

DISCUSSION PAPER

June 2006

***Children: Unintended victims of legal process –
A review of policies and legislation affecting children with
incarcerated parents***

**Flat Out Inc. and the Victorian Association for the Care and
Resettlement of Offenders (VACRO)**



Foreword

The project 'Children: Unintended Victims of Legal Process' was developed from the realisation that considerable research was available detailing the adverse effects of parental imprisonment on children, but that very little information was available about the policy and legislative context in which these adverse effects occurred.

The aim of the project is to trace the experiences of a number of children that currently have a primary carer in prison, through a series of interviews with involved adults including the sentenced mothers, arresting police officers, the mothers' solicitors, the sentencing magistrates/judges, and the interim carer/s.

It is hoped that by building a picture of the child's experience a realistic view can be developed of the financial and social costs involved in the care of children whose parents are incarcerated.

The first stage of this project has resulted in this discussion paper that examines the possibility that the lives of these children could be significantly improved, and the costs to the community reduced, by implementing policies and processes that acknowledged their existence and situation.

The second phase of 'Children: Unintended Victims of Legal Process' will be a collaborative consultation aimed at developing and presenting alternative policies and processes that seek to reduce the impact of parental arrest and prison terms on dependent children.

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Chapter 1 Introduction

1.1 Overview

This discussion paper examines the current policies and guidelines that affect children with an imprisoned mother. It covers the period from the arrest and imprisonment of the parent to their release and reconciliation with the family. Although the paper focuses on Victoria, it draws on national and international research. Where policies and guidelines do not exist, the implication of this omission will be examined. The paper concentrates particularly on the experiences of children whose mother has gone to prison, however broader data have been used when gender breakdowns for primary carers were not available.

When a primary carer is arrested and sent to prison their children suffer. An extensive amount of research has documented the psycho-social, academic, and developmental impact on children when their primary carer goes to prison. A search on 'Google.com' using the search string «children of prisoners» returns approximately 1.4 million internet links describing a vast number of programs attempting to help these children, and an equally comprehensive range of research.¹

Common themes occur in terms of the reported behaviours that children of prisoners display, such as anxiety, shame, grief, loneliness, regressive behaviour including bed-wetting, anger and guilt, delinquency, and truancy (Tudball, 2000; Nijnatten, 1998; Seymour, 1997; Healy, 2000; Hagan & Dinovitzer, 1999).

Common themes also occur in terms of the events that children experience, such as disruption of care, reduced economic circumstances, displacement of living arrangements and schooling, fragmentation of family relationships, social stigma and isolation (Tudball, 2000; Nijnatten, 1998; Seymour, 1997; Healy, 2000; Hagan & Dinovitzer, 1999; NSW Standing Committee on Social Issues, 1997).

Despite the obvious need for policy, there is a dearth of information about existing or developing policies that address the needs of prisoners' children, both in Australia and

¹ Similar searches for other categories of children do not return such a high result, for example, children of schizophrenics: 30,800 links; children with divorced parents: 456,000 links; children with absent parents: 650,000 links; children with HIV/AIDS parents: 388,000 links; children with addicted parents: 209,000 links.

internationally. Information regarding the ways in which prisoners' children experience the legal apparatus from arrest to release is also scarce. This is of great concern given a) the consistency with which researchers have called for child-focused policies spanning the various departments responsible for incarcerated primary carers and, b) the increasing emphasis by governments and corrections departments given to family connection and support in general, but particularly in terms of reducing both internal prison management problems and recidivism (Stanley & Byrne, 2000).

1.2 An historical perspective

There are few Australian research articles commenting on children of arrested persons until the early 1980s. Hounslow et al wrote one of the first articles '*Children of Imprisoned Parents*' in 1982. It almost seems as if these children did not exist as a discrete population before the late 1970's or early 1980's; their omission from official and public debate is notable.

Rising imprisonment numbers are almost certainly part of the reason that the needs of children of imprisoned parents became part of the policy debate in the 1980's, however the broader social reasons are unclear. A comment by a police officer offers some insight: 'Back then, no spouse: no kids' (Faulkner, 2004, conversation with author). This comment referred to children who had been removed from their mother's care and placed in state care (orphanages) because they had been born out of wedlock, and/or their mother was unable to support them financially, and/or the children were deemed to be in 'moral' danger of some sort. Parents, particularly single mothers, had rarely retained custody of their children by the time they found themselves in a police station being charged.

Changes in Social Security payment eligibility criteria in the early 1970's that made single parenting financially feasible, combined with legislative changes to the definitions of children in need of protection, may well account for the 'sudden' appearance of a significant group of offending mothers with dependent children, first noted by Hounslow et al in 1982.

1.3 From arrest to post-release, the child's journey

This paper is structured according to the time-line of events which may occur from the arrest of a primary carer to their release from prison. Between arrest and prison, incarcerated primary carers are subject to a legal process that affects their children in different ways and with differing outcomes. The criminal legal process is outlined in the process map provided in Figure 1 (p. 12).

1.3.1 Arrest

When a primary care-giver is arrested, her² children may or may not be present. If they are present, they are witness to this often highly stressful situation. The primary carer may or may not have the opportunity or resources to arrange appropriate care for their children prior to her removal to a police station. When appropriate childcare is not available at the time of arrest, the children will usually accompany their primary carer to the police station where the primary carer may be released without charge, charged and released on bail, held while further investigations take place, or charged and remanded in custody.

At the point of arrest, a mother will have very little idea how long she may be detained. Limited resources may restrict her from making alternative arrangements for her children. She may also not be able to determine when they are able to return to her care.

If the children are absent at the time of arrest (i.e. they are at school, kindergarten etc), there is the added issue of their ignorance of what has happened, as well as not being able to say goodbye to mum.

If the children have accompanied her to the police station, they will be waiting there while their mother is processed. If she is released without charge, life goes on for her and her children. If she is released on bail to present at court to face charges at a later time, her children still face many uncertainties regarding their future. If she is held overnight or longer, relatives (generally the grandparents, or fathers) or friends may

² NB Reference to primary carers will be feminine as the study concentrates on the experiences of children whose mother has gone to prison. When gender breakdowns are not available in the data, this will be noted.

be contacted and asked to look after them, or the children may be placed in some form of government organised care for as long as is necessary.

Relatives or friends may or may not be suitable carers for the children concerned or may not be available/able to care for a child. The alternative 'care' organised, often by police officers, may or may not be appropriately targeted to the children's age or situation, depending on the demand on resources in the children's crisis care sector at any given time. For example, if emergency foster care is not available, young children are often placed in residential facilities intended for teenagers, with rostered staff.

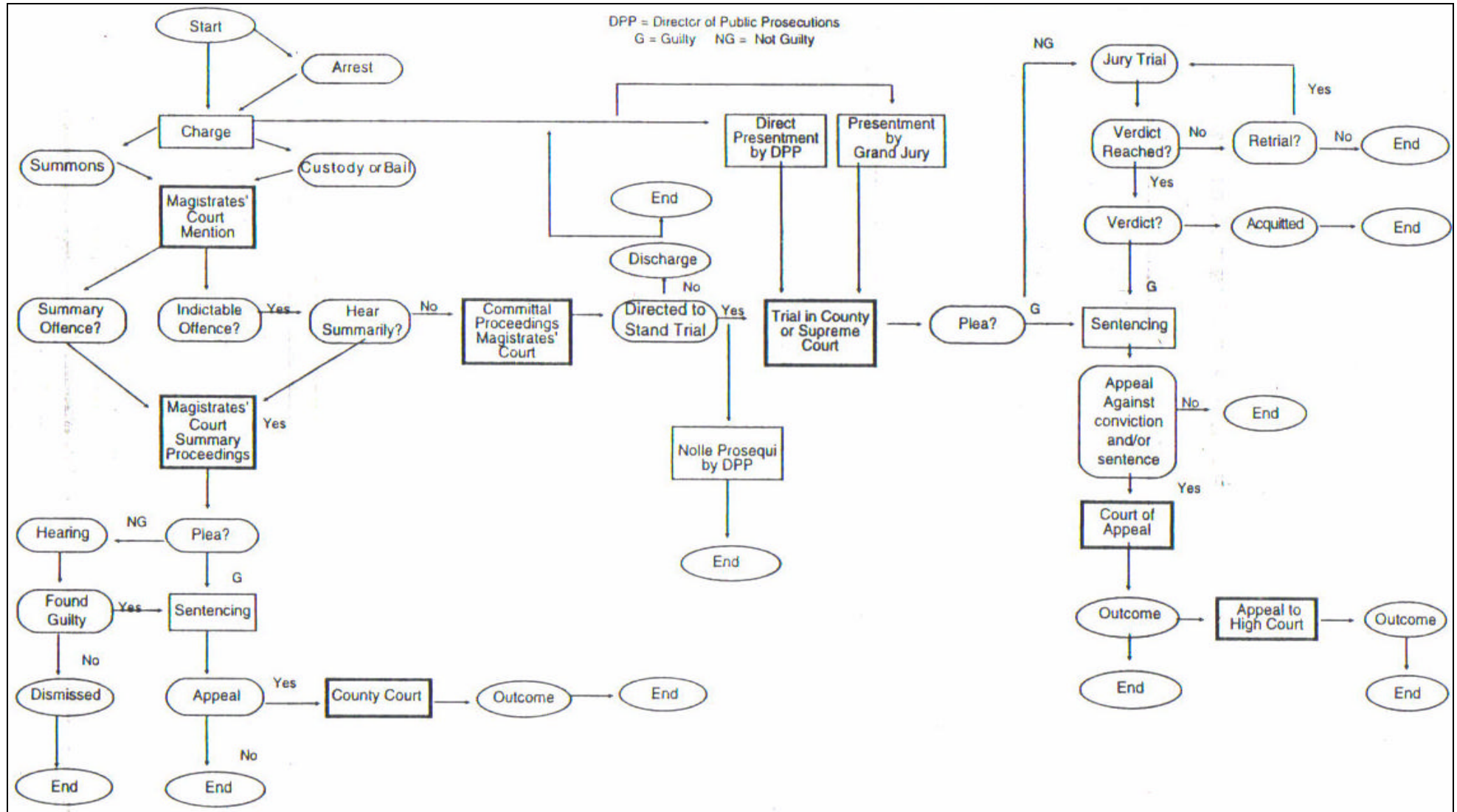
During the time it takes for these arrangements to be made, the children continue to sit and wait at the Police Station.

1.3.2 Bail

Primary carers that have been detained or remanded may be released on bail or released with their charges dismissed at various stages prior to sentencing. After their primary carer's release on bail, the children involved may or may not be reunited with her, depending on factors such as the care arrangements that have been put in place in the interim and the released primary carer's ability to provide a safe home at the time. However, when primary carers are not released on bail, their children's care problems begin immediately.

Whether or not primary carers are bailed, they are required to appear in a Mention Hearing at the Magistrates Court. From there they will be directed to either a Summary Proceeding where the charges may be dismissed or the woman may be sentenced, or directed to a Committal Proceeding. At the Committal Proceeding stage, their case will either be dismissed, or directed to a trial in a higher court, where they will be either found not guilty or sentenced. After sentencing there is a possibility of the woman appealing her conviction or sentence.

Figure 1: Overview of the prosecution process



Source: R, Fox. *Victorian Criminal Procedure: State and Federal Law*, Melbourne; Monash Law Book Co-operative Ltd., 2005 (11th ed),

1.3.3 Care of the Children after Sentencing

For children whose primary carer receives a custodial sentence, the care and living arrangements they may experience are still diverse. They may spend their primary carer's entire sentence with extended family, or this may become unsustainable and they may be placed with a foster care agency. They may spend their carer's entire sentence in foster care with either one or several placements and with varying degrees of success. During this time, they may have regular, frequent, visits with their primary carer, depending on factors such as their proximity to the prison in which she is held, and the agreement of their primary carer and their interim carer to participate in visits. In a small number of cases, the child may be deemed eligible to reside with their mothers in prison if they are under five years of age and/or yet to start school.

1.3.4 Post-release

Upon their mother's release from prison, the child/ren may return to her care quickly and successfully, or unsuccessfully. Reunification, if it occurs, may require some negotiation over time. The possibility and success of reunification after prison can depend on a range of factors including the care arrangements that were put in place while the mother was in prison, and the released primary carer's ability to provide a safe home.

1.4 How many children are involved?

It is difficult to ascertain the numbers of children who have had the experience of having a parent in prison in Victoria. The failure to collect demographic information about children from primary carers in prison appears to be widespread, and consequently most statistics provided regarding the numbers of children impacted are extrapolations based on samples generalised across prison populations. Nevertheless, these estimations do give some indication of the extent of the problem.

1.4.1 International statistics for the number of children affected

In the Netherlands 'each day 11,500 Dutch children live separate from their incarcerated fathers and 500 children have to manage without their mothers. On an

annual basis, more than 50,000 children will miss their fathers and almost 3000 their mothers' (Nijnatten, 1998). In the U.K. the figures are estimated at 100,000 children missing a father each year, and 8,000 missing a mother (Brown, 2001). More recent figures reported by EUROCHIPS (European Committee for Children of Imprisoned Parents) suggest that nearly 700,000 children in the European Community are separated from incarcerated parents each year (EUROCHIPS, 2004).

In the U.S. estimates suggest that 700,000 fathers and 70,000 mothers are imprisoned on any given day (Johnston, 1995). More recent figures for New York (Hirschfield et al, 2002), estimate 20,862 children have a father in prison for drug offences, and 2,675 have a mother in prison for the same. It is also estimated that 124,496 children had had a parent incarcerated for drug offences between 1980 and 2001.

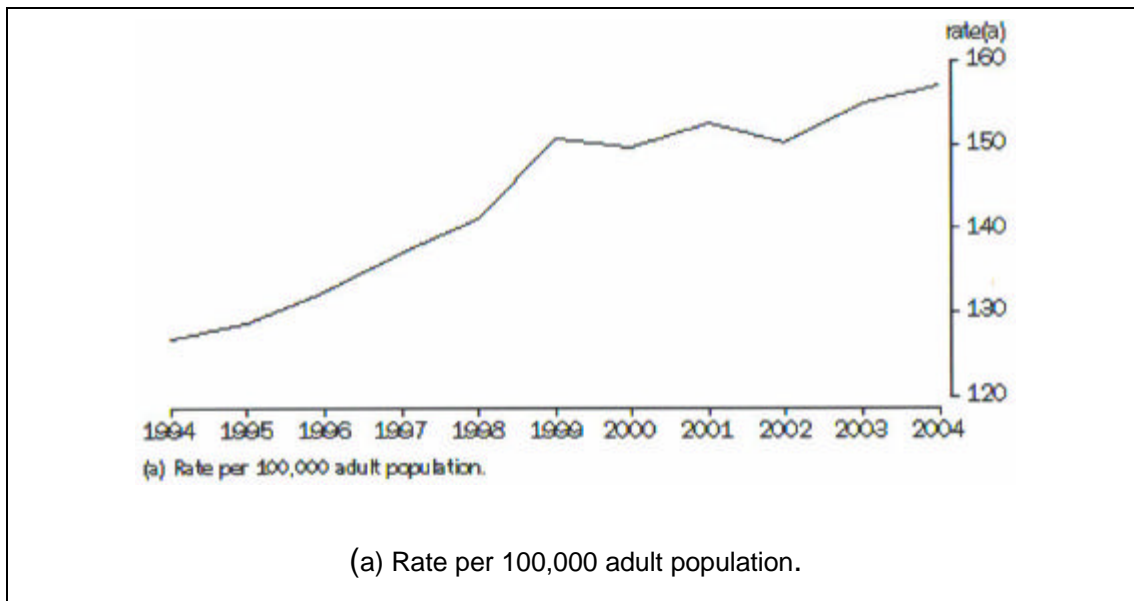
In 1999 the U.S. Bureau of Justice released figures indicating that approximately 721,500 State and Federal prisoners were primary carers of 1,498,800 children under age 18. 'Twenty-two percent of all minor children with a parent in prison were under 5 years old. The majority (58%) of the minor children reported by State and Federal inmates were less than 10 years old, and the average age of these children was 8 years old' (Mumola, 2000, p. 2). Since 1991 the number of children under eighteen with an incarcerated parent increased by over 500,000, from 936,500 to 1,498,800 in 1999. Prisoner numbers have risen by a further 10% between 1997 and 2003 (U.S. Department of Justice Bureau of Justice Statistics, 2004), implying that the number of children affected in the U.S. has increased by at least 150,000.

1.4.2 Australian statistics for the number of children affected

Australia has experienced a sharp increase in its imprisonment rates in the past two decades (see Figure 2, p. 15) with related increases in the numbers of children affected. According to the Australian Bureau of Statistics (ABS) data on prisoners in Australia:

The prisoner population has increased by nearly 43% since 1994. This increase has exceeded the 15% growth in the Australian adult population, resulting in the adult imprisonment rate increasing from 127 to 157 prisoners per 100,000 adult population between 1994 and 2004 (ABS, 2004, p. 4; see Figure 2, p. 15).

Figure 2: Increase in the numbers of prisoners per 100,000 of the population Australia-wide since 1994.



Source: ABS Prisoners in Australia, December 2004.

Extrapolating from NSW figures, Quilty found that in Australia:

Approximately 38,000 children experience parental incarceration each year, while 145,000 children have ever lost a parent to prison. These figures represent almost 5% of all children, and 20% of Indigenous children (2005, p. 256).

1.4.3 New South Wales

The Parliament of NSW Legislative Counsel Standing Committee on Social Issues commissioned *Report into Children of Imprisoned Parents* (1997) is one of the few documents available that specifically looked at policies and services affecting the children of prisoners. This inquiry placed the number of incarcerated mothers in NSW at 60% of the NSW female prison population, a half to two thirds of whom were sole parents. More recent figures suggest that:

Inmates who reported being 'providing' parents of children under 16 years prior to incarceration represented 62% of non-indigenous and 59%

of indigenous men who reported having children and 69% of all such women (Quilty, 2005, p. 256).

A number of recommendations emerged from the NSW Inquiry in 1997, two of which addressed the lack of accurate data on the number of parents in prison, and the number of children with incarcerated parents. They were specifically articulated in *Recommendations 2 & 3*, which stated:

2. That a data system be implemented by the Minister for Community Services on children with an imprisoned parent and who are wards of the state or in foster care, and
3. That the Minister for Corrective Services should establish a database on the number of imprisoned parents (NSW Legislative Counsel Standing Committee on Social Issues, 1997).

The NSW Government response to these recommendations was that a database already existed and in a form whereby information relating to children of prisoners could be retrieved. *Recommendation 3* was being implemented with the following questions being added to a court form for new receptions, for females only: 'Have you any children? If yes, what ages are they? Do you have legal custody? Were you the primary carer of the children prior to coming into custody?' (NSW Government Response to the Legislative Council Standing Committee on Social Issues' Inquiry into Children of Imprisoned Parents, 1998).

However, there are no statistics provided on the number of women prisoners who are primary carers in the NSW Corrective Services Annual Reports' statistics supplements, from 1997 through to 2004 (N.S.W. Government, 1998; 1999; 2000; 2001; 2002; 2003; 2004). Nor is there any mention of the requirement for gathering these statistics for use by other agencies in the NSW Interagency Guidelines for Child Protection Intervention (N.S.W. Government, 2000), a document specifically referring to the data collection and reporting responsibilities of the NSW Department of Corrections.

In 2005 an estimated 14,500 children in NSW have ever experienced the trauma of parental incarceration (Quilty, 2005).

1.4.4 Victoria

In Victoria, Tudball (2000) found approximately 3,000 children at any time to have a primary carer in prison. The Victorian prison population at the time (June 30, 2000) consisted of 2,970 male and 183 female prisoners. By June 30, 2004 this figure had increased by 13.8 percent for males to 3,380 prisoners, and for females by 33.3 percent to 244 prisoners (Department of Justice Victoria, 2005).

