

**Submission
No 38**

INQUIRY INTO CHILDREN AFFECTED BY PARENTAL INCARCERATION

Organisation: Liberty Victoria

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13 May 2022

The Secretary
Legislative Council, Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002
By Email: cipinquiry@parliament.vic.gov.au

Dear Committee Members,

Re: INQUIRY INTO CHILDREN AFFECTED BY PARENTAL INCARCERATION

1. Thank you for the opportunity to provide a submission to this important inquiry.¹
2. This is a public submission and is not confidential.

ABOUT LIBERTY VICTORIA

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil

¹ Liberty Victoria would like to thank Pravina Mugan and Maryam Rizvi for assisting in research for this submission.

liberties. Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and the defence. More information on our organisation and activities can be found at: libertyvictoria.org.au.
5. Some of the below adopts previous submissions made by Liberty Victoria.

TERMS OF REFERENCE

6. On 20 December 2021, the Legal and Social Issues Standing Committee self-referenced that it inquire into and report, by 1 July 2022, on the adequacy of policies and services to assist the children of imprisoned parents in Victoria, with particular reference to:
 - (a) the social, emotional and health impacts on affected children;
 - (b) what policies exist and what services are available, including consideration of those in other jurisdictions;
 - (c) how effective these services are, including —
 - (i) consideration of evaluation of work already done in this area; and
 - (ii) identifying areas for improvement.

THE IMPACT ON CHILDREN WHEN THEIR PARENTS ARE IMPRISONED

7. Sentencing a parent or caregiver has a direct impact on a child, in particular where the caregiver is incarcerated and separated from their children. The imprisonment of a parent can have socio-economic impacts, compound pre-existing disadvantage and significantly affect their mental and physical health.² Parental imprisonment can inflict

² See, eg, Lol Burke, 'Children and Families: The Collateral Consequences of Punishment' (2016) 63(3) *Probation Journal* 251, 251; Johnston, Annaliese, 'Sentencing the Silent: Children's Rights and the Dilemma of Maternal Imprisonment' (2014) 1 *Public Interest Law Journal of New Zealand* 97, 100–102; Mike Roettger, Krystal Lockwood and Susan Dennison, *Indigenous People in Australia and New Zealand and the Intergenerational Effects of Incarceration* (Research Brief 26, December 2019); *Poor Outcomes as Adults* (Analytical Paper 16/01, February 2016) ('*Roettger, Lockwood and Dennison*').

different harms on children, including unemployment, substance misuse, low academic attainment and anti-social behaviour.³

8. Research has further shown that paternal imprisonment is more likely to result in economic disadvantage, whereas maternal imprisonment can impact children prenatally, postnatally and may lead to stronger impacts on children.⁴
9. For Indigenous children in Australia, these impacts of parental imprisonment are often more significant, as Indigenous people are imprisoned at a higher rate than non-Indigenous people. In 2021, the imprisonment rate for non-Indigenous Australians was 214 prisoners per 100,000 and for Indigenous people, the rate was 2,412 prisoners per 100,000.⁵
10. Indigenous children are disproportionately affected by parental incarceration and with the rate of Indigenous imprisonment increasing, an increasing number of Indigenous children will be affected by their parents being incarcerated. It has been estimated that as at 2018, at least 4.3% of all children and 20.1% of Indigenous children experience paternal imprisonment.⁶ As at 2017, maternal imprisonment has been estimated to affect 0.7% of all children and 18.8% of Indigenous children.⁷

RELEVANT CHARTER RIGHTS FOR CHILDREN OF INCARCERATED PARENTS

11. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) protects the human rights of children whose parents are incarcerated. These include:

Section 17: Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

³ See eg, Kirsten L Besemer and Susan M Dennison, 'Family Imprisonment, Maternal Parenting Stress and Its Impact on the Mother-Child Relationship Satisfaction' (2018) 27(12) *Journal of Child and Family Studies* 3897, 3897 ('Besemer and Dennison'); Roettger, Lockwood and Dennison (n1).

⁴ Ibid at 2.

⁵ Australian Bureau of Statistics, *Prisoners in Australia, 2021* (Catalogue No 45170, 9 December 2021).

⁶ Besemer and Dennison (above n 2).

