carrying out this surveillance? Are they relying on volunteers? Are they properly trained and accredited?<sup>7</sup>
- Who explains to the child why these measures have been taken? Are guidelines and information available for other significant adults (teachers, youth workers, social workers etc.)?

## 8.4 Visiting the parent and maintaining contact

- If the parent is found guilty and obliged to serve a custodial sentence, will he or she be placed in a correctional institution that is close to and accessible from where the child is/will be living?<sup>8</sup>
- Which agency decides on the prison placement?
- Is financial assistance available to facilitate visiting? e.g. passes for public transport or credit for fuel.
- If the residential caregiver is not able or willing to accompany the children on prison visits, is anyone else available? e.g. charity volunteer. Are they trained, accredited and checked?
- Can it be guaranteed that the offender will remain in proximity to the child for the duration of their sentence?

<sup>6</sup>United Nations Standard Minimum Rules for Non-Custodial Measures('The Tokyo Rules'), 3.12.

<sup>7</sup>It is noted in the Commentary on the Tokyo Rules under 'Fundamental Aims' that community involvement in non-custodial models has the added advantage of improving public understanding.'

**(cont.)**

- If the offender is not placed in proximity to the children, what additional assistance are they given to facilitate visits?
- Is the child and their carer informed when a parent is transferred from one prison to another? Are the child's best interests considered when making this decision (taking into account the distance and accessibility of the prison, its security category and what type of visits are permitted and whether the new prison has child-friendly facilities)?<sup>9</sup>

## 8.5 The possibility of the child accompanying the parent into prison

- If the child can accompany the parent into prison, how is the length of the parent's sentence balanced with the age/ developmental stage up to which the child can remain in the prison?
- After the trial, the child may not see the parent again before the parent enters prison. If this is the case, is there provision for the child to say goodbye to the parent?
- Is there provision for the start of sentence to be deferred in order to enable the parent to make arrangements for and prepare the child for separation?

## 8.6 Alternative care

### **Good practice**

#### **China Morning Tears**

Morning Tears provides a home (food, shelter, education and a family unit) as well as psychological and emotional support to children whose parents have been imprisoned or executed in China. The Morning Tears Charter

<sup>8</sup>Long distances often separate children from their incarcerated parents, which can make it difficult to visit. For example, in the USA, women are imprisoned on average 160 miles from their families, men 100 miles away (Urban Institute, Justice Policy Centre, 2003).

<sup>9</sup>On the issue of transferring a prisoner without informing his/her family, see *S v. UK*, European Commission on Human Rights decision, 13th March 1984 (no. 9466/81). The child's right to be informed of the whereabouts of the parent is not absolute: it must be balanced with the parent's right to keep their detention private from their family.

### Good practice (cont.)

states '[I]n many countries in the world, the imprisonment of both parents often leads to the start of a life on the street for the children. Families tend to have more children, hence a proportionally higher number of children lose both parents as caregivers. The chances that other relatives or grandparents take care of the child are smaller because of the pressure of poverty. The option of foster care is often non-existent. On the street, the child must attend to their own basic needs (food, shelter etc.) and there is no help available to assist children in the healing process from their traumatic experience of parental imprisonment' (Morning Tears, March 2011).

See [www.morningtears.org](http://www.morningtears.org)

If a custodial sentence is deemed appropriate and alternative care is necessary, the following issues should be addressed:

- 8.6.1. Is the child's right to be heard respected in the provision of alternative care arrangements?
- 8.6.2. Are serious attempts made to facilitate child participation, beyond mere tokenism? This should involve child-friendly mechanisms such as art, games and group work, where children's voices are listened to as part of play, not exclusively restricted to a formal context.

See the UN Guidelines for the Alternative Care of Children (2009), available at: [www.unicef.org](http://www.unicef.org).

### Good practice

#### Lebanon SOS Children's Villages

**SOS Children's Villages supports and promotes a range of family-based care options for orphans and vulnerable children who cannot remain in the care of their families.** 'Only those children whose needs are best met by an SOS family are considered for admission to an SOS Children's Village. The child admission process undergoes a careful assessment of each individual case to ensure that joining an SOS family is in his or her best interests. Prior to admission, a thorough investigation is carried out by an SOS social worker to assess the child's situation and to consider whether an SOS family is the best care option. Whenever it is possible/feasible, the social worker listens to the views of the child regarding his or

### Good practice (cont.)

her current situation and possible solutions including considering an SOS family for alternative care. In doing so, the social worker takes the child's evolving capacities into account. A child admission committee, composed of senior SOS co-workers, screens the applications according to clear admission criteria. The children's views are discussed thoroughly and are taken into consideration. Although decisions on custody or separation from parents are taken into courts without listening to the child's views, the SOS Child Admission Committee does consider those views and in many cases, the court's decision is challenged on the basis of the SOS social worker's report on the child's current situation and his or her views on being separated from his/ her parents or custodial matters'.

From Zeina Allouche, *Lebanese Association of Children's Villages*, written submission, DGD 2006:5.

### Good practice

**England and Wales, Scotland** As stated in the UN Guidelines for the Alternative Care of Children, participatory case-by-case assessment of the family's capacity to provide the necessary care is required. Such assessments should seek to keep the family together as far as possible. In many countries in the world, the responsibility for alternative care (both formal and informal) is often undertaken by other family members, e.g. grandparents. In some countries, such as **England, Wales and Scotland**, relatives caring for children can receive State financial support (the 'kinship care allowance'). In the UK, **Holloway Prison and the NGO Prison Advice and Care Trust (PACT)** run a 'Kinship Care Support Project' for the families and friends of incarcerated mothers and children's carers. They also offer one-to-one case-work support. See [www.prisonadvice.org.uk](http://www.prisonadvice.org.uk).

#### 8.6.1 Issues to consider when assessing alternative care options

- Will the child have to move house/ neighbourhood/ town?
- Will the child be separated from other siblings with whom they are currently living?
- Will the child have to change schools?

**(cont.)**

- Does the child have any medical conditions or issues (physical/mental), the management and support of which could be affected by the parent's imprisonment?
- Are the concerned agencies aware that in some countries, the children of incarcerated parents may experience greater difficulty finding foster parents than other children without parental care?<sup>10</sup>
- Where the offending parent is a foreign national, how are the child's interests protected in relation to (inter-country) adoption if they are placed in institutions in the country of imprisonment?

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<sup>10</sup>Child rights workers from India, for example, have noted that the situation is especially difficult for children whose parents have been convicted of offences considered to be 'unpatriotic' such as terrorism (Enakshi Ganguly, HAQ Centre for Child Rights, India, oral intervention at Day of General Discussion, 2011).

# IMPRISONMENT

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## Imprisonment

From a child rights perspective, non-custodial measures should be considered for all parents with caring responsibilities for children, especially for the primary carers of babies and young children. This will be case-by-case and based on a careful risk and needs assessment. Countries have different provisions relating to the possibility of babies and young children accompanying a parent (usually their mother) into prison. Some, such as Kyrgyzstan, legislate for alternatives to imprisonment for a mother caring for children. The fundamental problem is how to reconcile the desire not to separate babies (especially when breastfeeding) and young children from their mother with a recognition that prison is not normally an appropriate environment for children.

Where the option of babies and young children accompanying parents into prison does exist, the particular situations vary - both between and within countries. Some countries, such as Spain, have purpose-built facilities for mothers and young children (see 9.10). Others, such as certain prisons in the UK, have separate sections within women's prisons where the mother and child live together in the mother's cell, some have nurseries within prisons where women can spend some time with their babies and some prisons make no special provision at all.

However, for the majority of children, accompanying their parent into prison is not an option. This is either because they are older than the maximum permitted age, or because the facilities are already at full capacity or because such provision does not exist in their country.

This chapter will be divided into two sections: first, children inside (living in prison with a parent) and second, children outside (separated from an incarcerated parent).

## 9.1 Decision as to whether the child should go into prison or not

### **Who decides?**

- Who has responsibility for this decision? A panel or an individual? Possible decision-makers could include social workers, the judge, the prison governor, the child's parents and family.
- Who is consulted? Relevant actors could include the above-mentioned.
- How are the child's best interests taken into account?

