

ARTICLE

**Sentencing the Silent: Children's Rights and
the Dilemma of Maternal Imprisonment**

ANNALIESE JOHNSTON*

The effects of separating young children from their mothers through imprisonment are dramatic and costly. Such separation affects the children and their families, as well as wider society and the state. However, imprisonment is too often regarded as the first port of call rather than as a last resort. This becomes particularly pertinent at the sentencing stage for female offenders, who are often single mothers, first offenders, and in the courtroom for benefit fraud or other property and non-violent offences. There are, however, some signs of promise. New Zealand's legislature has recently allowed the introduction of specialised units which house babies of up to two years of age in prison with their mothers. Our sentencing regime also has some tools for judges to constructively use their discretion to create more nuanced sentences that investigate, recognise and promote the rights and welfare of children. For example, appellate courts are increasingly accepting that in many cases, imprisonment is not appropriate. However at District Court level, where deterrence is still an overriding theme, there is less awareness of this changing direction.

The approach taken by other jurisdictions, such as South Africa and the United Kingdom, show that international human rights obligations can be part of the sentencing evaluation. A sentencing assessment need not choose between individual human rights and the interests of the state: both can be balanced without either being sacrificed. As recognised by the United Kingdom courts, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. Rather, it is the imposition of the sentence without investigating or paying appropriate attention to children's interests that

* Annaliese Johnston is in her final year of a BA, LLB(Hons) conjoint degree at the University of Auckland. She wrote this article as part of the Honours component of her LLB(Hons) degree.

threatens to do so. New Zealand courts can and should recognise that not doing so is in effect sentencing children, families and society to consequences that are likely to extend far beyond the imposed sentence.

I Introduction

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

—Sachs J¹

It is estimated that at any one time, about 20,000 children in New Zealand will have a parent in prison.² This is likely to continue to be an issue, as New Zealand appears to be following international trends of punitive justice. Organisations such as the Sensible Sentencing Trust have risen to new prominence in political discourse in recent years, pushing for a greater protection and voice for victims and wider society through tougher and longer sentences. This has been reflected in government policy which focuses on imprisonment as the prime response to crime, and “just desserts” sentencing, such as the Three Strikes Law. “Until recently, in New Zealand and elsewhere, the ‘get tough on crime’ message has achieved almost hegemonic proportions”.³ A distinguishing feature of New Zealand’s justice system is also “that we imprison more people for minor offences”.⁴ Consequently, prison numbers are rising, a trend that is expected to continue in the foreseeable future.⁵

In this context, prisoners who are mothers pose a particularly complex issue. Both options of keeping children in prison with their mothers and separating young children from a primary caregiver can be inherently problematic. This article will examine the effects of imprisonment on dependent children and the law’s response to those who are mothers, particularly in the context of benefit fraud offences and the sentencing stage. Children of prisoners are often touted as an *inevitable consequence of crime*—a sad but normal repercussion of society’s punishment of deviants. However, this article seeks to establish that the rights of children and their welfare under the current sentencing regime and international human rights obligations can and ought to be given greater recognition, significance and priority.

1 *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC) at [19] per Sachs J.

2 National Health Committee *Health in Justice: Kia Piki te Ora, Kia Tika! — Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau* (Ministry of Health, July 2010) at 5.

3 Liz Gordon and Lesley MacGibbon, *A study of the children of prisoners: Findings from Māori data June 2011* (Te Puni Kōkiri, December 2011) at 12 (citations omitted).

4 Kim Workman “Politics and Punitiveness – Limiting the Rush to Punish” (paper presented to the Australian & New Zealand Association of Psychiatry, Psychology and Law Conference “The Rising Punitiveness”, Wellington, November 2011) at 3.

5 Liz Gordon *Invisible Children: First year research report “A study of the children of prisoners”* (PILLARS, November 2009) at 3.

II Mothers in Prison: the Statistics

In keeping with international trends, New Zealand's female prison population is increasing at a greater rate than the male population.⁶ Despite only making up approximately 6.2 per cent of the prison population, they are often solo mothers, and often the fathers of their children are incarcerated.⁷ Female offenders also tend to commit proportionally more property crimes and fewer violent crimes than male offenders.⁸ At the last Department of Corrections census, 35 per cent of female prisoners had dependent children at the time of their imprisonment.⁹ The children of imprisoned fathers are more likely to be cared for by their mother or father's partner, whereas the children of female prisoners tend to be looked after by extended family or whānau, friends, or placed in foster care.¹⁰ This means that the children of mothers who are sentenced to imprisonment are at a higher risk of being separated from both parents and suffering the resulting consequences of the severing of the important child–parent relationship.

Venezia Kingi, in her 1999 thesis,¹¹ recognised that it can be difficult to get a comprehensive or cohesive picture of the effect that parental imprisonment has on children, as information on the numbers of children of prisoners is not routinely collected internationally or here in New Zealand.¹² Experiences of children who have a parent in prison will also differ according to which parent is imprisoned.¹³

Despite the acknowledged difficulties in gaining the full picture in New Zealand, these figures still have significant implications for the children involved. It is recognised that children in any country who have imprisoned parents are more likely to suffer health, developmental and psychosocial adversities, including being at a greater risk of infectious diseases, developing behavioural problems, and becoming involved in the criminal justice system themselves.¹⁴ Additionally, from a human rights perspective, children's rights are potentially threatened and ignored throughout the criminal justice process.

III Children of Prisoners: The Effects

Imprisonment has a number of effects on families, which are discussed below. Children, as particularly vulnerable members of society, are especially affected by the imprisonment of a parent, which becomes even more significant if their welfare, rights and interests are not considered in the legal framework.

6 Venezia Kingi and others *Mothers with Babies in Prison: Some Women Prisoners' Perspectives* (Department of Corrections, August 2008) at 4.

7 At 4.

8 Julia Tolmie "Women and the Criminal Justice System" in Warren Brookbanks and Julia Tolmie (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 295 at 298.

9 David Harpham *Census of Prison Inmates and Home Detainees 2003* (Department of Corrections, November 2004) at [9.2].

10 Venezia Kingi "The Forgotten Victims — the Effects of Imprisonment on Families/Whānau" (paper presented to the Institute of Policy Studies Forum, Wellington, 26 February 2009) at 4.

11 Venezia Marlene Kingi "The Children of Women in Prison" (PhD thesis, Victoria University of Wellington, 1999).

12 Kingi, above n 10, at 4.

13 At 4.

14 Simon Quilty and others "Children of Prisoners: a Growing Public Health Problem" (2004) 28 *Australian and New Zealand Journal of Public Health* 339 at 339 and 342.

A *Effects of imprisonment on prisoners' children*

New Zealand studies have found that the impacts of imprisonment on children differ depending on their age.¹⁵ It is significant and concerning that many of these behaviours are recognised as precursors to offending behaviours later in life:¹⁶

Age of Child	Impacts of Imprisonment
0-3 years	Low degree of attachment to imprisoned parent and loss of bond Separation anxiety
4-7 years	Separation anxiety Bedwetting Night terrors Aggression and violence Lack of engagement in school
8-10 years	Aggression and violence Feeling depressed Truancy
11-15 years	Violence Assuming the role of the absent parent or parenting the parent Truancy Decreased academic achievement

B *Effects on health*

Children of prisoners are also at a higher risk of negative health outcomes. The *Invisible Children* report by PILLARS, a charity for the children of prisoners, found that many “suffer from diseases like asthma and eczema, psoriasis and other skin and nervous disorders”.¹⁷ The report noted that although the problems displayed by these children probably differ little from those endemic across the large number of children living below the poverty line, the caregivers interviewed were adamant that, overall, the children’s health had worsened as a result of parental imprisonment.¹⁸

Separation of babies from their mother in particular can have significant health risks. The World Health Organization states that “[l]ack of breastfeeding—and especially lack of exclusive breastfeeding during the first half-year of life—are important risk factors for infant and childhood morbidity and mortality”.¹⁹ The lifelong impacts are thought to include “poor school performance, reduced productivity, and impaired intellectual and social development”.²⁰

15 National Health Committee, above n 2, at 115.

16 F Chauvel and M Roguski *The Effects of Imprisonment on Inmates' and their Families' Health and Wellbeing* (Litmus Ltd, Wellington, 2009).

