Court in the Act

A regular newsletter for the entire youth justice community

Nau mai Welcome

to the 67th edition of Court In the Act.

In this issue

Court In the Act is a national newsletter/ broadsheet dealing with Youth Justice issues. It is coordinated by research counsel attached to the office of the Principal Youth Court Judge. It receives wide circulation and we are keen for the recipients to pass it on to anyone they feel might be interested.

We are open to any suggestions and improvements. We are also very happy to act as a clearing-house, to receive and disseminate local, national and international Youth Justice issues and events.

If you would like to contribute an article, report or link to current research, please email all contributions to sacha.norrie@justice.govt.nz

Editorial

"Remember Your Teachings"

(Plaque outside Museum of Anthropology, University of British Columbia)

I begin this editorial by sincerely thanking Judge John Walker who carried out the role of Principal Youth Court Judge during my recent leave. I greatly appreciate his energy and commitment. I acknowledge his leadership during this time and take no credit for the considerable progress that has been made while I was away!

Recently I attended the first International Indigenous Courts Conference, together with Judge Heemi Taumaunu, who is the Liaison Judge for New Zealand's Rangatahi Courts. The conference took place in Vancouver, Canada, and was held at the University of British Columbia. Victoria's first aboriginal magistrate, Her Honour Magistrate Rose Falla and the deputy director of the Koori Justice Unit in the Magistrates and Children's Court of Victoria, Travis Lovett also attended. The full title of the conference was International Indigenous Therapeutic Jurisprudence + Conference.

In my view, it was a stunningly successful and challenging conference. We received magnificent hospitality and warmth, and it was an unforgettable experience to be part of this Conference. All eyes are now on New Zealand or Australia to host a second International Indigenous Courts Conference. Judge Taumaunu and I both had the opportunity to make presentations based on two papers we prepared, later referred to in this newsletter. I was particularly humbled to be able to participate and make a presentation as I was one of only two non-indigenous judges present at the conference.

The messages of the conference were both reassuring and challenging. Reassuring, because the work of our Rangatahi Courts is entirely consistent with what is being done and pioneered in a similar way in both Australia and Canada. The significant use of elders in the process, the incorporation of culturally appropriate processes and the challenges in working with marginalised, indigenous young offenders who are disproportionally represented in most first world justice systems were common themes.

The conference was held in the UBC First Nations Longhouse, constructed by the Musqueam people, described as the unceded owners of the land on which the university, and indeed Vancouver City, occupies. We could, however, easily have been in the wharenui on any New Zealand marae. The wisdom, teaching and humour of the elders replicated exactly what those of us who have attended hui in New Zealand have experienced so often.

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THE YOUTH COURT OF NEW ZEALAND | TE KOOTI TAIOHI O AOTEAROA

The University of British Colombia is built upon what is referred to as "unceded, unconquered and unsurrendered" Musqueam land

What was challenging, however, was the realisation that perhaps we have only just embarked on what could be a very significant and long journey in adjusting the way we deal with indigenous young offenders in New Zealand. We need to consolidate the work of our Rangatahi Courts and ensure that there are high-quality, culturally appropriate wānanga / programmes attached to the marae where all our Rangatahi Courts meet. Also, we cannot underestimate the challenges involved in working with the constellation of problems and disadvantages that serious young offenders present.

The disproportionality of indigenous offenders in all western world justice systems is a constant challenge and is one of the most important issues that justice systems in these countries face. In that respect the lessons emphasised by Judge Joe Flies-Away, an Appeals Court Judge of the Hualapai Nation in Phoenix, Arizona as to the need for a therapeutic, healing approach which nevertheless holds indigenous offenders account were extremely challenging. His Court, convened on reservation land in Arizona is a parallel system to the Arizona state system, with the court having jurisdiction over all offences committed within the reservation's boundaries.

I returned to New Zealand confident that our small steps forward with Rangatahi Courts are entirely in line with the practice and developments overseas and that in the best sense we can take heart from the progress to date and the enormous support that has been provided in New Zealand by Maori communities up and down the country. It was also clear that the contribution made by our lay advocates established by legislation is unique and unprecedented anywhere in the world. We need to continue to work to provide training and development for these increasingly important participants in the youth justice process.

I also want to say that I was genuinely proud to be part of a Youth Court that included Judge Heemi Taumaunu. His was an outstanding contribution. In my view, he made one of the standout presentations during the symposium. It is important that I acknowledge his contribution and the leadership he (and the Māori District Court Judges in New Zealand) has provided in the establishment of Rangatahi Courts. He will give a much more detailed breakdown of the conference and his whaakaro in the next edition of the Rangatahi Courts Newsletter, soon to be published.

Judge Taumaunu singing a mōteatea while being honoured alongside Judge Becroft with a tradition tribal blanket

One of the great benefits of attending an overseas conference is the renewed energy and enthusiasm one receives. I am more convinced than ever that we need to redouble our efforts to consolidate the progress that is being made with Rangatahi Courts and to carefully continue to move forward. We can be cautiously optimistic about progress so far.

Judge Andrew Becroft

Principal Youth Court Judge
Te Kaiwhakawā Matua o Te Kōti Taiohi

Judge Becroft cloaked in the traditional blanket of a tribal elder

Notices/Pānui

Letter to the Editor

"Geographical Solutions"

Ladies and Gentlemen, Boys and Girls,

I rarely go into print in a public forum but I believe that the issue needs to be highlighted as a significant impact on communities.

The practice of geographically sending offenders to other places has a huge impact in our area and I am sure other areas around the country.

I know we are in the sunshine capital of New Zealand and that we have lovely beaches, forests and other fantastic recreational opportunities, but that does not mean we have to have every offender that has been a problem to you sent here.

Now, I know some people will think I am picking on them individually, but this is an issue and something that Police, CYFS have all done and continue to do, which lately has become very frequent.
To the Judiciary I would ask you to question any such proposal to ensure that:

1. The local YJ team are aware;
2. The appropriate supports are in place and not just proposed?

I have no issue when we (police/CYFS YJ) locally are contacted and an agreed plan is made with all parties. Where the appropriate supports are put in place and everyone can monitor and assist with the outcome. This will have a better percentage of success than the current trend of dumping kids in our area.

This inevitably leads to further offending or breaches or orders and more importantly new victims.

I know some will say we are sending them to Whānau? This may be the case but some of the 'whānau' are not the most appropriate people to send them to? Nor have had contact for a number of years, if any contact at all.

A recent Te Kooti Rangatahi had three youth appearing, two of the three were out of town imports to our area.

My point is what might seem a good idea at the time and give some professionals and family respite from dealing with these kids, in fact puts pressure of local resources that are already dealing with their own challenges.

You're not solving a problem, just moving it. I hope this will encourage some robust discussion and welcome the debate.

Tom Brooks
O/C Youth Services
Eastern Bay of Plenty

Upcoming Conferences

14th Australasian Conference on Child Abuse and Neglect
29 March - 1 April 2015
Auckland, New Zealand

This conference will engage researchers, policy makers, practitioners and others from New Zealand, Australia and internationally, focussing on:

- Considering how to respond cross-sectorally to best prevent and address the complexity of child abuse and neglect; and
- An opportunity to exchange ideas, practice, knowledge and expertise and to develop a shared understanding between those of different professional backgrounds, cultures and locations.

World Congress on Juvenile Justice: Geneva (Switzerland) – 26th to 30th of January 2015.

State and civil society representatives are invited to attend the World Congress on Juvenile Justice which will take place in Geneva, Switzerland from 26 to 30 January 2015. The aim of the Congress is to work together to take a decisive step forward in the implementation of child rights and international norms in relation to juvenile justice.

Recent International Conferences

Healing Courts, Healing Plans, Healing People - International Indigenous Therapeutic Jurisprudence Conference (University of British Columbia, Canada) 9 - 10 October 2014

The conference concerned Indigenous practice and therapeutic jurisprudence initiatives that are underway and in development at the local, national and international practice, academic and policy levels.

Judge Heemi Taumuanu presented on the Rangatahi Court and Principal Youth Court Judge Andrew Becroft presented on the New Zealand framework of youth justice.

"Cultivating Restorative Justice Approach and Practices in South Asia" Roundtable Discussion (Kathmandu, Nepal) 19 - 21 September 2014

In collaboration with the South Asian Association for Regional Cooperation in Law (SAARCLAW), the Asia Foundation hosted a roundtable conference to brainstorm ideas surrounding restorative justice and its particular relevance in South Asia vis-à-vis prevalent practices of retributive justice.

Judge Peter Rollo presented on restorative practices in youth justice and domestic violence courts.

