

# Seeing children's suffering: feminist legal methods, sentencing decisions and incarcerating mothers who offend

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## **The child comes first**

In 1992, Helena Kennedy QC criticised British officials' indifference to children's suffering when sentencing a mother to prison:

in our Family Courts the philosophy is that the child comes first in any dispute. Children need their parents, and only in the most extreme circumstances do we break that bond. Yet in the criminal courts officials wash their hands of responsibility by saying that if her children suffer it is the criminal woman who is to blame. (1992, p. 79)

The assumption behind Kennedy's position promoting the child comes first principle is that criminal law courts should consider offenders' parenting responsibilities when deciding to incarcerate a mother who has "bonded" with her dependent child. My immediate response to Kennedy's concern is to query whether her criticism applies twenty years later to officials in Australian criminal courts. Do sentencing judges strive to preserve "that bond" or, to use Abramowicz's (2012, p. 320) phrase, "the bonding process"? My task in this paper, then, is to clarify how that bond is dealt with for a small group of female offenders in Australian criminal law courts. In so doing, I emphasise elements of a feminist legal method."

How Australian judges have dealt with offenders who are mothers of dependent children, particularly pre-school aged children, matters for a range of reasons. It matters because the number of female prisoners rose from 5% in the mid-nineties to around 8% of the prison population nationally and 12% in Western Australia in 2008: 53% were Aboriginal

women in 2008 and most of these women have dependent children (Department of Corrective Services, 2009, pp. 11, 26, 63; Bond & Jefferies, 2010). Sisters Inside, a community organisation working on improving services for women in the criminal justice system, cite statistics showing that 85% of women incarcerated in Australia are the primary carers of children and incarcerating their mother is a “destabilising and emotionally traumatic experience” (Australian Law Reform Commission, 2006, p. 189). It matters because women retain, for the large part, responsibility for caring for young children, despite some sharing of parental and household tasks in some families. It matters because, some have argued, breaking that bond does incalculable damage that breeds the next generation of offenders (see Abramowicz, 2012) or possibly contributing to, as Judge Patricia Wald (1995, p. 138) posited, the “next generation of unloved, unnourished, sociopathic criminals”. It matters finally because offenders’ children often require State care if they cannot stay with their mothers or with family and that adds to the social burden.

Listing statistics and generalisations hardly captures the details of female offenders’ lives. Such information though confirms that gender and ethnicity issues remain alive and relevant enough for me to consider how feminist legal methods help uncover how courts have sought to protect the bond. I refer here to the bond to denote the complex and often thwarted mother and child relationship as an amalgam of emotional, social and physical responses, and demands. Many women in multi-cultural Australia assume primary responsibility for caring for young children (see Miranda (2011, p.19)), a responsibility that seems resistant to change. I limit the discussion here to cases involving non-violent offending mothers for pragmatic reasons. That way, the discussion will proceed without the complex overlay of having to explore how the criminal justice system responds to violent offenders. That topic deserves special attention beyond this article’s concerns.

I have selected several court cases to explore how mothers who offend and their children are considered in criminal law courts. I begin by outlining my position as a necessary requirement of positionality, the epistemology that Bartlett (1990) argued, affirms feminist legal methods. Secondly, I introduce Bartlett’s feminist methods and apply these to several cases. I chose these cases to illustrate varying positions without supposing generalisations can be made beyond the cases. In this section, I discuss two legal tests, the exceptional circumstances test and its alternative, the best interests of the child test that is provided for in the Convention on the

Rights of the Child. Finally, I conclude that there is room for improvement in considering offending women and their children.

By way of introducing this article's topic, I set out the *Sinclair* case of 1990 that discussed sentencing issues involving a mother with dependent children, following the newly amended section of the *Crimes Act 1914* (Cth). Its facts and reasoning raise relevant issues, though some aspects have since been overturned. The *Sinclair* case, a Western Australian Court of Criminal Appeal case, involved a mother of two children aged 11 and 12 years. Charlene Sinclair had defrauded the Commonwealth of \$59,209.00 by collecting social security benefits over 9 years. She pleaded guilty to 12 counts of fraud and was handed down a prison term of 33 months.

