

What about the children? Sentencing defendants who are parents of dependent children*

Ko te Rātā te rākau i takahia e te moa

The Rātā was the tree trampled down by the moa

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**This article refers to defendants who are a parent, however the case law and sentencing principles are applicable to defendants who are caregivers generally. Similarly, the sentencing principles are not restricted to children, and may be considered and applied in respect of dependents of the defendant.*

Introduction

Aotearoa New Zealand has a high rate of imprisonment and many prisoners are parents (Superu “Improving outcomes for children with a parent in prison” (June 2015) Pillars <www.pillars.org.nz> at 1). More than 20,000 children are estimated to have a parent in prison at any one time (National Health Committee *Review of research on the effects of imprisonment on the health of inmates and their families*, Wellington, 2008, at 34). This estimate is supported by a finding that out of a sample of 137 prisoners, 87 percent of women and 65 percent of men were parents (Liz Gordon *Invisible Children* (report prepared for Pillars Inc, November 2009) at 29). Recent research indicates a more conservative figure, at around 3,000 children (Office of the Inspectorate *Thematic Report: The Lived Experience of Women in Prison* (report prepared for Department of Corrections, October 2021) at 95). It is also estimated that 29 per cent of women in prison previously had a direct parenting role, defined as having a child under 18 living with the parent prior to imprisonment (at 15).

Due to the prison population (94.3 per cent of prisoners being male and 5.7 per cent being female) children are more likely to be affected by paternal incarceration compared to maternal incarceration (Department of Corrections “Prison facts and statistics” (September, 2021) <www.corrections.govt.nz>). However, women are more likely to care for children than men (Office of the Inspectorate, above, at 11). Given the over-representation of Māori in the prison population, Māori children are also much more likely to have a parent in prison

compared to non-Māori. During the year ending 30 June 2018, 67 per cent of all children with a parent in prison (being 9,400 children) had a Māori parent in prison (Ara Poutama Aotearoa Department of Corrections *Hōkai Rangi Strategy*, 2019, at 10).

The Supreme Court recently considered the impacts of sentencing on children in the appeal of *Philip v R* CA604/2021, 9 September 2022. This appeal concerns the issue of sentencing parity between two co-offenders convicted for possession of methamphetamine for supply. Mr Philip, who committed the offending with his partner, Ms Hayman, is the father to two young children and received a longer sentence (two years and eleven months' imprisonment) when the Crown appealed his original sentence of twelve months' home detention to the High Court. Ms Hayman was sentenced to eleven months' home detention. The Court has reserved its decision.

Purpose of the article

This article considers the duty of the courts to recognise the implications for children which flow from sentencing defendants who are a parent. In 2020-2022, Dr Minson presented her research at judicial education seminars organised by Te Kura Kaiwhakawā, Institute of Judicial Studies. Dr Minson's research in England and Wales analysed the observance of children's rights in sentencing decisions concerning their primary carers (mainly mothers). Her work explores the lack of concern for children whose primary carers are before the courts in that jurisdiction. This research provided the impetus to assess the parallel situation here in Aotearoa.

The impacts of sentencing for children

The whakataukī used at the preface of this article provides a helpful analogy between the Rātā tree and tamariki, both in need of adequate support and stability at the beginning stages of life. Hirini Moko-Mead and Neil Grove (*Ngā Pepeha a Ngā Tūpuna* (2nd ed, Victoria University Press, Wellington, 2003) at 258) explain:

... The rātā, trodden on when young, cannot grow straight and must depend on another tree for support. The lesson is that early influences cannot be altered: 'as the twig is bent so grows the tree'.

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- social stigma:
- difficulty in maintaining contact with the imprisoned parent:
- instability:
- financial hardship:
- emotional distress:
- long-term negative health and education outcomes:
- high risk of intergenerational offending.

(at 1 ; Parliament of Victoria Legislative Council Legal and Social Issues Committee *Inquiry into children affected by parental incarceration*, Victoria, Australia, August 2022)

As mentioned, the sum of these negative impacts for children will be more acute for Māori children who are more likely to have a parent in prison.

Recent research advocates for reducing harm by reducing incarceration (Parliament of Victoria, Legislative Council Legal and Social Issues Committee, above, at 40-41). Imprisoning parents is not in the best interests of children, and should be avoided where possible (Parliament of New South Wales, Committee on Children and Young People, *Support for children of imprisoned parents in New South Wales*, June 2022, at 6).

