

# **“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.

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## 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 get 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.

## 1. The Gathering Storm

### A The concerning state of Youth Justice in New Zealand

New Zealand's youth justice system has been described as 'revolutionary' and 'an international trendsetter'.<sup>2</sup> However, this has not always been the case. At its inception, the Children, Young Persons and their Families Act 1989 was hailed upon as 'a new paradigm'<sup>3</sup> for going beyond traditional philosophies of youth justice and offering a completely new conceptual approach. In order to understand modern youth justice in New Zealand it is necessary to first examine the shortcomings of the previous system and the major driving factors for its significant reform.

In the 1980s, and decades preceding the Act's introduction, youth justice in New Zealand was the subject of growing public dissatisfaction, criticism and a perception that the "welfare approach" to youth justice had failed to hold young offenders properly accountable for their offending.<sup>4</sup> The broadly "welfarist" Children and Young Persons Act 1974 created a single jurisdiction over care and protection and criminal matters in which little distinction was drawn between those who were offending and those who were in need of care and protection.<sup>5</sup>

There was a clear disconnect between the underlying welfare-based principles of treatment and rehabilitation contained in the 1974 Act, and the practices and responses to young offenders by professionals and the wider system itself. Police were found to be bypassing diversionary mechanisms and overusing arrest to ensure prosecution.<sup>6</sup> Rates of offending were not reduced by rehabilitative responses. The legislation contained few legal safeguards, due process rights were seen as an impediment and were reassured with an assumption that professionals would act with the young person's best interests at heart.<sup>7</sup>

Responses to offending were wide ranging and inconsistent. At one end of the scale, there was a limited range of sanctions available for minor offences committed by young people. At the other end, there was a relatively high and disproportionate reliance on the institutionalisation of young offenders due to the fact that generally, more consideration was given to the welfare needs of the young person rather than the offence that they had committed. Significant concerns were also raised regarding the treatment of young offenders in residential placements with allegations of harsh treatment and abuse emerging.<sup>8</sup>

Families and communities felt frustrated and disempowered by the formalised and official decision making processes. Consequently, plans for reform of the law relating to children and young persons commenced within a decade after the legislation's enactment.

### B A system failing Māori?

Amid mounting concerns about the state of youth justice in New Zealand during this period there was an increasing awareness and discomfort about the mono-cultural nature of both the youth justice

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<sup>2</sup> J Wundersitz "Juvenile Justice in Australia: Towards the New Millennium" in D Chappell and J Wilson (eds) *Crime and the Criminal Justice System in Australia: 1000 and Beyond* (Butterworths, Sydney, 2000) at 110.

<sup>3</sup> Morris and Maxwell *Juvenile Justice in New Zealand: A New Paradigm* (Victoria University of Wellington, Wellington, 1990).

<sup>4</sup> Nessa Lynch *Youth Justice in New Zealand* Thomson Reuters, Wellington, 2012) at 13.

<sup>5</sup> At 10.

<sup>6</sup> Allison Morris and Warren Young *Juvenile Justice in New Zealand: policy and Practice* (Institute of Criminology, Wellington, 1987).

<sup>7</sup> Nessa Lynch, above n 3, at 14.

<sup>8</sup> At 14.

system, and the criminal justice system in general. There was a view that state systems and processes were failing to take account of Māori values and cultural practices.<sup>9</sup> The decision making mechanisms used by Department of Social Welfare and other government agencies when making decisions about children, particularly Māori children, were seen as culturally inappropriate and racist. Describing the concerns at this time, Mike Doolan, the first Chief Social Worker for Child and Youth Services, commented:<sup>10</sup>

In New Zealand, Māori and Pacific Island youth are more fundamentally at risk of the coercive, intrusive welfare dispositions, under the guise of treatment and in pursuit of rehabilitation, than are their Caucasian counterparts. The fact that most professional decision-makers in the youth justice system are from the dominant white culture and are rarely identified as working class, contributes directly to this state of affairs.

Māori concerns were given their strongest voice in the *Puao-te-ata-tu Report* released in 1987,<sup>11</sup> which exposed many deficiencies in the Children and Young Persons Act 1974 in relation to its treatment and dealings with Māori, and found evidence of institutional racism within the Department of Social Welfare.<sup>12</sup>

National structures are evolved which are rooted in the values, systems and viewpoints of one culture only. Participation by minorities is conditional on their subjugating their own values and systems those of ‘the system’ of the power culture.

Emerging from this report, and subsequent consultation with Māori groups, was the strong message that whānau (family) must be at the centre of decision making processes for children. *Puao-te-ata-tu* recommended that any review of the 1974 Act should have regard to the principles that:<sup>13</sup>

- For the welfare of a Māori child, regard must be had to the desirability of maintaining the child in his or her hapū (kinship group);
- Whānau, hapū and iwi must be consulted and heard on placements of Māori children; and
- When a child or young person is to be sentenced, the court must consult members of the child's hapū or with persons active in tribal affairs who have a sound knowledge of the child's hapū.

There was a strong commitment in the reform process and re-drafting the 1989 legislation to create a youth justice system that would better meet the needs and values of Māori and other cultural groups in New Zealand. This commitment culminated in the enactment of legislation that has been described as representing ‘a major change in the policy towards Māori family forms and tikanga’.<sup>14</sup>

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<sup>9</sup> Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington 2014) at 63.

<sup>10</sup> MP Doolan “Legislation and Practice” in BJ Brown and FWA McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (The Legal Research Foundation, Auckland, 1993) at 18.

<sup>11</sup> *Puao-te-ata-tu (day break) – The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, Wellington, December 1987).

<sup>12</sup> *Puao-te-ata-tu (day break) – The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, Wellington, December 1987).

<sup>13</sup> Alison Cleland and Khylee Quince, above n 8, at 63.

<sup>14</sup> D Durie-Hall, J Metge, “Kua Tutu re Puehu, Kia Mao: Māori aspirations and family law” in Henaghan and Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992).

## C Back to the drawing board: the 1986 Bill

When the Labour government came to power in the 1984 election, it determined that the controversy over the Children and Young Persons Act 1974 could not be remedied by piecemeal changes. A full review was called for, which was the first step in a ‘turbulent and protracted path’ towards legislative change that was to last four years.<sup>15</sup>

In 1984, a departmental working party was established (without Māori representation). In line with international opinion, the recommendations of the Working Party displayed a rejection of the philosophies of the welfare model:<sup>16</sup>

Many young people who commit offences do not have any special family or social problems. Any problems they or their families have are more likely to be exacerbated than improved by official intervention triggered by the young person’s prosecution [...] Thus an offence by a young person should not be used, as it can be under the present law, to justify the taking of extended powers over the young person’s life for the purposes of rehabilitation.

To this end, the Working Party’s intention was to establish justice-oriented proceedings for young offenders that would be clearly separated from welfare-oriented care and protection proceedings.<sup>17</sup> It was proposed that care and protection issues be transferred to the Family Court jurisdiction and a Youth Division of the District Court be established to address youth offending.

The draft Children, Young Persons and their Families Bill (the Bill), presented to Parliament in 1986, was subject to extensive criticism. Despite a clear commitment from the State to minimising intervention in young people’s lives, the diversion strategies in the Bill did not appear to live up to this promise. While the Bill attempted to limit police powers of arrest and prosecution in order to minimise young people’s contact with the formal justice system, Working Party recommendations that Youth Assessment Panels be established as gatekeepers to the courts with specific diversionary measures, were ignored.

The most vigorous condemnation was reserved for the Bill’s failure to provide any form of culturally appropriate justice. From a Māori perspective, the Bill ‘was seen as even more likely to continue to remove Māori children from their families, whānau, hapū, iwi and communities. In these years, Māori whānau and hapū meetings were advocated for by commentators, as the only appropriate model for Māori when decisions were taken about children’.<sup>18</sup> The concerns about state systems failing Māori had been crystallised in the *Puao-te-ata-tu Report*, whose framework for a bicultural approach had been accepted by the Department of Social Welfare, but was not reflected in the Bill.

When considering how the 1986 Bill would achieve its objectives, it was predicted that:<sup>19</sup>

The likelihood is that the present ambivalent and confused approach to the problem of juvenile justice will continue, and that the measures adopted in the Bill will do little either to promote the use of diversionary strategies or to advance due process considerations.

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<sup>15</sup> Emily Watt *A History of Youth Justice in New Zealand* (paper commissioned by the Principal Youth Court Judge Andrew Becroft, January 2003) at 17, accessible on the New Zealand Youth Court website: < <http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf>>.

<sup>16</sup> Department of Social Welfare *Review of Children and Young Persons Legislation: Public Discussion Paper* (Department of Social Welfare, Wellington, 1984) at 1.

<sup>17</sup> Emily Watt, above n 13, at 19.

<sup>18</sup> Gabrielle Maxwell ‘The Youth Justice System in New Zealand: Restorative Justice delivered through the Family Group Conference’ in Gabrielle Maxwell, James H Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Victoria University of Wellington, 2007) at 48.

<sup>19</sup> At 48.

At the Select Committee stage in 1987, it was decided that a significant review was required after finding major issues with the Bill, mostly in relation to care and protection. At this point, the decision was made to leave the original Bill with the Select Committee and a team of officials, rather than to withdraw it from the House and start again. The Select Committee, with the benefit of a Māori Advisory Group comprising of high profile Māori leaders, travelled throughout the country, visiting local marae to hear directly from the people most affected by this legislation.

Redrafting was also heavily influenced by a 1988 report by Mike Doolan, the then National Director (Youth and Employment) of the Department of Social Welfare. His report, *From Welfare to Justice (Towards New Social Work Practice with Young Offenders)*, was the result of a three-month study tour in the United Kingdom and North America. It focussed on diversion from formal criminal justice interventions, alternative measures and in particular, an initial idea about direct management of offending outcomes by whānau, hapū, iwi and family groups – what was to become the Family Group Conference (FGC).

The Bill was radically overhauled. The Youth Justice section of the legislation took the best of the legal principles established in the original Bill which safeguarded young people under questioning; inserted principles to guide practice; legislated for informal diversion by the Police (consolidating a practice already occurring) providing for a higher level diversion (the FGC) when Police felt prosecution was the next alternative; and, providing for a range of new responses. The Youth Justice provisions were exempted from the paramountcy principle and it was established that young people should be treated in the same way as adults in relation to establishing culpability (due process), but that their age would be a mitigating factor in determining penalty. This distinction addressed the previous blurring of vulnerability and accountability, which had under occurred under the 1974 Act and original Bill, and had resulted in a lot of distrust of the system.

As the final stages of drafting were reached, it was clear that the Bill represented something internationally unique and created for New Zealand's own particular national purpose. Mike Doolan remarked:<sup>20</sup>

We could not do “What Works” because there was no international consensus about what works. We had no evidence that what we were proposing would work either. Rather than a “What Works” approach we adopted a “What’s Right” approach and developed our policy, and ultimately the law, from that premise. For us, “What’s Right” incorporated the right of wider families to be involved, a handing back by government to families, the rights and responsibilities usurped over time, and protecting young people from systemic interventions when less intrusive approaches could be as effective.

For the first time New Zealand bravely stepped away from “the dominant international wisdom about how to do youth justice, and followed our hearts to do what was right”.<sup>21</sup>

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<sup>20</sup> Correspondence with Mike Doolan (former National Director (Youth and Employment) of the Department of Social Welfare) on 16 September 2014.

<sup>21</sup> Correspondence with Mike Doolan.



## 2. The New Paradigm

Enacted amid such a volatile political and social background, the Children, Young Persons and their Families Act 1989 (the Act) had much to live up to. Not only did it have to achieve a balance between the polarised goals of the welfare and justice models, but also to realise the objectives of effective diversionary strategies; to provide processes allowing for mediation between victims, offenders and their families; to empower whānau/families; and to offer appropriate services that are culturally sensitive.

The Act endeavours to reconcile these conflicts and at the same time to meet the unique needs of New Zealand society. As District Court Judge McElrea concluded in 1993:<sup>22</sup>

We indeed do have a new paradigm of justice. It is not simply an old model with modifications. A new start has been made, new threads woven together and a new spirit prevails in Youth Justice in New Zealand.

While the Act makes a clear attempt to strike a balance between the competing demands of the justice and welfare models, the legislation also goes some way toward promoting other contemporary principles and concerns.

### A Objectives of the Act: striking a balance between justice and welfare

The Act heralded a shift from a welfare-based mentality where the State imposed generalised solutions on young people and their families in the interests of “curing” and “healing” young offenders, to a hybrid justice/welfare system where young people, their families, victims, the community and the State are involved in taking responsibility for offending and its consequences,<sup>23</sup> but in the context of a criminal justice “rights based” approach.

The legislation is unique in that it has established specific youth justice principles separate and distinct from those governing care and protection procedures. The part of the Act devoted to youth justice begins with a statement of principles, as follows in their current form:<sup>24</sup>

- a) Unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter;
- b) Criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whānau, or family group;
- c) Any measures for dealing with offending by children or young persons should be designed -
  - i. To strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
  - ii. To foster the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.

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<sup>22</sup> F W McElrea “A New Model of Justice: in Brown and McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) at 13.

<sup>23</sup> Children, Young Persons and Their Families Act 1989, ss 4, 5 and 208.

<sup>24</sup> Section 208.

- d) A child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public;
- e) A child's or young person's age is a mitigating factor in determining -
  - i. Whether or not to impose sanctions in respect of offending by a child or young person; and
  - ii. The nature of any such sanctions.
- f) Any sanctions imposed on a child or young person who commits an offence should -
  - i. Take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapū, and family group; and
  - ii. Take the least restrictive form that is appropriate in the circumstances.
- fa) Any measures for dealing with the offending should so far as its practicable address the underlying causes of offending;
- g) Any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending; and
- h) The vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

These principles, revolutionary at the time but now unremarkable by today's standards, reflect the contemporary trends and concerns pervading youth justice practice: the separation of justice and welfare processes (b), the importance of diversion (a), empowering victims (g), strengthening families (c), and offering culturally appropriate law (f). It is in the interplay of these objectives that the new paradigm was founded.

## B The New Zealand youth justice process: from arrest to court<sup>25</sup>

In New Zealand, a "child" is aged 10 – 13 years old and a "young person" is aged 1 – 16 years old.<sup>26</sup>

The Youth Court process begins with Police detecting alleged offending by a young person. Where this occurs, an enforcement officer has three options:

- To give an on the spot warning or otherwise deal with the matter informally;
- To notify the Police Youth Aid division for further action; or
- To arrest the young person.

### *Formal warning*

The first consideration when police apprehend a young offender is whether it would be sufficient to warn the young person. Police deal with 21% of youth offending by issuing a formal warning then releasing the young person.<sup>27</sup> This is in keeping with the principle that young offenders should be diverted from the formal justice system wherever possible. It also reflects the nature of much youth offending (i.e. relatively minor).

<sup>25</sup> Taken from the *New Zealand Youth Court Bench Book*, a resource for Youth Court Judges, published by the Institute of Judicial Studies, 2005 edition, edited by Judge Harding, Judge Whitehead and Rhonda Thompson.

<sup>26</sup> CYPFA, s 2.

<sup>27</sup> New Zealand Police *Apprehension Statistics and Trends 2013* (New Zealand Police, Wellington, 2013).

### *Alternative action/diversion*

Given the statutory injunction in s 208(a) not to issue criminal proceedings if there are alternative means of dealing with the matter and unless the public interest otherwise requires, the police must consider a diversionary programme for the young person if a warning is insufficient or inappropriate.

The limits of what may be used as a form of alternative action are the limits of the imaginations of those involved. The best Police Youth Aid workers spend considerable time and effort tailoring solutions that satisfy victims, prevent re-offending and re-integrate young people into their communities.

### *Arrest*

There are significant restrictions on the right of the Police to arrest a young person where there is good cause to suspect that he or she has committed an offence. Under s 214, a young person can only be arrested:

- to ensure the young person's appearance before Court (e.g. where the young person refuses to give name and address details); or
- to prevent the young person from committing further offending or to prevent the loss/destruction of evidence or witness interference; and
- where a summons would not achieve the above purposes.