The Court discussed the "disastrous" effects that Sinclair's imprisonment would have on her two children who were both "extremely dependent" on their mother (para. 10). The son had learning difficulties and needed constant assistance. The daughter suffered from serious emotional problems and had allegedly been sexually abused (not verified). No arrangements had been made for their care (para. 10). As part of her reasoning, Her Honour differentiated between family members' roles with: "it also seems to me that the position of the care giver and nurturer must be regarded separately from the position of the bread-winner and father figure" (para. 16). Her Honour then said:

It is not for me to place the children or work out their custody arrangements but s16A(2)(p) directs that in sentencing you I must - not may or shall but 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. This is a new provision which came into operation in July this year. ... (para. 16)

As a consequence, Her Honour suspended the prison sentence after Sinclair had served two months of the sentence (para. 1). The Crown (State) appealed against the inadequacy of the sentence and won. Sinclair was required to serve a further six months non-parole period. Chief Justice Malcolm wrote:

In all the circumstances, taking into account the probable effect of imprisonment on the two children and, in particular, on the son, I do

not consider that the case was sufficiently *exceptional* to justify the fixing of a pre-release period of as little as two months. (para. 28) (my italics)

In the Chief Justice's view, insufficient weight had been given to the notion of general deterrence (para. 28). The Chief Justice's reference to the "exceptional" requirement is a principle, which is discussed below, of long-standing authority in the common law that holds greater weight than the new section s16A(2)(p) of the *Crimes Act 1914* (Cth). The tensions that arise between balancing these two positions (common law and the statute) guide the discussion below of reforming processes that followed the Sinclair case.

### **Positionality and positioning the Researcher**

Positionality requires me as a researcher to reflect on, and refine, amend and correct my position over time (see Bartlett, 1990, p. 883). I grant that others' truths, like mine, emerge from our lived experiences and are partial and also open to refinement. This means that when struggles ensue, the most satisfactory resolution emerges out of "what social realities are better than others" (Bartlett, 1990, p. 884). "Better" positions are those grounded in "experiences and relationships" that contribute to improved perspectives and understandings of people's lives (Bartlett, 1990, p. 885). This perspective requires that "better and worse understandings" be distinguished, based on those who "experience the validity" of truth claims (Bartlett, 1990, p. 885). "Better" social realities are "both nonrelative and nonarbitrary" (Bartlett, 1990, p. 885). The "truth is situated and provisional rather than external or final" (Bartlett, 1990, p. 829-830). Feminists committed to arriving at nonarbitrary truths are obligated to "extend and transform" their methods (Bartlett, 1990, p. 829-830).

In agreeing that arriving at the "better" social reality is possible, I avoid awarding all social realities equal value. In my view, a "better" social reality includes consideration for women's child rearing responsibilities and children's emotional lives. I reject, however, any suggestion that "woman" or "man" or "child" is a homogeneous category as people's social realities, experiences, truths and knowledge vary greatly. In focusing on women, that is, offenders who are mothers, I am also aware I may be reinforcing stereotypes that have been detrimental to women, for example, that mothers only are capable of caring for children. The US Judge Patricia Wald

(1995, p. 138) warned against searching for a “gender-oriented” solution to caring for children of prisoners as the issue “seems more of a generic parenting problem”. She admits though that the issue is one “affecting more women than men, for sure”. A position that Judge Wald prefers may confront stereotypes, but my concern is that to exclude gender and ethnicity issues is to render invisible many women’s experiences that have often been missing in public discourse and have disadvantaged them (see Harris, 2007). No one would dispute, however, that law’s many reforms have already sought to address such omissions [see Bartlett’s (1990, p. 842) discussion of rape in marriage laws. Other areas include domestic violence laws (restraining orders), homicide defences and evidence laws relating to rape trials]. But there is room for further reforms as discussed below.

