



The Equal Justice Project is a student run pro-bono legal services organisation operating out of the University of Auckland Law School since 2005. The Human Rights Team within the Equal Justice Project is dedicated to developing human rights discourse by contributing to government and non-governmental initiatives.

Every child in New Zealand is entitled to the fundamental human rights enshrined in the United Nations Convention on the Rights of the Child. The team therefore endeavours to promote awareness of issues and to encourage student participation in debates surrounding these issues.

Written contribution to the United Nations Committee on the Rights of the Child
General Day of Discussion 2011: Children of Incarcerated Parents

This paper provides an overview of issues regarding children of incarcerated parents in New Zealand for contribution to the UN Committee on the Rights of the Child General Day of Discussion on 30 September 2011. It was prepared by the Equal Justice Project Human Rights Team for Action for Children and Youth Aotearoa (ACYA).

ACYA is a non-profit incorporated society made up of non-governmental organisations, families and individuals. Our purpose is to promote and enhance the well-being of children and young people in Aotearoa New Zealand by

- (a) Promoting understanding and implementation of the UN Convention on the Rights of the Child (UNCRC).
- (b) Promoting action on the recommendations of the UN Committee on the Rights of the Child for Aotearoa New Zealand.
- (c) Providing reports from NGOs in Aotearoa New Zealand to the UN Committee on the Rights of the Child.
- (d) Promoting opportunities for the voice and participation of children and youth.

ACYA produced and published Children and Youth Aotearoa 2010, the third and fourth periodic non-governmental report on New Zealand's implementation of UNCRC, submitted to the UN Committee on the Rights of the Child in June 2010. Prior to that, ACYA produced and published Children and Youth Aotearoa 2003, the second period NGO report from New Zealand. ACYA is a member organization of the NGO Group for the Rights of the Child.

Working Group 1: Infants and children living with or visiting a parent in prison

Issues Related to Children's Entry into Prison

1. A recent New Zealand prison census indicates that around 26% of males and 47% of female prisoners have dependent children prior to their imprisonment.¹ However, 35% of female prisoners, against 12% of male prisoners, are the sole caregivers for their child/children. Women currently only make up 6% of the current prison population in New Zealand, however that number is growing at a much faster rate than male prisoners.² Although there is very little statistical data on the children of prisoners (they are often referred to as the invisible victims of crime) it is estimated that approximately 10,000 New Zealand children are affected by having one or both parents in prison.³ The impact of having an incarcerated parent can result in long-term detrimental effects on the child's development and behaviour. It can also lead to emotional distress and increased contact with the criminal justice system.⁴ Research also shows that children of prisoners are six to seven times more likely to serve time in prison, than children of non-prisoners.⁵
2. We make two submissions relating to the legislative provisions in New Zealand with the aim of making the governing regime consistent with the rights of the child. First, States Parties should ensure that imprisonment for women who are either pregnant or have very young children is a last resort as it is the least desirable option in light of the rights of the child and the family/*whanau*.⁶ Pregnancy has been taken into account in New Zealand courts as a relevant consideration in sentencing,⁷ however it is not a mandatory consideration under the Sentencing Act 2002.⁸
3. Our second submission is that if imprisonment cannot be avoided, States Parties should not separate the mother and child, provided it is in the best interests of the child. Research suggests that contact between prisoners and their children is beneficial to both the child and mother, as it reduces recidivism for parents and is essential for the development of the child.⁹

Issues Relating to Children Living in Prison

4. Currently the law in New Zealand permits infants of up to six months of age to reside in prison with their mother, if the mother meets security requirements and it is considered to be in the

¹ Venezia Kingi "The Forgotten Victims – the Effects of Imprisonment on Families/Whanau" (paper presented at the Institute of Policy Studies Forum, Victoria University Wellington) 2009 at 2 [The Forgotten Victims].

² Ibid.

³ "The Children of Prisoners – The Hidden Victims of Crime" (2008) Rethinking Crime and Punishment www.rethinking.org.nz/assets/Print_Newsletters/Issue_44.pdf [Children of Prisoners].

⁴ The Forgotten Victims, above n 1 at 2.

⁵ Children of Prisoners, above n 3.

⁶ *Whanau* is a Maori term referring to extended family and/or family-like group.

⁷ For example, see *R v Simanu* [2011] NZCA 326, and *O'Brien v Police* HC Wanganui CRI-2009-083-002789.

⁸ Sentencing Act 2002, s 9.

