YOUTH JUSTICE – EXAM NOTES

EVOLUTION OF THE YOUTH JUSTICE SYSTEM

Chapter 1 - The Evolution of the Youth Justice System

- Debate around the purpose - divided between
  - the view of the young person as a dependent being who needs protection
  - view of the young person as an autonomous individual who should be responsible for the consequences of his or her actions.
- Three periods of major reforms:
  - Path to the YJ model in the Child, Young Persons and Their Families Act 1989.
  - Reforms in 2010
  - Expert advisory panel convened in 2015 recommending a complete overhaul of the care and protection system with parallel reforms to YJS. Major reform which has re-orientated principles and the operating model. Changes to age parameters.

1.2 Early views of children in conflict with the law.

1.2.1 Children's rights and interests under the common law:

- Common law focused on the legal status of the father as the head of the household. Any actionable rights belonged to the father.
- The earliest forms of children's rights emerged not to protect the child themselves or to recognised the child as an individual of moral worth, but to further the interests of others (usually the interests of the father).
- In the criminal law sphere the only recognition of childhood as a distinct period of life was the *doli incapax* period - irrefutable presumption that those ages less than seven were incapable of forming the necessary intent for a criminal act.
  - 7-14 they were held to be presumptively incapable of forming criminal intent, but this could be rebutted by demonstrating that the accused appreciated that what he or she did was seriously wrong.
  - 14 years or older were subject to the same principles of liability as adults.
- Special presumption that for children between 10-14 (as well as normal BOP on the prosecution) BOP also has the burden of proving that the child knew what they were doing was wrong or against the law.
  - Enshrined in the Crimes Act - s 22
- Under 10 years old, you cannot be convicted of an offence - s 21

1.2.2. Māori concepts of justice.

- Predicated on a worldview of collectiveness.
  - Communitarian rather than individual responsibility.
- Socially harmful behaviours caused by an imbalance to the social equilibrium of some kind.
  - Restorative-type approach to remedy the harm done by the transgression.
- Difference between adversarial CL system and YJ system.
  - Trying to focus on the child as an individual but in the context of their whanua, hapu, iwi and family groups.

1.2.3 Early NZ youth justice statutes

- First colonial statutes in mid-19th century were enacted in reaction to escalating numbers of abandoned, criminal and neglected children.
  - First was the Neglected and Criminal Children Act 1867.
    Mixed the two groups of people together.
- First comprehensive legal recognition of youth as a different and separate class of criminal accused came with the Juvenile Offenders Act 1906.
- Criminal Code 1893 was when doli incapax came in.

1.3 The welfare approach

1.3.1 The 'child-saving' moment:

- Significant changes in the law's treatment of the child in conflict with the law did not occur until the late 19th century, when the initial signs of a rights discourse were observed.

- Characteristics of this model of youth justice are informality, lack of due process and a high degree of discretion in the name of 'best interests'.
    - The theoretical justification for this stems from the doctrine of parens patriae (state could be a benevolent parent for a child).
    - State intervening through means of treatment.
- Classical v positivist criminology
    - Move from the idea of classical responsibility (if you are not legally insane we are presuming you made a rational choice to offend so we can inflict a proportional punishment on you) to was this a choice?

1.3.2 Welfare-based youth justice in NZ:
- The Child Welfare Act 1925 established the Child Welfare Branch which dealt with supervision of youth offenders.
    - A separate Children's Court was provided for in the legislation.
- The Child Welfare Act 1925 appears to have had different objectives, notably the re-classification of criminal youth to youth in need of State assistance.
    - Non-specific complaint system
    - Instead of the police arresting you for a specific offence all that would have to happen was that a social worker/someone in the community just had to say that the kid or their family was in trouble.
        Didn't need a specific offence.
    - Establishment of reform schools caused harm
- Little distinction between those who were offending and those who were in need of care and protection.

1.3.3 Some negative effects of a welfare-based youth justice:
- Emphasised the young person's dependence.
- Actions taken in the 'best interests' of children led to many (predominantly Māori) children being sent to institutions by the courts until they were 20, often for minor offences.
- Lack of due process and formality - high level of discretion in the name of 'best interests'.
- Judge Mack in the Harvard Law Review in 1909 stated that the issue - it is apparent at once that the ordinary legal evidence from a criminal court is not the sort of evidence to be heard in such a proceeding.
    - i.e don't need process or evidence, just need to intervene and can do whatever in the kid's 'best interests'.

1.3.4 *Re Gault*
- The SCOTUS held that children were 'persons' under the Constitution and thus were capable of possessing the rights of due process enshrined in the Constitution (such as the right to be represented by counsel, the right to remain silent and the right to confront witnesses).
    - Later case added that a kid had to be proven to be guilty beyond reasonable doubt.
    - Human rights frameworks were starting to be established.
    - Needed to have a lawyer/charge/a right to appeal.

1.4 The path to 'the new paradigm:' 1974-1989
- Used to described the current model of youth justice introduced by the OT act in 1989.

1.4.1 The Children and Young Persons Act 1974
- 'welfare' and 'justice' models are shorthand methods of describing the two foremost approaches to offending by children and youth in modern criminology.
- Impossible to find the CYPA 1974 into either category but the legislation appears broadly welfarist in its intent.
- Little distinction between those offending and those in need of care and protection.
- First act that differentiated children or young persons
- Only reformed in 2019.
- Established a children and young person's court
    - But dealt with criminal and neglected children

    - Paramount consideration was the best interests of the child in the welfarist sense/paternalistic idea.
- Young people had to be legally represented
    - But like it was where junior lawyers just used to 'practice' there.
- Criminal standard of proof had to be met
- Rehabilitative focus

1.4.2 Drivers of Reform
- 1984: A working party was convened by the Hon Ann Hercus MP within the Department of Social Welfare;
    - Drivers of Reform
        Mono-cultural nature of YJS
        Perceived failure of welfare based system
        Rights of children and young persons
        Neo-liberalism
        Moves toward recognition of the principles of the Treaty.
- 1986: The Children and Young Persons Bill was tabled in Parliament;
- 1987: The second Department of Social Welfare working party was formed;
- 1989: The Children, Young Persons, and Their Families Bill was tabled in Parliament; and
- November
- 1989: The Children, Young Persons and Their Families Act came into force.
- Huge shift
- Principles at 1989 were revolutionary at the time - a 'new paradigm'
    - Innovative and original aspects: victim's rights, diversion, family, rein in power of state.
- Immediate fall in custody and court appearances.
- Diversion:
    - For minor issues, an enforcement officer could decide to do something informal.
        Police officers pretty much told not to prosecute unless absolutely necessary.
            - The meaning of family is quite broadly drawn.
        - There was extensive consultation carried out, especially with Māori and Pasifika.
            - Contentious over issues such as mandatory reporting of child abuse.

(1) The mono-cultural nation of the youth justice system
- Parallel concerns about the appropriateness of the youth justice system of indigenous young people.
- YJS was run mainly by professionals and decision-makers who were generally of European descent.
- The 1988 *Puao-te-ata-tu (Daybreak) Report* found evidence of institutional racism within the department of social welfare.
- Calls for recognition of the importance of the family structure to Māori, as well as recognition that the paramountcy of the child's interests may not be culturally appropriate for Māori.
- Families were generally disempowered from decision-making around their children.

1.5 Legislative stability: 1989-2010
- Then the Children, Young Persons and Their Families Act was passed in 1989.
- The characteristics of the 'NZ model' of youth justice are diversion, community-based sanctions, family decision-making and cultural flexibility.

1.5.1 Contrast between adult and youth systems
- From 1989 - 2010 the legislation remained intact.
- 'Penal populism' - Speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law abiding public in general. It feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment.
- NZ differs from other similar jurisdictions in that the YJ and AJ systems have remained quite separate.
    - YJ has remained immune from the forces of 'penal populism'.
- Innovative feature of youth justice in NZ is s 208(g) of the CYPTFA which states that "proper regard" must be given to the interests of the victim(s) of the offense.
- Small number of young people who appear in the Youth Court because of the high diversion rate.
- Policy development has been evidence-based and consultative.

- The YJ system is characterised by collaboration and investment by stakeholders.
- The views of experts are still respected in the YJ system.

1.6 Context of the 2010 reform of the YJS

1.6.2 The 2010 Reforms: re-orientation of the system?

- The Children, YP and TF (Youth Courts Jurisdiction and Orders) Amendment Act 2010 appears to re-orientate the theoretical foundations of the YJS.
    - Brought certain younger children into the criminal jurisdiction and broadened the nature and scope of Youth Court orders.
        Can prosecute 10-14 y/o for serious/persistent offending - not just for murder/manslaughter.
    - Punitive potential of those reforms have been tempered in practice.
- New powers to prosecute 12 and 13 year old children have been sparingly used.
- Judges are using the increased powers in the YJS to mitigate the use of the harshest outcome - transfer to the adult system for conviction and sentence.
- Up-tariff of YC orders
    - Can have them for up to 6 months, add on supervision
    - Became easier to move people to District Court.
        S 283 order made it easier, conditions for transfer removed.
- New forms of control - military style activity camps, curfews, supervision orders, drug and alcohol rehabilitation
- Conceptual shifts? Playing-catch up w adult system
    - Movement away from 1989 principles
    - Families began to be edged out of the act, police increased their powers as did the courts.

1.7 Fresh starts and action place: youth justice policy 2010-2016

- Youth Criminal Action Plan: emphasis on early intervention, cost-saving, building on achievements in reducing rates of apprehension.
    - Inter-agency structure to share information about children at risk
    - Implementing the Vulnerable Children Act 2014.
    - The CYPTFA was amended to strengthen the weight given to the interests of the child in care and protection proceedings.

1.8 Major reforms (2016-2019)

1.8.1 The expert panel report

- Expert panel report on the future of Child, Youth and Family released in April 2016.
- The overall assessment was that the system was not meeting the needs of vulnerable children.
    - Child-centred system proposed.
    - Recommended that the age of penal majority be raised to 18, with an option for some more vulnerable 18- and 19 year olds to be dealt with in the YJS.

1.8.2 Oranga Tamariki legislative reforms

- Summary 2017-2019 changes:
    - Most 17 y/o within the jurisdiction of the Youth Court
        Usually once you turned 17, you were in DC
    - New principles, particularly s 7AA - Treaty clause
    - New concepts - mana tamaiti; well-being (vs welfare)
    - New requirement to consider international conventions
    - New purposes for youth justice
    - Extensive provisions for duty of court and counsel to facilitate effective and meaningful participation by c/yp

1.9 A Snapshot of trends in YJ

- Reported youth offending is on a steady decline
- Young ppl make up only 2% of those appearing in court.
- Majority of young people/children are males.
- Māori are still disproportionately over-represented with this being more stark in recent years.

ADDITIONAL LECTURE NOTES:

What is the YJ system?

- Not just the police and the courts, includes - youth court, iwi, MOE, NGOs, social workers, police youth aid (manage diversions and youth proceedings).
- Loads of ppl are dual status - have care and protection proceedings as well as justice proceedings (crossover children)
    - Youth court matter, family court matter and then district court/HC matter and can often be a victim in another proceedings - four different proceedings.
    - One case one judge system - would assign one judge to go across all of the different issues in the cases.
        We don't have permanent judges in the Youth Court (so often they will be DC and HC judges)
- Other legislation that is relevant
    - Sentencing Act 2002 - when transferred out to adult system (or jury or murder/manslaughter case)
        Much more focused on retribution and individual accountability.
    - Criminal Procedure act 2011

GUIDING PRINCIPLES

- Ss 4, 4A and 5(1)(a)

The Principles of Youth Justice

- The UN Convention on the Rights of the Child - even though these international standards have not been formally incorporated into the domestic legislation governing the youth justice system, they have a strong persuasive effect in the interpretation of statute and in the exercise of judicial and professional discretion.

2.3 The guiding principles

- General principles: s 4- s 11
    - Covers everyone in care and YJ.
- Main part for us is part IV - deals with YJ
    - Have to look at general principles and YJ principles - s 208
- Also if you are making an order there are specific YJ order principles - s 284
- Poor standard of drafting in the act, there is not much consistency.

2.3.1 General Principles

(1) *Purposes of the youth justice system*

(a) The original purposes of the YJ system

- **YJ part of the OTA was specifically excerpted from the remit of s 6 (best interest of the child the paramount consideration).** This was because the youth justice system must also take account of others' interests such as the victim of the offence and the general societal interest in public safety.

(b) The new purposes of the YJ System

- Focus on the concept of 'well-being'.
- The new s4A establishes the purpose of the youth justice system as being:
  respond to alleged offending and offending by children and young people in a way that
    i. promotes their rights and best interests and acknowledges their needs; and
    ii. prevents or reduces offending or future offending; and
    iii. recognises the rights and interests of victims; and
    iv. holds the children and young people accountable and encourages them to accept responsibility for their behaviour.
- Extends the purposes past the dual 'need and deed' approach.
- Recognises the rights and interests of victims of crime and the prevention and reduction of offending - indicating a more "crime control" focussed approach.
    - Accountability and responsibility suggests a restorative justice approach.

(d) Well-being and best interests
- The meaning of 'well-being' does not have a proper definition - look to s 2 and s 5(1)(A).
- The concepts of 'welfare' and 'best interests' of children are relatively well defined.
- Primary focus has been in the measurement of economic, health and social indicators.
- Well-being includes the welfare of that child.
- The public interest and the interest of victims are separated.

(f) The rights of the child or young person
- Places an explicit duty on decision-makers to respect and uphold the rights of the child (5(b)) and specifically mentions two international human rights instruments: UNROC and the UN Convention on the Rights of Persons w Disabilities.
- Effect of this provision is quite unclear - doesn't make it clear whether it is being incorporated into NZ law or not.

(g) Concepts from Te Ao Māori
- The term "mana tamaiti" means the intrinsic value and inherent dignifty derived from a child or young person's whakapapa and their belonging to whānau.
- The importance of Te Tiriti is also emphasised, with new duties on the Chief Executive.

(h) Principles specific to the exercise of the YJ Powers
- S 208 contains the specific principle guiding YJ.
- Decision makers must weigh the four primary consideration in YJ set out in s 4.