### **Feminist legal methods**

According to Bartlett (1990, p. 831), the first question to ask is “the woman question” in the bid to identify how legal doctrine overlooks or disadvantages women including those from marginalised groups. Asking the woman question requires feminist lawyers to “situate themselves in the perspectives of women affected in various ways and to various extents by legal rules and ideologies that purport to be neutral and objective” (Bartlett 1990, p. 887). This requires challenges, according to Bartlett (1990, p. 887), that are never ending. Secondly, feminist legal reasoning “exposes and helps to limit the damage that universalizing rules and assumptions can do”; but “contextualised reasoning” will assist in challenging positions that overlook aspects of individuals’ lives. Thirdly, “consciousness-raising links that process of reasoning to the concrete experiences associated with growth from one set of moral and political insights to another” (Bartlett, 1990, p. 887). These feminist legal methods guide my questioning of how sentencing judges have considered the bond.

I acknowledge that much scholarly work has continued on exploring gender issues in law since the 1990s. Since Carol Smart’s groundbreaking work on gender differences in judicial decision making, challenges have followed including those that have emerged from the Feminist Judgment Project in England and Canada (Hunter, 2012: Hunter and Fitzpatrick, 2012) and those that will flow from the Australian version of the Project. Much contested ground on feminism, the law and judicial decision making has been covered. Here, however, I do not seek out differences in decision making based on a judge’s gender (see Rackley, 2009). Instead, I identify

various positions and question the reasoning behind rules, without attempting to attribute differences in reasoning to judges' gender.

### **1. Asking the woman question includes asking the child question**

Asking the woman question leads to a process of challenging rules and ideologies imbued with forms of oppression, and assumes that revealing and correcting processes are on-going (Bartlett, 1990, p. 887). Asking the woman question "does not demand that decisions must always be made in favour of a woman"; it is a "search for gender bias" and to arrive at a defensible position "in light of that bias" (Bartlett, 1990, p. 846). How then has the woman and child question been factored into judicial discussions affecting Australian women and children since the *Sinclair* case?

Asking the woman question exposes practices that exclude women's experiences. The question is "designed to expose how the substance of law may silently and without justification submerge the perspective of women and other excluded groups" (Bartlett, 1990, p. 836). In approaching the topic under Bartlett's guidance, I am asking about gender implications of a social practice or rule: has women's position as a primary caregiver of children been left out of consideration? How then might that omission be corrected? These questioning techniques, according to Bartlett (1990, p. 886), "affirm, and are enhanced by, the stance of positionality".

### **2. Practical reasoning includes the woman and child question**

Feminist practical reasoning introduces a method of legal reasoning that is sensitive to features of a case and generally not appreciated, at Bartlett's time of writing, when an established legal rule is applied (Bartlett, 1990, p. 836). Legal reasoning requires, according to the Honourable Michael Kirby (2003, p. 53), former judge of the High Court of Australia, "independence, impartiality, integrity, propriety, equality, competence" to ensure a judge's accountability. But it's the content of these abstractions that have attracted critical attention.

The feminist practical reasoning method rejects setting up "the sharp dichotomy between abstract, deductive ("male") reasoning, and concrete, contextualized ("female") reasoning" (Bartlett, 1990, p. 832). Doing so, in Bartlett's view, "misdcribes both conventional understandings of legal method and feminist methods themselves" (1990, p. 832). Objectivity in

law has attracted criticism from many quarters not least because it is usually constituted in opposition to subjective experience (see Bartlett, 1990, p. 878). Differences for Bartlett have less to do with “principles of logic” and more to do with “differences in emphasis and in underlying ideals about rules” (1990, p. 832). In her view, “all major forms of legal reasoning encompass processes of both contextualization and abstraction” (Bartlett, 1990, 856). The context in which differences or dilemmas arise involves acknowledging “multiple perspectives, contradictions, and inconsistencies” (Bartlett, 1990, p. 851).