Case Brief

C v R [2014] NZCA 376

This appeal, concerning the role of nominated persons, arose from a challenge in the District Court to the admissibility of a statement made by a young person (aged 16) when interviewed by police officers investigating his alleged participation in a series of offences.

At 7.45 pm on 1 July 2013, the appellant (C) was arrested at his parents' home by two police officers and was charged with causing grievous bodily harm with intent, attempted rape and indecent assault. Shortly thereafter he made a statement to the officers at the Manakau Police Station. In summary he admitted punching the victim (S) about four times but asserted that it was in retaliation to provocation. He denied sexually assaulting S.

C challenged the admissibility of this statement, alleging that the statement was obtained in breach of his rights under the Children, Young Persons and Their Families Act 1989 (the CYPF Act), or alternatively under the New Zealand Bill of Rights Act 1990 (NZBORA).

Following a defended hearing at which evidence was led from the police officers who conducted the interview, Judge Treston ruled that C's statement was admissible at trial (*R v Campbell* DC Manakau CRI-20130292-203, 4 July 2014). C challenged this determination.

Was there a breach of the CYPF Act?

It was submitted that the police officers had breached C's rights under s 215 of the CYPF Act, which provides that a police officer must explain to a child or young person their entitlement to consult with, or be accompanied by, a barrister or solicitor or any nominated person when being questioned by police.

Within five minutes of police arriving at C's home, C was arrested. The detective had what he described as an aide memoir for explaining C's rights to him before conducting any questioning. It contained a series of bullet point statements which the detective asked C to explain back to him in his own words. By that means the officer would gauge C's understanding of what had been said. Among those rights was the right to consult with and make or give any statement in the presence of a lawyer or nominated person.

The detective explained C's rights to him while at the family home. The s 215 right was described as "to have your lawyer and/or nominated person with you while you are making a statement or answering any questions". In answer to the detective's question "would you like to nominate a person to support you?", C answered "my dad". The detective was satisfied that C fully understood his explanations of each statutory right.

C and his father arrived together at the police station and conferred together before the interview started, approximately 30 minutes later. The detective commenced by explaining and obtaining a response to each of C's statutory rights as he had done from his aide memoir earlier at the family home.

It was submitted that the detective's advice of C's right to have a "nominated person and/or lawyer" present during the interview was wrong or at least confusing, and that C was under an apparent misapprehension that he was entitled to either a nominated person or a lawyer but not both.

It was accepted that the detective's use of the phrase "and/or" was arguably ambiguous; and that two of C's answers suggest that he understood the rights to a nominated person or a lawyer as alternatives, not cumulative. However, it was satisfied that any confusion was rectified when the detective advised C that the police had a list of lawyers to whom he may speak for free. The officer emphasised that it would not cost C's father any money if he was to speak with a lawyer. It was determined that C clearly understood that right as a standalone right which was available if and whenever — before, during or after making a statement — he wished to exercise it, regardless of the presence of his father.

Was the assistance given by C's "nominated person" inadequate?

It was further submitted that the police officer gave inadequate assistance to C's nominated person, his father. It was accepted that the police officers gave written information to C's father but said that it did not satisfy the provisions of the CYPF Act because they must have known that due to his passivity and inadequacies he was of little or no use as a nominated person. Namely, it was submitted that C's father:

1. did not ask any questions of the police in circumstances where his son was entitled to have a nominated person who acted in his best interests;
2. did not seek to engage a lawyer despite the changing circumstances in the interview;
3. offered, without prompting, his son's DNA sample; and
4. took very little time to consult with his son.

The appellant relied on *R v Z* [2008] 3 NZLR 342 to support the proposition that police are subject to a positive obligation to ensure that an effective nominated person who is willing and able to assist the young person is available:

> Under s 222(4) of the CYPF [Act], the role of a nominated person includes taking reasonable steps to ensure that the child or young person understands the rights explained to the child or young person and providing support to the child or young person during questioning and the making of a statement. The nominated person is not merely a cipher. To carry out their role, the nominated adult needs to know the jeopardy faced by the child or young person they are to support. If in this case Z's father had known of the peril his son was in, he may have urged his son to obtain legal advice. He may also not have been so insistent that Z tell the truth and that he not exercise his right to silence.

Case Brief

However, in this case, it was accepted that C's father confirmed that he had read and understood his son's rights. In contrast to *R v Z*, C and his father were allowed an extended period to confer before commencing the interview. Furthermore, the statutory duty on a nominated person under s 222(4)(a) of the CYPF Act is "to take reasonable steps" to ensure that the child or young person understands" the matters set out in s 221(2)(a). It was determined that s 222(4) does not require a best interests approach on the part of the support person.

Ultimately, it was decided that in any event, there was no evidence C's father failed to discharge this duty. The fact that he did not ask questions of the police or did not seek to engage a lawyer or offered his son's DNA sample did not mean that C's father did not take reasonable steps to ensure that the police officers had explained to his son his various statutory rights. In this respect the Court held that the legislature did not envisage that a comprehensive judicial enquiry is required into the nature and quality of the support given in any particular case.

Was there a duty to explain?

It was submitted that police officers were under a duty to explain to C the role of a lawyer in the context of police questioning. In *R v Z*, the Court of Appeal were supportive of the Canadian approach of handing out a brochure at the time of questioning to parents and guardians which positively encourages them to ensure legal advice is obtained for their children. However, the Court in *R v Z* did not go as far as to impose a positive obligation on a police officer to take this step.

It was held that the detective's statutory duty under s 215 (1)(f), was to explain to C before questioning him that he was entitled to consult with and make or give any statement in the presence of a lawyer. It was noted that whatever might be regarded as best practice, this provision settles the nature and extent of an interviewing officer's duties.

Was there a breach of NZBORA?

Finally, it was submitted that the police officers breached C's rights under NZBORA by deliberately not disclosing the sexual aspect of S's complaint until a late stage in the interview, leading C to incrementally incriminate himself. After obtaining admissions of violent offending, it was contended that the officers "were keeping the sexual allegation up their sleeves" with the intention that C would further incriminate himself on the sexual offending.

The Court accepted that the Judge at first instance had a proper ground for accepting that the police were not obliged to advise C that he was at risk on sexual charges. That was because when starting the interview the officers were not in possession of the full facts relevant to the sexual element of S's complaint. They properly advised him that he was being questioned about a serious assault which left S unconscious and caused her hospitalisation.

C unconditionally acknowledged that he was responsible for the attack when asked about it but explained that he had acted in retaliation to provocation.

The Court was not satisfied that C's statement should be inadmissible at trial for failure to comply with any of the statutory requirements under the NZBORA.

Result: the appeal was dismissed.

Nominated Persons

Right to a nominated adult
A child or young person who is at the Police station for questioning about their involvement in an offence, or who is arrested, has the right to consult with, and make any statement in the presence of, a nominated adult (ss 215 and 222 CYPFA).

Who can act as a "nominated adult"?
The following people can act as a nominated adult:
- a parent or guardian
- an adult family member
- any other adult selected by the child or young person
- if the child or young person refuses or fails to nominate one of the above people, an adult nominated by the Police (the nominated person cannot be a Police officer).

What if the nominated person is unsuitable?
The Police can refuse to allow the child or young person to consult with a particular nominated adult if the Police believe on reasonable grounds that:
- the adult nominated may attempt to pervert the course of justice, or
- the adult cannot be located, or will not be available, within a reasonable period of time.

If this happens, the child or young person should be allowed to nominate and consult with another suitable person.

What is the role of the nominated adult?
The role of a nominated adult is:
- to take reasonable steps to ensure that the child or young person understands his or her rights as explained by the Police, and
- to support the child or young person before and during any questioning and while the child or young person is making any statement.

It is also practice that in carrying out their role, the nominated adult should:
- try to make sure they have the chance to discuss matters with the child or young person before the interview with the Police begins (whether or not the child or young person wants to do this), and
- try to develop a relationship with the child or young person to an extent to be able to carry out their statutory responsibilities.

Conference Papers

Delivered at *"Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence Conference"*

Signed, Sealed – (but not yet fully) Delivered:

An analysis of the "revolutionary" 1989 legislative blueprint to address youth offending in New Zealand, particularly by young Māori, and a discussion as to the extent to which it has been fully realised.

by His Honour Judge Andrew Becroft
Principal Youth Court Judge for New Zealand
Te Kaiwhakawā Matua o te Kōti Taiohi

ABSTRACT: New Zealand's youth justice system in the 1980s was the subject of growing public dissatisfaction and criticism. There was a heavy emphasis on charging, followed by formalised "official" decision making and a relatively high reliance on the institutionalisation of young offenders. Families and communities felt disempowered. In particular, Māori (the indigenous peoples of Aotearoa New Zealand) claimed to be marginalised and disadvantaged by the mono-cultural process.

