

# **Incarcerated Mothers, Their Children and Non-Custodial Alternatives**

by  
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## **Introduction**

A fundamental distinction between male and female prisoners is the experience of pregnancy, childbirth and motherhood in prison. It is, therefore, not surprising that the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), adopted by the United Nations General Assembly in 2010<sup>1</sup>, have a number of provisions addressing these specific aspects of women's carceral experience, supplementing the meagre references in the UN Standard Minimum Rules for the Treatment of Prisoners (SMRs).<sup>2</sup>

Globally most women<sup>3</sup> prisoners are mothers, and most of these were the sole or primary carer of their children prior to imprisonment. (This does not mean that having a father in prison does not also affect children.<sup>4</sup>) These facts impact directly on both the women prisoners and on their children and should influence policy and practice in a number of respects. In particular, there is growing international recognition that the child is not guilty of the mother's offence, is not a prisoner even if living in prison, and maintains all their rights under the Convention on the Rights of the Child. Consequently the rights, welfare and best interests of the child have to be considered in the criminal justice process.

Principle issues for consideration in relation to incarcerated mothers, their children and non-custodial alternatives concern:

- Pregnancy, childbirth and breastfeeding in prison;
- Best interests of the child in sentencing or deciding on pre-trial measures of a mother;
- Babies and children living in prison with their mother; and
- Children living outside prison.

These issues, the applicable international standards and some examples of good practice are addressed in this paper.

## **Pregnancy, childbirth and breastfeeding**

SMR 23 covers pre- and post-natal care of imprisoned women, that babies should be born in a hospital outside the prison, that in any event prison should not be stated as the place of birth on the baby's birth certificate and, if remaining in the prison, 'nursing infants' should be cared for in a nursery with qualified staff when not being cared for by their mothers. The prohibition on stating that the child's place of birth is prison is to avoid the stigma likely to be associated with this, and highlights the general need to avoid discrimination against and stigmatisation of children of prisoners.<sup>5</sup>

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1 UN General Assembly resolution A/RES/65/229

2 The UN Standard Minimum Rules for the Treatment of Prisoners were adopted by the First UN Crime Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the UN Economic and Social Council by its resolutions 663 C(XXIV) of 31 July 1957 and 2076(LXII) of 13 May 1977

3 It should not be overlooked that imprisoned juveniles may also be parents

4 See Adele D Jones and Agnieszka E Wainaina-Woźna (eds), *COPING: Children of Prisoners: Interventions and mitigations to strengthen mental health* (Huddersfield: University of Huddersfield, 2013)

5 See also Convention on the Rights of the Child Article 2 prohibition on discrimination against children including on the basis of their parent's status

These provisions are amplified by Bangkok Rule 48 which provides more detail, including that women prisoners should not be discouraged from breastfeeding their children (unless there are specific health reasons). In addition, the Bangkok Rules prohibit the use of instruments of restraint on women during labour, birth and immediately after birth,<sup>6</sup> and also prohibit solitary confinement or disciplinary segregation for pregnant women, breastfeeding mothers and women with infants.<sup>7</sup>

These provisions take account of the duty of care for both the woman prisoner and her baby: shackling during labour and childbirth may cause direct damage to the unborn child or delay the ability of health personnel to take necessary action. Breastfeeding is important for the physical and emotional health of the child as well as for bonding and attachment between mother and child. Good family relations are recognised as being beneficial in relation to social reintegration and reducing the likelihood of recidivism. Thus not only should women prisoners be enabled to breastfeed their babies, but this factor should be taken into consideration specifically (in addition to the general requirement of taking account of the best interests of the child) not only in sentencing, but also as a factor in deciding in favour of non-custodial measures prior to and during trial. It also means that babies should not automatically be removed from their imprisoned mother.

Enabling and supporting imprisoned mothers to breastfeed has implications for prison facilities – including space and hygiene – as well as the prison regime, work programme, and nutrition.<sup>8</sup> In deciding whether a baby or child should live in the prison or for how long, the key factor needs to be an individual assessment based on the best interests of the child, including the optimal duration of breastfeeding.<sup>9</sup> However, those not living in the prison should still be supported in maintaining 'personal relations and direct contact'<sup>10</sup> with their mother (except in the rare cases when it is not in the child's best interests). According to the Convention on the Rights of the Child, the child has a right to have such a relationship and not to be separated from their parent unless this is in the child's best interests.<sup>11</sup>

If a mother is to be detained or imprisoned without her children, she should be given the opportunity to make arrangements for them, 'including the possibility of a reasonable suspension of detention'.<sup>12</sup> Being able to make such arrangements is likely to mean that the imprisoned mother is less stressed about where her children are and who is taking care of them, and that the children know and understand what is happening and who will be looking after them.