⁹ Verna McFelin "A Bill of Rights for Prisoner's Children", retrievable at <http://www.rethinking.org.nz/images/newsletter%20PDF/Issue%2044/Vernas%20Article.pdf>.

best interests of the child.¹⁰ Mothers and their children are housed in self-care units, which provide them with greater independence and a more supportive environment for their child. Mothers who do not qualify for a self-care unit are permitted daily visits in purpose-built facilities to feed and bond with their child. The New Zealand Parole Act 2002 gives the parole board discretion to grant early release on compassionate grounds to a prisoner who has given birth during her sentence.¹¹

5. The Corrections (Mothers with Babies) Amendment Act 2008 has passed all readings in Parliament but is yet to come into force. It is our understanding that it is due to come into force later this year. This Amendment Act extends the period during which mothers may keep their children with them in prison from six months to two years.¹² ACYA's submission supporting the Bill in 2006 highlights that the child needs a minimum period of close interaction with its mother to preserve a secure attachment and to reap the benefits of breastfeeding. Both these factors are believed to have a significant impact on a child's healthy development and future wellbeing.¹³ The Human Rights Commission also supports the Amendment Act.¹⁴ Their submission focussed on the right to breastfeeding,¹⁵ which has been considered a fundamental right.¹⁶
6. The mothers whose babies live with them in prison must enter into a parenting agreement with the Chief Executive of the Corrections Department ("Chief Executive") under s 81B of the Corrections Amendment Act 2008 in relation to the child's placement, this includes: notice that the mother is responsible for the care of her child, and identification of an alternative caregiver in case of emergency or when the child's placement ends. Under this agreement the Chief Executive must provide parenting information; education and support for the mother; arrange for the child to receive all necessary health checks; and ensure the mother has adequate access to counselling to support her role as a mother in prison.
7. A child has the right to be in a stimulating and supportive environment, and this may require additional educational resources. Section 81C of the Amendment Act states that the Chief Executive must ensure the prison has adequate facilities to accommodate and provide a healthy and supportive environment for the child. A child's needs change as they grow, so prisons must ensure that they are equipped to accommodate the child's dynamic needs. A child at 24 months is also likely to be more mobile than a new born; there must therefore be sufficient space for the child to explore, including an outdoor space. The most important thing to remember, for States Parties, prison officers, the Chief Executive and the imprisoned mother,

¹⁰ Department of Corrections "Women in Prisons", retrievable at http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/general_info/women-in-prison.html.

¹¹ Parole Act 2002, s 41(1)(a).

¹² Corrections (Mothers with Babies) Amendment Act 2008, s 81A.

¹³ ACYA Submission, see http://www.acya.org.nz/site_resources/library/Documents/Submissions/Corrections_Mothers_with_Babies_Submission.pdf [ACYA Submission].

¹⁴ Human Rights Commission Submission, see <http://www.neon.org.nz/newsarchive/mbabies/> [HRC Submission].

¹⁵ Ibid.

¹⁶ See Universal Declaration of Human Rights Art 25(1); Convention on the Rights of the Child Art 24; ACYA Submission, above n 13; and HRC Submission, above n 14.

is that the child is innocent and should therefore not be punished for a crime they are not responsible for.

8. Children in prison have the same rights as children outside of prison, and they must therefore have the same opportunities available to them. The purpose of placing a child in prison with the mother is to strengthen the emotional attachment between the mother and child, which is a vital factor in a child's development.

Issues Related to Children's Departure from Prison

9. Children who leave prison with their mothers do so once the mother has completed the custodial part of her sentence. Research shows that once outside, many mothers find it difficult to readjust to normal life.¹⁷ They have difficulties finding stable homes, jobs and in reconnecting with their families due to the negative effects of imprisonment.¹⁸ It is even harder if the mother has never cared for her child outside the prison environment or was given very little responsibility for her child's care while in prison.¹⁹
10. Some children leave before they reach the maximum age they are allowed to stay in prison for various reasons including: the mother, authorities or others consider that it is not in the child's best interest to live in prison; the mother is being transferred to another prison without appropriate childcare facilities; or because the mother has died.
11. The decision about the age at which children leave prison is unclear as there is no statutory guidance. Rather, decisions are made on a case-by-case basis. The Corrections (Mothers and Babies) Amendment Act 2008 permits the mother to have their babies with them in prison for up to 24 months of age, subject to the approval of the Chief Executive (s 81A(1)).
12. Once a child has left prison, contact with their mother may continue while the mother remains in prison and after she comes out. The ease, nature and frequency of this contact will differ depending on the mother and child's situation.²⁰ Contact may be prevented or restricted because new carers may be unable or unwilling to allow the child to have contact with their mothers.

Working Group 2: Children left 'outside' when their parent is incarcerated

13. Research conclusions in New Zealand about children with incarcerated parents have been consistent with international findings. The only major study on topic had found that children

¹⁷ Oliver Robertson "Children Imprisoned by Circumstances"(2008)
<http://www.quno.org/geneva/pdf/humanrights/women-in-prison/200804childrenImprisonedByCircumstance-English.pdf> at 28 [Children Imprisoned by Circumstance].

