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SENTENCING PARENTS: THE CONSIDERATION OF DEPENDENT CHILDREN

Abstract

Sentencing a parent will necessarily impact upon their dependent children; if a parent is imprisoned, hardship to their children is inevitable. In all Australian jurisdictions, judges and magistrates are able to consider the hardship that would be caused to an offender's family and dependants when determining a sentence. However, Australian courts have held that the circumstances will have to be 'exceptional' for hardship to children to influence sentencing. In this research, we considered 85 sentencing appeal cases from all Australian jurisdictions where hardship to the defendant's dependent children as a result of the sentence was considered. This article discusses the cases in order to consider the kinds of circumstances that have been found to be 'exceptional'. The authors also consider the mercy discretion, and its relationship with the exceptional circumstances test. The article identifies concerns with the requirement for exceptionality and argues that the best interests of offenders' children should always be a significant factor to be weighed in the sentencing process.

I Introduction

Sentencing is an important aspect of the criminal law, and yet it is one of the 'least principle-based and coherent' areas of the law.[1] Judges must balance a range of factors when making sentencing decisions. These factors include the aims of the sentence, such as rehabilitation, deterrence and community protection, among others.[2] These aims have been referred to as 'guideposts' that sometimes 'point in different directions.'[3] Sentencing courts have significant latitude to take into account a broad range of factors that are specific to the particular offence and offender. As part of their wide-ranging discretion in sentencing, magistrates and judges can consider hardship to offenders' families and dependants as a mitigating

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1 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 3.

2 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

3 Ibid.

factor.[4] In 'exceptional' cases, hardship can have an impact on the sentence, yet the role of hardship and exceptional circumstances in this context has received relatively little academic attention.

This article considers a number of Australian sentencing appeal cases determined between 2000 and 2014 where hardship to the defendant's dependent children as a result of the sentence was considered. The aim of the case analysis in this article is to better understand judicial approaches to hardship, exceptional circumstances and the 'mercy' discretion when sentencing parents who have dependent children. We begin with an overview of sentencing law as it relates to concepts of hardship, exceptional circumstances and mercy in the context of sentencing parents of dependent children in Australia. This is followed by the analysis of a number of cases where hardship to dependants has been raised and considered in sentencing appeals. In the final section we argue for a change of approach in sentencing such that 'exceptionality' is not necessary. We suggest that the human rights of children and their best interests should always be a significant consideration when sentencing an offender who is the parent of dependent children, especially where the offender is the sole or primary carer.

II The Consideration of Dependent Children in Australian Sentencing Law

A *Hardship as a Mitigating Factor*

It is well-established that the discretion of judges in sentencing is extremely broad[5] and 'hardship' has long been recognised as a factor for consideration by judges when sentencing offenders.[6] Offenders have received more lenient sentences on the basis that they are of old age, suffering from physical or mental ill health, or have a serious disability.[7] Such factors are taken into account in sentencing because the impact of a particular sentence upon the offender could result in exceptional hardship, or

4 See *Crimes Act 1914* (Cth) s 16A(2)(p); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3); *Sentencing Act* (NT) s 5(2)(s); *Penalties and Sentences Act 1992* (Qld) s 9(2)(f), (q); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(f), (n), (o); *Sentencing Act 1991* (Vic) s 5(2)(g), *Sentencing Act 1995* (WA) ss 6(2)(d), 8.

5 Edney and Bagaric, above n 1, 16; *Markarian v The Queen* (2005) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

6 Although, this has not been without criticism; see Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1, 16.

7 In relation to older age, see *Gulyas v Western Australia* (2007) 178 A Crim R 539 and *R v Sopher* (1993) 70 A Crim R 570. In relation to mental illness and cognitive impairment, see *R v Verdins* (2007) 16 VR 269. In *R v Bernier* (1998) 102 A Crim R 44, the combined effect of the offender's severe depression, the fact that he didn't speak English and the separation from family were taken into account in reducing the penalty.

additional hardships that other prisoners would not experience. Von Hirsch and Ashworth describe this as the 'equal-impact' principle.[8]

Prison might conceivably impose a more substantial burden on an offender with a terminal medical condition, or a defendant who is blind or has a cognitive impairment, for example.[9] In *York v The Queen*,[10] the High Court of Australia confirmed that a significant risk to an offender's safety whilst in prison was a relevant consideration in sentencing, and could justify a decision by a sentencing judge to not impose an immediate custodial sentence. In Queensland, judges have recommended that leniency should be extended towards 17 year olds who are sentenced to periods of imprisonment because they will be required to serve their sentence in an adult correctional facility.[11] It has also been recognised that the hardship likely to be experienced by some Aboriginal people in prison may be a mitigating factor.[12]

To argue that an offender should be afforded leniency because of their personal characteristics is one thing. It is quite a separate issue to argue that an offender should be afforded leniency because their sentence has the potential to cause harm to others. The effects on people other than the offender have sometimes been referred to as the 'collateral consequences'[13] of sentencing or 'third party hardship'.[14] Third parties that might be affected by an offender's sentence include spouses and elderly parents, particularly those with serious illnesses or disabilities who require care.[15] But most obviously, sentencing a parent can have a significant impact upon their dependent children.

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8 Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 172–3.

9 See, eg, *R v Pope; Ex parte Attorney-General* [1996] QCA 318 (30 August 1996) (diabetic nephrosis); *R v Todd* [1976] Qd R 21 (blindness); *R v Gommers* [2005] SASC 493 (22 December 2005) (intellectual disability); *R v Verdins* (2007) 16 VR 269 (cognitive impairment); *R v Mitchell* (2000) 112 A Crim R 315, 321–2 [22]–[23] (Tadgell JA) (reduced life expectancy).

10 (2005) 225 CLR 466, 473 [21] (McHugh J), 478–9 [38] (Hayne J).

11 See, eg, the dissenting opinion of McMurdo P in *R v Loveridge* (2011) 220 A Crim R 82, 83–84 [5]–[7], 85 [11]. Seventeen-year-old children are treated as adults by the criminal justice system in Queensland: see *Youth Justice Act 1992* (Qld) s 6.

12 *R v Fernando* (1992) 76 A Crim R 58, 62-63 (Wood J). See further Thalia Anthony, 'Indigenising Sentencing: *Bugmy v The Queen*' (2013) 35 *Sydney Law Review* 451.

13 John Hagan and Ronit Dinovitzer, 'Collateral Consequences of Imprisonment for Children, Communities, and Prisoners' (1999) 26 *Crime and Justice* 121; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2010) 175.

14 Fox, above n 6, 16.

15 See, eg, *R v Lane* (2007) 176 A Crim R 471 (the offender was a full time carer for his wife who had multiple sclerosis); *Fermanis v Western Australia* [2005] WASCA 212 (9 November 2005) (the offender was a carer for his invalid father).

B *Sentencing and Hardship to Dependent Children*

When parents are imprisoned this necessarily has implications for their dependent children, especially where both parents are incarcerated or the offender is a primary carer or a sole parent. In some Australian sentencing Acts, specific provision is made for the consideration of family hardship. For example, s 16A(2)(p) of the *Crimes Act 1914* (Cth) states that in determining the sentence to be passed, the court must take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.' Similar provisions exist in sentencing legislation in the Australian Capital Territory[16] and South Australia.[17] In most other states and territories, the impact on the person's dependants can be taken into account under general sentencing provisions that require the court to consider any mitigating factors[18] or other relevant circumstances.[19]

The situation in New South Wales and Tasmania is somewhat different. The *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out an (apparently) exhaustive list of aggravating and mitigating factors in s 21A(3), none of which allow for the impact on dependants to be considered. However, notably, the New South Wales Act states that nothing within it limits the prerogative of mercy.[20] It is the 'mercy discretion', therefore, that is explicitly used to take family hardship into account in New South Wales.[21] Tasmanian sentencing legislation does not specifically list mitigating or aggravating factors, but the legislation does give judicial officers a broad discretion to consider alternatives to imprisonment where a non-custodial sentence better meets the interests of justice.[22] It also allows the court to take the offender's 'economic or social wellbeing' into account when determining whether or not to record a conviction.[23]

C *'Exceptional Circumstances' Approach*

There is nothing in s 16A(2)(p) of the Commonwealth *Crimes Act*, or the equivalent provisions in the Australian Capital Territory and South Australia, to indicate that the effect of the sentence on an offender's family or dependants must be 'exceptional' to be taken into account. On the contrary, these provisions direct the court to take into account the 'probable' effect on the offender's family or dependants when determining the sentence to be passed. Yet, generally, the common law has found that hardship on others, such as dependants, must be 'exceptional' in order to mitigate the penalty. The Australian Law Reform Commission, in its inquiry into federal sentencing,

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

17 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(n), (o).