Examples of good practice include:

Sentenced prisoners in the Netherlands are given time between being sentenced and beginning their imprisonment in which to make alternative childcare arrangements for any children remaining outside prison.<sup>13</sup>

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

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6 Bangkok Rule 24

7 Bangkok Rule 22

8 Bangkok Rules 49-51

9 Bangkok Rule 52, and Guidelines for the Alternative Care of Children (UN General Assembly resolution A/RES/64/142)

10 Convention on the Rights of the Child, Article 9(3)

11 Convention on the Rights of the Child, Article 9

12 Bangkok Rule 2(2)

13 Oliver Robertson, *Children Imprisoned by Circumstance* (Geneva: Quaker United Nations Office, 2008), 9

their child'.<sup>14</sup>

### **Best interests of the child in sentencing or deciding on pre-trial measures of a mother**

The Bangkok Rules state the clear preference for non-custodial alternatives to pre-trial detention and prison sentences for women offenders in general, but also specifically address these in relation to pregnant women and mothers. Rule 64 specifies: 'Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.'<sup>15</sup>

This adds specificity to the general obligation under the Convention on the Rights of the Child, 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.' The Committee on the Rights of the Child has made clear that this includes when sentencing or considering pre-trial measures for a parent or primary caregiver<sup>16</sup>, including cases involving capital punishment.<sup>17</sup>

These provisions and recommendations reflect the general understanding that prisons are not a healthy and appropriate environment for pregnant women, babies and children, and that separating babies and children from their mothers should be avoided, unless such separation is in the child's best interests. In order to reconcile these understandings with the requirements of justice and public safety leads to the conclusion of giving priority to non-custodial measures. As the Commentary to the Bangkok Rules points out, 'By keeping women out of prison, where imprisonment is not necessary or justified, their children may be saved from the enduring adverse effects of their mothers' imprisonment, including their possible institutionalization and own future incarceration.'<sup>18</sup> In order for judicial authorities to consider the best interests of the children, they need to be provided with all relevant information. Such reports may be compiled by social services, and include an assessment of the probable impact of the mother's detention on the children and other family members, and the arrangements for the children's care, in the absence of the mother.

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14 Action for Children and Youth Aotearoa, written submission to the Committee on the Rights of the Child Day of General Discussion on Children of Incarcerated Parents, September 2011, 3

15 In the same vein see also the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Resolution 19 "Management of criminal justice and development of sentencing policies", Report of the 8<sup>th</sup> UN Congress on the Prevention of Crime and Treatment of Offenders, 1990, A/CONF.144/28/Rev.1; Human Rights Council Resolution 10/2, dated 25 March 2009; African Charter on the Rights and Welfare of the Child, 1999, Article 30 (and forthcoming General Comment No. 1 of the African Expert Committee on the Rights and Welfare of the Child); Council of Europe Parliamentary Assembly Recommendation 1469 (2000), on Mothers and babies in prison, adopted on 30 June 2000; and the Human Rights Council Resolution 19/37 on the Rights of the Child, adopted on 23 March 2012

16 Committee on the Rights of the Child, *Report and Recommendations on the Day of General Discussion on "Children of Incarcerated Parents"*, 30 September 2011, para.30; Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)*, CRC/C/GC/14, 29 May 2013, para.69, which also provides guidance on assessing the best interests

17 Committee on the Rights of the Child, *Concluding Observations on Kuwait*, CRC/C/KWT/CO/2, para. 32

18 Bangkok Rules, Commentary to Rules 57-58, cited in Penal Reform International and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)* (London: Penal Reform International, October 2013), 6

### Examples of good practice include:

In Italy, pregnant women or those with children under six years cannot be placed in pre-trial detention other than in exceptional circumstances, instead being detained at home or in 'attenuated custodial institutions'.<sup>19</sup>

The South African Constitutional Court in *S v M* case (2007) ruled that courts must give specific consideration to the best interests of the child when sentencing a child's primary caregiver.<sup>20</sup> The Court set out the procedure to be used:

- The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered. If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- If the appropriate sentence is clearly non-custodial the court must determine the appropriate sentence, bearing in mind the interests of the children.
- If there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

In March 2013, the Chief Judge at the Appeals Court of Thailand confirmed that judges have agreed to implement the Bangkok Rules' provisions when sentencing female offenders, by taking into account their particular circumstances. He gave as an example the case of a woman who was not given a prison sentence because she had a three month old child who needed her care. The Corrections Department is also promoting alternatives to imprisonment during trial, especially for pregnant women or those with infants or bad health.<sup>21</sup>

