

LAYERED DISADVANTAGES: WOMEN AND MOTHERS WITHIN AOTEAROA NEW ZEALAND'S BAIL SYSTEM

*Ella Rickie Shirtcliffe**

This article examines how women and mothers are impacted by Aotearoa New Zealand's bail system. It begins by identifying a shift towards a harsher bail culture, both in New Zealand and across Western jurisdiction. This shift is primarily characterised by an increased focus on public safety and has underscored a more risk-averse approach to bail decision-making. Stricter bail policies have led to a significant increase in the number of women held on custodial remand.

This article argues the public safety rationale of harsher bail policies does not map well onto women. It examines how women and mothers face layered disadvantages, both in their access to bail and while on custodial remand. It identifies how socially marginalised women are disproportionately affected by harsher bail policies and are at risk of being remanded in custody without a strong justification. It examines a further layer of disadvantage faced by mothers with dependent children. It suggests that during the pre-trial process, the impacts of incarceration on primary carers and their children often fail to be considered and supported. It argues that mothers on custodial remand face additional and disproportionate harm. This article joins a growing body of research critiquing the rate at which women are remanded in custody and concludes by suggesting initial steps to address the problem.

I INTRODUCTION

Over the past two decades, Aotearoa New Zealand's bail culture has become increasingly harsh, mirroring broader Western trends. Community protection concerns, sparked by high-profile violent offending by individuals released on bail, have driven a shift towards a more risk-averse bail system. The impacts have been significant. Across Western jurisdictions, the number of individuals on

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custodial remand has risen dramatically. Research projects that, by 2031, the custodial remand population in New Zealand will match the number of those formally sentenced.¹ Custodial remand sits in fundamental tension with criminal justice principles and represents a severe intrusion into an accused's procedural rights. As its use grows, it is increasingly drawing attention and criticism from legal scholars and advocates.

This article aims to contribute to this critique through a gender-specific examination of how New Zealand's bail system impacts women and mothers. Women's custodial remand rates in New Zealand, Australia and Canada have grown disproportionately to their male counterparts. Although a substantial body of overseas research focusing on women's experiences in the bail and remand context has begun to develop, it remains a relatively understudied topic in New Zealand. In light of the emergence of a more global trend, this article draws from international research while highlighting critical research gaps in the New Zealand context.

My approach is framed through the lens of layered disadvantage. Socially marginalised and vulnerable women are bearing the brunt of a tougher bail regime, despite typically posing a minimal threat to the public's safety. A series of interlapping disadvantages in these women's lives create barriers to their bail access and reduce their ability to comply with their bail conditions. These disadvantages intersect with racial inequalities, under which Māori women are at a disproportionately high risk of being remanded in custody.

Women who are mothers face a further layer of disadvantage. This article specifically focuses on mothers with dependent children, recognising that motherhood encompasses a broad range of relationships between mother and child. Mothers are significantly more likely than men to be primary caregivers to children.² However, the impacts of incarcerating mothers often fail to be considered in the pre-trial process, creating significant risks for their children. Further, while on remand, mothers are subjected to disproportionate and additional harm.

This article attempts to begin a process of unravelling the interlapping disadvantages faced by women in the bail context. In doing so, I reach the conclusion that the rate at which generally non-violent women and mothers are remanded requires attention and change. To that end, I suggest that raising the risk threshold in bail assessments and addressing the barriers to bail that women face are strong places to start.

I approach this topic mindful of my positionality as a young Pākehā female of relative privilege who identifies as a feminist. I have not had personal interactions with the criminal justice system, and I do not have children myself. My lived experiences and privileged identity therefore differ in

1 Ara Poutama Aotearoa—Department of Corrections and others *Long-Term Insights on Imprisonment, 1960 to 2050* (December 2022) at 8.

2 Isla M Masson "The Long-Term Impact of Short Periods of Imprisonment on Mothers" (PhD, King's College London, 2014) at 49.

meaningful ways from the women whom this article focuses upon. This has informed my choice to draw heavily from qualitative research which centres on women's personal experiences in the justice system.

Part II of this article examines how the public safety rationale driving stricter policies maps poorly onto women. It begins by outlining the bail decision-making process and how violent offending has driven a more risk-averse bail approach. Within this context, this article examines how women face difficulties in accessing bail and are at risk of being remanded for factors associated with social disadvantage rather than any risk to public safety. Part III focuses on women's roles and identities as mothers, how the pre-trial process overlooks mothers and their children's needs and the disproportionate harms experienced by mothers on remand. Part IV summarises the key findings of this article, proposing a series of changes to the bail system to address the rate of women on custodial remand.

II LAYER ONE: THE BAIL STAGE

A The Bail Act 2000

The Bail Act 2000 governs the process by which an individual accused of a crime is granted or denied bail. The question of bail arises at various junctures of an individual's progression through the justice system. Following arrest, the Police must decide whether to grant police bail or detain the accused in police custody.³ In some cases, the accused's criminal history or alleged offence will mean the Police cannot grant bail.⁴ Police bail lapses at the first court appearance, at which time the court must consider whether to release the individual at large (without restrictions), grant bail on reasonable terms or remand the individual in custody.⁵ Those on custodial remand are categorised as either remand-accused or remand-convicted. Remand-accused prisoners are legally innocent, while the latter have been found guilty and are remanded pending a sentencing hearing or appeal.⁶ This article uses the term "remand prisoner" to refer to both categories unless otherwise specified.

Bail is the presumptive starting point under the Act. However, this is subject to a series of exceptions that flip the presumption *towards* detention. Where an accused is subject to a reverse onus provision, either due to their criminal history or alleged offence, they must establish why bail should be granted.⁷ In all other cases, the onus rests on the prosecuting agency to establish there is just cause

3 Section 21(1)

4 Section 21(2).

5 Community Law *Lag Law: Your rights inside prison and on release* (3rd ed, Community Law Wellington and Hutt Valley, Wellington, 2015) at 18.

6 Holly Pelvin "Doing Uncertain Time: Understanding the Experiences of Punishment in Pre-trial Custody" (PhD, University of Toronto, 2017) at 12.

7 Sections 9–12 and 17A.

for the accused's continued detention. Section 8(1) sets out the test for just cause, under which the court must consider:

- (a) whether there is a risk that—
 - (i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or
 - (ii) the defendant may interfere with witnesses or evidence; or
 - (iii) the defendant may offend while on bail; and
- (b) any matter that would make it unjust to detain the defendant.