However, where:

- an offence is a Category 3 or 4 offence (for which the maximum penalty is life imprisonment or imprisonment for at least 14 years); *and*
- a police officer believes arrest is required in the public interest,

there is no such restriction, and the Police officer may make the arrest (provided he or she has good cause to suspect the young person of offending).

There are also significant limitations upon the police questioning of young people and additional legislative safeguards for young people, which were no doubt introduced to reflect the immaturity and vulnerability of young people.

Upon arrest, the police may:

- release the young person without charge (an "intention to charge" Family Group Conference should be held if the police later decide that a charge should be laid); or
- charge the young person, in which case he or she may be released with or without conditions to appear later in the Youth Court; or
- in some situations, charge and detain the young person in custody for longer than the standard 24 hour maximum, in which case he or she must be brought before the Court as soon as practicable.

### *"Intention to charge" FGC*

If the Police wish to charge a young person who has not been (or cannot be) arrested, an "intention to charge" FGC must be convened to consider the matter.

Usually this type of FGC, provided the charge(s) are admitted, will recommend a voluntary plan for the young person to undertake. If it is satisfactorily completed, this will usually be the end of the matter. If not, then a charge may be laid in the Youth Court. Alternatively, the FGC may recommend that a charge be laid without a plan.

FGCs will be discussed at length in Chapter 2.

#### *Police voluntary use of pre-charge FGCs where young person arrested and released*

It is common practice for the Police to voluntarily submit to a pre-charge FGC in a situation where a young person has been arrested, released and some days or weeks later is to be charged with an offence. Technically, as there has been no arrest, there is no statutory obligation to do this. However, this course of action is permissible and, indeed, it is highly desirable that this best practice continues (in accordance with the principles of the Act given effect by the FGC procedure).

#### *Charge laid in Youth Court: denied*

When a charge is laid in the Youth Court, the young person is required to indicate whether the charge is “denied”.

If a charge is denied, the matter is the subject of a defended hearing, conducted in the normal adversarial manner as for adults under the provisions of the Criminal Procedure Act 2011. If the charge is dismissed, the young person is free to go. If it is proved in the Youth Court, an FGC must be convened to consider sentencing options. The Youth Court will impose one of the orders set out in s 283 or, in some cases, may grant an absolute discharge under s 282 (whereby the charge is deemed never to have been laid). In practice, very few cases (less than 5%) are denied.

#### *Charges not denied: Court-directed FGC*

In any other situation, short of an outright denial – which has come to be known in short-form as a “non-denial” or “not denied” – an FGC *must* be convened. If the charge is “admitted” at the FGC, the conference will usually formulate a plan for the young person to undertake. The plan should address both the “deed” and the “need”; the consequences and the causes of offending. That is, the young person should be held accountable for the offending but a comprehensive, rehabilitative plan should be formulated to prevent further offending and to allow the young person to develop in a socially beneficial way without further offending.

The plan will then be presented to the Youth Court. In about 95% of the cases, the plan is accepted and the case is adjourned for the plan to be completed. If the plan is satisfactorily completed, the young person is often absolutely discharged under s 282.

Sometimes, the FGC may recommend formal orders being made under s 283 or, on occasions, such formal orders are necessary because of the young person’s failure or inability to complete an agreed FGC plan. A Court-ordered FGC may recommend that, in addition to any other recommendation, a formal Police caution be given to the young person.

#### *Care and Protection Issues*

If the charges against a young person indicate that the young person may be in need of care and protection, as defined in s 14, the matter may be referred to a care and protection co-ordinator and the

proceedings adjourned until the matter can be resolved by use of the care and protection provisions of the Act. In this case, the matter may be discharged under s 282.

### *Jointly Charged with an Adult*

One of the few ways that a young person can leave the Youth Court jurisdiction is where they are jointly charged with an adult co-defendant. A young person *may* be transferred to the adult jurisdiction in some circumstances, unless the court is satisfied that it is in the interests of justice for the young person to remain in the Youth Court.<sup>28</sup> In some circumstances, the adult co-defender may be tried alongside the child or young person in the Youth Court.

### *Jury Trial*

A jury trial is another of the select few ways in which a child or young person can leave the Youth Court. A child or young person is entitled to elect trial by jury if charged with an offence (other than murder or manslaughter) that is punishable by imprisonment for 2 years or more.<sup>29</sup> If an election is made, proceedings remain in the Youth Court until transferred to the District or High Court following an adjournment for trial callover. A child or young person may withdraw their election at any time before proceedings are transferred to the trial court. This is an absolute right and does not require leave from the Judge.

### *Formal Orders*

Most cases in the Youth Court are resolved through an FGC plan without the need for a formal court order. However the Youth Court has the power to make certain formal orders, typically, but not exclusively, on the recommendation of the FGC, or where the FGC plan has either not been fulfilled or has been only partly fulfilled. Many of the Youth Court orders are comparable to sentences available in the adult court, but there are some unique aspects. Youth Court orders include, but are not limited to:

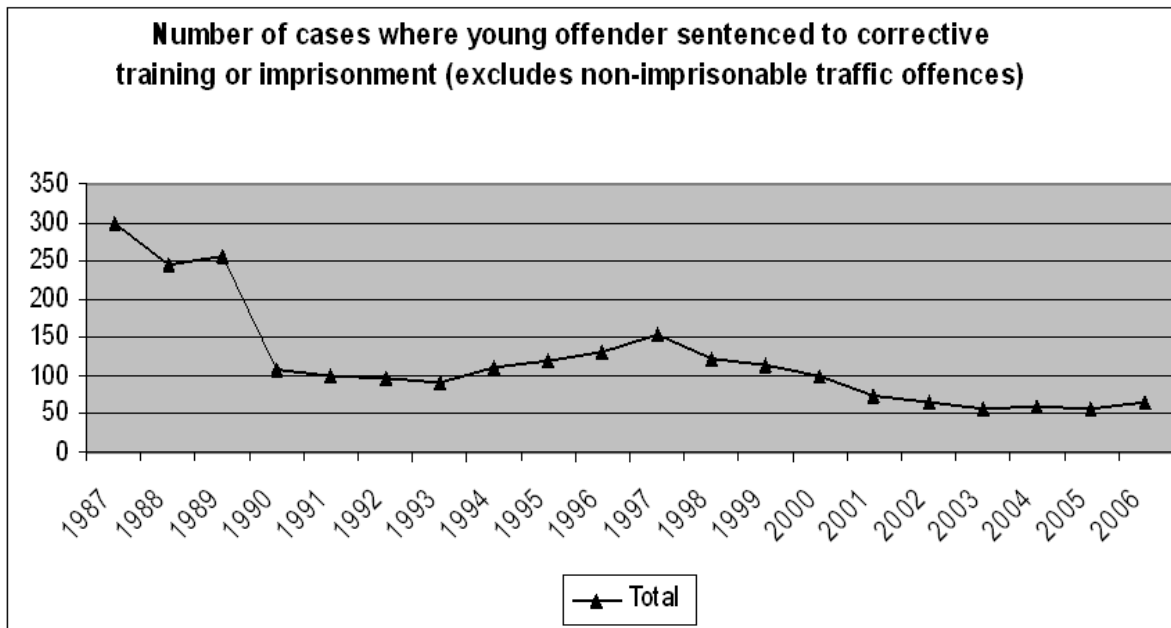
- Absolute discharge (s 282);
- A discharge that is noted on the young person's record (s 283(a));
- An order to come up for sentence if called upon within one year (s 283(c));
- Disqualification from driving (s 283(i));
- Reparation (s 283(f));
- Community work (s 283(l));
- Supervision (s 283(k));
- Youth justice residence (prison) (s 283(n)); and
- Conviction and transfer to the District Court for sentencing (s 283(o)).

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<sup>28</sup> See CYPFA, s 277.

<sup>29</sup> CYPFA, s 282(1).

As depicted below, rates of custodial sentences have radically decreased in the 17 years after the Act was passed. These trends have continued.



### *Convict and Transfer to the District Court for Sentence*

The ultimate order available in the Youth Court is to convict the young person and transfer them to the adult jurisdiction for sentencing under s 283(o). A decision to convict and transfer can only be made if it is considered that the less restrictive orders are clearly inadequate. Usually, the Judge presiding in the Youth Court will also preside over the sentencing decision in their capacity as a District Court Judge. Often, the case will stay within the physical bounds of the Youth Court and the Judge will merely “change hats” (i.e. declare a sitting of the District Court and sentence the young person under the Sentencing Act 2002 within their capacity as a District Court Judge).

As discussed in Chapter Seven, orders to convict and transfer to the District Court for sentencing are rarely made.

There are two central features of the system that require special consideration: diversion, and Family Group Conferences. These two mechanisms are essentially the twin pillars of the youth justice system in New Zealand.

### C Diversion

The objectives of diversion became increasingly important with the realisation that the adverse effects of court processes, including the resulting stigma, tended to increase the likelihood of re-offending. This realisation was based on a number of principles. First, research suggests that contact with the formalised youth justice system can have detrimental effects on a young offender, such as:<sup>30</sup>

<sup>30</sup> See Principal Youth Court Judge Andrew Becroft “Are there Lessons to be Learned from the Youth Justice System?” *Policy Quarterly* 5(2) May 2009 at 9.

- *Inoculation to the system*: All criminal justice systems rely upon a sense of authority and seeks to instil respect, and consequently produce compliance and feelings of remorse. Too much exposure to a system may increase familiarity and lessen the ‘awe’ factor.
- *Peer contagion*: Exposure to, and association with, other youth offenders during contact with the youth justice system has been shown to significantly detract from the benefits of any interventions/treatment that may be provided in that setting. Peer influence is hugely important in this age group.
- *Living up to the label*: Once an identity is established as an offender, this may colour all that young person’s dealings with family, friends and public agencies. It may be harder to break people’s assumptions than to live up to them.
- *Acquiring a ‘badge of honour’*: Some young people, particularly if surrounded by a criminal culture amongst adults, may find contact with the formal youth justice system to be a matter of pride, a mark of maturity or a ‘rite of passage’.

Given that most young people grow out of offending, and that prosecution may be an unnecessarily counter-productive, even harmful, intervention, the 1989 Act redefined the purpose of the youth justice system to now ‘confine prosecution to those cases where it is clearly in the public interest to prosecute’ and there is no alternative way of addressing the offending.<sup>31</sup> The new diversionary scheme proposed an alternative process to achieve this goal:<sup>32</sup>

The law is to be framed in such a way that once a young person is arrested, or a prosecution information [charging document] is laid before the Court, the Court is required to direct a family/whānau conference *prior* to the young person’s appearance before a Judge ... The object of the whānau/family conference, conducted in culturally appropriate ways and settings, would be to determine whether or not the matter could be resolved short of prosecution.

Section 208(a) of the Act codifies, with unprecedented clarity at the time in 1989, that criminal proceedings are to be a last resort. The legislation severely limits police powers of arrest without warrant, and prevents non-arrest charges being laid in the Youth Court until there has been a FGC. A report on the first year of operation of the Act concluded that the new diversionary scheme was achieving this goal.<sup>33</sup>

Increased use of warnings, reduced numbers of arrests and the limited numbers appearing in court demonstrates that diversion is successfully occurring. Significant advances have been made in avoiding unnecessary court appearances and in finding sanctions that are appropriate for the offence committed.

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<sup>31</sup> MP Doolan *From Welfare – to Justice (Towards new Social Work practice with young offenders): An Overseas Study Tour Report* (Department of Social Welfare, Wellington, January 1988) at 6.

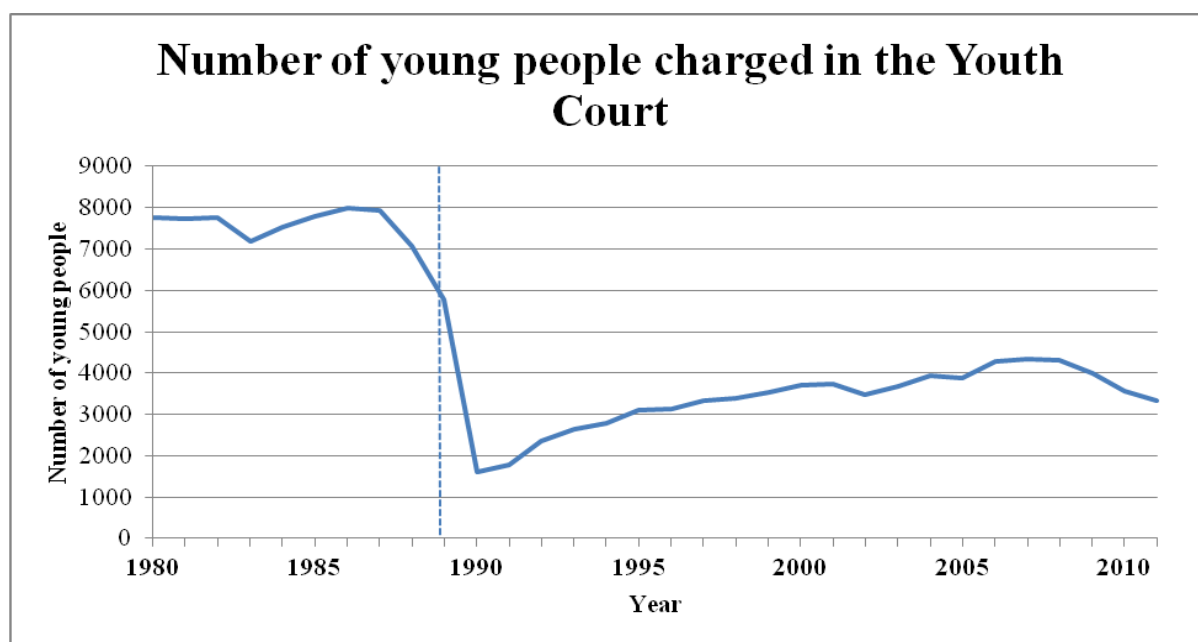
<sup>32</sup> At 11.

<sup>33</sup> J Renouf, G Robb and P Wells *Children Young Persons and their Families Act 1989 – Report on its First Year of Operation* (Department of Social Welfare, 1990) at 40.

The core statutory provisions<sup>34</sup> reflect a commitment to diversion and assume that alternative measures and rehabilitative responses will be both available and utilised. This can occur in several ways:

- Police take no action;
- A formal warning or caution by the police;
- Where there cannot be an arrest, and therefore a charge cannot be laid in the Youth Court directly, an Intention to Charge FGC may be convened; or
- A discharge in the Youth Court under s 282, following a successful FGC and subsequent plan.

New Zealand's diversionary scheme has proven to be an outstanding success in the 25 years since its overhaul in 1989.<sup>35</sup> The vast majority of police apprehensions of young people are dealt with out of court. Currently up to 84% of youth offending is not formally prosecuted. Youth Court data from the period 1992-2008 shows that apprehension, prosecution and conviction rates for both child and youth offenders have trended downward over the past two decades.<sup>36</sup> Only the top 20% or so of youth apprehensions ever make it to the Youth Court,<sup>37</sup> as the vast majority of offences are dealt with without formal charges ever being laid. A discharge under s 282, where the charge is dismissed as if it had never been laid, is granted to 47% of all young people prosecuted upon successful completion of an FGC plan, and is the most common outcome in the Youth Court.<sup>38</sup>



Source: New Zealand Ministry of Justice

This graph depicts a quiet revolution in youth justice practice in New Zealand over this period. Nowhere else, in the writers' knowledge, has there been such a dramatic decrease in the number of young people charged.

<sup>34</sup> Children, Young Persons and their Families Act 1989, ss 4(f) and 208(a).

<sup>35</sup> For an in depth discussion on youth diversion see Alison Cleland and Khylee Quince, above n 8, at Chapter 5.