In Russia the execution of a sentence may be postponed and then reduced or cancelled for pregnant women or women who have children under 14 years of age, with the exception of those "sentenced to imprisonment for terms longer than five years for grave and specially grave crimes." (Criminal Code of the Russian Federation, Article 82)<sup>22</sup>

In Argentina amendments made to the Penal Code and Penal Procedure Code in 2009 allow for mothers with children under five years or with caring responsibilities for persons with disabilities, to serve their sentences at home under house arrest. This has led to a significant reduction of the number of mothers with children in prison.<sup>23</sup>

### **Babies and children living in prison with their mother**

The Bangkok Rules are clear that 'Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be

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19 Associazione Comunità Papa Giovanni XXIII, written submission to the Committee on the Rights of the Child Day of General Discussion on Children of Incarcerated Parents, September 2011, 4

20 This was subsequently narrowed to cover only a single primary caregiver in *MS v S* (2011)

21 See <[www.nationmultimedia.com/national/Bangkok-Rules-for-women-convicts-30202577.html](http://www.nationmultimedia.com/national/Bangkok-Rules-for-women-convicts-30202577.html)>, cited in PRI/Thailand Institute of Justice, 9

22 PRI/Thailand Institute of Justice, 13

23 PRI/Thailand Institute of Justice, 13

treated as prisoners.<sup>24</sup> They also spell out that imprisoned mothers shall be provided with the maximum possible opportunities to spend time with the children who are in prison with them,<sup>25</sup> that the children shall be provided with ongoing health care services, their development shall be monitored by specialists in collaboration with community health services, and that the environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.<sup>26</sup> These provisions make clear that the authorities have responsibilities for promoting and protecting the welfare of these children.<sup>27</sup>

A question which arises frequently is the age to which children should be permitted to live in prison. Many countries have specific age limits, with more or less flexibility depending on various factors. These limits vary considerably not only from country to country but also sometimes within countries depending on the type of prison (open or closed), and the regulations may be applied flexibly if the mother will complete her sentence shortly after the child would normally 'age out' of the prison. The issue of age limits has been the subject of considerable discussion during which it has become clear that no single answer is appropriate. As with the decision on whether a child should live in the prison or not in the first place, it depends on the individual child and all the circumstances in the specific case.<sup>28</sup> These include such factors as the prison itself: a lower age limit is more appropriate if it is a closed facility, with little opportunity for the child to play, socialise with other children and have experiences approximating to life outside. However, even in this situation, there may be countervailing factors. For example, a child with disabilities in a situation where there is no appropriate external care available may be better off remaining in the prison for longer. The general rule of individualised assessment combined with the best interests of the child is set out in Bangkok Rule 52, which also identifies the need for sensitivity in making the separation between mother and child, good preparation in terms of ensuring alternative care arrangements for the child and in the case of foreign national prisoners consultation with consular officials.

Even before the maximum age for staying in prison is reached, the child's circumstances may have changed so that the best interest is to leave prison. For example, the age and developmental stage of the child, the facilities in the prison and the alternative care available may alter the balance in favour of leaving prison. In order to take account of such changes, it is necessary that the child's situation is reviewed regularly, not overlooking the child's own right to be heard in relation to such decisions.<sup>29</sup>

Children who have spent their formative years in prison may need careful exposure to the external world (whether leaving on their own or with their mother on her release), to acclimatise them to such everyday occurrences as traffic, animals, and so on.

Bangkok Rule 52 also states that women prisoners shall be given the maximum possible opportunity and facilities to meet with their children after the separation has taken place, when it is in the best interests of the children and public safety is not compromised. Frequent contact may be particularly important for both mother and child in the period immediately after separation.

Finally, any children living in prison should be enabled and encouraged to maintain contact with family outside the prison, such as siblings, father and grandparents.