Chapter 2 The research project

2.1 Aims

The research phase of the project was conducted to provide insight into the subjective effects of current Victorian laws and policies, regarding the children of women prisoners, on those who are enacting them, and those who are acted upon. It is hoped that this data will provide a human face to the review of policy and legislation covered in this discussion paper.

2.2 Method

2.2.1 Participants

Participants were drawn from a range of sources:

- mothers currently in prison,
- mothers in the first 18 months post-release,
- their police informants,
- their defending solicitors or barristers,
- the judge or magistrate who sentenced them, and
- the carers who looked after their children while their sentence was served.

‘Mothers’ were defined as women who had children who were 16 years of age or younger in their care or custody, though not necessarily in their presence, at the time of arrest. All of the participants were volunteers. The mothers in prison self selected for participation, and the post-release mothers were contacted through agency referrals and invited to participate. The other participants were identified by the mothers and, with the mothers’ permission, contacted and invited to participate.

Children were not interviewed in this project due to concerns about re-traumatising them through the process of remembering their experiences, and the risk of raising issues that they had not either encountered or confronted.

The Mothers

The initial aim was to interview 20 mothers, with 12-13 currently in prison and seven to eight in the post release phase. Unfortunately, due to difficulties contacting mothers, the target of 12 mothers inside was achieved, but only 3 mothers post-release were interviewed. Most had never had the opportunity to explore and discuss their experiences of the legal process. Of the fifteen mothers interviewed:

- Four were interviewed in the Dame Phyllis Frost Centre (DPFC);
- Eight were interviewed in Tarregower Prison;
- Three were interviewed in their homes;
- The age range of mothers interviewed was from 28years – 52 years of age, with a mean age of 37years;
- Two were on remand, one awaiting an appeal;
- For four mothers this was their first offence, six mothers had been in prison once before, and three mothers had experienced recidivism. For the remaining two mothers it was not their first offence but it was their first time in prison;
- Two mothers had children residing with them at Tarregower. In one of these cases two siblings had to be separated to achieve this as the prison residential program is restricted to children under five years of age and the older child was 11 years old;
- Six mothers had Department of Human Services (DHS) involvement as a result of their incarceration, three with children going currently into foster care, two with children in foster care during previous sentences,³ and one with recent problems in regards to an interim carer;
- The prison terms of the 14 sentenced mothers ranged from six weeks to 18 years. One sentence was of less than three months duration, five were of 12 months or less, three were of two years or less, and four were of more than

³ In both these instances the children were abused in care, one is now a police matter. Both the children involved are without care at all during the sentences in which these interviews were conducted. Both mothers and children were extremely wary of further DHS involvement. The three other mothers whose children were fostered through DHS were highly praising of the foster care their children received.

five years duration. The mean sentence was three years four months. The mother on remand at the time of interview had been held for ten months.

- The mothers interviewed were Anglo Australian with one British exception; Three mothers with Vietnamese backgrounds were approached to try and redress the above cultural imbalance, but declined to participate. All three cited family and social shame as their reasons, and a desire to put the experiences behind them and not revisit the past.

No Aboriginal mothers self selected in the prisons. Aboriginal agencies made several attempts to encourage participation, however only one Aboriginal mother agreed initially, but did not respond to later attempts at contact.

The failure to capture the experience of cultural and/or linguistic minorities in the prison population is seen as a major limitation of this study, particularly given the over representation of Aboriginal children in Australia ever having experienced parental incarceration (20%), and the increasing representation of Indo-Chinese women in prison in Victoria.

Their Children

- 35 children were connected to the 15 mothers interviewed. The numbers of children ranged from 1 to six per mother, with a mean of 2.3 children per mother.
- The children's ages ranged from less than six months to 16 years, with 19 children under 12 years, six children under 2 years, including two babies under 6 months, and eight teenagers.

The Police

Please note: The views expressed by police officers in these interviews are personal views only and do not represent those of the Victoria Police Department.

Fifteen police interviews were aimed for, generated from the 15 mothers interviewed, and 12 interviews were conducted. This represented 75% of the possible sample. One mother's informant was not approached due to the nature of the charge: the mother was summonsed rather than arrested, and her contact with police was minimal. In the remaining two cases the pertinent officers were on extended sick leave and overseas. Of the 12 police officers interviewed, all were male.

- Three of the police officers were constables, two were senior constables, one was a sergeant, and six were detectives.

The Solicitors/Barristers

Fifteen solicitor/barrister interviews were aimed for, generated from the 15 mothers interviewed, and 11 of the 15 possible solicitors and/or barristers were interviewed. This represented 73% of the possible sample.

Of the four not interviewed, three declined to participate and one did not respond to the invitation to participate. In instances where potential participants did not respond, two further attempts were made to contact them without success. Of the eleven solicitors and barristers interviewed, only two were female.

The Judges

Fifteen interviews were aimed for with Judges and Magistrates who had sentenced the 15 mothers interviewed, and six Judges participated representing 40% of the possible sample. The following demographic information was recorded:

Gender:

- two of the Judges were female, and four were male.
- Of the fourteen mothers sentenced, 13 Judges and Magistrates were male and one was female.

Court:

- Two Judges were Magistrates
- Two Judges were County Court judges, one now retired
- Two Judges were Supreme Court Judges.

The Interim Carers

Fifteen interviews were aimed for with people who cared for the children while the fifteen interviewed mothers were in prison. However, only 12 of these mothers had children being cared for. In three cases there were no carers involved.

Of the 12 potential participants, six were interviewed, representing 50% of the carers available and 11(31%) of the 31 children cared for. Another person was interviewed who was not actually caring for the children (no-one was) but checked in with them regularly. Three of the six remaining carers were DHS appointed foster carers, and

were unable to be contacted. Of the remaining three, one interim carer could not be found, one did not respond, and one interim carer disappeared – leaving a further three children uncared for; he also failed to inform the mother in prison or anyone else – between contact and interview.

All of the Interim carers stated they had found it a great relief to talk to someone about their experience, and only two had had the opportunity to do so prior to the interview. They displayed the following demographic characteristics:

Gender:

- The participants caring for children were three males, two alone, one living with his parents; three couples, and one woman relative. The other six carers comprised three males and three unknowns.

Relationship to children:

- Of the twelve carers there were five fathers, two friends, one paternal grandparent, one paternal uncle, and three foster carers. Of the carers interviewed three were fathers, one was a friend, and one was a grandmother. Another grandmother looked in on the children (teenagers) regularly.

Residence:

- Of the seven people interviewed, four lived rurally (one interstate), and two lived on the outskirts of Melbourne. Of the six carers not interviewed, one lived in Melbourne, four lived rurally, and one is unknown.

2.2.2 Materials

A guided interview procedure was employed with each participant group, with different sets of questions presented to each. For example, the post release mothers were asked an additional set of questions to those asked of mothers in prison in order to capture their post release experience of parenting.

The Mothers

The questions targeted for mothers were divided into stages corresponding to their experiences and those of their children prior to arrest, during arrest, the pre-trial phase, court, prison, visits, and pre-release. The questions were framed around the

effects on their children and their parenting, arrangements made for children and the availability of information and support regarding their children during the process.

The Police

The questions asked of police informants covered their knowledge of the suspect's primary carer status and the presence or absence of children, arrangements that were made for children preceding and following the arrest, and by whom, and the reactions of the primary carer, their children, interim carers and themselves.

The Solicitors/Barristers

The questions for legal representatives covered the information collected from their client (the mother) about her children, what was presented in court and how it was received, and their perception of the effects of judicial attitudes, legislation and policies on children during the sentencing process. They were also asked about the reactions of all the stakeholders they had contact with, including themselves.

The Judges

The judges were asked about information presented regarding the children of defendants, how much weight it was given as a sentencing factor, the sentencing legislation, and the effect of the process on themselves, the primary carers and children involved.

The Interim Carers

The interim carers were asked about the impact the judicial process and incarceration had on prisoners' children. Practical, social, financial and personal implications for the children were also examined. Interim carers were also asked about the information and support available to them at each stage of the mothers' legal process.

The participants in all categories were asked a set of standard questions regarding what made things better or worse for the children, what improvements they could suggest and, in particular, any negative or positive aspects of their experience that stood out. The police officers, defence counsel and judges were asked whether participation in the interview has affected their attitudes towards children whose parents were incarcerated.

All participants were provided with a consent form and information about the project. All participants signed forms guaranteeing their anonymity and confidentiality, co-signed by the researcher, and mothers in prison were informed where Department of Justice (DoJ) exclusions applied to anonymity and confidentiality. Mothers were also provided with a consent to release information form, information about that form, and a form to provide contact information about the other potential participants. All other participants were provided with copies of the mother's signed consent to release information form, with the mothers' permission.

2.2.3 Procedure

- Permission was obtained from Victoria Police and the Department of Justice to interview police officers and mothers in prison.
- Permission was also sought from the Department of Human Services to interview any foster carers that may have been involved.
- Permission was sought from the managers of the two women's prisons to conduct interviews and information sessions within the prisons. Two information sessions were then held at the Dame Phyllis Frost Centre (DPFC) - the metropolitan prison - and one at Tarrengower - the rural prison - in order to inform mothers and invite their participation. Copies of the information, consent and contact forms were handed out at the information sessions and returned to the researcher at the interviews. All interviews with mothers were conducted in privacy on a one-to-one basis either in the Prison Visits Centre or the programs / education rooms.
- Eight mothers were interviewed at Tarrengower. One of the mother's teenage child was visiting and, with her mother's signed permission, insisted on participating in parts of the interview.
- All other participants were identified through the mothers' contact information. Initially they were contacted by telephone and given the option of having information and consent documentation sent to them by post or email prior to the interview. Where this was not required, the documentation was given to participants at the time of interview, and time was allocated to read and complete the consent form before proceeding with the interview.

- All the interviews were recorded using a digital voice recorder, then later transcribed using the QSR Nvivo software encoded for qualitative analysis.

2.3 Results

The results of the interviews have been interpolated through the paper in the areas of discussion where they are most pertinent. A summary is presented in the final chapter along with a summary of all of the *Points for Discussion*.

Chapter 3 Arrest

3.1 The arrest process in Victoria – policies, laws, guidelines

The actions of arresting police officers (informants) are governed by the *Victoria Police Manual* (VPM), issued in July 2003. This manual determines the process of arrest. The psychological and physical well-being of any dependent children – present or returning – is influenced by the policies concerning children in the *VPM*, and the training provided for police officers regarding the care and treatment of children at the time of arrest.

The *VPM* does not contain any guidelines regarding children in any section, including the section dealing with ‘Arrests of particular classes of persons’, or ‘Searches of properties’.

In eight out of the 15 cases in this project, police officers knew prior to the arrest that they were dealing with a primary carer, and in five of these cases the children were present at the time of their mother’s arrest. Five police officers did not know prior to the arrest that they were dealing with a primary carer, and in four of these cases the children were present. Of the 35 children included in this study, 20 were present across nine arrests. In the other two cases the mothers were summonsed.

It was at home, at 7.30 in the morning. They knocked on the door, I opened it and I said: I've been expecting you. They came in, they had a search warrant; they went through and woke the boys up. My youngest was hysterical. He was only 14. (*Mother*)

There are no references to primary carers, or the presence or absence of their dependent children, in the *VPM* sections covering the removal of persons to a police station for interviewing, charging, holding in police cells, remanding, or bailing.

I virtually grabbed my neighbour as we were going out the door. On the way, at the police car, they said, have you got any one [to care for your child]? I said, I'll just have to ask my neighbour, and that was it. You know, what if she wasn't home or something? They went across and asked her. They didn't tell either of us how long it might be for. I was arrested there, and then charged at the police station. I didn't get bail for 16 hours, and during that time my son was with the neighbour. They had taken my husband too, so there was no one left at home. (*Mother*)

In a 1998 protocol, developed between the Victoria Police and the Department of Human Services, *Protecting Children*, there are no references to children whose homes will be or have been searched, or whose primary carers have been arrested and taken into police custody, with the exception of children who are direct victims of parental abuse or domestic violence.

On other occasions he's been dumped at people's places by police when they have said to me: "Well, you had better tell us what to do with him or we are taking him to DHS, and they've dropped him at a known drug dealers' house".....

They just dumped him there, they did not give a fuck, didn't even go in to see if anybody was there. He was about 11 yrs old and they said I would get bail and be home in a few hours. Six months later I got back. (*Mother*).

In the *Protecting Children* protocol, definitions are provided for various forms of child abuse including neglect which states:

Neglect includes a failure to provide the child with an adequate standard of nutrition, medical care, clothing, shelter or supervision to the extent where the health and development of the child or young person are

significantly impaired or placed at risk. A child is neglected if left uncared for over long periods of time or abandoned.⁴

In Victoria, under s.261 (2) and s.262 (2) (b) of the *Children and Young Persons Act* (1989) it is an offence to leave a child unattended and it is an offence to fail to protect a child from harm.

In the process of apprehending primary carers, both of these Sections of the Act are often contravened.

[In regards to a fifteen year old child left without a carer at the time of arrest.] I actually went out to her house to knock on the door to find out if she lived there, and she was actually out the front at the time. So I grabbed her out the front, and off we went. I don't know whether the daughter was home or not, I never actually went into the house. (Police)

The laws regarding the issues of warrants for search and arrest in Victoria are found in sections 28 and 61 of the *Magistrate's Court Act* 1989, and section 10 of the *Bail Act* 1977. Part Four, of the *Magistrate's Court Act* 1989, entitled 'Warrants and Criminal Proceedings, Division 2: General Procedures, and Division 3: Warrants' incorporating Sections 26-82i, detail how search warrants are issued allowing the forced entry, search, seizure and removal of property or persons. There is no reference to particular circumstances such as the presence of dependent children at nominated properties, or their existence elsewhere. Nor is there reference to the removal of a child's legal carer / parent. On arrest warrants there is no requirement for reference to a nominated person's status as a primary carer, or acknowledgement of a primary carer's need to transfer that duty of care in a considered and responsible way where possible.

Similarly, the issuing of arrest and search warrants covered by the Commonwealth *Crimes Act* 1914 s.3C – s.3ZQ, makes no reference to primary carers, their particular needs, or their children.

The police officers interviewed in this project expressed varying knowledge of and ideas in regards to policies on these issues.

⁴ Department of Human Services Victoria & Victoria Police, 1998, p. 7, 4.4,

We wouldn't just hand them over, well I don't think we would hand them over to anyone but family. If she nominated a friend, probably do a bit of a check into the circumstances, what her relationship was with the person, if they were reputable the child would be handed over. (*Police*)

In regards to a criminal matter; the fact that a child is there is not immediately our priority It becomes ... I mean, when you are executing warrants and you are coordinating members of the police force, it's not something that is a huge issue.

It's something that is probably mentioned that there may be children there, in which case we would also take a female police officer with us (*Police*)

On being informed during the interviews that there were no protocols in the *VPM* in relation to children, police officers responded with the following comments.

Although there is no protocol if you don't do something like that the kids, whatever kids that are there at the house, are going to be a pain in the arse for you because of what you're trying to do. So, although there is no set protocols, most coppers would think of it. (*Police*)

I can see where you're coming from, and it's not a bad idea because it helps us. If you know that you're going to go and grab someone and the kid's going to be taken away straight away it doesn't hold the process up. It's got some substance, but you will never get it off the ground because you haven't got the people there to do it. And if you're trying to get coppers to do it, or whatever, then we haven't got people to do it. (*Police*)

If you've got kids there [*at the time of arrest*] we take them into consideration, but normally it's very rarely that they haven't got a relative, a sister, or someone who takes them anyway, who comes and takes over. It's very rarely we call DHS in, very rare. Well, we don't anyway, because we had a bit more planning; I don't know how the uniform guys go. But if worst comes to worse, if mum's got to come back and they are only five or six, and there is no other choice -- we can't go by appointment -- we'll bring her back and let the kids play here, and one of us will look

after them. We've got toys downstairs for them. We generally don't have to wait that long, and if worst comes to worse we buy them dinner. In my experience here we don't put kids in interview rooms. The blokes here are a bit older, and most of us have got kids of our own. (*Police*)

Look, any protocols might be a good idea; but you can end up with ... Every time we go out to do a search warrant it's gotten so that, and look I know that with protocols there is consistency, and it helps less experienced blokes do it, but for us at times, it becomes a pain in the butt. What about something at the training phase? (*Police*)

3.2 The arrest process – its impact on children and their carers

3.2.1 Australia

In South Australia, Lilburn (2000) found that the lack of police policy or clear guidelines meant that any strategies adopted to deal with the presence (or absence) of children during arrests were dependent on decisions made by individual police officers. She felt this suggested that:

The risks of abuse to women and their children are not understood at the senior operational level. This cultivates a climate of uncertainty for individual police officers in conducting their duty. At the institutional level, lack of recognition can result in a lack of planning and inadequate resources for police to respond to the situation. Instead, police rely on the availability of private and public welfare services, but are uncoordinated in establishing what and when services are required (Lilburn, 2000, p. 7).

Through the interview process, the following are some comments on how this lack of clear process impacted on the police officers.

They are things that I actually thought at the time, but I haven't dwelt on ...taking away the kid's mother, you don't think about that. You've got to do your job and get on with it, but, yeah, you are impacting on someone's life. (*Police*)

Sometimes you wonder what hope these children have. I've often been abused by kids; they're doing it simply because of who you are, without knowing you. (*Police*)

Although very little literature exists concerning the impact specifically of parental arrest on children, a few of the numerous studies researching the effects of parental incarceration on children have commented on the trauma of arrest. Kampfner observed:

The children of imprisoned mothers reported long term recall of the trauma of separation from their mothers . . . a number of these children displayed several symptoms of post-traumatic stress disorder, namely: depression, feelings of anger and guilt, flashbacks about their mothers' crimes or arrests, and the experience of hearing their mothers' voices (Kampfner, 1995, p. 90).

For the young boy, it's not a very good experience to see your mum and dad behind a glass screen in the cells, so I was... he's not going to have a good memory of what's gone on. And I feel sorry for him, because hopefully down the track, he doesn't end up like that, following in mum and dad's footsteps. It's got to have some impact on him, I reckon. (*Police*)

Lilburn's (2000) research is one of the few dealing specifically with the impact of arrest and the legal processes on primary carers and their children. Sole mothers who are arrested and detained are often faced with the task of simultaneously negotiating two major legal systems – the criminal legal system and the child welfare system.

I wasn't able to concentrate on the court case, because I was so concerned about who would get custody of my son. (*Mother*)

As Lilburn states:

The failure to recognise, except at the most rudimentary level, the circumstances of women who have dependent children in the procedures used in the criminal legal system reinforces the systemic bias against women in the justice system. Because of this systemic failure – reflected in the use of inadequate and inconsistent practices – women and their children are subject to unjust, extraneous and even illegal treatment (Lilburn, 2000, p. 2).

There are no guidelines in either the *VPM* (2003) or *Protecting Children* (1998) regarding the treatment or reporting of children whose primary carers have been taken into custody, or have been unable to obtain bail, including in situations where no other protective adult can be mobilised prior to or after the removal of the primary carer to the police station.

I didn't know what had happened, or where they were. I didn't see them [my children] for about a month and a half. I was in the Magistrates Court cells for nearly a month. I had DHS, in the end, coming in to see me in the cells.

I was shattered. I was very upset. They had never left my side before in their entire lives, so for that to happen... it was just like, yeah. (Mother)

A study commissioned by the Queensland Catholic Prison Ministry *Parents in Prison and Their Families – Everyone's business and no-one's concern*, interviewed 30 primary carers in prison and found that 'respondents repeatedly highlighted the inadequacy of care arrangements as a factor in the vulnerability of children at the time of incarceration' (Healey, 2000, p. 15).

