NZLS CLE Ltd
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New Zealand Law Society

WEBINAR

IMPACT OF PARENTAL INCARCERATION ON CHILDREN

DATE

October 2023

PRESENTERS

Her Honour Justice Susan Thomas
Fiona Guy Kidd KC
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MINISTRY OF JUSTICE
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PRESENTERS



Her Honour Justice Susan Thomas, Chief High Court Judge, Wellington

Justice Thomas is actively involved in work with Corrections, the judiciary, and the criminal bar to ensure appropriate information is provided in relation to dependent children of primary caregivers in custody. She presented on the Bangkok Rules and the short-term and longer-term impacts on dependent children whose primary caregiver is in custody to Supreme Court, Court of Appeal and High Court Judges in June 2022 and at the District Court Judges' Conference in March 2023, as well as the Criminal Bar Association conferences in 2022 and 2023. Justice Thomas continues to work with Corrections to have information about dependent children



Fiona Guy Kidd KC, Barrister, Invercargill

Fiona is a criminal law and appellate specialist with experience as both a Crown and defence counsel. She is the Immediate Past President of the Criminal Bar Association of New Zealand. A member of both Montrose Chambers in Invercargill and Bridgeside Chambers in Christchurch, Fiona took silk in 2018.



Stacey Shortall, MinterEllisonRuddWatts, Wellington

Since 2010, Stacey has been a litigation partner at MinterEllisonRuddWatts. She previously worked for over a decade as a lawyer in New York. Stacey is the founding trustee of the WhoDidYouHelpToday Charitable Trust, which, among other initiatives, runs a project seeking to better connect imprisoned mothers with their children (See: https://www.mothersproject.org).

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1. THE IMPACTS OF PARENTAL INCARCERATION AND THE POINTS IN THE CRIMINAL JUSTICE SYSTEM WHERE IT CAN BE CONSIDERED

Introduction

Family and extended family are at the heart of a child's world and need to be nurtured to help every child flourish.[1]

Recognising the importance of family to a child's wellbeing is central to this discussion.

The impacts of parental incarceration

Reported lived experience and research reveal the impacts on children of the incarceration of a parent. The impact can be lifelong.

Impacts can include:

- "Confounding grief" – the ambiguous loss and grief felt by children.[2] Pillars Ka Pou Whakahou (Pillars) is a charity that works with the children and whānau of people in prison in New Zealand. According to Pillars' data, 96% of Pillars children are struggling emotionally.[3]
- loss of/change in the parent/child relationship. It is difficult for children to maintain contact with their imprisoned parent due to distance from prison, restrictions on communications and contact.
- stigma, shame and bullying from other children due to distance from prison, restriction on communications and contact.[4]
- isolation/losing friends and support systems.
- disruption to schooling and reduced educational achievement.
- the effects of reduced family income including housing insecurity and increased costs from supporting a family member in prison.[5]
- separation from siblings.
- are more likely to offend and to be incarcerated themselves. Dr Ian Lambie reports that "Children with a parent in prison are 10 times more likely to be imprisoned in future than are non-prisoners' kids."[6]

1 Professor Ian Lambie "The prison pipeline: Why early intervention is the best solution" (2022) 9(3) IJPBE 32 at p 33.
2 So named by Dr Shona Minson.
3 As recorded in an open letter for children's care plans dated 18 November 2022 signed by Corrina Thompson, Pillars.
4 Education Gazette editors *Supporting students with a parent in prison* (Education Gazette, Issue: Volume 98, Number 9, June 2019).
5 A number of the above impacts are identified in the chair's foreword in the Parliament of Victoria, Legislative Council Legal and Social Issues Committee *Inquiry into children affected by parental incarceration*, (Parliament of Victoria, Report August 2022) at p xi.
6 Above n 1 at p 34.

- long-term negative mental and physical health outcomes.[7] Children with an incarcerated parent are more likely than their peers to die before the age of 65 with an increased risk if it is their mother who is imprisoned.[8]
- they do not learn how to build good relationships with their own partners, children in wider society and their employment prospects are significantly diminished.[9]

Children with a parent in prison "tend to come from families with multiple risk factors"[10] and are therefore an already vulnerable group of children.

Resources

In June 2015 the Social Policy Evaluation and Research Unit (SUPERU) of The Families Commission released a paper "Improving outcomes for children with a parent in prison". It identified a number of negative impacts for children with a parent in prison from robust, prospective longitudinal studies supplemented by findings from smaller qualitative studies.