<sup>36</sup> Ministry of Justice, *Child and Youth Offending Statistics 1992-2008* (Ministry of Justice, Wellington, 2010).

<sup>37</sup> Alison Cleland and Khylee Quince, above n 8, at 147.

<sup>38</sup> Ministry of Justice, *Youth Court Quarterly Report 2013* (Ministry of Justice, Wellington, 2013).



The development of a separate section of the nation police force, Police Youth Aid, was crucial to the scheme's success and New Zealand apparently remains the only country in the world to have a specialist police force dealing with young offenders. Very minor incidents are handled by front-line police with an immediate warning to the young person. These incidents are recorded on standard forms and sent through to Youth Aid for their records. More serious or persistent offending will be referred to Youth Aid, who may then either deal with the matter through alternative action, or refer the matter to an intention to charge FGC. If alternative action is chosen, the Youth Aid officer will decide on a plan after talking to the young person and visiting their family and the victim. The limits of this type of programme are the limits of the imagination of those involved. The best Youth Aid officers spend considerable time and effort tailoring solutions that satisfy victims, prevent reoffending and reintegrate young people into their communities.

Despite the Act not directly addressing concerns about the police acting as gatekeepers to the courts, it is to their credit that in practice the overwhelming majority of all young offending is dealt with by informal police diversionary strategies. In this way, the approach taken by police has been fundamental to the Act's success, and this very significant part of New Zealand's youth justice process is little understood.

#### D Family Group Conferences

In 1989 the New Zealand youth justice process took the revolutionary step of (partially) transferring decision-making power from the State to families, victims and communities with the introduction of FGCs. FGCs are often described as the "lynch-pin" of the New Zealand system and are a "vital and integral part of the procedures for the delivery of youth justice".<sup>39</sup>

The need to involve families and communities in the resolution of youth offending was the significant driving factor behind the innovative FGC model. Accordingly, FGCs allow the young offender, the offender's family, the victim, police and other youth justice professionals<sup>40</sup> to make collaborative and consensus-based decisions, to address the underlying causes of offending while still holding the young person accountable for their offending. By giving each participant a voice, FGCs also endeavour to utilise and build upon the resources of the young person's extended family and community.

The FGC is the vehicle through which the Act's fundamental principles are exercised. Enshrined as the primary goals of youth justice in New Zealand are:

- Diversion;<sup>41</sup>
- Accountability;<sup>42</sup>
- Victim involvement;<sup>43</sup>
- Involving and strengthening the offender's family;<sup>44</sup>
- Consensus decision-making;<sup>45</sup>

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<sup>39</sup> *Police v V* (2006) 25 FRNZ 852 (HC) at [1].

<sup>40</sup> For a full list of who can attend a Family Group Conference, see Children, Young Persons and their Families Act 1989, s 251.

<sup>41</sup> CYPFA, s 208(a).

<sup>42</sup> CYPFA, s 4(f)(i)

<sup>43</sup> CYPFA, s 208(g).

<sup>44</sup> CYPFA, ss 5(b) and (c)(ii), and 208(c)(i).

<sup>45</sup> CYPFA, ss 5(a) and 208(c)(ii).

- Cultural appropriateness;<sup>46</sup> and
- Due process.<sup>47</sup>

In order to achieve these goals, the specific functions of the FGC are:<sup>48</sup>

- To recommend whether the young person should be prosecuted or dealt with in another way;
- To make a determination regarding custody;
- Where proceedings have commenced, to make a decision as to whether they should continue; and
- Where a charge is admitted or proved, to recommend how the young person should be dealt with.

The FGC is the ‘hub of the entire youth justice process’ – it is not peripheral to the court procedure.<sup>49</sup> FGCs are the primary and mandatory decision making forum for all types of offending (except for charges of murder and manslaughter, and most non-imprisonable traffic offences and minor offences dealt with by way of an on the spot infringement notice).<sup>50</sup> Despite subsequent adaptation and replication of the conferencing system in many jurisdictions around the world, New Zealand remains unique in that the FGC is the primary decision-making process in youth justice – it is not an adjunct to the court process and is mandatory, irrespective of consent, in Youth Court when a charge is not denied or proved after denial.<sup>51</sup>

#### *Six situations in which an FGC must be convened*

1. *Child offender care and protection FGC:* If the Police believe, after inquiry, that an alleged child offender (aged 10 -13) is in need of care and protection, this must be reported to a Youth Justice Co-ordinator (YJC). YJCs are employees of the New Zealand Government’s Children, Young Persons and Their Families Service (CYFS) and are often qualified Social Workers. The YJC and police must consult, after which if police believe an application for a declaration of care and protection is necessary in the public interest, an FGC must be held<sup>52</sup> to address the child’s offending. At a care and protection FGC, the group must determine whether the offence is admitted, and, if so, what steps should be taken, including whether a declaration that the child is in need of care and protection should be filed in the Family Court.<sup>53</sup>
2. *Intention to charge FGC:* This is required whenever a young person is alleged to have committed an offence and has not been arrested (or has been earlier arrested and released) and the police intend to lay charges. Police must first consult a YJC. If, after consultation, the police still wish to charge the young person, an FGC must be convened.<sup>54</sup> This is the second most common type of FGC, and accounts for between one third and one half of all FGCs annually. At an intention to charge FGC, the group must determine whether the charge is

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<sup>46</sup> CYPFA, ss 4(a)(i),(iii) and 5(a).

<sup>47</sup> CYPFA, ss 215-218 (questioning by police), s 221 (admissibility of statements), s 237 (brought to court as soon as possible), and s 323 (appointment of a barrister or solicitor to represent the young person) for example.

<sup>48</sup> CYPFA, s 258.

<sup>49</sup> Alison Cleland and Khylee Quince, above n 8, at 140.

<sup>50</sup> CYPFA, s 273.

<sup>51</sup> Alison Cleland and Khylee Quince, above n 8, at 135.

<sup>52</sup> CYPFA, s 18(3).

<sup>53</sup> CYPFA, ss 258(a) and 259(1).

<sup>54</sup> CYPFA, s 245.

admitted and, if so, decide what should be done. This may include completion of an agreed plan, which if successful will be the end of the matter, or a decision that a charge should be laid in Court.<sup>55</sup>

3. *“Custody conference” FGC*: Where a young person denies a charge, but, pending its resolution, the Youth Court orders the young person be placed in CYFS or police custody, an FGC must be convened.<sup>56</sup> At a custody FGC, the group must decide whether detention in a CYFS secure residence should continue and where the young person should be placed pending resolution of the case.<sup>57</sup>
4. *Court directed FGC - “not denied”*: Where a charge is not denied by the young person in the Youth Court, the Court must direct that a FGC be held.<sup>58</sup> “Not denied” is a somewhat odd, but very useful, mechanism. It triggers an FGC without the need for an absolute admission of culpability. It may indicate the young person’s acceptance that he or she is guilty of something, although not necessarily the charge as laid. Invariably, in such cases, the details can be resolved at FGC. This is the most common type of FGC and accounts for at least half of all FGCs. At a Court ordered FGC, the group must determine whether the young person admits the offence, and, if so, what action and/or penalties should result.<sup>59</sup>
5. *FGC as to “orders” to be made by Youth Court*: Where a charge is admitted or proved in the Youth Court and there has been no previous opportunity to consider the appropriate way to deal with the young offender an FGC must be held.<sup>60</sup> At a penalty FGC, the group must decide what action and/or penalties should result from a finding that a charge is proved.<sup>61</sup>
6. *FGC at Youth Court discretion*: A Youth Court may direct that an FGC be convened at any stage in the proceedings if it appears necessary or desirable to do so.<sup>62</sup>

### *What happens at a FGC?*

The FGC process is not prescribed by the Act, but there are some typical aspects to the process. Generally, the Youth Justice Coordinator welcomes the participants as they arrive, introductions are made and everyone states their relationship to the young person. Depending on the cultural or religious background of the family, there may be a karakia, or prayer. The police officer will read the summary of facts and the young person will be asked if they admit the charge. After the charge is formally admitted, discussion will take place, which will include victim input as to the impact of the offending.

Expert reports dealing with education, health and welfare may be available. The offender, together with his or her family, is required to propose a plan aimed at addressing past offending, repairing present harm and meeting future needs. A range of outcomes are available to the offender and his or her family.<sup>63</sup> Generally, suggested outcomes must be “necessary or desirable in relation to the child or

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<sup>55</sup> CYPFA, ss 258(b) and 259(1).

<sup>56</sup> CYPFA, s 247(d).

<sup>57</sup> CYPFA, s 258(c).

<sup>58</sup> CYPFA, s 246.

<sup>59</sup> CYPFA, ss 258(d) and 259(1).

<sup>60</sup> CYPFA, s 281.

<sup>61</sup> CYPFA, s 258(e).

<sup>62</sup> CYPFA, s 281B.

<sup>63</sup> CYPFA, s 260.

young person”<sup>64</sup> and must “have regard to the [youth justice] principles” set out in the Act.<sup>65</sup> More specifically, and depending on the purpose of the Conference, the plan can make a number of recommendations. Victims are usually involved in the formulation of a plan.

The young person and his or her family, together with youth justice professionals who attend the conference, use the information obtained from earlier discussions in the FGC to formulate an appropriate plan. The Court retains the overriding responsibility for decision-making. While the Court is required to consider the plan, it is not obliged to adopt it, although it does in the vast majority of cases. After this, the plan that is made is monitored on a regular basis by a Judge in the Youth Court.

#### *Advantages of the “delegated process”*

Further, the legislation requires that FGC plans reflect the principles laid down in the Act.<sup>66</sup> However, there are no other legislative, or formal or informal prescriptions for FGC plans - the established processes merely provide the platform from which creative and individualised resolutions are formulated. There are consequently no limitations on the imagination and ideas of the group and this is, in many ways, the strength of the system. The plan designed by the offender, victim and community, is likely to be realistic and reflect the resources and support available to those parties.<sup>67</sup> For 95% of cases, FGC-recommended outcomes involve accountability measures of some kind.<sup>68</sup> Plans commonly include an apology and/or reparation to the victim, community service requirements, counselling and rehabilitation programmes and educational requirements. Most recommendations/plans are accepted by the Court and if the plan is carried out no formal Court order is imposed.<sup>69</sup> However, formal orders are available if the plan is not carried out.<sup>70</sup>

### **3. The New Paradigm: an Indigenous Model?**

#### **A Addressing Māori concerns**

One of the most groundbreaking elements of the 1989 Act was that, for the first time, family and whānau status was clearly recognised and enshrined in legislation. The concerns expressed by Māori in the *Puao-te-ata-tu Report* and elsewhere in the period leading up to the 1989 reform, regarding the inappropriateness of removal of children from their whānau, hapū and iwi, were addressed in the objects and principles of the Act.<sup>71</sup> The Act now provides that, in the context of youth justice, any measures for dealing with offending by children or young persons should be designed:<sup>72</sup>

- To strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
- To foster the abilities of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.

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<sup>64</sup> CYPFA, s 260(1).

<sup>65</sup> CYPFA, s 260(2).

<sup>66</sup> CYPFA, s 260(2); the principles are set out in s 208 of the same Act.

<sup>67</sup> His Honour, (former) Chief District Court Judge of New Zealand, D J Carruthers *Restorative Justice and Juvenile Justice: A Comparison of the Singapore and New Zealand Experience* (2002) at 17.

<sup>68</sup> Maxwell, Kingi and Robertson *Achieving the Diversion and Decarceration of Young Offenders in New Zealand* (Crime and Justice Research Centre, Victoria University of Wellington, 2003) at 11.

<sup>69</sup> In this situation the young person is given an absolute discharge under CYPFA, s 282.

<sup>70</sup> CYPFA, s 283.

<sup>71</sup> Alison Cleland and Khylee Quince, above n 8, at 67.

<sup>72</sup> CYPFA, s 208(c)(i),(ii).

This was seen as a significant step towards legal acknowledgement that previous procedures had been oppressive and racist, and that a new procedure should give some ownership to Māori (and other cultural minorities) to make decisions about their young people.<sup>73</sup>

The new paradigm, and specifically the FGC process, was touted a partial amalgamation of traditional Māori and Western approaches to criminal justice, whereby Māori customs and tikanga o ngā hara (the law of wrongdoing) could influence dispute resolution processes. Khylee Quince identifies that fundamental to Māori notions of dispute resolution is the need to:<sup>74</sup>

[...] restore the equilibrium of relationships between individuals, families and communities that are deemed to have been disrupted or harmed by offending behaviour. This process also seeks to restore the mana (dignity) of those persons, by acknowledging and addressing their harm and seeking consensus as to the appropriate means of utu (redress) in the circumstances. In Māori culture, the individual is identified in terms of their connection to people and territory. This preference for collectivism is reflected in the concept and practice of collective responsibility for disputes. The Māori system aims to account for past wrongs, but also focuses on future relationships and the reintegration of all parties involved back into the community. It is flexible, principle-based and enforced from the ground up.

Therefore, understanding why an individual had offended is inherently bound to notions of collective responsibility, and the imbalance between the offender and the victim's family has to be restored, often through a mediation process. Although many of the processes of Māori law no longer exist, the whānau (or family) meeting is still used by extended families in some Māori communities to resolve disputes.

The FGC process is not prescribed in the Act. However, some parallels can be drawn between Māori tikanga (custom) and kawa (protocol) and the commonly utilised format of the FGC. For example, many FGCs open with karakia (prayer), those present are introduced, there is an opportunity for information sharing and consensus decision making, which are all aspects of traditional Māori dispute resolution principles and practices.<sup>75</sup>

However, it is important to recognise that the FGC is *not* (as is sometimes unrealistically touted) the wholesale adoption of an indigenous or Māori method of dispute-resolution and a rejection of the Western legal system. A distinction must be drawn between a system that attempts to re-establish the indigenous model of pre-European times and a modern system of justice, which endeavours to be more culturally appropriate. The New Zealand system is an attempt to establish the latter, not to replicate the former. While it may incorporate some whānau-centred decision-making processes, the FGC also contains elements quite alien to indigenous models (for example, the presence of representatives of the State). Furthermore, there are other competing principles that are considered equally important: the empowerment of families, offenders and victims.

The 1989 Act does not create an indigenous or Māori framework for responding to youth offending. Rather, the Act seeks to make the established system more culturally appropriate and flexible and offers greater scope for processes to better reflect the “needs, values and beliefs of particular cultural and ethnic groups”.<sup>76</sup>

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<sup>73</sup> Alison Cleland and Khylee Quince, above n 8, at 168.

<sup>74</sup> At 168.

<sup>75</sup> At 169.

<sup>76</sup> CYPFA, s 4(a).

#### 4. The New Paradigm: a Restorative Justice Model?

##### A In practice not theory

The Act has been described as the “first legislated example of a move towards a restorative justice approach to offending” in New Zealand, despite there being no specific mention of ‘restorative justice’ in the legislation.<sup>77</sup> Indeed, at the time the Act was debated and formulated, the restorative justice movement was in its infancy, and the provisions of the Act had been developed before ideas about restorative jurisprudence had been widely disseminated.<sup>78</sup> The New Zealand system, and in particular FGCs, have become restorative in practice in an evolutionary way, rather than as a result of any theoretical underpinning or legislative prescription to do so.

Although not mandated by, or mentioned in, the legislation, a restorative justice approach is entirely consistent with the Acts objects and principles. His Honour Judge McElrea notes:<sup>79</sup>

[...] it is essentially the practice of youth justice, as experienced by practitioners, that is restorative, rather than the legislation underlying that practice. Sections 4-6 and s 208 spell out certain objectives of the Act and principles to be applied in youth justice. These are partly restorative, but mostly reflect a narrower emphasis namely the strengthening of the relationships between a young person and his family, whānau, hapū, iwi, and family group, and enabling such group whenever possible to resolve youth offending – see the short and long titles of the Act and ss 408 and 208(c).