17 Gordon, above n 5, at 49.

18 At 49.

19 World Health Organization and UNICEF *Global Strategy for Infant and Young Child Feeding* (World Health Organization, 2003) at v.

20 At v.

C *Psychological effects*

Separation between parents and very young children in particular has significant implications on their development. A mounting body of research in the fields of developmental psychology and neuroscience confirms attachment relationships to be a “central axis of the child’s developmental pathway”.²¹ Development psychologists are increasingly learning about the importance of the early years of a child’s life, including having a secure attachment with a primary caregiver. American research found that babies tend to have a “principal attachment figure”.²² While they do have secondary attachments from which they can derive security, under certain circumstances such as stress or illness they will show a preference for the principal, which is usually the mother figure.²³ The existence of a secure attachment with a principal in their first year had significant bearing on behaviour and development in later years. They were found to be more co-operative and empathetic with peers, less aggressive to unfamiliar adults, more explorative and self-directed, were better able to elicit and accept help in problem-solving situations, and performed better generally in language and development tests.²⁴ Lyons-Ruth, Alpern, and Repacholi also found that disorganized attachment earlier in life was the ‘strongest single predictor of deviant levels of hostile behavior toward peers in the classroom.’²⁵ Thus attachment in the first two years of life, when the emotional right-brain circuits are in a critical period of formation, is different from attachment in the third or fourth year of life, when the full cognitive system involved is maturing.²⁶ This confirms that attachment that is disrupted early in a child’s life can have implications on future deviant behaviour, thus increasing the risk of generational cycles of crime.

In regards to custody, overnight care is not essential to an infant or child’s ability to form a healthy attachment to the *secondary* parent, but repeated overnight stays away from the *primary* caregiver in the first year or two may disrupt formation of secure attachment with both parents.²⁷ This is particularly pertinent for young children of women in prison: they are often looked after by extended family such as grandparents who can become important secondary attachments, while their mother remains the principal attachment figure.

D *Social and economic effects*

In addition to health and developmental implications, this issue has wider social and economic impacts. The families and whānau of prisoners tend to be among the poorest in society, and can already be in crisis or suffering other adversities before the imprisonment

21 Allan Schore and Jennifer McIntosh “Family Law and the Neuroscience of Attachment, Part 1” (2011) 49 Family Court Review 418 at 418.

22 Mary Ainsworth “Infant-Mother Attachment” (1979) 34 American Psychologist 932 at 936.

23 At 936.

24 At 936.

25 K Lyons-Ruth, L Alpern and B Repacholi “Disorganized infant attachment classification and maternal psychosocial problems as predictors of hostile-aggressive behavior in the prechool classroom” (1993) 64 Child Development 572 as cited in Noelle E Fearn and Kelly Parker “Washington State’s Residential Parenting Program: An Integrated Public Health, Education, and Social Services Resource for Pregnant Inmates and Prison Mothers” (2004) 2(4) Californian Journal of Health Promotion 34 at 39.

26 Schore and McIntosh, above n 21, at 423.

27 At 424.

of a parent.²⁸ The children of prisoners are far more likely to become prisoners themselves than children of non-prisoners.²⁹ It is also important to note the significant racial disparities in those who are imprisoned, and therefore in those who are affected by imprisonment. Māori are nearly eight times more likely to be given a custodial sentence than non-Māori, and Māori women are 10 times more likely to be imprisoned than non-Māori women.³⁰ Kim Workman argues “that New Zealand has now reached the level, in relation to Māori, of mass imprisonment. He notes that ‘*in these circumstances, prison becomes normalised*’.”³¹ Far from stopping crime, “[m]ass imprisonment creates unstable communities, poverty and social alienation, ... [and] contributes to a breeding ground for a new generation of criminals.”³² Mass imprisonment is also expensive. The rising imprisonment rate in New Zealand means that over \$800 million is spent on prisons each year.³³

IV Current Law in New Zealand

A The Corrections (Mothers with Babies) Amendment Act 2008

In 2008 the Corrections (Mothers with Babies) Amendment Act was passed, following a recommendation by the 1989 New Zealand Ministerial Committee of Inquiry into the Prisons System to allow babies up to two years of age to live in prison with their mother, an amendment of the earlier Act which only allowed babies up to six months old.³⁴ Section 4 of the Act states its aim:³⁵

The purpose of this Act is to amend the Corrections Act 2004 to provide for the best interests of the child by enabling young children of female prisoners to be placed with their mothers in prison until they turn 24 months old, for the purposes of bonding, feeding, and maintaining continuity of care, provided that certain criteria and conditions are met.

This acknowledges the significant problems associated with separating children from their mothers, particularly at a young age, and the importance of breast feeding and bonding. It also provides wider scope for babies to remain with their mother in the crucial first two years of life rather than enforcing separation at six months. “Allowing women to care for their child in prison [also] represents an opportunity to work with women prisoners to aid rehabilitation and reduce the risk of re-offending.”³⁶ Retaining the bond with a child can be highly significant for the mother and baby when re-entering society. In a survey of female prisoners, nearly six out of ten (59 per cent) agreed that mothers with children

28 National Health Committee, above n 2, at 122.

29 Gordon, above n 5, at 58.

30 Gordon and MacGibbon, above n 3, at 12.

31 Kim Workman “Redemption denied: aspects of over-representation of Māori in the criminal justice system” (paper presented at the Justice in the Round Conference, 2011) at 9 as cited in Gordon and MacGibbon, above n 3, at 13 (emphasis in original).

32 Gordon and MacGibbon, above n 3, at 12.

33 David Lomas “The Problem with Prisons” *The Listener* (online ed, Auckland, 30 July 2011).

34 At 5.

35 Corrections (Mothers with Babies) Amendment Act 2008, s 4.

36 Kingi and others, above n 6, at 5.

under 24 months should be able to have them in prison with them.³⁷ The World Health Organization notes that children with mothers living in special circumstances, such as in prison, should receive special attention and extra support, and that mothers and babies should remain together where possible.³⁸

B *Impacts of the Act*

At the select committee stage, a submission by the Children's Commissioner supported the Corrections (Mothers with Babies) Amendment Bill "in principle", and re-emphasised "that the best interests of the child must be the paramount concern in making decisions about placement of children of prison inmates".³⁹ However, the Children's Commissioner also recommended that "imprisonment of parents should be avoided where possible through the use of non-custodial sentences or home detention".⁴⁰

Thus the phrase "to provide for the best interests of the child" poses a difficult dilemma. Whilst there is clear evidence that parental separation can harm a child's development, living in prison—even in separate units—also has problematic implications on their welfare. The majority of the women prisoners who thought it was *not* a good idea for mothers to have their children aged up to 24 months with them in prison simply reasoned that "[c]hildren should not be brought up in prison".⁴¹