### **Factors include:**

- The availability of a willing, appropriate alternative carer available to assume responsibility for the child;
- The age of the child;
- The nature of the offender, offence and options open to that class of offender within the particular prison;
- The length of the custodial sentence;
- The prison that the parent would be sent to, and the facilities that are available for children to live in the prison;
- Whether there are siblings who are not being considered to live in the prison, and what effect separation may have on the siblings;
- The maximum time that the child could stay in prison with the parent;
- If the child reaches the maximum age before the parent has completed his or her sentence, the effect that separation will have on both parties at this later stage.

## 9.2 Children Inside

If the child accompanies the parent into prison

- Does the child go into prison immediately with the parent, or join the parent later? Do the circumstances change if the parent has been in pre-trial detention?
- What are the reception procedures upon admittance? e.g. health check-up, nutrition assessment, issuing of clothes and equipment.

(cont.)

- How is the child registered in the prison?
- Are children's care plans created? If so, who is consulted, how often are they reviewed and by whom?
- Is there a written agreement between the prison authorities and the parent outlining the ways in which the parent can exercise parental responsibility?
- Until what age can the child remain in prison?

### Good Practice

**New Zealand/Aotearoa** 'Mothers whose babies accompany them into prison must enter into a parenting agreement with the Chief Executive of the Corrections Department under s 81B of the Corrections Amendment Act 2008 in relation to the child's placement. This includes: notice that the mother is responsible for the care of her child and identification of an alternative caregiver in case of emergency or when the child's placement ends. Under this agreement, the Chief Executive must provide parenting information, education and support for the mother, all necessary health checks for the child, and they must ensure that the mother has adequate counselling to support her role as a mother in prison'.<sup>1</sup>

## 9.3 The physical environment of the prison

- Does the child stay in the parent's cell, and if so how is this made into a child-appropriate, friendly and stimulating environment? This includes taking into account the age of the child concerned. For example does the cell have windows at (child) eye-level, access to the outside, child-safe and appropriate furniture, and a child-friendly atmosphere and decorations?
- Is the cell shared with others? Or do the child and parent move into a separate unit? If so, how is this made child-safe and friendly?

<sup>1</sup>Action for Children and Youth Aotearoa, written submission to the Day of General Discussion 2011.

**(cont.)**

- Are washing and sanitation facilities located inside the cell or freely accessible?
- Outside the cell, is there any attempt to adapt the rest of the prison (the parts that the child may access) to a child-friendly and appropriate environment?

### **Good practice**

#### **Brazil and Aotearoa/New Zealand**

In Brazil, women's incarceration units are legally obliged to have nursery rooms where babies can be breastfed until 6 months of age, special sections for pregnant women and daycare for children.<sup>2</sup>

In Aotearoa/New Zealand, mothers and their children 'are housed in self-care units, which provide them with greater independence and a more supportive environment for their child. Mothers who do not qualify for a self-care unit are permitted daily visits in purpose-built facilities to feed and bond with their child.'<sup>3</sup>

## 9.4 Food and nutrition

- Who pays for/provides this?
- Is it age-appropriate?
- Do children receive different food from the adult prisoners?
- How is their food and nutritional programme decided upon and who cooks and prepares the child's food?
- If the parents cook are they provided with instruction in child nutrition?
- If a child is being breastfed does the prison provide the mother with support, including a suitable diet and relevant information?

<sup>2</sup>Isabel Bordin, Presentation to Plenary Session at Day of General Discussion 2011.

<sup>3</sup>Action for Children and Youth Aotearoa, written submission to Day of General Discussion 2011.

## 9.5 Physical and emotional health

- Do children living in prison have equal access to the healthcare services available in the country in question, without discrimination?
- Are there regular visits to the prison by child healthcare professionals or do the children attend facilities outside of the prison? Is the child registered with a local, external doctor? If so, who takes them to appointments and is the parent allowed to attend?
- Who holds the child's medical records - the medical authority, the prison, the parent?
- Are there on-site nurses, with training in child health?
- Do the children receive routine vaccinations and health check-ups?
- If the parent and child are locked in (whether routinely such as during the night, or in an emergency situation such as a prison lock-down), how does the parent contact the prison guards, for example if the child is ill?
- How is the child's welfare (physical, emotional and developmental) monitored while in prison? For example, do children receive regular visits from a social worker?
- Is the mother's health monitored, taking into account any possible implications for the child? For example, if the mother is depressed, is the child given extra support?

### Good practice

**India** Following a Commission of Investigation and a Supreme Court ruling in 2006, Indian prisons are obliged to provide a crèche for children under the age of three and a nursery for children under the age of six. These facilities must be available to children of (female) prison staff and some are also available to the local community. Some parents have been unwilling to allow their children to mix with the children of prisoners, but senior prison service officials have publicised the fact that their own children attend in an attempt to decrease the perceived stigma.<sup>4</sup>

## 9.6 Education, play and development

- What facilities are available?
- Who administers these to ensure that the child is receiving an age-appropriate education?
- If of a young age, does the child attend a nursery/crèche inside or outside the prison? If they are of school age, do they attend school outside the prison?
- For children schooled outside the prison, how are issues of stigmatisation and discrimination addressed?
- Who accompanies the child to and from school?
- Does the child attend school inside the prison? If so, who attends - only prisoner's children, children from outside communities, children of prison staff? Again, how are issues of stigma and discrimination addressed?
- What play facilities are available?
- How regularly is the child able to access these?
- Is this regulated by the parent or prison authorities?
- **Cultural identity:** what provision is made for the development of a child's cultural identity and/or language (where the parent wishes)?
- **Religion:** what provision is made for the development of the child's religious identity (where the parent wishes)?
- How is the child's social development encouraged? How is their interaction with other children facilitated?
- How is the child's interaction with the outside world facilitated?
- Who is allowed to take the child outside the prison (for example charitable groups or other service providers)? How are these companions checked, trained and accredited?
- Are such experiences provided routinely? Are they specifically targeted to children prior to their release or removal from prison?

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<sup>4</sup>Oliver Robertson, *Children imprisoned by circumstance*, QUNO, 2008:11.

### **Good practice**

#### **India**

In India, some schools have reduced tuition fees for children residing in prisons. An Indian prison worker explained: 'Jails can save money by not having to create an educational facility and children can get educated and be mainstreamed at the same time.' One NGO in West Bengal also provides transport from the prison to community-based schools.<sup>5</sup>

## 9.7 Safety and security

- What are the security safeguards regulating the child's interaction with other prisoners and guards?
- Does the prison have a Child Protection Plan?
- For the child, what belongings are the parent allowed to bring into the prison? (toys, clothes, cots etc.)
- Are children consulted (in an age and developmentally-appropriate way) about what would make them feel safer?

### **Good practice**

**Nepal** Prisoner Assistance Nepal run a series of programmes assisting the children of prisoners, both those living in prison and homes for children outside while their parents are incarcerated.

Volunteers accompany children living in prison on visits outside the prison, so that they can experience the outside world: trees, animals, traffic, shops, parks etc. PA Nepal also run an education programme named Junkiri ('firefly' in Nepali) for children for whom the traditional education system is inappropriate. Many of these children have suffered significant trauma and abuse while living with their parent in prison.

See <http://panepal.org/>.

<sup>5</sup>HAQ Centre for Child Rights, written submission to the Day of General Discussion, 2011:8.

## 9.8 Contact

- How does the child maintain contact with other family members? What kinds of visits are allowed, how frequently, for how long, in what environment?
- Does the child go out of the prison or do visits take place inside the prison?
- Is the imprisoned parent able to communicate face to face with those taking the child out of prison for a visit?
- Is there provision for children to write or talk to family members outside the prison? Both adult and child family members?
- How frequently is the situation reassessed to ensure that it remains in the child's best interests? Who conducts this assessment?