Ss 208...

a. Unless the public interest requires otherwise, criminal proceedings should not be instituted against a CYP if there is an alternate mean
   - Diversion
     - Warnings, cautions, FCG - also have ways in court to push them back out of the court.
     - ADVANTAGES:
       Having a criminal record is a barrier to travel and jobs etc.
       Aggregation - want to avoid putting them w other kids with issues lol
       Evidence based
       Accountability
       Cheaper
     - Plank of the YJ system

b. Criminal proceedings should not be instituted against a C/YP in order to provide any assistance or services needed to advance the well-being of the child or young person or their family
   - Trying to further themselves from the welfare approach where ppl get serious outcomes under the guise of welfare
   - Don't use criminal system for welfare purposes

c. Bringing family based approach to YJ
   - Measures should strengthen family/community units and encourage them to develop their own ways to deal with offences
   - E.g FCG and rangatahi courts.

d. C/YP should be kept in the community so far as practicable and consonant with the need to ensure the safety of the public
   - Diversion and decarceration - aggregation issue can be avoided
   - Dealing w matters at lowest level possible
   - Harnessing community support

e. Child or young person's age is a mitigating factor
   - Younger = more mitigation
   - Up until mid-20's your brain isn't fully developed.
     'Third systems' for young adults (18-25)
   - Similar in adult system

f. More around families
   - F(ii) take the lest restrictive form appropriate in the circs - proportionality principle.

fa. Came in in 2010 - specific requirement to deal with causes underlying offending
   - Rehabilitation/reintegration

    - More proportionate response than welfare - not a wide general power to intervene

g. Revolutionary victim provision - had to consider the interests and views of any victims
    - Under adversarial process, victims didn't have rights to participate and only had the ability to provide evidence

h. The vulnerability of children and young persons entitles a C/YP to special protection during investigation
    - Before 1989, when being interviewed etc there were no extra rights for child when they were being questioned.
    - C/YP are really vulnerable in custody - will often confess to anything to get out of there.

2.4 Characteristics of the NZ model of YJ

- Many of the attributes of the NZ model of YJ derive from practice rather than statutory prescription.

2.4.1 Welfare or justice?

- The Youth Court is entirely separate from the Family Court and so care and protection proceedings are entirely differentiated from criminal proceedings.
    - Exception is the regime which deals with children who offend.
    - They can be referred to the care and protection system, thus involving a hybrid model.
    - The 2010 reforms which allows 12-13 y/os to be prosecuted for certain serious and persistent offending encompasses a "safety valve" of a referral to consider care and protection.

2.4.2 Diversion and decarceration

- Diversion underpins the OTA
    - 'Diversion' - 'practice with respect to limiting the appearance of young people in court and restricting the use of residential or penal establishments for young people'
        Can mean that no formal action is taken at all
    - Strong statutory presumption against the use of formal orders or custodial sentences.

2.4.3 Restorative justice

- Family Group Conferences
    - Statutory forum where the young person, their family, state officials such as the police, and the victim come together to decide on a plan to deal with offending by that young person.

2.4.4 The centrality of whānau

- Empowerment of families as key policy imperatives.
- Sought to give increased responsibility to whānau for dealing with offending by their young people.
    - Legislative partnership.
- The 2010 amendments introduced a new order - the parenting education order.

2.5 International standard for YJ

- Certain sections of the ICCPR and the UDHR are relevant.
    - ICCPR is legally binding.
    - NZBORA incorporated it into NZ law.
        Under s 25(i) - there is the right in the case of a child to be dealt with in a manner that takes into account their age.
- Young people have the right to due process enshrined.
- ICCPR also provides some specific rights for young people.
    - No definition of child etc in ICCPR
- S 5(1)(b)(i) inserted which references the UNCROC and the UN Convention on the Rights of Persons with Disabilities
    - Ambitious interpretation - incorporation
    - Realistic interpretation - signals the importance of the Convention as an interpretative tool.
- Doesn't exclusively incorporate it as it could.
- In more recent times, language have become more strong
    - Court must recognise convention - *DP v R*
    - If any discretion, use the convention - *R v M*
    - *Whitcombe v Police* - should discount sentences

- Judges particularly keen to use the conventions where the legislative provision is quite punitive
    - E.g 283(o) - transfer to DC
        Judges try absolutely everything to keep them in the youth court even if it means detention.

2.5.2 United Nations Convention on the Rights of the Child

The relationship with other human rights instruments

- The provision of extra rights for young people on the basis of their special characteristics does not negate the rights that they possess as human persons. The fact that young people have special rights does not mean that the generally recognised rights cease to apply.
- Child-specific protections do not derogate from the protections agreed to by the States Parties in the ICCPR.

Legal status of the CRC in NZ

- CRC signed by NZ on 1/10/1990 and ratified on 6/04/1993.
    - Not formally incorporated into domestic law.
- 3 exceptions to this:
    - Minimum employment age - NZ does not have one.
    - MOE will enrol illegal children at a cost lol
    - In NZ we retain the right to mix children and adults in custody e.g young people in adult prisons.
- *Attorney-General for Canada v Attorney-General for Ontario* dualism approach - for Treaty obligations entered into by the executive to be given force of law within NZ obligations must be transformed through a process of legislative implementation.
- More rights-based approach to young people by the courts and a recognition that young people must be considered as principals in cases involving them.
- CRC not truly determinative but as a guiding principle.
- Judiciary's approach to the status of the rights contained in CRC remains ambiguous.
    - *Pouwhare v R* - Keane J: placed considerable emphasis on the CRC as an interpretative tool for judges.
    - Persuasive in the exercise of discretion

What are the characteristics of a CRC compliant YJS?

- The model of the CRC is that the young person is afforded the same basic right as an adult in the criminal justice system.
    - Include presumption of innocence, the prohibition on retrospectivity and the right to legal assistance.
- Certain extra rights e.g that the best interests of the young person should be a primary consideration in all matters affecting them
    - Dual status model - young person has basic minimum rights and extra rights based on status as a young person.
- Key principles:
    - Best interests: the best interests of the young person are a primary consideration in all decisions;
    - Participation: the young person's effective participation is promoted in matters affecting them, and their views are taken into account in any decisions made;
    - Reintegrative focus: any outcomes and processes must aim to reintegrate the young person so that they may take part in society, and avoid punitive and stigmatising processes and sanctions;
    - Age-appropriate timeframes: processes and outcomes are delivered in a timeframe appropriate to the age and other characteristics of the young person; and
    - Non-discrimination: the youth justice system does not further perpetrate discrimination, and is cognisant of the needs and particular characteristics of groups such as ethnic minorities, indigenous peoples and children with disabilities
- Committee emphasises that when the young person is diverted from formal judicial proceedings, human rights and legal safeguards must always be respected.
- Three main characteristics
    - Defines the child as those under 18
    - Child as rights holder rather than object of concern
    - Same minimum rights as an adult - suspect/defendant/offender in the same situation, but extra rights based on status and characteristics as 'child'.

Can the CRC's general principles limit rights?
- Are these rights absolute in all situations?
    - Article 3 - requires that the best interests of the young person be *a* primary consideration in all actions and proceedings concerning young people, not an absolute priority.
- State parties do not have a 'get-out' ability based on any other rights conventions.

2.5.3 the 'Beijing Rules'
- CRC complemented by the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).
    - These rules are not a legally binding treaty of themselves - recommendations on minimum standards for national youth justice system.

2.5.4 The value of international law for the young person
- International law is specifically designed to be general enough to cover differing legal systems and cultures.
    - Enforcement mechanisms are cumbersome and international law must be implemented and supported by States Parties to attain its full purpose.
    - The gaps between law and practice are often wide.
- **The status of the CRC in domestic law remains firmly interpretative rather than definitive.**
    - Vital role in providing a benchmark against which the NZ youth justice system can be measured.
- Young people in NZ are unable to take cases to an international human rights body.

Other relevant international standards
- UN Convention on the Rights of Persons w Disabilities (2006)
    - Collects and collates these rights
    - Affirms the rights rather than creating - particular focus on participation
    - Rly high rate of neurodisability - most kids in YJ
- UN Declaration on the Rights of Indigenous People (2007)
    - Self-determination, self-governance and right to maintain and develop culture
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
    - Assistance, participation, dignity and restitution for victims of crime.
- Council of Europe - Child Friendly Justice Guidelines

What monitoring mechanisms does the convention have?
- Weaker end of the spectrum
- Periodic reporting - generally quite positive
    - Also allowed a shadow report from an NGO
    - In NZ there is a coalition of children focused NGO's - Children's Rights Alliance

Committee on the Rights of the Child
- Body of independent experts who monitor the implementation of the convention
- State parties to produce regular reports
- Independent groups also produce reports (in NZ it is the Children's Rights Alliance)
- Concluding observations
- Produce general comments:
    - Thematic examination of a particular issue

Section 7 and the potential for partnership
- What is the new duty on the CE under s 7AA of the OT Act?
    - Brought in in 2017-2019 reforms
    - Seek to develop partnerships w iwi services

He Taonga Te Tamariki - Eru Kapa-Kingi
- S 14 of the OT Act
- Under s 7AA the CEO must meet three new duties:

1. Policies and practices must have the objective of reducing disparities by setting measurable outcomes for Māori.
2. Policies, practices and services have regard to mana tamaiti and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their wider family groups.
3. Develop strong partnerships with iwi and Māori organisations and set expectations to improve outcomes for Māori as well as provide opportunity to delegate functions under the OT Act to appropriately qualified people within the organisation.

- Provide for practical commitment to the principles of the Treaty.
  - First two parts directed at decisions of policy, practice and service
  - Last part about forming partnerships with iwi and Māori organisations to better provide for tamariki Māori.
- Section poses some threat to its effectiveness - drafted in weak terms
  - Only bound to 'seek to develop' partnerships - by just contacting people this is discharged. Not bound to see through formation or continuation of strategy.
- The value of this duty rests of importing the expertise and natural attributes of iwi and other Māori organisations who are best placed to deal with tamariki and whānau Māori.

Ki tua o te awe māpara - looking to the future.
- The system is not designed in a way that understands Māori ways of being.
- Should devolve more control to iwi or other Māori organisations.
  - Greater scope ought to be provided to devolve state power to Māori, particularly in policy and decision-making.
  - Crown can't relieve itself of its duty to provide for equality of Māori as promised under article III of the treaty.

Contemporary examples
- Structures that are more cognisant of Māori ways work better for Māori.
- Māori are best placed to provide for and make decisions which involve Māori.

A partnership framework
- These powers and functions devolved from OT would be limited to cases were tamariki Māori were involved.
  - Iwi or other Māori authority receiving these powers could take the form of a social services arm as a part of a wider post-settlement government entity, could be Māori orgs set up specifically to exercise these powers and functions.
  - Crown should fund the creation and maintenance of the infrastructure for Māori entities to exercise these functions and powers, with the Crown providing administrative support.
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***DOLI INCAPAX* AND THE PROSECUTION OF CHILDREN**

3.2.1 Theoretical foundations

(1) *Definition*
- **The minimum age of criminal responsibility (age of criminal responsibility) is the age from which an individual can be held liable under the criminal law, or conversely the age below which an individual is not subject to liability under the criminal law.**
- **Age of criminal responsibility in NZ is 10.**
  - Artificial construct.
  - Anything below 10 is considered 'incapable' of committing a criminal offence.

(3) *Conceptualising the age of criminal responsibility*
- "Capacity view" - children under a certain age do not have the capacity to commit crime, thus the age of criminal responsibility provides an irrefutable presumption of incapacity.
  - Advantage of avoiding the need to evaluate the capacity of each individual child.
- Policy based, wrong to punish children under a certain age, even if they do have capacity.

(4) *Developmental science and the law*
- Children have lesser cognitive development and are more susceptible to peer-pressure etc.
  - Capacity for change and rehabilitation is considerable.

- The pre-frontal cortex (responsible for reasoning etc.) is the last part of the brain to mature.

3.2.2 The age of Criminal Responsibility in NZ

(1) *S 21, Crimes Act 1961*

- Conviction of those under 10 is prohibited
    - But can they be dealt with informally in the YJ system.
    - There is no restriction on them being questioned on arrest or questioning.

S 22 of Crimes Act

- Not convicted between 10-14 "*unless he knew either that the act or omission was wrong or that it was contrary to law".*
    - This gives us the doli incapax presumption – BRD to prove this.
        Jury must make the assessment as to the child's understanding at the time of offending.
- We have two conceptions of wrongness - wrong *OR* contrary to law.
- *R v Adams* (1882) - conspiracy to make false accusation of rape, 8 year old girl
    - Crown failed to supply 'necessary strong and pregnant evidence' that child understood wrongdoing.
- *R v Brooks* [1945] - 13 year old accused of murder of family
    - Presumption not rebutted due to mental illness of accused.
    - Doli incapax was raised even though it pretty much ended up being an insanity case
- Doli incapax is not a defence; rather it is considered an ingredient of the offence, which the prosecution must prove to the criminal standard.
- In the case of *R v NM143*, the court helpfully summarised the authorities (domestic and international) on the type of evidence that may support a **rebuttal of the presumption of doli incapax:**
    - statements/admissions made by the child;
    - the type and seriousness of the offences, and the circumstances surrounding its commission
    - the behaviour of the child before and after the act;
    - the child's criminal history/previous dealings with police;
    - evidence of parents/home background;
    - evidence from lay persons (for example, teachers, principals, Youth Aid officers and sports coaches); and
    - evidence of psychologists/psychiatrists (for example, a report ordered pursuant to s 333 of the Oranga Tamariki Act).
- In *RP v The Queen,* it was said that the presumption cannot be rebutted merely as an inference from the doing of the acts constituting the offence. But the more serious the alleged offence the more likely the child is to know it is wrong. The older the child and the more serious the alleged offence, the easier it is to rebut the presumption.
- there is no "presumption of normality", that is to say that evidence the child has the normal capacities of a child of his or her age does not necessarily equate to knowledge of wrongdoing.
    -

(2) *Comparison with similar jurisdictions*

- Same in the UK and Australia.
- Ireland is 12 but certain 10-11 can be charged with serious offences.
- Scotland is 8 but children under 12 may not be charged with a criminal offence.
- European civil law jurisdictions tend to have a higher minimum age.
    - Some places just don't even have on and deal with it on a case by case basis.

(3) *Compliance with international standards*

- Contentious issue at international law.
- No concrete rule.
- Committee on the rights of the child reckons 14.
- NZ technically in compliance by having a minimum age.
    - UN told us to fix it and make it higher but we did *not.*

Brown and Charles Article

- Substantive progress in respect of raising MACR has not been forthcoming and such arguably has significant implications which flow beyond legal considerations into the very lives and future potential of children.

The Remaining MACR Stalemate: An unmoveable Westminster Parliament?