The Legal and Social Issues Committee of the Parliament of Victoria, Australia undertook an inquiry into children affected by parental incarceration issuing its report in August 2022. Chapter 2 covers the impacts of parental incarceration.

A useful paper on this topic is Francessa Maslin and Dr Shona Minson "What about the children? Sentencing defendants who are parents of dependent children".[11] Dr Shona Minson conducted research in the United Kingdom. She has presented to New Zealand judges and segments of that presentation will be played to the webinar attendees.

Recent New Zealand decisions

On 16 December 2022 the New Zealand Supreme Court issued its decision in *Philip v The King*[12]. This was an appeal against sentence by a man who had been convicted of drug dealing offences involving methamphetamine. He was the father of a young child at the time of sentencing with another child born after sentencing. The Court considered whether it was open to the sentencing judge to afford a discount to the sentence of imprisonment "to mitigate the effect of sentence on his young child." The sentencing judge had given Mr Philip a discount of 10% to reflect this impact.[13] The Court concluded that the sentencing judge was entitled to give this discount and that the discount afforded was appropriate. In identifying the relevant principles the Court stated:

> [50] The Court of Appeal in *Campbell v R* stated that it was "uncontroversial" to say that the impact imprisonment has on the offender's children is a relevant factor in considering the appellant's personal circumstances.[14] The Court also observed that, the "weight to be accorded that factor depends on the circumstances. The relevant

7 SUPERU *Improving outcomes for children with a parent in prison* (June 2015) at p 4.
8 As cited by Dr Minson in her presentation to Te Kura Kaiwhakawā, Institute of Judicial Studies and article Maslin and Minson, "*What about the children? Sentencing defendants who are parents of dependent children*" [2022] NZLJ 367 at 369.
9 Visher, C.A., Lattimore, P.K., Barrick, K., Tueller, S. (2017) Evaluating the long-term effects of prisoner re-entry services on recidivism: What types of services matter? Justice Quarterly, 34(1):136-65.
10 SUPERU *Improving outcomes for children with a parent in prison* (June 2015) at p 5.
11 NZLJ 367 [2022].
12 *Philip v The King* [2022] NZSC 149.
13 The relevant discussion is at [46] – [58].
14 *Campbell v R* [2020] NZCA 356 at [41].

> circumstances include the type of the offending and the circumstances of the child or children."[15]

The Court said that the approach was consistent with the earlier decision of the Court of Appeal in *R v Harlen*.[16] The Court stated:

> [52] The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence "would, in the particular instance, be disproportionately severe". Section 8(i) directs the court to consider various personal circumstances, namely, "the offender's personal, family, whānau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose". A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children's Convention).[17] The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a "primary consideration".[18]

The Court held that a discrete discount was available to Mr Philip given he "was an important presence in his young child's life.[19] It was also noted that there was a close connection between Mr Philip's relationship with his child and his rehabilitative prospects.

Responding to and rejecting a Crown submission that such discounts will be "rare", the Supreme Court stated:

> [56] … We do not find it helpful to characterise such discounts as "rare" or to emphasise, to the exclusion of other factors, whether the defendant is the primary caregiver or the seriousness of the offending. What is required is a consideration of all of the relevant circumstances which must include the child's interests. Those interests include, as our reference to the Children's Convention indicates, the importance for children of growing up in a familial environment.[20] We accept that there may be other factors in this consideration which take primacy including, by way of example, issues of inter-familial violence;[21] an absence of remorse and/or lack of any rehabilitative steps,[22] but those factors are not relevant here.

The interests of children should be considered when deciding whether a sentence of home detention should be imposed instead of imprisonment.[23] The Court of Appeal has endorsed the approach of the Court of Appeal of England and Wales in *R v Petherick*[24] that the interests of the children are particularly relevant where "the case stands on the cusp of custody" and that "the likelihood of interference with family life inherent in imprisonment being disproportionate is also inevitably progressively reduced the graver the offence."[25]

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15 At [41].

16 *R v Harlen* (2001) 18 CRNZ 582 (CA).

17 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). See: Francessca Maslin and Shona Minson "*What about the children? Sentencing defendants who are parents of dependent children*" [2022] NZLJ 367.

18 Preamble and art 3. The Court in *Harlen,* (2001) 18 CRNZ 582 (CA), did not consider art 3 was relevant to the interpretation of ss 6 and 7 of the then in force Criminal Justice Act 1985; at [28]. There is sufficient support in the Sentencing Act for our view regarding discounts for children but we see the Convention as affirming this.