The court must grant bail if the risks referred to under s 8(1) can be mitigated through reasonable bail conditions.⁸ Section 8(2) sets out several additional factors the court may consider, including but not limited to the nature of the offence, the probability of conviction and any history of breaching bail conditions.⁹ However, these are non-determinative and, if relevant, only to the extent they may inform the court's assessment of the risks under s 8(1)(a).¹⁰

B Bail Climate

Bail has always involved a balancing act between an accused's procedural rights and broader community interests. However, the global trend towards stricter bail regimes has involved a marked shift in how that balance is struck. The original purpose of bail was mitigating the risk an accused would fail to appear at their court hearing.¹¹ Indeed, 19th-century case law from England suggests the courts considered the risk of flight as the *sole* goal of bail.¹² Although the risk of flight remains relevant, bail law is now much more concerned with an accused's risk of future offending.¹³ Angie McMahon suggests this focus gradually morphed into broader community welfare concerns, with bail systems increasingly interested in preventing future crime.¹⁴

8 Section 7(5).

9 Section 8(2)(a) – (h).

10 *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308, at [15].

11 Pelvin, above n 6, at 13.

12 *R v Rose* (1898) 67 LJQB 289, as cited in Robert Parke Roulston "The Quest for Balance in Bail: The New South Wales Experience" (1970) 5 University of Richmond Law Review 99 at 108.

13 David Brown "Looking behind the increase in custodial remand populations" (2013) 2 International Journal for Crime, Justice and Social Democracy 80 at 84–85.

14 Marilyn McMahon *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention* (Parliamentary Library and Information Service, Parliament of Victoria, August 2019) at 2.

Protecting public safety appears now to be an essential purpose of bail decision-making. This focus has primarily come in response to high-profile, violent offending by individuals released on bail.¹⁵ In New Zealand, public concern that dangerous offenders were too quickly granted bail became widespread after the murder of Christie Marceau in 2011. The offender, Akshay Chand, was released on bail close to Christie's home despite being arrested for her kidnapping and attempted assault only months prior.¹⁶ Extensive media coverage of Christie's murder, which centred mainly on the fact that Chand was on bail at the time, contributed to a growing sentiment that the bail system was too "soft" on dangerous offenders.¹⁷ In partnership with the Sensible Sentencing Trust—a victim advocacy group—Christie's parents began a petition for stricter bail laws, ultimately receiving 58,000 signatures.¹⁸

The petition was ultimately successful, with Parliament introducing an Amendment Act in 2013. The Act introduced a reverse burden provision for individuals charged with murder or Class A drug offences while expanding the list of specified offences to which a separate reverse burden already applied.¹⁹ Before the 2013 changes, a reverse burden had already been applied to individuals with a previous criminal history or those caught offending on bail.²⁰ Taken together, the net effect of the bail restrictions substantially raises the bail threshold for repeat offenders or those charged with serious crimes.

Violent offending has also spurred legislative reform in Victoria, Australia. The Victorian legislature introduced a series of bail restrictions between 2017 and 2018 in an immediate response to the crimes of James Gargasoulas, who, while on bail, committed a mass murder, killing six individuals and injuring many more.²¹ The amendments have contributed to a growing crisis in Victoria's remand population and have been the subject of significant critique and research.²² In this article, I compare and apply research from Victoria to New Zealand, in light of their geographic proximity, broadly similar bail practices and parallel rise in female remand populations.

15 At 18.

16 See generally *R v Chand* [2012] NZHC 2746.

17 See for example Anna Leask "Christie Marceau's last plea" *The New Zealand Herald* (online ed, New Zealand, 18 October 2012); and Anna Leask "Terrifying last moments at hands of insane killer" *The New Zealand Herald* (online ed, New Zealand, 18 October 2012); and Marriner "The Law on Bail: A Case For Reform" (LLB (Hons) Dissertation, Te Herenga Waka—Victoria University of Wellington, 2018).

18 Tracey Marceau "Petition of Tracey Marceau on behalf of Christie's Law Group and 58,000 others" (2011/0024).

19 Bail Amendment Act 2013. See in particular ss 7, 8 and 12.

20 Sections 10–11.

21 McMahan, above n 14, at 13.

22 See generally McMahan, above n 14; and Brown, above n 13.

Webster, Doob and Myers suggest that reverse burden provisions may be best understood as a litmus test of a broader "culture of risk aversion" operating at a less explicit level.²³ They argue that, with public safety as the key metric, greater emphasis is given in bail decision-making to the consequences of the risk and less on the actual likelihood it may occur.²⁴ At an institutional level, the risks of a "wrong" decision are significant: bad press, public disapproval and lowered confidence in the judiciary.²⁵ Webster et al's research in the Canadian context indicates a growing preference among bail decision-makers to avoid these risks altogether.²⁶ They suggest police are more hesitant to grant bail, deferring the decision to the court instead.²⁷ Although police attitudes to bail in New Zealand have not been studied in similar depth, Ministry of Justice research indicates that, once the case reaches the courts, the likelihood of bail refusal increases, even after controlling for the seriousness of the offence.²⁸

Even where an accused is granted bail, they may encounter difficulties in keeping it. Bail conditions imposed by the police or court have become a popular tool to manage an accused's perceived risk.²⁹ These conditions may range from non-association orders and curfews at a particular address to drug and alcohol bans.³⁰ Research suggests that attaching conditions has become a somewhat standardised procedure, often with little acknowledgement of the accused's ability to comply.³¹ Those who are already disadvantaged may face a particularly challenging task. A lack of access to housing, public transport and addiction services can all impede an accused's capacity to meet their conditions, in turn raising the risk that their bail will be subsequently reconsidered and revoked.³² Indeed, the rate of bail revocations in New Zealand has risen substantially in recent years.³³ This is likely to be connected to greater vigilance among police in monitoring and enforcing bail conditions.³⁴

23 Cheryl Marie Webster, Anthony N Doob and Nicole M Myers "The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada" (2009) 21 *Current Issues in Criminal Justice* 79 at 99.

24 At 100.

25 At 100.

26 At 99–101.

27 At 99.

28 Ministry of Justice *Justice Sector Projections 2024-2034* (June 2024) at 7.

29 Brown, above n 13, at 87.

30 At 87–90.

31 At 88.

32 Danielle Hughes, Emma Colvin and Isabelle Bartkowiak-Théron "Police and Vulnerability in Bail Decisions" (2022) 11 *IJCJ&SD* 122 at 125.