This in part echoes the sentiment of the Children's Commissioner's submission, which noted concerns of developmental and social risks associated with children living in prison. The prison environment is "associated with developmental decline in cognitive and locomotor skills of children aged over 4 months",⁴² "mixing solely with imprisoned adults, who may have social and psychological problems" themselves,⁴³ and the child being punished alongside the mother by "living in a restrictive prison environment".⁴⁴ The age limit is also problematic; while 24 months is an improvement on six, especially for bonding and secure attachment purposes, it may still lead to a traumatic and detrimental separation once the child reaches the threshold age. Kingi found that mothers on release from prison struggled to reconnect with their children, and younger children particularly showed signs of insecurity, clinginess, anger, and fear and distrust of their mother leaving them again.⁴⁵

The submission also recommended a thorough list of amendments that were needed before it would be appropriate to accommodate pre-school children. These included further consultation on the age limit, a requirement for the chief executive to receive advice from child development professionals before making a decision about the child's best interests, provision for ongoing independent monitoring of the best interests of the child in prison and widening "appropriate facilities" to include broader parenting programmes and community support.⁴⁶ While the current Amendment Act includes some

37 At 21.

38 World Health Organization and UNICEF, above n 19, at 10 and 12.

39 Children's Commissioner "Submission to the Law and Order Committee on the Corrections (Mothers with Babies) Amendment Bill 2006" at Executive Summary [1]–[2] and [5.1].

40 At Executive Summary [3] and [5.3].

41 Kingi and others, above n 6, at 22.

42 Children's Commissioner, above n 39, at [4.17].

43 At [4.18].

44 At [4.19].

45 Venezia Kingi "The Children of Women in Prison: A New Zealand Study" (paper presented to the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) at 6.

46 Children's Commissioner, above n 39, at [5.6]–[6.1].

of these recommendations, some were not incorporated. The chief executive must be satisfied that the mother meets certain requirements of the parenting agreement under s 81(b), but there remains little provision for *ongoing* independent monitoring⁴⁷ of the best interests of the child living in prison, apart from basic health checks.⁴⁸ And although the phrase “best interests of the child” is used repeatedly in the amendments, there is no specification of matters that should be considered for this to happen.

The Amendment also requires provision for “appropriate facilities for the accommodation under the age of 24 months, and that those facilities support the developmental needs of children” for every prison in which female prisoners are imprisoned, “to the extent practicable within the resources”.⁴⁹ This limitation, whilst pragmatic, illustrates the reality of providing appropriate mother and baby units. New Zealand only has three women’s prisons, located in Auckland, Wellington and Christchurch. This means that women who are not based in these three centres, in order to have their baby in a self-care unit with them, have to separate themselves and their children from their family, community and support systems. This makes it difficult to implement parenting and family support programmes, and increases the trauma of separation once a child reaches two years and must be placed with an “alternative caregiver”⁵⁰ who may live far away from the women’s prison.

The Amendment Act clearly attempts to address the harm that is caused by separating young children from their mothers, especially in the first two years of life, and recognises the special attention and facilities needed to appropriately manage mothers and their babies in prison. It is a step forward for New Zealand in recognising the short-term and long-term effects of maternal imprisonment on children, families and society, and the value of retaining connections for rehabilitative purposes and reducing reoffending. However, it is largely still a mechanism that addresses the symptoms of imprisonment, providing for those already sentenced without questioning whether the sentence itself is appropriate.

C *The sentencing process*

(1) Principles and purpose

The Sentencing Act 2002 governs the sentencing process in New Zealand. Section 7 contains the overriding purposes of sentencing, and s 8 sets out principles that a judge is to take into account when sentencing offenders. There is no specific provision that mandates consideration of the effect of sentencing on offenders with children. However, there is capacity for broad interpretation of a number of sections in order to consider offenders’ children. There is an emphasis on imposing “the *least* restrictive outcome that is appropriate in the circumstances”,⁵¹ a mandate to “take into account any *particular circumstances* of the offender” that mean that an otherwise appropriate sentence would “be disproportionately severe”,⁵² and “the offender’s personal, family, whanau, community, and cultural background in imposing a sentence with a partly or wholly

47 At [6] (emphasis added).

48 Corrections (Mothers with Babies) Amendment Act, s 81B(d)(ii).

49 Section 81C(1) (emphasis added).

50 Section 81(b)(b).

51 Sentencing Act 2002, s 8(g) (emphasis added).

52 Section 8(h) (emphasis added).

rehabilitative purpose”.⁵³ Therefore, although there is a need for consistency⁵⁴ and for sentences to be within the limits of the sentence for the offence, there is some scope for the judge to take account of other factors, including the circumstances and background personal to the offender. A significant feature of sentencing in New Zealand is that the sentencing Judge is vested with a discretion.⁵⁵ Section 16 also has a strong presumption against imprisonment, based on “the desirability of keeping offenders in the community as far as that is practicable”,⁵⁶ and there are a number of requirements that must be met before a sentence of imprisonment may be imposed.⁵⁷

(2) Pre-sentence reports

If an offender pleads guilty to, or is found guilty of, an imprisonable offence, s 26 gives the court the option to direct a probation officer to provide a pre-sentence report.⁵⁸ This report can include “information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender”,⁵⁹ and “information regarding the factors contributing to the offence, and the rehabilitative needs of the offender”.⁶⁰ This section also provides the probation officer the opportunity to make a recommendation as to the appropriate type of sentence, including alternatives to imprisonment such as supervision, home detention or community work and conditions of those sentences.⁶¹

(3) Alternatives to imprisonment

The Sentencing Amendment Act 2007 amended the principle Act to introduce additional community-based sentences⁶² and elevate home detention to a stand-alone sentence.⁶³ The policy behind the amendment was expounded in the Explanatory Note to the Criminal Justice Reform Bill:⁶⁴

The purpose of the Bill is to introduce a range of measures to arrest the sharp increase in the prison population in recent years. This increase is no longer sustainable, neither financially nor socially. New Zealand's imprisonment rate is considerably higher than countries that we habitually compare ourselves with, such as the United Kingdom, Canada, and Australia. The Bill, which includes some measures that will have an immediate effect and others that will take longer for their impact to be felt, is intended to contribute to a reduction in the imprisonment rate over time.

This recognises that high rates of imprisonment are taxing on the economy, families, and society in general, and shows commitment to providing alternatives.

53 Section 8(i).

54 Section 8(e).

55 Geoff Hall “Sentencing” in Warren Brookbanks and Julia Tolmie (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2009) 249 at 253.