⁷ Ibid.

Section 19: Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
 - (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.
12. In addition to the Charter, Australia is a signatory to the *Convention on the Rights of the Child (CRC)*.⁸ The *CRC* has served as an instrument to set a standard as to how children's rights are to be taken into account on international, regional and domestic levels.⁹ The *CRC* also contains a number of articles and rights that are relevant for the Committee to consider. These include, relevantly:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

⁹ *Ibid* 2.

legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

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

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. 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, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

13. Liberty Victoria urges the Committee to consider these human rights, protected under the Charter and the CRC (which itself is expressly made relevant by s 32(2) of the Charter), when considering its terms of reference and making its recommendations in this Inquiry.

AVAILABLE PROGRAMS FOR INCARCERATED PARENTS

14. The main program available to imprisoned mothers is the “Living with Mum” (**LWM**) program run by Corrections Victoria, which is run at two prisons (the Dame Phyllis Frost Centre and Tarrengower Prison).¹⁰ The program is only available to women:
- (a) who are expecting a custodial sentence or received into custody and can demonstrate that they were the primary carer of their infant or pre-school child prior to their imprisonment; or
 - (b) are pregnant and due to give birth while in prison.
15. A literature review was commissioned by the Victorian Department of Justice and Regulation into prison-based mothers and children programs. This review was conducted by the University of Melbourne in partnership with Save the Children Australia and the Peabody Institute.¹¹ The literature review concluded that there was no evidence of harm to children involved in the children living with their imprisoned mothers program and that mothers involved in those programs were less likely to return to prison.¹² The report also made a number of recommendations to the Department in the implementation of the LWM program. It is unclear whether these recommendations have been accepted and implemented.
16. It is also unclear from the publicly available material whether the LWM program itself has specifically been evaluated, how many mothers and children have been part of the program and what impact the program has had on children and their parents. If the program itself has not yet been evaluated, Liberty Victoria recommends that there be regular, independent reviews of the program to ensure it is fit for purpose and achieving its aims.
17. Corrections Victoria outline on their [website](#) that there are other short-term parenting programs that are run for families. However, there is no clear information as to what

¹⁰ <https://www.corrections.vic.gov.au/prisons/going-to-prison/pregnancy-and-childcare>.

¹¹ Shlonksy et al, ‘Literature Review of Prison-based Mothers and Children Programs: Final Report’, <https://www.corrections.vic.gov.au/index.php/prison-based-mothers-and-children-programs> at 4, 53.

¹² Ibid at 5, 59.

these programs involve, whether they have been evaluated, how many prisoners can access the programs and whether the programs are achieving their intended aims. Similarly, if these programs have not yet been evaluated, Liberty Victoria recommends that there be regular, independent reviews of the program to ensure it is fit for purpose and achieving its aims.

18. In respect of incarcerated fathers, there is also no publicly available information as to what supports and programs are available. Research has shown that there do not appear to be the same kinds, or as many, programs available for incarcerated fathers. In 2019, Bartlett and Trotter considered the state of fathering programs in Victoria and found that the fathering programs available in prisons in Victoria were ‘transient, sporadic, and often times “distant” formal support services for fathers with no face-to-face contact involved’.¹³ Bartlett and Trotter found that 79% of the fathers in their study were not offered any parenting supports or services and 72% of the fathers did not access any supports or services.¹⁴ For the participants in the study who did access fathering supports, half of the supports did not include any educational or face-to-face elements, but took the form of non-contact assistance such as Christmas and birthday presents.¹⁵
19. In the circumstances, Liberty Victoria recommends that:
 - (a) there be publicly available information on the programs available to fathers in custody;
 - (b) these programs are regularly evaluated, preferably by a body independent of Corrections, such as the Ombudsman; and
 - (c) the programs include educational and practical assistances, such as parenting courses.

¹³ Tess S Bartlett and Christopher J Trotter, ‘Did We Forget Something? Fathering Supports and Programs in Prisons in Victoria, Australia’ (2019) 63(8) *International Journal of Offender Therapy and Comparative Criminology* 1465, 1477.

¹⁴ *Ibid* 1473.

¹⁵ *Ibid* 1474.