Judge McElrea goes on, however, to say that the partly restorative aspects of the Act should not be downplayed. These “partly restorative” aspects are:<sup>80</sup>

- Section 4(f) propounds the principle that young people committing offences should be “held accountable, and encouraged to accept responsibility, for their behaviour” and should be “dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial and socially acceptable ways”. These provisions emphasise accountability and membership of a wider community.
- By making criminal proceedings a last resort (s 208(a)), the Act encourages the solution to come from within the community.
- A “welfare” approach is discouraged by stipulating (s 208(b) and (f)) that criminal proceedings should not be instituted solely for welfare reasons, and that any sanctions should take the “least restrictive form” that might be appropriate.
- With almost breathtaking understatement, s 208(g) requires that “due regard” should be had to the interests of victims of offending and s 251 establishes the right of any victim or his/her representative to attend every FGC.

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<sup>77</sup> Gabrielle Maxwell and others *Achieving Effective Outcomes in Youth Justice – Final Report* (Ministry of Social Development, 2004) at 8.

<sup>78</sup> Nessa Lynch, above n 3, at 114.

<sup>79</sup> Judge FWM McElrea (1994), *The New Zealand Youth Court: A Model for Development in Other Countries?* A paper presented for the National Conference of District Court Judges, Rotorua, New Zealand (1994-1995) 4 JJA at 33.

<sup>80</sup> Judge FWM McElrea “*The Intent of the Children Young Persons and Their Families Act 1989 - Restorative Justice?*” Youth Law Review, July/August/September 1994 at 4.

- Young offenders are intended to be kept in the community, so far as that is consonant with public safety (s 208(d)).
- And finally, the whole machinery of the Act that propels the FGC process is one that makes possible a restorative approach to justice.

Accordingly, an assessment of sections 4, 5 and 208 of the Act reveals a number of principles that are consistent with restorative justice processes. The Long Title to the Act, the General Principles and Youth Justice Principles sections all stress the importance of rehabilitation through family involvement.<sup>81</sup> Importantly, section 5 states that “any Court which, or person who, exercises any power conferred by or under this Act shall be guided by:

The principle that, wherever possible, a child’s or young person’s family, whānau, hapū, iwi, and family group should *participate in the making of decisions affecting that child or young person*, and accordingly that, wherever possible, regard should be had to the views of that family, whānau, hapū, iwi, and family group.

Much like the focus on family involvement, the involvement of victims has been seized upon as a potentially restorative feature of the Act. However, it is important to note that at the time the Act was being contemplated, the inclusion of victims in the FGC process was intended to keep the system honest, *not* to contribute to restorative outcomes.

During the drafting process, the Youth Justice Policy team at the Ministry for Social Development recognised that the unprecedented FGC model would be the subject of much public scrutiny. For the first time, a fundamental portion of the criminal justice decision-making forum would be taken out of the courtroom, and the public view, and conducted in the private and unreported FGC forum. Questions around how the FGC process could appear to be, and indeed be, legitimate in the eyes of the public were fraught. It was ultimately decided that if victims could have their justice needs delivered by FGCs, then the public could be more confident that the process was legitimate. Accordingly, the Act provides for the right for victims, or their representatives, to be consulted about where and when an FGC should take place and to attend the FGC.<sup>82</sup> Victims are also entitled to a record of what was agreed to at the FGC.<sup>83</sup> These provisions are rooted in a “victim’s rights” framework, where the victim is able attend an FGC as of right, rather than as party contributing to a restorative process aimed at repairing harm.

Again, it was only after the legislation’s enactment that notions of the potentially restorative nature of victim involvement began to creep in. Central to restorative justice theory is the idea that the offender will perform actions to repair the harm caused by the offending to achieve restorative outcomes. Therefore, victim involvement in FGC processes certainly has the potential to be restorative in practice. However, as practice has developed since 1989, it has become evident that the actual “restorativeness” of FGCs fluctuates due, to a large extent, to the varying levels of victim attendance. Without a victim present, one of the key components of a restorative justice event, the repair of harm caused by the offending, is diminished.

Nevertheless, irrespective of its origins and underlying philosophies, the transfer of decision-making to the FGC, while radical at the time, is only partial and the Youth Court retains the ultimate decision-making power. The Youth Court has the obligation to “consider any decision, recommendation or

<sup>81</sup> CYPFA, Long Title (b) and (c), ss 5(a), 5(b), 5(e)(i), 208(c) and 208(f)(i).

<sup>82</sup> CYPFA, ss 250(2)(a) and 251(1)(f).

<sup>83</sup> CYPFA, s 265(1)(f).

plan made or formulated by the family group conference in relation to the offence”<sup>84</sup> but is not bound to follow it. The Youth Court could, if it so chose, override the decisions of the FGC – but in practice this is virtually unheard of. Consequently, attempts to provide an alternative restorative justice system in New Zealand have been described as “haunted” by the formal Court-based, punitive criminal justice system that waits “to catch the failures of the more progressive system”.<sup>85</sup>

## B The extent to which the Youth Court process is restorative<sup>86</sup>

The question, then, is to what extent are restorative principles such as inclusion, accountability, voluntariness, group involvement in decision-making, support and freedom of discourse already in evidence in the Youth Court; a court modelled on the “old Bailey” adversarial approach. A typical Court hearing involves youth advocates, police, social workers, the offender and their family and supporters and, of course, a Judge. Usually, Youth Court Judges encourage discussion and participation from these individuals and a key goal of Youth Court outcomes is accountability. At first glance, then, a Youth Court appears to display features of restorative justice, but levels of discussion and inclusion vary from Court to Court. Some key features of the New Zealand Youth Court that exhibit restorative qualities are:

- *Inclusive court layout*: To an extent, structure and form of the Youth Courtroom directly influences content and process. The ideal Youth Court arrangement has the desks arranged in a “U” shape around which the social workers, youth advocates and police sit. Family and supporters of the offender are seated against one side wall and other interested parties are seated along the facing side wall. The offender stands behind the “U” shape of desks, facing the Judge. This layout has been successfully adopted in a number of Youth Courts in New Zealand, with the first “purpose built” Youth Courts being constructed recently.
- *“Not Denied”*: The Western adversarial concept of putting the prosecution “to the proof” can be seen as a discouragement to people to plead guilty and accept responsibility for their actions.<sup>87</sup> As noted, the Youth Court avoids taking a guilty or not guilty plea and, instead, asks the young person whether the charge is “not denied”. When a charge is “not denied” it is transferred to a FGC where the young person may nevertheless opt to deny the charge, but in the majority of cases the charge is proven by admission. The “not denied” mechanism allows the parties to meet and discuss the charge(s) before the offender commits themselves to a plea. Once matters are admitted, including finalisation of the proper charge(s) and the summary of facts, the parties can then move along the reconciliation path.<sup>88</sup> Thus, the formal Court process assists restorative justice processes, because, if the Youth Court insisted upon the making of a guilty or not guilty plea, this would inhibit prompt access to the FGC process.<sup>89</sup>
- *Judicial monitoring and continuity of the judge*: Youth Court hearings are structured to be relatively short, frequent and engaged meetings between the young person, Judge and multi-

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<sup>84</sup> CYPFA, s 279.

<sup>85</sup> K Haines “Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders” in L Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks and Problems* A selection of papers from the International Conference of the International Network for Research on Restorative Justice for Juveniles, Belgium, Leuven University Press, 1998 at 105.

<sup>86</sup> For more in depth discussion refer to Principal Youth Court Judge Andrew Becroft “Restorative Justice in the Youth Court” Speech to the LEADR 9<sup>th</sup> International Conference on Alternative Dispute Resolution (Wellington, 19 September 2007).

<sup>87</sup> Judge FWM McElrea (2001) *Restoring Justice*, Address to Law Forum 2001, Organisation of Commonwealth Caribbean Bar Associations’ Fourth Conference at 4.

<sup>88</sup> Judge FWM McElrea, above n 81, at 4.

<sup>89</sup> At 4.



disciplinary team. For example, a young person may appear every two weeks so that the Judge can monitor their progress and address any issues that may be presenting before they escalate. Where possible, the young person will appear before the same Judge for the duration of proceedings, maintaining continuity, consistency and fostering a relationship between the Judge and young person.

Other restorative practices include:

- Regular monitoring of a young person's FGC plan in court (usually every two weeks);
- Continuity of Judge (where possible) throughout the proceedings;
- A coordinated, multi-disciplinary team approach with access to the necessary wraparound services;
- Direct engagement and dialogue between the Judge and the young person, their families and victims (when occasionally present); and
- Routine forensic and education screening.

## **5. Strengths and Challenges of the New Zealand System**

### **A Strengths of New Zealand's youth justice system<sup>90</sup>**

#### *Cross-over and flexibility of response*

As previously mentioned in Chapter Two, the New Zealand system avoids an unhelpful, artificial, rigorous split between the youth justice and care and protection provisions by allowing a cross-over between the two parts. Flexibility between the two systems allows youth offenders with care and protection issues to be dealt with appropriately and allows room for discretion as to whether an incidence of offending is really care and protection based, enabling transfer to the Family Court. This enables the justice system to concentrate on justice issues and avoid getting involved in care and protection work, which it is poorly equipped to carry out. The Youth Court also has the advantage of specialist courts, which avoid welfarising the response but which are designed to address the underlying needs of the young people before it, as well as providing a justice response to the offending. Examples of this are the Intensive Monitoring Group and Cross-Over List, as discussed in Chapter Six.

#### *Reduced institutionalisation*

Immediately preceding the Act in 1988, 2000 children in New Zealand were in State institutions. By late 1996 the figure was under 100. Research had firmly established that putting offenders into State institutions was more likely to reinforce their criminal identity and restrict their opportunity to choose a non-criminal lifestyle through normal integration into the community. As a result of the new approach, many boys' homes and borstals were able to close down.

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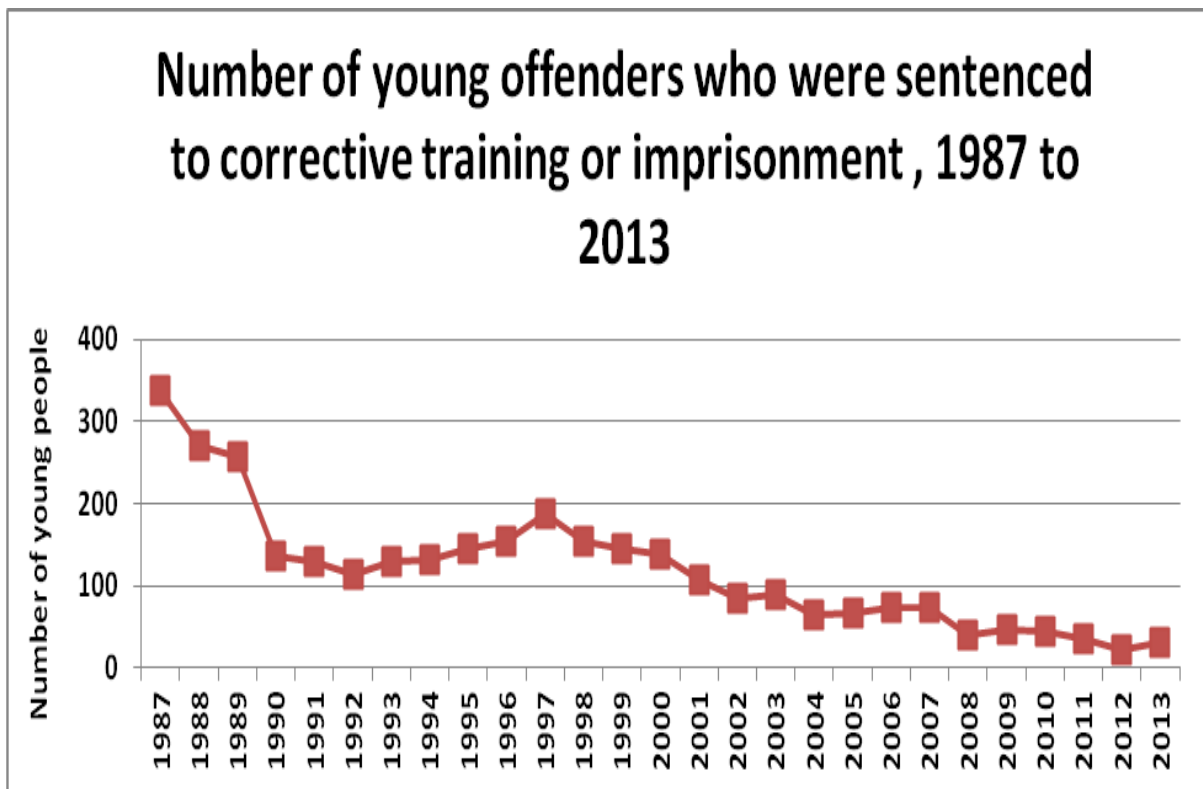
<sup>90</sup> For further discussion, see Principal Youth Court Judge Andrew Becroft "Are there Lessons to be Learned from the Youth Justice System?" *Policy Quarterly* 5(2) May 2009 at 9.

*Reduced use of Youth Court formal orders and more reliance on FGC plans and recommendations to hold young offenders accountable*

Youth Court orders are considered a last resort and wherever possible the recommendations from the FGC are implemented and carefully monitored. In 2013, only 26% of those appearing in the Youth Court<sup>91</sup> received a formal order.<sup>92</sup> If an FGC plan is successfully completed, a young person will receive a s 282 order, which is an absolute discharge.

*Significantly reduced rates of imprisonment*

The Act introduced the statutory enjoiner to consider alternatives to criminal proceedings, to impose the least restrictive sentence, and to keep young offenders in the community whenever consonant with public safety. Consequently, the use of imprisonment and corrective training (3 month custodial sentence for 16-19 year olds, which was abolished in 1996) fell dramatically. This trend has continued almost unabated since 1990. The graph below depicts the reduced reliance on incarceration and the increased use of community based sentences. In 2013, less than 0.5% of young people appearing in the Youth Court received a custodial sentence.<sup>93</sup>



*Specialist Youth Court Judges*

One of the greatest strengths of the Youth Court is the highly experienced and specialised bench of Youth Court Judges. All Judges with a Youth Court warrant are also full time District Court Judges, bringing with them a wealth of knowledge and experience from the criminal, and sometimes Family

<sup>91</sup> Ministry of Justice, *Youth Court Quarterly Reports 2013* (Ministry of Justice, Wellington, 2013).

<sup>92</sup> Refer to Chapter 2 on formal orders.

<sup>93</sup> Ministry of Justice, *Youth Court Quarterly Reports 2013* (Ministry of Justice, Wellington, 2013).

Court, jurisdictions.<sup>94</sup> Youth Court Judges receive specialist training on their role, covering the philosophy and principles underpinning the system, the legal and technical aspects of the jurisdiction and tools to more effectively engage with young people and their families. Most Youth Court judgments are delivered orally and, almost invariably, written judgments are recorded as if the Judge is speaking directly to the young person.

#### *Diversion and Specialist Youth Police*

As previously discussed, a diversionary approach is a key focus of the youth justice system and one of its biggest successes. The decision whether to divert or charge is made by one of the approximately 250 specialist Youth Aid police officers. These officers are sworn constables, receive additional training to deal with young people and receive higher salaries than other constables of a similar rank.

#### *Family Group Conferences*

As previously discussed, it is through the mandatory use of FGCs for all those who come before the Youth Court that control over, and responsibility for, youth offending is partially transferred and given back to the community and families.

#### *Youth Advocates*

Another reason for the success of New Zealand's youth justice system is that Youth Advocates (lawyers for the youth offender) are universally appointed by the Youth Court, and are paid for by the government, irrespective of the young person's family's financial means. Youth Advocates are specifically trained in the youth justice system. When appointing lawyers to the Youth Advocates Panel, the court takes into account a range of matters including knowledge of the objects and principles of the Act; knowledge of the roles and practice of various professionals within the youth justice system; ability to relate to young people and their families; and knowledge of restorative justice principles and practice.