33 Ara Poutama Aotearoa–Department of Corrections, above n 1, at 42.

34 Brown, above n 13, at 89–91.

The harshened bail regime has generated significant growth in the custodial remand population. In 1960, fewer than 60 individuals were on custodial remand in New Zealand.³⁵ By 2020, this number peaked at 3,900 before dropping slightly by 2022.³⁶ In line with the suggestion put forward by Webster et al, the reverse burden provisions introduced in 2013 were not the sole drivers of this growth.³⁷ Despite some impact on the margins, research conducted by New Zealand government agencies indicates the offences to which the additional bail restrictions attach were already unlikely to attract bail.³⁸ Instead, the growth has primarily been indexed to a rise in the rate at which individuals are remanded due to previous offending or failing to comply with bail conditions.³⁹ Due to court delays, individuals are also spending significantly longer on custodial remand. In February 2024, the average prisoner spent 83 days on remand, which is projected to rise to 99 days over the next 10 years.⁴⁰

Emily Colvin frames the rise in remand rates as a quiet erosion of the pillars of the legal system.⁴¹ It is quiet in that custodial remand does not typically receive mainstream attention, perhaps in contrast to more graphic depictions of extreme abuses of process, such as those exposed in the torture of prisoners at Guantanamo Bay, Colvin suggests.⁴² Nonetheless, custodial remand significantly interferes with an accused's procedural rights, including the right to liberty, due process, natural justice and the presumption of innocence.⁴³ These rights have been gradually de-emphasised, with the increased use of reverse onus provisions being the most explicit version. Not only are those subject to reverse onuses essentially assumed guilty, but they also arguably experience a double jeopardy effect. That is, their *past* criminal history—conduct for which they have already been punished—is used as a justification to deny bail in respect of their current charges.⁴⁴

The presumption of innocence is also wearing away at a less visible level. Colvin's research into police bail practices found Victorian police consistently referred to the accused as an "offender",

35 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 40.

36 At 40.

37 At 42.

38 At 42.

39 At 40–44.

40 Ministry of Justice, above n 28, at 8.

41 Emma Colvin "Police Bail Decision-Making in Victoria: Private Decisions, Public Consequences" (paper presented to Australia & New Zealand Critical Criminology Conference, December 2009), at 51.

42 At 51.

43 Brown, above n 13, at 86.

44 At 87.

further suggesting that an individual who was released on bail had gotten off lightly.⁴⁵ Given that police are the first point of contact in the pre-trial process, insights into their perceptions of bail, particularly those which appear punitive, would be an important tool in the development of the research on New Zealand's bail system.

C Impacts on Women

Having outlined the shift towards a harsher bail climate and the public safety goals underwriting it, I now turn to examine the implications of the "tough on bail" approach for women. Within the general increase in pre-trial detention numbers, the number of women on custodial remand has risen at a particularly disproportionate rate. In 2022, half of women in prison in New Zealand were unsentenced, compared to 40 per cent of men.⁴⁶ Women are remanded at a similarly high rate in Victoria, Australia.⁴⁷ The growth in Canada has been particularly stark. Between 1978 and 2008, the male rate doubled, while the female remand rate grew six times over.⁴⁸ There are also significant ethnic disparities within this pattern of growth, in which Indigenous women are profoundly overrepresented on remand. In New Zealand, Māori women constitute 70 per cent of the female remand rate.⁴⁹ Similarly, Indigenous women in Australia on custodial remand are the fastest-growing prison population.⁵⁰

There is an apparent incongruity between the rate at which women, the majority of whom are Indigenous, are remanded, and the community protection aims driving the harshened bail climate. Women offend at lower rates than men.⁵¹ Where women do offend, it tends to be less serious and involves a much lower rate of violence in comparison to men.⁵² Put simply, most women do not pose an unmitigable threat to the public's safety.⁵³

If the rate at which women are remanded directly correlates with the risk they pose, one would expect to see that reflected in an increase in the sentenced population. However, while custodial

45 Emma Colvin, above n 41, at 55–56.

46 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 65.

47 McMahon, above n 14, at 1.

48 Webster, Doob and Myers, above n 23, at 88.

49 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 57.

50 Samantha Jeffries and Greg Newbold "Analysing Trends in the Imprisonment of Women in Australia and New Zealand" (2016) 23 *Psychiatry, Psychology and Law* 184 at 180–192.

51 Hannah McGlue "Addressing the imbalance: Enhancing women's opportunities to build offence free lives through gender responsivity" (2017) 5 *Practice: The New Zealand Corrections Journal* 6 at 6.

52 Office of the Inspectorate *Thematic Report: The Lived Experience of Women in Prison* (October 2021) at 11.

53 McGlue, above n 51, at 6.

remand rates have dropped slightly since their peak in 2020, sentencing numbers have decreased faster.⁵⁴ The downward trend of sentencing has, in turn, caused a particularly pronounced shift in the female prison population. Due to their general offending patterns, women typically receive shorter sentences than men.⁵⁵ Thus, the time spent on remand for women—which counts towards time served—may end up subbing in for most, or all, of their eventual formal sentence.⁵⁶

The purported intentions of a stricter bail regime do not, therefore, align with the reality for most women. Remanding low-risk women does little to further the goal of community safety. This article does not essentialise female offending as unserious or suggest that it does not create harm. However, the purpose of bail law is not to deter, sanction or punish criminal behaviour. Some academics critique the emergence of public safety as a core purpose for bail law.⁵⁷ While recognising the ongoing debate in this area, this article proceeds on the assumption that public safety now widely functions as a legitimate aim of bail law. What is concerning is that this aim serves to exacerbate the rate at which women's bail is refused,⁵⁸ in spite of the empirically low risk of a typical female offender.⁵⁹

This disconnect is troubling from a legal and social perspective. Depriving an individual's liberty should be a decision based upon a strong justification. Custodial remand causes significant harm to women who, by and large, are already highly vulnerable.⁶⁰ A common thread of multiple disadvantages weaves through the lives of incarcerated women. There is an overwhelmingly high rate of trauma, victimisation, substance abuse and mental health problems among criminalised women.⁶¹ Female prisoners interviewed by Segrave and Carlton identified how their early experiences of trauma preceded their pathway to criminal offending, which was often intertwined with addiction and instability.⁶² Segrave and Carlton argue the "justice system separates and de-contextualises women's actions from the broader social and structural context of their lives".⁶³ That context is one in which

54 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 67.

55 At 67.

56 At 67.

57 See generally McMahon, above n 14; and Brown, above n 13.

58 See for example Emma K Russell, Bree Carlton and Danielle Tyson "It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage" (2022) 11 *International Journal for Crime, Justice and Social Democracy* 107 at 108–110.

59 McGlue, above n 51, at 6.

60 See generally Masson, above n 2.

61 Marie Segrave and Bree Carlton "Women, Trauma, Criminalisation and Imprisonment..." (2010) 22 *Current Issues in Criminal Justice* 287 at 290–297.