19 At [53].

20 See the discussion in *Berkland v R* [2022] NZSC 143 at [116] on the correlation between offending in later life and environment factors affecting children such as the lack of prosocial familial support and connection, and having a caregiver who is, or has been, in prison.

21 As in *Mau v R* [2021] NZCA 106.

22 As in *Fukofuka v R* [2019] NZCA 290 at [47]–[48].

23 *Honeybun v Police* [2022] NZHC 3445, *Aramoana v NZ Police* [2023] NZHC 1933 at [20] and *Sweeney v The King* [2023] NZCA 417 at [39]–[40].

24 *R v Petherick* [2012] EWCA Crim 2214.

25 *Sweeney v The King* [2023] NZCA 417 at [39].

When can these impacts be taken into account?

Parental incarceration "is not an isolated event, it is a process that unfolds over time".[26]

Accordingly there are many points during a criminal prosecution at which the harmful effects of parental incarceration should be considered by lawyers including:

- arrest
- bail. The interests of children can be considered within s 8(1)(b) Bail Act 2000: "any matter that would make it unjust to detain the defendant" and when considering bail pending sentencing within "the interests of justice" in s 13(1) Bail Act 2000.[27]
- sentencing. May be relevant to the type of sentence, the length of sentence and/or deferral of the start date of imprisonment.[28]
- during incarceration
- at parole hearings. The situation of and interests of dependent children will be relevant to "the public interest in the reintegration of the offender into society as a law abiding citizen"[29] and the relevance of the parental relationship as a protective factor against further offending.

In order for judges to take the impacts for children into account they will need information. There are different sources of information but counsel will be a primary conduit for information. Counsel will need to endeavour to establish trust with their clients and ask the right questions of the defendant from an early point/immediately. Indeed duty solicitors who first see defendants on arrest will need to be particularly "alive" to the issue.

Relevant information may include:

- how many children does the person have responsibility for? NB It may not be their own biological children.
- what are their ages?
- do any of the children have special needs/mental health issues?
- for mothers of infant children, are they breastfeeding?
- what are the usual care arrangements?
- have any arrangements been made for immediate care of the child/ren?
- how long can that arrangement be in place for?
- does the parent financially support the children?
- do the children have special events or external examinations coming up that would be disrupted by incarceration?
- if incarcerated/remanded in custody, how far away from the children would the parent be? This is particularly relevant for women who may be taken to a prison quite a distance from their home.

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[26] Steve Christian *Children of Incarcerated Parents* (National Conference of State Legislatures, Denver Colorado and Washington DC, paper dated March 2009) at p 7.

[27] The personal circumstances of the defendant and the defendant's immediate family are specifically identified in s 13(3)(c) as a relevant consideration in the interests of justice test.

[28] Section 100(1) Sentencing Act 2002 allows for the deferral of the start date of a sentence of imprisonment for up to two months on "humanitarian grounds".

[29] Section 28(2)(b) Parole Act 2000.

Different information will become relevant at different stages in the proceeding.

2. INSIGHTS FROM MOTHERS PROJECT ABOUT IMPRISONED MOTHERS IN NEW ZEALAND

Introduction

Analysis of New Zealand Census data tells us that imprisoned women are more likely than women in the general population to have given birth to children. They are in fact twice as likely to have four or more children. So it should come as no surprise that the vast majority of the approximately 500 women currently imprisoned in New Zealand are mothers (and/or caregivers of children, collectively referred to as "mothers" here) and often of at least several children. Many were primary caregivers before going behind the wire.

Since 2015, Mothers Project has been sending volunteer female lawyers once a month into New Zealand's female prisons to help mothers. An initiative of the WhoDidYouHelpToday charitable trust, Mothers Project has so far helped more than 900 imprisoned mothers to better understand their parental responsibilities and rights.

The purpose of this short paper is to provide an overview of the Mothers Project initiative and how it operates in New Zealand's female prisons, together with some insights in relation to parental imprisonment.

Overview of Mothers Project

For parents, imprisonment means that part of their punishment is being physically and emotionally separated from their children. As a result, children effectively serve prison sentences too.

Although this affects both men and women, in my experience, the stakes are higher – and the adverse consequences are more severe – for mothers. This is because (without wishing to diminish the roles of some fathers) many imprisoned mothers were more deeply involved in their children's lives before going behind the wire.