- The MACR in England and Wales is 10 years, meaning that a child from that age can be arrested and sent to court if they commit a criminal offence.
- The thrust of governmental opinion indicates that it is accepted that those aged 10 and above irrespective of what has been found in research and practice are indeed capable of understanding the severity and wrongful nature of the actions.

The relationship between MACR and diversion:

- Locally driven diversionary policy has become widespread, driven by Youth Offending Teams and the Youth Justice Board
- Diversion is something that the criminal justice system, in the context of FTE (first-time entrants) deems critical and, has arguably been an operational focus).
- Although, the use of diversion clearly forms an important and effective tool for engaging with children, it is routinely employed once a child has committed an offence and already made contact with the system. In this sense, it is a positive tool which is utilised post-system contact (where harm may have already been caused).
- Raising the MACR would mean that a cohort of children could potentially benefit from a renewed emphasis on primary prevention initiatives and non-stigmatising community-based supports.
- At its most basic level, reform of MACR, specifically raising it, would mean that certain age groups of children could benefit from the subsequent vacuum created: a vacuum which could be filled with non-stigmatising forms of support and initiatives which would act to reduce the likelihood of a child penetrating further into the formal YJ system.
- Doli incapax granted children a partial safeguard, with those aged between 10 and 14 being considered as incapable of forming criminal intent. In cases where those prosecuting wished to claim that children indeed understood what they were doing, they had to establish, before the court that that child understood what they were doing was a serious wrong as opposed to a stunt or prank turned bad.
- Removing it 'made childhood irrelevant to criminalisation' and effectively lowered MACR and enabled a net-widening effect.
- The consequence of New Labour's approach was that, the limited protection by doli incapax was removed effectively increasing the vulnerability of 10-14 year olds in england and wales.

***RP v The Queen:* Rebutting the Presumption of Doli Incapax**

- Children aged 10 but not yet 14 lack sufficient intellectual and moral development to be held criminally responsible (presumption of *doli incapax*).
- *RP v The Queen:*
    - Two counts of sexual penetration of a child under 10 years of age by a boy aged 11.5.
    - HCA ultimately found that it had not been proved beyond reasonable doubt that the boy understood his acts to be seriously wrong.

Rebutting the presumption:

- Presumption can be rebutted if the prosecution bring evidence proving that the child understood what he or she did was seriously wrong.

Knowledge of serious wrongness:

- *R v M:*
    - Interpreted in the same way as M'Naughten Rules for insanity - requiring understanding of the moral not legal wrongfulness of the behaviour,
    - Whether the child understood that the act was wrong according to the principles of reasonable people.
    - HCA noted that in the case of children, there is also the further dimension of proving 'knowledge of serious wrongness as distinct from mere naughtiness'.

Age of the Child:
- Argued that less evidence required the closer the child is to the age of 14
- The HCA correctly criticised this because it is 'apt to suggest' that children progress at a uniform rate.

Type of Act Committed:
- Argument that the more obviously wrong the act, the easier it will be to rebut the presumption.
- Ensure that the individual child's understanding is addressed.
- Does not mean that inferences cannot be drawn from circs surrounding the act.

Home background and intellectual and moral development
- It is preferable to have evidence about the child's intellectual and moral development and home background.
    - Accurate reflection of the child's abilities **at the time of the act.**

RP v The Queen:
- Trial:
    - Circs established beyond reasonable doubt that the boy knew what he was doing was seriously wrong. Circs incl:
        Using force
        Placed his hand over brother's mouth when he tried to call out
        Bro was clearly distressed and told the boy to stop
        Stopped when he heard and adult return
        Told his bro not to say 'nothin'
    - Held that because he knew the first time was wrong he knew the second one was wrong too.
- Court of Criminal Appeal
    - Logical conclusion that he knew the second one was wrong could not be made because the circs were quite different.
- HC:
    - The onus is on the prosecution to adduce evidence rebutting that presumption to the criminal standard.
    - Circs did not show that he understood the moral wrongfulness of his actions.
        Common for children to engage in sexual play, may find it naughty and want to keep it a secret.
        Don't always know that when they are inflicting pain it means they are doing something seriously wrong.
        The use of the condom was significant - evidence he had prematurely been exposed to sexual material and possible sexual violation.

Conclusion
- If the prosecution believe a child should be held accountable for his or her criminal behaviour in criminal proceedings it must gather evidence to rebut the presumption, it cannot simply rely on assumptions and generalisations.

R v Rapira
FACTS:
- Group implemented a plan to rob a delivery driver of food and money.
- The group planned to conceal themselves, 2 would engage with the delivery driver, another was to be armed with a club. All members were to assist with the robbery.
- Earlier on the day of the offending, the positions to be taken up by each group member was organised.
    - Baseball bat hidden in a nearby section.
- V was speaking to two of them when some other 2 (incl. appellant) went to steal the pizzas.
- One of the group struck V with the baseball bat with considerable force.
- The group robbed him and left.
- V died as a result of his injuries.
- Peihopa (who struck V) was charged under s 168, but denied intention to cause GBH.
- All other appellants were charged as secondary parties under s 66(2).

JUDGMENT -
Bailey Junior Kurariki appeal against conviction:
- Key provision is s 22 of Crimes Act
- Crown relied upon the evidence of his reactions at the time or shortly after the robbery given by other witnesses. Those reactions were said to be consistent with knowledge that what happened was wrong.

The s 22 directions
- Mr Hogan submits that the judge misdirected the jury in two respects.
    - Failed to properly identify the 'act' upon which liability depended for the purposes of the s 22 understanding.
    - Direction given in relation to s 22 did not conform to the standard direction in *R v Brooks*

The act known to be wrong or unlawful
- In the case of a party under s 66(2) it is contended that the relevant 'act' was 'the formation of the common intention [to rob]'. It is submitted that the jury should have been directed that it must be satisfied that Kurariki knew it was wrong or unlawful to conspire to rob.
- They were directed that understanding that joining a conspiracy to rob was wrong could not be inferred from participation in the robbery.
- The direction accurately captured the acts and knowledge upon which liability was based and required knowledge of wrongfulness or unlawfulness in respect of them all.
- The specific directions on s 22 left no room for the jury to be under the misapprehension that it could infer knowledge of wrongfulness from the acts which made up the offence.
- Under s 22, all acts giving rise to liability for the offence charged must be proved to have been known to be wrong or unlawful before a person under the age of 14 can be convicted, whether as a principal or a party.
- Evidence relevant to participation in the common purpose was not confined to Kurariki's presence at the meetings.
- As to whether Kaurariki knew such participation was wrong, the jury was properly instructed on the requirement of s 22 that it could not infer knowledge of wrongfulness from the participation itself.
    - It could draw on its knowledge and understanding of 12-year olds, so long as the focus was on this particular accused.

The direction in R v Brooks
- Mr Hogan submits that the standard direction required the judge to tell the jury that the law presumes that a child does not have sufficient capacity to know that the act in question is wrong or contrary to the law.
- It is not there suggested that any particular formula of the words is required.
    - Jury instructed in the language of the statute which restates the common law position.
    - Jury had to be satisfied BRD that Kurariki knew that he was doing wrong or acting contrary to law in all the essential ingredients of the offence which the Crown was required to prove.
    - That is what s 22 requires, as *R v Brooks* confirms.
- Rebutted it by:
    - Talking to the teacher and the policeman
    - It was a fairly weak presumption here.

The 'pushback' of child offending cases to the Family Court - Lynch
Key Decisions
Police v KK, Police v JC
- Children charged with arson of cinema property
- KK was a first offender and admitted to it at family group conference.
    - S 208A involved a two stage consideration
        Whether the child was (on the BOP) in need of care or protection under s 14(1)(e) of the CYPF Act
        - Whether the magnitude of the offending gave rise to concerns for the child's welfare.
        - Only 1e could be considered but other aspects of the child's situation would be relevant

        Whether the court was satisfied that the public interest would be better served by an application for a s 67 declaration on s 14(1)(e) grounds rather than a YC proceeding.

R v R W-T
- 13 girl - wounding with intent to cause GBH
- Serious and violent nature of the offending meant that there was concern for R's welfare, thus fulfilling the requirements of s 14(1)(e)
- The YC jursidiction appears to offer more for accountability BUT the FC could offer longer term options which would aim to address the anger and aggression issues contributing to R's violence

Police v DV
- 13 boy
- Aggravated robbery
- Public interest better served in YC because of his a t t I t u d e

Police v JK=G
- Involved a 13 year old charged w assault (w a knife) w intent to rob
- Significant additional offending
- S 208A hearing is not adversarial, rather a 'hybrid step in proceedings'
- JG had clear care and protection needs which were linked to his offending and the FC will have longer term oversight of JG, rather than the YC's shorter term measures.

Analysis
- Judges have shown a clear willingness to utilise the provision to ensure that children whose offending stems from care or protection issues are dealt with through the FC
    - Referral rather than definitive refusal of YC jurisdiction
- Hybrid of civil and criminal jurisdictions.

TEXTBOOK

3.3 Prosecution of Children
- From 1974 to 2010 (with the exception of murder and manslaughter cases), offending by children was regarded primarily as a care and protection matter.
    - The principle underpinning responses to children who offend was that offending by this age group was characteristic of problems in the home and family life of the child, and should be addressed through diversion and welfare-focused interventions. Serious and or persistent offending was dealt with through the care and protection provisions of the Oranga Tamariki Act, under the jurisdiction of the Family Court.
- 12- and 13year-old children may now be prosecuted for specified serious and/or persistent offending.

3.3.1 Prosecution of Children for Homicide
- Prosecution of a child for homicide follows the same process as for an adult defendant, though the initial hearing takes place in the Youth Court. 47 The child has the benefit of the doli incapax principle.

3.3.2 Prosecution of Children for Serious And/or Persistent Offending
(1) *Extension of Youth Court jurisdiction*
- children aged 12 and 13 years are now prosecutable in the Youth Court in two further circumstances:
    - where the child is alleged to have committed an offence where the maximum penalty is or include imprisonment for life or for at least 14 years.
    - where it is alleged that they 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.
- "Previous offender" is defined as:
    - a child who has been declared in need of care and protection by the Family Court in relation to an offence attracting a maximum penalty of at least 10 years;
    - a child who has been convicted by the High Court of murder or manslaughter;
    - a child who has been convicted of an offence with a maximum penalty of life or 14 years imprisonment in the District Court or High Court; and

- a child proved before a Youth Court to have committed an offence with a maximum penalty of life or 14 years.

(2) *Safeguards for the child*
- Children who are prosecuted in the Youth Court are protected from the most punitive orders available under s 283. **A child (10-13) may not be transferred to the adult criminal justice system under ss 273–277 nor s 283(o) of the Oranga Tamariki Act.**

(3) *S 280A 'pushback'*
- Provides that where at any stage in the proceedings after a charge is brought against a 12- or 13-year-old child in the Youth Court, it appears to the Court that the child may be in need of care or protection on the s 14(1)(e) ground and it appears to the Court that an application under s 67 on s 14(1)(e) grounds would serve the public interest better than a prosecution, the Court may refer the matter back to the person who commenced the proceeding.
- Family Court Orders Available
  - Section 83 - care or protection orders
  - Section 84 - criminal type orders
- In their application of the s 280A provisions, Judges have shown a clear willingness to utilise the provision to ensure that children whose offending stems from care or protection issues are dealt with through the Family Court jurisdiction. As noted, the legislative structure is such that the "pushback" is a referral rather than a definitive refusal of Youth Court jurisdiction, although there are no instances to the author's knowledge of the informant disagreeing and re-presenting the charges.
- Youth Court outcomes are short-term, generally of three to six months duration. The Family Court can have oversight of the child in the long term.

3.3.3 Justification for the Changes to the child offender provisions
- The two primary justifications for change to the child offender provisions were that child offending was out of control and that the Family Court was not able to cope with serious and/or persistent offending.
- The amended legislation did nothing to address a known problem with the current child offender regime, which is the complexity and clumsiness of the procedure.

3.7 Responses to children aged less than 10 years
- Examination of the empowering statute (the Oranga Tamariki Act) demonstrates that warnings and diversions are described as an alternative to prosecution. 164 Children aged less than 10 may not be prosecuted, therefore they cannot undergo alternatives to prosecution.
- The police may make a referral to Oranga Tamariki under s 14(1)(c) or (d) of the Oranga Tamariki Act
- This is purely a civil order and differs from the s 14(1)(e) declaration.

Reflections on 10+ years of the new provisions
- Were the changes needed?
- Mitigating punitive potential of prosecution powers
  - Police by using existing s 14(1)(e) procedure and informal options
  - Judiciary by careful consideration of s 280A applications
- Reforms have not tackled longstanding issues with the s 14(1)(e) ground in the FC jurisdiction.

Future reforms?
- Select committee enquiry on child offenders
  - More efficiencies in the FC
  - Better identification of children at risk
- Give YC more long term powers
- Early interventions vs dangers of labelling
- Diminishing returns.

ARREST, QUESTIONING AND INVESTIGATION

4.1 Introduction

- The New Zealand Police has a specialised branch known as Youth Aid, which deals specifically with youth offending.
    - Youth Aid's involvement is almost always after the young person has been arrested or offending has been detected by frontline police officers.
- The legislation provides robust protections for young suspects when being questioned and investigated by the police.