62 At 293.

63 At 289.

women are continually marginalised from mainstream society and, more often than not, are victims of violence themselves.⁶⁴ It is also one which, in light of the ongoing trauma suffered by women and the inherently hostile carceral environment, may make their imprisonment particularly inappropriate.⁶⁵

D Barriers to Bail

In the bail context, it appears the social and structural disadvantages tied to female criminalisation also act as impediments to women's bail access. Many women's remand status may stem from enduring social marginalisation, as opposed to any risk they pose to the public. In researching the rise of women on custodial remand in Victoria, Russell, Carlton and Tyson identified a "constellation of circumstances" present in the lives of women prior to incarceration, which impacted their ability to access bail.⁶⁶ Poverty, addiction, domestic and family violence (DFV) and unstable housing, particularly when these factors compound with each other, create hurdles for women in bail applications that, according to the authors, are overlooked by bail decision-makers.⁶⁷

A suitable bail address is not an explicit statutory prerequisite to bail.⁶⁸ It is, therefore, concerning that Russell et al found a lack of stable housing to be the most significant barrier to bail for women.⁶⁹ Housing deprivation is indeed recognised to be, across the board, a core factor for bail refusal.⁷⁰ Particularly for women, however, Russell et al found their inability to source a suitable address was often influenced or precipitated by DFV.⁷¹ Lawyers in the study described how many women became homeless or transient after fleeing their homes to escape violence.⁷² Women who are homeless may face additional gendered disadvantages, with lawyers suggesting courts may express stronger reservations in granting bail than for men due to the perception of women's greater vulnerability in the community.⁷³ Similar observations were made by Carlen and Tombs while attending court hearings in Scotland. During sentencing hearings, judges sometimes suggested that prison would be

64 At 293–297.

65 See generally Segrave and Carlton, above n 61, at 288–302.

66 Russell, Carlton and Tyson, above n 58, at 108.

67 At 108.

68 See s 8.

69 Russell, Carlton and Tyson, above n 58, at 112.

70 Scott Peterson, Ian Lambie and Claire Cartwright "Bailed out: Defendants' and stakeholders' experiences of a bail support programme" (2024) 63 *The Howard Journal of Crime and Justice* 216 at 222–231.

71 Russell, Carlton and Tyson, above n 58, at 113.

72 At 113.

73 At 112.

the best or only option for vulnerable women to seek help or security.⁷⁴ This suggestion was generally coupled with an acknowledgement that the resources offered in prison were not available in the community.⁷⁵

This is a complex issue. For some women, Russell et al suggest prison may be seen as a reprieve from chaos and violence or, as one lawyer put it, "four walls and ... a feed".⁷⁶ Although similar statistics are not available in New Zealand, research from Victoria indicates many women on remand never applied for bail.⁷⁷ The extent to which prison may serve as a temporary break or a roof over one's head is not indicative of its appropriateness. Nor should it serve as a justification for incarcerating vulnerable women, who cannot otherwise access support in their community.

Although often associated with barriers to housing, Russell et al also found the impacts of DFV to operate more broadly in women's bail applications. Complying with bail conditions may be unattainable for women contending with ongoing violence at home. In turn, women are at risk of their bail being revoked. Discussing the practical realities faced by victim-survivors of DFV, one lawyer interviewed by the researchers stated that:⁷⁸

Frequently, breaching your bail conditions could be in the context of experiences of family violence, whether it be the case that they're being prevented from going to court or their partners are hiding the letters from the lawyer or paperwork, or other kinds of experience of controlling behaviour.

The lawyer's quote emphasises how experiencing DFV may render supposedly achievable tasks highly complex and often difficult to achieve in practice. It also highlights the necessity for bail decision-makers to have a nuanced and informed approach to women facing DFV. However, Russell et al's research indicates this may not always be the case. Reports of DFV in the home increased the chances of interaction between victim-survivors and the police responding to callouts.⁷⁹ During these interactions, women were often arrested for separate matters or misidentified as the dominant aggressor.⁸⁰ This was particularly so where women did not fall clearly within the bounds of a "perfect" or "innocent victim" stereotype because they, for instance, engaged in drug use.⁸¹ In these cases,

74 Pat Carlen and Jacqueline Tombs "Reconfigurations of penalty: The ongoing case of the women's imprisonment and reintegration industries" (2006) 10 *Theoretical Criminology* 337 at 346–348.

75 At 346–348.

76 Russell, Carlton and Tyson, above n 58, at 113.

77 Corrections Victoria *Women in the Victorian Prison System* (Department of Justice and Community Safety, January 2019) at 11, as cited in McMahon, above n 14, at 5.

78 Russell, Carlton and Tyson, above n 58, at 114.

79 At 114–117.

80 At 114–117.

81 At 115–117.

lawyers suggested women were perceived as "less deserving" of police protection and were at a heightened risk of being criminalised themselves.⁸²

The confluence of circumstances which raise the risk that women are refused bail intersect with pre-existing racial inequalities. In New Zealand, the enduring impacts of colonisation create the context in which Māori women are overrepresented in key indicators of social disadvantage.⁸³ Māori women are disproportionately affected by reverse onus provisions, with a greater number remanded in relation to previous offending on bail or due to non-compliance with bail conditions.⁸⁴ The reasons for this are complex and likely reflect a dimension of institutional bias operating alongside the amplification of social disadvantage among Māori women. Institutional bias influences the rate at which Māori women are arrested, prosecuted and imprisoned.⁸⁵ However, there is a lack of direct evidence identifying how this plays out within the bail context. Research elsewhere suggests the broad discretion police and courts have in the bail decision-making process may have a causal influence on the racial disparity in remand outcomes.⁸⁶ For instance, Australian research indicates Aboriginal defendants are more likely to be given onerous bail conditions than their non-Indigenous counterparts.⁸⁷

Particularly in light of the significant growth of the Māori female remand population, there is a pressing need for research in New Zealand on whether Māori women are facing similarly differential treatment in bail decision-making. In any case, the Crown has a Treaty obligation to address the structural inequities faced by Māori women that are amplifying the risk they are remanded in custody.⁸⁸ Further, the Crown's apparent failure to take adequate steps in improving Māori women's outcomes forms parts of the subject of an ongoing kaupapa inquiry by the Waitangi Tribunal.⁸⁹

82 At 115–117.

83 Khylee Quince "The bottom of the Heap? Why Māori women are over-criminalised in New Zealand" (2010) 3 J Maori L W 99 at 116–118.

84 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 57.

85 Ministry of Justice *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (November 2009) at 12–60.

86 Cynthia E Jones "Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project" (2012) 27 *Articles in Law Reviews* 919, as cited in Peterson, Lambie and Cartwright, above n 70, at 218.

87 Harry Blagg and others *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System* (Equal Opportunity Commission, September 2005) at 57.