A common concern expressed by the mothers in Healey's study was mistrust of their families of origin and suspicion about their ability to adequately care for the children. This suspicion also applied to the formal welfare system. As one respondent stated 'What choice did I have? It was a toss up between my junkie mother and my paedophile father. At the time I thought, 'Anything to keep them out of welfare' (Healey, 2000, p. 15). The woman's mother picked up the children.

There are no guidelines in either the *VPM* (2003) or *Protecting Children* (1998) regarding who is considered suitable to look after children (such as undertaking a criminal record search on potential carers for sexual or violent offences). Nor are there any guidelines specifying what constitutes a suitable environment or length of time to hold children, either at Police Stations or elsewhere, where primary carers are being detained.

They were taken by a police car. My partner was taken in the divvy van and myself and my children were put in a squad car back to the police station. No arrangements were made. They had to sit in the interview room, until I was questioned. They offered us a drink – a glass of water. My children were there for eight hours. They slept on the floor. (*Mother*)

There are, however, guidelines in the *VPM* (2003) regarding detention in police custody of *offending* children in terms of their need for emotional support, family contact, entertainment, visits, and DHS contact. But there are no guidelines for children who have not committed an offence.

The next day after I was arrested I had him brought in for a visit, a box visit. He was screaming. He wanted a hug; they would not open the door to give him a hug. He was hysterical, and then I started going off and kicking the shit out of the door and the windows, and he was just beside himself, and I will never forgive them for that.

But they would not -- and that stuck with me and I think it's stuck with my son, too. All he wanted was a hug. He had his own hands up on the window and he was going, Mum, Mum. They didn't give any reasons and they just said "We can't do it". (*Mother*)

3.2.2 Internationally

A study in the UK interviewed teenagers directly about their experience of losing a family member to prison and covered the legal process from the point of arrest until release. This is a powerful study, giving a direct voice to children affected by these circumstances. One child remembered:

I heard a bang on the door and it woke me up. Policemen ran upstairs with dogs. My brother had a bleeding nose. Then they all went downstairs and took dad away. I was angry, not surprised. *12 year old male, father in prison* (Brown, 2001, p. 4).

In other parts of Europe, a similar situation was found. Although children were often present at arrests, EUROCHIP (2004) found that European Community police had little or no training in responding to their presence, and that the solutions to this 'problem' were therefore ad hoc and improvised. A more planned response is being trialled in Amsterdam, where 'a pilot project for a 24-hour emergency hot line put police/relatives in touch with an emergency squad, which would contact relevant child welfare institutions and ensure that the child was cared for until a solution could be found'(EUROCHIP, 2004).

Points for Discussion

1. Is there a need for Policy and Procedures taking children into account throughout the arrest process, including protocols both within and between:
 - a. Victoria Police
 - b. DHS
 - c. NGO's

(e.g Computer alert system for primary carers through Victoria Police.)
2. Is there a need for Policy and Procedures taking interim carers into account throughout the arrest process?
3. Is there a need for training for all stakeholders in regards to children and carers in the context of arrest Policy and Procedure? If so, what would the training consist of?

Chapter 4 Bail/Remand

4.1 Bail – policies and guidelines regarding primary carers

After a parent has been arrested and charged, the next legal stage is the bail hearing, where they may make an application for bail either to the court or to a bail justice if court attendance is not practicable, and bail has been refused by the police (see Figure 1, p. 12).

The *Bail Act* 1977, ss4-8, 12-3, and 18, which cover various requirements for giving and refusing bail, and appealing against refusals, makes no reference to the legal responsibilities of primary carers to protect and sustain their children, nor the immediate need to clarify arrangements in order to meet and/or transfer this responsibility.

The considerations that are taken into account by the presiding Judge/Magistrate in determining bail or remand decisions are based on three broad criteria: ‘The probability of the person appearing in court; the interests of the person charged; and the protection of the community’ (Bamford et al, 1999, p. 26). The factors taken into account are:

- the person’s background and community ties
- the type of offence and strength of evidence
- previous failures to attend court
- evidence indicating the likelihood of court attendance
- length and conditions of remand time
- the accused’s need to prepare for court
- the accused’s protection needs
- the accused’s likelihood of obstructing justice processes
- whether the accused may commit an offence if on bail
- whether the prosecutor has opposed bail

- and in Victoria, the alleged victim's attitude if expressed to the court (Bamford et al, 1999, p. 26).

Victoria has a lower rate of remand than other states (see Figure 3, p. 38), however it does not compare as favourably with other states or Australia as a whole in terms of the numbers of people spending long periods of time on remand (see Figure 3, p. 38). And, despite the care and time given to the bail process in Victoria, there is no reference in the Victorian *Bail Act* to an applicant's status as a primary carer, and the fundamental need to transfer their responsibility for their dependent children to another appropriate adult. Nor is there any acknowledgement of the effect of delayed court proceedings on remanded primary carers, their children, the child's interim carers, and the effect on proceedings in the Children's Court and the Family Court.

I had to go to Children's Court to get the order put on them for them to be placed into foster care. I had been inside for about four months at that point. I had to get them placed into foster care. They put them on a 12 month order because my court date had not been set until the end of the following year, so I had to wait that long, and I thought, well... (*Mother of six children*)

4.2 Bail/remand statistics

According to Australian Bureau of Statistics (ABS) data on prisoners in Australia:

Over the past 10 years, unsentenced prisoners have accounted for an increasing number and proportion of the total prisoner population. The proportion of prisoners on remand has increased from 12% in 1994 to 20% in 2004 (ABS, 2004, p. 13).

Unsentenced female prisoners increased from 15% in 1993 to 25% in 2003 as a proportion of the total female population (ABS, 2005). The ABS also reported that:

The median time spent on remand up to 30 June 2004 was 2.8 months. One in ten prisoners held on remand at 30 June has spent more than 12.5 months in custody (a 10% decrease on the previous year) (2004, p. 14).

A snapshot of the Victorian women's prison population on 30 June 2005 revealed 57 unsentenced (remand) women prisoners. They had spent a mean time of 4.4 months on remand with a median time of two months (ABS, 2005; unpublished data, ABS

catalogue no. 4517). Between January and December 2005, monthly averages of 59 women were on remand in Victoria (Money, 2005, conversation with author).

These remand figures, and the disturbing number of people spending more than a year in prison prior to sentencing, has serious ramifications regarding the impact of incarceration on dependent children.

In the interviews undertaken for this project, ten of the 15 mothers were refused bail, affecting 25 children. In four of these cases nine children waited 15 months, 17 months, 2 years, and 4 ½ years respectively while their mothers were on remand. The remaining 16 children's mothers spent an average of six months on remand.

Whilst anecdotal reports from defendants and magistrates seem to suggest that the primary carer status of a defendant, and their access to alternative child-care arrangements, has some influence on bail decisions, there are no formal guidelines to ensure that the rights of children are protected.

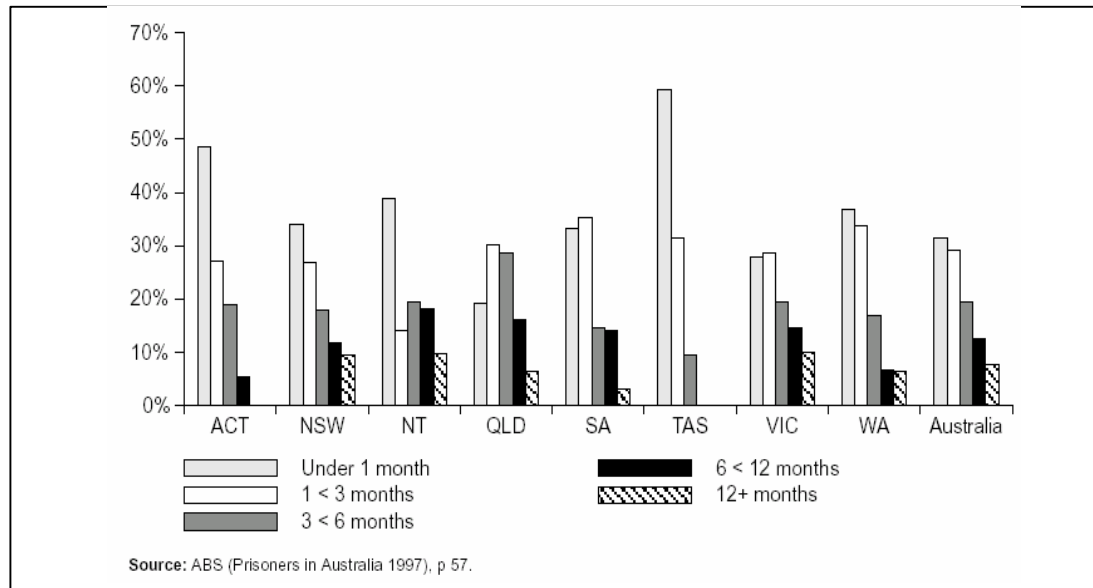
Quotes from the teenagers interviewed by Brown suggest that the bail/remand process is not a pleasant one for children.

We weren't allowed to go to court. Mum would go and she would come home and tell us what happened. When he was on remand that was the hardest bit because we didn't know what was going to happen or where we stood. *13year old female, father in prison* (Brown, 2001, p. 6).

4.3 Between Bail/remand and Sentencing

The period of not knowing what will happen to their primary carer can extend for quite long periods of time. Figure 3 (p. 38) shows that it is not uncommon for children to be waiting up to three months to find out what will happen to their parent and themselves, and in some cases that wait will be more than a year long.

Figure 3: Time Served on Remand by Jurisdiction, Unsentenced Prisoners, as at 30 June 1997⁵



Source: ABS, 1997, cited by Bamford et al, 1999, “Factors affecting remand in custody: A study of bail practices in Victoria, South Australia and Western Australia.” *Australian Institute of Criminology Research and Public Policy Series No. 23*. Criminology Research Council: Canberra.

The situation when mothers (and sole parent fathers) are remanded is worse for children than when partnered fathers are remanded, as there is a greater likelihood that the children will be in some form of substitute care (Stanley and Byrne, 2000; Hirschfield, 2002; NWS Legislative Council Standing Committee on Social Issues, 1997; Nijnatten, 1998). The outcome of bail hearings for these children has profound implications if they are not in appropriate care arrangements.

In both the Victorian criminal court system and the Victorian women’s prison system, there are no procedures in operation to gather information from remandees about their children, either in terms of numbers, transfer of parental responsibilities both immediate and/or for the near future, risk status etc.

⁵ More recent figures for remand times across jurisdictions were not available, however the increase in number of people on remand since 1997 will impact considerably on the statistics presented here.

There are no DHS child protection policies or protocols between Corrections Victoria, or the Magistrates, County, or Supreme Court, regarding children and/or primary carers in this situation.

Following the bail process, the next stage of the proceedings is the Mention Hearing. If no indictable offences are involved, the case will be heard at a later date in the Magistrates Court. If indictable offences are involved, a committal proceeding⁶ occurs at some point prior to the final hearing. Cases that are referred on at committal (rather than being dismissed) are of a more serious nature than those heard at the Magistrates Court, and attract more serious sentencing consequences.

Consequences for dependent children are also potentially more serious, as longer sentences translate into longer periods during which children are left without the protection of their primary carer.

The period of time waiting for committal, and then trial, is often a time of great uncertainty and anxiety for children, as their future hangs in the balance along with that of their primary carer. Dealing with the uncertainties and anxiety experienced by children during this period creates further demands and stresses for interim carers when the primary carer is remanded, and on primary carers, whether on bail or remand.

The mother has always said to the children that she is innocent, that she will be out in a couple of weeks So these kids have been led under false hopes for 4 1/2 years So for the kids, this is only a holding pattern, for 4 1/2 years, which is half your life when you are only eight or nine years old. (*Carer*)

He asks that a lot, when are you coming home? And I couldn't answer him, because I was on remand I was on remand 17 months, and it was the hardest thing to tell him I didn't know when I was coming home. And then I had to tell him it would be seven years. (*Mother*)

⁶ This proceeding determines whether sufficient evidence exists to continue with the matter, and if so, it is either heard summarily in the Magistrates Court, or is referred to the County or Supreme Courts for trial.

Points for Discussion

1. Is there a need for inclusion of the impact of parental incarceration on children as a factor for consideration in the Bail Act?
2. Is there a need for Policy and Procedures taking children into account throughout the bail/remand process, including Protocols both within and between:
 - a. Courts
 - b. DHS
 - c. Prisons
 - d. NGO's
 - e. Department of Education
3. Is there a need for Protocols in regards to information provision for remandees? (e.g. rights, needs, services, special visits for making care arrangements, school access/communication etc.).
4. Is there a need for Protocols in regards to information provision for interim carers (e.g. rights, needs, services etc.)?
5. Is there a need for Child court representatives for parent's criminal court proceedings?
6. Is there a need for specialist services for counselling for children and carers re post arrest trauma?

Chapter 5 Sentencing and Court

5.1 Sentencing Processes

The next stage of the legal process is that of the trial or plea, and, if a guilty verdict is found, sentencing. The Victorian *Sentencing Act* 1991 s.5 (2) outlines the governing principles and sentencing guidelines that the courts take into account at the sentencing stage. Among the many factors considered are those associated with the offender, specified as:

- 2) In sentencing an offender a court must have regard to-
 - (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
 - (f) the offender's previous character;
 - (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

There are no specific references to a person's primary carer status as a special category, or of the affect of sentencing on dependant children.

By contrast, the A.C.T. *Crimes (Sentencing) Act* 2005 – s.33 (Sentencing – relevant considerations) takes into consideration the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants.

The sentencing process works on the basis that the prosecution provide certain information, and so does the defence ... If there's a trial, the judge has the benefit of all the evidence; if the person pleads guilty, what information you have is what may have been in depositions or statements ... They essentially relate to and contain the information on the offence – representing the offence to the court so that the judge can properly sentence. The defence may call some witnesses, may tender some reports, but essentially the judge must rely on what is produced by the barrister. (*Judge*)

This is essentially an adversarial process. And in many ways in this process, particularly pertaining to affected children, the judge plays a passive role, and as stated above '*must rely on what is produced by the barrister*'.

I've never asked anybody 'do you have a legal responsibility to maintain someone else?', because it's usually just put before you. You know if she is represented by anyone that would be what you'd rely on. (Judge)

Our role is basically to fix a sentence in the light of the material that is presented to us. We are not expected to exercise a strong requisitioning role of saying we want to know the impact this has on a variety of other people. Our role is to know the sentencing principles that need to be applied, then we expect the parties to provide to us information which is relevant to the exercise of those principles. And we would expect, in relation to a situation where hardship to the family of the prisoner warrants consideration to be provided with that kind of material, and the more that is provided better, but it is not likely to have any major impact except in the sort of case which is a borderline case. (Judge)

No, he asked my mother as a key witness to verify that the children had Attention Deficit Disorder, and that's where it ended. I don't believe he mentioned that they would be left without a carer etc. The judge said he didn't care about the children, he was extremely angry. (Mother)

The Victorian *Sentencing Act* (1991) s.97 (1) allows the court to request a pre-sentencing report to provide information to the court about a variety of circumstances that may relate to the defendant; while none of these refers specifically to the circumstances of any dependent children, the *Sentencing Act* (1991) s.97 (2) does allow the court to call for a pre-sentence report including 'any other matter relevant to the sentencing of the offender which the court has directed to be set out in the report.'

A recent Australian Law Reform Commission (ALRC) review into federal sentencing noted:

Pre-sentence reports are a valuable mechanism for providing courts with information about the personal circumstances of special categories of

federal offenders and the probable effect of a sentence on an offender or the offender's family or dependants. In Chapter 14 the ALRC proposes that federal sentencing legislation should authorise a court to request a pre-sentence report prior to sentencing a federal offender and to specify issues to be addressed in that report (ALRC, 2005, p. 609).

A section in the *Victorian Sentencing Manual* (Judicial College of Victoria, 2005) is entitled 'hardship of sanction', which refers to extra difficulties that act to make a sentence more onerous for the convicted person than is intended by the court. It states:

Sentencers are frequently urged to take into account in mitigation matters which make a sanction harder upon the particular offender than on others sentenced for the same offence. Hardship is not so much a circumstance of the offender as it is a consequence of a sanction in the offender's circumstances, and it is on that basis that it is examined here.

Claims of hardship of a sanction to an offender are commonly associated with submissions about hardship to the offender's family or other dependents. Such submissions may be successful, but they face a more onerous burden than where it is the hardship to the offender that is relied upon (Judicial College of Victoria, 2005, s 12.6).

Fox and Freiberg's *Sentencing – State and Federal Law in Victoria* (1999) discusses the sentencing of primary carers and the impact of custodial sentences on their dependent children in sections covering 'gender' and 'hardship to others'.

Under the section related to gender, it is noted that while gender should not be a discriminating factor in sentencing, 'matters such as pregnancy, responsibility for the care of children, ... the difficulties of sole parenthood, the lack of a range of suitable sentencing options for supporting parents, ... all impinge upon the court's sentencing discretion' (Fox & Freiberg, 1999, p. 280).

These considerations are also stated in the *Victorian Sentencing Manual* in its section on hardship of sanction regarding gender (Judicial College of Victoria, 2005, s 12.6.8).

Certainly I think there was great emphasis ... my recollection is that he [judge] did certainly make comment on the fact that he had seen the defendant had two young female children as being an overweening factor in the relative shortness of the original sentence which was a minimum non-parole period of 2 1/2 years. (Solicitor)⁷

Although consideration of gender and carer responsibilities in the state criminal justice system have contributed, in some cases, towards reducing sentences to a non-custodial alternative, reducing sentences in length, or postponing sentences, the attitude of the Full Court towards these factors appears to be somewhat different:

The fact a prisoner is the mother of a young child may mean that a prison sentence will have a more devastating effect upon her than it would have upon others. But where the sentence must on any view be substantial that consideration cannot be given very much weight. A sentence otherwise thought appropriate in such a case cannot be reduced in order to allow mother and child to be re-united during the child's early years (Zampaglione, 1981; cited by Fox & Freiberg, 1999, p. 281).

Well, I don't think the court really concerns itself with the impact on the children. It concerns itself with the impact on the defendant. The process is about punishing the person who commits a crime, and the way we go about that, and the community's expectations. So, the fact that people have got children isn't an important factor is it? Well, I'm just aware of the age-old principle: the children don't do well without their mother, and really, she had to go to jail for something fairly pathetic. (Solicitor)

Fox and Freiberg's section on 'Hardship to Others', notes that a number of sentencing decisions support the conclusion that:

Distress, reduced financial circumstances and deprivation of emotional support and comfort are the usual consequences of the imprisonment of a spouse but, unless the circumstances are truly exceptional, the superior courts advise sentencers to ignore them as a significant factor in arriving

⁷ The Office of Public Prosecutions appealed the sentence and the mother received an additional two years to serve.

at the sentence, taking the view that the granting of preference to offenders with dependants will defeat the appearance of justice (Fox and Freiberg, 1999, pp 342-343).

[In reference to a defendant with four children going into foster care] I'm not confident that the situation with the children necessarily falls within the hardship principle; I would say that I have taken it into account, and indeed both the head sentence and her period in custody would have been longer if there had been other circumstances. So I think the reality is the opportunity for a sentencing judge to have significant insight into causal factors and sentencing processes is very limited. (Judge)

The Victorian Court of Criminal Appeal has stated that 'The offender cannot shield herself under the hardship she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors' (Tilley, 1991; cited by Fox and Freiberg, 1999, p. 343), and 'hardship or stress shared by the family of an offender cannot be allowed to overwhelm factors such as retribution and deterrence' (Le and Le, 1996; cited by Fox and Freiberg, 1999 p. 343).