18 *Sentencing Act 1995* (NT) s 5(2)(f); *Penalties and Sentences Act 1992* (Qld) s 9(2)(f); *Sentencing Act 1991* (Vic) s 5(2)(g); *Sentencing Act 1995* (WA) ss 6(2)(d), 8.

19 *Sentencing Act 1995* (NT) s 5(2)(s); *Penalties and Sentences Act 1992* (Qld) s 9(2)(q).

20 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102.

21 The mercy discretion is discussed further below.

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

23 *Sentencing Act 1997* (Tas) s 9(c).

advocated in favour of 'an approach that would encompass consideration of the impact of sentencing [on the offender's family and dependants] without the need to establish exceptional circumstances'.[24] Nevertheless the relevant provisions in the Australian sentencing Acts have been read down by courts to require circumstances that are exceptional.[25]

In *Markovic v The Queen*,[26] the Victorian Court of Appeal was specifically asked to consider the 'circumstances in which an offender can legitimately seek an exercise of mercy on the ground that his/her imprisonment is likely to cause hardship to members of his/her immediate family or other dependants.'[27] The Court recognised the importance of the 'mercy' question and convened a bench of five who held that circumstances needed to be 'exceptional' to influence sentencing. The Court noted that the 'exceptional circumstances test' was developed by the common law for several reasons:

> First, it is almost inevitable that imprisoning a person will have an adverse effect on the person's dependants … Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would 'defeat the appearance of justice' and be 'patently unjust'.[28]

As the Court in *Markovic* observes, imprisonment often causes hardship for dependants, indeed this is 'almost inevitable',[29] normal and to be expected.[30] Therefore, hardship must have an exceptional or extraordinary character in order to have an impact on the sentence. Consistent with the case of *Markovic,* Edney and Bargaric point to two policy reasons behind this approach.[31] First, they note that a person who commits a crime must suffer the consequences of that decision. If this

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24 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders,* Report No 103 (2006) 190 [6.127].

25 In New South Wales, see *R v Carmody* (1998) 100 A Crim R 41. In Queensland, see *R v Marshall* (2010) 199 A Crim R 331. In South Australia, see *R v Wirth* (1976) 14 SASR 291. In Tasmania, see *Emms v Barr* (2008) 187 A Crim R 390. In Victoria, see *Markovic v The Queen* (2010) 30 VR 589. In Western Australia, see *Boyle v The Queen* (1987) 34 A Crim R 202. Note, however, that the Australian Capital Territory courts have been less willing to accept this characterisation: see *Craft v Diebert* [2004] ACTCA 15 (12 August 2004) [10]; *Scheele v Watson* [2012] ACTSC 196 (17 December 2012) [86].

26 (2010) 30 VR 589 ('*Markovic*').

27 Ibid 591 [2].

28 Ibid 591–2 [6]–[7] (citations omitted).

29 Ibid 591 [6].

30 *R v Edwards* (1996) 90 A Crim R 510, 515; *R v Wirth* (1976) 14 SASR 291, 296; Edney and Bagaric, above n 1, 302.

31 Edney and Bagaric, above n 1, 303.

does not occur, the efficacy of sentencing may be undermined and the appearance of justice may be defeated.[32] The sentence is supposed to produce hardship by way of punishment. Secondly, they note that a punishment is directed at the individual in response to the crime they have committed; it is not directed to punishing other innocent people (such as dependants).[33] Indeed, Murphy argues that the law should remain blind to the impact of an offender's sentence on third parties because the purpose of sentencing is to respect and reassert the worth of the victim.[34]

However, it is also 'paradoxical' that the suffering caused to the offender by separation from her dependant through imprisonment could be taken into account if it could be shown that the offender's prison experience would be worse, as compared to others, as a result of her separation. Ashworth notes that in the United Kingdom, courts have sometimes reduced a penalty where the offender is pregnant,[35] although it is not absolutely clear whose hardship the court is responding to. Also in the United Kingdom, a sentence of intermittent imprisonment was specifically developed with mothers of young children in mind to allow parents to retain their jobs and maintain their childcare responsibilities;[36] factors arguably associated with the parent's rehabilitation rather than hardship on the child. Nevertheless such sentences reduce the disruption to the child and reduce their chances of growing up in care,[37] so there is a clear interrelationship between hardship to the offender and to the child in such circumstances.

D *The Mercy Discretion*

In some Australian cases it has been held that, in the event that the offender cannot meet the stringent test of 'exceptional circumstances', the effect of a sentence on the offender's children could still attract leniency under the court's residual 'mercy discretion'.[38] The mercy discretion under English common law is related to the royal prerogative of mercy, which Fox notes is ultimately based on the religious notion of

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32 Ibid.

33 Ibid.

34 Jeffrie Murphy, 'Mercy and Legal Justice' in Jeffrie G Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (Cambridge University Press, 1988) 162, 179–180; and see generally Julia Davis, 'Domestic Violence and Sexual Abuse: Should the Courts Abandon the "Welfare Approach" to Sentencing?' (1998) 27 *University of Western Australia Law Review* 227.

35 Ashworth, above n 13, 187, citing *R v Beaumont* (1987) 9 Cr App R (S) 342.

36 See Clarissa Penfold, Gillian Hunter and Mike Hough, 'The Intermittent Custody Pilot: A Descriptive Study' (Report No 23, United Kingdom Home Office, 2006) 24–25.

37 Ibid. Arguably this approach clearly recognises that appropriate childcare is not merely a private issue, but is indeed an issue of interest to the state: Jonathan Herring, *Caring and the Law* (Hart Publishing Ltd, 2013) 3, 325.

38 See especially *R v Carmody* (1998) 100 A Crim R 41, 45.

'God's pitying forbearance towards his creatures'.[39] It does not amount to forgiveness, but rather allows for a partial release from punishment based on the balancing of relevant considerations.[40] Some commentators have insisted that granting mercy is necessarily unjust because it amounts to a departure from accepted legal rules.[41] Murphy describes 'the paradox of mercy'; he observes:

> If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. … Thus to be merciful is perhaps to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue, but a vice — a product of morally dangerous sentimentality.[42]

The concept of mercy as a 'factor' in sentencing is rarely discussed in Australian case law.[43] Fox argues that if mercy is invoked to assist judges in balancing mitigating factors, and determining the weight that should be attributed to them, it is merely an aspect of a judge's sentencing discretion.[44] He remarks that, if revulsion of an offender can be taken into account in sentencing, so too should pity.[45] However, he finds it less defensible for mercy to be invoked as an independent doctrine that 'operates outside the main framework of sentencing'.[46] If mercy is used in a way that allows weight to be given to factors that would not ordinarily be considered in sentencing, Fox argues it should rarely be used,[47] otherwise the appearance of justice may be defeated.[48]

As noted earlier, in *Markovic*, the Victorian Court of Appeal determined that the exceptional circumstances test could not be separated from the mercy discretion. It found that:

> The common law requirement of 'exceptional circumstances' accepts that an offender is entitled to call for an exercise of mercy on the ground of family hardship, but confines the exercise of that discretion to a case where the circumstances are shown to be exceptional.[49]

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39 Fox, above n 6, 4. Fox notes that the mercy discretion has not always been used in a benevolent fashion, but at times was applied in a biased and classist manner to advance particular interests: at 5. See further: A T H Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398; Daniel T Kobil, 'The Quality of Mercy Strained: Wresting the Pardoning Power from the King' (1991) 69 *Texas Law Review* 569.