SENTENCING OF PARENTS

20. When considering the impacts of parental incarceration and how to lessen them, it is important that the Inquiry also considers to what extent, if any, a Court can take into account the impact a parent's sentence will have on a child. In Liberty Victoria's view, this is an area of the law where courts lack the ability to properly consider the impact a parent's sentence can have on a child. The *Sentencing Act 1991 (Vic)* (**Sentencing Act**) ought to be amended to expressly allow courts to take into account the impact a sentence will have on an offender's family and the best interests of the child (and without that impact needing to rise to the level of 'exceptional hardship').
21. This amendment would bring Victoria into line with the Commonwealth and ACT sentencing schemes, as well as other common law jurisdictions, such as the United Kingdom¹⁶ and South Africa.¹⁷ It would also mean that Victorian courts could make decisions in accordance with Art 3 of the *CRC* and the recommendations made by the United Nations Committee on the Rights of the Child.
22. Express legislative change is required, because, as outlined below, the common law approach has so far been reluctant to consider children's human rights and their best interests in sentencing caregivers unless the hardship experienced by the children is considered 'exceptional'. In Victoria, this position has been maintained by the Courts, despite the introduction of the *Charter* in 2006.

The Australian Common Law Approach to Sentencing Caregivers

23. In sentencing, Australian courts generally¹⁸ have a broad discretion to consider a range of factors as they relate to the offence and the offender. The various Australian acts which outline the principles that a court can take into account in sentencing are broad enough to encompass a consideration of the impact of a particular sentence on an offender's children.¹⁹

¹⁶ *R v Petherick* [2013] 1 WLR 1102.

¹⁷ *S v M* [2007] ZACC 18.

¹⁸ That discretion is generally only fettered through legislation, in particular with the increasingly common introduction of mandatory sentencing provisions or prescriptive legislative provisions that limit factors that can be taken into account (or which the legislature says should be afforded less weight), see, eg, *Sentencing Act 1991 (Vic)* s 5AA (good character not being able to be taken into account in certain circumstances) and s 10AA (mandatory imprisonment for particular offence against emergency workers).

¹⁹ Tamara Walsh and Heather Douglas, 'Sentencing Parents: The Consideration of Dependent Children' (2016) 37(1) *Adelaide Law Review* 135, 135–6. ('*Walsh and Douglas*')

24. The Commonwealth²⁰ and Australian Capital Territory²¹ Acts have an express provision that requires a sentencing court to take into account the probable effect that a sentence or order would have on any of the offender's family or dependants. The Northern Territory,²² Victorian,²³ and Queensland²⁴ Acts state that the effect of a sentence on an offender's family or dependants can be taken into account under a more general provision which allows the court to have regard to 'any other relevant circumstance'. In New South Wales,²⁵ South Australia,²⁶ and Tasmania²⁷ none of the Acts expressly refer to family being able to be considered nor include an 'any other relevant circumstance' provision. However, both the New South Wales²⁸ and South Australian²⁹ Acts state that the matters that can be taken into account in mitigation are in addition to any other law or any Act, thus it is arguable that the impact of sentencing a parent can be taken into account under general principles of mercy.³⁰ In Tasmania, the court has a broad discretion to consider a non-custodial sentence where that would better meet the interests of justice.³¹
25. Despite there being arguably a broad discretion available to sentencing courts to take into account the impact that sentencing a parent can have on a child, Australian courts have usually considered hardship to others to be of minimal importance in the exercise of the sentence discretion.³² Hardship to third parties is deemed by courts to be the usual consequence of sentencing a person to a term of imprisonment.³³ It has been described as 'the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a Criminal Court'.³⁴

²⁰ *Crimes Act 1914* (Cth) s 16A(2)(p).

²¹ *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o).

²² *Sentencing Act 1995* (NT) s 5(2)(s).

²³ *Sentencing Act 1991* (Vic) s 5(2)(g).

²⁴ *Penalties and Sentences Act 1992* (Qld) s 9(2)(r).

²⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁶ *Sentencing Act 2017* (SA).

²⁷ *Sentencing Act 1997* (Tas).

²⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

²⁹ *Sentencing Act 2017* (SA) s 11(2). The *Criminal Law (Sentencing) Act 1988* (SA) was the predecessor to the *Sentencing Act 2017* (SA) and it contained a provision similar to the Victorian, Queensland and Northern Territory Acts, in that it allowed 'any other relevant matter' to be taken into account: *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(o). In the second reading speech to the Sentencing Bill 2016 (SA), the then Attorney-General, disparagingly described s 10 of the 1988 Act as 'a huge obscure shopping list', which was one of the basis of its repeal: South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7883 (John Rau, Attorney-General).

³⁰ Walsh and Douglas (n 18) 138, 140–143.

³¹ *Sentencing Act 1997* (Tas) s 12(2).

³² Arie Freiberg, *Fox & Freiberg's Sentencing — State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 420 [6.150] ('Freiberg'); See also Walsh and Douglas (n 18) 138.

³³ *R v Edwards* (1996) 90 A Crim R 510, 515; 516 (Gleeson CJ, with whom James J and Ireland JJ agreed).

³⁴ *R v Wirth* (1976) 14 SASR 291, 296 (Wells J).

26. In most Australian jurisdictions the approach of appellate courts has been that the impact of a parent's imprisonment can only be taken into account where there are 'exceptional circumstances'.³⁵ The justification for this approach was set out in *Markovic* and was said by the Victorian Court of Appeal to be based on the following considerations:
- (a) The adverse effect a person's dependants was almost inevitable;
 - (b) The sentencing court's primary function is to impose a sentence that is commensurate with the crime;
 - (c) Treating family hardship as a reason for leniency would produce a paradoxical result where a guilty person benefitted so that innocent persons would suffer less; and
 - (d) More lenient treatment of an offender with needy dependants would defeat the appearance of equal justice.³⁶
27. In Liberty Victoria's view, these arguments are unsound. This is because sentencing is and has always been an individualised process and factors peculiar to an offender will always be taken into account. To take into account factors personal to an offender would in fact promote equal justice, rather than defeat it, because it would properly take into account an individual's personal circumstances. Further, the current approach is inconsistent with Australia's obligations under the *CRC* and inconsistent with the approach of other common law jurisdictions.
28. Even where there is an express requirement of courts having to take into account the impact on family in sentencing legislation, such as with s 16A(2)(p) of the *Crimes Act 1914* (Cth), some Australian courts have read down the section to require that exceptional circumstances exist in order for the court to take into account the effect of a sentence or order on an offender's family.³⁷

³⁵ See, eg, *Markovic v The Queen* (2010) 30 VR 589 ('*Markovic*'); *Veness v The Queen* [2020] NTCCA 13; *R v Toghias* (2001) 127 A Crim R 23 ('*Toghias*'); *R v Spiers* (1983) 34 SASR 546.

³⁶ *Markovic* (n 35) 591–92 [6]–[7].

³⁷ See, eg, *Toghias* (n 35); *Markovic* (n 35); *R v Huston*; *ex parte DPP (Cth)* [2011] QCA 350; *R v Sinclair* (1990) 51 A Crim R 418; *R v Berlinsky* [2005] SASC 316, *McAree v Barr* [2006] TASSC 37. See also: Commonwealth Director of Public Prosecutions, 'Sentencing of Federal Offenders in Australia: A Guide for Practitioners' (Commentary, 4th ed, February 2021) 75–77 [317]–[328]; Freiberg (n 31) 420 [6.150].

29. Recently, a five member bench of the New South Wales Court of Criminal Appeal has held that the previous approach to interpreting s 16A(2)(p) was flawed and decisions that said that s 16A(2)(p) required the impact on an offenders family to be exceptional was 'plainly wrong'.³⁸ Whether Victoria follows the NSW approach is yet to be seen, with leave recently having been granted by the Court of Appeal to consider the issue.³⁹
30. In the Australian Capital Territory, courts have expressly disavowed the reasoning of other state appellate courts and said that the establishment of exceptional circumstances is not required.⁴⁰ The necessity of the exceptional circumstances test has also been questioned in Western Australia. For example, in *Michael v The Queen* Wallwork AJ said that s 16A(2)(p) makes no mention of exceptional circumstances,⁴¹ although that was said in *obiter dicta* and the judgment itself was not concerned with the Commonwealth Act.
31. Despite the introduction at state level of human rights legislation and the ratification of human rights instruments by Australia, Australian courts have so far been reluctant to consider the role that human rights play in sentencing.⁴² This is evidenced by the approach of the Australian common law to third party hardship, in particular hardship for children whose parents are sentenced.
32. In *Markovic v The Queen*, the Court of Appeal considered the history of taking into account of third-party hardship and said that the 'exceptional circumstances' or 'exceptional hardship' approach in sentencing has developed on the basis that it is a plea for 'mercy'.⁴³ The Court found that, given reliance on family hardship is itself an appeal for mercy, family hardship does not attract a residual discretion of mercy,⁴⁴ and it is only where the exceptional circumstances test is satisfied that a sentencing court