¹⁸ Ibid at 28, and Dr Venezia Kingi "The Children of Women in Prison: A New Zealand Study" (2000)
<http://www.aic.gov.au/events/aic%20upcoming%20events/2000/~media/conferences/womencorrections/kingi.ashx> at 5 [Children of Women in Prison].

¹⁹ Children Imprisoned by Circumstance, above n 17 at 28.

²⁰ Oliver Robertson "Children Imprisoned by Circumstances"(2008)
<http://www.quno.org/geneva/pdf/humanrights/women-in-prison/200804childrenImprisonedByCircumstance-English.pdf>.

whose parents are incarcerated are more likely to do poorly at school, suffer emotional distress, and engage in deviant behaviours during their lifetime.²¹ The lack of official recognition by institutions of the consequences of parental incarceration is a major social concern which is often not addressed at the policy level.

14. In the United States, non-government organisations have formulated a “Bill of Rights” for children with incarcerated parents²², an initiative to push for legislative reform to recognise and protect the relationship between the parents and children going through the criminal justice system.²³ Child rights frameworks such as this ought to be encouraged as central considerations in the development of legislative or policy initiatives affecting children of incarcerated parents.

Arrest Process:

15. International estimations suggest that there is a child present at about one in five arrests, a statistic supported by the research undertaken for the “Invisible Children” report regarding New Zealand’s own situation.²⁴
16. While there is recent awareness of the effects of arrest and search processes on children, New Zealand has no official policy regulating the police’s procedure when making an arrest where there are children present. To respond to the growing concern in this area, the government should look into implementing official policies into police practices to ensure that the children’s best interests receive special protection in law.

Trial and Sentencing Process:

17. No provisions have been made to take into account the best interests of the child, and the possible benefits children could gain from being supported in observing their parents trial. Case studies suggest that while a small percentage of children find trial attendance traumatic, none who did attend regretted doing so. Of those interviewed, only one was well prepared for the trial process by a counsellor.²⁵ Given that research has suggested that children, especially young children find the legal process challenging to follow,²⁶ it seems sensible that courts should “develop a more pro-active approach”,²⁷ possibly ensuring a counsellor prepares and supports children through the trial process.

²¹ Ibid, at 16.

²² Aude Smith and Ebony Ruhland “Children of incarcerated parents: Challenges and resiliency, in their own words” *Children and Youth Services Review* 30 (2008): 1128.

²³ Full document retrievable at: <http://www.sfcipp.org/>.

²⁴ Liz Gordon “Invisible Children” (2009) First year report “A study of the children of prisoners”, retrievable at <http://www.networkers.co.nz/docs/invisible-children-with-cover.pdf> at 21 [Invisible Children].

²⁵ Invisible Children, above n 24 at 26.

²⁶ Joseph Murray (2007) “The cycle of punishment: Social exclusion of prisoners and their children” *Criminology and Criminal Justice* 7 (1) 59.

²⁷ Invisible Children, above n 24 at 27.

18. While research suggests that it is in the best interest of the child to attend the trial, there is general agreement among judges for children not to be involved in their parents' trial processes because their involvement has the potential to normalise the court process in their minds, leading to a higher risk of future offending.²⁸
19. In New Zealand, section 9 of the Sentencing Act 2002 sets out the aggravating and mitigating factors which must be taken into account when sentencing an offender. There is no explicit reference to the best interests of a convicted person's child, but their interests may be relevant to offender's personal circumstances under the Act.²⁹

Issues Relating to Contact with an Incarcerated Parent

20. Contact with incarcerated parents is governed in New Zealand by the Correction Regulations 2005, but wide discretion is given to the managers of individual prisons. Therefore, the specific rules will vary between prisons.
21. Children's visits to prisons are controlled by prison managers. The Regulations set out that children under the age of 16 must be accompanied by a parent, guardian, or other adult, unless they are satisfied that there is good reason for the child to visit the prisoner unaccompanied by an adult; and it is in the best interests of the child to be allowed to visit the prisoner.³⁰ Arrangements must also be made for approved adults to accompany children that do not have a parent, guardian or other adult.³¹ All visits to prisoners have to be supervised, though privacy considerations must be taken into account.³²
22. Many children are prevented from visiting their parent because of distance. In one study, over 55% of surveyed prisoners stated that they lived more than an hour's drive from their children.³³
23. The Correction Regulations state that the incarcerated parent has the right to reasonable quantities of writing materials and postage, and reasonable access to telephones for specific purposes (generally, legal advice) without charge.³⁴ This may be used to maintain contact with the child.