Sentencing a parent to prison also creates practical barriers for the parent-child relationship. Research shows that it is difficult for children to visit and have contact with their parents in prison (Superu, above, at 3). Problems associated with visiting or contacting an imprisoned parent include the complexity and stress of the visitation process, the cost and limitation of phone communication, the distance and cost required to travel to the prison, harsh staff attitudes and surveillance of visits (Office of the Chief Inspectorate, above, at 94-100). These problems are exacerbated for female prisoners due to the small number of prisons and their location (at 95). This contact issue intersects with guardianship rights under ss 17-25 of the Care of Children Act 2004 and the best interests and welfare of children under ss 4A-5 of the Oranga Tamariki Act 1989. Progress has been made however with a Mothers with Babies

unit at each women's prison to allow the mother-baby bond to develop in a safe and supportive environment during a baby's first two years of life (Ara Poutama Aotearoa Department of Corrections *Annual Report 2020/2021* at 60))

There is a connection between parental imprisonment and children being involved in youth offend and care and protection proceedings. Recent Oranga Tamariki research looked at youth justice pathways and collected data on the figures of the study group who experienced childhood with a parent in prison (Oranga Tamariki Evidence Centre *Youth Justice Pathways: an examination of wellbeing indicators and outcomes for young people involved with youth justice* (2021, Wellington, New Zealand: Oranga Tamariki— Ministry for Children) at 16). Of relevance to this article, Oranga Tamariki recorded the likelihood of the study groups to have had a parent in prison in their lifetime as:

- Those with involvement in both youth justice and care and protection proceedings – 45%
 - Those with involvement in care and protection proceedings – 34%
 - Those with involvement in youth justice proceedings – 26%
 - Those with no involvement with care and protection or youth justice proceedings – 5%
- (at 16)

What can we learn from England and Wales?

When a child is separated from their parent in the family courts in England and Wales, because of harm, abuse or neglect, the child's best interests are the paramount consideration of the court under section 1(1) of the Children Act 1989. The child is represented by a Guardian and state appointed and financed lawyers. If separated from their parent, the state provides alternative care for them. In contrast when a child is separated from their parent due to the parent's imprisonment, as a consequence of a sentencing hearing in the criminal courts in England and Wales, the child may not even be mentioned to the court. Around 300,000 children are separated from their parents because of parental imprisonment each year in England and Wales, and for 17,000 of those children it is their mother who is imprisoned (Sarah Kincaid, Manon Roberts and Professor Eddie Kane *Children of Prisons: Fixing a Broken System*' (Crest Advisory, United Kingdom, 2019) at 20).

The Human Rights Act 1998 (HRA) and the United Nations Convention on the Rights of the Child 1989 (UNCRC) set out the rights held by children who are separated from their parents by the state. They include:

The right to private and family life (Article 8: HRA)

The right to enjoyment of rights without discrimination (Article 14: HRA)

The right not to be discriminated against or punished because of anything their parent has done (Article 2: UNCRC)

The right for their best interests to be a primary consideration of any court taking an action concerning them (Article 3: UNCRC)

The rights for their views to be considered (Article 12: UNCRC)

The right to be provided special protection and assistance by the state if temporarily deprived of his or her family environment (Article 20: UNCRC)

A child with an imprisoned mother is likely to suffer more negative effects than a child of an imprisoned father, and the threshold at which their absence has an impact is lower than that of fathers. The evidence shows that even a very short sentence of imprisonment for a mother can have long lasting negative effects on a child (Danielle Dallaire “Incarcerated Mothers and Fathers: A comparison of risks for children and families” (2007) 56 (5) *Family Relations* 440-453; Jean Murray “Longitudinal research on the effects of parental incarceration on children” in J. Mark Eddy and Julie Poehlmann (eds) *Children of incarcerated parents: A handbook for researchers and practitioners* (Urban Institute, Washington DC, 2012) 55-73).