### Good Practice

#### Around the world

With the parent(s)' permission, **Portugal** and **Colombia** allow children to leave the prison to holiday with non-imprisoned relatives. In **Iceland**, children may leave the prison overnight to stay with grandparents. In some countries, visits may be longer or more frequent than usual (up to daily in **Hungary** or without a time limit in **Poland**), with further extensions for family members visiting from abroad (**Slovenia**). In **Sweden**, there may be opportunities for visits in child-friendly environments, equipped with toys, crayons, books etc., or in special 'visiting flats' with an outdoor area 'where the family can stay together for two or three days and live a nearly normal life.'<sup>6</sup>

### 9.8.1 Other

- 9.8.1. Who looks after the child if the parent works or attends classes inside the prison?
- 9.8.2. Are parents looking after children precluded from education, training, work or other activities? If so, does this impact negatively on their financial and/or sentencing situation?<sup>7</sup>

<sup>6</sup>QUNO, written submission to Day of General Discussion 2011, based on questionnaires sent out to all country Missions to the UN in Geneva.

**(cont.)**

9.8.3. If the parent leaves prison temporarily, e.g. to go to the hospital, what happens to the child? Does the child temporarily stay with a family member living outside the prison? Or are they cared for by another prisoner or member of prison staff? Is provision for such circumstances included in a Child Protection Plan, so that decisions are not made on an ad-hoc basis?

9.8.4. Child support and social benefits: in countries where this is relevant, do they continue to be paid for the child living in prison?

### **Good practice**

#### **Yemen Red Crescent**

The Yemeni Red Crescent Society provides opportunities for both children living in prison to receive basic education, and classes for their mothers in sewing, literacy and other subjects.<sup>8</sup>

## 9.9 Parenting skills programmes

Recognising that a percentage of prisoners are first-time parents and do not have access to the family/social support systems potentially available to parents outside of prison,

- What support are parents (especially first-time parents) provided to guide them in parenting, and specifically in a prison environment? For example, parenting classes or coaching in child development and nutrition, as well as support to maintain their own emotional/psychological health as parents.
- Are parenting programmes compulsory?

<sup>7</sup>In some countries (such as the UK), the prisoner's possibilities of early release can be affected if they do not complete the appropriate courses to demonstrate their reintegration.

<sup>8</sup>International Committee of the Red Cross, written submission to Day of General Discussion 2011.

## 9.10 Foreign national mothers

- If the mother enters the prison pregnant and the child is born in prison, are there issues concerning nationality and potential statelessness, depending on the countries in question?
- When a child is born in prison, is their birth registered?
- If a child enters prison with their foreign national mother, is special provision made for the child to learn the first language of the country in question? e.g. at the crèche.

### Good Practice

#### Spain External Mother Units

In Spain, where children have traditionally lived with their mothers in prison until the age of three, the Department of Prison Services has begun constructing External Mother Units (Unidades Externas de Madres), facilities designed specifically for incarcerated women and their young children to live separately from the main prison. As part of the 2006-2012 prison reform plan, five new External Mother Units have been approved, with the objective of removing all children from prisons by the year 2012. These new units are a pioneer initiative in Europe aimed at making the prison system more child-friendly. It includes the construction of Unidades Dependientes (semi-liberty), nursery schools and 'Módulos Familiares' (in cases where both parents are incarcerated, the family can be together in the prison and both parents can share parental responsibilities). They seek to reconcile the fact that prison is not considered a suitable environment for children with the fact that Spain considers mothers to have a right to be with their young children. The units have been developed in conjunction with the strengthening of other policies and measures aimed to provide alternatives to incarceration for mothers of young children. As such, the primary objective will be to keep women out of prison in the first place through parole, semi-liberty, and monitoring technologies. That means the units will be in place for the women who are in early stages of long sentences, convicted of violent offences or because they are in pre-trial detention and therefore alternatives are deemed inappropriate. Children will be allowed to remain in the units until the age of three, and in some cases, up to the age of six. Whenever possible, mothers will be released to some form of semi-liberty or other alternative by the time their child becomes too old for the unit, so as to not have to separate the child from the mother.

### **Good Practice (cont.)**

According to the Spanish Department of Prison Services, in both the architectural and the pedagogical design of the units, the best interests of the child have been considered above all else. Unlike the older mother-child prison modules, which are often converted prison modules that continue to resemble prisons, the new External Mother Units have been designed entirely with the goal of providing a normal, harmonious environment for mothers and children. The units were created based on consultation with childcare experts, psychologists, prison and government employees, the Public Health Department, and on the input of all currently incarcerated mothers. Contact with the community is being encouraged, and children will attend community pre schools and schools. The centres will also make an effort for children to maintain contact with other family members, primarily by having all visits be contact visits and allowing children to stay with family members outside of the prison whenever possible on weekends or vacations. One of the most important aspects of the new external units is the pedagogical design focused on breaking the cycles of social exclusion facing the children. The centre's psychologists and social workers will focus on strengthening mother-child relationships and will emphasize parenting skills, hygiene, and nutrition. The Spanish Department of Prison Services, assisted by NGOs, intends to track the children until the age of eighteen in order to evaluate the initiative (Secretaría General de Instituciones Penitenciarias, Ministerio del Interior, Gobierno del España, 2010) <sup>9</sup>

## 9.11 Leaving the prison

- 9.11.1. Are the maximum age limits flexible? For example, if a child must leave at age three but the parent's sentence will be completed by the time their child is aged three and a half, can an exception be made to allow the child to live in the prison for the remaining six months?<sup>10</sup>
- 9.11.2. If the child has to leave prison upon reaching a certain age and this is before the parent has finished serving the sentence, how is the child prepared for leaving the prison? e.g. Short stays outside the prison to acclimatise them to their new carers and environment? Can the imprisoned parent leave temporarily to accompany them to their new carer?

<sup>9</sup>From Sophie Feintuch, 2010, unpublished.

### 9.11.1 Where the prisoner is a foreign national

- 9.11.1. Are the consular officials notified of the child's impending move from prison? Are family members in the country of origin notified and assisted if they are to assume the role of caregivers?
- 9.11.2. How often can the parent and child meet?
- 9.11.3. How are foreign national incarcerated parents kept informed about their children's well-being?

## 9.12 Children outside

### **If the baby/child does not go into the prison:**

It is common for children to worry about their incarcerated parent. One NGO worker from the USA observed:

'Children are very literal. They have concerns most people don't think about. For example, when you go to State prison, your clothes are sent home. So a lot of children are afraid their parents don't have clothes to wear. They want to know if their parent is fed or if they're locked up how they go to the bathroom.'<sup>11</sup>

- Is contact between parent and child allowed shortly after imprisonment, so as to allay the child's concerns regarding the parent's safety and wellbeing?
- How are the new care arrangements decided upon? 8.6
- Is provision made for the parent to meet with the new carer?
- Is there the possibility of home visiting to allow the incarcerated parent to help the children to settle?
- Is there provision for the child to view the parent's cell?

<sup>10</sup>Some countries allow a degree of flexibility in this regard. For example, in the UK, children may stay in prison for up to two months beyond the official leaving age provided the mother will complete her sentence in that time.

<sup>11</sup>*Children of Arrested Parents: Strategies to improve their health and well-being*, Claire Nolan, California Research Bureau, 2003:21.

### Good practice

**Switzerland** In some prisons, e.g. La Stampa, near Lugano in Switzerland, children are invited to see their parent's room and understand where they live. It is believed that this helps to alleviate anxiety for the child.<sup>12</sup>

### Good Practice

#### Denmark

In Denmark, a joint initiative between individual prisons, the Department for Prisons and Probation Services and the Danish Institute for Human Rights has led to the creation of 'Children's Officers' in prisons, who 'work on securing the rights and needs of children of imprisoned parents'. These 'Children's Officers' may include social workers or prison officers. They receive training from human rights, prison, psychiatric and prisoners' family support professionals, and they visit other institutions to share good practice.<sup>13</sup>

- Is there a written agreement between the prison authorities and the imprisoned parent outlining the ways in which the parent can exercise parental responsibility?
- How frequently is the situation reassessed to ensure that it remains in the child's best interests? Who conducts this assessment? What criteria is it based on?
- If the child initially lives outside the prison, can the incarcerated parent later request to have the child transferred to the prison? On what grounds?
- Is the child's school, or other service providers, informed of the parent's imprisonment? See 4
- If the parent and/or child wish to have this information withheld is their right to privacy respected? If information is given, how is this used?