4.2 Powers of Arrest Without a Warrant

- The Oranga Tamariki Act limits police power of arrest without warrant.
- Despite these guidelines, the police were found to be bypassing diversionary processes by using arrest to proceed directly to prosecution even in minor cases, with the attendant disproportionate consequences of stigmatisation and increased risk of recidivism.
- Thus, a fundamental underlying principle of the Oranga Tamariki Act is to constrain the use of arrest to ensure that matters are dealt with at the lowest level possible.
- If the police wish to lay a charge against a young person who has not been arrested, there is a statutory requirement to consult with a youth justice coordinator and an Intention to Charge family group conference (ITC FGC) must be held.
    - Sometimes more immediate action is taken where the offence is more serious.
- Conditions under which a C/YP can be arrested without warrant:
    - Ensuring the appearance of the child young person before the court; or
    - Preventing that child or young person from committing further offences; or
    - Preventing the loss or destruction of evidence relating to an offence committed by the CYP or an offence that the enforcement officer has reasonable cause to suspect that child or young person of having committed or preventing interference with any witness in respect of any such offence; and
    - Summons won't do
    - PLUS exceptions for cat 3 & 4 offences AND in the public interest/breach of bail conditions/17 year olds released on bail.
        - Judges STRICT on the above, they will readily throw out a case that does not meet these conditions.
        - Have to report arrest of CYP to a senior officer

4.3 The protective code for young suspects

4.3.2 Principles

- The pivotal principle is that the young person has the same minimum rights as an adult suspect or offender, but may have supplemental rights based on his or her vulnerability as a young person.
- Section 208(h) of the Oranga Tamariki Act is the lens through which the provisions for the questioning and investigation of young people must be viewed.
- Police interrogations are innately coercive

4.4 Admissibility

- From s 215 onwards, the Oranga Tamariki Act provides an extensive protective regime for the young person during questioning and investigation by the police.
- In s 221, the Oranga Tamariki Act provides three cumulative conditions for admissibility (subject to some limited exceptions):
    - The young person's rights must have been explained before the statement was given; and
    - The young person must have been given the opportunity to consult with a lawyer and/ or with the nominated person before making the statement; and
    - The young person's statement must have been given in the presence of either the lawyer or the nominated person.
- The Court of Appeal had adopted a prima facie rule of exclusion, where improperly obtained evidence was considered to be excluded unless there was a good reason to admit it. The prima facie rule was abandoned by a majority of the Court of Appeal in the 2002 decision in *R v Shaheed*. *Shaheed* related to the admissibility of an improperly taken DNA sample, and established a balancing test to be applied where a court was required to consider the admissibility of improperly obtained evidence.

- The contemporary position is governed by s 30 of the Evidence Act 2006. This section applies to evidence in criminal proceedings and establishes a balancing test where the evidence has been "improperly obtained".
    - For the purposes of s 30, "improperly obtained evidence" is where evidence is obtained in breach of an enactment or a rule of law, in consequence of a statement by a defendant that would be inadmissible if offered in evidence by the prosecution, or unfairly.

4.5 Explanation of Rights

- First requirement is a comprehensive set of explanations that must be provided to the young person that the police wish to question, where there are reasonable grounds to suspect that the young person has committed an offence or before asking any question designed to elicit an admission from the young person.
- the police may make some limited general enquiries of the young person before the explanations are given.
- If the young person is not under arrest, the police must:
- warn the young person that failure to give his or her name and address might result in arrest; and
- inform the young person that he or she does not have to accompany the police to the station and if the young person does consent to accompany, that consent may be withdrawn at any time.
- In all cases (whether the young person has been arrested or not), the police must inform the young person that:
    - he or she is not obliged to make a statement and may withdraw the consent to the statement at any time; and
    - any statement made may be given in evidence; and
    - he or she is entitled to consult with a lawyer or nominated person.
- rights must be explained again if the young person requests it70 and when the police decide to charge.
- explanation must be given in a form and language that a young person can understand.

4.6 Access to legal assistance during police questioning

4.6.1 The importance of legal assistance

- Empirical studies have demonstrated the susceptibility of young people to coercion and their lack of understanding in relation to the right to legal assistance.

4.6.2 The young person's right to legal assistance during police questioning

(1) *Statutory Provision*

- The Oranga Tamariki Act provides that the young person must be advised of their right to, and given the opportunity to consult with, a barrister or solicitor. 84 Any statement given must be made in the presence of a lawyer and/or a nominated person. 85 If a young person wishes to exercise their right to consult with a lawyer before making a statement, that legal assistance will be made available through the Police Detention Legal Assistance Scheme. 86 The right to consult applies if the young person is at a police station for questioning, in relation to the commission of an offence, 87or following an arrest. 88Consultation may be made in private.

(2) *Explanation and Understanding of the right to Legal Assistance*

- Studies have demonstrated that young people frequently waive their right to legal assistance, particularly where they do not understand how a lawyer could benefit them, or they are concerned that they cannot afford a lawyer.
- *R v Z:* In the Court of Appeal, Glazebrook J emphasised the importance of the s 208(h) vulnerability principle. Glazebrook J stressed that there is an obligation on the police to explain how a lawyer could help in the interview process.
    - Glazebrook J considered that it was "obvious that [Z] was labouring under the misapprehension that lawyers helped and advised only in court"
- Thus, it is apparent that to comply with the conditions for admissibility, the police officer must ensure that the young person understands the right to legal assistance.
- In Police v HR, 108 Judge Malosi emphasised the importance of the police officer ensuring that a particularly vulnerable 14-year-old with capacity difficulties understood that he had a right to both a nominated person and a lawyer, and considered that the police officer was obliged to explain what a lawyer and a nominated person could do for him.

- This suggests that although the Campbell decisions would seem to place a lesser burden on the police to explain the rights, the enquiry is still fact specific, and the age and other characteristics of the young person.

(3) *Information about the Police Detention Legal Assistance Scheme*
- The Police Detention Legal Assistance Scheme (PDLA Scheme), is a specified legal service under s 68(2)(b) of the Legal Services Act 2011.
- Don't have to provide contact info unless asked.
- Vast majority of services on the phone.
- There is no explicit requirement in s 215 of the Oranga Tamariki Act to explain the young person's entitlement to free legal assistance under the terms of the PDLA Scheme. Since the Chief Justice's Practice Note came into effect, 118 the young person must be informed of this right when the police have sufficient evidence to charge a person with an offence, or whenever the police seek to question a person in custody (arrested or detained).

4.6.3 Should legal assistance be mandatory?
- One approach would simply be to require that the lawyer consults with the young person before questioning commences, when a young person is to be questioned by the police. This is the approach that is taken with young people appearing on a charge before the Youth Court (if private representation has not already been arranged). The young person must consult with the Youth Advocate before deciding to "deny" or "not deny" the charge.
- It would be a step too far to impose the presence of a lawyer for the full police interview on a young person who was opposed to it. It must be remembered that young people have the right to participate fully in matters affecting them, and a young person's informed decision to waive the right to legal assistance must be respected.
- In the *R v Z* decision, both Glazebrook J and Ellen France J were approving of the Canadian scheme, whereby the police are required to explain in plain language how lawyers can assist during police questioning and encourage parents to ensure that the young person receives legal assistance.

4.7 The Nominated Person
- The third requirement for admissibility is that the young person is informed of their right to consult with a nominated person and to have a nominated person present during questioning.

4.7.1 Who may be nominated?
- The legislation clearly envisages that the first choice is to be the parent or guardian of the young person followed by an adult member of the family/whānau of the young person. Nonetheless, the young person must be allowed to choose the person whom he or she believes best to support him or her and this may not be a member of the family or whānau
- Where no nomination is made the police may appoint another adult who is not an enforcement officer.
- In *Police v H C*, Judge Fitzgerald considered that the police should have made more effort to source a correct phone number for the young person's mother, before going ahead and nominating a Justice of the Peace.
- Where the police believe, on reasonable grounds, that the young person's choice of nominated person would attempt, or be likely to attempt, to pervert the course of justice if allowed to consult with the young person, 138 or cannot with reasonable diligence be located or become available with a reasonable period of time, 139 the police may refuse to allow the young person to consult with that person.
    - YP can chose again

4.7.2. Purpose and duties of the nominated person
- If a young person has been arrested, or is at a police station for questioning, the nominated person has the right to consult privately with the young person. The police officer must explain the young person's rights to the nominated person in a language that can be understood by them.
- duties of the nominated person are outlined in s 222(4) of the Oranga Tamariki Act as taking reasonable steps to ensure that the young person understands their rights and to support the young person during questioning and the making of statements.

- R v Kurariki that the nominated person should "assist the child to bring a mature judgment as to the wise course of action to follow and to help the child not to be over-awed"
- The courts have been reluctant to inquire into the quality of the support given where the nominated person is a parent
- In A v R, the Court emphasised that "there is no presumption that police or the nominated person have failed a child or young person who elects not to take legal advice and chooses to make a statement".
- *Campbell:* The Court of Appeal concluded that the legislation did not require that the nominated person take a best interests approach to the role.

4.7.3 Conflicts in the role of the nominated person
- Parents not always the best option.

4.8 The savings provisions
- There are a number of provisions that permit a court to exercise its discretion to allow statements to be admitted into evidence, even though the requisite cautions and explanations were not given properly (or at all) by the police.

4.8.1 Reasonable compliance
- S224
- This is a savings clause that allows statements to be admitted in evidence even if the procedures have not been complied with, as long as there is reasonable compliance.
- Reasonable is a factual question for the court taking into account the overarching principles of the OT Act.

4.8.2 Spontaneous statement
- Section 223 of the Oranga Tamariki Act provides that where the young person makes a spontaneous statement before the police officer has a chance to provide the necessary cautions, the statement may be admissible. This provision has been rarely considered.

4.9 Collection of DNA by police
4.9.2 Police powers to collect bodily samples from young people
(1) *The pre-2009 powers*
- DNA evidence is an integral part of criminal investigations in New Zealand. The governing legislation is the Criminal Investigations (Bodily Samples) Act 1995, which has been regularly amended since enactment.
- From the enactment of the primary legislation in 1995 until amendment in 2009, New Zealand's legislation was demonstrative of a conservative and rights-focused approach to the collection of bodily samples from young people. Samples could only be collected from young people pursuant to a judicial order, or with joint informed consent by the young person and his or her parent, with more restrictions for those aged 10–13 years.

(2) *Criminal Investigations (Bodily Samples) Amendment Act 2009*
- the amendment (which took effect in September 2010) removes the need for judicial authorisation of, or suspect consent to, the collection of DNA evidence from the suspect. It lowers the offence threshold considerably and changes the time at which the person's DNA can compulsorily be acquired from conviction to arrest.
- **A police officer can require a young person to provide a bodily sample if the young person has been arrested or a police officer has good cause to suspect that he or she has committed a relevant offence and intends to bring proceedings by way of a summons.**
- If the young person has not been arrested, he or she can be detained and reasonable force may be used in order for the sample to be taken.
- When converted to a profile, it may be stored in a temporary database and can then be used to compare against samples taken from unsolved crimes (and in the course of that criminal investigation).

4.9.3 Safeguards
- While some of these are replicated in the Criminal Investigations (Bodily Samples) Act 1995, in contrast to the requirements in the Oranga Tamariki Act that relevant matters are explained to the

young people and/or his or her parent or nominated person, the 1995 Act simply requires that the young person is "informed" of their rights. This must however be in a manner and language that the child or young person is able to understand, and a notice containing the prescribed information must be handed to the child or young person.
    - This appears to require simply a one way communication rather than the more thorough standard of explanation. The constable is required only to inform, but not to explain, which has been held to require the police to check the young suspect's understanding of what has been explained

4.10 Collection and retention of identifying particulars

- Section 32 of the Policing Act 2008 empowers the police to collect identifying particulars from suspects in lawful custody, detained in relation to the commission of an offence. The manner of collection must be reasonable, and reasonable force may be used to obtain the identifying particulars.
    - It is an offence not to comply.
- Section 34 of the Policing Act 2008 allows for identifying particulars obtained under ss 32 and 33 to be stored on a police information system. These identifying particulars must be destroyed as soon as practicable if a decision is made not to charge, or where proceedings against the suspect are completed (for example, through an acquittal), except where the offender is convicted, discharged under s 106 of the Sentencing Act 2002, or admits the offence in the context of a diversionary process.
- Of course, police may also collect identifying particulars (particularly fingerprints) from young people on a voluntary basis. Under a Practice Note issued in January 2007, police are encouraged to seek voluntary fingerprints from young people. It is hoped that collection and retention of the fingerprints will act as a deterrent.
    - Providing something voluntarily has different rules around it. Don't always need to destroy something if you give it up voluntarily.

R v Kurariki

- Killing of the pizza delivery driver
- Appellant alleged to have engaged Mr Choy in Conversation while another memver of the group approach him from behind and struck him on the side of the head with a baseball bat to incapacitate him.

JUDGMENT:

- S 215 rights [s 9]:
    - (1)(a): if they don't give name and address
    - (1)(b) not required to go to the station and can withdraw consent at any time to do so
    - (1)(c): under no obligation to make or give a statement.
    - (1)(d): If the child consents to make a statement this can be withdrawn at any time
    - (1)(e) any statement that is given may be used as evidence
    - (1)(f) can have lawyer and nominated person
- Three minimum conditions to be satisfied
    - Police must explain rights in a language appropriate to persons age and level of understanding s(221)(2)(a)
    - Where child has not be arrested or detained and child wishes to consult a lawyer, must be provided for before making the statement (s 221(2)(b).
    - Statement made in the presence of a lawyer or nominated person (s 221(2)(c)
- Language of s 224 (reasonable compliance w s 221) is very broad so that reasonable compliance can cover situations where there has not been strict compliance or no compliance at all.
    - Nature and extent of any failures must be closely considered by the court.
    - The language of s 224 is not apt to categorise as reasonable compliance situations where there has been **no attempt to comply with steps intended by parliament to be central in its operation.**
- Fundamental requirements of the statutory scheme in relation to explanation of rights was made out
- BUT major departure from statutory scheme in regards to the nominated person.
    - Required by s 222(3) to give the young person a genuine opportunity to nominate another support person.
    - Only where there is failure to do so will the default provision apply.
- The support of a fair-minded stranger is not what the legislature had in mind, would only be the case where there was a failure to nominate.

R v Accused
- 14 y/o charged with rape.
- Visited him at his mothers house
- Cautioned in the standard way
- She stayed there the whole time.
- First interview - denied involvement
- Second interview - admitted her guilt.

JUDGMENT - Cooke P
- Use the phrase **"no significant contravention of the spirit and object of the Act".**
- Reasonable compliance is necessarily a question of degree.
    - Enough done here to ensure no significant contravening of the purposes and the provision of the statute.
- Mother being there was manifestly the very sort of person contemplated by the legislature.
- Nothing substantially unfair
- More techincal
- Nothing seriously contrary to the purposes of the act

R v S
FACTS:
- Samoan kid whose mum didn't want him to get a lawyer.

HENRY J:
- The Crown must prove the fats necessary to establish admissibility under s 221(2) **on the balance of probabilities.**
- In articulating the duty to give support, the Legislature did not envisage a judicial inquiry into nature and quality of the support given in any particular case.
- Attitudes as to what was appropriate in this context would vary among different individuals, family and cultural groups.
- **Legislature didn't envisage a comprehensive judicial inquiry into the nature and quality of the support given in any particular case when enacting s 222(4).**
- Might be situations the requisite support has not been made available in a real sense, and that has led to a situation where the C/YP has been left in an unacceptable or unfair state of vulnerability.
- Mother called in as nominated person, but clear that the YP places a lot of advice that the mother gives him so he waves right to the lawyer and implicates the himself in the murder x
- Court nervous to evaluate the advice but obv the mother isn't liable for the murder
    - Young person doesn't really say that much at all.
    - She was objectively working against the young person's interests

Elia v R
FACTS:
- Elia changed his nominated person halfway through the interview from his mother to his aunt. His rights were not put to him again
    - [Judge regarded this as a failure on the part of the police to comply with s 215 and rules that the rest of the statement was inadmissible].
- In regards to Mr Tanu the judge ruled that an initial statement he made at home was inadmissible but the later statements at the police station were.