#### *Specialist Government Social Workers to work with serious young offenders*

## **B Challenges for New Zealand's youth justice system**<sup>95</sup>

#### *Improving FGC outcomes*

While FGCs have shown to be effective in reducing rates of recidivism and increasing the chances of positive life outcomes for young offenders, the success or otherwise of a FGC will always depend, to a large part, upon the coordination, stakeholder attendance (and in particular, victim attendance) and support resources provided to it. Current work is going into the revitalisation of FGCs to address some of the theoretical and practice-based limitations of the FGC model.

#### *Information-sharing between jurisdictions*

A further challenge is the lack of awareness that the Youth Courts sometimes have of the care and protection needs of, and existing interventions for, young people appearing before them. This is vital not only because it enables the Judge to identify whether the overwhelming need is in fact care and

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<sup>94</sup> The Family Court is also a division of the District Court. Youth Court Judges will be either Jury Trial or Family Court designated as their main area of work.

<sup>95</sup> For further discussion, see Principal Youth Court Judge Andrew Becroft "Are there Lessons to be Learned from the Youth Justice System?" *Policy Quarterly* 5(2) May 2009 at 9.

protection (and thus a different response is warranted), but it also enables the Judge to tailor the most effective responses in the Youth Court. Since July 2007, a protocol has been introduced which allows for the Youth or Family Court to request the young person's file in another Court. Prior to this, a Judge may have gone into Youth or Family Court proceedings entirely unaware of issues in the other jurisdiction (even current issues). Further promotion and awareness of this Protocol is still needed.

#### *Developing sector-wide training and capability*

There is a need to develop a more specialised and highly-trained, youth specific workforce. This needs to cover the whole youth justice system, from government agencies (Child Youth and Family, Police Youth Aid, youth advocates, health and education workers) to the community sector. Too often training takes place within government 'silos', or not at all. The newly pioneered specialist web based Youth Justice Learning Centre is a welcome step.

#### *Improving transitions from the formal justice system back into the family and community*

Transition services available to young people who have been under state custody or supervision, to assist in their placement back within the community and with their family, need to be greatly enhanced. Young people need significant help to reintegrate back into a normal community in a successful way, and without falling back into old habits. Usually, the young person and their family will need considerable assistance, such as is offered by the multi-systemic therapy approach (MSFT).

#### *Disproportionate overrepresentation of Māori*

To be involved in the Youth Court is to be confronted daily with the tragically disproportionate involvement of young Māori in the system. This will be discussed further in Chapter Eight.

#### *Keeping young people in education*

There is a clear link between a lack of engagement in education and youth offending. While there are no accurate figures, anecdotally it is thought that up to 65-70% of offenders in the Youth Court (and only the most serious 20% of offending results in Youth Court charges) are not formally "engaged" with the education system. The word "engaged" is used advisedly. Technically, many are not truants, because they are not meaningfully enrolled at any secondary school to be a truant from. They are simply not in the formal education system.

#### *Prevalence of neurodisability and other mental health needs*

The prevalence of neurodisability in youth offending populations is staggering. Many young offenders will have some form of psychological disorder, especially conduct disorder. Some will also have a neuro-developmental disability such as prior traumatic brain injury, fetal alcohol spectrum disorder, autism, attention deficit disorder, speech and communication disorders, a specific learning disability (eg dyslexia), or a combination of these. Current research shows a high prevalence for Oral Language and Communication difficulties in young people within the youth justice system.<sup>96</sup> The Youth Court, and especially FGC, processes rely heavily on the oral language abilities (everyday talking and listening skills) of the young offender, who needs to listen to complex and emotionally charged accounts of the victim's perspective and formulate his/her own ideas into a coherent narrative. This narrative is then Judged by the parties affected by the wrongdoing as either adequate or not. A

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<sup>96</sup> Hennessey Hayes and Pamela Snow "Oral language competence and restorative justice processes: Refining preparation and the measurement of conference outcomes" *Trends and Issues in Crime and Criminal Justice: Australian Institute of Criminology* (463 November 2013).

language or speech difficulty will significantly impact upon a young person’s ability to understand and positively engage with Youth Justice processes.

The time has come to provide a comprehensive health response to all these issues, with an emphasis on early identification and early intervention. At the same time, the Youth Court itself needs to be much better supported by appropriate experts and community groups who can identify these issues amongst young offenders and ensure that the response by the youth justice system is appropriate in all the circumstances.

A recent study by the Office of the Children’s Commissioner for England<sup>97</sup> has found a high prevalence of neurodisability in the youth offending population. While no similar comprehensive research has taken place in New Zealand, there is every reason to suggest that similar prevalence rates exist in New Zealand.

**Table 1. The prevalence of neurodevelopmental disorders**

Neurodevelopmental disorder	Reported prevalence rates amongst young people in the general population	Reported prevalence rates amongst young people in custody
Learning disabilities <sup>3</sup>	2 - 4% <sup>4</sup>	23 - 32% <sup>5</sup>
Dyslexia	10% <sup>6</sup>	43 - 57% <sup>7</sup>
Communication disorders	5 - 7% <sup>8</sup>	60 - 90% <sup>9</sup>
Attention deficit hyperactive disorder	1.7 - 9% <sup>10</sup>	12% <sup>11</sup>
Autistic spectrum disorder	0.6 - 1.2% <sup>12</sup>	15% <sup>13</sup>
Traumatic brain injury	24 - 31.6% <sup>14</sup>	65.1 - 72.1% <sup>15</sup>
Epilepsy	0.45 - 1% <sup>16</sup>	0.7 - 0.8% <sup>17</sup>
Foetal alcohol syndrome	0.1 - 5% <sup>18</sup>	10.9 - 11.7% <sup>19</sup>

### *Development of a nationwide mentoring scheme*

Mentoring programmes have been shown to produce promising results in terms of reducing reoffending and producing better life outcomes. Section 283(jb) of the Act provides for the Youth Court to order a young person to take part in a specified mentoring programme for a period not exceeding 12 months. However, the provision does not give specific guidance on the content or frequency of the mentoring relationship, or suitable mentoring programmes. Therefore, it is vital that there are nationally consistent best practice standards for contracts with providers of mentoring programmes – something in respect of which progress is being made.

### *Alcohol and drugs*

It is estimated that 80% of young people appearing before the Youth Court have alcohol or drug dependency or abuse issues that are connected with their offending. Dealing with a young person’s drug and alcohol issues is complex, because they usually present with a range of needs, including mental health issues, criminality, family conflict and disengagement with education. Initiatives such as the Christchurch Youth Drug Court are designed to enhance collaborative multi-agency work with young offenders. However, in general, the Youth Court’s desire to produce accountability and

<sup>97</sup> Nathan Hughes and others *Nobody made the connection: the prevalence of neurodisability in young people who offend* (Office of the Children’s Commissioner for England, October 2012).

restoration for each young person will only succeed if youth-specific drug and alcohol services can be made more widely available.

### *Legislative challenges*

In New Zealand, 17 year olds are not included within the Youth Court's jurisdiction. While this is a matter for Parliament to determine, it is worth noting that this position is inconsistent with international standards. The 1989 United Nations Convention on the Rights of the Child (UNCROC) defines a "child" as a being under the age of 18. The United Nations Committee on the Rights of the Child has criticised New Zealand for not including 17 year olds within the ambit of the Act. The Committee has recommended that the Government:<sup>98</sup>

[...] raise the age of criminal responsibility to an internationally acceptable age and ensure that it applies to all criminal offences; and ... extend the Children, Young Persons and their Families Act of 1989 to all persons under the age of 18.

By not including 17 year olds in the youth justice jurisdiction, New Zealand is out of step with our international peers. Most western countries include 17 year olds within the youth jurisdiction, including all Australian states (except Queensland), Canada, Great Britain and 38 states of the United States of America.

Another challenge to the Youth Court's jurisdiction under the Act is the exclusion of most non-imprisonable traffic offences and the enforcement of infringement notices.<sup>99</sup> These offences are currently dealt with in the District Court. This is concerning as it creates a jurisdictional anomaly for young people who will not be dealt with in the Youth Court for particular offences and who may, as a result, obtain a permanent conviction recorded against them – which would not occur in the Youth Court.

## **6. Development of Therapeutic Jurisprudential Model**

Therapeutic jurisprudence examines the role of the law as a therapeutic agent in relation to legal rules, legal processes and the role of the legal profession. In relation to the court process, therapeutic jurisprudence focuses on the role of the court and court processes in improving the wellbeing of parties to its processes.<sup>100</sup>

One of the basic premises of the therapeutic movement has been to refocus the court from merely an outcome to the court process. The court response identifies the underlying causes of offending and takes a problem-solving and solutions focused approach to criminal offending:<sup>101</sup>

Therapeutic Jurisprudence proposes a broadening of the role of the Judge, which has traditionally been limited to fact-finding and law-applying. Therapeutic Jurisprudence asks

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<sup>98</sup> Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention* (3 October, 2003) CRC/C/15/Add.216.

<sup>99</sup> CYFPA, s 272.

<sup>100</sup> D. Wexler (2000), *Therapeutic Jurisprudence: an overview*, International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/>, (accessed September 2014).

<sup>101</sup> Comments made by Judge Thorburn in his Book Review of B Winick and D Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) available <[www.brucewinick.com](http://www.brucewinick.com)>.

why the judicial role should not extend to the search for solutions to an individual's cycle of offending.<sup>102</sup>

In the context of youth justice, the main therapeutic premise is that effectively reducing offending requires the underlying causes of offending to be addressed via a holistic approach and taking into account family context, social background, mental health, drug and alcohol issues and other environmental factors.<sup>103</sup>

The principles of the Act allow scope for a therapeutic response by providing that any measures for dealing with a child or young person's offending should, so far as it is practicable to do so, address the underlying causes of offending.<sup>104</sup> Perhaps more than any other court in New Zealand, the Youth Court and its founding legislation is best suited and placed to utilise a therapeutic jurisprudence approach. There are also clear efforts to incorporate therapeutic principles in the operation of the Youth Court, for example:

- Regular monitoring of a young person's FGC plan in court (usually every two weeks);
- Continuity of Judge (where possible) throughout the proceedings;
- A coordinated, multi-disciplinary team approach with access to the necessary wraparound services;
- Direct engagement and dialogue between the Judge and the young person; and
- Routine forensic and education screening.

Therapeutic principles and approaches have also been incorporated into the development of a number of specialised Youth Courts including the Youth Drug Court, Cross-Over List, Intensive Monitoring Group and Rangatahi Courts.

#### A Youth Drug Court

The Christchurch Youth Drug Court (YDC), initiated by Judge John Walker in 2002 and now led by Judge Jane McMeecken, was developed after a need was identified for addressing the linkage between alcohol and other drug use and offending. The aim of the YDC model is to facilitate better therapeutic intervention for repeat offenders who have a serious drug or alcohol dependency which is contributing to their offending.

While the YDC has some different features to an ordinary Youth Court, the FGC process is still integral to the YDC and young people are expected to achieve the goals set out in the FGC plan. An offender is not sentenced until they either successfully complete their goals or they are discharged back to the ordinary Youth Court or District Court. The YDC is voluntary for the young people identified as suitable candidates and they can elect to go back to the Youth Court at any time.

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<sup>102</sup> Comments made by Judge Thorburn in his Book Review of B Winick and D Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) available <[www.brucewinick.com](http://www.brucewinick.com)>.

<sup>103</sup> Barrie Evans "The Intensive Monitoring Group and Youth Justice" (Master of Philosophy thesis, Auckland University of Technology, 2012) at 74.

<sup>104</sup> CYPFA, s 208(fa).

The underlying philosophy is therapeutic. Part of the Judge's role is help to change behaviour by acting in a preventative way through intervention. In exercising therapeutic jurisprudence the authority of the Judge is of considerable importance in the process, providing sanctions for failure to engage in the treatment, and providing praise and reinforcement where progress is made.

The process has been shown to be very successful in reducing reoffending. The two critical features are:

- *Consistency of Judge*: The consistency of Judge means that each time the young person appears in Court he or she is faced with the same Judge. Not only does this mean that the Judge builds up a detailed knowledge of that person's case, it enables a relationship to be established between the Judge and the young person which clearly enhances the treatment process. The fact that a single Judge is monitoring performance, reviewing the case on a regular basis and is knowledgeable about the circumstances surrounding the young person does not go unnoticed by the young person. It is usually the first time a person in authority has demonstrated such an interest. The positive recognition of progress and the responses to failures are effective tools employed by the Judge.
- *Immediacy of treatment*: Immediacy of treatment ensures that any level of motivation on the part of the young person engendered by the Court process is harnessed as early as possible. The paralysing debate between agencies as to who is going to be responsible for funding a treatment programme has to be avoided in order to ensure this immediacy of treatment. The team approach of the YDC and the agencies involved in it ensure immediacy of treatment.

## B Cross-over list

It is no secret that young people who regularly appear in the Youth Court (the serious persistent offenders particularly) almost always present with care and protection issues. In New Zealand, three quarters (73%) of youth justice clients have been the subject of CYFS notifications – i.e. there have been concerns of abuse or neglect at some point in their lives.<sup>105</sup> These young people present a difficult challenge to the criminal justice system. On the one hand their backgrounds of abuse and environmental dysfunction categorise them as vulnerable victims in need of help; on the other, their offending demands accountability and creates damaged victims.

Typically, youth offending is dealt with in the Youth Court while care and protection issues are dealt with in the Family Court under entirely different proceedings with a different Judge. Despite the existence of an Information Sharing Protocol between these two courts, there is often a lack of communication between the jurisdictions and concurrent offending and care and protection proceedings have not been streamlined. The potential consequences from the failure to share information can be disastrous. For example, the Family Court might remove a young person from a home because of abuse, and the Youth Court might inadvertently bail that young person to the same abusive home.<sup>106</sup>

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<sup>105</sup> Centre for Social Research and Evaluation Te Rokapu Rangahau Arotake Hapori *Crossover between Child Protection and Youth Justice, and Transition to the Adult System* (July 2010), p 8 as cited in Judge Peter Boshier *Achieving Equity: Our Children's Right to Opportunity* (Wellington, 2012) at 4.

<sup>106</sup> Kate Peirse – O'Byrne "Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector" (Bachelor of Laws (Honours) Dissertation, University of Auckland, June 2014) at 47.



In response to operational deficiencies, a ‘cross-over list’, pioneered by Judge Tony Fitzgerald, has evolved for children and young persons that are appearing in the Youth Court, but are first identified as having a ‘care and protection’ status. On a ‘cross-over list’ day, a Judge with both a Family and Youth Court warrant will manage the young person’s case by addressing both youth justice and care and protection issues at the same hearing. The ‘cross-over list’ streamlines proceedings, reduces court appearances and minimises the chances of either court unintentionally subverting actions taken in the other.<sup>107</sup>

### C Intensive Monitoring Group

A further example of therapeutic jurisprudence is Auckland’s Intensive Monitoring Group (IMG) Court. Established in the Auckland Youth Court by Judge Tony Fitzgerald in 2007, the IMG operates as a solutions focussed court for young people considered to be at particularly high risk in terms of mental health concerns and/or alcohol/drug dependence.

In order to be eligible for the IMG, a young person must first be identified as having ‘care and protection’ status, as discussed above. After an entry of ‘not-denied’ is made, an assessment must be made that the young person has moderate to severe mental health concerns and/or moderate to severe drug or alcohol dependency, and that they are at a medium to high risk of reoffending. The young person must also be deemed suitable for the therapeutic process.<sup>108</sup> Once in the IMG Court, the young person’s FGC plan will be monitored fortnightly, using a non-adversarial approach and a multidisciplinary team. The subsequent intensive therapeutic support for the young person does not welfarise the response: there is still a justice focus in that the young person must complete a FGC Plan and could still be subject to formal orders. However, the IMG Court provides a flexible and effective way of addressing some of the needs which may have driven the young person’s offending.