88 Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2450, 2017) at 81–87.

89 See generally Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry: Appendix A – Confirmed scope for the inquiry* (Wai 2700, #2.5.24(a), July 2020). See also Quince, above n 83; *Tū Mai Te Rangi! Report on Crown*

III LAYER TWO: HARMS OF REMAND

Having identified the adverse impact of stricter bail policies on socially marginalised women, I turn now to specifically focus on how women who are mothers face further disadvantage under the bail system.

A Mothers in the Pre-Trial Process

Maternal incarceration is a relatively understudied phenomenon in New Zealand. Comprehensive data on both the rate of mothers in prison and the children affected by maternal incarceration is not systematically collected by the Department of Corrections.⁹⁰ Ministry of Justice research in 2013 estimated that 29 per cent of the female prison population had *direct* parenting roles before their imprisonment.⁹¹ This did not include mothers who may not have custody or those who did not report their parenting status.⁹² The Mother's Project—a volunteer organisation working to support mothers in prison—suggests that 85 per cent of women in prison are mothers.⁹³ Although this rate is significantly higher than official statistics, it does not appear to be limited to mothers with a direct parenting role. There is also an absence of data which tracks the impacts of maternal incarceration on children. What research is out there indicates that children of incarcerated mothers are also likely to have an incarcerated father.⁹⁴ Thus, a high proportion of incarcerated mothers are also the sole caregivers for their children.⁹⁵

The lack of comprehensive research on maternal incarceration speaks to a wider institutional failure to consider and account for women's roles as mothers. It is this failure which may be understood as the precursor for what Liz Gordon, in *Invisible Children*, terms a "child-blind" justice system.⁹⁶ This blindness is not intentional, Gordon contends, but is instead the product of a system which overlooks incarceration's adverse effects on children.⁹⁷ As a result, the children of mothers

and Disproportionate Reoffending Rates, above n 88; and Annabel Mikaere *The balance destroyed* (revised edition ed, Te Tākupu, Te Wānanga o Raukawa, Ōtaki, 2017).

90 Annaliese Johnston "Sentencing the Silent: Children's Rights and the Dilemma of Maternal Imprisonment" (2014) 1 Pub Int LJ NZ 97 at 98–99.

91 Office of the Inspectorate, above n 52, at 15.

92 At 15.

93 Mothers Project "Why We Help" (2024) Mothers Project <www.mothersproject.org>.

94 Venezia Kingi and others *Mothers with Babies in Prison: Some Women Prisoners' Perspectives* (Department of Corrections, August 2008) at 4, as cited in Johnston, above n 90, at 99.

95 At 99.

96 Liz Gordon *Invisible children: First year research report "a study of the of the children of prisoners"* (PILLARS, November 2009) at 16.

97 At 16.

facing incarceration are at risk of falling through the cracks of a system which does not take their needs into account.

Children in the sole care of their mothers are especially vulnerable, as demonstrated by the tragic death of five-year-old Malachi Subecz in 2021. Malachi died at the hands of Michaela Barriball, his temporary caregiver.⁹⁸ His mother, Jasmine Cotter, organised an informal care arrangement with Barriball while she was remanded in custody on drug charges.⁹⁹ Although Malachi's family made a report of concern to Oranga Tamariki, the agency closed the report without a full investigation.¹⁰⁰ Less than six months later, Malachi was killed from head injuries inflicted by Ms Barriball.¹⁰¹

Malachi slipped through multiple information gaps between the different agencies and institutions involved. In 2022, a review led by Dame Karen Poutasi found that the period between which Malachi's mother was arrested and remanded in custody was a critical stage in which preventative action could have been taken.¹⁰² Malachi's mother was his sole carer before her incarceration.¹⁰³ As Malachi's mother made her way through the remand process, justice agencies were not at any stage legally required to contact Oranga Tamariki or otherwise support Malachi's mother in arranging care.¹⁰⁴ In light of this, the review recommended that Police make an automatic report of concern to Oranga Tamariki following the charging of any sole caregiver under circumstances in which a period of incarceration is likely.¹⁰⁵ Additionally, the review also suggested that more information regarding a mother's caregiving arrangements should be made available to courts during bail decision-making.¹⁰⁶

An automatic reporting function for sole caregivers facing incarceration may reduce the risk that dependent children are overlooked in the pre-trial process. It may not, however, be conducive to children's safety and wellbeing. Several academics have raised concerns over the mandatory reporting function, querying whether Oranga Tamariki is the appropriate conduit between sole caregivers, their children and justice agencies. Legal academic Luke Fitzmaurice-Brown (Te Aupōuri) suggests a requirement for vetting and reporting sole caregivers facing incarceration may "widen the net through

98 Karen Poutasi *Ensuring strong and effective safety nets to prevent abuse of children: Joint review into the Children's Sector* (Oranga Tamariki, November 2022) at 7.

99 At 7.

100 At 21.

101 At 23.

102 At 32.

103 At 33.

104 At 33.

105 At 33.

106 At 34.

which marginalised Māori families are caught and further disadvantaged by the state".¹⁰⁷ As Māori women are at a much higher risk of being remanded in custody, a mandatory reporting function would likely have disparate effects on tamariki Māori, contributing to the existing overrepresentation of tamariki and rangatahi Māori in state custody.¹⁰⁸ This overrepresentation was also the subject of a 2021 Waitangi Tribunal report into Oranga Tamariki.¹⁰⁹ The Tribunal recommended a devolution of Oranga Tamariki's role into whānau, iwi and hapū care, finding the Crown's failure to do so constitutes a breach of the right to tino rangatiratanga under art 2 of te Tiriti o Waitangi.¹¹⁰

The Tribunal's findings are particularly relevant in 2024, where an Amendment Act to remove the Treaty provision in the Oranga Tamariki Act 1989 has been passed.¹¹¹ Both the implications of the repeal and the appropriate role of Oranga Tamariki in parental incarceration are complex and beyond the scope of this article. What is directly within the ambit of this article, however, is that the circumstances of Malachi's death clearly show change is needed. The absence of safety nets for the children of mothers facing incarceration and the lack of support given to mothers during this process creates significant risks.

Strengthening the existing considerations for primary carers under the Bail Act could assist in closing the gaps identified in the Poutasi review. When considering bail pending sentencing or appeal, the court may take into account the personal circumstances and family of the offender.¹¹² While a similar consideration is not provided for remand-accused, the "just cause" test under s 8(1)(b) does require the court to consider any matter which would make it unjust to detain the defendant. Although these are avenues in which the impacts of incarceration on primary carers can be considered, bail decision-makers are not at any point obliged to do so. Implementing a mandatory consideration which requires all bail decisions to take into account the caregiving status of mothers, and the impacts of incarceration on their children, may have both a practical and a normative effect. That is, it would increase the visibility of primary carers' roles when the court is considering bail and, in turn, that awareness may lead courts to decide against custodial remand.