The enactment of the Children, Young Persons and their Families Act in 1989, which in today's public climate might struggle to be passed, introduced a new paradigm. Namely, a clear two-fold emphasis in the legislation: first, on not charging young offenders and if at all possible using Police organised alternative responses; and, secondly (where Police diversion was not possible), relying on the Family Group Conference (FGC) - both as a diversionary mechanism to avoid charging, and as the prime decision making mechanism for all charges that were not denied or which were subsequently proved. Clear principles were also enshrined, emphasising the importance of involving and strengthening whānau (family), hapū (sub-tribe) and family group in all decision making and interventions.

The FGC paved the way for a restorative justice approach (although the term was not *en vogue* at the time the legislation was passed) and increasingly the Youth Court adopted a therapeutic, multi-disciplinary approach. Court numbers plummeted, government youth residences and prisons were closed, and youth offending rates stabilised. Yet the challenge presented by a "hard core" group of problematic youth offenders, about 5% of all youth offenders, remained. Equally concerning, the disproportionate number of Māori youth in the system continued to increase.

As we look back over of the last 25 years of significant, even unparalleled, progress, it is impossible to resist the conclusion that the new system, which was introduced with so much hope for Māori, has not delivered as was envisaged. This is partly because some provisions in the Act that were designed specifically for the benefit of Māori (such as cultural reports, lay/cultural advocates for families, and the development of tribal resources to deal with young Māori) have been poorly utilised. Also, the over representation of young Māori in the youth justice system takes place in a much wider context of Māori disadvantage in most other socio-economic spheres.

These issues have led to the recent development of new initiatives and measures: to strengthen the FGC process and increase the system's therapeutic approach; to enable Māori greater opportunities to respond to young Māori offenders; and the innovative introduction of Rangatahi Courts - the use of marae (Māori meeting places) as a venue where the Youth Court can sit to monitor the progress of young offenders as they complete their FGC plans. This judicially led initiative has been driven by Judge Heemi Taumaunu and a team of eight Māori District Court Judges over the past five years. There are now 12 Rangatahi Courts around the country. Judge Taumaunu will separately address the context, philosophy and development of Rangatahi Courts, and their success to date, at this conference.

You can access the full paper here: http://socialwork.ubc.ca/fileadmin/user_upload/social_work/Events/Int_Indigenous_Therapeutic_Healing_Conference_Oct_2014/Signed_Sealed_-__but_not_yet_fully__Delivered.pdf

Rangatahi Courts of Aotearoa New Zealand: an update

by His Honour Judge Heemi Taumaunu
Ngāti Pōrou, Ngāi Tahu
National Liaison Judge for Rangatahi Courts

ABSTRACT: This paper will set the context of Rangatahi Courts in Aotearoa by examining the extent to which Māori youth and adults are disproportionately over-represented in the criminal justice system; historical imprisonment rates; likely future trends; and potential solutions.

Consideration will then be given to the Rangatahi Court protocols and processes. This will provide readers with a fuller understanding of how these specialist Courts operate within the present day context. Finally, this paper will set out significant findings of the recently released Evaluation of Rangatahi Courts commissioned by the Ministry of Justice and undertaken by Kaipuke Consultants.

Rangatahi Courts form part of the wider Youth Court of New Zealand. The overall framework for the Youth Court for all young people who commit offences will be examined. The steps that a young person in the Youth Court will go through and the legal requirements that accompany each step will be outlined.

This will include consideration of Youth Court principles, Youth Court jurisdiction, Youth Court processes, detection of offending, charging, the current procedure for very serious offences, family group conferences, monitoring of Family Group Conferences, Youth Court orders, newly introduced orders, enforcement of orders, restricted combinations of orders, care and protection issues, and the Youth Court terms "Not Denied" and "Proved by Admission".

Neurodisability and Youth Offending:
the connection has been made

by Kate Peirse - O'Byrne

Kate Peirse - O'Byrne has produced the first comprehensive analysis of neurodisability and youth offending specific to Aotearoa New Zealand. Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector draws on the recent study "Nobody Made the Connection: the prevalence of neurodisability in young people who offend" by the Office of the Children's Commissioner for England, which found a high prevalence of neurodisability in the youth offending population. Applying this correlation to the New Zealand context, this work uses legal and pragmatic arguments to highlight the importance of identifying and responding to neurodisability in the youth justice system. To assess whether we are achieving this goal, current processes and practice in the New Zealand youth justice system are examined and finally, recommendations for improving the identification of, and responses to, neurodisability within youth offending are provided.

In 2012, the Children's Commissioner for England published a report entitled 'Nobody Made The Connection: The Prevalence Of Neurodisability In Young People Who Offend'.

The report, which amassed evidence of the staggering correlation between youth offending and neurodisability, caused ripples – and then waves – in New Zealand's youth justice sector. For the first time, youth justice workers had a piece of research that, in no uncertain terms, testified to the profound importance of neurodisability to the question of youth offending.

In brief, neurodisability is a broad term encompassing such atypical neurological profiles as intellectual disability, Foetal Alcohol Syndrome Disorder, and Attention Deficit Hyperactivity Disorder. Characteristics symptomatic of such neurodisabilities include hyperactivity and impulsivity, low intelligence and cognitive impairment, alienation, and aggressive behaviour. These characteristics can directly lead to offending; low impulse control and social immaturity could, for example, result in deviant sexual behaviour. They can also lead to life choices that increase the likelihood of offending; a sense of alienation, combined with cognitive impairment, may render a child particularly vulnerable to the influence of gang culture.

This evidence has manifold implications for the youth justice sector. **From a moral standpoint, failing to take account of neurodisability in responding to offending is indefensible.** New Zealand responds differently to young people by virtue of their neurology: young people have different cognitive capacity to adults. By the same logic, young people with neurodisability merit a justice response that identifies and takes account of their neurological impairment.

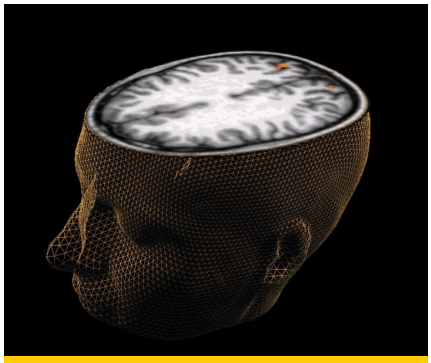
Pragmatically speaking, if we do not tailor our responses to—for example—a child with an intellectual disability or communication disorder, the child may be incapable of engaging with the intervention. Court processes and rehabilitative programmes are expensive. When they are ineffective, that money is wasted, but more concerning are the immeasurable costs to the offender and to society. **Indeed, ineffective processes can result in an *increased* risk of recidivism.**

Now that the relevance of neurodisability to offending is indisputable, so too is the relevance of neurodisability to fulfilling our legal obligations.

The obligation to identify and respond to neurodisability is implicit in both international human rights conventions (especially those pertaining to young people and to disability) and domestic human rights statutes (the Human Rights Act 1993 and Bill of Rights Act 1990). It is implicit in the 'fitness to stand trial' legislation, as neurodisability is now a potential basis for a finding of 'unfitness' (see the Criminal Procedure (Mentally Impaired Persons) Act 2003 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003).

Of most relevance to the youth justice sector is the Children, Young Persons and Their Families (CYPF) Act 1989, whose principles and objectives impliedly require a response to

neurodisability. The principle of addressing the causes underlying offending (s208(fa)) cannot be realised without knowledge of contributing neurodisabilities. Nor can sanctions "most likely to maintain and promote the development of the child" (s208(f)) be employed without knowledge of the child's neurological profile.



Moreover, without knowledge of and response to neurodisability, specific personnel cannot fulfil their statutory obligations. Under s255(1), Youth Justice coordinators must ensure that *all relevant information*, including information relating to the offender's health, is before the Family Group Conference (FGC). Under s10, the Youth Court and lawyer representing the young person must satisfy themselves that the young person *understands proceedings*; understanding can be profoundly affected by neurodisability. The Youth Court must have regard to the "*personal characteristics* of the young person" when imposing any sentence (s284).

These obligations necessitate an understanding of a young person's neurological impairments, and thus provide the framework and imperative to respond.