Law’s preference for neutrality, objectivity, impartiality and so on cannot be taken for granted or left unquestioned. For sure, law needs guiding principles of practical relevance. In Bartlett’s view we need legal truths and principles (see Bartlett, 1990, p. 844). Sir Owen Dixon (the sixth Chief Justice of Australia) confirmed this point in the 1950s:

it is taken for granted that the decision of the court will be “correct” or “incorrect,” “right” or “wrong” as it conforms with ascertained legal principles and applies that account to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness. (Dixon, 1955, p. 470)

How then do sentencing judges hold to external standards of legal correctness and account for an offender’s social circumstances in assessing mitigating factors?

The most obvious argument against considering the woman and child question centres on protecting the long-held principle of “equal justice under the law” (or the “same crime same time” principle). That is, the principle is disrupted if an offender is treated more leniently on the basis of their parenting responsibilities than others who commit similar crimes (Abramowicz, 2012, p. 331). In keeping with this view, Judge Callaway dismissed consideration of parenting responsibilities in the *Carmody* case from 1998 with: “children cannot be used as a form of insurance by parents engaged in criminal enterprises” (para. 10). Proponents of this position argue that children’s interests and a State’s human rights obligations must be addressed elsewhere, by prison policies and procedures, for example,

not by the courts. No one would take the next step and argue that offending mothers should not be imprisoned (see King, 1997, p. 177).

Judges have upheld other legal principles such as “in the public interest” or “deterrence” to justify not considering children particularly when a mother commits a drug offence. For example, in the *Nyugen* (2001) case, Judge Pidgeon, in dissent, maintained that “the public interest in deterring the handling of heroin of this amount must, ..., take precedence over the harmful effect on the children”, which he admitted “would be very damaging” (para. 43). For him, deterring would-be offenders justifies incarcerating a mother despite costs to her children. When principles such as in the public interest and deterrence are used as trump cards, a hierarchy of interests are established that relegate the interests of women and children to a lower rung. Bartlett warned, however, that assumptions about “the legitimacy of the community whose norms it expresses, ... tends to be fundamentally conservative” (1990, p. 855). Such positions safeguard long-held principles that may not be substantiated empirically. Here, feminist reasoning has a place.

By 2006, mandatory sentences aside, a discernible shift appeared as the Australian Law Reform Commission (2006) pointed to gender differences in the experiences of hardship that resembled Her Honour’s position referred to above in the *Sinclair* case. The Commission distinguished between the circumstances of a male from those of a female federal offender who is more likely to be the “primary caregiver” and that separating infants and children from the primary caregiver “can have profoundly damaging physical and psychological effects”. The Commission, here, appears to be endorsing a position elevating concerns about the woman and child up the legal hierarchy of principles. As discussed below, changes have been occurring in how judges exercise discretion when sentencing mothers that I suggest are informed by struggles about which position better reflects the non-arbitrary social reality of female offenders and their children.

### **Cases in point - The two tests relevant to preserving the mother-child bond**

Below, I outline the positions taken by some criminal law judges who have relied on the “exceptional circumstances test” before discussing the child-focused “best interests of the child test” or principle.

### a. The exceptional circumstance test

As mentioned above, the amended section of the *Crimes Act* 1914 (Cth) provides some protection for dependants of federal offenders. Section 16A(2) (p) appears below a long list of requirements, chief among which the court “must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence”. The “probable effect” on an offender’s dependants as a test, however, raises the bar to a high point by requiring for its satisfaction empirical evidence confirming how a child is adversely affected by his or her mother’s detention and separation.