³⁸ *Totaan v The Queen* [2022] NSWCCA 75.

³⁹ *Rodgers v The Queen* [2022] VSCA 82.

⁴⁰ See, eg, *Craft v Diebert* [2004] ACTCA 15 [60]; *DPP v Ip* [2005] ACTCA 24 [61]–[61]. See also Commonwealth Director of Public Prosecutions, 'Sentencing of Federal Offenders in Australia: A Guide for Practitioners' (Commentary, 4th ed, February 2021) 75 [321]; Walsh and Douglas (n 1819) 146.

⁴¹ *Michael v The Queen* [2004] WASCA 4 [56]–[57]. The judgment of the majority in that decision approached the issue of family hardship in the traditional 'exceptional circumstances' way: see [49]–[50].

⁴² John Tobin, 'Incorporating the CRC in Australia' in Laura Lundy and Ursula Kilkelly and Bronagh Byrne (eds), *Incorporating the Convention on the Rights of the Child into National Law* (Intersentia, 2021), 26; Julie Debeljak, 'The Rights of Prisoners under the *Victorian Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) UNSW Law Journal 1332, 1369.

⁴³ *Markovic* (n 35) 593–95 [12]–[21]. See also Walsh and Douglas (n 18) 140–1.

⁴⁴ *Markovic* (n 35) 593 [12].

can exercise mercy.⁴⁵ However, the subjective impact on an offender of family separation raised different considerations and could be taken into account.⁴⁶

33. Disappointingly, although the *Charter* was introduced in 2006 and *Markovic* was decided in 2009, there was no consideration by the Court of Appeal of the role of the *Charter* in the exercise of sentencing discretion or the interpretation of the *Sentencing Act*. There was also no discussion of the influence or impact of any international human rights instruments, such as the *CRC*. In particular, there has been no discussion of children as individual rights holders in sentencing processes that affect them when courts have considered whether and how to take into account the impact on children when their parents are sentenced.
34. Some Australian state appellate courts have had regard to the *CRC* in sentencing, however that approach has usually stuck very closely to the traditional considerations of family hardship, with courts likely feeling constrained by exceptional circumstances test. In *R v Chong*, Atkinson J said that the best interests of the child appropriately falls within the ‘relevant circumstances’⁴⁷ provision of the *Penalties and Sentences Act 1992* (Qld).⁴⁸ However, Her Honour said that this did not mean that the best interests could be considered a primary consideration, rather they were ‘a relevant circumstance’.⁴⁹ This approach was based on the judgment of Pincus JA in *R v Le*, where His Honour said that the interests of an offender’s children being a primary consideration was inconsistent with the Act as a whole.⁵⁰ In *Chong*, Atkinson J ultimately considered the impact on the children of a mother by closely following the general common law approach and said that there would be ‘exceptionally harsh’ consequences on the children, which were then taken into account in mitigation.⁵¹ Similarly, in *Walsh v Department of Social Security*,⁵² Perry J considered that international instruments such as the *CRC* underscored the importance of provisions such as s 16A(2)(p) of the *Crimes Act 1914* (Cth), although His Honour said that ultimately no recourse needed to be had to the *CRC* as s 16A(2)(p) was ‘clear and unambiguous in its terms’.⁵³

⁴⁵ Ibid 594 [15].

⁴⁶ Ibid 591 [5], [20].

⁴⁷ *Penalties and Sentences Act 1992* (Qld) s 9(2)(r).