Other impacts of Parental Imprisonment

24. Children with a parent in prison are exposed to a high risk of under-achieving at school. Children with incarcerated parents can be the target of bullying or engage in violent behaviour themselves.³⁵ Education is one of the most important factors in breaking the cycle of inter-

²⁸ Ibid, at 25.

²⁹ Sentencing Act 2002, s 8(h). For example, see *R v Simanu* [2011] NZCA 326.

³⁰ Corrections Regulations 2005, r 106.

³¹ Ibid.

³² Corrections Regulations 2005, r 112.

³³ See *Invisible Children*, above n 24.

³⁴ Corrections Regulations, rr 83-87.

³⁵ *Invisible Children*, above n 24 at 56.

generational crime, however there are no specific policies dealing with this issue.³⁶ Children of incarcerated parents may be compelled to move houses and cities to relatives or caregivers, which causes further disruption to their education.³⁷

25. Children with parents in prison show a range of physical and emotional health effects. These include depression, anxiety, anger, bed-wetting, sleeping problems and hyperactivity. While studies have identified that it is difficult to distinguish between health problems that existed before parental incarceration and those arising thereafter, the “Invisible Children” study found that most participants believed the child’s health had worsened since the parent was incarcerated.³⁸
26. Children fear discrimination and alienation.³⁹ Many are afraid of revealing what has happened and withdraw from social interaction.⁴⁰ Research suggests that young children with imprisoned parents have particular difficulties forming secure attachment relations.⁴¹ Participants reported that support from extended families and the community helped children cope, as well as partners of incarcerated individuals.⁴² Continued contact between children and their imprisoned parents might also help children deal with the trauma of separation.
27. Having an adult earner in prison puts stress on a family economically. In most cases it is the primary earner who goes to prison. Eighty percent of interviewed families with incarcerated members received welfare benefits from Work and Income New Zealand, the organisation responsible for the management of welfare in New Zealand.⁴³ There are also a number of high costs associated specifically with having someone in prison. These include travel costs for visiting the person in prison, high phone rates, and often the cost of moving. Work and Income New Zealand said they have no specific knowledge of these costs.⁴⁴
28. New Zealand has a high number of children placed in foster care compared to the rest of the world and Maori and Pacific Island children particularly are more likely to be placed within their *whanau*.⁴⁵ A recent report by the Office of the Children’s Commissioner reported that children and young people felt they were not involved enough in decision-making and reviews.⁴⁶
29. There seems to be no specific Government policy for supporting children once the parent returns home from prison. Children may feel uncertain about how to respond to a returned parent and may have difficulty re-forming bonds after a long separation. Community organisations such as PILLARS currently provide good support services, however it is

³⁶ Ibid, at 51.

³⁷ Ibid, at 53.

³⁸ Ibid, at 49.

³⁹ Murray Joseph, ‘The Cycle of Punishment: Social exclusion of prisoners and their children’, *Criminology and Criminal Justice*, 2007, Vol 7(1) 55, at 58 [Murray].

⁴⁰ Invisible Children, above n 24 at 41.

⁴¹ Murray, above n 37 at 56.

⁴² Ibid, 41.

⁴³ Ibid, 36.

⁴⁴ Ibid, 38.

⁴⁵ Atwool Nicola, “Children in Care: A report into the quality of services provided to children in care” September 2010, published by the Office of the Children’s Commissioner, at 212 [Children in Care].

⁴⁶ Children in Care, above n 45, at 214.

paramount that the Government itself develop policies that specifically target the educational and economic issues related to children with parents in prison.

Recommendations

We recommend that the Committee consider taking the following actions:

- (1) Confirm that parents (especially mothers) with dependent babies should be imprisoned only as a last resort, and alternative non-custodial sentences should be preferred.
- (2) Encourage States Parties to develop facilities to allow babies and dependent children of incarcerated mothers to live with their mother, subject to the best interests of the child. Such facilities should be fully compliant with the child's rights, welfare and best interests under the UN Convention on the Rights of the Child.
- (3) Recommend that States Parties develop and implement extensive support services for incarcerated mothers and children upon departure from a specialist custodial facility, including establishment of appropriate caregiver placement and contact procedures in circumstances where the mother remains incarcerated.
- (4) Identify policies and procedures that uphold the welfare and best interests of the child in circumstances where their parents are arrested, detained on remand and during the criminal trial process.
- (5) Issue best practice guidelines to States Parties on how to provide support for families and children with a parent in prison, which include:
 - (a) minimum levels of training for prison staff and government officials, including training on children's rights and an understanding of the State's Parties obligations under international human rights treaties.
 - (b) the minimum extent of support services for children of incarcerated parents, both during their parent's incarceration and after release.

ACYA Committee

Equal Justice Project

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