Addressing the gaps in our responses will not be a simple task. Neurodisability is not necessarily visible or easily deducible. Children with complex neurological conditions may show few signs of brain damage, cognitive impairment, or difficulty regulating emotion, and may not be capable of understanding or describing their difficulties. **For this reason, we need comprehensive screening processes, and these are not currently available: youth justice routes developed under the CYPF Act are largely reliant on ad hoc information gathering by legal personnel.**

Where information regarding underlying neurodisability is available, we then need to provide tailored responses. **Neurological impairments—such as learning disabilities—may result in a reduced capacity to comprehend the criminal process.** Without adjusted processes or special explanations, the young offender may disengage from a process that is "alien, confusing and misunderstood".

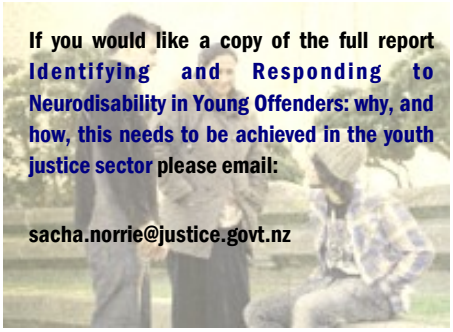
Evidence strongly indicates that while the FGC and Youth Court forums are working for some young offenders, neither forum is adequately equipped to tailor its process to young offenders with neurodisabilities. Young people are a hugely diverse population. In some cases, the FGC focus on taking verbal responsibility for one's actions will not be appropriate or effective: a child with a communication disorder may be incapable of expressing him/herself, and a child with autism may find the experience distressingly overstimulating. Radical changes to processes will sometimes be necessary.

Post-justice system supports then need to be responsive to specific needs and learning styles, which will differ depending on the young person's neurological profile.

FGC plans do have the potential to provide totally individualised responses, but evidence shows they are not always looking at the bigger picture. Without tailored services and supports, universal interventions may be employed—at a significant cost to the state—with no effect. Correspondingly, goals such as preventing long-term recidivism, and enabling reintegration into society, fail to be achieved.

Meeting these challenges is a considerable task, exacerbated by a paucity of appropriate available resources. While surmounting the financial barrier requires political buy-in, **the youth justice sector is empowered by the CYPF Act 1989: an excellent legislative vehicle for creative legal responses to neurodisability.** Its principles support the development of such initiatives as the Intensive Monitoring Group—an initiative spearheaded by His Honour Judge Tony Fitzgerald, which involves case management and a therapeutic court for high-risk young offenders. Its holistic approach recognises that criminal behaviour is not only a justice issue, but also a health issue, and a social issue. To paraphrase Judge Fitzgerald:

New Zealand has the potential to dramatically alter crime statistics if we pause, consider the causes of offending, and recognise criminal behaviour as a multifaceted—and therefore multiagency—issue. Our challenge is to pave the way towards a collaborative response to crime, and to engage wider society on this path.



If you would like a copy of the full report Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector please email:

sacha.norrie@justice.govt.nz

[2014] NZLJ 316

17 year olds and youth justice

Ian Lambie, Julia Ioane and Charlotte Best, University of Auckland

argue for including 17 year olds in the youth justice system

The New Zealand youth justice system has been praised internationally for its innovative approach to addressing offending by young people, however, it is currently characterised by one significant flaw. It does not include 17 year olds within its jurisdiction. Many Western countries now have separate youth justice jurisdictions for young people who offend. This reflects the common understanding that young people are not simply small adults, but rather, are dramatically different and consequently have very different needs. What is less clear however is at what age an individual should be considered "young". This article will discuss the growing need for New Zealand to include 17 year olds within its definition of "young person" in order to give them the benefits of its highly successful system.

CURRENT SYSTEM

CYPFA

The New Zealand youth justice system is governed by the Children, Young Persons and their Families Act 1989 (CYPFA). Under s 2, a "child" is defined as a boy or girl under the age of 14 years and a "young person" is defined as a boy or girl of or over the age of 14 but under the age of 17 years. An individual who comes within the definition of "young person" when an offence is committed but turns 17 before the commencement/conclusion of proceedings will still be dealt with within the youth jurisdiction. Once young persons turn 18 they are dealt with as an adult in either the District Court or High Court, depending on the severity of the offending. All offending committed by young people, aside from murder, manslaughter and traffic offences not punishable by imprisonment, is dealt with in this youth jurisdiction under s 272(3).

The youth justice system and CYPFA attempted to strike a balance between a welfare model (where the needs of the young person are the focus) and a justice model (where the deeds of the young person are the focus). The aim as provided for in s 4(f) of CYPFA is to ensure that where children or young people commit offences they are to be held accountable and encouraged to accept responsibility for their behaviour and also, that they are dealt with in a manner that acknowledges their needs and gives them an opportunity to develop in a responsible, beneficial and socially acceptable way. The Act also incorporates many of the principles of restorative justice wherein making amends for harm done, reintegrating offenders and the participation of all involved in the offending (including the offender, the victim and the wider community) are key to deciding the appropriate outcome for the offender. The Act provides that the needs of indigenous people should be taken into account, in part due to the overrepresentation of indigenous peoples in the New Zealand criminal justice system as well as in keeping with the obligations under the Treaty of Waitangi. Young people have a say in how their offending is responded to and group consensus is the model of decision-making (Maxwell and Morris "Youth Justice in New Zealand: Restorative Justice in Practice?" (2006) 62 *Journal of Social Issues* 239; Morris and Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26 ANZJ Crim 72).

CYPFA contains general principles under s 5 stating the importance of involving families in decision making, the wishes and welfare of children and young people and working within a time frame appropriate for the age of the child or young person. In addition, the Act contains several principles under s 208, specific to youth justice. Within these principles are the beliefs that criminal proceedings should not be instituted against children and young people where offending can be addressed by alternative means (unless the public interest requires otherwise), criminal proceedings should not be instituted solely to advance welfare, and any measures for dealing with offending by children and young people should address the causes underlying the offending. Young people who offend should be kept in the community so far as is practicable and any measures for dealing with offending should strengthen families and whanau and better enable them to deal with offending by their young people. The age of children and young people is to be a mitigating factor in determining sanctions and sanctions should take the least restrictive form, as well as the form most likely to maintain and promote the development of the child or young person within his/her family/whanau. Finally, under s 208, children and young people should be protected during proceedings while due regard should also be given to the interests of victims of offending.

Diversion plays a key part in the New Zealand youth justice system. Under s 209, police have the discretion to give a child or young person a warning instead of instituting criminal proceedings where they consider it a sufficient response.

Family Group Conference

At the centre of the CYPF Act is the Family Group Conference (FGC). The FGC is the key method of dealing with young people who offend in New Zealand and is, for the most part, regarded as highly successful (Maxwell and others *Achieving effective outcomes in youth justice: Final report to the Ministry of Social Development* (Ministry of Social Development, Wellington, 2004)). Underlying the FGC are values of restorative justice such as including the offender, their family/community and the victim in the decision-making process with the goal of reaching a just outcome by way of group consensus (<http://www.justice.govt.nz/courts/youth/about-the-youth-court/family-group-conference>). Under s 245 of CYPFA, proceedings are not to be instituted against a young person unless a family group conference is held. Under s 249 of the Act, a FGC is to be held within 21 days of the

youth justice co-ordinator receiving their report. Section 260 enables the FGC to formulate plans and make recommendations to be presented to the Youth Court. Those who can attend a FGC include the young person, any members of his/her family/whanau, the victim, a youth justice coordinator, member/s of the police, any agencies involved with the young person (eg, psychologists, mentors, education professionals), a Child Youth and Family Social Worker and, if arranged, a youth advocate. If the FGC cannot reach a consensus the matter may then proceed to the Youth Court.

Youth Court

The Youth Court is effectively the last resort in the New Zealand Youth Justice system, only to be used if diversion or a FGC are unsuccessful. Under s 283 of CYPFA, the court has a broad discretion as to the form of penalty however it must give consideration to the factors under s 284. This discretion includes, for the most serious youth offenders, transfer to the District Court or High Court for sentencing under s 283(o). Under s 282 the Youth Court has the discretion to discharge without conviction meaning the charge is deemed never to have been filed.

BRAIN DEVELOPMENT OF YOUNG PERSONS

It is unsurprising to most that the brains of young people are vastly different from those of adults. Adolescents are often characterised as impulsive, temperamental, immature and as unable to consider the feelings of others or consequences of their actions. Research tells us that most adolescents will grow out of this developmental stage and will grow into mature functioning members of society. However, it is less clear when exactly this will occur. The literature, as outlined below, suggests that often it will not be until the young person is in their twenties. The legal importance of this stage of adolescent brain development has been recognised in discussions of culpability and the standard young offenders should be held to in multiple decisions of the United States Supreme Court (Laurence Steinberg "The influence of neuroscience on US Supreme Court decisions about adolescents' criminal culpability" (2013) 14 *Nature Reviews: Neuroscience* 513). This next section will discuss some of the key findings on adolescent brain development, indicating that a young person's brain development is not complete on the day of their 17th birthday.