56 Section 16(1).

57 Section 16(2).

58 Section 26(1).

59 Section 26(2)(a).

60 Section 26(2)(b).

61 Section 26(2)(d)–26(2)(i).

62 Section 10A.

63 Section 15A.

64 Criminal Justice Reform Bill 2007 (93–1) (explanatory note) at 1.

D *Benefit fraud, mothers and the courts*

(1) *Hogan v Ministry of Social Development*

There have been several cases in New Zealand concerning mothers with young children appealing against sentences of imprisonment for benefit fraud. In *Hogan v Ministry of Social Development*, four of the five appellants were women who were first offenders, had up to three children, and were sentenced to between six and nine months' imprisonment for dishonestly obtaining between \$22,766 and \$48,576.⁶⁵ In their interpretation of the Sentencing Act, the Judges advocated a balancing exercise when weighing up the various factors of ss 8, 7 and 16.⁶⁶ Despite the endorsement of the District Court Judge's observation that there was "no presumption in favour of imprisonment" he believed that there was "long standing support" for six to nine months' imprisonment when fraud amounted to \$15,000 or more over a significant period. The Court made the following statement in summary of the issue:⁶⁷

Offenders ought not generally seek refuge from a sentence of imprisonment behind the tender age of their children if there is a need to deter other offenders from a view that prison would not be visited on them simply because they happen to have small children ... The size of the benefit may be dependent upon that fact of children being in the family. The family situation of an offender including the wellbeing of children must of course form part of the personal circumstances being only one of a number of relevant factors that a judge must consider. The weight afforded to it must depend on all the circumstance of the case. As said in *R v Prescott* the effect on an appellant's imprisonment on an offender's children is a "sad but inevitable consequence of offending at this level". Of course the effect of a sentence on children is a mitigating factor in relation to the length of any custodial term imposed, and the common granting of leave to apply for home detention illustrates an approach by District Court Judges to ameliorate against the severity of short terms of imprisonment.

This approach makes clear that an offender being a mother of dependent children cannot in itself be a reason to reject imposing a prison sentence. Despite assurance that weight of various circumstances must depend on each individual case, there does appear to be a presumption in favour of deterrence—and therefore imprisonment—in welfare fraud cases because of its prevalence. This was justified on the basis that the overall gravity and culpability reached the threshold that any other sentence would be inappropriate.⁶⁸ The offender's opportunity to apply for home detention was said to "ameliorate" against the severity of terms of imprisonment.⁶⁹ However, once a sentence is imposed, decisions on granting home detention are entirely at the discretion of the parole board.

The culpability of offenders in this context was also discussed in *Hogan*. It was acknowledged that those who fraudulently obtain the Domestic Purposes Benefit are usually young mothers who have young children and are otherwise of good character.⁷⁰ A common reason these offenders are convicted of benefit fraud is because they have partners who do not support them financially and are therefore dishonest about the

65 *Hogan v Ministry of Social Development* (2005) 23 CRNZ 500 (HC).

66 At [24].

67 At [40].

68 At [40].

69 At [40].

70 At [31].

existence of their partners for benefit purposes.⁷¹ However, the Court also stated that it cannot be a general assumption that fraud is committed to alleviate financial burdens of the family—sometimes it is “pure greed”.⁷² Even proof that the offending was to support children is not enough alone to justify a non-custodial sentence.⁷³ The court endorsed the statement by the Court of Appeal in *R v Osborne*.⁷⁴

There is not much doubt that much, perhaps most, of the money Ms Osborne obtained went on what could broadly be regarded as the necessities of life for herself, her children and her partner. But likewise, it is clear that the Judges in the District Court and High Court recognised the nuances of the situation. Sentencing is often necessarily carried out without detailed inquiry into all the minutiae that collectively provide the context to the offending. Broad-brush assessments are necessary. A sentencing approach which treats as relevant the amount of money which was obtained by fraud seems to us to be acceptable.

An emphasis on deterrence and a consideration of the amount of money defrauded, rather than the context and culpability of offending, was a priority for the Court in their sentencing approach for these kinds of offences. It certainly promotes consistency;⁷⁵ however, it arguably gives disproportionate weight to deterrence alone rather than being a balancing exercise based on the factors of the Sentencing Act. The Court in *Hogan* asserted that because the overall gravity and culpability reached the threshold that under the Act, any other sentence would be inappropriate. However, that very culpability, or lack thereof, was largely dismissed. Robert Lithgow, commenting on *Hogan*, passionately stated that:⁷⁶

If appellate Judges do not take the lead and use all the variations of the Sentencing Act constructively then they are defaulting on their duty to use the legislation given. They are defaulting to the incessant one way auction of the Sensible Sentencing Trust and Crown submissions that every crime is worse than the one before, society is getting worse, criminals today are worse than criminals yesterday.

This approach of the full Court in *Hogan* significantly influenced later decisions with similar fact scenarios, such as *Davey v Ministry of Social Development* in 2009 in the High Court⁷⁷ and a plethora of decisions including *Ministry of Social Development v Joseph* in the District Court.⁷⁸ Even though *Hogan* was decided before the 2007 amendment, it was regularly used as authority to dismiss home detention as an option in post-amendment cases, because it made clear that “a sentence of imprisonment is a usual and appropriate outcome for cases of substantial benefit fraud”.⁷⁹ Deterrence was evidently still a high

71 At [31].

72 At [31].

73 At [35].

74 *R v Osborne* CA468/04, 14 February 2005 at [6].

75 Sentencing Act 2002, s 8(e).

76 Robert Lithgow “Criminal Practice: Sentence Appeals” [2005] NZLJ 433 at 436.

77 *Davey v Ministry of Social Development* HC Palmerston North CRI-2009-454-47, 15 December 2009.

78 *Ministry of Social Development v Joseph* DC Palmerston North CRI-2009-054-4281, 9 February 2010.

79 *Davey*, above n 77, at [15].

priority for Judge White in the District Court in *Harris v The Ministry of Social Development*.⁸⁰

You bear a card for others to read, Ms Harris. Defraud the revenue in this way in substantial sums and prison will be the outcome and everybody in Paeroa needs to know that.

This was not disputed in the failed appeal to the High Court, where the Judge did not accept that the District Court's failure to consider the appellant's young children was an important point.

This punitive approach has significant implications for mothers and their children. Kingi's profile of women offenders identified that of those surveyed, they generally had limited educational skills, little or no work experience, were predominantly welfare dependent before coming to prison (86 per cent), lived in rental accommodation or with family (80 per cent) and were often single parents (40 per cent).⁸¹ This indicates the vulnerability and severe financial hardship of female prisoners, issues which are further exacerbated for their children when a sentence of imprisonment is imposed. Reliance on welfare is also an important factor; in these cases, those most vulnerable tend to attract more punitive sentences. Issues of power imbalances for women in relationships with partners who do not financially support the family are also largely ignored. Under benefit regulations technically they are considered as in a relationship and thus to claim more as a single parent is considered fraud.⁸²

E *Promise of change?*

In *R v Simanu*, Woolford J exercised discretion to impose a sentence of home detention in place of imprisonment due to the two women being mothers of young children.⁸³ Alongside considering culpability, he particularly took into account the parole officer's pre-sentence report. This acknowledged that while a sentence of imprisonment was usually imposed for offending with this degree of seriousness, home detention was the "preferred option" for them and their families as it would enable them to care for their children.⁸⁴ The first convicted mother had a 16-day-old baby, and it was noted by the Prison Service that an application to have her newborn accompany her to prison was possible.⁸⁵ However, it was accepted that she was "ill prepared" for this type of sentence.⁸⁶ The second mother who was convicted was also sentenced to home detention and her sentence was reduced, despite the offence being more serious than the first, involving significant amounts of money in money laundering offences. Instead of this seriousness being a barrier to a final sentence of home imprisonment as in *Hogan*, community service was included as an added punitive measure.⁸⁷

Thus the gravity of the offence was not undermined; the Judge was able to impose a sentence that still reflected the need for accountability, promoted a sense of responsibility, denounced the conduct and deterred the offenders and others from acting in the same

80 *Harris v The Ministry of Social Development* HC Rotorua CRI-2010-463-22 at [8].