JUDGMENT:
- S 218 provides that all explanations shall be given in language that is appropriate for a child or young person of that age.
- The presence of a nominated person does not in itself diminish the responsibilities of police officers to explain the rights in language that is appropriate to the age and level of understanding of the child or young person involved.
- Nothing indicated Elia understood what he was being told.
    - Little interaction between him and the police officer and little eye contact.

    - Responses were not in relation to whether or not he wanted to exercise his rights but whether or not they had been explained to him.
- Always good practice to get them to repeat their rights back to you
- Under *R v Z:* CYP must understand the rights and how to exiercise them, ensure that the young person is in a position to make an informed decision whether to exercise those rights
- Ensuring the young person understands the assistance that a lawyer can provide and the mechanisms for instructing a lawyer.
- Possible that Mr Elia did not understand that he could have both a lawyer and a nominated person. Didn't explain how a lawyer might helpd. Wasn't asked whether he wanted to exercise his right to a lawyer.
    - Don't have to invariable outright ask but depends on the circs.
- **Not enough to show that elia understood his rights, must show on the BOP that the young person understood the rights available to them and was in a position to make an informed decision whether or not to exercise them.**

Campbell v R
FACTS:
- Police arrested Mr Campbell at 7:45 pm within 5 minutes of arriving at his house.
- Asked Mr Campbell to explain to explain back the rights in his own words.

JUDGMENT:
- Accept that Detective Tamihere's use of the phrase "and/or" was arguably ambiguous in context.
    - But any confusion was rectified by the subsequent exchange where Detective Tamihere advised Campbell that the police had a list of lawyers to whom he may speak for free.
- **Mr Campbell not bound to show that he had misunderstood his rights.**
- S 222(4) does not require a best interests approach on the part of the support person.
    - P/O acted reasonably in informing Mr Campbell senior about his role.
- No evidence in which we could find that Mr Campbell senior failed to discharge this duty.
    - Does not mean that Mr Campbell senior did not take reasonable steps to ensure that the police officers had explained to his son his various statutory rights.
    - Legislature did not envisage that a comprehensive judicial enquiry is required into the nature and quality of the support given in any particular case.
- No positive obligation to explain to Campbell Snr that there should be legal advice.
- Just need to explain the rights and offer the presence of a lawyer and this was done.

Police v FG
- Young person has complex needs and communication disorder. Needs communication assistant.
- Mother (as the nominated person) and young person were really stressed.
- The OT act doesn't require nominated person AND a lawyer there
- Uses Convention and General Comment no 24 - not reasonable for parent to help their child understand rights when they might not understand them, and they also aren't really that objective to decide what is in the best interests of the child.

R v Z:
- Young person has the idea of a lawyer from TV. Defending you in *court.*
- Young person didn't grasp that a lawyer doesn't just help you in court but also advise you in questioning.

Police v HR/Police v TMW
- Had neurodisabilities and mental health issues.
- Real fact specific enquiry re the child's respective understanding.

DIVERSIONS
5.1 INTRODUCTION
- Encompasses warnings, cautions and the youth diversion scheme commonly known as alternative action.

- Police may partner with the iwi or community.
- Due process is an issue
- "Practice with respect to limiting the appearance of young people in court and restricting the use of residential or penal establishments for young people" (Maxwell & Morris)
- Diversion can occur within the formal system
    - Over half of young people that do end up in court exist the youth court with no formal order.
    - S 282(1) discharge - discharge without a record

5.2 Principles Underpinning Police Diversion

5.2.1 Defining diversion

- Originally, diversion probably meant that no action was taken against the child or young person and the child or young person was "diverted" away from the criminal justice system completely.
- modern schemes quite often result in a diversion towards a particular process or programme.
    - Just being diverted away from formal aspects.
- Employed at every stage

5.3 **The Legislative Framework**

5.3.1 Statutory Basis

- The anchoring principle for diversion is s 208(a) of the Oranga Tamariki Act, which provides that unless the public interest requires otherwise, criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.
- Section 208(d) provides that a 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.
- Section 208(f) provides that any sanctions imposed on a child or young person who commits an offence should 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 take the least restrictive form that is appropriate in the circumstances.
- Sections 209–213 then provide a statutory basis for police warnings and cautions.
- the legislation is entirely silent on the subject of police diversion (apart from warnings and cautions).

5.3.2 International Standards and Diversion

- International standards for youth justice strongly encourage disposition of cases outside the formal strictures of the criminal justice system.
    - Article 40(3)(b)

5.4 Diversionary Processes

- In comparison with many overseas youth justice systems, in New Zealand Youth Aid Officers have a high degree of autonomy in deciding what level of action will be taken when a child or young person is referred to them by frontline Police.

5.4.2 Police Warnings

- The Oranga Tamariki Act urges the police to first consider warning the young person as an alternative to prosecution unless a warning is clearly inappropriate, having regard to the seriousness of the offence and the nature and number of previous offences committed by the young person.
- Warnings are given a legislative basis in ss 209 and 210 of the Oranga Tamariki Act.
    - Minor offences have an immediate warning at the scene and written warning.
    - Warnings are on the police register, but are not criminal convictions.
- On a strict application of s 209 children may only be warned in respect of offences for which they can be prosecuted
- It appears as if the police can use their general discretion to informally warn a child, and the difference between a formal warning and an informal warning followed up by a letter is of little consequence in practice.

5.4.3 Police Cautions

- A caution is a more formal procedure where the young person is warned in respect of his or her offending by a police officer at the police station in the presence of his or her parent or caregiver.
    - S 211

- S 212 = caution followed ASAP by a written warning to parent/YP which must be written in such a way that can be understood by both parties.
- The wording of s 211 indicates that a caution may only be given to a young person in respect of proved or admitted offending, and only where a family group conference (FGC) has recommended that the caution be given.
- Practice of warnings in ss 209-210 effectively cautions.

5.4.4 Police diversion (alternative action)

(1) *The process*

- The procedural requirements appear to draw on the cautioning procedure set out in s 211 of the Oranga Tamariki Act, that is, the young person takes responsibility for the offence in the presence of a parent or caregiver or other nominated adult.
- Once the young person admits the offence, a plan is developed in consultation with the family and a Youth Aid officer.
    - Best practice is for the Youth Aid officer to familiarise him or herself with the young person's personal and family background.
    - First, almost all decisions about warnings and prosecutions are made by Youth Aid rather than frontline police.
    - a shortened version of a commonly used risk screening tool (YORST) will be used to inform the decision as to the option to be taken.
    - police will consult more regularly and extensively with Child, Youth and Family about young people apprehended for offending.
- The victim of the offence should also be consulted and involved where possible, to fulfil requirements under the victims' rights legislation, and s 208(g) of the Oranga Tamariki Act.

(2) *Nature of diversionary plans*

- Alternative action does not always involve a formal plan.
    - There is a lot of leeway because there are no strict legislative parameters.
- Some victim centric, community focused, focused on the young person themselves.
- If the plan is not completed within the agreed timeframe, the police may choose to refer the young person to Child, Youth and Family for the FGC to take place.
- In the case of a child (except 12- and 13-year-olds in relation to specified serious or persistent offending), further alternative action may be pursued, or a referral made to the care and protection system.

5.4.5 Admissibility in subsequent proceedings

- An important consideration in diversionary processes is whether, and to what extent, participation (and/or non-completion of plans) should be admissible in subsequent proceedings. In New Zealand, the position is clear.
- Under s 213 of the Oranga Tamariki Act, no information or evidence of an offence that has been disposed of through a warning or caution shall be admitted by the prosecution in subsequent proceedings.
    - *R v Kaukasi* - only ss 209 and 210 warnings excluded.
      Seems as if informal warnings are admissible but formal warnings are not.
- Also have the option to do nothing.

5.5 The Parameters of diversion

5.5.1 Police power or family empowerment?

- The goal of family empowerment is to be achieved primarily through the FGC, where (like the victim of the offence) the family has a direct role in the decision-making process in relation to the offence.
- There is also a statutory imperative to strengthen families through the use of community and family-based sanctions.
- It is arguable that the ethos of family empowerment is being diminished through the present diversionary processes.
    - police were found to be bypassing diversion and using arrest to ensure prosecutions.

- The expansion of the non-statutory diversion scheme is such that in recent years, the vast majority of apprehensions are resolved internally by the police i.e not as many FCGs and more police discretion.

5.5.3 Net-widening

- Net-widening in this context refers to "an increase in the number of people having contact with the criminal justice system as the unintentional result of a new practice"
  - Risk because it's not so formal that more willing to bring people under it.
- Nonetheless, it is arguable that many of the young people who are dealt with through the diversion scheme are "desisters", that is they would have stopped offending of their own accord. In many cases it may be better for no intervention to take place at all or a referral made to welfare services.

5.6 Protecting Rights

5.6.1 Ensuring Reliable Admissions

- The Police Youth Diversion scheme hinges on an admission by the young person.
  - Evidentiary requirement is an important safeguard.
- Diversionary processes should only occur in response to alleged offending that is prosecutable.
  - but for the availability of the diversionary process, the young person would have been prosecuted.
- The New Zealand situation (perhaps more than the systems of other jurisdictions) involves a diversion towards a particular outcome (often involving a sanction). While there are valid arguments for diverting young people from the formal criminal justice system, young people should not be drawn into the criminal justice system through formal or informal means unless the offence is provable.
  - So they must consider two things when considering charging you with an offence:
    Whether or not there is sufficient evidence to charge a C/YP with an offence
    Whether it is in the public interest to do so.

- *Regina v Durham Constabulary (Ex Parte R)*
  - In EW, they have a much more structured scheme.
    Kind of a three strike system - doesn't take into account cluster of offences.
  - Young person had accepted caution for an offence
    Didn't know that because they agreed to the set of facts and the caution, they would be on the sex offender's register for the rest of their lives. Wasn't advised by a lawyer.
- Baroness Hale:
  - Good to own up when they've done wrong BUT
  - Children's admissions should be voluntary and reliable.
    Even in an informal process, need to know what they are agreeing to.
    [Diversion is predicated on admission]

- Some argue rights protections don't apply because diversion is not punishment and it is voluntary
  - Is diversion punishment?
    Think about it more as like, assisting the situation and helping ppl
    What is the trigger points on rights?
    Punishment maybe isn't the point - just one of the elements
    But still part of the rehabilitation process
    State imposed repercussions on your actions
    - A PO is an element of the state

    Depriving you of your liberty.
  - Is it voluntary?
    Not voluntary because there aren't many options if you say no.
    State-coercion, someone who is representing the state is imposing something on you.
    Technically it is voluntary, but consent is in a coercive situation.

5.6.2 Ensuring Fair and Rational Outcomes

- Nonetheless, there is the potential for diversionary plans to be disproportionate, particularly since there is no mechanism for the independent review of plans.
- The second issue is the potential for disparity. At present, there are no formal mechanisms for ensuring a basic level of equality and consistency between similarly situated offenders.

5.7 Discretionary or statutory?

- A statutory diversion scheme would have the advantage of being a more clearly defined and transparent process.
- There is a stronger argument that the current discretionary system provides a better response (with the introduction of a set of transparent and publicly available guidelines, particularly in relation to limits on sanctions).

- Once there is admission and acceptance of diversion, assess the young person and their background.
    - Background and meeting.
    - With the YP and their family.
    - Might end up being a situation where they do not take any action at all.
    - Monitoring - police monitor completion of plan.
    - Non-completion - what if they don't do what the diversion plan agreed to?
        Re-negotiation or further action might be taken.
        More discretionary
        Look at why didn't they complete the plan e.g didn't have anyone drive them to community service.
        Progress to court but this is unusual
- Common diversion plans:
    - Letter of apology
    - Reparation or financial restitution to victim
    - Donation
    - Community work
    - Attending a programme or counselling related to the perceived needs of the C/YP
    - Re-enrolling in school or a training course.
    - Curfew or commitments not to associate w certain peers
- What goals do these elements seek to achieve?
    - Reinforces accountability and responsibility
        4 primary purposes of YJ - have to also consider the interests of the victim.
    - Payment of money stuff = I honestly wasn't listening oops jk it was about reinforcing community connections not just those w victim
    - Rehabilitation and re-integration.
    - Public interest and safety, preventing re-offending

- What are the strengths and weaknesses of a non-statutory system for diversion?
    - Could have an appeal body instead - not just going to the officer in charge
    - Could leave statute kind vague
    - Include more of that due process stuff
    - Maximum penalties
    - No statute means more creativity
    - BUT no independent oversight
    - No formal constraints
- Possible Models:
    - Ensure prosecution guidelines adhered to: the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction and public interest test net (But For Test)
        Only things that would be prosecuted are diverted - not can't take them to court so will divert them.
        Don't want to widen the net.
    - Central control
    - Requirement for legal assistance/consultation or other independent advice before agreeing
        Youth help line - get a bit of independent advice before they agree to a diversion.
    - Review and accountability

RESTORATIVE JUSTICE

- RJ is a process whereby all the parties with a stake in a particular offence come together, in a sage and controlled environment, with trained facilitators, to share their feelings and opinions truthfully and result together how best to deal with the impact of the offence and its implications for the future.
- Relational theory
    - We are formed, informed and sometimes deformed, always reformed through relationships
    - Relationships can be a source of good and bad
    - Justice as existence of right relationships
    - Crime as injury more than infraction
    - Justice as recovery of right relations and repairing of damage.
- Distinctive set of values or principles
    - Voluntary involvement
    - Accountability
    - Participation
    - Empowerment
    - Respect
    - Interconnectedness
    - Honesty
- Distinctive focus on victims
    - "justice needs"
        - Safety
        - Acknowledgement or validation
        - Information
        - Truth-telling
        - Re-empowerment
        - Re-connection
        - Reparation
        - Hope
- RJ In practice
    - FGC (?)
        - Maybe this is not actually a good example of restorative justice
    - Restorative conferencing (Sentencing Act s 24A)
        - First-time offender, usually if ppl agree and it's not too high level this will occur
        - Kind of a lottery as to whether there are good RJ resources in your area
    - Victim-offender mediation
    - Sentencing circles
    - Restorative panels
    - RJ in schools

Rights, responsibilities and RJ

- What is the proper role of the state in responding to crime? How might this relate to RJ processes?
    - Without the state, there is no crime :) because of this they should be responsible for dealing with the crimes
- What are the dangers of 'community justice'?
    - Are you holding the right person accountable
    - How are you doing that
    - Rights
    - Unattributed Harms
    - Tbh can be just as punitive as state justice.
- What are the proper role and responsibilities of the victim of the crime?
    - More involvement than we see now
    - Should they have any involvement in punishment?
    - Can't say they are at the centre of a process when they are obviously not.