Prefrontal cortex

Adolescence is a time of impressive brain change and development. The main area known to continue developing through adolescence is the prefrontal cortex. This part of the brain at the front of the frontal lobe is responsible for executive function, which includes the coordination of thoughts and behaviour, response inhibition, self-regulation and the ability to plan and see future consequences of current activities. The prefrontal cortex has also been linked to other high-level cognitive capacities such as self-awareness and the ability to understand another's perspective (Sarah-Jane Blakemore and Suparna Choudhury "Development of the adolescent brain: implications for executive function and social cognition" (2006) 47 *J Child Psychology & Psychiatry* 296). Problems arise because at the same time as this prefrontal cortex development is occurring, puberty is causing changes in the brain's incentive and social processing areas but at a faster rate (Elizabeth Cauffman and Laurence Steinberg "Emerging Findings from Research on Adolescent Development and Juvenile Justice" (2012) 7 *Victims and Offenders* 449). Development of the prefrontal cortex has been found to continue well into the mid-twenties (Kathryn C Monahan and others "Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persisting antisocial behaviour" (2013) 25 *Development and Psychopathology* 1093). Laurence Steinberg in "Cognitive and affective development in adolescence" (2005) 9 *Trends in Cognitive Sciences* 69 at 70, referred to the current state of brain development in adolescence as similar to "starting an engine without having a skilled driver behind the wheel". Young people are drawn to increased sensation-seeking without having the needed self-control and maturity to ensure their behaviour is not harmful and is socially appropriate.

A clear example of this appears in *R v R* CRI-2005-092-14652 6 September 2006. The defendant was 14 years old when he threw an eight kilogram block of concrete over a bridge onto a motorway, killing a driver. Winkleman J regarded his actions as demonstrating "breath-taking stupidity" and "foolishness" (at [29]). While to an adult, the likelihood of serious harm or death resulting from such an action is clear, Winkleman J said, she was "satisfied that the full consequences of [his] actions were not foreseen by [him]" (at [32]). He was unable to look past the thrill of the immediate action to the potentially devastating consequences of his actions.

Peer influence

In addition to development of the prefrontal cortex, young people have to contend with the significant effect of peer influence on the brain. Peer influence has been heavily linked to engagement in risky behaviour such as experimentation with drugs and alcohol, unprotected sex and criminal activity (Chein and others "Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry" (2011) *Developmental Science* F1), as well as reoffending (Jason R Ingram and others "Parents, Friends and Serious Delinquency: An Examination of Direct and Indirect Effects Among At-Risk Early Adolescents" (2007) 32 Crim J Rev 380). This effect goes beyond the physical influence of peer pressure as it has been shown that observance by peers leads to activation of areas of the brain which increase sensitivity to potential immediate rewards of risky choices (Smith and others "Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known" (2014) *Developmental Psychology* 1). This effect is not, however, present in adults.

Chein and others found that adolescents engaged in more risky driving behaviour when being observed by peers using a simulated driving task with a sample of 14 to 18 year olds. The same effect was not found for adults. Using fMRI the authors found that adolescents, when observed by a peer, had greater activation in reward-related brain areas, which when activated, led to more subsequent risk taking. Areas of the brain associated with cognitive control were less likely to be activated in adolescents when compared with adults.

This effect of peer influence on risk taking has been found to exist even when adolescents are provided with information about the likelihood of a positive or negative outcome of the risk taking behaviour. Smith and others had male and female participants aged 15 to 17 years complete a simulated gambling task where the likely outcome of the risk was explicitly provided. The authors found that adolescents were more likely to engage in risky behaviour even when they had concrete evidence to suggest the outcome would be negative.

In fact, the research showed that young people may be more likely to make a risky choice when the outcome will most likely be negative. This provides clear support for the idea that the presence of peers influences the way young people evaluate the rewards of risk-taking behaviour. The peer influence effect exists even when the adolescent has never met the peer who is apparently observing them.

The literature on the adolescent brain in no way supports the notion that all the trappings of adolescence are gone by 17 years of age. As discussed earlier, the purpose of a separate youth justice system is to recognise the different needs of young people and adults. The inclusion of 17 year olds in all of the above research demonstrates that the problems known to affect those currently in the youth justice system are still affecting 17 year olds. The prefrontal cortex continues to develop well past age 17 and young people continue to be extremely susceptible to the influence of peers. The current distinction between a 16 and a 17 year old and the resulting inclusion or exclusion from the New Zealand youth justice system is inconsistent with this research and is thus, highly problematic.

INTERNATIONAL APPROACHES

UNCROC

In addition to being inconsistent with the brain literature, the New Zealand youth justice system is also out of step with much of the international community. Article 1 of the United Nations Convention on the Rights of the Child (UNCROC) defines a child as anyone under the age of 18 years. New Zealand ratified the convention in 1993 but continues to breach it by not including 17 year olds in the youth justice system. New Zealand has received criticism for this from the United Nations Committee on the Rights of the Child who, in their concluding observations in 2011, recommended that the age of criminal majority be changed to 18 years. Three years on, New Zealand has still not made the necessary changes (United Nations Committee on the Rights of the Child *Consideration of reports submitted by the State parties under article 44 of the Convention: Concluding observations: New Zealand* (CRC/C/NZL/CO/3-4, 11 April 2011) at [54]–[55]).

Commonwealth countries

New Zealand's failure to include 17 year olds in its youth justice system is also out of step with much of the western world. All of the Australian states, with the exception of Queensland, include 17 year olds in their youth justice jurisdiction. Queensland, like New Zealand, has received considerable criticism both from the United Nations Committee on the Rights of the Child (who recommended Queensland also increase the age of criminal majority to 18 years) and from those within the youth justice community such as Elizabeth Fraser, Commissioner for Children and Young People and Child Guardian "A case of injustice – 17 year olds in Queensland's adult prisons" (speech to the Australasian Institute of Judicial Administration, Brisbane, 24 August 2012). Under the Youth Justice Act 1992, 17 year olds are dealt with in the adult criminal justice system and subsequently can be sent to adult correctional facilities. The intention was that 17 year olds would ultimately be included in the system as recognition of the negative effects of prison on children and young people however, more than ten years later this is yet to happen.

The Canadian youth justice system is governed by the Provincial and Federal Youth Criminal Justice Act 2003 and includes those aged between 12 and 17 years inclusive in the youth jurisdiction. The Act recognises the special guarantees of young people's rights and freedoms in line with the UNCRC, the desire not to over-rely on incarceration and the idea that communities and families should work together. Unlike New Zealand, the Canadian youth justice system considers these factors relevant to 17 year olds also. The United States are not party to the UNCRC however over half of all states (38 of 50) include 17 year olds in their juvenile justice jurisdiction.

The youth justice system in England and Wales is largely governed by the Crime and Disorder Act 1998, of which Part III specifically addresses youth justice. Under s 117(1), a "young person" is a person who has attained the age of 14 years and is under the age of 18 years. England and Wales have separate specialist youth courts, as part of the Magistrate's Court, where those offenders 18 years and under are dealt with. Similarly to New Zealand, those in the youth court jurisdiction can be transferred and tried in an adult court where the offending is of the most serious kind.

CONSEQUENCES

The existing literature suggests that the less contact young people have with formal adult justice systems, the better the likelihood of a successful outcome is. Maxwell and others in *Achieving effective outcomes in youth justice: Final report to the Ministry of Social Development* (Ministry of Social Development, Wellington, 2004) reported that those young people who were dealt with less severely were less likely to reoffend.

Risk of reoffending

Lanza-Kaduce and others in "Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer" (2005) 28 J of Crim and J 59, using a matched pairs sample design, where one young person was transferred to the adult court and the other was retained in the juvenile system, found that those who were transferred to the adult court were more likely to reoffend. They were also more likely to reoffend violently after the age of 18 years. This effect remained present when young people of equally serious offending status were matched. Longhran and others in "Differential Effects of Adult Court Transfer on Juvenile Offender Recidivism (2010) 34 Law & Hum Behav 476, found that transferring young people to the adult system was less effective for those who committed property offences (such as vandalism), than for those who committed person offences (such as assault). This is of particular relevance to New Zealand as most offences by young people are property offences and those who engage in serious person crimes can still be transferred to the adult system if required (Jin Chong *Youth Justice Statistics in New Zealand: 1992 to 2006* (Ministry of Justice, August 2007 at 40).