With regard to the possibility of continuing a relationship with an imprisoned parent, research found that only half of mothers who lived, or were in contact, with their children prior to imprisonment received a visit whilst in prison (Social Exclusion Unit *Reducing Re-offending by ex-prisoners* (Social Exclusion Unit, London, 2002)). One in five women are held more than 100 miles away from home (Social Exclusion Task Force *Short Study on Women Offenders* (Cabinet Office and Ministry of Justice, London, 2009)). Mothers have to relinquish their caring role due to their limited ability to meet the child’s physical or emotional needs and children protect their mothers from the difficulties of their lives because they recognise that their mothers can no longer help them. This leads to distance in their relationship.

With regard to children's wellbeing and future outcomes in England and Wales, research conducted by Minson found that children whose mothers were imprisoned experienced a change of caregiver, change of home, separation from siblings, changes to education, multiple placements, negative changes in family roles and relationships, stigma, loneliness, grief, regressive behaviours, problems at school and anger (Shona Minson *Maternal Sentencing and the Rights of the Child* (Palgrave MacMillan, Oxford, United Kingdom, 2020). Parental imprisonment is a recognised Adverse Childhood Experience which is known to negatively impact children's future health and wellbeing (Vincent J Felitti et al "Relationship of Childhood Abuse and Household Dysfunction to many of the leading causes of death in adults. The Adverse Childhood Experiences Study" (1998) 14(4)*American Journal of Preventative Medicine*, 245). Adults who have experienced maternal imprisonment as children are more likely to have mental health problems, drug and addiction problems, are less likely to achieve higher educational levels and are more likely to die before the age of 65 than their peers (Steve GA van de Weijer, Holly S Smallbone, and Valery Bouwman "Parental Imprisonment and premature mortality in adulthood" (2018) *Journal of Life Course Criminology* 1).

Case Law and Sentencing Guidelines in England and Wales

There is a body of case law on the point, starting with the case of *R (on the application of P and Q)* [2001] EWCA Civ 1151, in which Lord Phillips stated at paragraphs 78 and 87:

The criminal sentencing of a parent engages the Article 8 right to respect for family life of both the parent and the child. Any interference by the state with this right must be in response to a pressing social need, in pursuit of a legitimate aim, and in proportion to that aim. The more serious the intervention the more compelling the justification must be - the act of separating a mother from a very young child is very serious.

Other decisions have endorsed this position. The welfare of the child should be at the forefront of the judge's mind (*ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department* [2011] UKSC4 at paragraphs 25-26). The court has a duty to make sure it has all relevant information about any dependent children when concluding what is an appropriate sentence (*R v Bishop* [2011] WL 84407 (CA)).

There is no standard or normative adjustment for dependent children, but their best interests are a ‘distinct consideration to which full weight must be given’ (*R v Petherick* [2012] EWCA Crim 2214 at paragraph 19). In a case which is on the threshold between a custodial and non-custodial or suspended sentence, a child can tip the scales and a proportionate sentence can become disproportionate (at paragraph 22; Sentencing Council *Imposition of Community and Custodial Sentences Definitive Guideline* (Sentencing Council, United Kingdom, 2017)). The Sentencing Council provides an expanded explanation for the mitigating factor, sole or primary carer of dependent relatives, and sets out the duties on the court when considering that factor:

- 1) The court to make sure it has all relevant info about children before sentencing.
- 2) The court should ask for a pre-sentence report to address the issues.
- 3) If immediate custody is considered the court need to check that arrangements are in place for the children and adjourn sentence if necessary.
- 4) The court must consider if a custodial sentence is disproportionate particularly if on the borderline of a community/custodial penalty.
- 5) Even if custody is unavoidable dependents should make a difference to length of sentence.
- 6) When sentencing a pregnant woman the court must consider the effect of sentence on the health of that woman and the health of the unborn child.

(Sentencing Council *General Guideline: Overarching Principles* (Sentencing Council, United Kingdom, 2019)).

Minson’s analysis of research with Crown Court Judges found that four factors influence the lack of consideration of dependents in women’s sentencing decisions:

1. Judges do not take a consistent view on the relevance of dependents as a factor in mitigation
2. Judicial understanding of the guidelines and case law which set out the duties of the court in relation to considering dependents in sentencing decisions is limited and at times incorrect
3. Common misconceptions hinder a judge’s willingness to make appropriate enquiries about children and to properly understand how their mothers’ sentence would affect them

4. Judges do not request a pre-sentence report as a matter of course when sentencing primary carers

Although England and Wales have both case law and guidelines on the need to consider dependent children when sentencing primary carers, there is a need for consistent application of the case law and guidelines to ensure parity between children across different courts.