- Wasn't until July 2019 that the words 'RJ' were included in the act
    - S 258(2) - must consider restorative justice
- What principles of the OT act might indicate a restorative approach is encouraged
    - Victim centred stuff

FGCs

Moyle and Kauri - *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*

- FGC has been frequently cited as representing a culturally appropriate and empowering justice mechanism for Indigenous people and communities, particularly in the case of Māori in Aoteroa
- Key marketing strategy is presenting FGC's as being founded on indigenous cultural practices
- Populations e.g Māori are those for which the mythologies of crime control are most frequently deployed, often as colonial projects, to strip their members of agency or to obstruct attempts to practice self-determination.
- There was little intent on the part of the architects to empower Māori or any other "community of concern"

Lack of cultural responsiveness and capability:

- In many instances, FGC involving Māori clients was often impacted by a lack of cultural competence by non-Māori professionals involved.
- Flowing from an ethnocentric one world view, one size fits all standardised approach to engaging with that is a socio-culturally diverse clientele.
- Important risk assessment tools were particularly problematic.
- Overall, experiences of the practice were largely negative.
- Non-Māori workers didn't know how to engage.

The mystical origins of the FGC

- Idealised link w Māori mythology.
- Participants have been indoctrinated with the FGC's potential to be culturally responsive because it was presented as based on a Māori model of restorative justice.
- Process is an attempt by the state to Indigenise child care and YJ through the co-option of Māori cultural practices.
- Forum-related practice undermined and even at times excluded Māori cultural expertise.
- Just another method to remove Māori from their homes.

What do Māori want?

- Enforcement based rather than strength based - don't want this.
- Policy makers need to reconsider their preference for importing socially and culturally inappropriate interventions and instead work directly w Māori communities to develop effective solutions that reflect NZ's indigenous context.
- Power-sharing partnerships
- Greater emphasis on community based initiatives
- Decentralisation of the design and delivery of services.

Chapter 6: THE YOUTH JUSTICE FAMILY GROUP CONFERENCE

6.1 Introduction

- Statutory decision-making forum in which the young person, their family, state officials and the victim meet under OT to decide on a plan to deal w the offending by that young person.
- Lynchpin of the NZ justice system.
- Vehicle through which fundamental principles of the legislation are exercised.
- One of our best known policy exports.
- OCCURS AT THE CHARGING OR THE PROSECUTION STAGE
    - Other options:
        - No action
        - Warning
        - Diversion (non-statutory).

6.2 Procedure at the FGC

6.2.1 Venue

- Envisaged to be in alternative venues such as the home of the young person, the victim or the marae.
- Most happen on OT premises.

- Court in *Police v JB* notes that lots of times they just do it at OT convenience rather than asking as they should.

6.2.2 FGC participants and their statutory roles - s 251

(1) *The Youth Justice Co-Ordinator*

- Employed by OT to perform the statutory convening role.
- Number of legal duties including:
    - Convening the FGC according to the time limits prescribed by the OT Act.
    - Consult w the family group and the young person to agree on a suitable date, venue and time to hold the FGC.
    - Ensure that the victim is notified and ascertain their views
    - Notify those entitled to attend.

(2) *The Informant*

- Usually a member of the Youth Aid section. In practice, police act as the guardian of the public interest, especially when the victim is not present.

(3) *The young person and their whānau*

- Attendance is a right but not an obligation for the young person concerned. But obv they usually involve them.
- Can involve whoever they want rly.

(4) *Legal representation*

- Can be the person's own lawyer or court appointed youth advocate.

(5) *Other professionals*

- The legislation is prescriptive in regard to attendance by professionals.
- Social workers can only attend in limited circs - other agency representatives may only attend where the young person is subject to a support order pursuant to the care and protection provisions of the OT Act.
- 251(1)(o) kind of lets whanau and YP select anyone to attend.
- Restriction of the attendance of professionals is presumably intended to restrict the power of professionals and empower the young person and their family to make decisions.
    - Minimising the crossover between care and protection and youth justice, except where strictly necessary.

(6) *The victim of the offence*

- Statutory duty to ascertain their views if they cannot attend.
- Victim's supporters can attend.

6.2.3 Time limits for convening the FGC - s249

- The time limit for the FGC and intention to charge FGC is 21 days from the time at which the YJ coordinator received the report.
- For the FGC relating to the YP in custody, the time limit is not more than 7 days from the time at which the detention order was made under s 238(1)(d).
- Court referred FGC to be convened within 14 days or 7 days if the person is still in custody.
- *H v Police:* non-compliance w timeframes meant charge was nullified.
- *Police v V:* found that the time limits were not mandatory. Have to consider whether the delay is fatal to the continuance of proceedings are the extent of the delay, the reasons for the failure to convene within the time limit, and the circs and seriousness of the offence and offender.
    - "If the cause and consequences of non-compliance involve an unacceptable intrusion into the rights of the offender, it will be appropriate to dismiss the charge".
- Most are usually convened within the time limits.

6.2.4 Process at a typical FGC

- Welcoming participants.
- May be a mihi or prayer by a member of the family.
- The YJC explains the purpose of the FGC, in the case of a court-ordered FGC, the YJC explains that the judge has referred the matter to the FGC to make decisions.
- Best practice is for the YJC to meet the participants separately before the FGC and explain it to them.
- One of the few prescribed procedural requirements is that the young person admits the offence at the FGC.

    - Reading out the facts and the YP agreeing.
    - Formally noted.
- Moves onto the discussion phase.
- Three broad themes:
    - The effect of the offending or the circs of it - victim can speak
    - General circs of the YP and the family
    - Possible and appropriate outcomes for the FGC.
- Family has time to make a decision.

6.2.5 Decision-making model
- Theoretically speaking it is characterised by group consensus decision-making.
- Characterised by negotiation and decision-making.
- The agreement must be reached before the recommendations are reported back to the referring agency (the police or the Court)
    - *Police v JB:* Judge Becroft Critical of the police in a case where the police officer had approached the FGC with the fixed view that the young person should be charged.

6.2.6 Agreement and recording
- Must be agreement.
- Meeting is closed and formal record of the FGC plan is set to the participants and the referring agency.
- Proceedings are privileged, only the plan is to be reported to the YCJ.

6.3 Statutory Functions of the FGC
- Many of the functions traditionally carried out by the court in the adversarial process, such as proof of the offence and decisions around sentencing, are delegated to the FGC.

6.3.1 Categories of the FGC
(1) *Child Offender FGC*
- If the child comes to notice for serious or repeated offending (which causes concern as to child's well-being but does not meet the criteria for prosecution), the police may form the opinion that the child is in need of care and protection.
- Good ground for care and protection under s 14(1)(e) of the OT Act.
- The FGC may then take place after a consultation with the YJC.
- Different to a standard FGC because the FGC can recommend that an application be made to the Family Court for a s 67 declaration that the child is in need of care and protection.

(2) *Intention to charge FGC*
- A YJC must be consulted and the FGC held before a charge is laid.
- Providing the YP admits the offence, this type of FGC is tasked w deciding on a plan to keep the charges out of the YC.
- If the agreed actions are completed within the specified time frame, the police will agree not to charge the YP and that will be the end of the matter.

(3) *Court-referred FGC*
- Two types above operate outside the formal court-based system. But when the YP has gone through prosecution, the FGC has a central role in the decision-making process. The court-referred FGC may be convened in two situations.

(a) Court-referred FGC: charges 'not denied'
- When the YP appears before the YC, they are asked whether the charge is 'denied' or 'not denied'.
    - Not denied = charge not contested, the FGC must ascertain whether it is actually admitted.
- This FGC is tasked to consider whether the offence alleged to have been committed should be dealt w by the court or whether the matter can be dealt w some other way, and to recommend to the court accordingly.
- If admitted, formulate a plan, send to judge, judge must approve before it becomes legally binding.
    - Adjournment for the plan to be completed.
    - If they are completed, the person will be given a s 282 discharge (as if the charges were never laid).

    - If not completed, further orders may be made under s 283. Can recommend an s 283 order to be made.

(b) Court referred FGC: charges "denied"

- A hearing date is set.
- Assigned a Youth Advocate unless private representation has been arranged.
- Hearings are closed to the public.
- The the offence is proved, the YCJ must adjourn the case and refer the matter to the FGC.
    - Deciding how to deal w it.
    - YC may not make orders under ss 282 or 283 unless the FGC has had an opportunity to consider the matter.

(4) *FGC: Custodial Placement*

- Necessary for protection of the public for a young person to be placed in OT custody pending resolution of a denied charge.
- The FGC must then be convened to make recommendations to the YCJ on whether the custodial placement should continue and where the young person should be placed.

(5) *FGC at the discretion of the YC*

- YCJ has a residual discretion that the FGC be arranged at any stage of the proceedings where necessary and desirable to do so.
    - E.g where the YC has to make a decision on whether YC jurisdiction is to be offered to a young person accused of certain serious offences.

6.4 Content of the FGC Plan

6.4.1 Statutory Provisions

- OTA is not prescriptive on the content of the FGC plan.
- Provided the YP has admitted to the offence, plan can proceed as it sees necessary.
- Under s 259: the FGC is to ascertain whether the CYP admits to the offence.
    - If they do not a plan cannot be formulated.
- S 260 affords the FGC a large measure of discretion but does provide general guidance. 260(3) proceeds to set out some possible outcomes for the FGC. These include guidance that:
    - Any proceedings already commenced against the YP should proceed or be discontinued;
    - A formal police caution should be given to the young person;
    - Appropriate penalties should be imposed upon the young person; and
    - The young person should make reparation to the victim.
- Although these are traditional penalties, doesn't limit the generalty of the provision.
    - Have regard to s 208 and s 5.
- A provision enacted under the 2010 amendments requires FGC participants to consider whether certain measures should be recommended for the young person (the parenting education order, the mentoring order, and the drug and alcohol rehabilitation order).The FGC must also consider whether the parent or caregiver of the young person should be required to complete the parenting education order.

6.4.2 Typical Elements of the FGC plans

- Typical elements include:
    - Work in the community
    - Work for the victim
    - Donations to charity
    - Payment of money to the victim
    - Gift to the victim
    - Written apology
    - Referral to counselling
    - Curfew.
- FGC plans may also contain recommendations that the YC make an order pursuant to s 283. The proper parameters of the FGC plan is discussed in more detail in later chapters.

6.5 Concepts Underpinning the FGC

6.5.1 Restoration, not punishment?
- Certain features mean it is commonly identified as an example of RJ.
- Proponents of RJ often deny the need for due process rights in such processes, arguing that the process does not involve punishment, but a "higher purpose" of reconciliation and reintegration.
- RJ now a purpose of the FGC legislation.

(1) *The FGC as a RJ process*
- Under the RJ model, the criminal act is not seen as an act against the state but against the community and the victim in particular.
- OTA is restorative in practice rather than as a result of any theoretical basis.
- Three particular elements being restorative:
    - The transfer of state power from the courts to the family and community, group consensus decision-making and the involvement of the victims.
- Levels of 'restorativeness' varies between FGCs e.g if victim chooses not to attend.
- Also issues around like voluntary participation which is a huge thing in RJ.

(2) *Implications for the rights of the YP*
- In the current system, it is argued that the sanctions resulting from the FGC are distinguished from punitive criminal justice sanctions because the intention or purpose is not punishment for its own sake, but the repair of harm, the reconciliation of the young offender with the victim and the reintegration of the young person to their community of care.
- But does the purpose of the sanction mean that it is not punishment?
- RJ views conflicts more as the property of individuals.

(3) *Is the FGC outcome punishment in respect of a criminal offence?*
- Loads of ppl reckon a sanction is only punishment if it intends to punish.
- These always lead to the argument that rights are not required when the intention is not punishment.
- Daly: what people intend to do doesn't mean that this translates at the receiving end.

(4) *Application to the FGC*
- YP don't think they are being punished but this probably has more to do with the way that the proceedings are packaged and dealt to them.
- Can't sustain the argument that sanctions resulting from the FGC are not punishment because they are designed to repair harm and effect reconciliation when you consider that victims show up to less than half the FGCs.

(5) *Censure in the FGC*
- Depriving the offender of important interests.
    - Involves admitting liability and being censured for a criminal offence.
- Holding a young person 'accountable' is in itself retributive as it involves censure for an action in the past (Daly).
    - So there are elements of retributive justice, rehabilitative justice (e.g counselling) and restorative justice (e.g paying reparations).
- They are still punishment lmfao.
- FGC outcomes must be seen as alternative punishments, not alternatives to punishment.

6.5.2 Voluntary, rather than coercive?
- Rights are not required because it is a voluntary process.
- Even vonluntary processes must have rights as a safeguard against coerciveness.

(1) *Mandatory nature of the FGC*
- Luna argues voluntariness means: that a party is involved in the sanctioning process of his own freewill. An individual is granted respect by providing him the power of choice, giving him the autonomy to participate in a decision making process and the freedom to accept or reject a particular decision.
- The process is nominally voluntary - they can't choose to do nothing.

- Plan in the ITC FGC is binding once agreed on.
- In a court-referred FGC, the plan is a sentencing recommendation to the YCJ - but they are not bound to accept the plan.
    - YC can modify or extend the plan.
- The FGC plan is technically a recommendation that is accepted by the judge - therefore, it is a type of order, though not one under s 283.
- YCJ retains the right to make orders if the FGC plan is not completed.
- Judge must deliberate on the FGC plan before it becomes binding on the young person.

(2) *Consent to the FGC Plan*
- It IS a criminal sanction regardless of consent.
- What happens if they veto the plan? Goes back to the police or the Youth Court.
- The freedom of choice for families is within tightly controlled boundaries.
    - Any decisions/recommendations must also be acceptable to the referring agency (police or YCJ).
- Professionals are still the primary decision-makers.