40 Fox, above n 6, 6.

41 Andrew Brien, 'Mercy Within Legal Justice' (1998) 24 *Social Theory and Practice* 83.

42 Murphy, above n 34, 167; see also Von Hirsch and Ashworth, above n 8, 168.

43 Fox, above n 6, 4.

44 Ibid 11–12.

45 Ibid 23.

46 Ibid 11.

47 Ibid 13, 16.

48 Ibid 15, 23.

49 *Markovic* (2010) 30 VR 589, 594 [15].

Thus the Court decided that an appeal to the 'residual discretion' of mercy was a 'contradiction in terms'.[50]

E *Instinctive Synthesis*

In Australia, the High Court has characterised sentencing as, almost always, a process of 'instinctive synthesis'.[51] As was observed in *Markarian v The Queen*:

> the [sentencing] judgment is a discretionary judgment … what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached.[52]

Von Hirsch and Ashworth consider matters like the offender's hardship as equity factors. They reason that '[i]f a court regards equity factors as part of the process of arriving at a just sentence, then the issue of an unjust sentence does not arise'.[53] This analysis is consistent with an understanding of sentencing as a process of instinctive synthesis. The instinctive synthesis approach to sentencing inevitably makes it difficult to disentangle the effect of various aggravating and mitigating factors, including hardship (and the effect of mercy), on the sentence.

Mercy may be extended as part of a judge's sentencing discretion in Australia, and whilst there is no right to mercy,[54] a failure to extend mercy is reviewable on the basis that it amounts to an inaccurate weighing of mitigating factors in sentencing.[55] In the Victorian case of *R v Miceli*,[56] Tadgell JA said that 'an element of mercy has always been … properly regarded, as running hand in hand with the sentencing discretion'.[57] In the South Australian case of *R v Osenkowski*,[58] King CJ similarly remarked that '[t]here must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case'.[59]

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50 Ibid 594 [16].

51 *Markarian v The Queen* (2006) 228 CLR 357, 373 (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Wong v The Queen* (2001) 207 CLR 584, 621–622 (Gaudron, Gummow and Hayne JJ).

52 *Markarian v The Queen* (2006) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne and Callinan JJ), although the Court did recognise that there may be some occasions where a two-staged approach may be appropriate: at 375.

53 Von Hirsch and Ashworth, above n 8, 168.

54 As Lord Diplock said in *De Freitas v Benny* [1976] AC 239, 247, mercy 'is not the subject of legal rights' rather it 'begins where legal rights end.'

55 See, eg, *R v Miceli* (1998) 4 VR 588.

56 Ibid.

57 Ibid 592.

58 (1982) 30 SASR 212.

59 Ibid 212.

The role of mercy in sentencing was earlier noted by Windeyer J in the High Court case of *Cobiac v Liddy*,[60] where his Honour said: '[t]he whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy'; not that mercy should 'season justice', but that 'a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.'[61] Justice Windeyer also said, however, that a cautious approach should be taken, and that before extending mercy a court 'ought gravely to hesitate' and 'weigh the matter well'.[62] More recently, in *Dinsdale v The Queen* (an appeal from Western Australia),[63] the High Court considered the circumstances in which such judicial discretion should be exercised to suspend a sentence. Justice Kirby observed:

> discretion must be left to permit those with the responsibility of sentencing to take into account the peculiar circumstances of the case, any exceptional circumstances affecting the prisoner, and in some cases the prisoner's family, or some feature of the matter that reasonably arouses a judicial decision that a measure of mercy is called for in the particular case.[64]

While Kirby J's comments seem to suggest that exceptional circumstances may be separate from the mercy discretion, in Victoria at least it is exceptional circumstances that may evoke mercy. [65]

III Analysis of Australian Cases

A *General Overview*

With this legal context in mind, we examined reported sentencing appeals heard by state and territory criminal appeal courts between January 2000 and June 2014 in which the offender appealed their sentence, at least in part, because of the hardship it would cause to their dependent children. The aim was to better understand judges' reasoning in relation to the offender's parenting responsibilities and its impact on sentencing decisions. Case searches were conducted on all major online Australian case law databases.[66]

The *Australian Constitution* does not give the Commonwealth Government an express power to make laws with respect to criminal law. As a result, criminal law and sentencing in Australia is an area largely regulated by the states and territories. The Commonwealth's laws in this area are limited to matters incidental to other

60 (1969) 119 CLR 257.

61 Ibid 269.

62 Ibid 268.

63 (2000) 202 CLR 321.

64 Ibid 343.

65 *Markovic* (2010) 30 VR 589, 594 [15]–[16].

66 Specifically, Casebase, LexisNexis, Westlaw and Austlii.

heads of power, such as offences relating to social security and tax fraud.[67] This factor makes it difficult to compare cases where they have been heard under differing legal regimes in the states and territories. Despite this, improved understanding of the judicial approach to dependent hardship in sentencing decisions may be gained from the consideration of the reasoning in the cases considered.

The cases we identified involve offenders of diverse backgrounds and circumstances. A total of 85 sentencing appeal cases were identified from all Australian jurisdictions where hardship to the defendant's dependent children as a result of the sentence was considered. In 51 of the cases, the offender was female, and in 34 the offender was male. Sixteen of the female offenders were pregnant at the time they were sentenced, and 20 of the offenders had a child aged less than one year. The offender was known to be Aboriginal in seven cases, and in all of these cases, the offender was female. At least 38 of the offenders were single parents: 28 women and 10 men. Thus slightly more than one third of the sole parent offenders in this sample were men. This is not surprising given that, although women in the broader community are more likely to be single parents, men are much more likely to be charged with offences than women.[68]

At least 20 of the offenders had at least one child with a disability or a serious medical condition.[69] Of the offenders, 71 had either one or two children, not including any unborn children; the remainder had more than two children. In 37 cases the offender was stated to have a criminal history. The children mentioned in the cases ranged in age from unborn to 16 years. In 62 cases, the offender's youngest child had not yet reached school age. In a further 14 cases, the offender's youngest child was aged between six and 10 years.

In 16 cases, the children were still in the care of the offender, however in most cases (n=49) the children were in the care of a relative: 24 were in the care of the other parent, 14 were in the care of grandparents and 11 were in the care of another relative (most often an aunt). There were four cases where the children were being cared for by a friend. In a further six cases, there was no alternative carer available, other than state care.

Most of the offenders had committed either a drug offence (n=32) or a fraud offence (n=17), most often social security fraud. Most of the offenders in this sample of cases ultimately received a full-time custodial sentence.

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67 See *Criminal Code Act 1995* (Cth) ss 137.1, 135.2. As to the taxation and social security powers, see *Australian Constitution* s 51(ii), (xxiiiA).

68 United States statistics are also consistent with this finding. There, roughly half of the claims of exceptional hardship to dependants in sentencing cases are made by men, although many more men face the criminal courts than women in all jurisdictions: Patricia M Wald, '"What About the Kids?": Parenting Issues in Sentencing' (1995) 8 *Federal Sentencing Reporter* 137, 139.

69 That is, it was noted in court that they were single parents or parents of a child with a disability or serious medical condition.