81 Kingi, above n 45, at 3.

82 Social Security Act 1964, s 127.

83 *R v Simanu* HC Auckland CRI-2008-004-20453, 16 December 2010.

84 At [58].

85 At [27].

86 At [26].

87 At [74].

way.⁸⁸ By using the old and new provisions constructively, the Judge was able to assist in rehabilitation and reintegration and achieved a balance between the *equally* important principles in ss 7 and 8 of the Sentencing Act.⁸⁹

I must take into account the contrasting principles: the need to adopt the least restrictive outcome appropriate; the need to take account of anything that would make any otherwise proper sentence disproportionately severe and the need to recognise you in the context of your families.

All these outcomes were achieved without resulting in a fragmentation of families or separation of young children from their mothers. A similar conclusion was reached in the High Court decision of *Beedell v Ministry of Social Development*, which held a relatively rare commitment to home detention and community work as providing sufficient deterrence, with the existence of two young children considered a strong mitigating factor.⁹⁰ This exemplifies that the rights of children *can* be considered under the framework of the Sentencing Act without significantly compromising factors important to the Court in *Hogan* and *Osbourne* such as deterrence.

F Appellate-level decisions

In recent years, two Court of Appeal judgments have considered the appropriate sentence for benefit fraud concerning mothers with dependent children. *Ransom v R* in 2010 addressed the issue of whether imprisonment was necessary to mark benefit fraud offending.⁹¹ The fraud involved a sum of \$127,985 over 10 years.⁹² The decision in the Court in part disagreed with the traditional assessment that a certain seriousness of fraud automatically warrants imprisonment, instead saying that there is no prescriptive or usual sentence, and the assessment needs to be more nuanced:⁹³

We have concluded that a sentence of home detention will, in conjunction with one of community work, adequately respond to the sentencing goals of accountability, denunciation and deterrence. While the remorse expressed by Ms Ransom is not as fulsome as one may have liked and there is no real ability to repay the dishonestly obtained money, the need for her to care for her child, the benefits of ensuring that her husband returns to paid employment (something we were assured by Mr. Laurenson he would do if the appeal were successful) and her acceptance of responsibility by entering pleas of guilty persuade us that home detention is an appropriate sentence and responds adequately to the sentencing goals to which we have referred.

It was also noted in the postscript of the judgment that a *significant* factor in the Court's decision to allow the appeal and substitute home detention was concern for the care of their six-year-old child and the consequences of imprisonment.⁹⁴ The child had "considerable behavioural difficulties, which [had] been exacerbated by his mother's

88 At [43].

89 At [44].

90 *Beedell v Ministry of Social Development* HC Wanganui CRI-2010-483-9, 11 February 2010 at [25].

91 *Ransom v R* [2010] NZCA 390, (2010) 25 CRNZ 163 at [1].

92 At [1].

93 At [42].

94 At [47].

absence from the family home”.⁹⁵ This had also resulted in the husband having to give up work and go on a social welfare benefit to look after the child.⁹⁶

The 2012 Court of Appeal judgment of *Heta v R* allowed an appeal of 12 months’ imprisonment and reduced the sentence to eight months’ imprisonment for three charges of benefit fraud.⁹⁷ The Court held that the sentencing Judge made a material error of law by assessing on quantum alone, rather properly assessing culpability.⁹⁸ It also found that the Judge insufficiently took into account the effect that imprisoning Ms Heta would have on her family, especially her two younger children, and was incorrect to assume she could rely on extended whānau in deciding what term of imprisonment was proper for her offences.⁹⁹ Home detention would have been preferred to the eight months’ imprisonment; however, it was found that Ms Heta’s address was no longer available for this purpose.¹⁰⁰

This approach of taking into account and investigating personal circumstances such as the care of dependent children was picked up on in the High Court in 2013 with *Maa v Ministry of Social Development* and *Frost v Ministry of Social Development*.¹⁰¹ Toogood J tactfully challenged the District Court Judge’s decision on appeal in *Frost*:¹⁰²

I have no doubt that the experienced District Court Judge who sentenced you turned his mind to home detention since it had been referred to by the probation officer and in the submissions of counsel for the informant as a possible alternative to imprisonment. But the problem is that he made no reference in his sentencing remarks to that possibility. That may have been an oversight, but it does appear that the Judge focused very much on deterrence at the expense of other factors.

The factors noted by his Honour included the needs of her two-month-old baby who was being breastfed, the needs of her 15-year-old daughter who was living at home, the low risk of reoffending, and the stable relationship with her partner and father of the baby.¹⁰³ Thus it was indicated that focusing “on deterrence at the expense of other factors” was not an appropriate approach to take and indeed the *absence of their discussion* was significant.¹⁰⁴ Toogood J went on to note that home detention is still a significant and punitive sentence and that the choice is not necessarily between one or the other:¹⁰⁵

After careful consideration of the present facts and the other cases, I am satisfied that the Judge’s conclusion in this case was wrong and that, despite the factors indicating the appropriateness of a term of imprisonment, a less restrictive penalty should have been imposed. In my view, a period of home detention will serve adequately to punish you and deter you from further offending and to deter others from offending of this kind, while

95 At [47].

96 At [47].

97 *Heta v R* [2012] NZCA 267.

98 At [26].

99 At [35].

100 At [40].

101 *Maa v Ministry of Social Development* [2013] NZHC 1846; and *Frost v Ministry of Social Development* [2013] NZHC 1239.

102 *Frost*, above n 101, at [15].

103 At [12].

104 At [15].

105 At [16].

recognising that your prospects of rehabilitation and putting these matters behind you will be enhanced by your ability to remain at home caring for your baby and your teenage daughter.

These appellate-level judgments show significant promise in moving away from the approach in *Hogan* and *Osbourne*, by making constructive use of the 2007 home detention amendment. However, the Court in *Heta* also stated that it could not make a binding authority on the issue of balancing between imprisonment and home detention:¹⁰⁶

Whether a short-term sentence of imprisonment or home detention was imposed called for specific analysis. Where the scales were finely balanced the appellate Court would normally defer to sentencing Judge and it was not for the Court to revisit merits of a decision to decline home detention in absence of material discretionary error.

The limits of the authority of an appellate court in sentencing mean that this matter is still largely discretionary for the lower courts. While this can enable appropriate analysis on a case-by-case basis, it also means that the lower courts can give significantly different weights to the factor that the accused has dependent children. As illustrated by the variety of outcomes in similar fact scenarios, even after decisions like *Ransom*, the judicial approach is still very mixed. The District Court still tends to favour imprisonment, and there is significant variation between different judges in their consideration of pre-sentence reports and the potential for home detention. The new sections which provide a number of alternatives to imprisonment are not always being used constructively, especially where considering the interests and welfare of children appears to compete with populist and taxpayer pressure.

V International Law Obligations

The issues and risks associated with young children being separated from their mothers, and alternatively being in prison with them, both raise questions of significant intrusion on or abuse of the children's rights. New Zealand is party to and has ratified a number of conventions and international human rights instruments that specifically and generally protect children's human rights and their right to family life, such as the United Nations Convention on the Rights of the Child (UNCRC)¹⁰⁷ and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁸

A *Children in prison*

Despite good intentions to focus on the "best interests of the child" being the rationale for Mother and Baby prison units, they are still potentially problematic in light of international obligations. The Convention Against Torture and Other Cruel, Inhuman or Degrading

106 *Heta*, above n 97, at [21].

107 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC].

108 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR], art 23(1).