Adopting a child-aware lens in Aotearoa sentencing decisions

Minson's research is underpinned by a best interest lens for children. In terms of the criminal jurisdiction — distinct from family— there is no express incorporation of a well-being and best interests assessment of dependent children in the Aotearoa sentencing framework. This article nonetheless canvasses the courts' ability to take into consideration the impacts on a child when sentencing a parent. It is important to recognise that the consideration of the personal circumstances of a defendant, including their whānau circumstances, is already part of the sentencing process.

At stage two of the sentencing process, the impact, or hardship, of sentencing a parent for their child or children may be taken into consideration as a personal mitigating factor under s 9(4)(a) of the Sentencing Act 2002 (the Act). This section operates in nexus with s 8(h)-(i), which instructs the court to take into account the impact of sentencing on children as a relevant consideration. Section 8(h)-(i) provide:

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court –

...

- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

Section 8(h) is engaged on the basis that a defendant's circumstances will render an otherwise appropriate sentence disproportionately severe. The consideration of disproportionate severity is not limited to the effect of sentence on the defendant personally and may be

considered more broadly where the severity of sentence affects third parties, such as a defendant's child or children (*R v A* HC Wellington CRI-2007-032-477, 3 October 2008 at [20]-[22]). In determining whether a sentence may be disproportionately severe, recent decisions have considered r 64 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (*Theodore v Police* [2018] NZHC 2364 at [35]-[39]; and *Sulusi v New Zealand Police* [2020] NZHC 3314 at [28]). Rule 64 provides:

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.

The government position is that women offenders are managed in a manner that takes into consideration their specific needs and family circumstances (*Zhang v R* [2021] NZCA at [68], citing United Nations *New Zealand's Sixth Periodic Report on the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* CAT/C/NZL/6 (United Nations, 2013) at [152]).

A sentence of imprisonment for a parent frequently results in family hardship, and where offending is premeditated, the Court of Appeal has held the impact or severity of that sentence upon whānau is likely to be given little weight (*Borg v R* [2015] NZCA 289, citing *R v French* CA69/74, 4 November 1974; *R v Prescott* CA360/00, 1 November 2000). An important consideration for the court to bear in mind when deciding what constitutes as a circumstance which renders a sentence disproportionately severe is whether the consequence is a result of the offending as opposed to the imposition of sentence (*Borg v R*, above, at [22]; compared to *A v R* [2018] NZHC 543 at [24]).

Section 8(i) outlines that the court must consider (among other things) a person's family and whānau background when it is considering the imposition of a sentence with a rehabilitative purpose. This provides another path for the court to consider a defendant's child or children as a relevant factor in deciding which type of rehabilitative sentence is appropriate. For example, the ability for continued contact with children may tip the balance in favour of a sentence of home detention as opposed to imprisonment if this factor will incentivise the parent's motivation to rehabilitate (*Sulusi v New Zealand Police*, above, at [28]; and *R v Veatupu* [2018] NZHC 2640 at [35]-[38]). This enables a sentencing approach which takes

into consideration the wellbeing of children, where possible, and does not emphasise punishment at the expense of rehabilitation and restoration (Te Uepū Hāpai I te Ora — The Safe and Effective Justice Advisory Group He Waka Roimata (First Report, June 2019) at 37; Te Uepū Hāpai I te Ora — The Safe and Effective Justice Advisory Group Turuki! Turuki! (Second Report, December 2019) at 47).

In accordance with these sentencing principles, the impact or hardship on children from their parent being sentenced may affect the sentencing exercise in the following two ways:

- 1) **Warrant a discount** on the basis of compassionate grounds, mitigating against the length of sentence (*Theodore v Police*, above, at [38], citing *R v Petherick* [2012] EWCA Crim 2214 at [20]-[24]; and *Garnett v R* [2010] NZCA 173 at [36], citing *R v Harlen* (2001) 18 CRNZ 82 at [22]).
- 2) **Promote a non-custodial sentence**, where a case is on the “cusp” of a short-term of imprisonment, by tipping the balance in favour of home detention to ameliorate against the severity of imprisonment (*Hogan v Ministry of Social Development* HC Napier CRI 2005-441-24 8 July 2005; *Theodore v Police*, above, at [46]; *Sulusi v New Zealand Police* [2020] NZHC 3314 at [28]). The presence of this factor may also temper against a sentence of imprisonment where the needs of the community, balanced against sentencing principles, can be met by a community-based sentence (*R v A*, above; *R v Keyte* [2022] NZHC 1063 at [46]).