B *Exceptional Circumstances and the Mercy Discretion*

It is important to note that the basis upon which the appeals were decided was not always clear from the judgment. Given the process of instinctive synthesis generally applied by judges in determining sentences,[70] this comes as no surprise. It is likely that there were a number of factors that contributed to the sentencing decision on appeal, including parenting considerations, but also considerations such as the seriousness of the offence, the part the offender played in the commission of the offence and the nature of the offender's criminal history. The legal basis for any mitigation of sentence was also not always explicitly stated by judges in the cases we examined.[71]

The relationship between the 'exceptional circumstances' test and the mercy discretion seems to be a matter of some debate and uncertainty.[72] In the 2009 case of *R v Xeba*,[73] the Victorian Court of Appeal held that the court still has a discretion to show mercy, even if exceptional circumstances cannot be shown, yet this was clearly rejected the following year in *Markovic*. As noted earlier, in *Markovic* the Victorian Court of Appeal unanimously rejected the argument that the 'mercy' discretion for family hardship was available, as distinct from, and as an alternative to, exceptional circumstances.[74] In that case, the Court determined that the purpose of the exceptional circumstances test was to limit the availability of the court's discretion to exercise mercy on the grounds of family hardship. The Court pointed to other cases in which a 'residual' mercy discretion had been denied, such as the 1976 case of *R v Wirth*,[75] where Wells J of the South Australian Supreme Court said that circumstances related to family hardship would have to be 'highly exceptional' to be taken into account in mitigation, and that a court should go no 'further than that'.[76]

Having said this, in some of the Western Australian cases, the requirement of exceptionality was questioned. For example, in *Michael v The Queen*,[77] despite involving a state crime of burglary, Wallwork AJ of the Western Australian Court of Criminal Appeal referred to s 16A(2)(p) of the Commonwealth *Crimes Act*, and noted that '[t]he section makes no mention of "exceptional" circumstances'.[78]

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70 *Markarian v The Queen* (2006) 228 CLR 357, and see earlier discussion.

71 In 43 cases, the basis for the decision related to mitigation was not stated.

72 *R v Capper* [2000] NSWCCA 63 (14 March 2000); *S v The Queen* [2003] WASCA 309 (10 December 2003); *R v Xeba* [2009] VSCA 205 (17 September 2009); *Markovic v The Queen* (2010) 30 VR 589; *Ramezanian v The Queen* (2013) 37 VR 92.

73 [2009] VSCA 205 (17 September 2009).

74 (2010) 30 VR 589.

75 (1976) 14 SASR 291.

76 Ibid 296.

77 [2004] WASCA 4 (22 January 2004).

78 Ibid [57] (Wallwork AJ). Similar misgivings were noted by the Australian Capital Territory Supreme Court: see *Craft v Diebert* [2004] ACTCA 15 (12 August 2004) [10]; *Scheele v Watson* [2012] ACTSC 196 (17 December 2012) [86].

C *Understanding 'Exceptional'*

Regardless of what the basis for mitigation was, a common refrain in the cases was that although an offender's circumstances were 'sad', 'special' or worthy of sympathy, they were not sufficient to receive leniency in sentencing.[79] In most of the cases, the judges agreed that to be relevant, the impact upon the children must be 'exceptional' — that is, 'quite out of the ordinary'[80] — and that this was understood as a stringent test.

In the sample of cases we reviewed there were 16 cases where judges explicitly stated that the appeal outcome was based on a finding of exceptional circumstances due to hardship to the offender's children.[81] Below we examine these cases more closely to consider further the kinds of circumstances that may underlay 'exceptionality'.

1 *Child Illness or Disability*

In a number of cases, circumstances were considered 'exceptional' where there were medical concerns regarding at least one of the offender's children or where at least one of the children had a disability. Medical concerns noted by the judges included recognised disabilities (physical, sensory, psychological and cognitive) and serious illnesses (such as cancer and neurological conditions). Some examples of cases are discussed below which illustrate judges' approaches to these issues.

(a) Immediate Release to Care for a Child with a Serious Medical Condition

In some cases the appeal court found that the offender should be released immediately in light of their child's medical needs. For example, in the case of *Macri v Moreland*,[82] a single mother had committed social security fraud in the context of caring for two children with disabilities, one with ADHD and epilepsy, and another with cerebral palsy that had caused paralysis in one arm. The evidence indicated that both children were heavily dependent upon the offender for their personal care needs and the administration of medication. The Appeal Court held that the probable effect

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79 See, eg, *R v Luong* [2000] NSWCCA 139 (14 April 2000); *Craft v Diebert* [2004] ACTCA 15 (12 August 2004); *R v Girard* [2004] NSWCCA 170 (12 May 2004); *Markovic v The Queen* (2010) 30 VR 589.

80 See *Hodder v The Queen* (1995) 81 A Crim R 88.

81 They are: *Nguyen v The Queen* (2001) 118 A Crim R 519; *R v Edwards* [2011] QCA 331 (22 November 2011); *R v La Mude* [2001] VSCA 33 (20 March 2001); *Milosevski v Police* [2000] SASC 342 (16 October 2000); *R v McConachy* [2011] QCA 183 (3 August 2011); *R v Penno* (2004) 236 LSJS 457; *Scheele v Watson* [2012] ACTSC 196 (17 December 2012); *Roberts v The Queen* [2007] NSWCCA 112 (20 April 2007); *R v Gip* (2006) 161 A Crim R 173; *R v Liu* [2005] NSWCCA 378 (25 October 2005); *S v The Queen* [2003] WASCA 309 (10 December 2003); *Adams v The Queen* [2003] WASCA 91 (2 May 2003); *Michael v The Queen* [2004] WASCA 4 (22 January 2004); *Egan v Western Australia* [2007] WASCA 182 (5 September 2007); *TAN v The Queen* (2011) 35 VR 109; *Ramezanian v The Queen* (2013) 37 VR 92.

82 [2008] WASC 194 (12 September 2008).

of the offender's incarceration on the children could be described as 'exceptional' and the offender was released forthwith.[83] In *Ramezanian v The Queen*,[84] the offender's 11-year-old son had been diagnosed with leukemia on the day he was sentenced. The diagnosis and its effect were admitted as fresh evidence on the appeal; the information had not been available to the original sentencing judge. The offender, the child's father, had been the primary carer of his two sons before he was imprisoned. The children were in the care of their mother at the time of the appeal, however there was evidence that, in light of their son's diagnosis, the mother would have to cease employment to care for him. The two appeal judges agreed Ramezanian should be released immediately, rather than serving the three-month non-parole period imposed by the trial judge.[85]

(b) Reduction in Sentence to be Reunited with a Child with Disabilities or an Illness

In several other cases involving dependent children with an illness or disability, the non-parole period, prison sentence or both were reduced on appeal.[86] For example, in *Roberts v The Queen*,[87] the offender was the father of a five-year-old daughter who had been diagnosed with a serious neurological condition and was not expected to survive beyond middle childhood. Roberts had been the sole carer of the child until he was placed in custody. Despite the fact that the daughter was now being cared for by her mother and there were no specific care concerns raised, two of the three judges agreed that his non-parole period should be reduced primarily so he could be reunited with his daughter at an earlier time.

Day v The Queen[88] concerned an offender who had committed drug offences to raise money to care for his severely disabled son. The child's condition, cortical dysplasia, rendered him unable to toilet or care for himself, and it was anticipated that his care needs would increase as he got older. Whilst the Court acknowledged that the motive behind his offending did not diminish his culpability,[89] it concluded that some (although not substantial) reduction of his prison sentence should be granted having regard to the needs of the child and the heavy burden that his absence would place upon the boy's mother.[90]

In *R v McConachy*,[91] the offender was a sole father. The Court heard that one of his children had epilepsy, one had developmental delays and the third, an infant,

83 Ibid [32].

84 (2013) 37 VR 92.

85 Ibid 100 [32].

86 *R v McConachy* [2011] QCA 183 (3 August 2011); *DPP (Vic) v Gerrard* (2011) 211 A Crim R 171; *Roberts v The Queen* [2007] NSWCCA 112 (20 April 2007); *R v La Mude* [2001] VSCA 33 (20 March 2001).

87 [2007] NSWCCA 112 (20 April 2007).

88 (2001) 127 A Crim R 403.