Treatment or Punishment was ratified by New Zealand on 10 December 1989.¹⁰⁹ The right not to be subjected to torture or cruel treatment is also affirmed in s 9 of the New Zealand Bill of Rights Act 1990. Children spending significant time in prison, even in separate units, could potentially be considered “degrading treatment” and “punishment” under the Convention. The Children’s Commissioner’s select committee submission noted the risks and concerns of children living in prison; considering a children’s rights perspective highlights the importance of having thorough safeguards and continual review procedures in place for the Mother and Baby units. However, it also illustrates the importance of reducing the need for these facilities at all, by moving towards a proactive approach where children’s rights are considered at the sentencing stage.

The UNCRC was ratified by New Zealand in 1993.¹¹⁰ There are several articles that are particularly significant for children facing the prospect of a parent, particularly a mother, being imprisoned: art 2 states that children’s rights are to be respected without discrimination, including on the basis of the *status of the parent*; art 3 mandates that the best interests of the child must be a *primary consideration* in all actions concerning children; art 6 states that every child has the inherent right to survival and *development*; and arts 7 and 8 state that *as far as possible*, the child has the right to know and be cared for by his or her parents, and to preserve family relationships. Finally, art 9 expresses that a child who is separated from their parents has a right to personal and direct contact with both parents on a regular basis. Where the state initiates separation, the child needs to know where the parent is being held.

The commitment to international instruments is, to a degree, recognised by direct ratification into domestic statutes. For example, one purpose of the Children’s Commissioner Act 2003 is to confer additional functions and powers on the Commissioner to give better effect in New Zealand to the Convention.¹¹¹ The New Zealand Bill of Rights Act also affirms New Zealand’s commitment to the ICCPR.¹¹² However, the legal status of these instruments in the courts is unclear.¹¹³

B *The right to family life*

The right to respect for family life is not often considered applicable to prisoners as they have already had their right to liberty removed by the state. However, every interference with their rights must be justified as a necessary and proportionate consequence of their imprisonment.¹¹⁴ The children of prisoners, as a consequence of their parent’s loss of liberty, are exceptionally vulnerable. The United Nations has proclaimed that childhood is entitled to special care and assistance:¹¹⁵

109 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987); and “Convention Against Torture” (2008) Human Rights Commission <www.hrc.co.nz>.

110 See UNCRC, above n *; and “United Nations Convention on the Rights of the Child” (2008) Human Rights Commission <www.hrc.co.nz>.

111 Children’s Commissioner Act 2003, s(3)(c).

112 New Zealand Bill of Rights Act 1990, long title.

113 Graeme Austin “The UN Convention on the Rights of the Child — and the domestic law” (1994) 1 BFLJ 63 at 64.

114 Maryam Tabib and Nuala Mole “Imprisoned Parents and the Right to Family Life” [2006] IFL 97 at 97.

115 UNCRC, at Preamble.

... the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ...

The analysis in *Tavita v Minister of Immigration*¹¹⁶ suggests the substantive significance of the UNCRC and other human rights obligations pertaining to family life for New Zealand jurisprudence.¹¹⁷ Despite Cooke P's reluctance to make a binding statement at the time, he suggested that *legitimate* criticism could extend to New Zealand courts if they accepted that the Executive could ignore international rights, norms or obligations because a domestic statute giving general discretionary powers did not mention them.

The case was an appeal of a discretionary immigration decision that declined to revoke a removal order of a father from New Zealand, and prevented him from returning for five years. The appellant placed reliance on the ICCPR and the UNCRC. Article 23(1) of the ICCPR in particular affirms the centrality and importance of the right to family life and the family as a unit in society: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."¹¹⁸

Cooke P looked to the European Court of Human Rights for guidance on the issue as to whether, against the background of powers available under the Immigration Act 1987, the Minister and the department should have had regard to the international obligations concerning the child and the family.¹¹⁹ Both cases he considered¹²⁰ related to art 8 of the European Convention on Human Rights:¹²¹

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

They also emphasised balance when weighing up legitimate public interests such as economic wellbeing and prevention of crime, with the seriousness of the interference with the applicants' right to respect for their family life. There was a need for proportionality between the means employed and the legitimate aims that were pursued. In both cases it was determined that the means used were disproportionate. Cooke P summarised the significance for the appeal in *Tavita*.¹²²

116 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

117 Graeme Austin "The UN Convention on the Rights of the Child — and domestic law" (1994) 1 BFLJ 87 at 92.

118 ICCPR, art 23(1).

119 *Tavita*, above n 116, at 262–265.

120 See *Berrehab v Netherlands* (1988) 11 EHRR 322; and *Beldjoudi v France* (1992) 14 EHRR 801.

121 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

122 *Tavita*, above n 116, at 265.

It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be required under the two international instruments relevant in the present case, but the basic rights of the family and the child are the starting point.

Thus, under these instruments, legitimate aims of the state such as the importance of preventing and deterring crime are still recognised. However, they call for an approach that does not *disproportionately* infringe on the fundamental rights pertaining to the family and of children.

It was generally thought that *Tavita* implied that the international obligation of considering the child's best interests was a mandatory relevant consideration in accordance with administrative law principles.¹²³ The more recent case of *Ye v Minister of Immigration* posed a similar question to *Tavita*, in considering the status of the interests of New Zealand-citizen children in a decision to remove their "overstayer" parents from New Zealand.¹²⁴ The Supreme Court seemed to go slightly further in their interpretation of provisions of the Immigration Act 2009. Section 58 is highly discretionary, and denies any obligation to even consider cancellations of deportation orders.¹²⁵ However, the Court held that the "competing public interest" question would only outweigh humanitarian and "undue harshness" concerns if that public interest went *beyond* the general interest in the integrity of the immigration system.¹²⁶ This was justified largely by the principle that the Act should be interpreted consistently with New Zealand's international obligations, particularly under art 3 of the UNCRC.¹²⁷ Article 3(1) provides that in all actions concerning children, by public and administrative authorities, the best interests of the child shall be "a primary consideration". Although Tipping J noted that "[a] primary consideration does not mean *the*" or a "paramount consideration"¹²⁸ as in the Care of Children Act,¹²⁹ the Court was prepared to go a long way to read qualifications into the words of the relatively strict provision in order to comply with international obligations.¹³⁰ The later case of *B v G*, in the context of adoption, affirmed that unless the words of a statute rule out such an interpretation, a court should favour an interpretation that is in line with the UNCRC and New Zealand's international obligations.¹³¹

This suggests a move away from a strict dualist approach to international human rights obligations when courts and executive powers hold discretionary decision-making power. It appears to follow the stronger approach, as suggested in different contexts such as in *Sellers v Maritime Safety Authority*¹³² and *Zaoui v Attorney General*,¹³³ of reading the statutory power subject to the substantive limit that it cannot breach relevant international obligations. This may go *beyond* merely giving effect to international conventions if they are specifically ratified in the statute concerned.

While these cases are significant for a creating a general picture of how the rights of children should be complied with in domestic law, they are in the context of immigration

123 "New Zealand: *Ye v Minister of Immigration*" [2010] PL 201 at 201.

124 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

125 Immigration Act 2009, s 58.

126 "New Zealand: *Ye v Minister of Immigration*", above n 123, at 202.

127 At 202.

128 *Ye v Minister of Immigration*, above n 124, at [24] per Tipping J.

129 Care of Children Act 2004, s 4.

130 "New Zealand: *Ye v Minister of Immigration*", above n 123, at 202.

131 *B v G* [2002] 3 NZLR 233 (CA) at [43].