Where the incarceration of a parent will impact their children negatively, the parent is not automatically entitled to a sentencing mitigation as a result (*Gonzales v Police* [2013] NZHC 1691 at [22]; and *R v Neroj* [2008] NZCA 184 at [15]). Hardship to the defendant’s child or children is accepted as an inevitable consequence of a sentence of imprisonment.

The weight to be given to the presence of this factor will therefore depend on the circumstances of the case, including the seriousness and type of offending and the circumstances of the children (*R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [13], citing *R v Harlen*, above, at [21]-[22]; and *Campbell v R* [2020] NZCA 356 at [41]). For example, a modest discount may be available at sentencing if an parent’s imprisonment is unduly depriving their family of a reliable source of support (*Campbell v R*, above, at [42]—[45]; *Mau v R* [2021] NZCA 106 at [41]). The ripple effect for children, will usually be more keenly felt in the form of decreased, or loss of, contact, financial support, and the provision of

care (see for example *R v Lyon* [2018] NZHC 1434 at [22]-[23]). The difference in impacts for an offender's child or children between, for example, imprisonment and home detention, is a relevant factor which may alter the assessment of what sentence will be appropriate in the circumstances.

Providing relevant information to the court

Courts generally receive information as to whānau impacts of an offender's imprisonment by way of a pre-sentence report under ss 26-26A of the Act. Details regarding the domestic situation of a defendant is often limited in these Corrections provided reports.

The court may also receive information regarding the offender's personal, family, whānau, community and cultural background orally or via a written cultural report under s 27. Pursuant to s 27(1)(e), the report may also provide information on how the offender's support networks may be relevant in respect of possible sentences. A report may extend to providing specific detail as to the circumstances of any children of an offender parent, and how those children, or more specifically their impending hardships, may be relevant to determining an appropriate sentence.

Psychological reports submitted by counsel can also provide the court with information about the circumstances of an offender's child or children, and the likely hardship they will suffer as a result of their parent being sentenced.

What can the courts do?

While the criminal courts are focused on the offender-victim dynamic in the context of addressing the harm inflicted by the offending, there is an ability for these courts to have a child-aware lens when sentencing parents. In this scenario, key stakeholders in the courts, such as judges and lawyers, can adopt a child-aware lens in their work to negate the otherwise general invisibility of children in the criminal courts.

This article emphasises that consideration of whānau-wide impacts from sentencing a parent, namely the impact on children, is exactly the type of relevant background information that should be before the court so that well-informed decisions can be made based on the offender's circumstances as a whole. The provision of this information would deliver on the aspirations of Te Ao Mārama to improve the detail and scope of information available to, and accessible by, judges to enable tailored sentencing decisions and outcomes for the offender.

and all others involved and affected by the criminal justice system (Heemi Taumaanu, Chief District Court Judge of New Zealand “Mai te pō ki te ao mārama: the transition from night to the enlightened world” (Norris Ward McKinnon Lecture, Waikato University, 11 November 2020) at 24).

The consideration of children affected by the sentencing of a parent is crucial to ensure that children, affected by the sentence of their parents, are seen, heard and understood by the court. This would also assist to better recognise the rights of children under UNCRC, which Aotearoa ratified on 6 April 1993, when they are affected by the criminal sentence of a parent.

Conclusion

To summarise, the impacts on a child when sentencing a parent may be taken into consideration as a personal mitigating factor at sentencing. Information of a parent’s whānau unit, particularly dependent children, is a relevant and important consideration that must be put before the court. The court also has an obligation under Art 3 of UNCRC to ensure the best interests of the child is the primary consideration in all actions concerning children. This article advocates for the consideration of the children of parents being sentenced in the criminal jurisdiction by lawyers, corrections staff and the judiciary. Should the circumstances be appropriate, the court can impose a sentence that best facilitates the continuance of a parent-child relationship.