⁴⁸ (2008) 181 A Crim R 200, 207 [34] (*‘Chong’*).

⁴⁹ Ibid (emphasis in original).

⁵⁰ *R v Le* [1996] 2 Qd R 516, 519.

⁵¹ (2008) 181 A Crim R 200, 207–9 [35]–[42]. Atkinson J also considered the hardship in the specific context of the offender being an Indigenous mother and considered statistics, including the overrepresentation of Indigenous women in custody.

⁵² (1996) 67 SASR 143.

⁵³ Ibid 147.

35. There was consideration of the *CRC* in *Togias*, although ultimately the Court did not disturb the exceptional circumstances principle. In *Togias*, the respondent attempted to rely on Art 9(1) of the *CRC*,⁵⁴ however, the Court found that this article and the case before it was not an appropriate vehicle to consider whether the *CRC* extends or diminishes the exceptional circumstances test.⁵⁵ Chief Justice Spigelman commented that Art 3.1 was not relied upon by the respondent,⁵⁶ however, disappointingly, his Honour did not then consider in *obiter dicta* as to how Art 3(1) would impact upon the sentencing discretion.
36. In *S v R*, Wallwork AJ said in *obiter dicta* that children were entitled to proper protection under the *CRC*⁵⁷ and that the impact on an offender's family should be considered in sentencing 'without any riders'.⁵⁸ However, this comment by Wallwork AJ was criticised by McKechnie J in the same case, who said that there was no argument before the court on the *CRC* and therefore the issue of the impact of the *CRC* should be left for full argument in another case.⁵⁹ Ultimately, the Court's decision in that case was again based on considerations of exceptional hardship.⁶⁰
37. Similarly, in the Northern Territory the authorities have stuck to the traditional view of family hardship, even when considering any role that the *CRC* might play. In *Veness v The Queen*, the Northern Territory Court of Criminal Appeal accepted the argument that the best interests of a child can be taken into account pursuant to the 'any other relevant circumstance'⁶¹ provision.⁶² However, the Court said that ultimately the *CRC* does not displace common law principles requiring that there be exceptional hardship on third parties before that hardship can be taken into account.⁶³ The Court also said that it cannot be accepted that children's best interests are to be regarded as a primary consideration in the exercise of the sentencing discretion.⁶⁴
38. The courts' general reluctance in considering the best interests of the child in sentencing and the impact that sentencing can have on families (without the impact needing to achieve a level of exceptionality), is a good reason for the Victorian

⁵⁴ *Togias* (n34) 27 [25].

⁵⁵ *Ibid* 37 [85].

⁵⁶ *Ibid*

⁵⁷ [2003] WASCA 309 [38].

⁵⁸ *Ibid* [39].

⁵⁹ *Ibid* [33].

⁶⁰ *Ibid* [29] (Miller J), [35] (McKechnie J).

⁶¹ *Sentencing Act 1995* (NT), s 5(2)(s).

⁶² *Veness* (n 35) [64].

⁶³ *Ibid*.

⁶⁴ *Ibid*.

Sentencing Act to be amended so that these factors can be expressly taken into account. This amendment would help achieve equal justice having regard to all relevant circumstances of the offender.

39. Thank you for the opportunity to make this submission with regard to the important work being undertaken by the Committee.
40. If you have any questions regarding this submission, please do not hesitate to contact Michael Stanton – President of Liberty Victoria, or Julia Kretzenbacher – Immediate Past President of Liberty Victoria, or the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au.

Summary of Recommendations

- There should be regular evaluations and review of the Living With Mum programmes at the women’s prisons, conducted by an independent body such as the Ombudsman.
- There should be greater transparency with respect to other short-term parenting programmes run through Corrections Victoria for both men and women, including publication of what the programmes involve and how many prisoners benefit from them. Such programmes should also be subject to regular and independent evaluation and review.
- The *Sentencing Act 1991 (Vic)* should be amended to allow courts to expressly take into account the impact that sentencing can have on children under the care of offenders, thus bringing Victorian courts into line with their obligations under the Charter and the Convention of the Rights of the Child. The impact on children and families should not have to reach a level of ‘exceptional hardship’ in order for a court to take it into account.