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24 Bangkok Rule 49

25 Bangkok Rule 50

26 Bangkok Rule 51

27 See also CRC, *Report and Recommendations*, 30 September 2011, para.34

28 Committee on the Rights of the Child, *Report and Recommendations*, 30 September 2011, paras.33 and 37, Human Rights Council resolution A/HRC/RES/19/37, para. 69(b), 23 March 2012

29 Convention on the Rights of the Child, art. 12; and Committee on the Rights of the Child, *Report and Recommendations*, 30 September 2011, para.41

### Examples of good practice include:

Following a Supreme Court ruling in 2006, Indian prisons have to provide a crèche (for children under three years) and a nursery (for children under six years), which are required to be available to children of (female) prison staff as well. Some of them are open to the local community, thereby allowing children from different groups to mix.<sup>30</sup>

Spain has created External Mother Units built within the community, outside the prison, to enable children under three years (on occasion under six years) to live with their incarcerated mothers in a non-prison environment. The Units, developed following a survey of mothers raising children in prison, are 'bright, colourful and spacious', with an outdoor play area, separate 'apartments' for each family including cooking, eating, sleeping and relaxation areas. Mothers take their children to school, doctors' appointments and community activities. Educational and job training support is provided to the mothers.<sup>31</sup>

Portugal and Colombia allow children to leave prison for a holiday with their non-imprisoned relatives if the parents so request, and Iceland allows children to stay the night with grandparents. Slovenia permits extended visiting for family members from abroad, and Sweden has visiting apartments where the visiting and imprisoned family members can stay together for two or three days.<sup>32</sup>

### **Children living outside prison**

Because so many women prisoners are mothers, the Bangkok Rules identify the need to record information about the children of women being admitted to prison (this is separate from the requirement to register any children accompanying her into prison). Gathering such information is an important but delicate issue. A major factor in the general omission to consider such children in policy and planning is the lack of even basic data about the numbers. In addition, children may not be informed about their mother's imprisonment nor properly provided for if their existence is not known to the authorities. At the same time, mothers who fear that they will lose custody of their children may be reluctant to provide information about them, preferring to try to make informal arrangements for their care.

The Bangkok Rules seek to balance the different concerns, stating 'The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status. All information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children.'<sup>33</sup> The purpose of recording information and contact details of children outside prison is to enable prison authorities to contact the children in case of need and to assist women to maintain contact with their children on a regular basis. Because of the stigma that often attaches to being the child of a prisoner or criminal, it is essential that the confidentiality of this information is respected.

Any arrangements for the alternative care of such children should follow the general approach set out

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30 Oliver Robertson, *Children Imprisoned by Circumstance* (Geneva: Quaker United Nations Office, 2008), 11

31 Sophie Feintuch, 'New Spanish Practice Aims to Break the Cycle Among Mothers and Children', in *Corrections Today* 2010:6, 38-42

32 Oliver Robertson, *Collateral Convicts: Children of Incarcerated Parents, Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011* (Geneva: Quaker United Nations Office, March 2012), 26

33 Bangkok Rule 3

in the Guidelines for the Alternative Care of Children<sup>34</sup>, but in addition the children should be encouraged and facilitated in visiting and maintaining contact with their mother, unless it is contrary to their best interests. This may include seeking to place the children near the prison, or to have the imprisoned mother assigned to a prison near to the children.

In many countries, children are supported by the authorities, social workers, or non-governmental organisations to visit their imprisoned parent. Such support takes many forms, for example, travel grants or provision of transport to the prison (in some cases with social workers or counsellors travelling with the children and thus able to prepare them for the visit and help them afterwards). Prison authorities can also help by timing visits to accommodate the most likely other demands on children, such as not having to miss school in order to visit their imprisoned parent. Child-friendly visiting procedures,<sup>35</sup> including rooms with toys suitable for children of different ages, and permitting children to have physical contact with their parent and opportunities to play or undertake other activities together, or having special family visiting days and activities, make visiting more enjoyable for both child and prisoner and encourage bonding: children, especially young children, find it difficult to relate to their mother if she is unable to touch them and can only speak to them through a glass panel or other barrier.

In addition to actual visits, there are many other ways in which children and their imprisoned parent can be helped to maintain and improve their relationship such as using modern technologies to enable 'virtual' visits to supplement physical ones (especially for those living a long distance from the prison), and recording messages, such as reading bed time stories, by the parent to be able to which the child can listen. The general problems in maintaining contact are increased if the imprisoned parent is in another country, with the greater distance, possible time differences and language barriers.

Both for children living in the prison and those visiting it, the attitude of prison staff is crucial. A common complaint from child visitors is about the unfriendly attitude of staff who treat the children as though they were criminals, or subject them to humiliating or frightening security procedures.<sup>36</sup> In some cases, this can lead to the children not wishing to continue visiting, or to the mother becoming so upset that she does not want the children to visit.