The opportunity to improve consequences is also more available for mothers. And that is because approximately 50 percent of New Zealand women in prison are on remand – awaiting trial or sentence – which is a far greater proportion than for our men's prison population.

Mothers Project was developed in 2014 and later launched at the Auckland Women's Prison. While the project focusses on working with imprisoned mothers, volunteers are motivated to help their children. In this connection, it is estimated that around 20,000 New Zealand children are impacted by parental imprisonment.

Mothers Project subsequently grew to also include the Wellington and Christchurch female prisons. Coordinated and trained through Mothers Project, over 160 lawyers have volunteered time on the project to date.

While the COVID-19 pandemic interrupted for a period the ability of Mothers Project volunteers to visit each female prison every month, the project generally involves a group of lawyers spending a morning a month at the prisons. Going onto prison units or meeting mothers in educational rooms, volunteer lawyers invite any woman who is a mother or child caregiver to speak with them about any questions relating to their children. Often the demand is great.

Mothers typically meet with Mothers Project on multiple visits and over some time. Many mothers repeatedly worry about the care their children are receiving while they are imprisoned and the loss of influence they have over their children's lives.

Participation is entirely voluntary by the mothers and has no status as a prison programme that they can list when applying for parole. In other words, it is hard to see an ulterior motive for a prisoner to participate in Mothers Project beyond genuinely wishing to maintain a meaningful connection with their children.

Following prison visits, the volunteer lawyers make calls, as appropriate, to family members, caregivers, schools, criminal and family lawyers, and/or, if needed, Oranga Tamariki, seeking to facilitate meaningful connections between mothers and their children. Updates on the calls made and information exchanged are provided back to the imprisoned mothers. Where sought, possible and appropriate, calls and/or visits between mothers and children are arranged.

In recent years, Mothers Project has run an extension called "Weaving Whānau". Through this arm of the Project, mothers in the community under the supervision of the Department of Corrections (approximately 4,000 women) can also access help from Mothers Project volunteers.

In addition, in 2022, Mothers Project began a pilot with NZ Police in the Counties Manukau Police District to offer the services of our volunteer lawyers to other mothers in the community. Police officers now make referrals directly to Weaving Whānau via their AWHI App, which is a tikanga-based voluntary referral service used by frontline Police to connect a person needing help with a wellbeing service provider in their community. Mothers Project volunteers then make contact with the mother and help her in whatever way is appropriate (for example, explaining legal concepts such as protection orders, finding a family lawyer to act for her, suggesting other support services she may be able to access etc). Most AWHI referrals to Mothers Project happen following family harm incidents attended by Police.

Given the success of the Counties Manukau pilot, Mothers Project has recently been asked to expand our Weaving Whānau offering into the wider Tāmaki Makaurau area, with the addition of Waitematā and Auckland Police Districts.

For many years, Mothers Project has also run a Storybook Programme at Auckland Women's Prison. Each month, a volunteer goes into the prison with a box of books and a recording device so that books can be sent to children with an audio recording of their mother reading to them. This programme is intended to help foster connections even when visits or other contacts with children are not occurring.

Insights in Relation to Parental Imprisonment

While most imprisoned parents in New Zealand are men (estimated to be approximately 5,000 fathers compared to approximately 425 mothers) – from what I have seen – women's

imprisonment is far more disruptive to families than men's imprisonment. Imprisoned women are much more likely to be the sole or custodial parent compared to imprisoned men. While my experience in female prisons (both here and in New York, where I previously worked) is that the majority of children of imprisoned fathers live with their mother while the father is in prison, imprisoned mothers often have a labyrinth of formal and informal (and, sometimes, State-appointed) people caring for their children.

Through Mothers Project, we find many imprisoned mothers' children living with their grandparents (often grandmothers). Other children have been placed with siblings (often sisters), friends and, more rarely, with their fathers while their mother is in prison. Indeed, often we find that the father, also, is behind bars.

The imprisonment of mothers can have a profoundly destabilising effect on children and families. For example, a child's home may change from the environment in which they lived prior to their parent's imprisonment. They may need to move schools, change sports clubs, lose existing friendships and, on occasion, live separately to their siblings. This can be disruptive, distressing and traumatic.

Sadly it is not unusual for Mothers Project volunteers to discover that the imprisoned mother she is seeking to assist has childhood experiences of her own mother being imprisoned.