The appeals court did ask the woman question in the *Nguyen v The Queen* [2001] WASCA 119 case where the offender, the sole carer of four young children, was sentenced to 8 years imprisonment with a non-parole period of three years and seven months (para. 1). An author of a court report wrote, “the children appear traumatised by their mother’s incarceration, their father’s rejection and have become hostile and challenging as a result of their abandonment and grief” (para. 13), and the children may need State care (para. 14). On appeal, it was found that the sentencing judge failed to take into account “the probable effect of the sentence ... on the appellant’s dependent children as required by s 16A(2) (p) of the *Crimes Act* 1914 (Cth)” (Malcolm CJ para. 1). The offender’s role was minor as she “was no more than a recipient or an attempted recipient of the drug” (para. 2). She had served about seven months of the sentence (para. 15).

Chief Justice Malcolm (para. 7) reiterated that “the learned [sentencing] Judge did not say how he took the effect of the sentence on these children into account or make any inquiry about the fate or future of the children”. On appeal, the Nguyen children’s hardship was found to be “exceptional” and Nguyen was released on good behaviour for five years. The mother and children may not have been separated for seven months had the question been asked in the first court.

How do judges distinguish between “exceptional” and “ordinary” or “normal” suffering in their practical reasoning? The *Holland* case from 2002 found a child’s suffering to be ordinary. The case involved a couple whose daughter was 7 years and 6 months old when both parents were imprisoned (the mother for 9 months) for cultivating a narcotic plant and one count of trafficking a drug of dependence. The child was quiet, withdrawn and non-communicative at home and “at school, she is said to be vague and detached and not performing as well as previously” (para. 42). Her carer,

the grandmother, was disabled, had short-term memory loss and had difficulty driving a car (para. 43). For these judges, these were not exceptional circumstances.

Justice Patricia Wald (1995, p. 137) warned that in the US, “courts have gone every which way in deciding whether a particular case presents “ordinary” or “extraordinary” circumstances. She goes on to claim, however, that as women comprise less than 6% of the prison population in the US, the circumstances of a mother of a dependent child caught up in the criminal justice system are far from ordinary. What is ordinary, exceptional, highly exceptional or inhumane suffering depends in part on a judge’s perspective and experiences, including their social reality, their priorities in practical reasoning, and their social consciousness as well as the sentencing jurisprudence in particular jurisdictions. A place remains here though for feminist reasoning to assist judges in their decisions affecting mothers and children.

The controversial exceptional circumstance test does not always protect women’s and children’s concerns. The Australian Law Reform Commission cited *Sisters Inside* to propose that Section 16 A(2)(p) of the *Crimes Act* (Cth) be modified further to extend to whether or not the circumstances are exceptional (Australian Law Reform Commission, 2006, p.183). The suggestion for reform had not been taken up by 2014, suggesting that Bartlett’s three feminist legal methods have a place in future legislative reforms.

### **b. An alternative to the exceptional circumstance test is the best interests of the child principle**

In Australia, family law courts have a statutory requirement under the *Family Law Act* 1975 (Cth) to regard the principle, the best interests of the child, as the paramount consideration. In custody disputes, efforts are made to reduce disruptions to a child’s environment that would adversely affect the child’s well-being and “developmental progress” (Abramowicz, 2012, p. 232). In this section, I show that some criminal law courts have considered the best interests of the child principle. I argue, however, that Bartlett’s three feminist legal methods have a place here in advancing the incorporation of this principle in sentencing decisions by bringing the child question to the fore.

Turning attention to the rights of children as secondary victims of criminal justice decisions opens onto a minefield. In his analysis of how judges in various jurisdictions deal with children's rights, John Tobin (2009, p. 579) identified a continuum of responses ranging from "the 'invisible' to the 'substantive'" interspersed with the "'incidental', 'selective', 'rhetorical' or 'superficial'". These findings alone suggest the child question; that is, asking whether children's concerns have been excluded, remain relevant for 2014 and beyond. But again this test itself has attracted much critical attention and confirms the need for further reforms.