There are four primary components that contribute to the effectiveness of the IMG:<sup>109</sup>

- *Coordinated service delivery*: The IMG Court brings together a large and varied group of professionals to discuss the young person’s needs, and to oversee and monitor the provision of services and therapeutic interventions;
- *Case management and monitoring*: The Judge closely and frequently monitors the young person, resulting in both the offender and the professionals involved being held to account;
- *Small caseload*: At any one time, there are only a maximum of 10 cases in the IMG Court, enabling proper engagement with each intervention; and
- *Court environment*: The Court is structured so that the young person is sitting just a few meters away from the Judge. The atmosphere is intimate and personal, with the Judge taking an interest in the personal life of the young person.

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<sup>107</sup> At 47.

<sup>108</sup> Intensive Monitoring Group Charter (version at April 2013) at [3][b].

<sup>109</sup> Kate Peirse – O’Byrne, above n 94, at 49.

## D Ngā Kōti Rangatahi: Transformative Justice

Rangatahi Courts are sittings of the Youth Court that are held on the marae, following Māori kaupapa (ideology) and tikanga (culture). The Rangatahi Court initiative was established in 2008 as a response to the disproportionate rates of young Māori in the Youth Court.<sup>110</sup> The aim of the Rangatahi Courts is to reduce reoffending by young Māori and to provide the best possible rehabilitative response, by encouraging strong cultural links by involving local Māori communities in the youth justice process.

Attempts to tackle the issue of Māori overrepresentation in the youth justice system must necessarily consider the, often debated, wider historical and modern context of Māori social, economic, political and cultural marginalisation and, also often highly politicised, Māori aspirations for self determination. Consequently, therapeutic and restorative theories do not always fit comfortably with the Rangatahi Court model:<sup>111</sup>

The theory of restorative justice implies that offending has disrupted an otherwise functional life – that offending is abhorrent and abnormal, to the offender and their community. Arguably, it is also predicated upon homogeneity and shared values across society. The language of such theory is instructive – to *restore, repair, rehabilitate, reconcile*. All of these terms assume a state of functionality before the harm – a state to which we desire the offender to return. *This belies the reality of the lives of many offenders* (emphasis added).

It has been argued that restorative and therapeutic processes cannot in and of themselves address the effects of intergenerational marginalisation that contribute to Māori overrepresentation in the criminal justice system. One way to begin addressing structural inequalities, while strengthening families and communities to promote positive cultural identities within the context of youth offending, is to tackle these challenges through the lens of ‘transformative justice’.<sup>112</sup> Transformative justice focuses on transforming or changing the life of the offender, in an attempt to improve the conditions in their life that are risk factors for offending. This approach looks beyond the individual offender, and even beyond their family, and acknowledges and addresses wider contextual issues that have influenced the offending and the current state of the offender.<sup>113</sup>

To date, the Rangatahi Court has pioneered a transformative approach to youth offending. The Rangatahi Court process, with its recognition of Māori custom and protocol, involvement of marae communities and holistic approach to the wellbeing of whānau and their young people, is one of the most successful innovations of the New Zealand youth justice system.

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<sup>110</sup> For a comprehensive discussion on the Rangatahi Court refer to His Honour Judge Heemi Taumaunu *Rangatahi Courts of Aotearoa New Zealand: an update* Paper presented for the International Indigenous Therapeutic Jurisprudence Conference: University of British Columbia, Vancouver, British Columbia, Canada: October 9 and 10, 2014.

<sup>111</sup> Alison Cleland and Khylee Quince, above n 8, at 251.

<sup>112</sup> At 251.

<sup>113</sup> At 251.

## 7. Survival Intact: Changes and Amendments to the Act

Youth justice has been, and will always be, susceptible to political and populist pressures. It operates in an environment where seductively simplistic solutions, such as “adult time for adult crime”, are pressed by those in political power:<sup>114</sup>

‘Youth crime’, the political issue, is characteristically mobilised by opposition parties during elections to highlight the social disintegration and moral decay fostered by the government’s complacency and inaction, or its muddle-headed policies which reward moral turpitude and discourage moral continence among the young.

To an extent, the New Zealand youth justice system has remained the exception to this rule. To date, despite being overshadowed by a volatile and punitive adult criminal jurisdiction, Governments in New Zealand have held fast to the principled approach pioneered by the 1989 legislation. Despite a period of reform in 2010, the legislative principles focusing on diversion, decarceration, victim participation and family and community input have survived largely unchanged.

### A Resisting “peer pressure” during a period of legislative reform

The fundamental tenets of the 1989 Act have remained largely unchanged and immune to the socio-political and social factors influencing reform. From 2000 to 2010, youth justice took a worldwide ‘punitive turn’. Across international youth jurisdictions, ‘punitive values associated with retribution, incapacitation, individual responsibility, and offender accountability have achieved a political legitimacy to the detriment of traditional principles of juvenile protection and support’.<sup>115</sup> Domestic attitudes in New Zealand showed similar trends and in the lead up to the 2008 election, a central plank to the opposition National Party’s campaign was youth justice reform:<sup>116</sup>

It’s not good enough to simply throw up our hands and allow troublesome teens to become life-long criminals. National will act quickly to defuse some of the 1,000 or so unexploded human time-bombs who begin their criminal careers as youth offenders.

When subsequently elected in 2009, the new government introduced their “First 100 Days” programme to immediately deliver on their election promises.<sup>117</sup> Consequently, in 2010 the previously untouched 1989 Act was amended.

On 6 March 2010 the Children, Young Persons and their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 (the Amendment) was passed. There appear to be two main protective factors that inoculated the youth justice system in New Zealand against populist political lures to ‘get tough on youth crime’:<sup>118</sup>

- *Victim participation*: One of the greatest protective factors against the encroachment of punitive policy was that ‘proper regard’ must be given to the interests of the victim, as enshrined in s 208(g):<sup>119</sup>

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<sup>114</sup> Pitts J *The New Politics of Youth Crime: Discipline or Solidarity* (London, Palgrave, 2001).

<sup>115</sup> Nessa Lynch “Playing catch-up? Recent reform of New Zealand’s youth justice system” *Criminology and Criminal Justice* 12(5) 2012 509 at 510.

<sup>116</sup> John Key, Leader of the Opposition “2008” A Fresh Start for New Zealand” (State of the Nation Speech, 29 January 2008).

<sup>117</sup> Nessa Lynch “Changes to youth justice” [2010] NZLJ 129 at 129.

<sup>118</sup> See Nessa Lynch, above n 103, at 510.

<sup>119</sup> At 510.

Victims may play a *direct role* in the disposition of the offence through the FGC [...] The FGC is an integral part of the system. Thus, when the important decisions are made in relation to the offence, the victim of the offence may be part of the process, giving him or her tangible power in the resolution of the offence. True participation by victims (and the community) can reduce the public appetite for punitiveness.

- *Practitioner attitudes*: Over the years, practitioner attitudes and behaviours have remained faithful to the diversionary principles, and limited punitive nature, of s 208.<sup>120</sup> The evolution of restorative practices within the youth justice system is largely attributable to practitioner innovation. Similarly, the success of diversion can be credited, for the most part, to Police Youth Aid.

## B Child offender provisions

One of the most significant changes under the 2010 Amendments was the provision for certain serious and persistent child offenders to be prosecuted in the Youth Court. In the thick of the National party's campaign to get "tough" on youth offenders, it was expressed that "New Zealanders are appalled that some of our most serious young offenders are as young as 12 or 13".<sup>121</sup> Reforming provisions relating to child offenders was touted as a way to "reduce re-offending by [these] serious and recidivist child and youth offenders and thereby improve community safety".<sup>122</sup>

The subsequent inclusion of some 12 and 13 year olds within the Youth Court, albeit on a very limited basis, has been said to represent "the most fundamental change to New Zealand's youth justice system since its inception in 1989".<sup>123</sup> These changes were met with significant opposition during the Select Committee stage. The main concern was that the criminal justice process would not have the requisite powers and resources to deal with child offenders with profound care and protection issues, and the potential harmful consequences of associating younger offenders with older offenders.<sup>124</sup> Furthermore, it was a concern that at no point in the legislative process or supporting documentation was any reference made to evidence, reviews, or meta-analysis about the likely effectiveness of lowering the criminal age of responsibility, nor the likely consequences or costs.<sup>125</sup>

The age of criminal responsibility in New Zealand is 10. Prior to the Amendment, all young offenders under 14 years of age (except where facing murder/manslaughter charges) were dealt with on the basis that care and protection issues are the primary cause of their offending. Consequently, they were dealt with in the Family Court and could not be charged in a criminal court. Section 22(1) of the Crimes Act 1961 also states that children aged from 10-13 cannot be held criminally responsible unless it is proved that the child knew what they did was wrong or contrary to law. This position reflected the common law doctrine of *doli incapax* which is a rebuttable presumption that a child is generally incapable of committing a crime through lack of understanding – literally a child is incapable of evil.<sup>126</sup>

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<sup>120</sup> Report to the Ministry of Social Development *Safeguarding our children: Updating the Children, Young Persons, and their Families Act 1989: Overall Summary of Submissions* (Allen and Clarke Regulatory and Policy Specialists, 2007).

<sup>121</sup> Hansard (10 Feb 2010) 660 NPD 87777.

<sup>122</sup> Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009) at 2.

<sup>123</sup> The Youth Court of New Zealand "Submission to Social Services Select Committee on the Children, Young Persons and their Families (Youth Court Jurisdiction and Orders) Amendment Bill".

<sup>124</sup> Nessa Lynch, above n 105, at 129.

<sup>125</sup> Sarah Kuper "An Immature Step Backward for New Zealand's Youth Justice System?" (Bachelor of Laws (Honours) dissertation, University of Otago, October 2010) at 24.

<sup>126</sup> At 8-9.

Under the Amendment, the age of criminal responsibility remains at 10 years and children may still be prosecuted for homicide, but children aged 12 and 13 may now be prosecuted in two further circumstances:<sup>127</sup>

- Where the child is alleged to have committed an offence with a maximum penalty including imprisonment for life or at least 14 years; or
- Where a child is alleged to have committed an offence where the maximum penalty is or includes at least 10 years imprisonment but less than 14 years imprisonment and the child is a previous offender.

These provisions focus on the type of offence rather on the needs of the children that are offending. To ameliorate this increasingly punitive approach to child offenders, the Amendment introduced what has now come to be known as the “push back” provision. Section 280A allows the Judge to refer a case back to the informant if there are care and protection issues and the public interest would be served better if a declaration under s 67 (that the child is in need of care and protection) is made. In such a case, youth justice proceedings are discharged when the child is “pushed back” from the Youth Court to the Family Court jurisdiction, where their care and protection needs can be more effectively addressed.

Despite being touted by politicians as a “silver bullet” solution for the perceived cohort of serious, recidivist child offenders, the number of children that have been charged in the Youth Court since the 2010 Amendment has been significantly less than was anticipated. In 2011, 14 children came before the Youth Court. In 2012, the figure was 13, which increased to 24 in 2013. In the first quarter of 2014, five children have come before the Youth Court.<sup>128</sup> The majority have been “pushed back” or diverted into care and protection.

Overall, the amendments to include some 12 and 13 year olds within the criminal jurisdiction have been described as the most, but relatively anomalous, “immature step backward for New Zealand’s youth justice system”.<sup>129</sup>

## C Expansion of powers and orders

In response to attitudes that the scope of Youth Court orders was not sufficient to deal with the top-end offending, the Amendment provided for the general reorganisation of s 283 of the 1989 Act (the provision dealing with Youth Court orders).

There is now a hierarchy of orders under s 283, from Group 1 (discharge or admonishment) to Group 7 (transfer to the District Court for sentence). The parameters of the top-end Youth Court order (supervision with residence) were extended to a minimum of three months and a maximum of six months,<sup>130</sup> and supervision with activity orders may now be up to six months duration.<sup>131</sup>

Three new orders were introduced to supplement to the Youth Court’s sentencing “toolkit” and focus on the perceived causes of offending:

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<sup>127</sup> CYPFA, s 14.

<sup>128</sup> Ministry of Justice *Quarterly Reports: 2011 – 2014* (Ministry of Justice, Wellington).

<sup>129</sup> See Sarah Kuper, above n 113.

<sup>130</sup> CYPFA, s 283(o).

<sup>131</sup> CYPFA, s 283(m).

- *Parenting education order*: The genesis of the parenting education order comes from the principle that parents themselves should be held accountable, re-educated and reformed. As articulated by the Minister of Social Development - “some parents have not been held to account for their role in their children’s offending”.<sup>132</sup> A parenting education order may be imposed when an offence is proved before the Youth Court and will require the young person (if they are a parent or soon to be a parent) or the parent or caregiver of the young person to attend a parenting education course.<sup>133</sup> There is no criminal sanction for non-compliance, but non-compliance may trigger a care and protection investigation for *all* children in the family.<sup>134</sup>
- *Mentoring order*: Section 283(jb) provides for the Youth Court to order a young person to take part in a specified mentoring programme for a period not exceeding 12 months, with the aim that the advice and support offered by an older, more experienced person, will help re-engage the young person with their community, build confidence, build employment skills, promote educational achievement and reduce the risk of recidivism.
- *Alcohol and drug rehabilitation programme order*: Section 283(jc) empowers the Youth Court to make an order requiring the young person to attend a specified alcohol or drug rehabilitation programme for a period not longer than 12 months. This provision promotes the principle that measures should address the cause of offending.<sup>135</sup> Programmes may be residential or non-residential, and involve counselling or therapy, or “a medical, psychiatric, psychological, social, therapeutic, rehabilitative, or re-integrative programme with a focus on alcohol or drug issues”.<sup>136</sup>

On one hand, the now expanded array of sanctions available to the Youth Court after the 2010 Amendment was seen by some as symptomatic of punitive policies creeping in during a particularly volatile political climate.

Conversely, and with the benefit of four years’ hindsight, the increase in the Youth Court’s powers has been one of the most positive shifts in modern youth justice in New Zealand. The sentencing powers available to the Youth Court are now more akin to those available in the District Court, and consequently there has been a significant reduction in the number of cases transferred to the adult jurisdiction for sentencing. In 2010, 54 young people were transferred to the District Court. That number dropped dramatically to 21 in 2011 and in 2013 only 10 young people were transferred to the District Court for sentencing.<sup>137</sup> Youth Court Judges are now more satisfied that public safety and accountability can be appropriately achieved through Youth Court orders and are consequently more willing and able to keep young people within the Youth Court jurisdiction.

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<sup>132</sup> Barry Goldson and Janet Jamieson “Youth crime, the ‘parenting deficit’ and state intervention: a contextual critique” (2000) 2 Youth Justice at 82.

<sup>133</sup> CYPFA, s 283(ja).

<sup>134</sup> CYPFA, s 297A(4).

<sup>135</sup> CYPFA, s 208(fa).

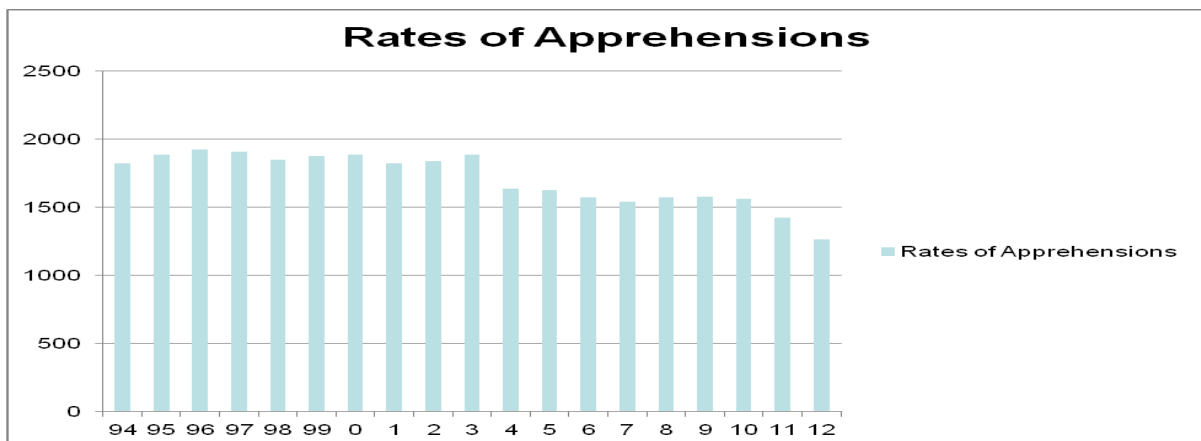
<sup>136</sup> CYPFA, s 297B(1).