<sup>12</sup>Presentation given at the conference 'Parentalité et détention, Société Suisse de Psychologie Légale, November 2011, Bern, Switzerland.

<sup>13</sup>Peter Scharff-Smith and Lucy Gampall (eds.) *Children of Imprisoned Parents*, The Danish Institute for Human Rights, European Network for Children of Imprisoned Parents, University of Ulster and Bambinisenzasbarre, 2011:259.

### Good practice

#### England and Wales

The High Court recently judged that the Prison Service had acted unlawfully by neglecting to consider the best interests to the children of two women prisoners when deciding whether to grant Childcare Resettlement Leave (CRL). CRL is a form of leave available to prisoners in England and Wales who have sole caring responsibility for children under the age of 16. The judge also found that the child's human right to respect for private and family life under the European Convention on Human Rights should be considered when deciding whether his or her parent should be granted leave from prison.<sup>14</sup>

### 9.12.1 Visiting at the start of imprisonment

9.12.1. Are orientation or induction visits available to introduce children to the prison and visiting procedures?

9.12.2. Taking into account that children may require particular support during the first visit(s), is there provision for the presence of a social worker or counsellor to support the child before, during and after the initial visit(s)?

9.12.3. Is provision made for the child to have extended and frequent visiting, e.g. weekend visits, or during school holidays, to aid the transition?

### Good practice

#### India, Ecuador and Estonia

Various jurisdictions channel financial support towards children of incarcerated parents. In the **Indian state of Kerala**, the state pays a monthly stipend for the children of prisoners serving at least a two-year sentence. In **Ecuador**, the state provides the children of incarcerated parents with a monthly payment, 'which can be spent on food or other goods, health, education, transport or recreation as decided'. In Estonia, imprisoned mothers continue to receive the state benefits allocated to all mothers.<sup>15</sup>

<sup>14</sup>See 'Restrictions on leave for jailed mothers are unlawful, High Court rules', in Solicitors' Journal, available at [http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=19602&c=1&eclipse\\_action=getsession](http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=19602&c=1&eclipse_action=getsession), accessed 17 February 2012

## 9.13 Long-term visiting for children not living in prison

'Long term visiting' is taken to mean visiting over the course of a parent's sentence. Beyond the initial transition, children need to be assisted to maintain contact (unless it is not in their best interests). Prohibitive factors need to be considered and addressed, including practical and financial constraints, as well as the possible disinclination of caregivers to facilitate visits, children's reluctance to visit because of the perceived hostility of the environment and parents' reluctance to have their children see them confined. The situation of having a parent in prison has its own particularities, but many of the same issues can arise as with separated parents, such as parental alienation and/or one parent not supporting contact with the other. Without underestimating the importance of this as a factor in a child's relationship with their imprisoned parent, issues around difficulties in the parents' own relationship are not considered to be within the scope of this Framework for Decision-Making.

An important conceptual issue is the question of to whom visits 'belong', discussed in a report by the Scottish Commissioner for Children and Young People. In Scotland, untried prisoners are allowed one 30 minute visit per day and convicted prisoners are normally allowed one 30 minute visit each week or one two hour visit every 28 days. However, the governor has the power to refuse or restrict visits on the grounds of security, good order and discipline, or if he or she believes doing so will prevent or discourage crime. Within the Scottish prison system, as in many other countries, visits are seen as 'belonging' to the prisoner and therefore can be taken away from the prisoner as a punishment. The Scottish Commissioner for Children and Young People recommends that a paradigm shift needs to occur and that 'where children are involved (the visits) 'belong' also to the child who has a basic human right to contact with their parent, where that is in the child's interests, taking account of the child's views.'<sup>16</sup>

- Whose responsibility is it to ensure that children can visit and communicate with their parent, whether they are with another informal or family carer, a foster carer or in institutional care?
- Is there provision for assisting and supporting contact? This may include financial assistance to cover travel, phone call and/or internet costs or other practical support (such as, for example, a shuttle bus between the city and the prison if not already accessible by public transport).
- If the carer is not able or willing to take or assist the child in visiting, can others do so? e.g. social workers, voluntary organisations.

<sup>15</sup> QUNO, written submission to the Day of General Discussion 2011:5.

<sup>16</sup> (Kathleen Marshall, *Not Seen, Not Heard, Not Guilty*, Scotland's Commissioner for Children and Young People, 2008:31.)

**(cont.)**

- If the child is not able to visit their parent (for example he or she lives too far away, or in another country) is the child's imprisoned parent given an additional allowance for phone calls or other forms of contact (text messaging, email etc.)?

### **Good Practice**

#### **UK**

Askham Grange Prison in the UK has a special house where children up to 18 can stay overnight, unsupervised, with their incarcerated mothers. An independent evaluation found that while most children found routine visits 'false' or 'inadequate' because the public space and limited time meant that they felt unable to raise important issues, the overnight visits were highly valued and could have a strong positive impact on the mental health of the children involved, including those with mothers serving long sentences. See <http://www.justice.gov.uk>.

### **Good Practice**

#### **Belgium**

In **Belgium**, children's association 'Le Fonds Houtman' have produced a comic book about visiting prison. '*Petit Tom en visite*' is available in French and other languages, on request. See <https://www.fonds-houtman.be>.

### **Good Practice**

#### **Sweden**

Children at Riksbryggan, a Swedish organisation supporting children of prisoners, helped design an animated film about having a parent in prison. It included the issues they had come across and their experiences of how their lives were affected, told from the perspective of a 10-year-old girl, Emilia. The film is available in Swedish with English subtitles at: [http://www.arnehed.com/workpix/emilia/emilia\\_eng.htm](http://www.arnehed.com/workpix/emilia/emilia_eng.htm).

## Good Practice

### Italy

The Catholic University of Milan has developed a 'Memory Box' project, which aims to help keep the child and parent in contact. It is a real box in which things that come to light during visits are stored. Issues are addressed through different creative methods, such as drawings and stories, which often allow the expression of issues that are too difficult to address in words. At the end of each meeting, everything produced is placed in the Memory Box.<sup>17</sup>

- Are the facilities and visiting arrangements 'child friendly'?
- Is it easy to book a visit, if necessary?
- What is the likely travel and waiting time?
- Is the prison accessible by public transport?
- How often can the child visit and for how long?
- When are the times for visits and do they conflict with school times?
- Is there a visitors' centre at the prison? Is it child-friendly? Are there age-appropriate toys and is the space welcoming to a child? Are there facilities for older children too e.g. magazines or games. Are there toilets or baby-changing facilities? Are there facilities for women who may be breastfeeding another baby? Is it possible to buy food and drinks?
- Are search arrangements designed so as not to frighten children or deter them from visiting, or deter the parent from having the children visit? See 9.15 for further consideration of this issue.
- Who works/ volunteers at the visitors' centre or play projects? Are they trained and accredited in first-aid and child protection and aware of the issues facing the children of prisoners?
- Are the parent and child able and facilitated to interact in a child-friendly environment? e.g. play together, as opposed to sitting in a visiting room designed for adults. Are there activities that foster non-verbal communication between parents and children?

<sup>17</sup>'Collateral Convicts' exhibition, panel 4, available at: <http://quino.org/geneva/pdf/humanrights/women-in-prison/2011Collateral-Convicts-light.pdf> (accessed 23 January 2012).

**(cont.)**

- Are the parent and child allowed physical contact (e.g. cuddling, sitting on the parents knee); are they physically able to touch but not allowed to do so; or are there physical barriers preventing contact? (Child-parent visits in many prisons throughout the world take place through Plexiglas or wire barriers.)