Labelling

Including young people in the formal adult criminal justice system risks labelling young people as "criminals" unnecessarily. This can lead to identification of the young person as a "criminal" which may in turn lead to subsequent reoffending (Jon Bernburg and Marvin Khron "Labelling, Life Chances, and Adult Crime: Effects of Official Intervention in Adolescence on Crime in Early Adulthood" (2003) 41 Criminology 1287). Uberto Gatti and others, in "Iatrogenic effect of juvenile justice" (2009) 50 J Child Psychol Psychiatry 991, found that more extreme and constrictive approaches led young people to identify as "delinquents" and interact more with other delinquents and subsequently to engage in further criminal offending.

Punitive approach

Including young people in the adult criminal justice system increases the likelihood that their offending will be dealt with in a manner that is more serious than required. At the most extreme end of the spectrum is the likelihood of incarceration. Lambie and Randell, in "The impact of incarceration on juvenile offenders" (2013) 33 *Clinical Psychology Review* 448, discussed the various negative outcomes of incarceration. Incarceration hinders appropriate social development and prevents the reinforcement of appropriate social norms and expectations. Prison is an aggressive and often unsafe environment and can increase aggression in young people. Young people are often surrounded by more hardened criminals, as separation of young offenders and adult offenders is not always successful, and may in fact learn more about offending and crime. Importantly, young people in adult prisons have restricted access to their family and community which makes reintegration back into the community far more difficult.

Many young offenders bring with them a myriad of personal problems and negative life experiences. Lambie and Randell report that the vast majority of detained youth have mental health problems, many have substance abuse issues, over a third have special education needs and many are below their chronological age in terms of spelling, comprehension and cognitive abilities. The youth justice system is equipped to deal with such issues through processes such as specialist training of Youth Court judges however an adult system is not. As 17 year olds will likely only constitute a small minority of the adult offender population, their specific needs as young people will most likely not be recognised and consequently appropriate interventions will not be available (Debra R Chen and Randall T Salekin "Transfer to Adult Court: Enhancing Clinical Forensic Evaluations and Informing Policy" in Elena L Grigorenko (ed) *Handbook of Juvenile Forensic Psychology and Psychiatry* (Springer, New York, 2012)).

The New Zealand youth justice system is viewed as highly successful and innovative in the international community and so it remains unclear why 17 year olds continue to be excluded from it. The literature shows that positive outcomes are far less likely for young people whose offending is dealt with in the adult system and the risk of reoffending is greatly increased. Including 17 year olds in the adult system may prevent them from ageing out of offending and ultimately growing into functioning members of society. The present system, with 17 year olds in the adult criminal justice system, is likely doing more harm than good when dealing with offending by 17 year olds.

EFFECTS OF REFORM

As discussed previously, the New Zealand youth justice system is viewed as highly successful in dealing with young people who offend. Including 17 year olds in this jurisdiction would allow them access to more developmentally appropriate services while staying more connected with their families; and arguably would result in more positive outcomes for them.

The first approach to be taken with regard to young people who offend is diversion. This is in line with the principle under s 208 of the CYPF Act of only instituting criminal proceedings against a child or young person where no alternative solution is available. Diversion as a whole is not legislated for under the Act however, under s 210, police have the power to give a warning to a child or young person if they consider it a sufficient response. Between 60 and 80 per cent of New Zealand youth offending is dealt with by police diversion schemes (*Trends for Children and Youth in New Zealand Youth Justice System: 2001–2000* (Ministry of Justice, Wellington, 2012). Diversion is key to the effectiveness of the overall system as it ensures that young people are kept in the community and remain connected with their families while providing an opportunity for early intervention to prevent further offending. It also avoids the stigmatisation that comes with formal actions and unnecessary mixing with adult criminals (Nessa Lynch *Youth Justice in New Zealand* (Brookers, Wellington, 2012)).

Alternatively, a family group conference (FGC) may be convened. The FGC has been termed the "lynch-pin of the New Zealand youth justice system" (Andrew J Becroft and Rhonda Thompson "Restorative Justice in the Youth Court: A Square Peg in a Round Hole?" in Gabrielle Maxwell and James H Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Wellington, 2007)). It allows participation of those most affected by the young person's offending in the decision-making process, and gives families and communities, rather than so called experts the power to deal with offending by their young people. Young people see the effects of their offending first hand when victims attend the conference (A MacRae "Family Group Conferencing: An Effective Justice Process" (Presented at Santa Rosa, California, 22–25 May 2000) cited in Anne Hayden *Restorative Conferencing Manual of Aotearoa New Zealand: A Treasure from our Basket* (Department for Courts, Wellington, 2001) 74). The FGC holds young people accountable for their actions without making them feel powerless as to the outcome. The final plan is one agreed on by all members at the conference, and is specific to the offender and the offence. Once the plan is completed successfully, under s 282 of CYPFA, the Youth Court judge has the power to discharge the charge as if the charge had never been laid. This is likely a powerful motivator for young people actively to engage with the process.

In the event that the above approaches are not successful or appropriate, the Youth Court judge, under s 283 of CYPFA, retains discretion as to the penalty to impose on the young person. This discretion can include requirement of the young person to pay a fine, referral to specialist programs (such as drug and alcohol rehabilitation programs) and community work orders, among others. Young people are given the option to attend specialist courts such as the Christchurch Youth Drug Court or may choose to have their offending addressed in cultural courts such as the Rangatahi Court or Pasifika Court. If the offending is considered too serious for the Youth Court to deal with, the option remains under s 283(o) of the Act, for the young person to be referred to the District Court or High Court for sentence. This should allay fears that including 17 year olds in the youth justice system means providing a "soft option".

Concerns that including 17 year olds in the youth justice system will overwhelm judges in the Youth Court are most likely unfounded. In Victoria, fewer 17 year olds than 15 or 16 year olds have appeared in the Youth Court jurisdiction since the decision to include 17 year olds (Sentencing Advisory Council "Sentencing Children and Young People in Victoria" (Sentencing Advisory Council, Melbourne, 2012) at 95). In 2013, those aged 17–19 constituted only 12.67 per cent of those appearing before court across New Zealand

[2014] NZLJ 316

(Statistics New Zealand "Criminal convictions and sentencing statistics: calendar year" (28 March 2014) http://www.stats.govt.nz/toolsandservices/nzdotstat/criminal-conviction.aspx). Furthermore, these young people would be included in the wider justice system in any case. In coming within the youth jurisdiction they may be able to be dealt with under the diversionary scheme thus decreasing the numbers dealt with by courts.

Including 17 year olds in the youth justice system would also lead to more consistency in the law. At present, young people cannot buy or drink alcohol, vote, change their name or get a tattoo without parental permission before the age of 18. At 17 however, they can be treated in the same manner as an adult who has committed an offence. We believe that it is illogical to treat 17 year olds as children in almost every area of the law, yet hold them to an adult standard when they offend.

CONCLUSION

This article has discussed the clear need to include 17 year olds in the New Zealand youth justice system. At present, New Zealand's approach of excluding them is out of line with brain science, the international community and the UNCROC, and what is known about the detrimental effects of including young people in an adult justice system. New Zealand has a youth justice system which is highly regarded for its success in holding young people who offend to account. It is illogical to exclude 17 year olds from this system and to include them in a system they are not prepared for, one which evidence has shown to have few benefits and which may in fact pose a greater risk to both the individual and to society.

We believe that the interests of New Zealand and its young people will be better served by the inclusion of 17 year olds in the youth justice system. These young people will gain the benefits of the impressive diversionary focus of the system and will have the opportunity to take part in the highly regarded FGC. They will receive the benefit of alternative options and processes under the Youth Court discretion such as specialist programmes and courts. Finally, where necessary young people can be transferred to the adult system ensuring the interests of society are also protected. As long as 17 year olds continue to be excluded from the Youth Justice jurisdiction they will be dealt with ineffectively and unsuccessfully. ❐

Fetal Alcohol Spectrum Disorder (FASD) Symposium

The FASD symposium on 5 September was held to raise awareness of the implications of FASD. A collaborative effort, it was organised by Alcohol Healthwatch and Auckland University's Centre for Addiction Research with support from the Health Promotion Agency (HPA).

FASD is the term used to explain a range of physical, cognitive and behavioural impairments caused by alcohol exposure during fetal development. It is a leading cause of intellectual disabilities and is a serious neuro-development disorder which significantly impacts on a person's day-to-day functioning and social interactions. The aim of the symposium was to seek consensus from the sector on a plan of action for research, policy and prevention and the delivery of care to those who are affected by FASD in New Zealand.