<sup>137</sup> Ministry of Justice *Youth Court Quarterly Reports 2010-2013* Ministry of Justice, Wellington, New Zealand).

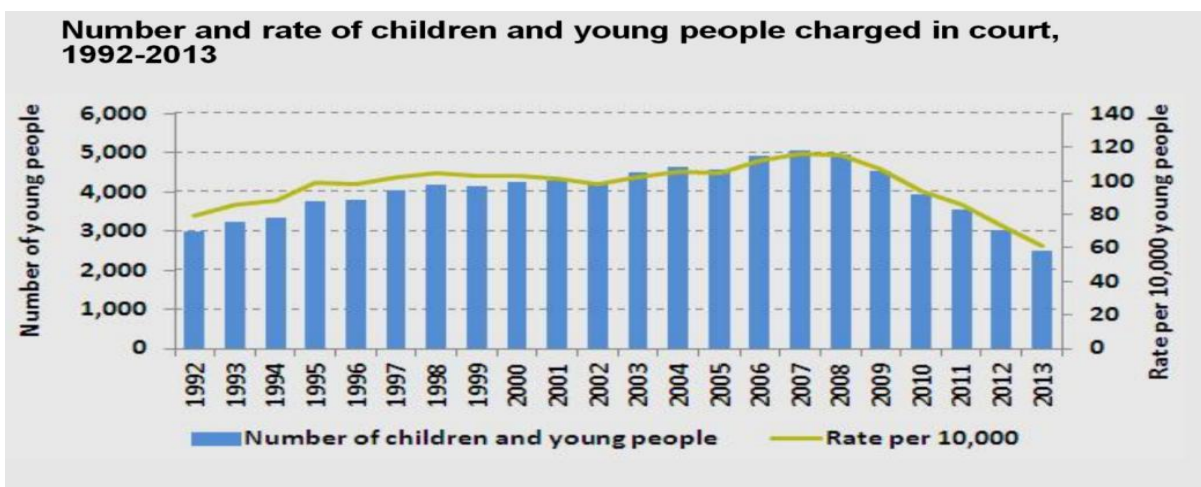
## 8. Signed, Sealed (but not yet fully) Delivered

In the intervening 25 years a significant part of the Act’s original vision has been realised. Much about the Act was innovative and indeed world leading. Pioneering new principles well ahead of their time were introduced; important principles which are still absolutely relevant today. Foremost is the twin emphasis on accountability and also responses which address the needs of the young offender and the causes of offending. Other key principles include the strong focus on police led, community based diversion wherever possible rather than charging the young person with an offence; the importance of family, whānau and victim involvement; the FGC as a key decision making mechanism for serious cases (delivered with a restorative justice approach); community involvement in the process; reduced reliance on institutionalisation and incarceration; and rehabilitative, wraparound, community-based sentences as a priority. And more recently, there has been a rise in the use of a therapeutic jurisprudential approach.

Youth (aged 14-16) apprehension rates have consistently trended downwards and are at an historical low:



Consistent with the significant drop in apprehension rates, so too have court numbers dropped significantly. The number of children and young people charged in the Youth Court has more than halved in the last five years:<sup>138</sup>



<sup>138</sup> Ministry of Justice *Trends in Child and Youth Prosecutions 2013* (Ministry of Justice, Wellington, New Zealand).

While this is to be celebrated, there remains three predominant groups of young people which represent a significant challenge for the youth justice system, and for whom the rates of offending have not abated at the same rate as youth justice figures overall. There are also parts of the legislation that remain untapped.

#### A Persistent “hard core” offenders

Persistent offenders (often violent), also known as “early onset” or “life course” offenders are not abating at the same rate as youth offenders generally. Our very serious youth offenders, which make up roughly 5-15% of young offenders, account for up to 50% of all youth offending. The alarmingly common personal characteristics of “persisters” are that:<sup>139</sup>

- 85% are male. However, the proportion of young women who offend, especially violently, seems to be increasing.
- 70-80% have an alcohol or other drug problem, and a significant number are drug dependent/addicted.
- 70% are not engaged with school – most are not even enrolled at a secondary school. Non-enrolment, rather than truancy, is the problem.
- Most experience family dysfunction and disadvantage; and most lack positive male role models.
- Many have some form of neurodisability or psychological disorder, especially conduct disorder, and display little remorse, let alone any victim empathy. Some will also have a specific learning or oral language disability eg dyslexia, although research is required to establish the extent of this problem.
- At least 50% are Māori<sup>140</sup> and in some Youth Courts, in areas of high Māori population, the Māori appearance rate is 90%. This figure is a particular challenge to the youth justice system, and to all working with young offenders.
- Many have a history of abuse and neglect, and previous involvement with CYFS.

#### B Female offenders

In 2013, only 18% of Youth Court charges were female, making up a relatively small minority of youth offending.<sup>141</sup> However, relatively, there are more female youth offenders in the youth justice system now than twenty five years ago. While youth offending generally is decreasing, female offending, and particularly violent offending, is decreasing at a much lower rate than male offending, meaning there are more young female offenders in the system. Between 2006 and 2012, the rate of apprehensions for males decreased by 21%, but only 14% for females.

Violent offending by young female offenders has also been a particular concern. The rate of apprehensions of girls for violent offences has increased steadily in the last 20 years, reaching its peak

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<sup>139</sup> These statistics are provided by the New Zealand Ministry of Justice, the New Zealand Police and anecdotal evidence from Youth Court Judges.

<sup>140</sup> *Youth Offending Strategy: Preventing and Reducing Offending and Re-offending by Children and Young People, Te Haonga* (Ministry of Justice & Ministry of Social Development, Wellington, 2002) 11 available online at <<http://www.justice.govt.nz/pubs/reports/2002/youth-offending-strategy/youth-strategy/index-strategy.html>> (last accessed 2 August 2006).

<sup>141</sup> Ministry of Justice *Child and youth prosecutions – trends for 2012-2013* (March 2012) at 2.



in 2010. In a positive development, this rate has declined sharply in 2013.<sup>142</sup> However, the disparity in reduced offending rates between males and females remains, and requires special attention.

There is an almost complete lack of comprehensive research on the particular situation of girls in the youth justice system in New Zealand.<sup>143</sup> It has been suggested that females present to Courts with unique concerns that the system needs to be wary of and careful to address. Some suggest that the “most common pathways to crime (for women) are based on survival (of abuse and poverty) and substance abuse”.<sup>144</sup> Issues which may be drivers of crime which affect women exclusively or more than men might include (unwanted) pregnancy, (adolescent) motherhood, sexual abuse, sexual assault, domestic violence and depression. Sexual abuse is particularly prominent among young women who offend. Dr Donna Swift, who carried out research through interviews of 1704 girls and 1720 boys in Nelson, New Zealand notes that:<sup>145</sup>

[i]t is well documented in New Zealand that 1 in 4 females have been victims of sexual violation and both international and national research acknowledges that many females who end up in the justice system have also been survivors of sexual violation. During their interviews, many girls spoke about their unwanted sexual experiences. The girls’ quotes scattered throughout this report provide the evidence. A girls’ reputation for violence almost always paralleled her experience of sexual abuse.

New Zealand’s Youth Offending Strategy 2002 noted a scarcity of programmes targeting young female offenders in New Zealand.<sup>146</sup> This continues today. Dr Swift advocates for the development of female specific programmes in her research, stating that her findings “highlight the need for New Zealand to follow international prevention and intervention strategies. These use a gender specific, gender responsive and trauma informed approach to address girls’ use of violence and anti-social behaviour. This means programmes must be designed specifically for our girls and young women.”<sup>147</sup>

### C Disproportionate rate of Māori apprehensions and appearances getting worse not better

While apprehension rates for both Māori and non-Māori young offenders are decreasing, the rates are decreasing much faster for non-Māori than Māori, so the disproportionality of Māori young offenders within the system is getting worse, not better.

In New Zealand, 23% of the 14 – 16 year old population are Māori.<sup>148</sup> The vast majority do not come into contact with the youth justice system. However, those who do come into contact with the youth justice system are disproportionately represented at every stage of the process. The number of young Māori aged 14 – 16 who appear in the Youth Court is 5% of the total population of 14-16 year old

<sup>142</sup> See Nessa Lynch ““Girls Behaving Badly?” Young female violence in New Zealand” (2014) 45 VUWLR 509 at 521.

<sup>143</sup> At 518.

<sup>144</sup> Department of Corrections New Zealand “Female Offenders” < [www.corrections.govt.nz/research/risk-assessment-of-recidivism-of-violent-sexual-female-offenders/female-offenders.html](http://www.corrections.govt.nz/research/risk-assessment-of-recidivism-of-violent-sexual-female-offenders/female-offenders.html)>.

<sup>145</sup> Donna Swift *The Girls’ Project. Girl fighting: An Investigation of Young Women’s Violent and Anti-social Behaviour* (Nelson, Stopping Violence Services, 2011). <[www.thegirlsproject.org.nz/results.htm](http://www.thegirlsproject.org.nz/results.htm)>.

<sup>146</sup> Ministry of Justice and Ministry of Social Development *Youth Offending Strategy (Te Haonga)* (Wellington, 2002), p 32 < [www.msdc.govt.nz/](http://www.msdc.govt.nz/)>.

<sup>147</sup> Donna Swift *The Girls’ Project. Girl fighting: An Investigation of Young Women’s Violent and Anti-social Behaviour* (Nelson, Stopping Violence Services, 2011) at 95 <[www.thegirlsproject.org.nz/results.htm](http://www.thegirlsproject.org.nz/results.htm)>.

<sup>148</sup> Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand ([www.stats.govt.nz](http://www.stats.govt.nz)) “Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and “Infoshare” “National Population Estimates” “Population” “Population Estimates DPE” “Estimated Resident Population by Age and Sex (1991+) (Annual-Dec)”.

Māori.<sup>149</sup> However, Māori make up 52% of apprehensions of 14 – 16 year olds,<sup>150</sup> and 55% of Youth Court appearances.<sup>151</sup> Māori youth offenders are given 66% of Supervision with Residence orders (the highest Youth Court order before conviction and transfer to the District Court).<sup>152</sup> In some Youth Courts the percentage of those Māori young offenders appearing in the Youth Court is over 90%.

This disproportionality is unacceptable. These figures have long term implications and tell their own quiet story of deep-seated disadvantage. Recent research from the longitudinal study conducted by Canterbury University and Professor David Fergusson tends to suggest that Māori young people who are disconnected from their culture and cultural roots make up the vast proportion of Māori youth offenders.<sup>153</sup> In reality this may just be another way of pointing to the effects of long term socio-economic disadvantage: i.e. those Māori families who are most disadvantaged are most likely to be disconnected from their culture. At any rate, the issue of disproportionate Māori youth offending is more complex and subtle than is often recognised in this important discussion.

#### D Latent and waiting: some unrealised provisions in the Act

There are also aspects of the Act that were, and still are, particularly visionary within their legislative framework, but whose potential has not yet been realised. There are key parts of the legislation that are still yet to be delivered.

##### *Lay advocates*

Lay advocates were “created” with the Act in 1989 and have no known counterpart in any other legislation anywhere in the world. The role of the lay advocate was legislatively created to serve two principal, but not exclusive, functions. These are to:

- ensure that the court is made aware of all cultural matters that are relevant to the proceedings; and
- represent the interests of the child's or young person's whānau, hapū, and iwi (or their equivalents (if any) in the culture of the child or young person) to the extent that those interests are not otherwise represented in the proceedings.

Despite this visionary new role created for the Youth Court being funded by the state, irrespective of means, lay advocates were simply not used in the youth justice process in any meaningful way until 2008. In that year, New Zealand's first Rangatahi Court was launched. Lay advocates played a crucial role in the operation of that Court.<sup>154</sup>

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<sup>149</sup> Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand ([www.stats.govt.nz](http://www.stats.govt.nz)) “Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and Statistics New Zealand “Child and Youth Prosecution Tables” “Multiple-Offence Type Prosecution”.

<sup>150</sup> Calculated using statistics for the mean year ended 31 December 2012 from Statistics New Zealand ([www.stats.govt.nz](http://www.stats.govt.nz)) “New Zealand Police Recorded Crime and Apprehensions Tables” “Annual Apprehensions for the Latest Calendar Years”.

<sup>151</sup> Calculated using statistics for the mean year ended 31 December 2012 from Statistics New Zealand ([www.stats.govt.nz](http://www.stats.govt.nz)) “Child and Youth Prosecution Tables” “Multiple-Offence Type Prosecution”.

<sup>152</sup> Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand ([www.stats.govt.nz](http://www.stats.govt.nz)) “Child and Youth Prosecution Tables” “Multiple-Offence Type Youth Court Order”.

<sup>153</sup> Joseph M Boden, David M Fergusson and Danette Marie “Ethnic Identity and Criminal Offending in a New Zealand Birth Cohort” (2009) 42 Australian and New Zealand Journal of Criminology at 354.

<sup>154</sup> Alison Cleland and Khylee Quince, above n 8, at 121.

It is clear that the [...] Act envisaged a person of mana (status/reputation) who could support the person's whānau, hapū and iwi and advise the court of any whānau context of which it would not be aware, which would be relevant to any decision making about the young person.

Such has been the demonstrable value of lay advocates in the Rangatahi Courts, and the youth justice process generally, they quickly become 'mainstreamed' into many Youth Courts. Lay advocates are now an established and growing part of the Youth Court process and are adding real value to it. Reports provided by lay advocates often uncover family issues and dynamics that CYFS social workers cannot penetrate, especially when families take a "closed-rank" position to government agencies. Families are given a voice by lay advocates, relieving youth advocates of the dual, and often conflicting, tasks of presenting the views of young offenders and their families. Insightful advice as to cultural factors involved in the offending, or necessary as part of any subsequent intervention package, is being provided.<sup>155</sup>

This gives the court a deeper pool of information that it can use to craft appropriate responses to the young person and his or her family. It also helps the Judge and kaumātua (elders) in the Rangatahi Courts to draw connections to the young person's family in a "strengths-based" manner. Often, elders can inform a young person, using the lay advocate's information, of ancestors who have played an important role in the local community. A recent evaluation of Rangatahi Courts found that the role of the lay advocate was regarded as crucial by families and by professionals:<sup>156</sup>

We learn a lot more about the rangatahi and their whānau through the lay advocates and the Rangatahi Court process. This is really important for us so that we know the circumstances surrounding the rangatahi and what we need to address.

The growing appointment and use of lay advocates constitutes one of the biggest changes in Youth Court operations in the last 20 years and more lies ahead. Recently, much energy and work has gone into the vitalisation of the use, coordination and training of lay advocates. These efforts have culminated in the publication of the first Lay Advocates Handbook in June 2014.<sup>157</sup> This Handbook provides a comprehensive overview of the processes, boundaries and intricacies of the lay advocate role. There are currently 105 in the pool of lay advocates that are available for appointment to a Youth Court proceeding.<sup>158</sup> It is expected that this number will grow in the years ahead. The ultimate goal is of course the provision of expert lay advocates available for families and as specialist cultural advisers in all Youth Courts in New Zealand.