89 Ibid 406 [13], 410 [35].

90 Ibid 409 [29].

91 [2011] QCA 183 (3 August 2011).

had recently been diagnosed with whooping cough. The children had been split between their two grandmothers as their mother was mentally unwell and unable to care for them. There was evidence that the children, particularly the eldest, were 'greatly emotionally distressed' at the separation from their father. The Court determined that the offender's head sentence and non-parole period should be reduced so that he could 'return to his young family and to care for them in a united family unit'.[92]

In *R v La Mude*,[93] the concerns related to the mental health of the offender's eight-year-old daughter. The offender was convicted of drug trafficking, and she was a mother of two children aged 8 and 14 years. The children had different fathers, both of whom had committed suicide. At the time of the offence, both the children were living with other carers. The eight year old was living with her maternal grandmother; however the grandmother's husband (the offender's step-father) had been diagnosed with terminal cancer. As a result, the grandmother had become substantially pre-occupied with his medical care. The eight-year-old child had begun having suicidal thoughts and claimed to have seen her deceased father on a number of occasions. Phillips JA observed: 'Having given this matter anxious consideration, I think … we should intervene in the particular circumstances of this case, which in many respects I regard as quite extraordinary'.[94] The Appeal Court reduced the offender's head sentence and non-parole period; however she was still required to serve a minimum period of two years imprisonment.

In *DPP (Vic) v Gerrard*,[95] the fact that the offender's young son had autism contributed to a finding of exceptional circumstances, along with the fact that his de facto wife, the mother of their two children, was profoundly deaf and therefore substantially reliant upon the offender in certain situations. In *Stumbles v The Queen*,[96] the Court found that having two severely autistic young children amounted to exceptional circumstances, but that, in view of the seriousness of the offences, this only warranted a reduction of the non-parole period by six months, to eight months.

(c) Children with an Illness or Disability Where There Was a Risk of Both Parents Being Incarcerated

The court's concerns regarding the welfare of a child with a medical condition or disability were particularly acute in cases where there was a risk that both parents would be incarcerated. In some of these cases, the mother received a non-custodial penalty so there would be one parent available to care for the child, but the father was

92 Ibid.

93 [2001] VSCA 33 (20 March 2001).

94 Ibid [17] (Batt JA and Coldrey AJA concurring).

95 (2011) 211 A Crim R 171 .

96 [2006] NSWCCA 418 (21 December 2006).

imprisoned.[97] For example, *Milosevski v Police*[98] concerned a mother whose nine-year-old daughter had Perthe's disease, a disease of the hip joint. The child's father was already incarcerated, and there was no extended family available to properly care for her. Again, this was a case where fresh evidence was admitted on appeal. A psychologist's report stated that the appellant and child had an exceptionally 'close emotional bond' that would be 'disrupted' if the appellant was imprisoned; he expected the child to become behaviorally and emotionally disturbed if the appellant was incarcerated.[99] The Court found the 'combination of circumstances' to be exceptional.[100] The mother's 18 month prison sentence was suspended by the Appeal Court so the mother could recommence care of the child.

In *S v The Queen*,[101] the offender was a mother of three children, one of whom had autism. The child's father was co-accused with the offender. Both parents were substantially involved in the child's care and the school viewed them as valued 'partners' in his education.[102] Justice Miller held that the offender's sentence should be suspended because, according to expert medical evidence, the child 'would probably never recover' if both his parents were imprisoned.[103] Interestingly Wallwork AJ, concurring with Miller J, referred to the United Nations *Convention on the Rights of the Child* ('*CROC*'), and observed that: 'It can be a serious derogation of a child's rights to order a particular offender go to prison.'[104]

The jointly heard cases of *R v Gip* and *R v Ly*[105] also concerned co-accused parents. Their two young children, aged three and one, were both described as unwell; the three year old was held to be of 'fragile health' while the one year old experienced 'significant health problems' when the mother was detained on remand.[106] The original sentencing judge had sentenced the mother, Gip, to a suspended sentence and the father, Ly, to a period of immediate imprisonment.[107] The Crown appealed

97 See, eg, *R v Gip* (2006) 161 A Crim R 173; *S v The Queen* [2003] WASCA 309 (10 December 2003); *Milosevski v Police* [2000] SASC 342 (16 October 2000). See also the older case of *Walsh v Department of Social Security* (1996) 67 SASR 143, where the South Australian Supreme Court referred to the United Nations *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*'), when ordering the release of the mother.

98 [2000] SASC 342 (16 October 2000).

99 Ibid [12].

100 Ibid [12].

101 [2003] WASCA 309 (10 December 2003).

102 Ibid [16].

103 Ibid [18].

104 Ibid [38].

105 (2006) 161 A Crim R 173.

106 Ibid 179 [27]–[28].

107 Ly was originally sentenced to serve two years imprisonment with a non-parole period of 15 months.

against both sentences. On the appeal, McLellan CJ at CL underlined the difficulties in determining whether a case was exceptional. In dismissing the appeal, he commented:

> there may be difficulties in defining in a particular case whether the circumstances are relevantly 'highly exceptional.' Minds will differ about whether it is appropriate to classify a particular case in this manner … I am not persuaded that the finding made by [the sentencing judge] was not open.[108]

(d) Children with an Illness or Disability Where Circumstances Were Not 'Exceptional'

Although some appeal judges saw fit to reduce certain offenders' sentences in view of the ill health of their children, this was not the outcome in all cases where the offender had a child with a serious illness or disability. For example, in *Chislett v The Queen*,[109] the offender's seven-year-old daughter had a congenital hip condition that required major surgery. The child was in the care of the grandmother (the offender's mother), however the grandmother believed she would require assistance to care for the child after the operation. The offender was also the mother of two other children, a two year old and a one year old. The Court concluded that these particular circumstances did not outweigh 'the need to impose deterrent sentences for drug dealers',[110] and the offender's non-parole period of two years and one month was not disturbed.

In *Craft v Diebert*,[111] the offender was a sole father caring for his 15-year-old son with ADHD. The evidence indicated that the offender was a dedicated father and that his son's condition had improved considerably since the offender took over his care. Yet, the magistrate concluded that such matters were generally not given 'much weight'.[112] She said that whilst she 'pondered long and hard' and felt 'considerable sympathy and empathy' for the offender, this could not be allowed to overtake the importance of general deterrence.[113] The three appeal court judges held unanimously that the magistrate had not erred in exercising her sentencing discretion. In support of their findings, the Court quoted the judgment in *R v Tilley* where the separation of a mother from her two-year-old daughter was at issue and that court said: 'An offender cannot shield himself under the hardship he or she creates for others' and 'undue weight' should not be given 'to personal or sentimental factors.'[114]

Similarly, in *Markovic*,[115] the offender had three children — the eldest child had epilepsy, the second child had asthma and the youngest child had learning difficulties.

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108 *R v Gip* (2006) 161 A Crim R 173, 179–80 [29].

109 [2009] NSWCCA 30 (9 February 2009).

110 Ibid [10].

111 [2004] ACTCA 15 (12 August 2004).

112 Ibid [32].

113 Ibid [34].

114 *R v Tilley* (1991) 52 A Crim R 1, 3, cited in *Craft v Diebert* [2004] ACTCA 15 (12 August 2004) [9].

115 (2010) 30 VR 589.

The children were in the care of their mother, the offender's estranged wife. These circumstances, combined with the ill health of the offender's parents and brother, were considered 'sad' but not exceptional and thus there was no sentence reduction on this basis.[116]

Hopley v The Queen[117] suggests that concerns related to a child's mental health will not always be considered exceptional. In that case, the offender was a sole father with a 13-year-old son who had clinical depression. The Court held that this level of emotional distress was 'commonplace' for children in these circumstances, and that single parents 'do not automatically receive a lesser sentence because their imprisonment will have adverse consequences on children in their care'.[118] In relation to other cognitive and psychological concerns, in *Harrison v The Queen*[119] the Court held that the mild intellectual impairment of one child was not sufficient to render the circumstances exceptional, and in *R v Hinton*[120] having a 'difficult' child with 'rapid mood changes' (but no formal diagnosis) was not considered sufficient to amount to exceptional circumstances justifying leniency.[121]

The importance of detailed pre-sentence reports and submissions relating to the care of unwell children cannot be underestimated. In *Sowaid v The Queen*,[122] there was evidence that at least one of the offender's children had a medical condition, but the Court concluded that the reports suggested only 'modest' cause for concern.[123] Similarly, in *R v Orphanides*,[124] there was evidence that one of the offender's children experienced serious health problems, but there was insufficient evidence to establish that the offender father's incarceration would constitute 'exceptional hardship'.[125] The child was cared for by the mother and on appeal Phillips J observed:

> True it is that [the child] suffers significantly from ill-health, but, as is so often the case, it is the family which suffers when gaol is ordered. Such might have provided a basis for an exercise of mercy, but in itself that does not bespeak error on the part of the sentencing judge.[126]

The comments of Phillips J suggest that the circumstances may have justified the exercise of mercy at the original sentencing, but the failure to do so given its discretionary basis did not constitute an error.