The following are some of the 'personal and sentimental factors' the courts did not give 'undue' weight to.

When I look back I really think we should have used it as more of a defence for me not to come in here. Not an excuse, you know, but for the sake of my girls, for me not to do my sentence in here. My youngest daughter's illness is a bit complicated -- she has got what is called Turner's syndrome. It's usually diagnosed at birth, but it wasn't diagnosed with her until she was five years old. In the first five years of her life she had had heart surgery, bowel problems, kidney problems, skin problems, bone problems and then at five she was diagnosed with it The stuff about my daughter's illness was presented in court, but not in a lot of detail. The trouble is, when you get legal aid they can only get so much. They can't get reports from specialists and we had to rely on information from the Internet, and that was presented to the judge. (Mother)

When I was on bail I had to organise the psychiatrist, because he was walking up and down the corridor with this voice telling him to do it 10 times or something bad was going to happen to him, and doing a lot of things like that, it was awful. *(Mother)*

The older one was not happy where she was living. She started self harming. *(Mother)*

But he said to me, Mum, some days I just want to wake up and kill myself -- and he was seven, I think at the time, six or seven -- and I said, I feel like that sometimes too mate. And he said. Don't do that, I'd miss you. So I told him I would miss you too, if you did it. So then I said how about we make a deal, that we both won't kill ourselves. And we shook hands, and he never said it again. That's how deep it was, from a six-year-old saying how much he missed me. That's how scary it's been for him, but he's never said it since. *(Mother)*

He told me what happened on the night of the arrest. He told me about how he felt when Mum was taken away, how scared he was and is. He can remember everything very clearly. He stashes his things very carefully in case someone is going to steal them. When he hears noises in the night, he is always scared that someone is coming in. Things like that still affect him. *(Carer)*

She had just got that way that everywhere I went, she had to go; do or die, she had to go with me. She was just so scared that one day I was going to go out the door, and I wasn't going to come back either. She would never ever sleep in another bed, well, she is still in the same room as me, but now she's got her own little mattress on the floor It's been five months, and it's only actually twice in the last two weeks that she went somewhere with my father, and that's basically the first time she has chosen to go away from me, in five months. *(Carer)*

I've had him with friends, then my sister, then he went back to those friends. From there he went to my co offender's sister's house for three years. He was very badly mistreated there. He was always grounded; if he hit anybody in school, because he was acting out, the husband and wife were taking turns to hit him. They used to tell him: If you don't be good today in school you'll get hit when you get home, so he lived in fear. Very occasionally, they brought him into see me. (*Mother*)

This adherence to the duty of 'retribution and deterrence' can only be tempered when 'a sense of mercy or of affronted common sense imperatively demands that they (the sentencing judges) should draw back (*T* [1990] 47 A Crim R 29, 40, citing *Wirth* [1976] 14 SASR 291, 296) . . . one that is considerably more severe than normal for a family where the father [*or single mother*] is imprisoned' (*Mawson v. Nayda*, 1995, 5 NTLR 56, 57; cited by Fox & Freiberg, 1999, p. 343). In other words, children can only be presented as a mitigating factor in reducing or modifying their primary carer's sentence under specific circumstances. The court can only show mercy and consider the child's needs when it is evident that incarceration of primary carer's would have grave consequences for their child.

It's not a fact that we are supposed to take into account, because of the equality with which we are supposed to sentence. It used to be significantly different. (*Judge*)

The reality is we don't . . . that person's family is not regarded as a matter of sentencing significance. In other words, there's got to be some degree of, I suppose, uniformity in sentencing; not that there really is, in some respects. It's a very difficult process, really, trying to get it right. Whether one ever gets it right is a matter of debate, I think. (*Judge*)

I think once upon a time that it did play a part, that they did take it into account, but over the last few years the cases that I have seen in court I don't think that they take into account at all. (*Solicitor*)

Statements made by the Appeal Court in Victoria regarding ‘normal’ levels of suffering give rise to critical questions such as: does normal trauma mean that the percentage of children experiencing a particular effect is sufficient to characterise that effect as normal for the stimuli? Or does it constitute some *level* of suffering that can be characterised as ‘normal’ e.g. nightmares and bedwetting? Where does the failure to attain crucial developmental goals relating to attachment and separation security, and the ability to form sustainable adult relationships, or severe educational impairment, stand on the continuum from normal suffering to extreme and exceptional hardship? It would seem that ‘normal’ is being interpreted by the courts in terms of the *numbers* of children experiencing trauma, rather than the degree of trauma experienced.

Under Commonwealth sentencing (applying to federal offences) ‘29.25 Section 16A(2)(p) of the *Crimes Act* requires a court sentencing a federal offender to take into account the probable effect of the sentence under consideration on the offender’s family or dependants’ (Australian Law Reform Commission, 2005, p. 615). In a recent review of federal sentencing the Australian Law Reform Commission noted that:

Some courts have held that this factor can be considered only in ‘exceptional circumstances’. The ALRC proposes that federal sentencing legislation should clarify that this factor should be considered, where relevant and known, when sentencing any federal offender (Australian Law Reform Commission, 2005, p. 615).

Table 1 summarises the range of primary effects on children who are separated from primary carers due to imprisonment. A wide range of symptomatic reactions are experienced as a result of these broader impacts.

Table 1: *Possible developmental effects of parental arrest and incarceration on children.*

Developmental state	Developmental characteristics	Developmental tasks	Effects of Separation
Infancy (0-2years)	Limited perception, mobility Total dependency	Development of trust and attachment	Impaired parent-child bonding
Early childhood (2-6 years)	Increased perception and mobility and improved memory Greater exposure to environment; ability to imagine	Development of sense of autonomy, independence, and initiative	Inappropriate separation anxiety Impaired socio-emotional development Acute traumatic stress reactions and survivor guilt
Middle childhood (7-10 years)	Increased independence from carers and ability to reason Peers become important	Sense of industry Ability to work productively	Developmental regressions Poor self-concept Acute traumatic stress reactions Impaired inability to overcome future trauma
Early adolescence (11-14 years)	Organisation of behaviour in pursuit of goals Increased abstract thinking Puberty Increased aggression	Ability to work productively with others Control expression of emotions	Rejection of limits on behaviour Trauma-reactive behaviours
Late adolescence (15-18 years)	Emotional crisis and confusion Adult sexual development and sexuality Formal abstract thinking Increased independence	Development of cohesive identity Resolution of conflicts with family and society Ability to engage in adult work and relationships	Premature termination of dependency relationship with parent Intergenerational crime and incarceration

Source: Travis et al, (2003). *Families left behind: The hidden costs of incarceration and re-entry.* <http://www.urban.org/url.cfm?ID=310882> p. 3.

'Exceptional circumstances' have been defined as:

If the imprisonment of a parent leaves the children without parental care, if a dependant will suffer overwhelming hardship because of the imprisonment of the offender, or where the offender provides the only means of support for a grandparent (Fox & Freiberg, 1999, pp 343-344).

In these circumstances a number of options are available to sentencers. Judges may suspend sentences of imprisonment, shorten sentences, or shorten non-parole periods.

Carmody was a 1998 decision reported in Australian Criminal Appeal Reports, but in that case there was a very young child, and the child reacted adversely to being separated from the mother's care following the mother's incarceration. The child pines for her, vomited frequently, it goes on to deal with that situation, then in effect, I'll just quote this for you 'The courts have taken the view that provision... in the Crimes Act is to be interpreted as making hardship to a prisoners family resulting from imprisonment relevant, but only if exceptional circumstances are shown'. Then it goes on to say ' I cannot regard this as a case where exceptional circumstances have been shown, but nevertheless this court is in a position to learn something of less than satisfactory material, that the impact of incarceration of the mother had had on the son, it cannot act as though exceptional circumstances have been shown for they have not been shown. We can however show some mercy, tempering the wind to the shorn lamb,' and then gives reference to another Australian case and talks about two English cases. In each of these cases an amendment was made on appeal so as to achieve the immediate release of a prisoner in order to allow a sick child or children to be cared for.

[In another case].....there was evidence tendered in the Court of Appeal about the son of the appellant, who was diagnosed as suffering from muscular dystrophy when he was three years old. It goes on to indicate all of the problems that they had had, and then again it states the principle 'It's only in circumstances where the hardship on a prisoner's family is exceptional that would operate in mitigation. The hardship must be sufficiently extreme, going beyond the sort of hardship that inevitably result from a family where the breadwinner is incarcerated that a sense of mercy or affronted common sense imperatively demands that the sentencing judge should draw back' (Judge)

It would appear that many of the children currently experiencing the effects of parental incarceration would fit into the 'exceptional circumstances' category.

The department had to step in because he was at risk because he wasn't attending school. His teacher, bless him -- he's been fabulous, got payments organised for him but he couldn't keep up with the bills. He wasn't eating There's been a couple of suicidal ideations; not actual attempts as far as I'm aware, but they are expressions of. He was getting really depressed. He [the judge] didn't find exceptional circumstances, but there you go. It's a completely discretionary thing to every individual judge: there are no guidelines by the Supreme Court. The child was part of the exceptional circumstances I was presenting. Exceptional circumstances can be a combination of things, not only one. He accepted that the child was a concern, but he didn't accept that it formed part of exceptional circumstances. (*Solicitor*)

Exactly how many children are affected cannot be determined because of the lack of data collection at every point of contact – police, courts, prisons.

Highlighting the marginalisation of dependent children in criminal court processes, other significant factors need to be taken into consideration in imposing, suspending or reducing custodial sentences. These include outcomes such as loss or disbarment of employment, pension rights, loss or suspension of licences, reduced educational opportunities, discharge from the army, and deportation (Fox & Freiberg, 1999). It is interesting to note that these 'outcomes' can be taken into sentencing consideration, while the hardship experienced by dependent, legally innocent children are often not considered when a primary carer is incarcerated.

Following any sentencing, the prosecutor and the defendant are entitled to appeal, which can make the whole process interminable for children. This is often exacerbated by children's (and other family member's) lack of understanding of the processes involved.

Well, she knew that her mother had gone to jail ... the whole thing had never been explained properly to her. She thought her mother had just been involved in a little accident. Now her mother has gone to jail and she finds out there is an appeal; how she had it explained to her was that

her mother was appealing against the severity of the sentence ... and when her mother's sentence was increased, she went through the roof, saying: I told you not to appeal, I told you not to appeal So she knew there was an appeal going on, but she had no comprehension that it was instigated by the prosecutor That started the ball rolling, I think, with her getting angry and I think not quite understanding, particularly when she reads in the papers about people being fined for what she thinks happened. (*Carer*)

5.2 A comparison of two court systems

A comparison of two court systems operating in Victoria – the Family Court and the Criminal Courts – provides a striking example of the disparate attitudes towards children from within the system.

In the Family Court, children often find that access to a primary carer is restricted to periodic contact because of parental separation or divorce. In this process, the child is given an advocate and time is made available for the advocate to prepare a report, with recommendations, about how the various decisions available to the judge/magistrate could affect the child. The child's needs are placed above those of either parent, and in terms of access, it is impressed upon the custodial parent that it is the child's right to access, not the primary carers', which is being protected. Many of the processes in the Family Court system occur in recognition of the importance of protecting the needs and rights of children, and that loss of contact with a parent can have devastating consequences for children.

By contrast, the criminal courts enact processes by which children may lose their mother or father for a considerable length of time, with no guarantee or plan in regards to access. In addition, children also risk losing their home, school, peer group, security, educational gains, and long-term psychological health, as a result of decisions made. The protection of their rights in the criminal courts is highly precarious and inconsistently applied. The rights of every other player in the criminal system are protected, except those of the children.

The Family Court of Australia is clear about its recognition of children's rights stating, 'The appointment of a Child's Representative is one means of giving effect in

family law proceedings to the United Nations Convention on the Rights of the Child which states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3)

Parties shall assure to the child who is capable of forming his or her views 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. (Article 12.1)

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body consistent with the procedural rules of national law (Article 12.2) (Family Court of Australia, 2004).

While some might argue that parental criminal law matters are not matters which relate directly to the child, the wording of the United Nations Convention on the Rights of the Child Article 12.2 is quite specific in stating that in ‘*any* judicial and administrative proceedings affecting the child’ the child should be represented and heard, and, as Article 3 clearly articulates, in courts of law (without any specific qualification) ‘the best interests of the child shall be a *primary* consideration.’⁸

It is not current practice in Victorian adult criminal courts to allow dependent children or child advocates a role in the procedure, nor are the best interests of the child a ‘primary consideration’ of sentencing.

The nature of the Victorian criminal court discourse does not allow the representation of multiple victim positions. Victims are framed within the narrow definition of those who have suffered loss or harm as a direct result of a crime committed.

⁸ Emphases added

As one teenager experienced it:

The police have been, and the judge, so insensitive. I feel like they have no care towards me. I felt I had no-one to talk to. I told my two best friends. The school still doesn't know because I don't feel they will be sympathetic. Now I am doing my GCSE's I really wished they knew. I have hardly any free time. *15 year old female, both parents in prison* (Brown, 2001, p. 9).

5.3 Other court processes and sentencing options in Victoria

A number of specialist courts have recently been established in Victoria that target particular categories of crime and/or defendants. The Drug Courts, the Family Violence Courts, and the Koori Courts are all divisions of the Magistrates Courts, although they have different operating procedures and powers. The relevance of such specialist courts to the children of imprisoned mothers, is in their ability to incorporate either the voice of children or their representatives, as in the Koori Courts, or in their ability to acknowledge children at other stages in the sentencing process, as in the Family Violence, and Drug Courts.

5.3.1 Drug Courts

The most significant difference between the Drug Court Division and a normal Magistrates Court proceeding is in the sentencing and post-sentencing support. Defendants in the Drug Court have received a prison sentence, but they are serving it in the community, with a high degree of very practical support to enable them to do so in a crime and crisis free manner. This may include housing, drug and alcohol counselling, legal support, parenting support, and training and employment support. People who are primary carers or who wish to resume this role are assisted, and the needs of their children are a major focus of this support.

Of the 15 mothers interviewed for this study, nine had drug or alcohol problems. Three stated their crimes were not drug and alcohol, or gambling related. The types of crimes committed by these mothers were:

- four white collar⁹
- five drug or drug-related theft
- four violent
- two driving offences (one culpable and one with numerous driving while disqualified offences).

A recent evaluation of the Drug Court found that both fiscally and socially, the process has produced savings. The benefits to the Department of Justice and the Department of Human services have been valued at \$16.65M in total, (based on reduced demand for prison beds) since its inception (Acumen Alliance, 2005). A study of offending outcomes using a control group of 50 randomly selected from a mainstream Magistrates Court found that:

During the study period, in which members of the treatment group spent most of their time in the community and members of the comparison group spent most of their time in custody, both groups committed offences at a similar overall rate. However, during the proportion of the study period spent out of custody (free days), members of the comparison group committed offences at a substantially higher rate than members of the treatment group. This difference is statistically significant, and suggests that, once the opportunity factor is taken into account, the Drug Court is having a greater effect on reducing offending rates compared to the alternative of incarceration (King & Hales, 2004, p. 1-2).

The implications for the reduction of trauma to children affected by the Drug Court process are enormous – the primary carers remain in the community, they are supported in their parenting, they are assisted in Family and Children’s courts to reunite with their children, and children’s attachment needs are less threatened. Obviously, other problems for children with a parent in prison are also less likely to occur. It is not surprising that the level of support provided through this court process

⁹ The ALRC federal sentencing review commented: ‘A significant proportion of female federal offenders commit fraud-related offences. These offenders often do not present a threat to the safety of the community. Accordingly, when determining what sentencing option to impose on a female federal offender for a fraud-related offence the sentencing purpose of protecting the community will often have little relevance. Where a female federal offender is motivated to commit a fraud-related offence by need, the sentencing purposes of retribution and general deterrence may also be of limited relevance and rehabilitation may be the most relevant sentencing purpose to consider. This may have implications for the sentencing option chosen.’ ALRC, 2005, p. 611

has simultaneously reduced the impact and cost of offending on the community compared with incarceration outcomes.

5.3.2 Family Violence Courts

The objectives of the Family Violence Courts are varied, and include making access to the court easier and safer for people who have experienced family violence, and increasing the protection of children who have been exposed to family violence (Magistrates Court Victoria Family Violence Court Division, 2005). A number of services are available at the court to assist these aims, such as:

- Information, advocacy, referral, legal services and links from the court to key family violence organisations in the community.
- Magistrates who have been especially assigned to hear your case based upon their knowledge of family violence, trained family violence applicant workers, family violence outreach workers, additional legal services from Victoria Legal Aid and community legal centres, dedicated Victoria Police prosecutors and additional security officers.
- The magistrates, registrars, police prosecutors, family violence applicant workers, family violence defendant workers, outreach workers and lawyers have special training and knowledge in family violence matters.
- There will be an increased focus on the needs of Indigenous and culturally and linguistically diverse (CALD) applicants and applicants with a disability, *as well as children affected by family violence*.
- The magistrate can hear other matters at the same time as hearing an application for an intervention order. These include compensation applications that are linked to family violence, *criminal cases and some family law contact and residency matters at the same time* as hearing an application for an intervention order (Magistrates Court Victoria Family Violence Court Division, 2005; emphases added).

5.3.3 Koori Courts

The Koori Court system is somewhat different to the two previous court divisions referred to above in that ‘the range of sentencing options available to the Magistrate in the Koori Court is no different than those for mainstream Magistrates Court’ (Harris, 2005, p. 77). The eligibility criteria are very similar to that of the Drug Court, with the emphasis on Koori identity rather than drug addiction. However, the sentencing process itself differs markedly from the adversarial process in the mainstream Magistrates’ Court.

The Koori court is required [legislatively] to sit with as little formality and technicality as is possible and is required to take steps that ensure that the defendant, the defendant’s family or any member of the Koori community who might be present can comprehend what is happening (Harris, 2005, p. 77).

In contrast, defendants in mainstream courts can find the experience incomprehensible.

... no one explains what's happening to you, your solicitor comes in and says: 'I'm going to put in an application for this and that', and you go into court and all this mumbo-jumbo gets talked, and you come back going, well what the hell? (*Mother*)

I'm not sure. I hardly got to speak to him (barrister) or even see anything from him. I just seemed to sit in the dock, and just dwindle away in my own thoughts and just blanked out. I just didn't understand it. (*Mother*)

To facilitate the informality of the proceeding in the Koori Courts, all the participants sit around an oval table. The Magistrate is able to draw on a broad spectrum of information pertaining to the defendant and their circumstances before making a sentencing decision, more than is possible in the mainstream court. In the evaluation of the Koori Courts conducted by Dr Mark Harris, Paul Grant (Deputy Chief Magistrate) is quoted as observing:

There are many voices to be heard – the prosecutor, the defence lawyer, the justice worker, the defendant, family members, friends, support

persons, community members, the magistrate, the respected persons – the cases need to take as long as they need to take (Harris, 2005, p. 31-32).

When children are denied a voice in court proceedings – as is the case in mainstream court proceedings – they may be reduced or compelled to express their feelings in other venues.

Well, the daughter got charged by myself after court. Yeah, she gave me a mouthful walking out of the court, and she actually got charged, so... it annoyed me a little, because it was like she was blaming me for locking her mum up. (*Police – after charging a teenage child for an outburst in the Court Foyer*)

This approach has meant that Koori Courts have an average listing of 8.5 cases per sitting day, compared with average estimated listings of 50-60 matters in mainstream Magistrate's Courts (Harris, 2005). This in itself has the additional effect of reassuring defendants that their matters are receiving serious consideration rather than the impression created by the time constraints of mainstream Magistrate Court case loads.