Finally, it should perhaps be observed that the statutory name 'lay advocate', viewed through a 2014 lens, now seems a little outdated. While the statutory language must be adhered to, there is the potential for it to convey the wrong impression in today's climate. Lay advocates are no well-meaning amateurs, untrained do-gooders, or second-tier participants in the process. Rather they might be better understood as 'community advocates', 'cultural advocates', or 'family/whānau advocates'. They will be highly trained in other walks of life and/or experienced in working with young people and their families/whānau. They will inevitably be highly respected within their communities. And they will have a highly developed knowledge of different cultural perspectives and values.<sup>159</sup> They have the potential to significantly contribute to the Youth Court process and to become a vital and independent

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<sup>155</sup> Principal Youth Court Judge Andrew Becroft *Lay Advocates Handbook* (Ministry of Justice, June 2014) at 6.

<sup>156</sup> Kaipuke *Evaluation of Early Outcomes of Nga Kooti Rangatahi* (17 December 2012) available at <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>157</sup> Ministry of Justice *Lay Advocates Handbook* (Ministry of Justice, June 2014).

<sup>158</sup> Ministry of Justice data, September 2014.

<sup>159</sup> Principal Youth Court Judge Andrew Becroft *Lay Advocates Handbook* (Ministry of Justice, June 2014) at 6.

voice in the process. In one sense lay advocates may become the “conscience” of the Youth Court – and a true community voice in the process.

### *Iwi remand services*

The legislative mechanisms designed to allow Māori communities to look after their own rangatahi have not eventuated. The “remand provision” in s 238(1)(d) provides for young offenders to be delivered into the custody of an approved Iwi Social Service or approved cultural service, as well as the Chief Executive of CYFS.

This provision affirms the aspirations for increased Māori self-determination and protection that were originally incorporated into the Act, and which are increasingly affirmed in modern legal and constitutional discourse in New Zealand. However, this provision has been dormant for 25 years and, by and large, has remained unused to date.

One possible barrier to realising the potential for remanding rangatahi to Iwi Social Services is resources. In a climate where access to funding by government departments is competitive, and considerable resources are needed to build Iwi Social Services appropriately, it is not difficult to see why this provision may have languished.

However, it would be remiss not to acknowledge the contemporary and principled relationships of partnership between the government and Māori. It is thought that the Treaty of Waitangi is a touchstone against which all Crown actions, including law, policy and practice within New Zealand should be evaluated.<sup>160</sup> Therefore, in reality, if Māori are to be able to tap into the processes enabled under the Act, arguably the government has a duty to participate in the growing of those resources, such as iwi and community services.

### *Cultural and community reports*

Section 336 allows the court to obtain a cultural or community report before sentencing a young person to a formal order under s 283. However, this provision is seldom used. It is ripe with potential. Cultural reports assist the court to ensure that it deals in a culturally appropriate fashion during the sentencing process. The report provides a holistic assessment of the child’s cultural heritage, environment, affiliation, needs and wishes. For example, a young person from a migrant community will have different and specific cultural circumstances and needs that should be considered before an appropriate order is made.

In the Youth Court, the Judge’s powers to obtain a cultural report under s 336 are the same as the powers granted in the Family Court under s 187. There is currently no Youth Court protocol in place to guide a Judge as to when a cultural report might be appropriate, the process for selecting an appropriate cultural report writer, or what might be within the scope of a cultural report. However, the Family Court does have two comprehensive sets of guidelines available for cultural report writers, one

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<sup>160</sup> Alison Cleland and Khylee Quince, above n 8, at 256.

of which is specifically for Māori cultural report writers, which the Youth Court “borrows” in the absence of its own protocol.<sup>161</sup>

With respect to Māori, the provision for the consideration of cultural factors when sentencing, in both the adult<sup>162</sup> and youth jurisdiction, is a legislative attempt to engage with the asymmetry of Māori representation through culturally specific sentencing to fit the circumstances of the offender. Indeed, when reflecting on Māori overrepresentation in the criminal justice system, Justice Williams has noted that “the statistics suggest trying to do something different on a wider scale cannot possibly do any harm”.<sup>163</sup>

Justice Williams has argued that culture and background will *always* be relevant to sentencing, if the sentence is to fit not just the crime but the offender:<sup>164</sup>

[...] while there is no longer room for tikanga-based approaches to the criminal verdict inquiry, there is substantial room for tikanga to speak in the sentencing process and therefore, for whānau and hapū to wrest some measure of control back to the kin group. After all, in a whānaungatanga-based culture, kin group responsibility for the wrongs committed by a member of the group is assumed. The tikanga of muru (restitution) reflects that basic idea. Finding means by which that kin group can participate in sentence selection processes, whether therapeutic or otherwise, assists the kin group and therefore the wider community to take responsibility for offenders in a manner consistent with tikanga Māori and good criminal justice practice.

The Rangatahi Court, through the incorporation of tikanga-based programmes, is working towards a more culturally responsive approach to sentencing. The early evaluations of this approach are very positive and the model will continue to evolve and grow over time.

### *Supervision with activity*

The original vision for supervision with activity as provided for in the Act was for a true community-based alternative to a custodial sentence. In the original iteration of the provision, an order for supervision with activity could not be made unless the type of offending was such that an order of supervision with residence was contemplated.<sup>165</sup> This meant that there were two truly alternative responses for the most serious youth offending – one community based and one custodial.

This vision was partly lost in the 2010 Amendment, which subsequently ranked supervision with activity as a Group 5 response, and supervision with residence a Group 6 response in the hierarchy of Youth Court orders under s 283. However, the utilisation of this order has increased significantly over the past twenty five years, but while remaining consistent over the past five years, is still less favoured than the custodial supervision with residence order.<sup>166</sup> The increase in community-based orders can be mainly credited to the gradually increasing commitment by the Ministry of Social Development to resource appropriate programmes and facilities and it is hoped that this commitment continues to grow.

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<sup>161</sup> Ministry of Justice *Guidelines for Writers of Cultural Reports in the Family Court and Guidelines for Writers of Māori Cultural Reports in the Family Court* (October, 2006).

<sup>162</sup> Section 27 of the Sentencing Act 2002 provides for pre-sentence cultural reports to be ordered.

<sup>163</sup> Justice Joe Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern NZ Law” (2013) *Waikato Law Review* 21 at 29.

<sup>164</sup> A 29.

<sup>165</sup> CYPFA 1989, s 289 (since repealed).

<sup>166</sup> Ministry of Justice *Youth Court Quarterly Reports 2009 – 2013*.

The supervision with activity order under the new s 283(m) can involve the young person attending a specified centre with the purpose of undertaking a particular programme or activity. The court can require the young person to attend the centre during the week, in the evening and in the weekends. If the court is not satisfied that the activity can be provided while the young person stays with parents, it may order that the young person be placed in the custody of the Chief Executive of the Ministry of Social Development, an iwi or cultural social service or the director of a child and family support service.<sup>167</sup> Such orders can be made for a period of up to six months with a further period of supervision for up to six months.

Supervision with activity remains the highest tariff non-custodial order available to the Youth Court, and should still be given real consideration where a custodial order is contemplated. Rehabilitation of young people is more likely to be achieved with supervision with activity rather than supervision with residence, because the programmes are intensive in nature and designed to address risk factors relevant to the young person's offending.<sup>168</sup> The goal, as envisaged by the Act, is to have a truly community-based and readily accessible alternative to custodial orders for young people.

## **9. Over-promised or under-delivered: is the Act “working” for Māori?**

The 1989 Act is arguably one of the most comprehensive pieces of legislation to affirm Māori aspirations for self-determination in New Zealand. The principles of the Act place whānau, hapū and iwi at the centre of decision-making and emphasises that a Māori child or young person is to be dealt with within their familial and cultural matrix.

There is a subtle irony in that the piece of legislation that promises so much for Māori has apparently, in many ways, failed many of its intended clientele. While the original vision was pioneering, the legislative framework needs to accommodate and provide for Māori young people and their communities as they exist today. The reality is that many young Māori live in broken or dysfunctional families and communities and are the latest in a multi-generational line of alienation from land, culture and customs.<sup>169</sup> As such, many Māori lack the cultural resource to tap into the processes that are enabled under the Act.

### **A Representation, Intervention and Partnership**

As previously discussed, the disproportionate overrepresentation of young Māori in the youth justice system is getting worse, not better. The majority of serious persistent offenders are Māori. The Māori youth apprehension rate continues to be more than three times that of non-Māori.<sup>170</sup> Māori are more likely to receive supervision orders and are more likely to be sent to residential care than non-Māori for the same type of offending.<sup>171</sup> These more serious outcomes are more often imposed by the Youth Court after an FGC breaks down and is referred back to court. However, an FGC is most likely to break down due to lack of family support, which is a phenomenon that occurs more often with young Māori offenders than others.<sup>172</sup>

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<sup>167</sup> CYPFA, ss 307(3) and (4).

<sup>168</sup> *Police v CMT*, YC Wanganui, CRI-2003-283-44, 6 May 2005, Judge Callinicos.

<sup>169</sup> Alison Cleland and Khylee Quince, above n 8, at 250.

<sup>170</sup> Ministry of Justice, *Child and Youth Offending Statistics 1992-2008* (Ministry of Justice, Wellington, 2010).

<sup>171</sup> Principal Youth Court Judge Andrew Becroft, 'Māori Youth Offending' speech to New Zealand Police Management Development Conference, 8-10 November 2005.

<sup>172</sup> Alison Cleland and Khylee Quince, above n 8, at 148.

Because Māori representation increases at every step of the youth justice process, this issue needs to be addressed on a number of levels, starting with diversion. By and large, the New Zealand Police are committed to building relationships with iwi to confront this issue. Iwi Liaison Officers act as a regional interface between Police and iwi, communicating concerns between Youth Aid and iwi groups.

One iwi-based initiative aimed at tackling this issue is the Oho Ake (to awaken) framework launched in 2010 by the Tūhoe iwi in partnership with Whakatane Police. The framework is aimed at Māori young people who come into contact with the justice process and who are eligible for diversion, and provides them with an option to work within a kaupapa Māori health service delivered by the Tūhoe iwi.

This initiative was the first of its kind in New Zealand, providing iwi and police with an opportunity to work collaboratively in addressing the rising rates of youth offending, particularly with young Māori males. In the agreement between Tūhoe and the Whakatane Police, the following actions are included:<sup>173</sup>

- The Police will not change their current practice dealing with child and youth offenders. When an offence occurs they are referred to Youth Aid. Home visits are made to carry out a Youth Offending Risk Screening Tool to assess risk.
- Police consult with iwi to formulate a collaborative approach. Tūhoe conduct the Ngā Pou/Whānau Ora screening tool to assess the needs of the young offender and their whānau. Iwi decide the level of intervention required.
- Police will not intrude with whānau and will remain involved normally for three months, while iwi continue to work with the young offender and their whānau.

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.<sup>174</sup>

Initiatives like this require strong visionary leadership and ongoing commitment from all stakeholders involved. This regional initiative providing a partnership basis between Police and iwi, to divert young offenders from the Youth Court and to avoid formally charging them, is one that could be implemented throughout New Zealand.

## **B FGCs not working well enough for Māori?**

Evidence shows that the experience for Māori young people in terms of family involvement, and consequently consensus decision making, is different to the whānau, hapū and iwi network that the Act envisaged. The archetypal FGC in New Zealand involves “a young Māori boy and his mum” - which, in reality, is the whānau that many young Māori are raised in.<sup>175</sup> This fact issues an immediate

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<sup>173</sup> *Oho Ake Evaluation Report June 2014* at 9.

<sup>174</sup> *Oho Ake Evaluation Report June 2014* at 26.

<sup>175</sup> Alison Cleland and Khylee Quince, above n 8, at 163.

challenge to the goals of the Act, including the procedural objective to involve the offender's whānau through consensus decision making, and the long term goal of strengthening their family. It has been argued that in order for these statutory goals to be realised, it needs to go hand in hand with real social and economic commitment to change the condition in which offending behaviours are fostered.<sup>176</sup>

The legislation's aspirations for a more culturally appropriate conferencing system are also yet to be realised to their fullest potential with respect to the FGC venue and organisation. Most FGCs are held in Child, Youth and Family (social welfare) premises:<sup>177</sup>

This is not neutral territory, and it is particularly confronting for Māori, many of whom have longstanding negative associations and relationships with state agencies, including social welfare.

Although the legislation allows for an FGC to be conducted at any appropriate venue, for example a marae, and while the Rangatahi Court endeavours to facilitate a more culturally appropriate venue for monitoring FGC plans, very few actual FGCs are conducted on the marae.

In 2012, the Ministry of Social Development undertook a comprehensive review of the FGC process.<sup>178</sup> Consequently, a significant amount of work is underway to strengthen FGCs, and there is a genuine acknowledgement and willingness across all agencies to improve the FGC process, and to allow joint facilitation of FGCS between the state and Māori.

## **10. Past, Present, Future: the meeting house of Youth Justice in Aotearoa New Zealand**

*Mā te whakaaro nui e hanga te whare, mā te mātauranga e whakaū  
Big ideas create the house; knowledge maintains it*

This Māori whakatauki (proverb) refers the wharenuī, the meeting house and main building of the marae. It is the heart of any Māori community and the natural venue to air and resolve disputes. The wharenuī embodies both a particular ancestor to whom all community members relate and also reflects a world of interconnectedness and equilibrium. It is a repository of knowledge, precedent, functionality and wellbeing. While it is a communal space, there are protocols which set parameters for engagement and dispute resolution.<sup>179</sup>

The Children, Young Persons and their Families Act 1989 is the wharenuī of youth justice in New Zealand. It is truly a house built with big ideas - both a product of its historical genealogy, and also a fertile framework for innovation and evolution. Twenty five years ago the foundations were cemented strongly in the Act's principles. These principles still stand strong today. Foremost is the twin, and equal, emphasis on accountability but also responses which address the needs of the young offender and the causes of offending. There is a strong focus on police led diversion wherever possible rather than charging. Communities are involved in the process, resulting in reduced reliance on

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<sup>176</sup> At 163.

<sup>177</sup> At 169.

<sup>178</sup> Ministry of Social Development *Report to Minister for Social Development: Final recommendations on improving Family Group Conferences to achieve better outcomes for New Zealand's most vulnerable children* (13 September 2012) available at <<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/evaluation/review-family-group-conferences/improving-family-group-conferences.pdf>>.

<sup>179</sup> Kylee Quince "Māori and the Criminal Justice System in New Zealand" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333-358 at 339.



institutionalisation and incarceration, and rehabilitative, wraparound, community-based sentences are a priority. These principles will stand the test of time and continue to make a difference, as evidenced by record low numbers in our youth justice system – both in terms of the apprehension rates by the police and the rate of Youth Court prosecutions.

At the heart of the whare, for the small group of youth offenders who are not subject to police diversion, is the Family Group Conference – the primary decision making forum in every such case. The legislation provides for families, whānau and victims to contribute to this decision-making process. In many ways, it has surpassed its original vision and has evolved to become restorative in practice. However, limitations and problems with the operation of the FGC have surfaced and require careful consideration and reworking.

Over the past twenty five years, the shared learning and experiences, triumphs and failures of both the Act and those within the youth justice community, have contributed to an expansive knowledge base. There is more to learn. There are parts of the legislative blueprint that remain latent, waiting to be realised: the continued expansion of lay advocates, Iwi Remand Services and use of community-based sentences.

There is also much more to be imagined. The diversity and complexity of young people, their families and communities is the biggest challenge to any youth justice system. Complex problems need informed but innovative solutions. The New Zealand system also has a principled and pragmatic duty to continue to do better for young Māori. On this score, to walk into the future our gaze must also be fixed on the past – the overrepresentation of Māori in the youth justice system is just one strand of a much broader story of modern and historical social, economic, political and cultural marginalisation and Māori aspirations, albeit not without controversy, for self determination. The 1989 Act recognises the potential for whānau, hapū and iwi to have a greater role in responding to their rangatahi. Over twenty years later we are beginning to see the fruits of this vision. The Oho Ake framework is but one example of effective and collaborative partnership between Police, iwi and whānau. Perhaps, it is a harbinger of what is to come.

Indeed, twenty five years on it is now safe to say that big ideas might create the house, but knowledge maintains it and vision grows it.