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116 Ibid 603 [75].

117 [2008] NSWCCA 105 (15 May 2008) [17].

118 Ibid [17].

119 [2006] NSWCCA 185 (19 June 2006).

120 (2002) 134 A Crim R 286.

121 Ibid 289 [12].

122 [2011] NSWCCA 177 (8 August 2011).

123 Ibid [16].

124 (2002) 130 A Crim R 403.

125 Ibid 409 [21].

126 Ibid 409 [22].

2 *No Alternative Carer*

Another factor that sometimes contributed to a finding of exceptionality was where there was no alternative carer for the child or children available other than state care. In *R v Edwards*,[127] the offender's two daughters were older children (aged 16 and 18 years) but they had been left with no lawful means of support since the offender's incarceration; there was no family to care for them, and the offender's 16-year-old daughter had left school because they were unable to make their rent payments. The offender mother was granted immediate parole. The judge also took into account the *CROC* art 3.1 which states: 'In all actions concerning children … undertaken by … courts of law … the best interests of the child shall be a primary consideration', noting this was a 'relevant circumstance' pursuant to s 9(2)(r) of the *Penalties and Sentences Act 1992* (Qld).[128]

In *Michael v The Queen*,[129] the offender was an Aboriginal mother of four children who were in separate foster homes. Some of the foster families were under investigation for alleged abuse of the children. The Court held that her sentence for burglaries should be reduced to provide her with the chance to regain care of her children at an earlier time. Despite the fact that these were state offences, and therefore subject to *Sentencing Act 1995* (WA), Wallwork AJ referred to s 16A(2)(p) of the Commonwealth *Crimes Act* which requires the court to take into account the probable effect that any sentence would have on the offender's family members. He suggested that the provision 'puts into statutory form the modern thinking on punishment and it should be applied with respect to sentencing for State offences.'[130]

In two other cases, *R v Penno*[131] and *Scheele v Watson,*[132] there was fresh evidence indicating that the current carer of the children had experienced a significant deterioration in health and was unexpectedly unable to continue to care for the children. In both these instances, a lesser sentence was imposed to enable the offenders to regain care of the children.

Having said this, there were a number of other cases where there was no alternative carer available for the child other than state care, yet the court nevertheless concluded that this did not make the case exceptional. In *Cooper v The Queen*,[133] the Court remarked:

> It is trite to say that the separation from a loving natural parent will have a significant impact on a child which foster care can never replace. And the deprivation

127 [2011] QCA 331 (22 November 2011).

128 Ibid [69].

129 [2004] WASCA 4 (22 January 2004).

130 Ibid [57].

131 (2004) 236 LSJS 457.

132 [2012] ACTSC 196 (17 December 2012).

133 [2001] WASCA 379 (30 November 2001).

> of a child's parental care is a relevant consideration when sentencing an offender and the rights of children in this respect need to be protected.[134]

However, the Court then acknowledged that 'single parenthood these days is not an unusual circumstance'[135] and that the risk that the child would go into state care did not outweigh the fact that the drug offences committed by the offender were at the higher end of seriousness.[136] In *Egan v Western Australia*,[137] the offender was a single mother of two children who would likely end up in foster care if she was incarcerated for an extensive period of time. The elder child, 15 years of age, had begun drinking excessively. Nevertheless the Appeal Court did not find the circumstances exceptional.[138] In *Winter v The Queen*,[139] the Court concluded that there were no exceptional circumstances despite the fact that the offender's incarceration meant that her 16-year-old son (who himself had ADHD) was forced to become a primary carer of the offender's other child, who was 19 years old with multiple disabilities and confined to a wheelchair.

3 *Pregnancy and Breastfeeding*

In several cases submissions were made that circumstances were exceptional for offenders who were pregnant or had recently given birth and may have been breastfeeding. However, the cases examined here suggest that being a breastfeeding mother alone will not amount to 'exceptional circumstances' for the purpose of sentencing. Indeed, in *R v O'Dea*,[140] Dunford J explicitly remarked: 'there is no evidence that there is any greater burden on a female prisoner who is pregnant than there is on any other prisoner, or on any other woman who is pregnant in the community'.[141]

In this sample of cases, pregnancy alone was similarly not generally considered to be 'exceptional' by the judges; however, in some cases judges did explicitly consider the implications for the mother and baby of the mother's incarceration.[142] For example,

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134 Ibid [16].

135 Ibid [18].

136 It did not assist the offender that cannabis had been found on the kitchen bench at the offender's home, easily accessible to his four-year-old son. As Daly says, '"bad" parents' tend to be seen as undeserving of court mercy: Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law and Society Review* 267, 285.

137 [2007] WASCA 182 (5 September 2007).

138 While the Appeal Court did suspend the offender's sentence, this was in response to an error made by the sentencing judge about the offender's role and culpability in the offending, see *Egan v Western Australia* [2007] WASCA 182 (5 September 2007) [13]–[14].

139 [2011] NSWCCA 59 (28 March 2011).

140 (2002) 36 MVR 184.

141 Ibid [17].

142 See *R v Togias* (2002) 132 A Crim R 573; *R v Moss* [2004] NSWCCA 422 (2 December 2004); *Adams v The Queen* [2003] WASCA 91 (2 May 2003); *R v Liu* [2005] NSWCCA 378 (25 October 2005).

in the case of *R v SLR*,[143] the judge sentenced a young pregnant woman to detention and recommended that she be transferred to an adult prison upon the birth of her baby so that she could be accommodated within the mothers and babies unit there.[144] In *R v Chong*,[145] the Attorney-General of Queensland appealed against a sentence for wounding and breach of an intensive correction order. The sentencing judge had ordered Chong to undertake 15 months probation and two and a half years imprisonment with court ordered parole to begin on the day of sentence. The offender had a number of children, one of whom she was currently breastfeeding. Justice Atkinson provided the lead judgment dismissing the appeal. She observed that the best interests of the children who are dependent on the offender fell within s 9(2)(r) of the *Penalties and Sentences Act 1992* (Qld), which requires the court to have regard to 'any other relevant circumstance'.[146] Justice Atkinson referred to art 3.1 of the *CROC* and noted that although s 9 of the Act precluded the court from regarding the best interests of the child as the primary consideration, the court could regard the child or children's best interests as a 'relevant circumstance'.[147]

There was no clear difference between the appeal outcomes of men with parenting responsibilities and the treatment of women. While this might be because women more often receive mitigation of their sentence at the initial sentencing hearing, meaning that an appeal is not contemplated,[148] Bray CJ of the South Australian Supreme Court has reflected:

> [It is said] that more weight will be given to the position of the offender's family in the case of women than in the case of men. I find it difficult to see why this should be so. The contemporary sociological climate frowns on discrimination on the basis of sex.[149]

4 *Other Exceptional Circumstances*

Although submissions related to economic dependency of a family upon a male breadwinner were made in some cases we examined, this was not held to amount to exceptional circumstances in any of the cases.[150]

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143 (2000) 116 A Crim R 150.

144 It is notable that at the time SLR was sentenced there was no legislative basis for this recommendation in New South Wales. This has subsequently been addressed and is discussed further below.

145 *R v Chong; Ex parte A-G (Qld)* (2008) 181 A Crim R 200.

146 Ibid 207 [33].

147 Ibid 207 [34].

148 Samantha Jeffries and Christine E W Bond, 'Gender, Indigeneity and the Criminal Courts: A Narrative Exploration of Women's Sentencing in Western Australia' (2013) 23 *Women and Criminal Justice* 19, 26–29.

149 *R v Wirth* (1976) 14 SASR 291, 293.