However, despite the greater demand on time required by matters heard using the Koori Court system, this is not reflected in higher costs. Using a calculation of costs that takes into account the cost of re-offending, 73 finalised matters heard in the Koori Court enabled a cumulative 'cost of crime' saving of \$691,728.00 compared with the re-offending rate associated with mainstream Magistrates Court processes. This is based on a recidivism rate of 14% in the Koori Court and 32.6% in mainstream Magistrate's Courts (Harris, 2005, p. 117).

Initiatives such as these, despite their apparent effectiveness, have yet to be adopted by the higher courts. The affect on judges in these courts, of not having a broader range of sentencing options or adequate protocols for primary carers, are alluded to in the following statements.

I don't think I remain detached from many sentences at all. there are always multiple victims. The victims who have actually suffered whatever's happened, but I have always considered the family of the prisoner to be one of the biggest victims. I don't care if they are male or

female, they've got Mums and Dads, sisters, kids... and you can just see them, you can see it breaks their heart. My view is that the moment you send someone to jail you destroy them and everyone around them. (Judge)

What so often happens is that you have a breach of a suspended sentence, and the law says that you must imprison in that situation unless you show exceptional circumstances. Well I must say, if there are children involved, I bend the rules. If it was just, she just won't stop offending, that's a big problem. [Normally if there were children involved you would consider that an exceptional circumstance?]. Very much so, yes. Yes. Or even if I didn't, I'd bend the rules to keep the children and Mum together. (Judge)

The problems that arise from that which happens to the young children say, in the tsunami affected areas, people understand why it's disastrous for all those young children, but in a sense it's happening relatively routinely with the way the court operates here. There's a great deal of scope for admitting further people into the realm of those that I can regrettably acknowledge as part of the process, but it's not within my power to do anything. (Judge)

5.3.4 Home Detention

Home detention commenced in Victoria in 2003 under the *Corrections and Sentencing Act (Home Detention Act) 2003*. Home Detention is an option for people convicted of 'low risk' crimes who would otherwise have received a prison sentence. It cannot be accessed by people who have ever been found guilty of rape, murder, manslaughter, threats to kill, serious drug offences, sexual offences, offences involving the use of firearms or prohibited weapons, breaches of intervention orders, or stalking.

Home detention can be used in two ways: either as a 'front end' option where a person begins their sentence on Home Detention for a maximum of 12 months from court; or as a 'back-end' option (as of January 2004) where a person goes into Home

Detention for a maximum period of six months in the last stage of their prison sentence.

As of December 2005, 115 people have experienced home detention, and approximately 20% of these were women. It has not been possible to determine how many of those on Home Detention were primary carers or how many children were directly or indirectly affected.

According to Corrections Victoria,

The Home Detention Program will enable certain carefully selected low risk offenders to maintain their employment, family and community ties essential to rehabilitation and reintegration (Corrections Victoria, 2003, p. 1-2).

While the intention of maintaining family ties through home detention is laudable, there are often a number of unintentional effects and outcomes for dependent children of people on Home Detention. Children in Home Detention households will come into constant contact with Corrections Officers, thus exposing them to parental legal processes in a way unprecedented in Victoria. In sole parent households, the curtailing of parental activities and movements through strict curfew inevitably has a direct impact on children. Additionally, in the fulfilment of the Activity Plan's requirements, primary carers face a range of other demands that are a part of parenting (eg. minor emergencies, delays etc). These factors may impact on the carer's ability to avoid breaches of the Home Detention criteria, consequently imposing additional stress on the whole family unit.

5.4 Court protocols for children if the primary caregiver is incarcerated.

In Victoria, there are no protocols between the Department of Human Services, the Magistrates Court, the County Court, and the Supreme Court respectively, regarding arrangements for children or the reporting of immediate protective concerns when a primary caregiver receives a custodial sentence. The courts have no judiciary guidelines for determining the immediate safety and transfer of responsibility for children when primary carers are incarcerated and unable to continue their protective and provisory role. As the *Children and Young Persons Act* (1989) s261 (2) and s262

(2) (b) in Victoria states: 'It is an offence to leave a child unattended and that it is an offence to fail to protect a child from harm.' It is also an offence to leave a child in neglect, and 'a child is neglected if left uncared for over long periods of time or abandoned' (Department of Human Services Victoria & Victoria Police, 1998, p. 7, 4.4).

My son is at home on his own now. I have got friends who live two doors down who are feeding him, and he's managing but it is a big ask, of a 15 year old. (*Mother*)

With this client's daughter there was a lot of truancy, with no dad so that kid just drifts off, and the system is ill-equipped to deal with this. There's no one to get out of bed and give them breakfast, there is no one to make them a cut lunch, there is no one there at three o'clock when they come home from school, no one is telling them anything about discipline She is 14, but she acts like a 26 year old, she is traumatised. (*Solicitor*)

He is finding it hard, money-wise, and the limits that he has got, he says: Mum doesn't have any worries, she doesn't have to worry where the rent is coming from, or where the electricity is coming from. She's got us in this mess, and I'm the one that has to be concerned about it. I'm the one who's got to make sure there is money there, and everything like that. Very, very angry sometimes. (Family member interviewed re children of (*Mother*))

The failure by the courts to acknowledge their role in the transference of parental duties can result in major and unexpected disruptions for a child with immediate effects on families of the accused.

Yes. I expected to go to prison, but not on that day. I was told, again by my barrister, that it was a pre-hearing and sentencing would be later that week. Everybody thought I would be home that afternoon. (*Mother*)

Other than Court Network, a volunteer program which is funded by the Department of Justice, there is no service that works with families to plan to meet the needs of the children through this process. In this project, none of the people interviewed had any contact with Court Network.

So that there is somebody there on the very first day you go to court who comes up to you and says: you are a parent, we have this whole bag of information around what is available for your children, and so that these people could help you set up, and so that you know you need to get things set up. Like a lay-buy system, for the children. So that when that day comes that she is ripped away from them, these people have had contact with the children, so that they feel like a trusting them, that these people have a bond with the children and follow up afterwards to make sure that those kids are coping (*Mother*)

Points for Discussion

1. Is there a need to revisit the Sentencing Act in relation to children of defendants to:
 - a. Accord with the UN Charter for the Rights of Children.
 - b. Include the option of Court reports covering defendants' children.
 - c. Children's advocate in parental criminal proceedings.
2. Is there a need for Policy and Procedures taking children into account throughout the court/sentencing process, including Protocols both with and between:
 - a. Courts
 - b. Prisons
 - c. DHS
 - d. NGO's
3. Is there a need for Policy and Procedures taking interim carers into account throughout the court/sentencing process?
4. Is there a need for a Specialised Court for primary carers?
5. Is there a need to educate the judiciary of the implications of the new Child,

Youth and Families Act for primary carer defendants and their children?

Chapter 6 Prison

6.1 Removal to prison – protocols

The next stage for a primary caregiver in this process is the entry into prison. At the time of writing, in the Victorian women's prison system, there are no formal procedures in place to gather information from sentenced prisoners about their children. There is no data collected or collated regarding numbers of children, transfer of parental responsibilities either immediate and/or impending, where and with whom the children are housed at that time of sentencing, or about emergency contact information etc. This is despite 577 women being received into Victoria's prisons between June 30, 2003 and June 30, 2004 (Department of Justice, 2005).

6.2 Where do the children go?

The children of prisoners experience very different patterns of care depending on whether the parent imprisoned is their mother or father.

6.2.1 International Findings

A New York study found that 88% of incarcerated fathers had their children cared for by the other parent or step-parent, and 14% of incarcerated fathers' children were cared for by grandparents. Less than 1% of incarcerated fathers had children in foster care. For women the statistics are worse. Only one in five women had partners that cared for their children; half had children with grandparents, and nearly 20% had children in foster care.

Many children have more than one carer during their mother's imprisonment. A New Zealand study found that this had occurred for nearly 20% of imprisoned mothers' children, and nearly 25% were placed with strangers (Kingi, 2000). A number of studies have also made the observation that siblings are often separated during these care processes (Hirschfield et al, 2002; Kingi, 2000; Lloyd, 1995).

Table 2: *Caregiver of Children of Incarcerated Parent in New York**

Child's current caregiver	Father incarcerated	Mother incarcerated	Total
Other parent of step-parent	88.8%	20.4%	84.8%
Grandparent	14.0%	51.2%	16.2%
Other relatives	6.1%	23.1%	7.1%
Foster home/Agency	0.7%	18.1%	2.1%
Friends/Others	0.5%	1.9%	0.6%

*Totals made exceed 100% because some prisoners had multiple children living with multiple carers.

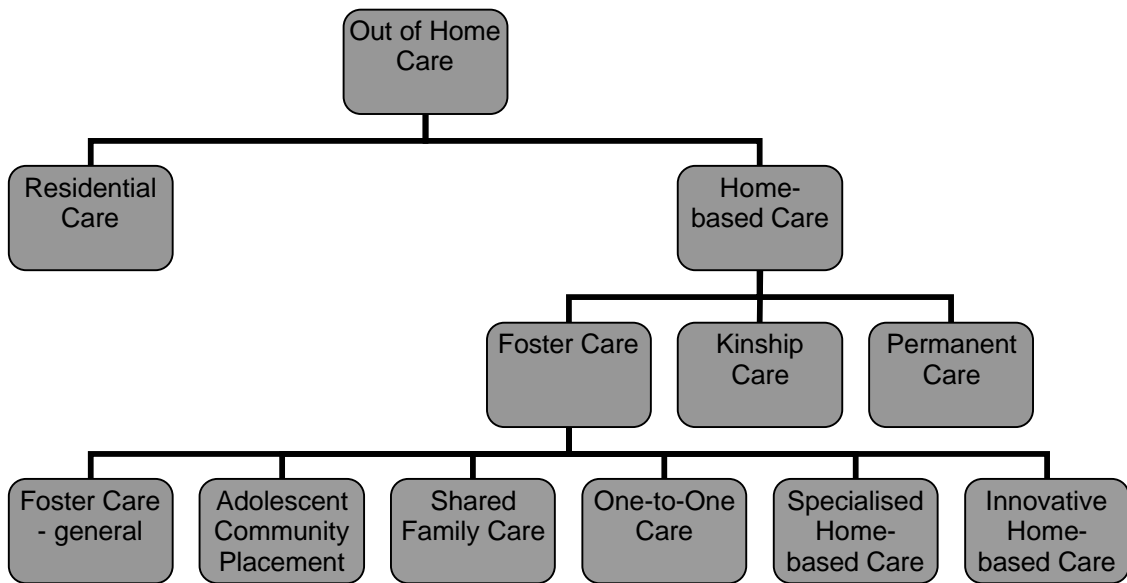
Source: Hirschfield et al, 2002. Collateral casualties: Children of incarcerated drug offenders in New York. *Human Rights Watch*. June. Vol. 14, No. 3(G).

6.3 Foster Care in Victoria

Children whose primary carers enter prison without family or friends willing to take on the carers' role, or whose kinship placement has broken down, will generally end up with home-based foster carers, or in some other form of care (see Figure 4, p. 66).

Their father actually had them when I came into custody, but he apparently left them at a friend's house. He said he was only going to be an hour, but 14 hours later he still hadn't been back there to pick them up. So DHS actually came into the cells to visit me and asked where he might be. I said I had no idea, and they asked if I minded if they took the children into their care. And I said no, because I preferred them to be in their care than with him, so I just signed. He was using, and was incapable of looking after them at all. The kids were only one and two years old, and you know, that was very scary. While I was at Deer Park [prison], and I was there for three months, I only saw them twice in that whole time. I pushed the whole time to get more access, and they [DHS] kept saying we're trying, we are trying. (Mother)

Figure 4: *Out-of-home care in Victoria.*



Source: DHS, 2003, *Public Parenting*

An exploratory study conducted in the Melbourne Children’s Court by Magistrate Greg Levine found that 40 cases appearing in the Mention Court from May to July 2004 coincided with the current or previous incarceration of one or both parents. These cases involved a total of 66 children in the three month period. Three of these children were teenagers, 46 children were under 10 years old, and a third were under three years old (Sheehan & Levine, 2004).

A range of orders were sought in relation to these children, from Undertakings (by parent) to Guardianship Orders. 22 of the orders sought were for Custody to Secretary Orders, which are Orders at the more severe end of the protective intervention spectrum. Of the parents involved, 12 were mothers currently in prison, and in a third of these cases the father was also in prison, and four were mothers who had previously been in prison. A further 34 cases were for 20 fathers currently in prison and 14 fathers who had previously in prison. (Sheehan & Levine, 2004).

The majority of their children (24) lived with their grandmother, and in three cases siblings were spread across their extended families. Ten of the children were in foster care.

Table 3: *The cohort of new clients who entered home-based care in 1997-98:
Summary of their placement experiences 1997-98 to 2001-2002*

Per cent of the cohort with more than one placement	75
Per cent of the cohort with four or more placements(a)	32
Average number of placement changes	3.4
Average number of weeks for each home-based care placement	61
Per cent of the cohort with two or more attempts at reunification	17
Per cent of reunifications with parents that break down	38
Per cent of cohort successfully restored with their parents over five year period(b)	30
Average number of weeks from the first placement to successful restoration(b)	71
Of successful restorations, per cent within two months(b)	27
Of successful restorations, per cent taking 12 months or more(b)	43
Per cent of total time cohort spent in care over five years	60
Total placement costs for cohort over five years	\$120 million
Average cost per client	\$67,000

Notes:

(a) Placement changes include returns to parent(s)

(b) 'Successful restoration' is defined as a child returning to parents with no subsequent return to out-of-home care in the period up until the end of June 2002

Original Source: Department of Human Services 2002, (unpublished data)

Source: Public Parenting: A review of home-based care in Victoria, Table ES.1, 2002

6.4 The impact of foster care on children of prisoners

The Department of Human Services' commissioned report on foster care in Victoria, *Public Parenting* (2002), provides some insight into the experience of both children and carers involved in the foster care system. The findings are based on 1802 children who entered home-based foster care in 1997-98 for the first time, and were tracked for five years. A number of the statistics generated for this group of children brings home the extent of the disruption that occurs when primary carers are no longer able to parent. For example, 75% (n = 1300+) of these children experienced more than one placement, and 32% (n = 575+) experienced four *or more* different placements. The entire group spent an average of three years in care, at an estimated average cost of

\$67,000 per child over that period, and by the end of June 2002, 70% (n = 1250+) had not successfully reunified with their parent/s. Where reunion was achieved, it took an average of 71 weeks.

Children involved with the Child Protective Services system must make considerable psychological adjustments in order to cope with the innumerable challenges imposed on them.

The children of prisoners also have a number of additional 'tasks' they must undertake as a result of their parent's sentencing; tasks that the interim carer will be intimately involved with. These tasks have been described as 'adjusting to the changing patterns of prison visits, its unfavourable aspects, competing for their parent's attention with others visiting, conflicting feelings during visits, and coping with changes in visiting patterns after parental divorce (Pellegrini, 1992a; 1992b, cited by Lloyd, 1995). A study of maternal grandmother carers of prisoners' children found that these children must cope with three types of transition: residential relocation, transfer between interim carers, and transfer of primary carers from one prison to another (Dressel & Barnhill, 1994). Additional demands on children's emotional resources could be added to these challenges. Coping with the arrest, bail and remand traumas and uncertainties, along with the upheavals associated with the return of the incarcerated carer on day leaves, and their eventual permanent return can cause further disruption.

6.5 The impact on interim carers of prisoners' children:

6.5.1 Kinship Carers

The prominent role played by grandparents referred to in international research is relevant to Australia. In Queensland for example, an estimated 75% of carers are maternal grandmothers (Farrel, 1998). In Victoria, an estimated 80% of prisoners' children were living with their other parent, 10% with grandparents, and 4% with friends (Tudball, 2000).¹⁰

¹⁰ Gender differences in prisoner primary carer respondents in Victoria were not presented; or the number of children in foster care, if any.

In the interviews undertaken for this discussion paper, the displacement of children was quite different.

Table 4: *Placement of children in this study.*

Carer	No of Children	No of Mothers
None	4	3
Father – partner	2	1
Father – separated	8	4
Maternal Grandmother	0	0
Paternal Grandmother	2	1
Family other	2	1
Friend	4*	2
Foster care	12	3
Total	34	15

* 3 of these children were abandoned by the friend before the end of the mother’s sentence.

According to Kingi,

[Interim] carers shared many of the characteristics of the imprisoned mothers; they were also predominantly single or single parents and the majority were welfare dependent. Carers were usually female members of the mother’s family, particularly maternal grandparents (Kingi, 2000, p. 3).

This trend is also reflected in the general population of children in care arrangements, where kinship carers assume almost two thirds of the burden of care for children who have been or are at risk of neglect, abandonment, or abuse (see Table 5, p. 70).

Table 5: *New clients in out-of-home care by placement type, Victoria, 2001-2002: %*

Placement	%
Foster care	25
Kinship care	62
Permanent care	0
Residential care	13
Total	100

Source: Public Parenting: A review of home-based care in Victoria, Table 3.2, 2002

The four roles of an interim carer specifically caring for prisoners' children include

1. maintaining ties between the mother in prison and her child
2. caring for the child
3. caring for the prisoner as defined by Aungles (1994) and
4. maintaining their own life and the lives of others.

The demands placed on interim carers fulfilling these roles include taking children to prison visits, facilitating telephone calls and letters, reassuring children of their mother's love, explaining where the primary carer is, and caring for all physical, mental, emotional and educational needs of the children. In addition to the children's requirements, further demands may include providing money, personal items, and post-release rehabilitation for the prisoner, and maintaining their own economic, social and personal wellbeing (Rosevear, 2003). Dressel & Barnhill (1994) identify further demands on the interim carer role in terms of possible involvement in legal tasks, for example, they may be involved in the imprisoned primary carer's criminal case; her children's possible encounters with the law; accessing child support and Family Court matters.

The impact of these demands on interim carers can be summarised as economic, social, and personal (Aungles, 1994). Financially, interim carers can be affected by changes in employment due to childcare, which in turn can lead to changes in income, decreased opportunities for improving economic wellbeing, increased expenditure on transport, food, clothing, educational and other miscellaneous costs.

Yes heaps. I've got to weigh it up whether ... of course his lunches, I always make sure he's got his lunches but sometimes I've had to get food vouchers from St Vinnies, or the Salvos, so that we can go out there and visit. This weekend I can't afford to go out there because of money problems. (*Carer*)

I had to give up shearing, as I say, because I didn't expect anyone to look after the kids for 12 hours a day. You can earn anywhere from \$1000-\$1200 a week doing that. So I mean, that was the downfall; but on the other side of it, you get to spend more time with the kids I suppose. The unfortunate thing is, if you haven't got money.... (*Carer*)

Yes, I had to leave my job, and I was lucky because I had worked there for 24 years at the time, and they said no problem, your job would always be here waiting for you no matter how long you are away for. (*Carer*)

Centrelink used to pay \$330 per fortnight. I'd had to get my superannuation out when I first got the baby. That was in June. Then when the baby went, I was told I was going to get a bill because I had taken my superannuation when I shouldn't have, and it was classed as earnings. Even when I got my tax done this time, I still owed money from that. That was me being ignorant though, I just didn't understand, never having had any dealings with Centrelink before. (*Carer*)

In this study, five of the eight family and one of the two friend interim carers ceased or down-graded jobs as a consequence of taking on children of prisoners.

Socially, interim carers' time for entertainment, relaxation, sport and hobbies can be curtailed, and their degree of community involvement, the attitudes of the community towards them, and their perception of that attitude, are affected by caring for a prisoner's child.