Taking a children's rights position means setting aside the controversies that the best interests of the child principle has attracted over many decades (Goldstein, 1973; Eekelaar, 1994; Mnookin, 1975) about its "indeterminacy" as a legal standard. Eekelaar (1994, p.46) suggested that perceptions and evaluations of these issues are ambiguous and unstable. Much critical attention has been directed at the psychoanalytic approach to understanding children's needs that contends that children require "continuity of relationships, surroundings, and environmental influence" for normal development (Goldstein, 1973, p.31), upon which the best interests of the child principle appears to be based. The principle's application has also been criticised, as Rehman implies, in requiring that where the best interests of the child principle is a factor under consideration, ideally a place must be made to include the wishes of the child (see Rehman, 2010, p.565; Eekelaar, 1992, p. 228).

Despite the principle's problems, the English, Australian and the US legal systems (Gilad, 2013, p.380), for example, do apply the best interests of the child principle in family law decisions involving child placement. It is the legal standard in such decisions (Spinak, 2007, p.8). The standard has the United Nations' backing under the Convention on the Rights of the Child that Australia ratified in 1990. Article 3 of the Convention established that:

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.

- 9 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The best interests of the child principle with its future orientation draws attention to the plight of the child as a vulnerable individual. The principle appears to lower the requirements of the exceptional circumstance test by drawing attention to the child's vulnerability as an important factor.

Judges in the High Court of Australia in the mid-1990s did discuss in the *Teoh* case whether court officials, other than those in family law courts, must respect the best interests of the child principle. Though Australia had ratified the Convention on the Rights of the Child in December 1990, the principle had not been incorporated into Australian criminal legislation. A few details of the case help illuminate the position the High Court judges took regarding Mr Teoh's situation.

The offender, Mr Teoh, was a sole carer of seven children. Mr Teoh had been found guilty of importing heroin into Australia and sentenced to six years imprisonment. As he was in Australia on a temporary entry permit, he was ordered to be deported. In the 1995 *Teoh* case, it was reported that in the event of his deportation the family was facing "a very bleak and difficult future" (para. 7). On appeal, the judges held (Judge McHugh dissenting) that administrators had a "legitimate expectation" to meet Australia's international human rights obligations under the Convention on the Rights of the Child. That is, administrators were to treat the best interests of the child as a primary consideration (Gibbs, 2003, p. 82), though not the only consideration. The High Court judges decided not to have Mr Teoh deported in his children's best interests, a decision based largely upon the legitimate expectations that flowed from Australia's ratification of the Convention. Judge Toohey wrote, "It follows that while Australia's ratification of the Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth" (*Teoh* case, para 32).

The position the judges took in the *Teoh* case is highly controversial. The Right Hon Sir Harry Gibbs explained the dangers for sentencing judges of following the *Teoh* case:

Logically, it is difficult to see why the principle in *Teoh's* Case would not entitle a person convicted of say, murder, to have a legitimate expectation that the best interests of his child would be a primary consideration in deciding upon his sentence. (Gibbs, 2003, p. 82)

The Right Hon Sir Harry Gibbs (2003, p. 82) was concerned, however, that in applying a treaty's terms "literally, and without appropriate qualifications, may have unfortunate consequences....as, he continued, was the result in *Teoh's Case*". High Court justices in *Lam's* case also raised serious doubts about the "correctness of the decision in *Teoh's* case" (Groves, 2008, p. 499-500). A decision that asks the child question is a human rights victory on the one hand. On the other hand, however, it was deemed to risk adversely affecting democratic processes and attracted much political and legal criticism.

Despite the controversies surrounding children's needs, it is generally accepted that the quality of children's early bonding provides a firm basis conducive for their social development. Nevertheless, feminist legal methods involving practical reasoning would allow for "further critical evaluation and revision" (Bartlett, 1990, p. 880).