Alongside a mandatory consideration, a system could be implemented into the statutory framework to ensure courts are provided with information relating to the accused's family. When considering incarceration in the sentencing context, courts are typically provided with a pre-sentence

107 Luke Fitzmaurice-Brown "The tragedy of Malachi Subecz should prompt change, but not like this" *The Spinoff* (December 2022) <<https://thespinoff.co.nz>>.

108 Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 93.

109 At 2–4.

110 At 106–108.

111 Oranga Tamariki (Repeal of Section 7AA) Amendment Act 2025, s 6.

112 Bail Act 2000, ss 13(3)(c) and 14(3)(c).

report and cultural report by prison officers, support workers or whānau, all of which may include information relating to the defendant's family.¹¹³ While practical and fiscal constraints may preclude the viability of a similarly comprehensive approach in bail assessments, a more condensed version of pre-trial reports could still be an important tool in reducing information gaps.

B Impacts of Custodial Remand

I turn now to consider the impacts of custodial remand. Incarceration is broadly understood as an adverse experience, reflecting its primary purpose as a punitive measure. This sits in tension with the use of custodial remand. That tension is particularly acute for mothers, who face additional consequences while incarcerated. Although this section specifically focuses on mothers' experiences, much of the following discussion is relevant to women more broadly.

1 Maternal incarceration

Lucy Baldwin suggests prison disrupts and destroys the maternal experience and relationship.¹¹⁴ Incarceration deprives mothers of their ability to perform a mothering role, a pain which must be endured *in addition* to the harms and discomfort inherent to the prison experience. Baldwin describes the pain of separation as a central feature of motherhood in prison, though she notes how that pain is experienced will differ significantly among mothers.¹¹⁵ Many describe their separation from their children as a profound grief, with one mother expressing to Baldwin as a "pain to the point of numbness".¹¹⁶ Anxiety, anger, hopelessness and embarrassment similarly emerge as common emotional responses for mothers experiencing the pain of separation.¹¹⁷

Shame and guilt, in particular, may be uniquely associated with the experience of mothers in prison.¹¹⁸ Motherhood is a value-laden identity. It is, as put by Soffer and Ajzenstadt, "a role that is claimed and constructed by performing culturally-expected acts".¹¹⁹ Incarcerated mothers unable to perform that role may, therefore, experience "double punishment", both sanctioned by society for their

113 Sentencing Act 2002, ss 26–27.

114 Lucy Baldwin "Motherhood disrupted: Reflections of post- prison mothers" (2018) 26 *Emotion, Space and Society* 49 at 51.

115 At 52.

116 At 52.

117 At 52.

118 Amy Walsh and others "Experiences of mothering from prison; a qualitative evidence synthesis" (2023) 34 *The Journal of Forensic Psychiatry & Psychology* 216 at 234–231.

119 Michal Soffer and Mimi Ajzenstadt "The Multidimensionality of 'Pains of Imprisonment' Among Incarcerated Women in Israel" (2010) 50 *Women & Health* 491 at 501.

criminal offending and their additional failure to be a "good mother".¹²⁰ Particularly for mothers whose maternal identity forms a central part of their self-conception, the loss of this identity in prison can damage their very sense of self.¹²¹

The emotional distress experienced by mothers can create or exacerbate worsened mental health issues.¹²² Former prisoners have described how their anguish led them to consider self-harm and even suicide.¹²³ Indeed, the disproportionately high rates of self-harm among female prisoners may be associated with the low self-esteem and shame cited by many mothers.¹²⁴ Additionally, mothers are often not given adequate support in coping with their pain within prison.¹²⁵ As one mother interviewed by Baldwin described:¹²⁶

The officers didn't care—I wasn't a mother, I wasn't a grandmother who was feeling sad and in pain, I wasn't someone who had made a successful career and made one mistake—I was just a prisoner, the rest ... all gone.

Though a personal anecdote, this mother's experience seems to speak to the profound disempowerment felt by incarcerated mothers, who must continually negotiate their maternal identity against their status as a prisoner. However, it also indicates the loss of this identity is not an inherent feature of maternal incarceration and may be partially mitigated by a compassionate institutional response.¹²⁷ This could include a greater provision of parenting programmes, which have been found to play an important role in helping mothers to retain their maternal identity.¹²⁸

When discussing the experiences of mothers in prison, it is important to acknowledge that, for some women, their roles as mothers can positively impact their prison experience. Research by Walsh et al found that some mothers viewed their maternal identity as an opportunity for redemption, and their incarceration as a time of motivation and hope.¹²⁹ This highlights the need for a nuanced approach to the diverse emotions and experiences associated with maternal incarceration.

120 At 501–503.

121 At 501.

122 Masson, above n 2, at 124 .

123 At 126.

124 At 126.

125 Walsh and others, above n 118, at 225–232.

126 Baldwin, above n 114, at 52.

127 At 54.

128 Walsh and others, above n 118, at 241–245.

129 At 236–240.

Mothers will typically aim to maintain their maternal identity and continue to hold an active role in their children's lives.¹³⁰ Their relationship with their children, however, is mediated, and often undermined, by the prison environment. Some mothers choose to shield their children from the prison and will forego visits, while others may not inform their children of their incarceration, fearing it could harm their wellbeing.¹³¹ Research suggests, in some instances, prison visits can adversely impact the mother's mental health, as they may confront the adverse impacts their incarceration is having on their children.¹³² Despite these challenges, visits are generally seen by most mothers as a broadly positive factor in mitigating the pain of their separation and an important tool in maintaining their relationship with their children.¹³³ It is, therefore, concerning that mothers in prison receive significantly fewer visits in prison than their male counterparts.¹³⁴

There are several probable reasons underlying the low rate of visits. For many families, the cost and logistics of visitation can be prohibitive, meaning visits may be infrequent or impossible.¹³⁵ Women are particularly disadvantaged in this regard. Due to the low number of women's prisons in New Zealand relative to its geographic size, mothers are often placed at a far greater distance from their community than their male counterparts.¹³⁶ Additionally, mothers may face barriers to regular contact depending on who is looking after their children. Walsh et al found the ability to maintain contact—whether through visits, phone calls or otherwise—is highly predicated on the external caregiver, with some restricting children's access to communication.¹³⁷ Particularly for mothers who may not have a strong relationship with their children's external caregiver, this situation leaves them vulnerable to further disconnection from their maternal identity.¹³⁸

2 *Custodial remand*

Layering upon the foregoing discussion, distinct features of custodial remand may expose mothers to further harm. A core characteristic of custodial remand is its inherent uncertainty.¹³⁹ Many mothers

130 Baldwin, above n 114, at 50–55.

131 At 53.

132 Masson, above n 2, at 131–133.

133 At 131.

134 At 131.

135 Gordon, above n 96, at 32–33.

136 Hannah Bentley "The Cycle of Female Prisoner (Re)Integration: Pathways, criminal justice and imprisonment" (Master of Criminology, Te Herenga Waka-Victoria University of Wellington, 2014) at 61.