### **Good Practice**

#### **England**

**NEPACS**, a charity in the north east of England, provide special 'youth room' facilities for young people aged 8-18 at three prisons. Young people can play pool or computer games whilst they are waiting for their visit, and there is one-to-one support available for young people. During family visits, the charity **Send Family Link** organises specific activities for older children, such as dance mats.<sup>18</sup>

### **Non-contact visits**

Gail Smith, Executive Director of Chicago Legal Advocacy for Incarcerated Mothers, describes an infant's encounter with the pane of thick glass separating him from his mother:

When he saw his mother come out, his little hand went to the glass. But when he realised he couldn't touch her, he just started screaming.<sup>19</sup>

Aware that the prison visit is often the only time that the accompanying adult gets to see the incarcerated partner (where, for example, Dad's in prison and Mum brings the kids to visit),

9.13.1. Do the adults have time to speak privately? There are some conversations (for example, 'we're in a huge amount of debt and I can't pay the rent' or 'I'm really angry with you') that young children should not be burdened with. Is there somewhere the children can go?

<sup>18</sup>Action for Prisoners' Families, written submission the Day of General Discussion 2011:6.

<sup>19</sup>In Instituto Terra, Trabalho e Cidadania, Brazil (Institute for Land, Work and Citizenship) written submission to Day of General Discussion 2011.

**(cont.)**

- 9.13.2. Is there provision for the imprisoned parent to spend time alone with the child during a visit (without the other parent or carer)?
- 9.13.3. Is there a supervised play area? Acknowledging that visits are often long and boring for children, and they may start running around. The lack of appropriate play facilities makes the whole experience more difficult to tolerate, and increases the likelihood of the prison staff becoming angry and shouting.
- 9.13.4. Is there sufficient privacy during visits, so that the child and parent can speak? This may be especially important for adolescents, who are often overlooked in attempts to make visits 'child-friendly'.
- 9.13.5. Are extended, overnight, weekend or school holiday visits possible?
- 9.13.6. Is there provision for 'whole family' visits where the parent, child and other significant family members (for example the other parent, significant other parental figure, grandparents etc.) and/or the child's carer can meet together? Are prison staff aware that understandings of 'family' are often culture-specific, not adhering rigidly to a nuclear family unit?
- 9.13.7. If the prison is located a long way from their home, is there provision for children to stay for a short period (for example with 'host families') in the nearby community so that they can more easily and frequently visit their parents, during, for example, school holidays or on weekends?
- 9.13.8. Is there provision for the imprisoned parent to be released temporarily to visit their child? Can this occur regularly?
- 9.13.9. What provision is made for the parent to see the child during emergencies - for example if a child is ill, changing schools or carers?

## 9.14 Other forms of contact in addition to visiting

### **Good practice**

**UK, Ireland, Australia** Storybook Dads, Storybook Mums

One innovative approach to the problem of maintaining contact outside visits is provided by the **Storybook Dads** and **Storybook Mums** an organisation run in the UK, Ireland and Australia. Incarcerated fathers and mothers are recorded or filmed reading a story, which is then made into a CD or DVD to be sent to the child. This has the added advantage of the child being able to

### Good practice (cont.)

see their parent. The organisation states that it assists children because 'at a time when the children have little control over their situation, the ability to hear their parent's voice whenever they need is empowering and can reassure them that they are loved and valued.'

(Storybook Dads, <http://www.storybookdads.co.uk/index.html>)

### Phone calls

- Are they prohibitively expensive or highly restrictive in duration?
- Can the child call into the prison, as well as the parent calling out?
- Are there enough phones available so that children can satisfactorily speak with their parent (note that there may be several children of different ages all wanting to speak to their parent)? Is the size of the prisoner's family taken into account when determining his or her phone allowance? e.g. Six children, ten minutes each.
- Is the incarcerated parent permitted a phone in their cell? Are they allowed to text message?
- How is the timing of phone calls planned so that they do not conflict with school hours or the child's bed time?
- How is the timing of phone calls planned to accommodate different time zones in the case of non-resident foreign nationals? **Video calls or calls over the internet** (for example with programmes such as Skype, so that the parent and child can see each other).
- What kind of computer facilities and internet connection are accessible to the parent?
- What facilities are available to the child? If they do not have a computer at home, is there somewhere they can go to use one? e.g. a public library.
- **Letters/cards** - what are the policies regarding these?
- **Video or audio tapes** - what are the policies regarding these?
- **Email** - although note same issues regarding computers and internet access as with online phone calls. What are the policies regarding this?

### **Good Practice**

#### **Afganistan and internationally**

Red Cross The Red Cross provides video calls for families of detainees held in Bagram, Afganistan. One call centre is based in Bagram (for detainees) and one at the International Confederation of the Red Cross (ICRC) delegation in Kabul (for families). Video calls have also been made internationally, from families in Yemen to relatives detained at Guantanamo Bay in Cuba.<sup>20</sup>

### **Good practice**

#### **Australia**

SHINE for Kids, an Australian charity working with children of prisoners, has set up a 'Video Visit' facility in partnership with the New South Wales Department for Corrective Services. This enables children and parents to talk to each other when a face-to-face visit is not possible. Additionally, the calls utilise a camera, microphone and speakers so that both parties can view each other. Because of this, multiple children and/or adults can talk to their incarcerated family member at the same time. SHINE locates a suitably equipped venue for the family to go to, such as a local library, TAFE (an centre for technical and further education in Australia) or health centre. For more information see <http://www.shineforkids.org.au/index.html>.

### **Good Practice**

#### **Jamaica**

A social networking website for children and incarcerated parents is being prepared for use in Jamaica. Modelled on the popular website 'Facebook', 'Prisonbook' aims to allow children (especially adolescents) to share updates and photos with their parents. It will have a secure framework acceptable to prison managers.<sup>21</sup>

<sup>20</sup> ICRC, written submission to the Day of General Discussion, 2011:2-3.

<sup>21</sup> Jason Daye, oral intervention at Day of General Discussion 2011, Working Group 2.

### **Good Practice**

#### **Norway and Australia**

In Skien high security prison in Norway, all prisoners have computers and internet access in their cells. Firewalls have been set up to ensure that security is maintained. Internet access is seen as central to rehabilitation, 'to help in their education and also so that they know that they are still connected to the outside world' (Leif, prisoner).<sup>22</sup>

Some prisons in the Australian territories of Victoria and the Australian Capital Territory provide computers in prison cells and the Australian NGO 'Justice Action' have proposed to expand the system nationwide. There would be restrictions on the software and uses of the computers, but it is proposed that they would include email (checked by computer programmes and staff) to enable communication with family members and others.<sup>23</sup>

## 9.15 Searches

- In what situations are searches of children conducted? For example upon entrance or re-entrance to the prison, or routinely (if the child lives in the prison)?
- Is the search explained to the child, in an age-appropriate manner? Are there guidelines for prison staff on how to go about this?
- Are there always two officers in the room when a child is being searched?
- For small children, is the parent/carer present?
- For older children, is the search carried out by a member of the same sex?
- How are searches conducted in a culturally-sensitive and appropriate manner? e.g. asking Muslim girls to remove their head scarves, or Sikh boys to remove their turbans.

<sup>22</sup>In Erwin James, 'What are prisons in Norway really like?', available at: <http://www.guardian.co.uk/society/2008/nov/14/norway-prison-erwin-james>, accessed 7 December 2011.

<sup>23</sup>Justice Action, 2011, Computers in cells: maintaining community ties and reducing recidivism, available at: <https://justiceaction.org.au/cms/images/stories/CmpgnPDFs/computersincells.pdf> (accessed November 2011).