### **3. Every small challenge represents consciousness-raising**

There is evidence of consciousness-raising taking place in criminal law courts on these issues as the woman and child question have been incorporated into practical legal reasoning. The language of children's rights is appearing in criminal law courts and is being used to assist in establishing exceptional circumstances. For example, Judge Atkinson, in a 2008 Queensland case (*R v Chong*) involving an Indigenous woman for a remote community whose youngest child of seven children was breastfed, noted:

where relevant, the best interests of children who are dependant (sic) on the offender fall within s 9(2)(r) of the *Penalties and Sentences Act* 1992 (Qld), which requires the sentencing court to take account not only of the enumerated matters found in s 9(2)(a) to (q), but also of 'any other relevant circumstance'. (para. 33)

The judge went on to argue that a recommendation made in a Women in Prison report required amending the *Act* to "include the principle of the best interests of the child be a factor to be considered when sentencing a person with a dependent child" (para. 33). Including the principle, she added, would be consistent with s 16A(2)(p) of the *Crimes Act* 1914 (Cth). The court agreed with the sentencing judge who had granted the mother immediate release on parole as the degree of hardship experienced would be 'exceptional' if the mother was imprisoned. She could no longer breastfeed her infant (para. 13) and her other six children would be

adversely affected (para. 42). The judge's position adds weight to arguments favouring future reforms.

The few cases I have examined here point to how existing legal standards and concepts have served to advantage some offenders and disadvantage others whose concerns were overlooked. There are opportunities, however, to consider the well-being of an offender's dependants where discretion is allowable. Changes are underway. References made to the woman and child question imply an expectation that the best interests of the child principle will be considered, priorities will shift and differentiating between ordinary and exceptional suffering will be removed from legal practical reasoning.

There is evidence then of consciousness-raising and what Bartlett might have seen as expanding perceptions (1990, p. 863) as some judges have asked the woman question as a part of their practical reasoning. It appears that it is no longer acceptable for sentencing judges to ignore women's (and parents') social responsibilities towards children whether their circumstances are exceptional or not. In Bartlett's view, more facts ought to be made "relevant or 'essential' to the resolution of a legal case than would more non-feminist legal analysis" (p. 856). A method that takes into account the diversity of human experiences and positions must inform decisions involving facts about individual particulars.

### **Why do feminist legal methods remain necessary?**

Feminist legal methods affirm Bartlett's epistemology, that is, positionality that foregrounds women's experience and uses the diversity of these experiences to help forge theoretical positions from which to defend women. Positionality enables us to see that a woman's identity is also tied in with her embodied experiences (Alcoff, 1988, p. 434). It is also positionality's focus on lived or embodied experiences and subjectivity as a foundation of knowledge (see Bartlett, 1990, p. 880) that Bartlett uses to advance knowledge and the position from which she argued. Positionality is a feminist legal method offering, according to Bartlett (1990, p. 832), the "best explanatory grounding for feminist knowledge". It's an approach that awards priority to experiences (Bartlett 1990, p. 880). The general assumption is that women's individual experiences, though diverse, differ from those of most men regarding responsibilities for child care and those differences have not always been fully acknowledged and allowed for in law. Of course some men do assume full responsibility for children as Mr

Teoh did. But the point remains that parenting, whoever assumes the primary role, and mothering in particular, requires attention by court officials.

The positions judges and others take on parenting vary, in general. Each woman or man, judge or offender amass experiences of parenting from their particular upbringing, set of relationships, race, social class, professional identity and so on that they accept as "truths" about child rearing (Bartlett, 1990). Their truths, though, are subjected to further influences (see Bartlett, 1990, p. 881). Thus, a judge's truths about mother and child relationships, for example, are situated, partial, "necessarily incomplete" and certainly not final (Bartlett, 1990, p. 881). As individuals with differing life experiences and social realities, according to Bartlett, judges and of course all of us do not have access to other people's experiences or truths. Hearing other people's views does not require us to accept their truths as our own (Bartlett, 1990, p. 883), or to compromise our truths. But positionality's line of enquiry requires that others' perspectives be sought and attempts made to understand their views. Bartlett posited that positionality, "rejects both the objectivism of whole, fixed, impartial truth and the relativism of different-but-equal truths"; instead, "being 'correct' in law is a function of being situated in particular, partial perspectives upon which the individual is obligated to attempt to improve" (1990, p. 832). There is room to move in law without compromising principles that have kept arbitrary decision-making in check, providing that a crime does not attract a mandatory prison sentence or children are not already in care.