The Symposium's keynote speaker was FASD expert Dr Jocelyn Cook who heads up Canada's largest FASD research network CanFASD. Dr Cook was also joined by New Zealand's Commissioner for Children Dr Russell Wills and Auckland District and Youth Court Judge, Tony Fitzgerald.

The symposium was well attended by people from different parts of the sector: families living with FASD, academic research, addictions, population health, social services, disability support, police, education, youth justice, child health, mental health and midwifery. The symposium also helped to support International Fetal Alcohol Syndrome Awareness Day which is held every year on September 9 to raise awareness of the risk of drinking during pregnancy and bring attention to the needs of those affected by FASD.

You can watch a video of Judge Fitzgerald's presentation here:

https://onedrive.live.com/?cid=c0832c5fbb90538c&id=C0832C5FBB90538C%218425&Bsrc=Share&Bpub=SDX.SkyDrive&authkey=!AkOEUlyP-RbuXfY#cid=C0832C5FBB90538C&id=C0832C5FBB90538C%218435&v=3&authkey=%21AkOEUlyP-RbuXfY

Source: Ease Up is available online here: http://hpa.cmail1.com/t/ViewEmail/r/31B098F48A436D202540EF23F30FEDED/

Book Review

Burning Down the House: the end of juvenile prison

Nell Bernstein

"... On they day of our arrival to Oakley, we observed a 13 year old boy sitting in a restraint chair near the Ironwood control room. Reportedly, he was placed in the restraint chair to prevent self-mutilation. No staff approached him, and he was not allowed to attend school or receive programming, counselling, or medication. This boy had been severely sexually and physically abused by family members ... prior to being sent to Ironwood. Just before our arrival, he had been locked naked in his empty cell. His cell smelt of urine, and we observed torn pieces of toilet paper on the concrete floor that he had been using as a pillow..."
(p. 21).

One in three American schoolchildren will be arrested by the time they are twenty-three, many of them for so-called status offenses—including cutting school, drinking alcohol, or disrespecting a police officer—that are not crimes for adults.

Despite recent reforms, too many youths will land in horrific state detention facilities where children as young as twelve are preyed upon by guards; driven mad by months in solitary; and, in their own words, "treated like animals." Beyond these abuses, the very act of isolating children in punitive prisons denies delinquent youth the one thing essential to rehabilitation: positive relationships with caring adults.

In this clear-eyed indictment of a failed institution—the juvenile detention facility—award-winning journalist Nell Bernstein shows that there is no right way to lock up a child."
– *The New Press*

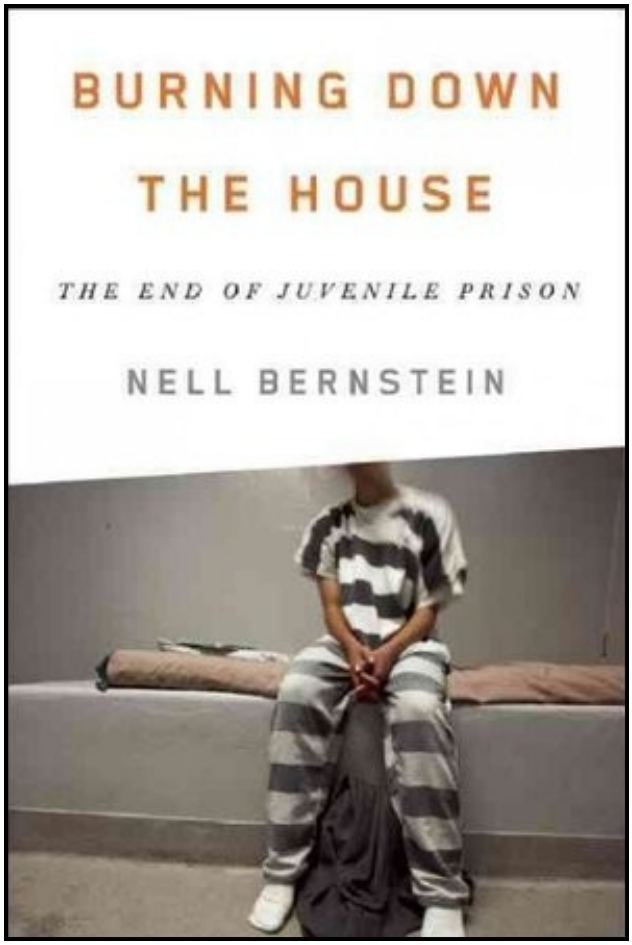
This book takes an in-depth look at youth incarceration in the United States of America. The United States incarcerates more young people under the age of 18 than any other industrialised country in the world. Most juveniles who are sent to these facilities are from racial minorities. Many of them suffer abuses in prison that are "heinous for adults and potentially ruinous for youth" — solitary confinement, rape, repeated physical abuse, deprivation of sunlight, insufficient food and human contact or affection. In fact, young people are less likely to suffer instances of sexual violence if locked up in an adult prison.

Most of the stories in this book are drawn from interviews, and often long friendships, with young people who have been in and out of youth correctional facilities. Berstein writes:

Here is the truth as I have come to understand it, after listening to hundreds of young people and their families, speaking with dozens of practitioners, and reading thousands of pages of documentation of vicious abuse, chronic neglect, and unremitting failure behind the walls of youth prisons:

- ***Correcting our children does not require containing them;***
- ***Rehabilitation happens in the context of a relationship, making our addiction to isolation a sure-fire route to failure;***
- ***Reform is inadequate to the moral challenge posed by the violence-plagued dungeons in which we keep our children;***
- ***Setting our children free will make us safer, not less so.***

The time has come to move beyond the long battle to reform our juvenile prisons and declare them beyond redemption.



"*Raze the buildings, free the children, and begin anew.*"

Latest Research /Articles

An update on some of the current research and publications from the Youth Justice sector

New Zealand

Rangatahi Courts of Aotearoa New Zealand: an update
Author: His Honour Judge Heemi Taumaunu
Source: Paper presented to the International Indigenous Therapeutic Jurisprudence Conference: University of British Columbia, Canada (October 9 and 10, 2014).
Abstract: This conference paper considers the Rangatahi Courts and their protocols and processes and recent evaluation, and provides an understanding of how these specialist Courts operate within the overall framework of the Youth Court. The disproportionate overrepresentation of young Māori is examined in reference to the overall criminal justice system, historical imprisonment rates, likely future trends and potential solutions.

Signed, Sealed - (but not yet fully) Delivered: an analysis of the "revolutionary" 1989 legislative blueprint to address youth offending in New Zealand, particularly by young Māori, and a discussion as to the extent to which it has fully been realised
Author: His Honour Judge Andrew Becroft
Source: International Indigenous Therapeutic Jurisprudence Conference, Canada (October 9 and 10, 2014).
Abstract: This paper maps the historical and political evolution of the Children, Young Persons and their Families Act 1989, its principles and processes. Twenty five years later, the 1989 Act and the youth justice system shows significant progress. However, there are parts of the legislation that are still yet to be delivered upon.

17 year olds and Youth Justice
Authors: Ian Lambie, Julia Ioane and Charlotte Best
Source: [2014] New Zealand Law Journal 316
Abstract: This paper advocates for the inclusion of 17 year olds in the youth justice system in Aotearoa New Zealand, highlighting the importance of scientific evidence about the adolescent brain, and also that New Zealand is out of step with international practice.

"Girls Behaving Badly?" Young Female Violence in New Zealand
Author: Nessa Lynch
Source: [2014] 45 Victoria University of Wellington Law Review 510
Abstract: While female crime, and particularly young female violence, has long been a titillating subject for the media, recent reports suggest an upsurge in violence amongst girls in New Zealand. This short article uses raw apprehension and sentencing data to consider the question of whether violence by girls is indeed increasing. It is concluded that while there does seem to have been an increase in violence by girls in the earlier part of the decade, the level of violence has fallen in the last three years. There may also be other explanations for an increase in apprehensions for violent offences such as changes in Police practice and societal attitudes.

Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector
Author: Kate Peirse – O'Byrne
Source: Dissertation completed for a Bachelor of Laws (Honours), University of Auckland, June 2014
Abstract: Research has shown neurodisability to be closely correlated with youth offending. This dissertation first illustrates the prevalence of neurodisability in the youth offending population, and argues for the importance of identifying and responding to it in the youth justice system, using normative, pragmatic and legal arguments. It then examines whether New Zealand's youth justice system is achieving this goal in practice, by reference to key processes and outcomes. In relation to screening for disability, police diversion, Intention-to-Charge Family Group Conferences, and the Youth Court forum are discussed. Responses and outcomes are then discussed in the context of the Family Group Conference, the Youth Court, the special Intensive Monitoring Group initiative, and the 'unfitness to stand trial' response. Finally, recommendations are provided for improving identification of, and responses to, youth offending in the youth justice system.