137 Walsh and others, above n 118, at 232.

138 At 232.

139 See generally Pelvin, above n 6, at 67–146.

will not expect their arrest, nor the decision to remand them in custody.¹⁴⁰ Catherine Flynn's research into the care arrangements of children with incarcerated mothers highlights the potential consequences of this uncertainty. Her study found the largest group of children were those without secure care arrangements, with half of these children in their mother's sole care before her imprisonment.¹⁴¹ When no plans had been made, these children faced an "immediate crisis", particularly for those without strong family support.¹⁴² Mothers who are remanded upon arrest are essentially deprived of the ability to plan for their children's care.¹⁴³ This situation not only puts their children at risk but is likely to further compound the sense of powerlessness mothers face while imprisoned. The uncertainty of custodial remand also means remand prisoners are often unsure of how long they will remain in prison, a fact which some academics argue amounts to cruel and unusual punishment.¹⁴⁴

Compounding upon the psychological and practical implications of uncertain imprisonment, remand prisoners also face significant isolation, as well as limited access to meaningful activities and rehabilitation programmes. Although their security status is unclassified, Corrections policy manages remand prisoners as *de facto* high-security prisoners.¹⁴⁵ As such, they are subject to highly restrictive conditions that may not accurately reflect the risk they pose to staff or inmates.¹⁴⁶ Many programmes offered inside prison are held in the lower security wings and are therefore inaccessible to remand prisoners.¹⁴⁷

Mothers interviewed in Isla Masson's research described their inability to participate in prison opportunities as a key source of frustration.¹⁴⁸ For those seeking support in addressing the issues that contributed to their offending, their incarceration appeared pointless.¹⁴⁹ Many rehabilitation programmes in prison are designed for prisoners serving longer sentences and will often form the foundations for their parole hearings.¹⁵⁰ However, research shows that half of the women transitioning

140 Masson, above n 2, at 99–103.

141 Catherine Flynn "Mothers Facing Imprisonment: Arranging Care for Their Adolescent Children" (2013) 23 *Women & Crim Just* 43 at 52.

142 At 54.

143 At 54.

144 Gary Mason "Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?" (1990) 16 *New England Journal on Criminal and Civil Confinement* 89 at 89, as cited in Pelvin, above n 6, at 124.

145 Office of the Inspectorate, above n 52, at 113.

146 At 30.

147 At 28–29.

148 Masson, above n 2, at 110.

149 At 110.

150 Ara Poutama Aotearoa—Department of Corrections, above n 1, at 67.

from remand to sentences over two years in length had insufficient time to complete any rehabilitation programmes before their first parole hearing.¹⁵¹ Similarly, half of those sentenced to under two years did not complete any programme before their release.¹⁵² Conversely, the Parole Board may require some prisoners to remain in prison longer than anticipated to complete rehabilitation programmes. For instance, one prisoner at Arohata Women's Prison interviewed in the Office of the Inspectorate's 2021 report described that:¹⁵³

... I was in remand for a year, and I wasn't able to do anything. So then when I got sentenced, I was straight up [eligible for] parole and then they said I had to do all these programmes which I could have started earlier. So that has made me do close to my whole sentence. It is quite hard having to wait a year and a bit before getting on to the DTU [Drug Treatment Unit]. It's not like those behaviours were yesterday.

Without further data, it is unclear whether this prisoner's experience may be more widely shared. Nonetheless, it is suggestive of a certain arbitrariness in the distinction between the management of remand and sentenced prisoners. A better avenue may be to adopt Masson's suggestion that, if the short-term incarceration of women is to continue, tailored programmes should be introduced so they are able to benefit in some capacity from their time in prison.¹⁵⁴

3 *Downstream impacts*

Custodial remand, in addition to causing direct harm, also generates a series of downstream impacts. The "constellation of circumstances" identified by Russell et al as contributing to chaos in women's lives pre-incarceration does not cease upon their release.¹⁵⁵ If anything, the destabilising effects of custodial remand may simply exacerbate or present new sources of strain. Masson found the psychological harms experienced while incarcerated continue to impact women well past their release date, even where their time in prison was brief.¹⁵⁶ These effects compound and likely interact with the limited options women face when re-entering the community.¹⁵⁷ Women may face difficulties in accessing rental accommodation or gaining suitable employment due to the prejudice attached to criminal records.¹⁵⁸ Additionally, their inability to earn income while incarcerated may

151 At 67.

152 At 67.

153 Office of the Inspectorate, above n 52, at [125].

154 Masson, above n 2, at 256.

155 Russell, Carlton and Tyson, above n 58, at 108.

156 Masson, above n 2, at 167.

157 At 110–128.

158 At 153–155.

lead to the accumulation of debt payments, compounding upon existing financial strain.¹⁵⁹ For mothers, these issues have an amplifying effect, in that they may delay their ability to resume their children's caregiving.¹⁶⁰

For children, the impacts of their mother's incarceration are similarly long-lasting. Tamariki and rangatahi Māori are particularly vulnerable due to the higher rate at which Māori women are remanded.¹⁶¹ Families are often facing significant financial strain prior to incarceration, and these families bear the heaviest burden of incarceration, without the financial resources which may mitigate the impacts of losing a primary carer.¹⁶² Dependent children of incarcerated mothers are, in most cases, forced to move out of their family home, often into unstable living situations.¹⁶³ For children without family or whānau who may help absorb some of the shockwaves of their mother's incarceration, the consequent instability can lead to a cascade of adversity. The impact is often varied by age, with younger children more likely to display emotional attachment issues and higher rates of anxiety and depression.¹⁶⁴ Older children are at risk of disengaging from education, particularly where their home life remains chaotic.¹⁶⁵ The significant adversity faced by children with incarcerated parents likely forms the context in which their risk of intergenerational offending and imprisonment is disproportionately high.¹⁶⁶

This article does not fully explore how children are harmed by maternal incarceration.¹⁶⁷ However, their hardship raises a further question as to the use of custodial remand for mothers. Where sentencing, courts have referred to the impacts of parental incarceration as an inevitable consequence of criminal offending.¹⁶⁸ While hardship to children may lead to a discrete discount in sentencing, it will typically hold little influence where the offending is serious.¹⁶⁹ This is an important distinction in the bail context, where considerations like deterrence or punishment, which may otherwise

159 At 166.

160 At 146.

161 Johnston, above n 90, at 102.

162 Gordon, above n 96, at 58.

163 Flynn, above n 141, at 45.

164 Shona Minson "Direct harms and social consequences: An analysis of the impact of maternal imprisonment on dependent children in England and Wales" (2019) 19 *Criminology & Criminal Justice* 519 at 9–11.