### **Good Practice**

#### **UK**

Charity **Kids VIP** has produced posters explaining what happens during a search. The posters use words and pictures so that children of different ages and languages can understand.<sup>24</sup>

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<sup>24</sup>For this poster and other excellent resources, see <http://www.kidsvip.co.uk>

## RELEASE AND REINTEGRATION

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## Release and reintegration

‘When mommy went to prison, I felt sad and broken-hearted. When mommy came home, I felt happy and double-hearted’

Child aged 6, Canada.<sup>1</sup>

‘It’s been very hard for both of us. It’s like getting to know each other all over again. I know it was only two years, but both of us had changed so much - especially me’

Mother, UK.<sup>2</sup>

Children and other family members often have extremely high expectations about what life will be like when their incarcerated parent is released. One partner of a prisoner in the UK remarked ‘All that people in prison can see is the light at the end of the tunnel. They think that after getting out of prison, life will be wonderful. I’d say to them, “You need to remember that life’s harder outside prison than it is inside”.<sup>3</sup> Release and reintegration is an especially stressful period, characterised by disruption, uncertainty and, frequently, disappointment.

Reintegration is made even more difficult if the parent’s legal right to custody of the child has been terminated during imprisonment. ‘Alternative caregivers (often relatives) may apply for legal guardianship of the children they are caring for, perhaps

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<sup>1</sup>Alison Cunningham and Linda Baker, *Invisible Victims: the Children of Women in prison*, Centre for Children and Families in the Justice System, Ontario, 2004:5.

<sup>2</sup>In *Preparing for Release, a guide for the partners and families of prisoners*, Action for Prisoner’s Families, UK, 2006.

<sup>3</sup>In *Preparing for Release, a guide for the partners and families of prisoners*, Action for Prisoner’s Families, UK, 2006:3.

in order to access child-linked benefits or to be able to better support the child (for example, having the authority to make decisions about medical treatment). Laws in some countries may mandate the termination of parental rights in particular circumstances, such as when the parent has not been caring for the child for a specified length of time.<sup>4</sup>

In the US, for example, the Adoption and Safe Families Act (1997) requires that the state file a petition to terminate parental rights if a child has been in foster care for fifteen of the previous 22 months, and in some places, such as California, this can be as low as six months.<sup>5</sup>

However, some good practices have arisen in this area. Certain US states have established that parental incarceration is an exception to mandatory termination of parental rights. Others, such as California, require a court 'to order reasonable reunification services for an incarcerated parent and his or her child if in the best interest of the child.'<sup>6</sup>

## 10.1 Legal guardianship status

### Issues to consider

- To what extent is the child's right to live with their parents balanced with the child's right to a permanent and stable home environment? Is this done on a case-by-case basis?
- If parental rights have been removed during imprisonment, is the parent provided with assistance and support? (If it is deemed in the best interests of the child to live with the parent)
- If children were put into state care during their parent's incarceration, is the parent provided with assistance and support in getting them out of care (if it is deemed in the best interests of the child to live with the parent)?
- In the country in question, is it even possible to access state care on a temporary basis, e.g. for the duration of a prison sentence?

<sup>4</sup>Oliver Robertson, *The Impact of Parental Imprisonment on Children*, QUNO, 2007:42.

<sup>5</sup>Kenya McCullum, 'Locking Up Abuse: What Female Prisoners Face Before, During, and After Incarceration', in Bay Area Business Woman, <http://babwnews.com/article.php?id=854&action>, 2007 (accessed 24/11/2011).

<sup>6</sup>Jessica Nickel, Crystal Garland and Leah Kane, *Children of Incarcerated Parents: An Action Plan for Federal Policy Makers*, New York: Council of State Governments Justice Center, 2009:10.

### 10.1.1 Decision-making

Just as the child's best interests should be taken into account when sentencing a parent, they should also be taken into account when making decisions about release that will impact on the child.

#### **Issues to consider**

- How are the child's best interests taken into account when making decisions about release (either temporary or permanent)?
- How are the child's best interests taken into account when determining post-release limitations on parents?
- Is the child's right to be heard respected? Is their input sought when making decisions about the prisoner that will affect them?
- Is the child's right to privacy respected; for example if the parent has on-going reporting or probation requirements, other restrictions on their activities or movement, or has to change identity for their own security?

### 10.2 Preparation for release

#### **Issues to consider**

- How are children prepared for the release of the parent?
- Is support available for the child, to manage her or his expectations and guide any necessary adjustments?
- Was the child very young or not yet born at the time of the imprisonment? If so, how are the child and parent prepared and supported? (The child may have little or no memory of the parent and feel uncomfortable around the parent).
- Will the parent return to the family or live separately?
- How is the child's carer prepared for release?
- How is the prisoner prepared for release? For example, is the parent informed and supported about the changes that are likely to have occurred in their absence if they have been in prison for a prolonged period and their children have grown up?
- Is parenting education provided?

#### Issues to consider (cont.)

- Is there any provision for 'graduated release' programmes, as in the UK or Switzerland, where parents can stay at home for short periods of time leading up to their release date, or leave to attend key events e.g. school sports days?

#### Good Practice

**Wales** HM Prison and Young Offenders' Institution, Parc Prison, Bridgend, and elsewhere throughout England and Wales

##### **Project: M-Pact - Moving Parents and Children Together**

This intervention acknowledges that resumed or on-going problems with alcohol or drugs are often a major concern at release, impacting heavily on children and family life. M-Pact prepares prisoners and their families for reintegration and release by adopting a 'whole family' approach to addressing problems of substance misuse. Sessions are held in the evening (after school), in the family intervention area of the prison which is equipped with comfortable sofas and designed to be 'homely'. Amongst other activities, participants work on creating 'family first-aid kits' and 'toolboxes', with strategies and agreements about how to deal with problems and obstacles. These are part of an on-going support package for families.

See <https://www.actiononaddiction.org.uk>.

### 10.3 Accommodation

This point is worth elaborating on as it can be a critical consideration post-release. Women often need residency permits before they can regain custody over children who have been placed in state care. Research in some countries has shown that women leaving prison often lack these documents.<sup>7</sup>

A consequence of a prison sentence can be that detainees lose their homes through not being able to pay the rent or maintain mortgage repayments. However, secure housing is often a prerequisite for regaining custody over children. In many countries applicants with dependent children are given priority access public housing. This 'can lead to a vicious circle where parents cannot regain custody of their children because they lack a home, yet cannot secure housing because they are not caring

<sup>7</sup>Oliver Robertson, *Children Imprisoned by Circumstance*, (Research in Kyrgyzstan), QUNO, 2008:21.

for children at the time.<sup>8</sup> A further problem arises in the US where Federal Law imposes restrictions on gaining access to state housing for those with certain criminal records.<sup>9</sup>

#### Issues to consider

- If the parent is to resume/ become the primary carer, are they assisted in finding housing for themselves and their child?
- If the parent is not the primary carer, are they assisted in finding accommodation that is safe and suitable for a child to visit?

## 10.4 Employment and financial situation

Difficulties finding employment are often a major problem for the released ex-prisoner. This inability to earn a living, as well as the depression and low self-esteem that can follow have knock-on implications for dependent children's welfare. Many application forms for jobs ask about previous criminal convictions, and employers may be reluctant to hire someone with a criminal record or history of imprisonment, even when they have worked or undergone training in prison.

It is also common for ex-prisoners to have 'lost touch' with the realities of life outside: they have led 'a very sheltered existence, isolated from the responsibility of earning or paying out money. They may not even be aware of how much it now costs to keep a house warm, how much it costs to put food on the table every week, or how much a loaf of bread costs.'<sup>10</sup>

#### Issues to consider

Aware of the negative impact on the child's well-being that parental unemployment may have,

- Is the parent supported in their search for suitable employment?
- Are micro-credit initiatives available to help ex-prisoners set up their own small businesses?
- Once employment is found, is the ex-prisoner supported in re-adjusting to the routine of daily working life?

<sup>8</sup>Oliver Robertson, *The Impact of Parental Imprisonment on Children*, QUNO, 2007:41

<sup>9</sup>Jessica Nickel, Crystal Garland and Leah Kane, *Children of Incarcerated Parents: An Action Plan for Federal Policy Makers*, New York: Council of State Governments Justice Centre, 2009:34.

<sup>10</sup>*Preparing for Release*, Action for Prisoners' Families, 2006:2.