That's why I sneaked down to the pokies every chance I get. I find, after the oldest boy had gone to school and there was nothing to do, it was real peaceful on the pokies. Everything went out of your head; you didn't think about having a son in prison or anything like that. It was a good relief. It can be a bad relief, too. (*Carer*)

Personally, their individual relationships both with the wider community and with significant others, including the prisoner, the child, other relatives, their own children, their partner etc, as well as the carers' own freedom, obligations and responsibilities, and physical, mental and emotional health, are all significantly affected (Aungles, 1994; Rosevear, 2003; Hirschfield et al 2002; Kingi, 2000; Dressel & Barnhill, 1994).

So it's not just the financial cost, it is also things like the fact that my children very rarely get the chance to experience me and my wife doing things with them together, as one of us is always off to the prison with the two girls, while the other one has to cope with our four children on their own to do things on the weekend. We've tried loading all our kids in the car as well, so that we could do something in Melbourne together with them while the girls were visiting their mother in the prison, but then the girls thought we were being unfair too, because why should our kids get to go to the Aquarium, or something like that, while they have to go into a prison. (*Carer*)

These carers were under Family Court orders to take the children to visit their mother on three weekends out of four. Eventually in recognition of the burden this created for the carers, this was changed to once a month. Now, however, in line with the visiting regimes awarded to parents with children on Permanent Care and Guardianship orders, these children's contact with their mother has been reduced to four visits a year. This would seem to be going from one extreme to the other.

According to Dr. Pat Brown of the Children's Court Clinic:

If the welfare of the child is indeed the primary concern, it makes no sense to attempt to attenuate or undermine the bond between the

primary parents by extremely limited access, only, being allowed through departmental decision making (eg. the application of the informal 'four times a year rule'), thus compounding for the child a sense of loss. Clinical wisdom concerning attachment supports the view that multiple attachments in life are desirable, this becoming possible through the efficacy of the primary attachment(s) – normally with the parents – and the primary attachment needs to be supported when the child is living away from home unless there are quite serious indications to the contrary (Brown, 2004, p. 1).

A further, distressing difficulty experienced by families caring for the children of prisoner's occurs when the interim carer role can no longer be fulfilled, and children must be relinquished to the foster care system. Such decisions inevitably have long-term repercussions for family carers, imprisoned primary carers, and the children concerned. These processes can also have an adverse affect on their perceptions of self worth.

The sentencing of primary carers imposes hidden contracts of care onto the families of prisoners (Aungles, 1994). It is apparent that they are performing a key role that is exploited but not articulated or acknowledged by the criminal justice system (or any other system), and this role imposes serious and long term financial and psycho-social costs on its recipients.

In a case study reported by Rosevear, one grandmother's experience as a carer of her imprisoned daughter's child supports the above observation:

She made initial contact with welfare, and felt that welfare always assumed she was coping and would perceive her as a nuisance should she request extra assistance. She felt this was not a fair deal due to the amount of assistance her daughter had been offered to facilitate her role as a mother, and was praised for assistance, whereas she felt she was offered almost no assistance and was, or would be, looked down upon had she asked for assistance. Overall, she felt disadvantaged and victimised as a result of the caring role and her daughter's imprisonment, as it had had a negative impact on almost every element of her life (2003, p. 9).

In a sense, carers experience many forms of adversity and disadvantage as a result of their caring. O’Keefe (2000) summarises this experience with the observation that families of prisoners begin ‘doing time’ from the moment the prisoner is arrested. Given the above findings, it is apparent that family members who become carers of children with imprisoned primary carers are as much secondary victims of crime as the children they are caring for.

It was just a nightmare, and I felt that I am the one really doing the sentence. (*Family member interviewed re children*)

Ironically, the interim carers of prisoner’s children are the only people having a choice about the degree of their involvement. It would be a major burden to the criminal justice system, DHS and welfare services were these carers to relinquish their duty of care.

That's something that is really needed, help for the carers. The counsellor we were given was in Melbourne, which made it difficult to afford getting there. We got a little bit of money from victims of crime, but most of the time we just had to fork out money for ourselves. This is what you get for putting your hand up to help. If anyone ever asked me in the future should they do this, I would tell them no, and where does that impact on children? Because we have been jacked around so much, and not give any assistance that really, should be forthcoming -- we've been left high and dry, basically. (*Carer*)

6.5.2 Foster Carers

The Victorian *Public Parenting* (Department of Human Services, 2002) report highlighted a number of concerns expressed by foster carers that particularly impacted on their ability and/or desire to fulfil a carer’s role. These included a relative dissatisfaction with the legal system’s role and support from DHS; dissatisfaction in dealings with birth parents; the basic rate of payment and the lack of transparency around reimbursement; high turnover and limited availability of staff;¹¹ lack of

¹¹ For example, of the 1802 children tracked for five years from 1997/98, 63% of foster care clients had to deal with four or more case workers in a 2 ½ year period.

information about the children and their access visits and a failure to listen to the carers' concerns about children.

A further observation of the Victorian report on out-of-care services revealed that children in foster care are becoming an increasingly complex group. For example, an increasing number of children placed in foster care have a greater number of notifications prior to their entry; they are younger; more of them have protective issues; the type of orders on which children are being placed (in order of severity from interim orders, supervision orders, custody orders) are increasing in terms of severity and these orders almost always carry conditions attached which in turn have implications for the carers. Children are going into their first placement with more difficult and challenging behaviours, and are increasingly coming from homes with a background of substance abuse, domestic violence, psychiatric disability, or combinations of all of these (Department of Human Services, 2002). Given the rise in the female prison population, the number of children in foster care is burgeoning. In turn the number of carers assuming responsibility for prisoner's children is decreasing, further complicating the situation.

In Between 1998 and 2002, 11% of placements in Victoria were in residential care, not home-based care. 4.1% of the children in out-of-home care were under 12 years old and in residential care settings, either as a result of challenging behaviours, or as members of sibling groups too large to find home-care placements (Department of Human Services, 2002). According to the DHS Community Care Division website, residential care consists of:

An out-of-home care placement service for children at risk of abuse and neglect. Residential units are operated by community service organisations. They provide supported semi-independent accommodation options for young people aged 13 to 17 years who are homeless, in crisis as a result of family conflict, breakdown or violence or who may be subject to a statutory order. The short, medium and long term accommodation and support is provided in households supported by either a volunteer lead tenant or care management support (Department of Human Services, 2004).

6.6 Parental incarceration and children's schooling

The impact on education outcomes for children with a parent in prison can be enormous. A number of observations were made from reports provided to the Children's Court about the children involved in the study conducted by Sheehan and Levine. The school experiences of these children were summarised as follows:

- Poor school attendance. Parent fails to get child to school; child left to care for self and cannot get to school; child's lack of normal routine makes for difficulties, for example, with sleep goes to bed too late to wake up for school
- Non-school participation. Children who have never been to school until they get to foster care
- Literacy difficulties
- Poor language difficulties
- Cognitive and emotional developmental delay
- Changes to schools. One child in first year of school has already had three changes in school
- Peer interactions. Children who exhibit high levels of aggression towards other children; children who are hypersensitive; children exhibiting sexualised behaviours
- Child presentation. Children who through neglect are unkempt, who are small for their age, who soil etc. Children are thus ostracised by others.
- Asocial acts: fire-starting, stealing food, toys, from other children
- Child sent out to beg rather than attend school (Sheehan & Levine, 2004).

While their mothers are in prison, children suffer a number of difficulties in the school environment. These may include bullying, either as victims or as perpetrators, teasing, truancy, poor academic performance, and dropping out altogether.

Well, obviously because I'm not there to get him off he's missed heaps of school since I got locked up. (*Mother*)

For the older girl it has been a bit harder to adjust -- she told people her mother was overseas and living in Mexico, and that's why she couldn't see her, and then when it hit the papers of course, it all came home to roost. (*Carer*)

My oldest quit school. He left in year 10, but he had failed year nine. He was just starting year nine when I was arrested. He is being more concerned with keeping the house going, and the family together. So, his life is sort of on hold, because, I mean, he said to me one day: thanks a lot, I can't even be a teenager, you even took that away because I am going to be 20 when you get out. His life is on hold because he's got the whole care package -- the house, the dog, cat, him and his brother. His life will move on again, after that. He's in limbo. We're all in limbo waiting for two years to pass. (*Mother*)

Many children must change school as a result of moving to the interim carer's residence. They also lose any peer and teacher supports they may have in the process. In this project, three out of eight teenagers left school and ten children changed schools as a direct result of their mother's incarceration; in addition, four children started school, two children transitioned to high school and a further three await high school – all without their mothers' support.

Mothers may experience a number of frustrations when dealing with schools from within prison. Most of these difficulties centre around a lack of information from schools regarding their children's progress, doubts about informing schools of the situation, the inability to inform schools when crises are occurring for their children, no contact with school staff, and not attending children's first days or other major school events.

One of the boys was going from kindy to school for the first time, and he had a few words to say to me about that -- he was just shattered. I should have been there. It shouldn't have been the foster carer. Even though I was on a minimum security rating, I wasn't even allowed to go into

hospital when my 12 year old was getting an operation, so I knew I wouldn't have been allowed to attend with my son on his first day of school. *(Mother)*

I wrote to the principal because () was going on a camp. Then the uncle wrote to the Family Court and complained because I was communicating with the school. I am now not allowed to communicate with the school. He said I was interfering. *(Mother)*

However, it appears that for mothers who have taken the risk and informed their children's school of their circumstances, the majority of schools have been extremely helpful, in some cases representing the only support and/or counselling these children can access.

They've been great, actually. I haven't been in there often, but when I have they have been very welcoming. The first time I went they were a bit standoffish; they knew what I was in for because I have never hidden it from them. I said look I'm in jail, this is what I am in for, and this is how long I am doing. And now they are very friendly. They say how supportive I am of my son. I get a newsletter from them every week. With the school reports they actually produce two copies and send me one of them. They've been really, really good. *(Mother)*

Yes, the teacher actually said, you've moved up here to make a change to yourself and your children. So if there is anything you need just come and see me. *(Mother)*

Some women seem better able to make use of prison resources to facilitate school contact than others.

Yes I have. Not so much by phone calls, but they actually gave me a special leave to pick a new school for him. I had an officer taking me, in uniform, but that's okay. I actually went and looked at two schools and chose one of them. *(Mother)*

My thought was to maybe try and contact the school counsellor, because then they had the right to the confidentiality, and it can't go any further. And I thought maybe they could get in contact with my eldest, and let her sit down and maybe get a few things off her chest. Maybe I am the issue at the moment, or part of the problems that she is having ... But nobody has said to me anything about doing that for me, or helping me with it.
(Mother)

Quilty's (2005) figures, estimating that nearly 5% of Australian children have ever experienced parental incarceration, theoretically place a child with experience of a primary carer in prison in every classroom in Australia. In Victoria, the Department of Education, Employment and Training has no policies specifically relating to the children of parents who are currently or have previously been imprisoned. Nor does Corrections Victoria have any protocols about primary carer contact with schools. Although schools' responses have been generally very positive, the lack of policy places staff in much the same position as police officers during arrests where children are present.

Yes. Just some suggestions about what to do when you've got kids -- what problems you could face, and what you should do. For instance, is it in their best interest to let the school know, or not let the school know? Even if it's done through programs. They should have dealt with enough women in the system with children to know what the statistics are about, how schools react and what you should or shouldn't do. *(Mother)*

6.7 Children in prison residential program

A policy has been recently developed by the Women's Prisons Ministerial Advisory Committee (WCSAC) to manage the children in the prison residential program. The program policy is based on the principles stated in Article 3.1 of the United Nations Convention on the Rights of the Child 1989, which states that in all actions concerning children, 'the best interests of the child shall be the primary consideration' (Corrections Victoria, 2005).

A child's eligibility for the program is dependent on considerations such as:

- the prisoner's social history and offence history and current sentence or remand details, including earliest release date
- the prisoner's classification
- the history of the child, including age, siblings, other family members, known medical condition and profile of physical, intellectual and emotional development
- assessment of the child's current placement and/or viable alternative placements. This may include consultation with the family and/or current caregiver
- the legal status of the child, indicating whether the prisoner has legal custody of the child, is the primary carer, and any access rights that other parties may have.
- an assessment of the suitability of the nominated alternative carers. This is to enable respite and/or child care to be available to the mother to participate in education, work or rehabilitation programs and in circumstances where the prisoner is unable to continue to care for her child in prison, or an emergency situation requiring the removal of the child (Corrections Victoria 2005, p.8).

Unfortunately, the majority of children with imprisoned primary carers are not eligible for the residential program due to age and, for primary carer fathers, gender. Even for those children that are eligible, the processing of applications submitted at the Dame Phyllis Frost Centre (DPFC) can take considerable lengths of time (although this process has been reviewed as a part of the WCSAC recommendations); the environment at DPFC is a lot less child friendly than Tarrengower prison, and fewer children reside with their mothers at DPFC.

It took me nearly seven months to get the baby back. So I left him at four months and got him back at 11 months old. He was at my mother-in-law's, interstate. At DPFC I started trying to get him, and I pushed to get up here, which took me six months, and they helped me here at Tarrengower, a lot, to get him in, whereas it was sort of stagnant, apparently [at DPFC]. (Mother)

6.8 Prison arrangements for children visiting

She mustn't think we don't love her ... if we don't keep in touch she will think we don't love her and she will harm herself again. *Sisters aged 15 and 13, mother in prison* (Brown, 2001, p. 8).

During their primary carer’s sentence, the prison visit centre will become the physical and systemic context for children’s contact with her. The environment itself and the attitudes of those controlling that environment have a significant impact on the quality of the experience for all involved. According to Brown:

Keeping in contact with their imprisoned relative appears to be important, not so much because their own needs are met (although this is difficult to ascertain), but to ensure the welfare and mental well-being of the prisoner. This must bring significant emotional pressure and responsibility to many of these teenagers and this is an issue which warrants a great deal more thought and consideration (Brown, 2001, p. 8).

For many children, and for their primary carers and interim carers, visits are a very mixed experience.

And all he did for the entire visit was hide behind the Coke machine and he wouldn't come out. He would have been about seven at the time. Apparently he used to do it every time he went out there. (Carer)

I don't want them to go. My six-year-old keeps saying, is it time to go yet Dad? (Mother)

For a significant percentage of children, visits occur very rarely, if at all.

6.8.1 Victorian Visits

In Victoria, fewer than 25% of incarcerated primary carers never saw their children, and more than half the respondents saw their children fortnightly or weekly (see Table 6), although more than a third only saw their children once or twice a year or less.

Table 6: *Frequency of visits for incarcerated parents in Victoria*

Frequency	No of respondents	%
Weekly	77	40%
Fortnightly	24	13%

Monthly	13	7%
Every 2 months	5	3%
Once or twice a year	9	5%
Children do not visit	46	24%
Prisoner had no contact with children	12	7%
Other	8	4%

Source: Tudball, N. (2000). *Doing it Hard – A Study of the Needs of Children and Families of Prisoners in Victoria*. VACRO: Melbourne.

A number of factors appear to affect the frequency of visits. The most common factors impacting on whether children see their primary carer are that:

- the interim carers do not want the children to visit
- the imprisoned parent does not want the children to visit
- there is no-one to bring the children in
- children do not want to visit
- problems with family relations prevent visits or make them very uncomfortable
- and/or problems with travel costs and distance.

The reasons generally given for why interim carers and parents don't want children visiting include:

- the difficulties of travelling long distances with young children
- the parent did not want the child to know they were in prison
- the environment was considered unsuitable
- and/or the visits were too upsetting for the children.

The reasons given by and for children not wanting to visit are that they:

- are angry with the imprisoned parent
- that they have grown distant from them
- had little contact with that parent prior to incarceration (Tudball, 2000; Hirschfield et al, 2002).

In the interviews conducted for this discussion paper, the frequency of visits changed in some cases over the years of the sentence and/or the location of the prison the mother was in. Table 8 provides an overview of these patterns.

Table 7: *Frequency of visits over time, prison location and carer type in this study.*

Length of sentence/remand	Beginning of Incarceration		Later		Residence of children	Carer Type
	Prison location	Frequency of Visits	Frequency of Visits	Prison location		
10 months	Urban	3 times		Urban	Urban	None
5 years	Urban	Every 3 weeks		Urban	Rural	Family
6 weeks	Urban	Weekly		Urban	Rural	Family
18 years	Urban	Weekly	4 times a year	Rural	Rural	Family
7 years	Urban	Once	Fortnightly	Rural	Rural	Friend
4 ½ years	Urban	Once	Monthly	Rural	Urban	Family
1 year	Urban	Twice	Reside in prison	Rural	Rural	Foster
1 year	Urban	Monthly	Monthly	Rural	Rural	Family
18 months	Urban	Never	3 times	Rural	Interstate	Family
2 years	Urban	Monthly	Monthly	Rural	Urban	None
9 months	Urban	3 times		Rural	Rural	Friend/None
1 year	Urban	Never	Monthly	Rural	Rural	Family
2 ½ years	Urban	Weekly		Rural	Rural	Foster
1 year	Urban	A few times		Urban	Urban	None
18 months	Urban	Never		Urban	Rural	Foster

Other factors, often part of prison procedure associated with visits, make the experience a difficult one for children. Long delays may occur while visitors are processed into the prison; primary carers are not allowed to leave their seats during visits in some prisons (a difficult concept to explain to active toddlers); food and drink cannot be taken in for children; outdoor areas are very small and there is limited equipment – inside or out – for children to play with.

There is nothing here, I've told them and told them and told them, there is nothing here for a kid his age. They have got the soccer table -- it's too noisy. It's a good game, but it is so noisy it disrupts the other visits. All they have got is a little gym thing out there. It works, and he plays on it, but after 10 minutes he is bored. (*Mother*)

A further consideration is that primary carers may be under prison management regimes for infractions of the prison regulations that result in the loss of contact visits, sometimes for months at a time.

Non-contact visits are not conducive to comfort and intimacy between mothers and their children, however interim carers may not be told prior to embarking on the visit that contact visits will not be allowed.

I've actually arrived there, and the guards have said no, she's not having a visit today. So I've driven all the way down from [2 ½ hours drive] and they tell me there's no visit. They say they have rung, but they have rung people who occasionally bring the children, rather than us who are the carers at the moment. So we actually experienced the prison itself is another area of obstruction. (Carer)

Also visits can seem very short when compared with all the travelling time, waiting time, costs, and emotional disruption, and can seem like a poor return for the investment involved. The study giving voice to of prisoners' teenaged children concluded:

Visiting . . . places significant burdens and emotional pressures on their lives. The issues which seemed to concern the young people most when visiting were the lack of privacy and individual time with the prisoner. The lack of privacy clearly damages the right to contact with family. Teenagers are too self-conscious to be open with their families while others are present and often, as a result, they are unable to say anything during visits. Similarly, not being able to spend quality individual time with a parent or sibling is contrary to Article 9(3) of the UN Convention on the Rights of the Child. As they stand, visits are largely unpleasant and uncomfortable (Brown, 2001, p. 9).

Visits are really boring, and Mum calls me a lot during the week so there's nothing really new to talk about. I try to come out here when I can stay, when it is worthwhile, and it's not in here [gestures around the visit centre]....Look how close the tables are.... It's better sometimes to sit outside, because then you feel like you're further away from people and not so close together. It was better when we could walk around the children's farm, because Mum was working on the farm and I could see

the cows and pigs and things. It's not so much that I need more activities, it's just more space. (*Teenage child*)

Rarely, I've seen him three times in the last few months because he hates this place. That is the main reason he doesn't come. A girlfriend brings him. It's not because of that. It's just because he hates the jail. (*Mother*)

The ALRC review into federal sentencing noted that:

In some circumstances a sentence may have a more severe impact on a female offender than on a male federal offender. For example, because women represent a small proportion of the overall prisoner population, states and territories generally have a limited number of correctional facilities for women. The fact that a female offender may be required to serve a sentence of imprisonment in a correctional facility located far from her family and social networks may be relevant to sentencing (ALRC, 2005, p. 611).