For many imprisoned mothers, family relationships are largely severed while they are in prison. This unsurprisingly strains mother-child relationships and is linked in some research to poor behavioural outcomes for both mothers and children.

Offshore studies indicate that imprisoned mothers often have attachment disorders and can be insecure about their emotional bonds with their children. Reducing or eliminating contact between mothers and children exacerbates this insecurity, making reconnection upon release more difficult and potentially developing another generation with attachment issues.

It is widely known that the likelihood of a child ending up in prison – even though there are many who do not – is greatly increased if their parent has been imprisoned. In fact, government research tells us that these children are greater than five times more likely to end up in prison than children of never-imprisoned parents. While many risk factors may contribute to why someone ends up in prison, at least one US study found that children of imprisoned mothers had higher rates of imprisonment – and even earlier and more frequent arrests – than children of imprisoned fathers. While mindful that there are exceptions, I suspect this may be because mothers are more likely to be a primary support for a child.

Although offshore research shows there are proven benefits to both mothers and their children through regular contact, many mothers never receive even one visit from their children during their imprisonment. While some mothers describe to Mothers Project volunteers not wanting their children or families to see them in prison, many more mothers raise simple logistical challenges that prevent visits. For example, with female prisons only located in (the outskirts of) Auckland, Wellington and Christchurch, many mothers are imprisoned miles away from home.

The prison environment can also present specific obstacles to mother-child visitation, such as inadequate information about the visitation process (which we have tried to address through Mothers Project by developing child-centric information brochures for families), difficulty scheduling visits, and/or the family's inability to access or afford transportation.

Further complicating potential visits can be concerns raised by some caregivers about not wanting to upset children by bringing them to visit their mother in prison.

Indeed, physical distance, coupled with the complexity of caregiving relationships for the children of imprisoned mothers and, frankly, often poverty means that very few mothers in our experience receive at Mothers Project regular visits from their children. The COVID-19 pandemic certainly made things worse when visits were not permitted at all, and other challenges, including staffing meant women were locked in their cells for longer periods and unable to access phones to make calls to their children.

It bears reiterating how international research supports that continued contact during imprisonment has positive outcomes for both children and mothers. It supports more secure attachment and bonding, plus provides positive motivation to mothers for change.

Potential Barriers to Imprisoned Mothers Providing Information About Their Children to Defence Counsel

It is not clear to me that imprisoned mothers on remand in New Zealand know or understand – or, if they do, trust – that putting information about their dependent children before judges could change whether they are remanded in custody or on bail and/or positively impact sentencing decisions. While Mothers Project volunteers can seek to raise such awareness during our prison visits, defence counsel may have better opportunities to explain the significance of such information.

It should, however, come as no surprise that at least some mothers may be reluctant to identify that they have dependent children. They might worry that such disclosure will cause Oranga Tamariki or other state agencies to become involved.

Many imprisoned mothers had poor experiences as children themselves in state care, and fear exposing their children to similar risks. A history of childhood abuse – particularly sexual – is a recurring theme for the imprisoned mothers we encounter on Mothers Project. At least some of that abuse regrettably happened in state care.

Some imprisoned mothers may also worry that providing information about their children will result in the caregiving arrangements they have made being disturbed. That, in turn, has the potential to antagonise caregivers and jeopardise the contact mothers may be having with their children.

Other mothers also – not unjustifiably – feel they will be further stigmatised by disclosure because people may perceive them even more negatively given that their criminal offending adversely impacts children. Against this backdrop, reluctance to provide information about dependent children is understandable. Overcoming such reluctance will require developing trust – not only at an individual level between counsel and clients, but also at an institutional level where imprisoned mothers hear of other women having more favourable remand or sentencing decisions after disclosing such information.

Trust (or lack thereof because it has been abused in the past) is a very real issue for many imprisoned mothers. Without wishing to simply state the obvious, building trust requires time, clarity, empathy and good listening skills.

Conclusion

It is hoped that this paper provides some useful insights for counsel and others interacting with imprisoned mothers. Without in any way wishing to lessen the impact of their criminal offending on victims, in my experience, most imprisoned mothers have survived criminal behaviour inflicted on them. While not excusing their offending, their backgrounds can sometimes offer a glimpse of explanation.

All of the women I meet in prisons are different, but the mothers have one common thread – a desire for their children to have better outcomes than them and not to become victims. Anything we can do to support that desire makes good sense to me. Enabling ongoing connections between mothers and children is one way to do so.