#### **Issues to consider (cont.)**

- How does the return of the parent affect the benefits to which the family is entitled? (in countries where this is relevant)

#### **Good practice**

**UK Working Chance, Restorative Recruitment Working Chance** was set up in 2007 to assist women offenders in making the transition into the world of work and employment. Employment is proven to help reduce re-offending and break the cycle of disadvantage and offending that is so often transmitted from generation to generation. Working Chance establish links with employers across London and work in partnership with their clients to target meaningful, aspirational jobs, both paid and voluntary.

See <http://www.workingchance.org>

#### 10.4.1 Foreign national prisoners and their children

Foreign national prisoners may be deported either at the end of their sentence or under an early removal scheme, or transferred to prison in their country of origin (where repatriation agreements are in place). This has major implications for the child.

#### **Issues to consider**

- Will the child move to a different country (possibly one that they do not know or remember) with their recently-released parent?
- Will the child remain in the country of residence in alternative care and see their separation from their formerly-imprisoned parent extended indefinitely and possibly permanently?
- All of the issues raised above, regarding reintegration, accommodation and employment, may be even more difficult for foreign nationals
- Is the presence of children and the consideration of their welfare grounds to challenge a deportation order?

## 10.5 On-going support

One Australian study noted that '[while] the prison environment is often destructive to family relationships, it can also provide a window of opportunity for change. National and international research indicates that parents in prison are often motivated to use this period to reflect on their relationships with their children and to improve their capacity to parent'.<sup>11</sup>

### Issue to consider

- Are post-release support programmes available to the children and to either/both parents?

### Good Practice

**Pre and post-release support** United States In their study *Incarceration and the Family*, Herman-Stahl, Kan & McKay identify several programmes that showcase good practise in this area. Whilst there are many programmes conducted pre-release, a pilot programme in New York, 'Project Greenlight', provides 'family reintegration sessions focused on couple, co-parenting, and family-of-origin relationships' both pre and post-release.' (Herman-Stahl, Kan & McKay, *Incarceration and the Family; A Review of Research and Promising Approaches for Serving Fathers and Families* (RTI International for the USA Department of Health and Human Services), 2008:7-17.)

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<sup>11</sup> *Commission for Children and Young People and the Aboriginal and Torres Strait Islander Advisory Board*, Discussion Paper on the Impact on Aboriginal and Torres Strait Islander children when their fathers are incarcerated, 2001:16.

# EXISTING STANDARDS

**A**

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## **Existing standards specifically on the children of prisoners and those in conflict with the law**

### **A.1 Convention on the Rights of the Child**

**9.4.** Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

### **A.2 Guidelines for the Alternative Care of Children**

Adopted 20 November, 2009, A/RES/64/142.

#### **IV. Preventing the need for alternative care Promoting parental care, Preventing family separation.**

**47.** 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. 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.

## **VII. Provision of alternative care: Policies and general conditions applying to all forms of formal alternative care arrangements**

**81.** States should pay special attention to ensuring that children in alternative care because of parental imprisonment or prolonged hospitalization have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard.

### **A.3 United Nations General Assembly Resolutions**

#### **A.3.1 Human Rights in the Administration of Justice (A/RES/65/213), adopted without a vote on 21 December 2010**

[The General Assembly] Reaffirming that the best interests of the child shall be a primary consideration in all decisions concerning the child in the administration of justice, including in relation to pretrial measures, as well as being an important consideration in all matters concerning the child related to sentencing of his or her parents, or, where applicable, legal guardians or primary caregivers,

**11.** Stresses the importance of paying greater attention to the impact of imprisonment of parents on their children, while noting with interest the upcoming day of general discussion on the theme 'The situation of children of prisoners' to be organized in 2011 by the Committee on the Rights of the Child;

**12.** Calls upon States to identify and promote good practices in relation to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment, and emphasizes that, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary caregiver, appropriate priority should be given to non-custodial measures, bearing in mind the gravity of the offence and after taking into account the best interests of the child;

### A.3.2 Rights of the child (A/RES/64/146), adopted 18 December 2009

Children alleged to have infringed or recognized as having infringed penal law and children of persons alleged to have infringed or recognized as having infringed penal law

**15.** Also reaffirms paragraphs 43 to 47 of its resolution 63/241, and calls upon all States to respect and protect the rights of children alleged to have infringed or recognized as having infringed penal law, as well as children of persons alleged to have infringed or recognized as having infringed penal law;

### A.3.3 Rights of the child (A/RES/63/241), adopted 24 December 2008

Children of persons alleged to have infringed or recognized as having infringed penal law

**47.** [The General Assembly] Also calls upon all States to give attention to the impact of parental detention and imprisonment on children and, in particular: (a) To give priority consideration to non-custodial measures when sentencing or deciding on pretrial measures for a child's sole or primary caretaker, subject to the need to protect the public and the child, and bearing in mind the gravity of the offence; (b) To identify and promote good practices in relation to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment;

### A.3.4 Human rights in the administration of justice (A/RES/58/183) of 22 December 2003

**15.** [The General Assembly] Invites Governments, relevant international and regional bodies, national human rights institutions and non-governmental organizations to devote increased attention to the issue of women in prison, including the children of women in prison, with a view to identifying the key problems and ways in which they can be addressed.

### A.3.5 General Assembly Resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted 9 December 1988

#### **Principle 5**

Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles (...) shall not be deemed to be discriminatory...

### **Principle 31**

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

## **A.4 Human Rights Council Resolutions**

### **A.4.1 Resolution 11/6. The right to education: follow-up to Human Rights Council resolution 8/4, adopted 17 June, 2009**

**10.** Urges all States to ensure the right to education, an imperative in its own right, of persons in detention in the criminal justice system, and to provide appropriate education to foster reintegration into society and help reduce recidivism, including by making every effort: (l) To ensure that primary education is compulsory, accessible and available free to all, including to all children in detention or living in prisons;

### **A.4.2 Resolution 10/2, Human rights in the administration of justice, in particular juvenile justice, A/HRC/10/RES/2, Adopted 25 March, 2009**

Recalling that the best interests of the child should also be a primary consideration in relation to the question of whether and how long children of imprisoned mothers should stay with them in prison, and emphasizing the responsibility of the State to provide adequate care for women in prison and their children.

**12.** Invites Governments, relevant international and regional bodies, national human rights institutions and non-governmental organizations to devote greater attention to the issue of women and girls in prison, including issues relating to the children of women in prison, with a view to identifying and addressing the gender-specific aspects and challenges related to this problem;

13. Emphasizes that, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary carer, priority should be given to non-custodial measures, bearing in mind the gravity of the offence and after taking into account the best interest of the child.

A.4.3 Resolution 7/29, Rights of the child, A/HRC/7/RES/29 Rights of the Child, adopted 28 March 2008

**Children of persons alleged to have or recognized as having infringed penal law**

33. *Calls upon* all States to give attention to the impact of parental detention and imprisonment on children and, in particular:

(a) To give priority to non-custodial measures, when sentencing or deciding on pretrial measures for a child's sole or primary carer, subject to the need to protect the public and the child, and bearing in mind the gravity of the offence;

(b) To identify and promote good practices in relation to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment;

A.5 UN Standard Minimum Rules for the Treatment of Prisoners

Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

**Medical Services: Rule 23**

(1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

## A.6 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)

Approved 21 December 2010, UN General Assembly Resolution A/RES/65/229.

### **PART I: INTRODUCTION**

#### **Admission: Rule 2**

(1) Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives, access to legal advice, information about prison rules and regulations, the prison regime and where to seek help when in need in a language that they understand, and in the case of foreign nationals also access to consular representatives; (2) Prior to or on admission, women with caring responsibilities for children shall be permitted to make arrangements for the children, including the possibility of a reasonable suspension of detention, taking into account the best interest of the children.

#### **Registration: Rule 3**

(1) The number and personal details of the children of women being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status. (2) All information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children.

#### **Allocation: Rule 4**

Women prisoners shall be allocated, to the extent possible, to prisons close to their homes or places of social rehabilitation, taking account of their caring responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services.

#### **Personal Hygiene: Rule 5**

The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary

towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking, those who are pregnant, breast feeding or menstruating.