Family visits, or their revocation, should never be used as a tool to punish or induce behaviour from the incarcerated parent, for instance in the context of interrogation and investigation. Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.<sup>37</sup> Women have a very strong need for regular contact with their families, especially if they have children outside prison. Total prohibition of contact between women prisoners and their families would constitute an extreme form of punishment on women while also punishing their children. The UN Human Rights Council has called on States: "To provide children of persons accused or convicted of offences with access to their incarcerated parents or parental caregivers throughout judicial proceedings and the period of detention, including regular and private meetings with the prisoners, and, wherever possible, contact visits for younger children, subject to the best interests of the child, taking into account the need to ensure the administration of justice."<sup>38</sup>

In instances involving capital punishment, the children as well as the families and lawyers of the incarcerated parent should be informed as to the date of execution in advance, be allowed a private

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34 UN General Assembly, 64th Session. Guidelines for the Alternative Care of Children (A/RES/64/142), 24 February 2010

35 Bangkok Rule 28.

36 Bangkok Rule 21

37 Bangkok Rule 23

38 Human Rights Council resolution on the Rights of the Child, A/HRC/RES/19/37, para. 69(c), March 2012

final contact visit and have remains returned to them following execution.<sup>39</sup>

More broadly, children of prisoners often suffer a range of negative effects<sup>40</sup> due to the absence of their mother, requiring changed care, housing and, possibly, school, arrangements. In turn, these may mean losing contact with friends, even if the stigma of parental imprisonment does not lead to isolation and shunning by the community. In addition, impoverishment is a common result of imprisonment for prisoners' families. Having a parent sentenced to death or executed has particularly negative impacts on the children.<sup>41</sup> The need to provide adequate and appropriate support for children of prisoners is not addressed in the Bangkok Rules because these are designed to address the prison experience. However, it is clear that the prison and criminal justice authorities need to be working with other governmental, and non-governmental, bodies to reduce the negative impacts of the criminal justice and prison systems on these children, including addressing public and professional attitudes which tend to stigmatise them.

Some examples of good practice include:

The Indian state of Kerala pays a monthly stipend to children of prisoners serving at least a two-year sentence.<sup>42</sup>

UK children's charity Barnardo's Northern Ireland has produced a comic book about visiting prison, including the feelings and concerns of children before, during and after a visit, as well as detailing the procedures and features of visits in Northern Ireland prisons. The brightly coloured drawings are designed to make it more attractive and accessible to children of different ages.<sup>43</sup>

Children at Riksbryggan, a Swedish organisation supporting children of prisoners, helped design an animated film about having a parent in prison. It included the issues they had come across and their experiences of how their lives were affected told from the perspective of a 10-year old girl, Emilia.<sup>44</sup>

## Conclusion

Motherhood and the relationship between mothers and their children are distinguishing features of the female prison population. They require particular attention and responses in law, policy and practice. Unnecessary separation of mothers from their children not only affect the individual mother and child, but the long-lasting negative impacts may have broader societal and inter-generational effects. Thus separation should be avoided whenever possible by using non-custodial alternatives at all stages of the criminal justice process.

In order to understand the scope of the problem, and to develop policies and implementation plans, data collection is essential. This is separate from the need to know about the children of an individual prisoner in order to ensure that they are informed about their parent's incarceration, and are adequately cared for and supported, while being mindful of privacy and confidentiality issues.

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39 Human Rights Council resolution on the Rights of the Child, A/HRC/RES/19/37, para. 69(f), March 2012

40 Oliver Robertson: *The Impact of Parental Imprisonment on Children* (Geneva: Quaker United Nations Office, 2007)

41 Helen F Kearney, *Children of parents sentenced to death* (Geneva: Quaker United Nations Office, 2012); Oliver Robertson and Rachel Brett, *Lightening the Load of the Parental Death Penalty on Children* (Geneva: Quaker United Nations Office, 2013); *Children of parents sentenced to death or executed. How are they affected? How can they be supported?* (Geneva: Child Rights Connect Working Group on Children of Incarcerated Parents, August 2013)

42 Oliver Robertson, *Collateral Convicts*, 49

43 Oliver Robertson, *Collateral Convicts*, 34

44 Oliver Robertson, *Collateral Convicts*, 50

Providing appropriate facilities and regimes for mothers with babies and children living in prison may require adaptation in prison conditions, programmes and staff training. Equally, staff attitudes, flexibility and understanding can go far in providing a more child-friendly environment in general as well as specifically in relation to visiting facilities and procedures for children visiting their mother in prison. In particular, it is essential that children of prisoners are recognised as children who are in this situation through no fault of their own and who are entitled to all their rights under the Convention on the Rights of the Child, including non-discrimination, maintaining contact with their parent, and to have their best interests taken into account and to be heard in all proceedings affecting them.

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