6.9 Children-specific visit programs

6.9.1 International Programs

A number of initiatives have been instituted in various countries in an attempt to improve the quality of mother/child relations during prison visits. Some international programs range from special visiting areas where children and parents can spend time together in a child-friendly setting, mothers spending weekends with their children at semi-open prisons, and mothers accessing a swimming pool where they can swim with their children to facilitate non-verbal contact and communication, and to allay stress and foster intimacy.

A practice increasingly adopted in the U.K. is the provision of independently staffed visitor centres¹². An indication of how importantly this resource is regarded can be inferred from the following Hansard excerpt:

¹² 'Visitor centres' are facilities that cater to the needs of visitors and are usually situated outside the prison wall and run by non-prison staff. 'Visit centres' are the prison's area for prisoner's visits, are situated within the prison and are staffed by prison officers.

Baroness Linklater of Butterstone: My Lords, visitor centres, which are relevant to the previous question, play a crucial role in the quality of prisoners' families' visits. The Prison Service states that it has 110 visitor centres, although only 85 are properly manned and giving a necessary and effective service. Thirty prisons have nothing at all, including the newest women's prison, where they have to make do with the car park. Does the Minister agree that visitor centres must be more than simply waiting rooms with a lavatory and some refreshments? What plans are there to turn the current 25 waiting rooms into proper visitor centres? (Lords Hansard text for 14 Oct 2004 (241014-01)).

The following is an example of an independent visitor centre in Northern Ireland.

The Monica Barritt Visitors' Centre, (known locally as the Quaker Visitors' Centre), in the grounds of Maghaberry prison provides a range of services for visitors to the prison. Many families travel considerable distances to visit and our centre staff strive to create a welcoming atmosphere for children and adults alike.

Children are delighted to use the play area and have the guidance and participation of one of our caring child care staff who understand the difficulties of having a parent in prison and are sensitive to individual children's needs.

For some children visiting prison can be a very difficult experience and by providing child care within the prison visits area we know that the quality of visit for the adults and children is enhanced. Children have the opportunity to engage in a variety of activities with the guidance and support of staff (Ulster Quaker Service, 2005, website).

6.9.2 Victorian Programs and Policy

In Victoria, no women's prison has a visitor centre.

When Fairlea Women's Prison was still in operation (having closed in 1996 with the completion of the new facility, the MWCC¹³ at Deer Park) children were able to participate in all-day visits with their mothers, within the prison grounds. The visits lasted from 9.00am until 4.00pm every Saturday, and children were able to return to their mother's accommodation, eating with her and engaging in a variety of activities that sustained mother-child relationships. A child experiencing a similar program in Holloway Prison in the UK stated:

I don't like the visits room. The tables are too small and I can't cuddle my mum enough. I like this visit 'cause I can cuddle my mum for a long time. *9 year old boy, mother in prison* (Pellegrini, 1992a; 1992b, cited by Lloyd, 1995, p. 30)

Unfortunately for Victorian women and their children, these visits were discontinued with the opening of the new MWCC prison in 1996 and have not been reinstated at DPFC since that time. According to the General Manager Victorian Women's Prisons Region, this is based on a number of factors that could affect the safety and well-being of visiting children.

The size of DPFC is three times that of Fairlea in terms of prisoner numbers. With those increased numbers has come an increased level of complexity, activity and unpredictability. There are also implications resulting from the increasing numbers of women coming into prison with issues relating to psychological/mental illness. I worry about the issue of supervision and welfare of the children in the event of an incident or an emergency. I remain committed to the importance of the connection between mother and child and I believe we should also continue to look at more creative ways of facilitating these sorts of visits in the Visit Centres themselves, such as creatively constructed Visit Centres with infrastructure that promotes purposeful activity. I am also concerned about services for visitors, and would like to see this addressed (Money, 2005).

For now, children are restricted to three hour visits in the visit centre on Sunday afternoons.

¹¹ Now called the Dame Phyllis Frost Centre (DPFC)

While the visits are on I either read in the car park for the three hours, sometimes I go to the market and buy some veggies ... what else can you do? It's not enough time to go and visit relatives, or go into the city and do something, because the prison is so far away from everything. I've tried visiting friends, but they're not always home and besides, there is a limit to how many times you can go to someone's house and kill time. The car park becomes the only place, a scintillating place to spend three hours.
(Carer)

A number of other programs are now operating in Victorian women's prisons in recognition of the need to maintain bonds between mothers and children. These are:

- Family Visits Program (HM Tarrengower Prison) - a weekend family visits program for children aged less than 16 years who reside with alternative carers in the community
- School Holiday Program (HM Tarrengower Prison) - a school holiday program allowing children aged less than 16 years to stay in the prison for up to four days
- Family Ties (Primary Care Giver) Permit – a permit allowing an eligible prisoner who has been the primary care giver of a child, sick or elderly relative prior to imprisonment to visit that individual in the community
- Weekly visits between mothers in prison and their dependent age children (Corrections Victoria, 2005, p. 3).

A significant number of children are unable to access the other visit programs provided because of distance from the prison and the difficulties that brings. Mothers are also often unable to make use of Family Ties Permits because of the distance from the prison to where their children reside, and the limited time available on many Permits.

Research indicates that the maintenance of family relations has led to positive short and long term gains for prisoners, particularly in terms of recidivism, and intergenerational offending (Kingi, 2000; Louckes, 2002).

A consistent approach to the welfare of these children, embracing the philosophy that primary carers and their children should be reunited post-release, must take the visit environment into serious consideration.

As one mother pointed out, young children cannot understand why they cannot stay with their mother – visits are like ‘giving a toddler a lollipop and then snatching it away.’ Each visit means another separation (Hirschfield et al, 2002, p. 9).

6.10 Other forms of contact between mothers and children

Telephone calls and letters constitute the main other form of contact that imprisoned primary carers can have with their children. However, telephone calls can only be made at certain times, are of limited duration, and can be expensive for prisoners to access if children reside any distance from the prison. They also require the receiver of the calls to accept them; this can be difficult if the interim carer, for a variety of reasons, does not want to have contact with the primary carer in prison.

Because I have no partner, I have no private money coming in, I have to live from the basic prison wage, which allows me two phone calls a week and there is a lot to try and fit into 15 minutes, and a visit once a month.
(Mother)

I had phone calls, I could ring once a week. But it was very expensive to ring up there, and I could barely afford it on my wage even to ring once a week. Up here we used to get \$10 a month from the jail for phone calls, but that has stopped, then we got five and that really helped. Now we get nothing, not even the five. And that I think is the problem for a lot of girls up here. It's very expensive to ring home. It's four dollars for 15 minutes in the evening. And there are a lot of other things that you have to buy out of your wage. *(Mother)*

For Victorian women prisoners, the location of the minimum security prison two hours from Melbourne affects the cost of telephone calls significantly, just as it affects travel arrangements for visiting children. Furthermore, imprisoned primary carers are unable to receive telephone calls, preventing children from receiving comfort and support from their primary carer at times when crises in their lives are actually occurring.

The biggest problem with jail if anything is the communication. The inability to have a child contact you, or for you to contact the child when an issue becomes real and relevant is obviously going to have a great affect on a mother, and consequently, a great affect on the kid. When a parent is in prison and doesn't have that ability to communicate it has a great impact on both parties concerned. *(Solicitor)*

And now my biggest issue is that my eldest daughter has left home, and we can't get her to go back because she doesn't want to live with her dad. She is 16. She is staying at a friend's place, and I haven't been able to ring her because I haven't got the phone number on my phone list. Two weeks later my father, who is fighting cancer at the moment, was able to get in contact with her. I finally rang her and convinced her to go home. That was on the Monday, and by the Friday she had left again. And I am a wreck over it all, because I just don't know what is happening. *(Mother)*

She's trying to get a point across – “I want to communicate with my kid, I know my kid's got a problem, I've been given information. I know my kid has got a problem.” If she had been able to, at 10 o'clock at night, perhaps spend 15 or 20 minutes on the phone consoling the kid. *(Solicitor in regards to a woman in management)*

There was the *Good Beginnings* program, and some of the welfare workers in the prison were a great asset. Because they were able to make the phone calls and have the woman in the office. I was able to have conferences with the mother over the telephone because they were able to contact me and we could discuss things, rather than her having to post me a letter and hope that it got to me as soon as possible, or making numerous phone calls trying to catch me in the office. Because that is

the problem with solicitors, they are hardly ever in the office, and women can use up a lot of their time for phone calls trying to chase us down. Having workers available that are able to make those calls and help you speak with the legal representatives, or the children's councillors, or whoever it is makes a difference, because you have to realise the women only have so many numbers that they are allowed to call. *(Solicitor)*

6.11 Retaining a say in decisions affecting children – deconstructing family roles

Mothers in prison lose efficacy as active participants in their children's lives on two levels. Firstly, because they must wait for others to facilitate their children's contact with them, or wait for the children themselves to initiate contact if they are old enough. Secondly, depending on who is caring for the children, the primary carers are no longer consulted in decisions affecting their child's health, welfare, placement, schooling, or indeed anything at all. This is often made more difficult by a lack of information about the child's circumstances, school life, and safety.

None, not one little bit. We are supposed to have joint responsibility but I have never been asked anything about the kids. Not any decisions, no consultations, and they are supposed to. The court order says they are supposed to communicate and let me know what's going on. *(Mother)*

I was given a say in day-to-day decisions and major decisions in a court order we obtained from family court before I came to jail. But at the end of the day, are you going to go back to court because your daughter is not allowed to have her hair tipped, or because they make her go to bed at 8.30 at 13 years of age? So what do you do? You're just not going to do that. *(Mother)*

Furthermore, prisoners have limited access to Family Court to attend hearings. When visitation orders requiring interim carers to take children to prison for visits are breached, there is little that imprisoned mothers can do to rectify the situation. As one mother said:

Their father has custody and I haven't got any say. I am unhappy about that, but I'm told, 'you don't stand a chance for custody or access' while in prison. I didn't lose my children, he stole them from me (Healy, 2000, p. 22).

Points for Discussion

1. Is there a need for Policy and Procedures taking parenting into account throughout the prison sentence, particularly around:
 - a. Absentee parenting
 - b. Phone/video link contact
 - c. Crises contact
 - d. Family conferencing/planning/negotiating etc
 - e. Family/Children's Court issues
 - f. School contact
 - g. Reunification planning
 - h. Interim carer information, support and planning requirements
2. Is there a need for Policy and Procedures around prison visits to be re-examined/reviewed in accordance with the UN CROC:
 - a. Resources
 - b. Amenities
 - c. Access
 - d. Visitor centres
3. Is there a need for Protocols across whole of government and community agencies in regards to the care of children, including:
 - a. Family and Community Services (eg. Centrelink)
 - b. Department of Education
 - c. DHS
 - d. Department of Health
4. Is there a need for Protocols across whole of government and community agencies in regards to interim carers of children?

Chapter 7 Pre and Post Release

7.1 Pre-release programs for parenting and reunification

A number of programs have been established for women prisoners for pre- and post-release support, such as Bridging the Gap, OPUS and the VACRO Women's Mentoring Program (VWMP). However, in Victoria's women's prisons, there are currently no specific pre-release programs addressing parenting and reunification issues, family mediation, or any other aspect of re-engaging with parental roles in the community. A pilot program at DPFC providing a family support service for women and their children (Good Beginnings, a Federally funded program) has not been refunded. However the issues addressed by the Good Beginnings program have been picked up by Melbourne Citymission through their Family Support Service. The OPUS program provided by Caraniche Psychological services and VACRO at Tarrengower (minimum security rural prison) assists women with these issues and at times provides supports to families during the reconnection process prior to release.

Better Pathways, a response by the Victorian Labor Government to 'women's offending and re-offending' has recently been launched, dedicating \$25.5 million dollars over four years to establishing 28 programs. The 28th program listed aims to 'develop a model of support for the children of women in custody'. Other programs that have the potential to benefit children are the provision of general and Koori-specific housing for women on bail, creating new program space at the DPFC, and expanding and upgrading visit centres (Department of Justice, 2005, pp. 36-37).

Regarding pre-reunification counselling, the Director of the Children's Court Clinic states:

Time and again a case is returned to the Children's Court Clinic, a year or sometimes two years later, and it is found that very minimal ('I was only entitled to two sessions') or no input whatsoever has been given to a parent, even though it may have been Court ordered. Sometimes counselling or other help is given to the carer, however, and the child, or course, is given attention, but the omission of providing services to the parent when the child has been removed

begins to narrow significantly the opening for having the child returned home again (Brown, 2004, p. 3).

7.2 When Mum gets out

Almost all [children] were concerned about their mothers' feelings and emotions and the thing they were looking forward to most about their mother's release was just being with her (Pellegrini, 1992a; 1992b, cited by Lloyd, 1995, p. 30).

In Victoria, 4592 men and 614 women exited prison between June 30, 2003 and June 30, 2004 (Department of Justice Victoria, 2005). Between January and November 2005, 519 women exited from DPFC and Tarrengower prisons (Money, 2005). It is unknown how many of these were primary carers.

Corrections Victoria has no specific policy concerning the release of primary carers, including specifics such as notifying interim carers, or facilitating special visits to allow handover planning.

.....the gaps in this whole system are phenomenal, that yeah, as the custodial parent I don't even know that mum is out. The pre-planning, the pre-sentencing, the post-sentencing, the pre-dismissal, there is absolutely no contact with the custodial parent. I may be an exception, I don't know, but I'm just telling you, no one has contacted me. She got out yesterday.
(Carer)

Corrections Victoria also has no specific pre-release education, information, or counselling programs aimed at primary carers in the two women's prisons.

They have parenting programs, and they have long termers' pre-release programs, but not a specific program for parents going home to children.
(Mother)

Generally when mothers get out of prison they expect to be reunited with their children, and generally, this expectation is shared by their children and their interim carers. In Victoria, 76% of a caregiver sample expected the imprisoned parent to return to their family, and 47% of imprisoned primary carers expected to live with

their children post release (Tudball, 2000). Many more mothers care for their children prior to incarceration than fathers. Accordingly it would be reasonable to assume that the percentage of children returning to their primary carers post prison would be much higher for women prisoners than for men.

The process of reunification is often perceived differently by the various parties. Kingi identified a number of concerns expressed by women reuniting with their children, including their children's anger or clinginess towards them, children's fears that their mother will leave them again, loss of respect and trust, difficulty controlling children, loss of closeness due to loss of contact, children bonding with their interim carers, fear and distrust of police in younger children, and loss of respect for police in older children (Kingi, 2000).

There came a stage when they knew they were home, and they were doing their own thing, and realising that I wasn't going anywhere. My five-year-old daughter is still a big clingy, she is scared that if any of the kids do something wrong then I will go back to jail. She says things to the others like: put your seat belts on or Mummy will go to jail. I've been trying to explain to them that they had done nothing wrong. But it's very hard. (*Mother*)

I was grateful to her but I think I was worried that they weren't going to love me any more. That was really... that they wouldn't want to come back to me, that they would want to stay with the foster carer; I thought about that a lot over the time that I was in there. And she was devastated to be handing them back. (*Mother*)

For many women, returning to their children means accepting living arrangements with family or carers that are fraught with difficulties and restrictions, the very thing they look forward to escaping from in leaving the prison environment. As one woman found, after six weeks of living with her mother:

It's okay here because me and the kids have two rooms but me mum's pissed off with me and watches them car keys like a hawk . . . the kids do what me mum says and not what I say which pisses me off. I'm

their mother but there's still a bit of blame on me for going to jail and leaving them – like I had a choice (Goulding, 2004, p. 45).

This can be an equally difficult situation for the family member. As one grandmother stated,

She drinks too much and she gets nasty and starts fighting. I'm not strong enough to stop her and she needs help. . . . All I can do is give her a place to live so Family and Children's Services don't take her kids off her (Goulding, 2004, p. 42).

For children, situations such as these add to the difficulties they face adjusting to the post-release return of their primary carer.

Other women have no family support through the post-release process.

My dad came around when I first got out and when the baby was born, and he helped me move out. But then he takes off and I don't see him for ages, and my mother has moved to New South Wales. So I don't really have family support. (*Mother*)

Some mothers may find themselves returning to the homes of now adult children, a situation that may be fraught with tensions and difficulties as roles are renegotiated.

I'm very worried. I'm very scared of the impact that is going to happen when she walks back into that house. Because her eldest son now thinks he is the one in charge of that house. She is going to come home, and she already... this is what a lot of the arguments between him and his mum are about, she's already: that is my home as well as yours and your brothers, and I will be the senior person there when I come home. The eldest is already starting to talk about the fact that he doesn't want to be there when his mum comes home. And I know that will have an impact on her, and knowing her, that will have an impact on me. (*Family member interviewed re children*)

Children may look forward to their primary carers' release with very mixed or differing emotions. Many have adjusted to the regimes of their new carers, and may

well have bonded with these people too. They may have adjusted to new schools and friends, and may perhaps have experienced a more stable life-style than with their primary carers prior to incarceration. For these children the happiness with which they look forward to their primary carers' release can be offset by anxieties related to the primary carers' potential demands of them in terms of roles and behaviours.

She never mentions her. I've never heard her say: when Mum gets out... she has just, she has just basically shut down. (Carer)

Alternatively children who have been consistently unhappy in their placements while their mother was in prison can view her release from custody as their release.

Sometimes children's fantasies and expectations about life after their mother gets out and 'rescues' them are met, but often they are disillusioned.

She makes him a lot of promises about things that I don't think she will be able to keep, because she has no idea of the real monetary value of things in the world out here. She is going to find it hard keeping a budget, and always having a snack there for him, and things like that. (Carer)

Two teenagers expressed their quite different expectations of their primary carers' release:

My Dad may be released next January. . . I'm looking forward to it – I want to know how it feels to have someone home again. I'll be able to talk to him about myself and my brother. . . . There will be a big reunion. He's very hyperactive, so I'll have to get used to that! *18 year old male, father and brother in prison*

Each time he got released he said he would come home but he never did, he always lied. We never knew the release date, never knew what was happening – we are always waiting. *12 year old male, step-father in prison* (Brown, 2001, p. 12).

For interim carers too, particularly kinship carers, the return of the primary carer can have mixed effects. A return to former freedoms can also be their experience, as they relinquish the demands of child care on their time, finances and earning capacity.

However this can be offset by concerns about the released primary carer's stability and current caring skills, and by attachment to the children involved. They may suffer grief over losing the children or suffer anguish over determining whether to keep them.

I felt lost, you know, you sort of wrap your life around them. I felt lost, and I still feel a little bit lost. They fill a space, and you feel so empty afterwards. (Carer)

Figures presented in the Victorian Department of Human Services audit *Public Parenting* (2003) do not augur well for the successful reunification of mothers exiting prison. Of the 1802 children that were tracked through foster care for five years (see Table 3, p. 67) only 30% were successfully restored to their parents' care, and this took an average of 71 weeks. 17% of the children went through at least two attempts to live with their parents, and 38% of reunifications broke down.

The *Public Parenting* audit (Department of Human Services, 2003) placed the 1802 children tracked in care in one of three categories: kinship care, foster care, and residential care. Children in kinship care were less likely to attempt reunification (43%) than those in foster care (63%). Of the 38% of reunifications that broke down, the lowest numbers were those who attempted it from kinship care (36%), and the highest number of break downs was with families whose children had been placed in residential care (43%). The end result was that, of those who entered kinship care, 28% were restored to their families within the five year period, as were 37% of those who entered foster care, and 27% of those who entered residential care.

These figures are particularly concerning when it is considered that the vast majority of children with an imprisoned primary carer, especially mothers, are in kinship care, and in Victoria, only 28% of these children were reunified with their primary carer at the end of the five year tracking period.