150 See *Sherd v The Queen* (2011) 5 ACTLR 290; *Dipangkear v The Queen* [2010] NSWCCA 156 (21 July 2010); *Harrison v The Queen* [2006] NSWCCA 185 (19 June 2006); *R v Al Aiach* (2007) 1 Qd R 270.

Other factors raised by judges when coming to conclusions regarding the exceptionality of the case were the possibility that a parent's incarceration might make the children vulnerable to a risk of offending themselves,[151] and the special vulnerability of young children.[152] For example, in *Adams v The Queen,* Hasluck J considered that:

> it is open to the Court of Criminal Appeal in the circumstances of the present case to take account of and give weight to the role of the applicant as a mother, especially in regard to her role as the mother of a young child of less than 12 months of age.[153]

However, generally judges did not consider these factors, on their own, to amount to 'exceptional circumstances'.

D *What the Cases Suggest*

As observed in our initial comments, the fact that sentencing is a process of instinctive synthesis in Australia makes it difficult to disentangle the various factors that may have been most influential in sentencing a particular offender. The relevant sentencing principles, the diversity of offending, the criminal histories and the variety of circumstances experienced by offenders are all relevant to the sentencing judge's exercise of their discretion. Furthermore, only selected sentencing decisions are appealed. Despite these caveats, in our consideration of the cases several matters were prominent. First, judges often found an offender's care responsibilities for a child with a serious illness or disability to be 'exceptional'. Second, the fact that an offender was pregnant or was breastfeeding was not by itself generally viewed as an exceptional circumstance. Third, while considerations of children's human rights played a part in some of the sentencing decisions, this was rare. We consider these matters in turn.

1 *Caring for a Child with a Serious Illness or Disability*

The disability of a dependent child was identified by offenders in a number of cases we examined. Often the dependant's disability was identified in fresh evidence brought to the appeal.[154] Given that most children do not have a severe disability,[155] perhaps the existence of disability which requires complex care arrangements can be more easily identified as 'exceptional'. While the community benefits from retaining the

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151 See *Nguyen v The Queen* (2001) 160 FLR 284; *Michael v The Queen* [2004] WASCA 4 (22 January 2004).

152 *Adams v The Queen* [2003] WASCA 91 (2 May 2003).

153 [2003] WASCA 91 (2 May 2003) [57].

154 See, eg, *R v NAD* [2008] VSCA 192 (26 September 2008); *Stumbles v The Queen* [2006] NSWCCA 418 (21 December 2006).

155 See Australian Bureau of Statistics, 'Children with a Disability' [2012] (June) *Australian Social Trends*, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30Jun+2012#Children>.

services of those who provide voluntary care to dependent individuals generally,[156] the cost of providing such services to children with a disability is particularly high and can be particularly complex.[157] Moreover, Jeffries and Bond suggest that strong community or family ties may indicate higher levels of 'informal social control', and thus lower risks of reoffending[158] — this is particularly the case for an offender who is responsible for the care of a child with a disability.

In cases where the dependent child has a serious illness, a judge may be influenced as much by the offender's hardship in being absent for the last months or years of a child's life as by the caring needs of very unwell child. In addition, considerations of 'mercy' may be more persuasive for a judge where the offender's child suffers from an illness or disability.[159]

2 *Pregnant and Breastfeeding Offenders*

Generally judges did not find pregnancy or breastfeeding exceptional on its own. This approach may be based in part on an assumption in some cases that, once imprisoned, a pregnant or breastfeeding mother may be able to retain care of the baby by being accommodated in a mothers and babies facility.[160] This is not an accurate assumption for a judge to make. Whilst almost all Australian jurisdictions[161] have some facility for admitting young children to prison with their mothers,[162] very few places are available. Capacity, and the selection process, varies from state to state. In New South Wales, s 26(2)(l) of the *Crimes (Administration of Sentences) Act 1999* allows for mothers of young children to obtain a 'local leave permit' to enable them to serve their sentence

156 Herring, above n 37, 6–7, 93–95.

157 Karen R Fisher et al, 'Cost of Providing Specialist Disability Services and Community Services in Queensland' (Summary Report No 08/09, Social Policy Research Centre, July 2009).

158 See Jeffries and Bond, above n 148, 31–32; Donna M Bishop and Charles E Frazier, 'The Effects of Gender on Charge Reduction' (1984) 25 *The Sociological Quarterly* 385.

159 As to mercy and sentencing in Australia, see Edney and Bagaric, above n 1, 311–314. As to mercy in the context of sentencing mothers, see Ann-Claire Larsen, 'Gendering Criminal Law: Sentencing a Mothering Person with Dependent Children to a Term of Imprisonment' (2012) 1 *Australian Journal of Gender and Law* 21.

160 *R v Moss* [2004] NSWCCA 422 (2 December 2004); cf *R v Togias* (2002) 132 A Crim R 573, where the judge identified the reality that she would most likely be separated from her child for the sentence if assessed as not appropriate for the mothers and babies unit.

161 South Australia does not currently have a mothers and babies unit: Sean Fewster, 'SA Court Suspends Breastfeeding Mother's Sentence Because Her Daughter Will Not be Bottle Fed', *The Advertiser* (Online), 12 May 2014 <http://www.adelaidenow.com.au/news/south-australia/sa-court-suspends-breastfeeding-mothers-sentence-because-her-daughter-will-not-bottle-feed/story-fni6uo1m-1226914783505>.

162 Lorana Bartels and Antonette Gaffney, 'Good Practice in Women's Prisons: A Literature Review' (Technical and Background Paper No 41, Australian Institute of Criminology, February 2011) 59–64.

with their child or children in an 'appropriate environment'. Jacaranda Cottage is a purpose-built facility at the Emu Plains Correctional Centre in New South Wales that accommodates female prisoners and their young children, however, it has capacity for only 16 mothers. The Parramatta Transitional Centre also houses female prisoners pre-release and it has some limited capacity to house children.[163] However, there is a detailed application and assessment process for women who wish to be accommodated at these facilities, and demand may outstrip supply.[164]

In Queensland, the Chief Executive makes the decision to allow a child up to the age of five to reside with his or her mother in prison based on the availability of accommodation and a consideration of the best interests of the child.[165] Victoria has a similar process to Queensland.[166] In Western Australia the superintendent of the prison, based on a recommendation of the Child Management Committee, makes the decision in relation to children up to 12 years (but usually up to four years), grounded on a number of exclusionary factors mainly related to the mental and physical health of the mother.[167]

The situation is even more problematic for young mothers who are in juvenile detention centres. Whilst mothers and babies units are available in some adult prisons, there are no such units in Australian youth detention facilities. This issue was raised in some of the New South Wales cases in this study's sample. In the case of *R v SLR*,[168] the judge sentenced a young pregnant woman to detention, and recommended that she be transferred to an adult prison upon the birth of her baby so that she could be accommodated within the mothers and babies unit there. However, at that time, there was no legislative basis for this recommendation. Now, under s 26 of the *Crimes (Administration of Sentences) Act 1999* (NSW), young offenders can be transferred to adult prisons for this purpose.[169]

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163 Section 26(2)(j) of the *Crimes (Administration of Sentences) Act 1999* (NSW) allows a local leave permit to be obtained to enable an inmate to reside at a transitional centre. See also Cleo Lynch, 'The Parramatta Transitional Centre: Integrating Female Inmates into the Community Before Release' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October–1 November 2000).

164 Dianna Kenny, 'Meeting the Needs of Children of Incarcerated Mothers: The Application of Attachment Theory to Policy and Programming' (Consultant Report, The University of Sydney for the Department of Corrective Services, New South Wales, October 2012) 3.

165 Department of Corrective Services, '*Management of Women and Children*' (Custodial Operations — Standard Operating Procedure, Version 01, Queensland Government, 7 May 2013) 5. See also *Corrective Services Act 2006* (Qld) ss 29–30.

166 Department of Health and Human Services, '*Placement of Children with Mothers in Prison*' (Child Protection Manual, Advice No 1256, State Government of Victoria, 5 November 2012).