**Substance abuse treatment programmes: Rule 15**

Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

**Safety and Security: Rule 21**

Prison staff shall demonstrate competence, professionalism and sensitivity, and preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners.

**Discipline and punishment: Rule 22 and Rule 23**

Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, breast-feeding mothers and women with infants in prison.

Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

**Contact with the outside world: Rule 26 and Rule 28**

Women prisoners' contact with their families, including their children their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions which are at long distances from their homes.

Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.

**Institutional Personnel and training: Rule 33**

(3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.

#### A.6.0.1 **PART II, RULES APPLICABLE TO SPECIAL CATEGORIES**

##### **A. Prisoners under sentence, Prison regime**

###### **Rule 42**

(2) The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities. (3) Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

##### **Pregnant women, breastfeeding mothers and mothers with children in prison**

###### **Rule 48**

(1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided for pregnant women, babies, children and breastfeeding mothers, free-of-charge.

###### **Rule 49**

Decisions to allow children to stay with their mothers in prison shall be based on the best interest of the children. Children in prison with their mothers shall never be treated as prisoners;

###### **Rule 50**

Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with them.

###### **Rule 51**

(1) Children living with their mothers in prison shall be provided with ongoing health care services and their development monitored by specialists, in collaboration with community health services. (2) The environment provided for the child's upbringing shall be as close as possible to that of a child outside prison.

#### **Rule 52**

(1) Decisions as to when a child is separated from his or her mother shall be based on individual assessments and the best interests of the child within the scope of relevant domestic laws. (2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and in the case of foreign national prisoners, in consultation with consular officials; (3) After children are separated from their mothers and placed with family or relatives or other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interest of the children and when public safety is not compromised.

#### **Foreign Nationals: Rule 53**

(1) Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign national women prisoners to their home countries, especially if they have children in the home country, shall be considered as early as possible during their imprisonment, following the application or informed consent of the woman concerned; (2) Where a child living with a non-resident foreign national woman prisoner is to be removed from prison, consideration should be given to relocation of the child to his or her home country, taking into account the best interests of the child and in consultation with the mother.

### **A.6.0.2 PART III, NON-CUSTODIAL MEASURES**

#### **Rule 60**

Appropriate resources shall be made available to devise suitable alternatives for women offenders, in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse, suitable treatment for those with mental disabilities, educational and training programmes to improve employment prospects,

among others. Such programmes shall take account of the need to provide care for children and women-only services.

#### **Pregnant Women and Women with dependant children, Rule 64**

Non-custodial sentences for pregnant women and women with dependant children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent, 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.

### **A.6.0.3 PART IV: RESEARCH, PLANNING, EVALUATION AND PUBLIC AWARENESS-RAISING**

#### **Research, Planning and Evaluation: Rule 68**

Efforts shall also be made to organize and promote research on the number of children affected by their mothers' confrontation with the criminal justice system and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and programme development, taking into account the best interests of the children.

#### **Rule 69**

Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatisation and negative impact of their mothers' confrontation with the criminal justice system on them.

#### **Raising public awareness, sharing information and training: Rule 70**

(1) The media and the public shall be informed about the reasons that lead to women's entrapment in the criminal justice system and the most effective ways in responding to it, in order to enable women's social reintegration, taking into account the best interests of their children. (2) Publication and dissemination of research and good practice examples, shall form comprehensive elements of policies that aim to improve the outcomes and fairness to women and their children of criminal justice responses to women offenders.

## A.7 UN Office on Drugs and Crime (UNODC)

### A.7.1 Resolution 19, Management of criminal justice and development of sentencing policies, Adopted 7 September, 1990

The use of imprisonment for certain categories of offenders such as pregnant women or mothers with infants or small children should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories.

## A.8 Regional standards

### A.8.1 **African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) Entered into force Nov. 29, 1999**

#### A.8.1.1 **Part 1, Article 30: Children of Imprisoned Mothers**

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

### A.8.2 **Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (March 2008)**

#### **The Inter-American Commission on Human Rights**

##### **Principle X: Health**

Women and girls deprived of liberty shall be entitled to access to specialized medical care that corresponds to their physical and biological characteristics, and adequately meets their reproductive health needs. In particular, they shall have access to gynecological and pediatric care,

before, during, and after giving birth, which shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospitals or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate.

In women's or girls' institutions there shall be special accommodation, as well as adequate personnel and resources for pre-natal and post-natal care and treatment of women and girls.

Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child.

#### **Principle XII: Accommodation, hygiene, and clothing**

1. Accommodation Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

#### **Principle XVIII: Contact with the outside world**

Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners.

They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law.

#### **Principle XXII: Disciplinary regime**

3. Measures of solitary confinement The law shall prohibit solitary confinement in punishment cells.

It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty.

**A.8.3 Council of Europe: Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules<sup>1</sup> (11 January 2006)**

**Appendix to Recommendation Rec(2006)2**

**A.8.3.1 Contact with the outside world**

**24.1** Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

**24.4** The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

**24.5** Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.

**24.7** Whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons.

**A.8.3.2 Women**

**34.3** Prisoners shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities.

**A.8.3.3 Infants**

**36.1** Infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners.

**36.2** Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present.

**36.3** Special accommodation shall be set aside to protect the welfare of such infants.

**60.4** Punishment shall not include a total prohibition on family contact.

#### A.8.3.4 **Untried Prisoners, Contact with the outside world**

**99.** Unless there is a specific prohibition for a specified period by a judicial authority in an individual case, untried prisoners: (a) shall receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners; (b) may receive additional visits and have additional access to other forms of communication;

#### A.8.4 **Parliamentary Assembly of the Council of Europe: Recommendation 1469 (2000), Mothers and babies in prison<sup>1</sup>**

**1.** Assembly Recommendation 1257 (1995) on conditions of detention in Council of Europe member states recommends more limited recourse to prison sentences.

**2.** Despite this, the number of women being sent to prison under sentence and on remand is increasing in many Council of Europe member states. The overwhelming majority of women sent to prison are accused of, or convicted of, relatively minor offences and they do not represent a danger to the community.

**3.** It is not known how many babies and young children are separated from their mothers in prison. There are about 100 000 women in prison in European countries, and the Howard League for Penal Reform, a non-governmental organisation in the United Kingdom, estimates that this means that some 10 000 babies and children aged under 2 are affected by this situation.

**4.** Experts agree that early maternal separation causes long-term difficulties, including impairment of attachments to others, emotional maladjustment and personality disorders. It is also recognised that the development of young babies is retarded by restricted access to varied stimuli in closed prisons.

**5.** In view of the adverse effects of imprisonment of mothers on babies the Assembly recommends that the Committee of Ministers invite member states:

**(i)** to develop and use community-based penalties for mothers of young children and to avoid the use of prison custody<sup>2</sup>;

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<sup>1</sup> Assembly debate on 30 June 2000 (24th Sitting) (see Doc. 8762, report of the Social, Health and Family Affairs Committee, rapporteur: Mr Vis). Text adopted by the Assembly on 30 June 2000 (24th Sitting).

<sup>2</sup> Community sentences can include probation, community service, restorative measures like mediation, compensation to victims, or suspended prison sentences which only come into force if further offences are committed.

- (ii)** to develop education programmes for criminal justice professionals on the issue of mothers and young children, using the United Nations Convention on the Rights of the Child and the European Convention on Human Rights;
- (iii)** to recognise that custody for pregnant women and mothers of young children should only ever be used as a last resort for those women convicted of the most serious offences and who represent a danger to the community;
- (iv)** to develop small scale secure and semi-secure units with social services support for the small number of mothers who do require such custody, where children can be cared for in a child friendly environment and where the best interests of the child will be paramount, whilst guaranteeing public security;
- (v)** to ensure that fathers have more flexible visiting rights so that the child may spend a little time with its parents;
- (vi)** to ensure that staff have appropriate training in child care;
- (vii)** to develop appropriate guidelines for courts whereby they would only consider custodial sentences for pregnant women and nursing mothers when the offence was serious and violent and the woman represented a continuing danger;
- (viii)** to report back on the progress made by the year 2005.