165 Johnston, above n 90, at 100.

166 Gordon, above n 96, at 59.

167 See generally Minson, above n 164; and Gordon, above n 96.

168 *Fukofuka v R* [2019] NZCA 290, at [47].

169 At [49].

influence sentencing decisions, are not at issue. Arguably, therefore, the interests of children should be given particularly close examination and weight.

IV FUTURE DIRECTIONS

The final section of this article aims to provide a brief insight into how the layered disadvantages experienced by women under the bail system could be attended to. My suggestions are initial steps, not a solution. As this article has suggested, it is the women who are already highly vulnerable and socially marginalised who are experiencing the most harm under the bail system. Therefore, interventions must be located at the systemic level to effectively address the marginalisation faced by women, particularly Māori women.

Joining a growing body of academic critique, this article finds the rate at which women are remanded in custody is a problem that requires addressing. A key concern identified in this article is that many women are facing raised barriers to bail access that do not reflect their risk, nor the rationale of a tougher bail climate. However, the extent of the harm caused to women and mothers on custodial remand should render its use a last resort, and only where there is a compelling justification to do so.

One possible way to achieve a justified use for custodial remand for women is by amending the "just cause" test under s 8 to require the accused to pose a significant risk before custodial remand can be justified. At present, s 8 only asks whether there is *a* risk an accused may interfere with witnesses, fail to show at court or offend while on bail. Bail decision-makers therefore have broad discretion in their interpretation of what level of risk should justify custodial remand. In the "culture of risk aversion" identified by Webster et al, this may be contributing to the rate at which non-violent women are refused bail.¹⁷⁰ A recent study in New Zealand found those involved in the pre-trial process consistently drew concern to the lack of clarity in bail decision-making, with one suggesting a judge's "mood" could be the deciding factor in whether they granted bail.¹⁷¹ Requiring the risk an accused poses to be significant may promote greater consistency among bail decisions. Particularly in tandem with the mandatory consideration for primary carers suggested prior in this article, it would also better reflect the impacts of incarceration.

The barriers women face in accessing bail must also be addressed, the most significant of which is a lack of bail accommodation. Russell et al found that women may be refused bail based on a bail decision-maker's belief that they will not be able to comply with their bail conditions without a suitable bail address.¹⁷² Although a bail address is not an explicit prerequisite to bail under the Act, it appears that, at a practical level, it will often be a decisive factor for bail decision-makers in whether

¹⁷⁰ Webster, Doob and Myers, above n 23, at 99.

¹⁷¹ Peterson, Lambie and Cartwright, above n 70, at 225–226.

¹⁷² Russell, Carlton and Tyson, above n 58, at 112.

bail should be granted.¹⁷³ Consequently, it is difficult to predict how raising the risk threshold might affect the significance of having a suitable bail address. If accommodation remains centrally important to women's bail access, then there is a clear need for greater provision into housing investment, given that an inability to access stable housing should not be regarded as a compelling justification for custodial remand.

In 2017, the Department of Corrections commissioned a bail support services programme aimed in part at reducing custodial remand numbers.¹⁷⁴ The programme involves a court arm, which provides the court with information about the needs of the accused, and a community arm, aimed at supporting bailed defendants to adhere to their conditions.¹⁷⁵ This is a promising development. Peterson et al's review of the programme found some initial support among defendants and stakeholders interviewed. The defendants suggested their bail support worker helped them to navigate the bail process, keep up to date with court hearings and access support within the community.¹⁷⁶ However, difficulties in sourcing accommodation for bailed defendants remained a critical issue for the programme's efficacy.¹⁷⁷ Given the early signs of success, greater funding into specific bail accommodation could be transformative in the programme's ability to assist those in the pre-trial process.

Although this article advocates for a higher risk threshold for bail assessments, it will inevitably be the case that, for some women, there will be a strong justification for their remand. Where this occurs, steps should be taken to reduce the harms caused by custodial remand. Segrave and Carlton's research indicates that a trauma-informed response is critical, in light of the complex needs and vulnerabilities of incarcerated women.¹⁷⁸ As previously discussed in this article, the emotional harm associated with maternal incarceration means mothers may require particular support. Within the prison environment, this could involve creating safe places for mothers to discuss their mothering experiences, as well as reducing the barriers to contact with their children.¹⁷⁹ At a broader level, a key finding of this article is that much of the harm faced by women and mothers on remand *is* mitigable and should not be dismissed as being an inherent consequence of incarceration. Custodial remand already represents a significant infraction into an accused's process rights. Therefore, it is

173 Peterson, Lambie and Cartwright, above n 70, at 225.

174 At 219.

175 At 219.

176 At 231.

177 At 231.

178 Segrave and Carlton, above n 61, at 297–302.

179 Baldwin, above n 114, at 54–55.

particularly crucial to ensure remand prisoners are not subjected to any further avoidable harm while incarcerated.

V CONCLUSION

This article has examined the interlapping and intersecting disadvantages experienced by women and mothers under the bail system. A harsher bail culture has underwritten the significant rise in women's remand rates both in New Zealand and abroad. Yet, as this article has identified, the public safety concerns provoking risk-averse bail policies do not translate well to women. Socially marginalised women are facing barriers to bail access that do not reflect their level of risk, nor the purported aims of community protection. Mothers with dependent children experience further adversity. The impacts of their incarceration are neither emphasised nor supported during the pre-trial process. Particularly for mothers who are sole carers, this is deeply concerning.

Acknowledging that one simple solution may not be evident, this article has recommended that strengthening the considerations for primary carers under the Bail Act could contribute to reducing the gaps in the pre-trial process which, at present, put their children at significant risk. This article has also drawn attention to how mothers on custodial remand face additional and severe harm that extends post-release and is amplified by the hardship caused to their children. Reducing the rate at which women are remanded, in light of this harm, must be seen as a crucial issue. This article has recommended that raising the risk threshold in bail assessments and confronting the barriers are important first steps toward this aim. Custodial remand is a matter of growing attention in New Zealand and, throughout this article, I have highlighted areas where more research is needed for further development of bail policies.