6.5.3 A cultural process, not a State matter?
- Traditional Māori dispute resolution processes thus used a restorative-type approach of restoring the balance by remedying the harm done by the transgression.
    - Some elements influenced by Māori culture e.g collective decision-making, consensus etc.
- The FGC process has few procedural rules; therefore, there is potential for different cultural groups to adapt the process to fit with their own cultural ethos.
- The OTA seeks to make the established YJ system more culturally appropriate and flexible.
- FGC has been criticised for failing to live up to its potential to engage tamariki, rangatahi and whanau.
    - Failing to prioritise iwi and hapu involvement, insufficient identification.
- Even though it could be culturally appropriate, the criminal law and procedure of the state remains in place.
- Family cannot chose to have nothing happen to the YP or pursue an alternative method based on culture if it is not in the public interest.
    - *Police v S and M,* two YP of Samoan descent accused of serious sexual offending against a girl from the same community. Families knew each other, wanted to resolve the things according to cultural norms and wanted it to be dealt with in the YC. Judge Harvey said that the nature of the offence was too serious and so remitted it to the HC.

FGC review - 2012
- Criticisms
    - Wanted it to be more community based - being held in people's homes
    - More effort wanted in preparation
    - Overly bureaucratic
    - Engage better w the people themselves.
- State has failed to prioritise iwi and hapu involvement
- Practice is inconsistent
- Resourcing inadequate
- Insufficient whanau and wider iwi
- Bad at identifying relevant whanau and wider iwi

YOUTH COURT – JURISDICTION AND PROCEDURE

7.2 Jurisdiction of the Youth Court
- Since Oct 2010, the YC has had jurisdiction over certain 12-13 year olds charged with specified serious offences.
- Category 4 offences that are not murder and manslaughter can also now be transferred to the DC for sentencing once the offence has been proceed in the YC (pursuant to the Criminal Procedure Act 2011).
- From July 2019, 17 year olds are within the jurisdiction of the YC, except for a set of serious offences.

7.2.1 Murder and Manslaughter
- Outside the jurisdiction for C and YP.

- Exception to the rule that 10- and 11 year olds may not be prosecuted (though they retain the protection of the *doli incapax* rule).
- Being charged w murder or manslaughter, prelim hearing will be in the YC. But not provision to offer YC jurisdiction.
- Universal jurisdiction argument.
    - But sentencing needs the powers of the normal courts - but could have a hybrid system.

7.2.2 Prosecution of Children
- Significant reforms in 2010
- Prior to these, could only be prosecuted in cases of homicide.
    - Under present regime, if you are charged w serious or persistent offending you can be charged under the YC.
- Push-back provision: court asking informant if the public interest would be better served by the child being dealt with through the care and protection system.

7.2.3 Prosecution of 17 year olds.
- From July 2019, most 17 year olds are within the jurisdiction.
- Murder manslaughter still excluded.
- Sch 1A offences excluded e.g wounding w intent to cause GBH, sexual violation, aggravated burglary.
- First appearance at YC and then transferred to DC or HC.
    - For a related charge, also dealt w at DC or HC unless it is in the interests of justice to deal w it in YC (s 276AC(2)).
- Can be transferred back if the circs or reasons for transfer no longer apply and charges are within jurisdiction of the YC.
- So still non-compliant because excluded for loads of things.

7.2.4 Jurisdiction over top-end offences.
- Balancing desire to protect young people from harshness of the adult CJS, interests of victims, accountability and public safety.
- Previous provisions re transfer are complex and clumsy.
- The CYP and their families Amendment Act (No 2) 2011 simplified previously complex procedure by creating new ss 273-276.
    - At least for 14-16 year olds simplified
    - Apart from provisions for 17 year olds, all category 3 and 4 offences (apart from murder/manslaughter) are deemed to be within YC jurisdiction unless the young person elects a jury trial.
    - Where trial for MM, and there is a jury trial, the pre-trial proceedings will be dealt w in the YC.
    - Section 277 provides for a presumption that a young person that is jointly charged with an adult, or a child facing a jury trial, will be included in the jury trial in the District or High Court, unless the interests of justice require the Youth Court judge to order a trial in the Youth Court.
    - The other conduit to the District Court (the s 283(o) transfer order) is preserved, but the five-year sentence cap is removed due to the repeal of s 7 of the Summary Proceedings Act 1957.
        Maximum sentences can be imposed - removed to DC for sentencing.
        Can convict and transfer the YP to the HC in respect of a category 4 offence.

7.3 Ethos of the Youth Court

7.3.1 Specialisation
- Provision to recruit judges who are familiar with and sensitive to, the particular situation of the YP before the court.
- DCJs may be designated as YCJs by Chief DCJ.
- None sit full time.
- Special provision ois made for specialised legal assistance.
- Assigned a state funded YA unless private representation has already been arranged.
    - Lawyers specially selected to act for young people.

7.3.2 Participation

- Effective and meaningful participation is a requirement of the UNCRC. Evaluations have criticised the level of participation by the YP in proceedings.
- More likely to also have reduced capacities.
- The general principles in s 5 place great emphasis on the CYP's right to participation.
    - The young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process or decision affecting them, and their views should be taken into account. (s 5(1)(a)).
    - The young person must be treated with dignity and respect and be protected from harm. (s 5(i)(A) and (B)).
    - Decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the YP. (s 5(1)(v)).
    - Endeavours should be made to extent consistent with age and stage of development of the young person and the support of the young person for the exercise or proposed exercise of a power. (s 5(1)(b)(vii)).

(1) *Information and understanding*
- Pursuant to s 10 both the YC and the lawyer must satisfy themselves that the YP and their caregivers understand the proceedings.
    - Where order made under s 283, must understand the nature and requirement of the order.
- S 11 deals with right to participation - significant duties to:
    - Encourage and asst to participate to the degree appropriate to their age and maturity
    - Reasonable opportunity to freely express views on matters affecting them
    - Assist them to express their views
    - Any views expressed taken into account
    - Written decision must set out their views and if not followed, the reason for doing so.
    - Decision, reasons for it and how it will effect them must be explained.
- S 11 subject to s 4 - YP interest's are paramount, bust also subject to s 5(1)(i) - recognises the interests of victims.
- E.g need something like the Lord Chief Justice's Practice Direction - talks ab language that is understood, familiarisation visit to the court, support person, timetable that suits their concentration levels.
    - Something like this was done in *R v DP*.

(2) *Practical measures to promote participation*
- Should aim to communicate directly with the YP, rather than through the legal representative.
- Have YP describe the circs of the offence.
- Child-friendly language.
- Summarising FGC plan.
- Design of the court room - can sit w their YA, parents etc.

(3) *Lay Advocates*
- S 326 - lay advocate may be appointed for any YP facing charges before the YC.
    - Statutory functions: make the court aware of all the cultural matters relevant to proceedings and to represent the interests of the whanau/hapu or equivalent cultural group. State-funded.

(4) *Participation by the victim*
- 2014: entitled to attend and participate in the YC proceedings, and to present a victim impact statement.
- Before that they didn't have the right to go (but they were usually allowed).
- Probably deliberately left out and supposed to be the domain of just the GC.
- Unsure what we do if a victim says they are not happy w the agreed FGC plan.

(5) *Communication assistants*
- Trained SLTs.
- Interpret the proceedings for those with communication difficulties and ensures as far as possible that the child understand the process.

7.3.3 Delegation
- Anchor principle of the YC is omewhat counter-intuitive: keeping people out of the court where possible.
- Try our best to deal with stuff without formal orders.
- Proof of the offence through the adversarial hearing is very rare.
    - Mostly remitted to FGC without a plea, offence proved through admission at FGC, later confirmed before the YC.
    - Traditional sentencing function largely delegated to the FGC.
    - When the offence is proved through a defended adversarial hearing, the matter is also remitted to the FGC for a recommendation on outcomes to be provided to the YCJ.

7.3.4 Expert Reports
- An important resource is ability to order medical, psychiatric and psychological reports pursuant to s 333 of the OTA.
- Four instances where these may be generated:
    - Where YP is unfit to plead
    - Where might be insane
    - YC is considering what form an order should take
    - Nature of any requirements related to that order.
- A good s 333 report should contain an assessment of the young person's mental health and psychological health, details of their family/whānau background, a discussion of the offences, the reasons for the psychological problems and offending behaviour, and a set of clear recommendations for interventions to address the mental health/psychological problems and the offending behaviours.
- Not evidence in the stict legal sense

7.3.5 Privacy
- Confidentiality of proceedings important to acknowledge the vulnerability and immaturity of the YP - promotes the YP's reintegration.

(1) *Public access*
- Limited to YP, family, lawyer/court officials, victims and those with direct involvement.
- Not open to general public but judge has discretion to let other ppl in e.g whānau.

(2) *Media access and reporting*
- Section 329(l) allows accredited news reporters to attend Youth Court hearings.
- To protect the confidentiality of the young person, the victim and their families, leave of the Youth Court judge must be sought before a media report is made in relation to the case.
- Further, publication of any identifying details such as the young person's name, the educational establishment he or she attends or the name(s) of his or her parents or caregivers is strictly forbidden.

7.3.6 Non-stigmatisation
- YC is required to operate an appointment system.

S 10 - Duties on the Court to Explain
- Explain in a manner and language that can be understood (s 10(1)(a))
- If not legally represented - explain legal implications of the allegation (s 10(1)(a))
- Satisfy itself that the CYP understands the proceedings
- For s 283 orders, explain to a CYP and parent/guardian/cargiver in a manner and language that can be understood
    - Nature and requirements of order
    - Provisions for variation of the order
    - Existence of rights of appeal

S 11 - CYP participation and view's judge's role
- CYP encourages and assisted to participate to the degree appropriate for their age and maturity
- CYP given reasnoable opportunity to freely express views
- Support must be provided if they have difficulties expressing themselves

- Any views must be taken into account
- Any written decision must set out those views and if they are not followed, the reasons for doing so
- Decisions, reasons for it and how it will affect them must be explained

7.4 Proof in the YC

7.4.1 Initial Youth Court Hearing
- In YC, proof through the adversarial process is rare.
- Language of denied or not denied is used.

(1) *Charges denied*
- Matter will then be subject to a defended hearing.
- Adversarial.
- If not proved obv end of the matter, if proved, the FGC must be convened to make recommendations as to the sentencing options.

(2) *Charges Not Denied*
- Court does not enter a plea to the charge but must adjourn proceedings to allow the FGC to be convened.
    - Not a formal admission or plea of guilty but allowed the person to acknowledge that there is a case to answer for the FGC to determine.
    - Reading out the facts and being required to indicate agreement.
- If the YP does not admit the offence, the FGC cannot form a plan.
- Two functions:
    - Agreeing to have the matter resolved in an FGC
    - YP is waiving the right to have a defended hearing.
- If you say not denied to charge at YC, but change mind and decide not to admit the offence at the FGC, matter is referred back to the YC for a defended hearing to take place.

7.4.2 Terms
- *not denied* is used to facilitate the referral to the court-referred FGC;
- *admit* the offence is used to acknowledge responsibility for the offence in the FGC;
- *denied* is used when the young person wishes to have the matter determined by a defended hearing in the Youth Court;
- *proved* is used when the offence has been established through a defended hearing in the Youth Court.
- Key issue is whether the not denied procedure, under which the majority of charges are proved through admission at the FGC means that a lesser standard of proof applies to young people in these situations.
    - Does it contravene presumption of innocent.
    - One school of judicial thought is that the admission made at the FGC does not equate to a conventional plea of guilty and thus cannot support YC orders.
    - Other school says the sum of 'not denied' plus admission at the FGC plus the Proved by Admission at FGC notation made by the YCJ on the Info equates to criminal standard of proof.
- Does this actually take into account the necessary intent?

7.4.3 The Case Law: divergent approaches.
- Case law on the meaning of 'admits' in s 259 and the legal status of the 'not denied' mechanism has divergent strands.
- Issue in the cases is whether admission + notation at the time FGC is reported back = criminal standard of proof.

(1) *C v Police:*
- S 283(o) discharge to DC.
- Crown argument that If there was a not denied court-referred FGC, and there was subsequently an application for removal to the DC, the admission made at the FGC was sufficient and within the requirements of NZBORA to prove guilt according to the law.

- Hammond J went on to hold that the concepts of 'not denied' did not mean that a conviction had been entered.
- 'Admits' can mean admitting to the facts of the offence but not the legal responsibility.
- Not denied or admitted could not support a conviction, so have to make correct pleas at DC.
- Analysis based on rights as an alleged offender and the importance of the presumption of innocence.
- This judgment patently had wide-ranging consequences. If an "admitted" notation could not support a conviction, then it could not support the rest of the orders in s 283 of the Oranga Tamariki Act.

(2) *Police v S:*
- Matter resolved purely by FGC. No s 283 orders made.
- Based on the principle that the normal standard of criminal proof should be met.
- Denied CIBS application because no finding that the charged was proved by the purposes of the CUBS Act.
- Must have a specific finding at the charge is proved.
- In both of these cases, judge douvted that the admission at the FGC could support an order or a conviction; did not meet the criminal standard of proof.
- Gone the other way now and held that admissions made at the FGC equated to a plea of guilty and thus the requirement to prove the offence was met.

(4) *Police v M*
- M admitted sexual violation at FGC and was offered YC jurisdiction.
- Notation on the info.
- Police later made an application under CIBS.
- Drew a distinction between "not denied" (being that the young person did not deny that the factual scenario took place) and "admitted" (being that the young person admitted all necessary elements of the charge).
- Said 283 orders could be made after admission in FGC or defended hearing.

7.4.4 Analysis
- The latter cases rely on there being a definite distinction between 'not denied' and admitted charges.
- Denied concept = refusing right to a hearing
- Admission = guilty plea
    - When confirmed at YCJ = proof by guilty plea.
- Hammond J correct at being reserved from departing from principles/language that have come to have pretty entrenched meaning.
- Guilty pleas are the norm.
- In addition, the history of youth justice demonstrates less of a focus on the offence and more of a focus on the young person's general situation. Under the welfare-orientated mode of youth justice, proving the offence was regarded as secondary. The system focused on the young person's problems as a whole, rather than a reaction to a proved offence.
- If "admission" is taken to equate to acknowledgement of the facts and the necessary mental element, then the young person is technically pleading guilty, despite the different terminology. This interpretation of the legislative provisions, that there is a clear difference between a charge that is "not denied" (which is a conduit to the FGC) and a charge that is "admitted" (which means that the young person has accepted legal liability) would mean that the provisions are in compliance with the presumption of innocence.
- Nothing in the OTA requires the judge to take into account the circumstances surrounding the admission.
- It would be considerably simpler if the "not denied" plus "admit at FGC" could be combined into a normal guilty plea at this first Youth Court hearing, thus avoiding the convoluted process of "not denied" and "admit the offence".
- There is a strong argument that a formal guilty plea should be taken when there is the possibility of a court-ordered sentence such as a supervision with residence order.
- Could have a safety valve where they could go back on it at the FGC.
- If the current model is retained, clearer information should be given to YP and their families.