167 Department of Corrective Services, '*Prisoners Mothers/Primary Carers and Their Children*' (Policy Directive 10, Government of Western Australia, 4 April 2007) 4 [3], 5–6 [6.1]. See also Larsen, above n 159.

168 (2000) 116 A Crim R 150.

169 The amendment is discussed in *HJ v The Queen* [2014] NSWCCA 21 (28 February 2014), although in that case the Court decided to release the offender on parole.

3 *Human Rights Arguments in Sentencing*

As noted earlier the *CROC*, to which Australia is a signatory, states at art 3.1 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.' While art 9 of the *CROC* recognises that the State may legitimately separate a child from his or her parents, such decisions should be made in the shadow of art 3.1. This suggests that the best interests of the child should be a primary consideration in the decision to incarcerate the parent of a dependent child. Furthermore, art 23 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')[170] states that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society.'

Of course, neither the *CROC* nor the *ICCPR* are legally binding in Australia unless they are incorporated into domestic law.[171] The two Australian jurisdictions that have introduced human rights instruments, Victoria and the Australian Capital Territory, have legislated to protect the rights of children and the family unit. Section 17 of the Victorian *Charter of Rights and Responsibilities Act 2006* ('*Victorian Charter*') states that '[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State' and that '[e]very 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'. Section 11 of the *Human Rights Act 2004* (ACT) states similarly that '[t]he family is the natural and basic group unit of society and is entitled to be protected by society' and that '[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'.

The *Victorian Charter* and the Australian Capital Territory state that legislation must be interpreted in a manner that is compatible with human rights, so far as it is possible to do so consistently with its purpose.[172] The protections the interpretive principle affords may have been diluted as a result of the High Court's decision in *Momcilovic v Commonwealth*,[173] however, the recent Victorian Supreme Court case of *Victorian Police Toll Enforcement v Taha*[174] suggests that in accordance with the principle of 'unified construction',[175] relevant Charter rights are still to be taken into account in the interpretive process.

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170 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

171 See *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Ethnic Affairs v Teoh* (1995) 183 CLR 273. Most recently, see *Tajjour v New South Wales* (2014) 88 ALJR 860, 886 [96]–[98].

172 *Victorian Charter* s 32(1); *Human Rights Act 2004* (ACT) s 30.

173 (2011) 245 CLR 1. In that case, it was held by a majority of the High Court that s 32(1) of the Victorian Charter does not go beyond the general principle of legality.

174 [2013] VSCA 37 (4 March 2013) [27] (Nettle JA).

175 Ibid [24]–[25].

In Victoria, therefore, it may be appropriate to reconsider the approach to sentencing offenders with dependants in accordance with Charter rights. While the High Court ruled in *Momcilovic v The Queen* that the Victorian Charter does not justify courts departing from the clear text or purpose of statutory provisions, the *Sentencing Act 1991* (Vic) does allow the sentencer to consider 'any other relevant circumstances'.[176] Following *Victorian Police Toll Enforcement v Taha*,[177] this would require the sentencer to inquire as to the offender's particular circumstances and have regard to them before making an imprisonment order.

Domestic law in the other states and territories has introduced specific sentencing legislation that may be understood to exclude the considerations of the rights of the child and family enshrined in the *CROC* and *ICCPR*. Protection of the human rights of dependants is not specifically identified as a sentencing consideration in any Australian sentencing legislation. While one of the aims of sentencing is to protect the community, and this could be read to protect the dependent child and the family unit, it is just one aim of sentencing that is required to be balanced with others that are focused on the offender and future potential offenders.[178] Nevertheless, the Australian High Court has recognised that human rights instruments may be consulted in the sentencing process with 'discrimination and care'.[179]

Regardless, the human rights of children were rarely discussed in the cases in our review. In the Queensland case of *R v Chong*,[180] as noted earlier, Justice Atkinson found that human rights instruments such as the *CROC* are a relevant consideration for the purposes of sentencing, without the requirement for exceptionality. In Queensland, Justice of Appeal Fraser took a similar approach in *R v Edwards*,[181] and in Western Australia, Wallwork AJ has referred to the *CROC* and observed that: '[i]t can be a serious derogation of a child's rights to order a particular offender go to prison.'[182] But in none of the cases we examined were human rights determinative of the outcome, or central to the court's reasoning.

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

177 [2013] VSCA 37 (4 March 2013) [14]–[15].

178 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 — ie deterrence, rehabilitation, denunciation, retribution.

179 *Momcilovic v The Queen* (2011) 245 CLR 1, 37 [19]. As to the relevance of human rights in sentencing and corrections, see generally Bronwyn Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014) 31 *Law in Context* 84.

180 *R v Chong; Ex parte A-G (Qld)* (2008) 181 A Crim R 200, 207 [34]. Section 9(2)(q) of the *Penalties and Sentences Act 1992* (Qld) similarly allows for the consideration of 'any other relevant circumstance'.

181 [2011] QCA 331 (22 November 2011) [69].

182 *S v The Queen* [2003] WASCA 309 (10 December 2003) [38]. In the *Sentencing Act 1995* (WA) specific mitigating factors are not exhaustively listed.

IV Conclusion

This study considers the kinds of circumstances where caring for a dependent child has been upheld as 'exceptional' in sentencing appeals. Our review of the available Australian cases suggests that offenders who have children with serious disabilities or medical conditions may be more likely to be understood as presenting a case of exceptional circumstances. However, and perhaps surprisingly, it suggests that pregnancy and breastfeeding is not generally considered exceptional. Finally our review of the cases shows that the human rights of children are rarely (explicitly) considered by judicial officers. We suggest that the consideration of the human rights of the child and, relatedly, the family should play a more important role in consideration of the appropriate sentence in Australian jurisdictions. Only a few judges identified the rights of the child as a significant factor when considering the impact of a sentence on the offender's dependent children.[183]

Maintaining the family unit often has benefits for the parent and child, but also for the community as a whole: it is costly to replace a parent in a child's life, and negative social outcomes can result from separation as the child grows older, particularly where the child is vulnerable due to physical or mental health concerns. The trend in some Australian jurisdictions to reduce, rather than increase, non-custodial sentencing options is worrying in this context.[184] Periodic detention, home detention and mothers and children's units in correctional facilities all have the potential to strike the right balance between child welfare and just punishment, and to reduce the social costs associated with imprisoning parents.

As observed earlier, the *CROC*, to which Australia is a signatory, states at art 3.1 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'. In its review of federal sentencing law, the Australian Law Reform Commission observed that:

> An offender's family and dependants may be seen as indirect 'victims'. They may suffer adverse consequences as a result of the sentencing of the offender, through no fault of their own. … [the Australian Law Reform Commission] advocates an approach that would encompass consideration of the impact of sentencing on this particular group of persons without the need to establish exceptional circumstances.[185]

Acting Justice Wallwork of the Western Australian Supreme Court has said that the Commonwealth approach, which requires sentencers to take into account the probable effect that any sentence would have on the offender's family members or

183 Justice Atkinson in *R v Chong; Ex parte A-G (Qld)* (2008) 181 A Crim R 200; Justice Wallwork in *S v The Queen* [2003] WASCA 309 (10 December 2003); Acting Justice Fraser in *R v Edwards* [2011] QCA 331 (22 November 2011).

184 In Queensland, for example, the sentencing options of periodic detention and home detention were abolished by the *Corrective Services Act 2006* (Qld).

185 Australian Law Reform Commission, above n 24, 190 [6.127].

dependants,[186] reflects 'the modern thinking on punishment' and 'should be applied with respect to sentencing for State offences.'[187] We suggest that the probable impact of a sentence on the offender's dependants should be a significant factor that is weighed with other factors in the process of 'instinctive synthesis' applied by Australian sentencing judges. We suggest that the notion of 'exceptionality' may not be a useful concept in determining the appropriate outcome in any given case, given its vagueness and openness to different interpretations. In our view, when a parent is being sentenced, the best interests of the child should always be considered.

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

187 *Michael v The Queen* [2004] WASCA 4 (22 January 2004) [57].