Far from an inflexible application of fixed rules and tests, criminal law processes have undergone considerable changes and reforms not least because "feminist legal methods, which have emerged from the critique that existing rules over-represent existing power structures, value rule-flexibility and the ability to identify missing points of view" (Bartlett, 1990, p.832). There is evidence of changes made in criminal law courts to accommodate the individual particulars and lived experiences of female offenders. The pliability of the law is intriguing.

More work, however, needs to be done to protect the bond. In the first instance, developing alternative community-based detention arrangements is not a fanciful proposition. Alternatives to incarceration such as home detention and community confinement (see Abramowicz, 2012, p. 237) need not compromise judges' position in some cases. For example, Berman

(2001, p. 278) called for a shift in focus from judges' understanding of hardship to an offender's dangerousness. Of course, a child's developmental needs for bonding must be balanced against these legal requirements. Secondly, much more could be made of protecting the bonding process between a child and his or her "psychological" parent (Spiezia, 2013), regardless of whether the parent (mother or father) is biological or not, heterosexual or not, legally recognised or not, or of another generation or culture. Most often, though, the primary caregiving role of children still falls on mothers' shoulders. Female offenders are therefore disproportionately affected when incarcerated.

## **Conclusion**

Feminist legal methods have a place in criminal law court decisions involving mothers who have bonded with young children. The legal arena is contested, dynamic, possibly unpredictable, but also reflective of social realities. As a consequence of consciousness-raising, some judges have taken it upon themselves to ask the woman and child question as part of their practical reasoning. At the same time, balancing established legal principles against the social reality of offenders' lives and responsibilities is hardly straightforward. But where discretion is allowable, new ways emerge for limiting the damage done when a mother is incarcerated. Feminist sensibilities have found a place, albeit uneven, in legal reasoning. Feminist legal methods have challenged legal methods that have been used to justify ruling out the sociological and psychological realities of women and children.

Feminist legal methods go some way to limiting the adverse effects on the increasing numbers of women and children involved in the criminal justice system. New questions require new methods to improve the legal response to situations where aspects of women's lives, all women's lives, have been rendered invisible and the application of rules unjust. How a judge responds to female offenders either in applying universalising tests for hardship and exceptional circumstances or the best interests of the child test reflects their legal responsibilities as well as their social understandings of the values society in general hold toward women and children. The impulse to protect offenders' vulnerable children who do not have the wherewithal to change their circumstances is justified in light of the body of literature on children's needs and rights that are also in flux.

Judges in criminal law courts have long had discretion to consider the well-being of an offender's child or children though their commitment foremost is to upholding established legal principles. In incremental ways, we are seeing the effects of feminist reforms in criminal law courts. Yet, much work remains to be done on reforming criminal justice interventions affecting the bond. Helena Kennedy, a champion of the child first policy, is not likely to be impressed by the rate of legal reform in this area. However, every small step is evidence of hopeful changes in continuing to bring women's and children's positions and lived experiences to the forefront of legal reforms.

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- R v Sinclair* (1990) 108 FLR 370
- R v Chong; ex parte A-G (Qld)* [2008] QCA 22
- R v Wirth* (1976) 14 SASR 291

### **Legislation**

- Crimes Act* 1914 (Cth)
- Family Law Act* 1975 (Cth)

### **United Nations' Convention**

Convention on the Rights of the Child

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

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