Canada

Dangerous Kids: a case analysis illustrating critical issues with applying a Dangerous Offender designation to youth
Authors: Stephanie Dawson, Simon Verdun-Jones, Garth Davies, Raymond Corrado
Source: [2014] Criminal Law Quarterly 65
Abstract: This paper explores the forensic and legal issues associated with using the Dangerous Offender provisions for youth.

United States

Adolescent negligence, 'obvious risk' and recent developments in neuroscience
Author: David Thorpe
Source [2014] 21(3) Torts Law Journal 195
Abstract: Recent neuroscience research reveals that the human brain undergoes structural changes at the onset of puberty which predispose adolescents to physical risk taking that in certain circumstances is difficult, if not impossible, to control. The implications of this research in respect to negligence under US state civil liability legislation are considered in this article.

Europe

Psychopathic traits and ethnicity in female youths
Authors: Pedro Santos Pechorro and others
Source: [2014] 47(2) Australian and New Zealand Journal of Criminology 223
Abstract: This paper analyses the differences regarding psychopathic traits and related constructs in female youths of diverse ethnic backgrounds.

Latest Research /Articles

United Kingdom

Diversion from Prosecution for Young People in England and Wales: Reconsidering the Mandatory Admission Criteria
Authors: Karen Cushing
Source: [2014] 14(2) Youth Justice Journal 140
Abstract: In England and Wales, diversion from formal criminal proceedings in the Youth Court for a young person who offends is usually only available if an admission to an offence is made. Failure to do so can be an immediate barrier to diversion, even for very young people who have committed low level offences. This article considers the complexities of the admission criterion, and explores whether the new provisions for diversion in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) is a lost opportunity to reconsider whether an admission should be a mandatory prerequisite for diversion.

General Deterrence: A Valid Objective in Youth Justice?
Authors: Nigel Stone
Source: [2014] 14(2) Youth Justice Journal 187
Abstract: An earlier Commentary reviewed judicial responses to serious public disorder and associated offending such as looting, in the light of sentencing arising from widespread rioting in London and other English cities in August 2011, observing that the Court of Appeal's judgment in *R v Blackshaw and Others* [2012] 1 WLR 1126 gave 'little basis for confidence that juvenile offenders [in this context] should properly be regarded in a more nuanced, contextual light rather than in a catch-all spirit of condemnation and deterrence'. More recently the Court of Appeal has revisited this issue with the additional instructive value drawn from one of the appellants being a juvenile.

Making Up Gangs: Looping, Labelling and the New Politics of Intelligence-led Policing
Authors: Alistair Fraser and Colin Atkinson
Source: [2014] 14(2) Youth Justice Journal 154
Abstract: The 2011 'summer of violent disorder' in England cast a spotlight on the often arbitrary and uneven process through which individuals become labelled as 'gang-members'. Based on data from two separate but concurrently conducted qualitative studies in Glasgow, Scotland, this article draws on the critical vocabularies of Bourdieu and Hacking to conceptualize this new frontier in the politics of gang policing: analysing the distinctive 'fields' that street-based young people and police actors inhabit; uncovering the complex chain of interactions through which individuals become labelled as 'gang-members'; and exploring the consequences of such labelling processes.

A Question of Family? Youth and Gangs
Authors: Tara Young, Wendy Fitzgibbon and Daniel Silverstone
Source: [2014] 14(2) Youth Justice Journal 172
Abstract: This article is concerned with exploring the role of the family in the formation of gangs, gang-related criminality and desistance. The overall aim of the article is to review the research literature. It posits that the evidence that connects the family to 'gang' membership is far from conclusive and argues that the aetiology of gang formation and criminality cannot simply be reduced to poor home environments or 'broken' families.

Re-inventing Diversion
Authors: Roger Smith
Source: [2014] 14(2) Youth Justice Journal 109
Abstract: This article reviews recent developments in the area of 'out of court' disposals in youth justice in England and Wales, highlighting the emergence of recent trends towards decreased use of formal procedures to deal with the reported offences of young people. The idea considers possible explanations for these developments and assesses the contribution of a number of recent practice initiatives with a diversionary orientation. The article reflects on the varying rationales underpinning these developments, and wider influences in the form of economically driven pragmatism, before concluding that in order to sustain recent achievements, diversion must demonstrably strengthen its claims to legitimacy.

Australia

Blurred Lines: Reconsidering the Concept of 'Diversion' in Youth Justice Systems in Australia
Author: Kelly Richards
Source: [2014] 14(2) Youth Justice Journal 122
Abstract: Although 'diversion' is omnipresent in youth justice, it is rarely subject to critical examination. This article raises four interrelated questions: what young people are to be 'diverted' *from* and *to*; whether young people are to be 'diverted' from the *criminal justice system* or from *offending*; whether young people are to be 'diverted' from criminal justice *processes* or *outcomes*; and whether 'diversion' should be considered distinct from crime prevention and early intervention. The article concludes that the confusion about youth 'diversion' may foster individualized interventions in young people's lives.

Conceptualising Responses to Institutional Abuse of Children
Author: Kathleen Daly
Source: [2014] Current Issues in Criminal Justice 26(1)
Abstract: Drawing from 19 major cases in Australia and Canada, this paper analysis government responses to institutional abuse of children.

News Worth Celebrating

Student Documentary: "State Care in NZ - How can the community help?"

This short and compelling documentary examines some of the issues facing children in State care, the challenges for those children and the institutions charged with their care.

Produced by **Eruera Davies** (BA/LLB, University of Auckland - now working in Family Law), this documentary catalogues a series of interviews with people connected to child and youth work in South Auckland.

Tui Gallagher shares her childhood experiences as a "ward of the State". Ross France and Allan Cooke, both Family and Youth legal practitioners, discuss the legal environment and share insights from their years of experience working with children and families. Isaac Paparoa, former member of the Killer Bees gang, talks about his journey from a young person on the streets of Otara to running the Fight Right boxing gym - a local initiative providing community-based intervention for South Auckland youth.

You can view the documentary here: http://vimeo.com/79855218

Oho Ake Framework Evaluation

The Oho Ake (to awaken) framework was launched in 2010 by Tūhoe in partnership with Whakatane Police. The framework is aimed at Māori tamariki and rangatahi who come into contact with the justice process and provides them with an option to work within a kaupapa Māori health service delivered by the Tūhoe iwi. The evaluation on the Oho Ake framework was commissioned by Tūhoe Hauora, and prepared by Kay Montgomery, to measure its effectiveness for rangatahi and their whānau who have been referred to the framework.

Over the four years since 2010, there have been 91 referrals from Police. The Oho Ake framework evaluation concludes that the regime has been instrumental in reducing the number of youth offending in the Whakatane area.

The main influence appears to be the use of whakawhānaungatanga (process of establishing relationships) within a kaupapa Māori health service with highly knowledgeable and skilled staff in this area. The positive benefits reported are not only between rangatahi and whānau, but also the relationships between Tūhoe, police and whānau.

You can request a copy of the full report from: sacha.norrie@justice.govt.nz

Alcohol, Marijuana and the Adolescent Brain Symposium

Brainwave Trust Aotearoa with support from the Health Promotion Agency (HPA) ran two symposiums in Auckland and Wellington on the effects of alcohol and marijuana on the adolescent brain.

The symposiums were aimed at those developing policy or working with youth across a range of sectors (government, social services, iwi, health, etc) and focused on the latest research findings and New Zealand interventions and practices relating to drug and alcohol abuse in adolescence. Both symposiums were well attended and received positive feedback overall.

Key note speakers were: Dr Lindsay Squeglia, University of California, USA, a leading researcher on the effect of alcohol and marijuana on the adolescent brain; renowned researcher Professor David Fergusson, Founder and Director of the Christchurch Health and Development Study and Nathan Mikaere-Wallis, Brainwave Trust Trustee.

Sue Wright, Executive Director, Brainwave Trust Aotearoa said *"the information provided compelling evidence to delay and reduce exposure of young people to alcohol and drugs as their adolescent brain is going through significant development that can be impacted by these drugs".*

Sourced from **Ease Up**: a monthly e-newsletter published by the Health Promotion Agency to about the alcohol environment.

The latest edition of **Ease Up** is available online here: http://hpa.cmail1.com/t/ViewEmail/r/31B098F48A436D202540EF23F30FEDED D18E639A43B75F614E9AB52EF5D51DA2#toc_item_3