Furthermore, 'most of the restorations [reunifications] occurred after the first placement, with only 14% after the third or any subsequent placements' (Department of Human Services, 2003, p. 55). While reunification typically occurs within 43 weeks when a child has had one placement, this time frame extends to nearly two years (103 weeks) after two placements. These figures suggest that even a fairly short

parental prison sentence can have fundamental affects on the children's lives, often extending long after the sentence has been completed, when multiple placements exacerbate reunification difficulties.

Primary carers leaving prison are further faced with additional challenges, such as re-establishing relationships with children, partners and family that have often been damaged by the prison experience. They face these hurdles while attempting to adjust to the culture shock of living in a non-institutionalised environment after months or years of systematic disempowerment.

Parents will return to children who have grown up in their absence, who have developed emotional needs, who have formed relationships with other carers, and/or who have conflicting emotions about the parent who 'left them' for prison. Some of these children carry emotional injuries that will be a long time in healing. Repairing frayed family ties is a challenge – one that sometimes proves insurmountable (Hirschfield et al, 2002, p. 12).

In Israel a particularly long-term, intensive program has been established for mothers exiting prison. It involves three months in an initial assessment hostel, followed by up to two years in a group hostel where mothers live with their children, and up to five years in satellite apartments. This program offers a range of counselling, education and employment services and life-skills support, and provides an interesting model for addressing the post-release difficulties facing primary carers.

7.3 Barriers to Successful Reunification

Most of the women that I've sort of interviewed when wearing my parole board hat at Dame Phyllis Frost prison are people who have had major drug problems and come from a deprived background, so their background has been as bad as what happens in many cases to their children. They've been struggling to overcome these adverse circumstances and one can't help but be very sympathetic, but you see in relation to them the same faces, not all the time thank goodness, but too often you see the same people in front of you who've been there the previous year asking for parole, saying "this is going to be the last time,

you won't see me again, I've got my kids to go back to and they mean everything to me; and I'm not going to have anything to do with ' Joe', and I'm not going to go into that sort of scene. I am just going to devote myself to my kids." And you can see it, one year after another, and its part of the scene unfortunately. And they do believe it, they do believe it and they are determined at that time, but they get out to a scene where things fall in a heap, and they resort to the familiar. (*Judge*)

For mothers getting out of prison the goal of reunifying with their children, particularly if they are under court orders and in foster care, can be particularly daunting.

The majority of women in prison (66%) became involved in the criminal-legal system as a result of drug or alcohol addictions (Melbourne Criminology Research and Evaluation Unit, 2003), and unfortunately the experience of systematic disempowerment and the prison culture itself often exacerbates existing psychological problems. If the original problem contributing to drug addiction is not addressed, a return to drug use after prison is highly likely. Children can act as a powerful motivator for primary carers, as acknowledged by one mother:

My biggest successes have been getting off the benzos, and staying clean. And I've done it on my own, I've had support but ... I think that is a success, and I am so determined to get my boys home. (*Mother*)

Unfortunately the lack of primary carer focussed programs post-release can jeopardise many mother's ability to maintain their resolve.

The prison environment is hardly conducive to preparing women for release. For many, readjusting and reintegrating into society is overwhelming, especially if they never felt part of that society in the first place. Not surprisingly, many women exiting prison identify profound loneliness as the greatest difficulty they had to overcome, and not surprisingly many find themselves seeking the solace and companionship of their former friends, who are often still addicts.

I never belonged to any clubs or groups or had anything to do with my neighbours. I just hang out with my friends – we all use and we all look out for each other (Goulding, 2004, p. 44).

The combination of prior drug addiction and extreme loneliness creates a high risk situation. In fact, getting out of prison can be deadly. Between 1990 and 1999, 820 men and women who had been released from prison died unnatural deaths in Victoria (Davies & Cook, 2000). As Ross commented:

Many of those at greatest risk are profoundly alienated from society, and we need to find ways to engage them. For example, heroin-dependent Indo-Chinese offenders frequently face rejection by their families and community, and are isolated from the mainstream community as well. Female offenders often come from backgrounds of extensive sexual and physical abuse, their heroin dependency is often supported by prostitution, and any interventions need to take account of their responsibilities as parents (Ross, 2004, p. 469).

For women who identified themselves as members of the broader community before prison, other factors are involved, but extreme loneliness is still the most common experience.

Most of my close friends were from work and they won't talk to me. . . my fiancé broke off our engagement and our house had to be sold to pay my restitution so he never wants to speak to me again. . . it's like being a social leper, especially for a woman (Goulding, 2004, p. 46).

Homelessness is another major issue facing women exiting prison. While women in long-term public housing have a good chance of retaining their home through their sentence, provided they are serving less than six months, women serving longer sentences, or in private rental, or who are buying homes lose their income while in prison and cannot maintain payments, therefore losing their housing and often incurring debts in the process.

If Flat Out wasn't there, I would have probably gone straight back to the old lifestyle I'd had. I had no accommodation, I would have been fucked.
(Mother)

In 2002-2003, 130 women were released from prison on parole in Victoria and were therefore expected to meet a variety of conditions stipulated by their parole order. Of these approximately 84 (65%) were primary carers. The breach of parole rate for that year was 38.5% (Adult Parole Board of Victoria Annual Report, 2003).

The primary carers among people on parole orders must also comply with the various conditions imposed by their Department of Human Services' caseworker if their children were on child protection orders – although it is more likely that they will have dealt with several caseworkers, before (or if) reunification occurs. There are parallels between the post-release phase of the legal process, the initial arrest and the sentence. In each phase, many primary carers are still coping with two systems. There is a disparity of resources necessary for them to meet parole conditions, which may vary from case to case.

7.4 Children, Youth and Families Act 2005: Implications for Prisoner's Children

The new *Children, Youth and Families Act 2005* contains a number of additional conditions relating to its permanent care orders. Changes to the *Act* may have profound implications for incarcerated primary carers and their children, and their prospects for reunification post-release. The *Act* states that the Court may make a permanent care order if:

- a) the child's parent or, if the child's parent has died, the child's surviving parent has not had care of the child for a period of at least 6 months or for periods that total 6 months of the last 12 months, and
- b) it is satisfied that –
 - i). where feasible an appropriate package of professional remediation for the parent has been undertaken with a view to reunification but was unsuccessful; and
 - ii). The parent is unwilling or unable to resume custody and guardianship of the child; and

- iii). It would not be in the best interests of the child for the parent to resume custody and guardianship of the child (*Children, Youth and Families Act 2005*, 2nd draft).

The concern for prisoners' children is that, using the current study as an example, only one of the fifteen mothers served less than six months in prison, thus placing the great majority of these mothers into the first set of criteria.

Only one mother spoke of receiving reunification counselling in prison (although all stated it would be invaluable) and so any expectation of such professional mediation is currently somewhat unfeasible; only two mothers had some of their children in custody with them, and the other 13 were unable to do so due to the age restrictions of the prison residential program for children. These last two points satisfy the latter two of the three criteria in the second set presented above.

Unfortunately, the third criterion is sometimes inadvertently created by the complete lack of contact experienced by women in prison with children in DHS care, as a result of a failure to bring children in to visit. Two of the women in this study experienced separations of four and 18 months respectively. One of the women had two children under one and two years old, and the latter had three children under two and five years old. The continuity of care experienced by these children, particularly in the latter example, and the lack of contact with their mother, can cause a transfer of children's primary bond from their mother to the foster carer. To disrupt their attachment again could well be regarded as not in the best interests of the child, thus fulfilling the last of the above three criteria. Indeed, in the more extreme situation recounted above, the mother has yet to be reunified with her three children, more than a year post-release, although she is currently caring for a new baby with no DHS involvement.

I have this baby living with me now. I've been out for a year and a half and I haven't got the other three back with me yet. Like, I'm pleased that DHS were there for my children. I'm rapt that they were able to take them out of that situation and give them care. I'm rapt with that. But ... I fought them [foster carers] getting a guardianship on the kids ... they are trying to get an order where they don't have to involve me, and I've been fighting them all the way, and so far I've succeeded. (*Mother*)

Although the intentions of this section of the *Act* are admirable in that they aim to reduce the multiple placement and reunification breakdowns experienced by children in foster care, it is the unintended consequences of the *Act* that are of concern.

Magistrates may interpret these criteria strictly, and strictly speaking, a large number of primary carers in prison, and their children, will fall within the parameters. Once again, the failure to acknowledge the children of prisoners in legislation, as a discrete population with particular circumstances and needs, may result in their unintentional mistreatment under the new law.

Many women feel that the barriers to reunification imposed by departmental requirements are simply too high. Considering the absolute lack of social support, material assets and self-esteem experienced by many women after exiting prison, their perception is understandable.

The impact of this experience on primary carers and those around them can be devastating, undermining already fragile emotional resources. As the partner of one woman put it:

She comes out of jail with big expectations – she thinks she’ll get her kid back but then welfare come round and for whatever reason she can’t see the kid that day – maybe there’s no one to bring the kid or they wanted her to do some mothering course – whatever – to her it’s just another knock back. So what happens is she goes on a real downer, her using gets out of hand again, she disappears and then eventually I get a call from Bandyup [prison]. That’s pretty much how it goes (Goulding, 2004, p. 44).

Points for Discussion

1. Is there a need for Policy and Procedures taking children and parenting issues into account throughout the post release/parole process?
2. Is there a need for Policy and Procedures taking interim carers into account throughout the post release/parole process?
3. Is there a need for Policy and Procedures taking children into account in the Home

Detention process?

4. Is there a need to inform both Family and Children's Court judges about the implications of the *Children, Youth and Families Act* for primary carers in prison and their children?

Chapter 8 Summary

8.1 The policy gaps

When primary carers are arrested there are no policies or guidelines specifically protecting their children in these circumstances, and the sections of the *Children and Young Persons Act* (1989) referring to neglect and abandonment are often contravened in the pursuit of criminal justice objectives.

When mothers are detained at police stations with their children, there are no guidelines determining where children can be held, or for how long, or who can pick them up.

When mothers are unable to obtain bail and are remanded in custody, there are no laws, policies, or guidelines, with the courts, the police, the prisons, or DHS regarding who takes responsibility for the children, or how this responsibility is transferred from the mother. Nor are there any protocols alerting any department that a potentially uncared for child is 'out there' somewhere.

When mothers are sentenced, despite many precedents and instructions otherwise, custodial sentences are not used as a last resort in many cases. Furthermore, there are no laws, policies or guidelines with the courts, the police, the prisons, or DHS regarding who takes responsibility for the children, or how this responsibility is transferred from the mother. As in the remand situation, there are no protocols ensuring potentially uncared children are identified.

A range of alternative sentencing protocols exist in the Magistrates Court acknowledging the existence of dependent children of defendants, however these initiatives do not extend to the mainstream or higher courts. These children – equally innocent regardless of their parent's offences – are therefore experiencing a disparity in their ability to participate and affect parental court processes.

Victorian women's prisons have no specific policies or programs targeting issues such as planning for children's care and wellbeing, absentee parenting, reunification planning etc.

8.2 The personal costs

When children go into care as a result of their mother going into prison, they are likely to experience post traumatic stress disorder, anxiety, guilt, shame, and insecurity. They are also likely to be separated from siblings; schools, and friends; have at least two placements, experience at least four caseworkers; reside in homes that are financially and socially disadvantaged as a result of their presence, and possibly end up in residential care unsuitable to their age or needs, simply because they have too many siblings, or have become too difficult to place in home care or when a foster care placement can not be found. They have only a thirty per cent chance of successfully reunifying with their mother post release (Department of Human Services Victoria, 2003).

When people receive children of imprisoned primary carers into their care, they are likely to suffer financial, social, and personal losses, feel unsupported and exploited, unheard by caseworkers and disempowered by prison protocols, have unsatisfactory relationships with the primary carers, and be expected to support and sustain her reintegration post-release.

Many children will start school, change schools, move to high school, or drop out of school during their primary carer's prison sentence. Many of these children will also bring their trauma symptoms to school, including declines in academic performance, truancy, anti-authoritarianism and bullying. However, there are no protocols between the Department of Education and Corrections regarding either the imprisoned primary carers or their children.

Children will spend the majority of their time with their imprisoned primary carer in prison visit centres which have not been designed to meet their needs, or those of their interim carers.

Prison programs are not delivered addressing the issues facing primary carers and their pre and post-release difficulties of reunification, dealing with traumatised children and renegotiating family roles, while coping with their own anxieties and readjustments.

When primary carers leave prison they face homelessness, loss of material possessions, loneliness, unemployment, parole conditions, DHS conditions, high risk

of drug addiction, culture shock, and strained relationships with emotionally damaged children.

8.3 The financial costs

The financial cost to the community of keeping a woman in prison in 2002-2003 was \$147.20/day, or \$53,728/annum (Council of Australian Governments, 2004). The financial cost to the community of keeping a child in foster care is \$67,000 over a three year period, or \$22,333/annum (Department of Human Services Victoria, 2003). This adds up to a total expense of \$76,000/annum (\$1,500 a week) to keep a mother, with one child, in prison. This does not include the explicit costs borne by carers that are directly related to a child's expenses, or the hidden costs carers pay in terms of loss of employment and training, time and opportunities.

This substantial amount of money could pay for a wide range of housing, counselling, child care, training and education, parenting programs, and drug and alcohol services. At \$200 a week for each of the above services, there would still be \$300 a week left over (from a total of \$1500/week) per mother and child unit. Community-based services such as these could enable sentenced primary carers to connect with the broader community in a way that is supportive rather than punitive and inclusive rather than marginalising. Offenders with community corrections orders cost the community \$13/day in 2001-2002 or \$4,745/annum (Council of Australian Governments, 2004).

At least 4000 Victorian children under sixteen, predominantly under ten years of age, are at risk of the outcomes discussed in this paper, at any one time. Thousands more children have already suffered because their mothers have gone to prison.

8.4 Conclusion

In Victoria, there are no policies or laws in place to protect children when their primary carer is arrested, sentenced, imprisoned and released. The one exception to this is the Corrections policy for the small number of children eligible to reside with their mothers in prison.

This policy vacuum has a profound and negative effect on the thousands of children, primary carers and interim carers caught up in the criminal legal system. And these

negative consequences – social, psychological and financial – can extend for long after the prison sentence has been served.

Although many departments and agencies come into contact with children at various stages of their primary carer's legal process, responses to their situation remain inconsistent and ad hoc in nature. In some cases, these inconsistencies have resulted in: laws enacted in some courts being directly contravened in others; rights that are recognised in some courts being completely unacknowledged in others; and police officers unaware that they are breaching child protection laws to comply with criminal laws. In all cases, these inconsistencies result in the unfair and unacceptable treatment of children whose primary carers have been imprisoned.

The findings from this discussion paper suggest that the hardships experienced by the children and their carers in Victoria were similar to those found in the rest of Australia, and in Europe and the U.S.A.

There are certainly systemic precedents for the courts to overlook the human rights of this particular sub-group of society. Yet within the judiciary there is a reluctance to consider that this oversight may constitute a form of discrimination, let alone a violation of human rights. Either way the situation is unacceptable.

As signatories to the United Nations Charter for the Rights of Children, Australia has committed to protecting the rights of *all* children. The articles of the treaty clearly state how those rights are to be protected in court proceedings and that the best interests of the child must *always* take priority.

Fortunately, the task of developing a cohesive, interdepartmental policy and legislative safety net for children experiencing parental legal processes is not as daunting as it may seem. The establishment of the Child Safety Commissioner (Victoria), a role with departmental independence and interdepartmental oversight, provides an ideal framework to guide this process. The acknowledgement of children in the Family Court, and the more holistic approaches of the Drug, Koori, and Family Violence Courts, show that effective systems are already in place, and many established practices could be readily incorporated into protocols and law.

It is not the intention of the law to punish innocent people for crimes another adult has committed. It is not the intention of the Victorian legal system to damage the lives of the children it touches. It is, however unintentionally, the end result.

Discussion Points

Please note that the following points are not exhaustive but rather are offered as preliminary suggestions for consultation.¹⁴

Arrest

1. Is there a need for Policy and Procedures taking children into account throughout the arrest process, including protocols both within and between:
 - d. Victoria Police
 - e. DHS
 - f. NGO's

(e.g Computer alert system for primary carers through Victoria Police.)
2. Is there a need for Policy and Procedures taking interim carers into account throughout the arrest process?
3. Is there a need for training for all stakeholders in regards to children and carers in the context of arrest Policy and Procedure? If so, what would the training consist of?

Bail/Remand

1. Is there a need for inclusion of the impact of parental incarceration on children as a factor for consideration in the Bail Act?
2. Is there a need for Policy and Procedures taking children into account throughout the bail/remand process, including Protocols both within and between:
 - a. Courts
 - b. DHS
 - c. Prisons
 - d. NGO's
 - e. Department of Education

¹⁴ Please contact Terry Hannon at VACRO if you would like to contribute to these suggestions.

3. Is there a need for Protocols in regards to information provision for remandees? (e.g. rights, needs, services, special visits for making care arrangements, school access/communication etc.)
4. Is there a need for Protocols in regards to information provision for interim carers (e.g. rights, needs, services etc.)?
5. Is there a need for Child court representatives for parent's criminal court proceedings?
6. Is there a need for specialist services for counselling for children and carers re post arrest trauma?

Sentencing and Court

1. Is there a need to revisit the Sentencing Act in relation to children of defendants to:
 - a. Accord with the UN Charter for the Rights of Children.
 - b. Include the option of Court reports covering defendants' children.
 - c. Children's advocate in parental criminal proceedings.
2. Is there a need for Policy and Procedures taking children into account throughout the court/sentencing process, including Protocols both with and between:
 - a. Courts
 - b. Prisons
 - c. DHS
 - d. NGO's
3. Is there a need for Policy and Procedures taking interim carers into account throughout the court/sentencing process?
4. Is there a need for a Specialised Court for primary carers?
5. Is there a need to educate the judiciary of the implications of the new *Child, Youth and Families Act* for primary carer defendants and their children?

Prison

1. Is there a need for Policy and Procedures taking parenting into account throughout the prison sentence, particularly around:

- a. Absentee parenting
 - b. Phone/video link contact
 - c. Crises contact
 - d. Family conferencing/planning/negotiating etc
 - e. Family/Children's Court issues
 - f. School contact
 - g. Reunification planning
 - h. Interim carer information, support and planning requirements
2. Is there a need for Policy and Procedures around prison visits to be re-examined/reviewed in accordance with the UN CROC:
 - a. Resources
 - b. Amenities
 - c. Access
 - d. Visitor centres
 3. Is there a need for Protocols across whole of government and community agencies in regards to the care of children, including:
 - a. Family and Community Services (eg. Centrelink)
 - b. Department of Education
 - c. DHS
 - d. Department of Health
 4. Is there a need for Protocols across whole of government and community agencies in regards to interim carers of children?

Pre and Post Release

1. Is there a need for Policy and Procedures taking children and parenting issues into account throughout the post release/parole process?
2. Is there a need for Policy and Procedures taking interim carers into account throughout the post release/parole process?
3. Is there a need for Policy and Procedures taking children into account in the Home Detention process?

4. Is there a need to inform both Family and Children's Court judges about the implications of the Children, Youth and Families Act for primary carers in prison and their children?

System wide

1. Is there a need for data collection in regards to children of offenders and carers at:
 - a. Arrest
 - b. Bail
 - c. Sentencing
 - d. Prison reception
 - e. Release
 - f. Parole.
 - g. Home detention
2. Is there a need for education and training in regards to incarcerated primary carers and their children for:
 - a. Department of Human Services
 - b. Department of Education
 - c. Department of Health
 - d. FaCS
 - e. Department of Justice – including prison officers, judiciary, parole officers.

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