132 *Sellers v Maritime Safety Authority* [1999] 2 NZLR 44 (CA).

133 *Zaoui v Attorney General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

and adoption law, which does differ from the sentencing context. As of yet, there been no cases in New Zealand which employ international obligations regarding children in the context of sentencing their parents, which leads us to look to other jurisdictions.

VI Lessons from Other Jurisdictions

A South Africa

Jurisdictions such as South Africa have taken a significantly more rights-based approach in their legislative framework. A developing child's-rights jurisprudence is emerging with the UNCRC and the African Charter on the Rights and Welfare of the Child. African Nations have been leaders in a sense, adopting a uniquely "African" approach with their own Charter and 34 constitutions that mention the rights of children.¹³⁴ An example of their unique approach is the small but significant difference in wording between the United Nations Convention and the African Charter. The Convention refers to the best interests of the child as "*a* primary consideration", whereas the African Charter uses "*the* primary consideration", a difference picked up by Elias CJ in *Ye*. This subtle but important distinction gives different weight to the interests of the child; in the African Charter, the child's interests are to be paramount over other interests or rights.¹³⁵ The Charter is also unique in that it specifically provides for the interests of children of imprisoned mothers:¹³⁶

States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

There is an emphasis on *alternatives* to imprisonment in the provisions, and generally on the purpose of the prison system as having a reformatory and rehabilitative purpose. The Charter was referred to in *S v M*, which involved a single mother of four children who was convicted of various counts of fraud and theft.¹³⁷ The case was an appeal in the South African Constitutional Court, under a framework of a constitutional provision which

134 Ann Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" (2009) 9 African Human Rights Law Journal 482 at 486.

135 At 486.

136 African Charter on the Rights and Welfare of the Child OAU CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999), art 30.

137 Skelton, above n 134, at 490.

mandates that in all matters involving children, the children's interests should be paramount. Article 30 of the Charter, alongside other international instruments, were used in the judgment to suggest that a new direction be taken, stating the "best interests of the child need to be considered by every judicial officer when considering the sentence to be imposed on a primary caregiver".¹³⁸ The Court allowed the appeal and replaced the prison sentence with a suspended sentence and correctional supervision.¹³⁹ It emphasised that not only M herself, but "her children, the community and the victims who will be repaid from her earnings, [stood] to benefit more from her being placed under correctional supervision than from her being sent back to prison".¹⁴⁰ Thus, alternatives to imprisonment were considered an advantage rather than a disadvantage to the victims and wider society.

The attitude of the Court in *S v M* in coming to this conclusion was still pragmatic, acknowledging potential criticisms of this approach. It did not claim that family breakdown is entirely preventable, or can be cured by the state. However, it recognised that the state can *minimise* the negative effects of its agencies on those who are vulnerable:¹⁴¹

No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. ... in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.

It also discussed potential criticism that this attitude would unfairly "excuse" parents from punishment:¹⁴²

... it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.

New Zealand can glean insight from this progressive approach. The Court discussed that the new provision is one way to respond more expansively to South African's obligations as a state party to the United Nations Convention of the Rights of the Child.¹⁴³ Despite also being a state party, New Zealand currently has little to show for its commitment to the Convention, besides limited incorporation into domestic legislation. New Zealand also has the tools to implement home detention and non-custodial sentences under the Sentencing Act, which provide opportunities "to protect ... children as much as is reasonably possible

138 *S v M*, above n 1, at [122].

139 At [77].

140 At [76] per Sachs J (footnote omitted).

141 At [20] (footnote omitted).

142 At [35].

143 At [16]; and UNCRC.

in the circumstances from avoidable harm".¹⁴⁴ South African courts have also advocated a balancing approach that is similar to New Zealand's sentencing principles under s 7 of the Sentencing Act, endorsing the "triad" of balancing the nature of the crime, the personal circumstances of the criminal and the interests of the community:¹⁴⁵

The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.

The purpose of not giving undue weight to certain factors at the expense of others has significant similarities to s 7(2) of the Sentencing Act. Balancing different factors such as accountability, protection of the community, rehabilitation and reintegration and taking account of the context of the offender is also echoed in ss 7 and 8.

This approach is consistent with the evolving attitude of New Zealand courts towards international obligations as demonstrated in *Tavita* and *Ye*: certain rights should not simply be dismissed by overriding competing interests such as the deterrence of crime. While these are valid interests, the approach embraces the attitude that they should not have the effect of interfering significantly with the basic rights of the child and the family.

Therefore, giving due consideration to the significant and costly effects imprisonment can have on children should be a part of the sentencing evaluation, rather than assuming that this is merely a way for parents to "seek refuge from a sentence of imprisonment behind the tender age of their children" as feared in *Hogan*.¹⁴⁶

B *United Kingdom*

Human rights jurisprudence in the United Kingdom is arguably more evolved than in New Zealand. However, the United Kingdom has clear influence and applicability to New Zealand law because our legal system finds its roots in, and is still heavily influenced by, the English common law. The Human Rights Act 1998 (UK) gave further effect to rights and freedoms guaranteed under the European Convention on Human Rights,¹⁴⁷ generally increased the ability of the courts to interpret domestic legislation in light of Convention rights,¹⁴⁸ safeguarded against public authorities from acting in a way which is incompatible with those rights¹⁴⁹ and provided powers of remedial action.¹⁵⁰

R (on the applications of P and Q) v Secretary of State for the Home Department engaged the art 8 European Convention rights of the child to family life when reviewing the decision to not provide places for mothers and their babies in a Mother and Baby

144 *S v M*, above n 1, at [35].

145 *S v Banda* 1991 (2) SA 352 (B) at 355A-B/C as cited in *S v M*, above n 1, at [10].

146 *Hogan*, above n 65, at [40].

147 Human Rights Act 1998 (UK).

148 Section 3.

149 Section 6.

150 Section 10.

Unit.¹⁵¹ Lord Phillips MR described the balancing exercise to be carried out—between art 8 rights and the seriousness of the offence—when a mother is convicted of an imprisonable offence:¹⁵²

It goes without saying that since 2nd October 2000 sentencing courts have been public authorities within the meaning of s 6 of the Human Rights Act. If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by s 6(1) to carry out the balancing exercise identified by Hale LJ in *In re W & B*... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under s 6(1), ask for more. It will no longer be permissible, if it ever was, for a court to choose a custodial sentence merely because the mother's want of means and her commitments to her children appear to make a fine or community sentence inappropriate, if the seriousness of the offence does not itself warrant a custodial sentence. In such circumstances it must ensure that the relevant statutory authorities and/or voluntary organisations provide a viable properly packaged solution designed to ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children.

The balancing exercise referred to is very similar to the one identified by Cooke P in *Tavita*, recognising the legitimate aims of the state under art 8(2) while still using an approach that does not *disproportionately* infringe on the fundamental rights pertaining to the family and children. In determining whether the interference with the convention right outweighed a legitimate aim of the state, Lord Phillips also created a relatively high test:¹⁵³

The more serious the intervention in any given case (and interventions cannot come very much more serious than the act of separating a mother from a very young child), the more compelling must be the justification.

He acknowledged European cases which stated that a prisoner's separation from family is an inevitable consequence of detention, and that only in exceptional cases would the detention of a prisoner a long way from home constitute a violation of art 8.¹⁵⁴ However, he went on to distinguish situations where mothers being separated from young children were "exceptional" cases, where "special considerations are always likely to apply".¹⁵⁵ It was made clear that the sentencing court has a duty under s 6 of the Human Rights Act to obtain information on the likely consequences of the separation on the child, and if need be, provide alternatives to a custodial sentence. Lord Phillips emphasised that a "mother's want of means and her commitments to her children" cannot be an excuse to give a prison sentence instead of alternatives such as a fine or community service. This demonstrates a commitment to moving beyond the attitude of using prison as an easy tool to deal with offenders who are financially and otherwise vulnerable, and suggests that it has been implemented too readily in the past.

151 Rona Epstein, Isla Masson and Ian Wise "*R (on the application of Aldous) v Dartford Magistrates' Court: Imprisonment for Debt — a Case Study*" (2011) 16 Cov LJ 57 at 57.

152 *R (on the applications of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 at [79].

153 At [78].

154 At [76].

155 At [78].

The later case of *R (on the application of Aldous) v Dartford Magistrates' Court* challenged the approach that Lord Phillips warned against—of using prison as a tool rather than a last resort.¹⁵⁶ The claimant was originally sentenced to prison for 90 days for failure to pay Council Tax arrears amounting to over £7,000 for the period 2003 to 2009.¹⁵⁷ She was the mother of five children, the youngest of whom had been diagnosed with autism, and she had been the victim of domestic violence.¹⁵⁸ The claimant had been asked outside court what her income and liabilities were, and she had filled in a standard form. “She made ... an offer to pay £20 per week, and some calculations were undertaken as to how long it would take her to pay off £7,000 ... at that rate”.¹⁵⁹ It was clear that the local authority sought the committal of the claimant to prison. The Judge on appeal to the High Court applied the principle from *R v Secretary of State for the Home Department* and concluded that alongside other issues, the Magistrates had failed to make enquiries in order to assess the effect of the parent's imprisonment on the claimant's children:¹⁶⁰

She went to court apparently not aware, or not fully aware, that the result of the day's proceedings might be that she would go immediately to prison, but that is what happened. There were two children at school who had no idea that that might happen. Whilst she was in prison they had to be looked after, and I understand that it was the claimant's husband who took most of the duties, but the youngest child is a person with a number of disadvantages, one of which is that he does not relate very well to his father because his father does not understand his speech.

The Judge also identified that the sentence had been used inappropriately; the option of imprisonment for failure to pay Council Tax was for those who could pay but were *wilfully* and *culpably* neglecting to.¹⁶¹ It was clear that the Magistrates had also failed to determine whether there were other ways to persuade the claimant to make payment, such as by attachment of the earnings of the claimant's husband. This case shows that the power to imprison mothers of dependent children, especially at a lower court level, is still a reality. However, it also shows a strong willingness from higher courts to protect the rights and interests of those children and a recognition of the detrimental consequences of imprisoning mothers. This recognition is now being established as an essential part of the sentencing equation and the duty of the court in the United Kingdom:¹⁶²

The existence of children cannot of course keep a person out of prison who should properly be sent to prison, but a sentencing court needs to be able to bear in mind what the effect on the children will be, and, if there are children and if the court does not have the information it needs in order to assess the effect of the parent's imprisonment on them, then the court must make enquiries so that it is properly informed.

C *Lessons for New Zealand*

New Zealand does not have the same powerful framework of full ratification of international human rights instruments into legislation as the United Kingdom has with its

156 *R (on the application of Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 (Admin).

157 At [3].

158 Epstein, above n 151, at 59.

159 *R (on the application of Aldous) v Dartford Magistrates' Court*, above n 156, at [6].

160 At [15].

161 At [14].

162 At [16].

Human Rights Act. The South African example also illustrates some limitations in New Zealand. The statement in *S v M* that it “was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution”¹⁶³ demonstrates that a substantial constitutional, and perhaps ideological, reform was required for this change to occur. New Zealand does not have the same context of a binding constitutional statute with a specific provision protecting and supporting the rights and welfare of children. Thus, much of the bearing of covenants such as the ICCPR and the UNCRC on domestic legislation is still largely a discretionary matter for the courts.

However, despite not having as full a toolbox as other jurisdictions, New Zealand still has the opportunity to extend a rights-based approach to the sentencing of mothers of dependent children. It is a party to several core human rights instruments that create a responsibility for the legislature and judiciary to ensure and protect the child’s right to family and healthy development. The Sentencing Act 2002, despite having no explicit mention of the interests of children of parents being sentenced to imprisonment, still contains principles that support the accommodation of family interests and circumstances, and thus can be interpreted in light of New Zealand’s international obligations to children. The amendments in 2007 introduced the option of home detention and more non-custodial sentences, providing avenues for judges to properly consider these interests in many cases.

New Zealand has made some progress in recognising the importance of the mother-child relationship and the costly and significant effects of separation with the Corrections (Mother and Child) Amendment Act. However, this only provides for women who are already imprisoned. There is an opportunity for progress at the sentencing stage, where currently the international human rights of dependent children are not being given significant weight.

VII Possibilities for Reform

There is potential for the rights of children to be duly recognised and advanced under the New Zealand Bill of Rights Act 1990 (NZBORA). As stated in its long title, the NZBORA was designed:

- (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.

Subsection (b) of the long title is significant, as it confirms the importance of the ICCPR to New Zealand. However, NZBORA does not fully incorporate the ICCPR: there is no section in NZBORA that protects the right to “family life” or the right of the child to have protection without discrimination.¹⁶⁴ As the United Kingdom cases show, the courts in the United Kingdom have a *greater ability* to protect these rights because they are enshrined by virtue of the European Convention in the Human Rights Act 1998 (UK). To allow a similar rights-based approach to evolve in New Zealand, these two articles of the ICCPR could be incorporated into NZBORA. If these rights were enshrined in domestic legislation, and

163 *S v M*, above n 1, at [10].

164 Compare ICCPR, arts 23(1) and 24(1).

interpretation in light of them was preferred, this would enable courts to give fuller effect to the rights of children and consider their welfare when interpreting domestic legislation. This would provide for, as in the United Kingdom, a greater duty on sentencing judges to bear in mind consequences of imprisonment on children, and to give greater attention to the various alternatives to imprisonment provided in the Sentencing Act. It may also remove some of the uncertainty and variation seen in the approach of the District Courts when considering the sentences of mothers of dependent children.

VIII Conclusion

The impacts of separating young children from their mother through imprisonment are dramatic and costly—on the children themselves, on families, on society, and on the state. These consequences highlight the importance of moving towards an approach that does not consider imprisonment a first response, but rather a last resort. New Zealand's sentencing regime allows judges to constructively exercise their discretion and to create more nuanced sentences that investigate, recognise and promote the rights and welfare of children. The Court of Appeal and in some cases the High Court have begun to accept that in many cases, imprisonment is far from appropriate. However, at District Court level, there needs to be more awareness of this changing direction, and greater attention needs to be given to provisions that provide alternatives. Particularly, there should not be a presumption in favour of imprisonment for deterrence purposes alone. Examples from other jurisdictions show that our duty under international human rights obligations does not require a binary choice between human rights and interests of the state: both can be balanced without either being sacrificed. As recognised by the United Kingdom, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children; it is the imposition of the sentence without paying appropriate attention to children's interests that threatens to do so. New Zealand courts can, and should, recognise that not doing so is fundamentally sentencing children, families and society to consequences that will extend far beyond the original verdict.

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.

—Sachs J¹⁶⁵

165 *S v M*, above n 1, at [18] per Sachs J.