YC Procedure:

1. Not denied/denied at YC appearance

   a. Will get to talk to a youth advocate before this
   b. Majority of people say not denied.
   c. Summary hearing at YC if they deny it.

1. ND - adjourned for FGC
2. YP must 'admit' offence, s 259(1) CYPF Act
   a. The terms 'denied' and 'not denied' is not mentioned in legislation - just a way of getting stuff out to FGC's
   b. But the term admit does appear in the legislation.

1. Plan comes back to YC
2. YCJ makes notation 'proved by admission of FGC'
   a. Supposed to equate to a criminal standard of proof - proved through an adversarial process

1. When offence is proved --> orders such as supervision with residence… up to transfer to DC for trial or sentence… and CIBS orders
   a. Legislation allows the orders
   b. As well as FGC plans (which are informal) the FGC can also recommend more formal orders e.g 6 months in YJ residence or supervision in community, compulsory alcohol course, reparation etc.
   c. If really serious, transfer out to DC
   d. CIBS - compulsorily acquire your DNA.
   e. Bit of an anomaly in the sense that this can follow you after you exit YJ.

1. Proved is NOT equal to a conviction (*Timo v Police*)
   a. The notation of proved by admission of FGC is not equal to a conviction

1. And of course the FGC plan hinges on admission.

7.5 Te Kooti Rangatahi/The Rangatahi Court

- Pasifika court has also been established in Auckland.

7.5.1 Context

- Over-representation of Māori.
- But even this hasn't had a massive impact.
- Context of awareness of general disengagement by Māori from the formal criminal justice system.

7.5.2 Operation of the Rangatahi Court

- On Marae - not a separate court for Māori people, but a relocation of a portion of the court process to the marae.
- After an initial YC hearing, and if the YP and the family consents, the FGC and the subsequent hearings will take place on the marae.
- Victim must also agree and they can participate.
- At present, all RC are presided over by judges who are themselves Māori.
    - Elements of tikanga used.
    - Try to follow the protocol of the marae but have following process usually:
        Powhiri
        Sharing of food
        YP delivers Mihi.
        Kaumatua and kuia of the marae provide support.
        Usual for the Court to appoint a lay advocate.
- The power to relocate the proceedings derives from the District Courts Act 1947.
- What do we think about judicial innovation?
    - Doesn’t fit in w traditional common law notions of conception
    - But judges are well placed to create solutions to problems that they see everyday.
    - NZ quite at the forefront of this
    - Judges can make things happen fast in their jurisdiction.
- Where a young person can participate and is supported they will have a much better experience and a much better rehabilitative outcome.

7.5.3 Evaluation

- Evaluation carried out in 2012 by MoJ.
- Focuses on qualitative outcomes.

    - Higher level of satisfaction
    - Participate better
    - Closeness w culture
    - Better standards of behaviour
    - More pro-social attitudes
    - More accountability.
- However, neither the FGC nor the Rangatahi Court are a separate system of justice, and the criminal law and procedure of the State remains in place, particularly through the State's veto on the FGC plan.
- Is this just a colonisation of the marae space?

KOORI COURTS (VIC):
- Only time australasian jurisdiction is ahead in NZ
- Establishing indigenous courts
- Children's Koori Court established by statute in 2005
    - Increase Koori ownership of the administration of the law
    - Increase positive participation by Koori offenders
    - Increase the accountability of the Koori offenders, families and community
    - Encourage defendants to appear in court
    - Reduce the amount of breached court orders
    - Deter offenders from re-offending
    - Increase community awareness about community codes of conduct and standards of behaviour; and explore sentencing alternatives priori to imprisonment.
- Moving away from the formal court-room - more round-table looking
    - Involving elders.
- Key criticisms was that the indigenous people were drawn from a lot of different tribal traditions
    - So elders might not be from that tradition.
    - Elder's were associated with the courts - might not have any familial or tribal links w the young people.

THE CROSS-OVER LIST:
- Dual status young people
    - In the care of the state/or subject to restrictions and will also have youth court matters.
    - Triple status - care, YJ and DC matters.
- When the law was changed in 2019, when you leave care at 18 you can be in partial care and get access some services until 25.
- Have quite a few CYP who are technically still in the care and protection system.
- Judge with family court and youth court warrants.
    - Loads of judges have this dual status anyway
    - Can deal with both issues in one court
- One judge rule -
    - Having the same judge across all of the different jurisdictions
    - But we need to be mindful of information - just because you have committed a crime, doesn't mean that all of your information should be known to other areas of the justice system.

INTENSIVE MONITORING GROUP:
- Care and protection status plus moderate severe mental health and/or drug and alcohol dependency
    - Also at Risk of re-offending
- Therapeutic support as well as justice approach
- Appearing more regularly before same judge

<u>Youth Court Research - Experiences and views of young people, their families and professionals - Research Team MoJ</u>

5 DURING YOUTH COURT

5.1 Summary of findings
- Judge essential in the process - understood that the judge would be deciding what happened and judge was pivotal in their understanding.

- Concerns regarding the use of jargon, can result it disengagement.
- Generally had a good understanding of what happened in court, especially for their bail conditions.
    - Understanding reliant on professionals using language that they could understand.
- Ppl there for ages tend to forget why they are appearing, detach from the court experience.
- Family attendance considered important.
    - Family support linked to properly completing FGC plan and sticking to bail conditions.

5.2 Courtroom environment

5.2.1 *Courtroom layout*

- U-shaped setting better than a traditional DC layout.
- Concerns about whether the judge should be elevated.
- Most YP didn't like standing up or thought that the room was small.

5.2.2 *Knowledge of people in the courtroom*

- Most YP knew some, but not all, of the peopole in the courtroom.
- Usually knew the judge, YA, PO and CYF.
- Those who suggested that they were uncomfortable said it was because they didn't want strangers watching them, they felt stared at or considered it an invasion of privacy.

5.3 People in Court

5.3.1 *Professionals' interaction in court.*

- People noted there was a lot of talking amount professionals, esp where it was a difficult case. Could make it hard for the families and the YP to understand what was going on.
- This does not necessarily mean that they did not get information about the decisions made in court.
- Some YP reported that their YA explained things to them after court.
- Half said they usually understood what was happening, the other half said they didn't understand at all or only understood some of the time.

5.3.2 *Judges*

- Central to the experience.
- Main interaction w the YP is with the Judge.
    - Shows that someone is taking interest in them and holding them to account.
    - Can also give praise and reinforcement where they are doing well.

Encouraged to participate

- Judges generally encouraged YP to participate in court.
- Asked them questions ab themselves, their family and usually why they had not completed their FGC plan.
- Some professionals noted that this sometime depended on the judge or time available.
    - Most families still reported feeling included in the court process.

Feelings about participating in court

- Variation in how YP felt about participating.
    - Found it nerve wracking or felt like they couldn't answer the questions.
- Some ppl think that whilst they were asked questions, this wasn't meaningful participation.

Understanding the judge

- Most, but not all, understood the judge.
- Some families said that judges spoke on their level.
- Clear that some YP did not always understand the judges
    - Big words
- Despite attempts, sometimes the YP simply do not understand.
- Professionals identified the following as factors associated with a lack of understanding:
    - Capacity and capability
    - Formality of environment
    - Language sued by the judges
    - Familiarity of the court - if they are regulars sometimes they don't care.

5.3.3 *Youth Advocate*
- YPs and families experiences generally pretty positive.
- Viewed positively because they helped to explain what was going on.
- Some ppl were unhappy because they felt that they had not had enough contact w the YA, or because they were not using language that was easy to understand.

Contact w YA
- For most ppl, first contact was once they arrived to the court on the day of the hearing (or in the cells).
- Have contact after their hearings.
- Sometimes the limited contact before the hearings would be due to not receiving that much contact information for the YP.
    - Also the YA was busy lol.
- Also changing lawyers in the middle of a proceeding is obv problematic.

Information
- Most YP and families had explained to them what to expect and the possible outcomes.
- Sometimes the YA would summarise the discussions that they had with the judge in the court-room.
    - If they have had an ITC FGC, they might already know some information.
- Sometimes even if they had had things explained, their own capacity or capabilities limited how much they retained from the discussions.

5.3.4 *Child Youth and Family*
- Most professionals felt that CYF had a very important role for the YP and often also the families.
- Esp important in being able to explain what was happening in court.
- A few were unhappy w the social worker because they felt that they had not had enough contact with them, did not trust them or because of a frequent change in social workers for their case.
- Some ppl don't really understand what CYF does.

5.3.5 *Police*
- YP had more of a mixed knowledge of what the police were going to say.
    - Said that they usually understood what the police were saying, although they could get more confused when they were talking to other professionals.
- Some people said they felt as if the police were working against them rather than with them.
- Sometimes felt as if police were condescending or interacted more with the judge.

5.4 Family attendance at court
- Nearly all the YP had a support person, usually a family member, with them for at least some of their court appearances. Consistent w the perceptions of the majority of professionals.
- Usually the mother - having the father/both parents was quite uncommon.
- Social worker would attend if no family were there so that they were not alone.

5.4.1 *Consistency of family attendance*
- Inconsistencies w family attendance at court - different family members at different appearances/coming sometimes but not all the time.
- Commonly identifies a drop off in family attendance for recidivist offenders.
- If they come, they generally come all the time and vice versa.

5.4.2 *Feelings about family attendance at court*
- Generally liked having their family with them.
- Preferable than no support, even for those who felt a bit of trepidation at having their family there.
- Small number where they really didn't want family support - usually because the relationship had broken down.

5.4.3 *Benefits of family attendance*
- Source of support. Showing someone believes in them.
- Shows that it is a serious and important event.

- Also meant families heard stuff directly from the court, and they can have input and speak to the judge.
- More likely not to re-offend if they had family there.

5.4.4 *Barriers to family attendance at court*
- Practical barriers identified were:
    - Childcare and associated costs
    - Transport and associated costs
    - Work commitments - incl not wanting to tell ppl ab the offending, not being able to take multiple days off, can't take time off without pay.
- For many ppl the real barrier is commitment to the young person.
- Barriers to attending more present for those who re-offend.

5.5 Timeframes for cases
- A few YP made comments that they case took a long time to be dealt with, or that the case was dragging on.
- Might drag on because the FGC was not completed or because it was complicated.
- Or like mental health assessments, when disclosure is not prepared/where they were given an appearance on non-YC day.

5.3.1 *Impact on the YP*
- Could create a lot of stress and be frustrating.
- Living with bail conditions for ages.
- Court appearance becomes detached from the offending.
- More likely to forget about the victim.

5.5.2 *Appearances within a case*
- Raised sicussion on the type and number of appearances required.
- Like when ppl appear and then just get remanded off, over and over again.
- YP commonly attended court for a review appearance after their FGC plan is approved to monitor progress.
    - Felt like these held people to account.
- But where the person was complying with the FGC, felt like these repeat appearances normalised going to court and so should just be restricted to those not complying w the FGC plan.

NZ Police v FW **[2018] NZYC 393**

FACTS:
- Had done a lot of offending lol.
- Was placed in custody under s 238(1)(d): remanded because there was nowhere to place him.
- Many FGCs, last one did not come to an agreement.
- Described as a high risk offender.

JUDGMENT
- Using te reo actually.
- Sending him to see the mother, after consulting with father who said that is what he wanted, and victims who said they did not want to see FW in prison.
- Given an s 282 discharge.
- Referenced a report that was made where FW talked about what he wanted to do in his life.
    - Set him up with a mentor for the music.
- Expressed a want to go back to school, get NCEA, get mentoring, get out of trouble and listen to his family.
- Police do not agree that you should be discharged.
    - Usually the YP has a plan, don't think anything has been done here BUT
    - Victims have been consulted
    - Is clearly thinking about what he is doing in the future
    - The remand/custody should have only been for a short amount of time.
- Time spent should be taken into account as if it was the punishment.

- Should not be kept in the system longer than you need to
    - Refers to s 208 principles.
    - Should be kept in the community as far as possible, also need to empower the whanau and wider community groups.
    - Age needs to be considered, and need to be as least restrictive as possible.
- Need a care and protection plan tbh. Offences not at the higher end of the scale haahha.
- There will be lots of help where u are going.
- Making sure that they go to mentoring and there is a plan for drug and alcohol counselling.

Good stuff about it:
- Treating him as a person of equal value
- She is pretty optimistic
- Addressing him directly
- Defining stuff
- Using language he would use himself e.g using mum and dad
- Integrating quite basic te reo

Realising the Right of the Child to Participate in the Criminal Process - Forde
- Ensuring that children can participate meaningfully in criminal proceedings is an integral part of ensuring that a state's YJ system is child-friendly and rights-compliant.

International standards and guidelines:
- Rights of children in conflict w the law are set out in Art 37 and 40 of UNCRC.
- Art 12 recognises that all children who are capable of forming their own views should have the opportunity to express them freely in any proceedings affecting them.
- Art 40 outlines due process rights.
    - Apply from earliest contact.
- Need the participation to be effective.

Realising the child's right to effective participation in practice:
- Clear that positive, meaningul steps are required.
- CRC requirements are minimum standards only.
- Important acknowledgment of the different capacity of young people compared to adults.
    - Obv can't reason the same
    - Aren't at the same developmental level.
- Requires legislative provisions and effective implementation.
    - Need a rights-based framework.
- NZ system is adapted to take care and protection needs into account.
    - Strong focus on strengthening whanau
    - RJ plays an important role
    - Decision-making power thus shifts at some points in the system from the courts to the young person and their families.

Effective participation at the pre-trial and investigation stage:
- Robust safeguards in the OT Act compared to a jurisdiction like Ireland, where there are no statutory remedies for the child for breach of their procedural safeguards that are fundamental to their effective participation.
- S 208 is highly significant.
- S 5 also outlines that the child must be encouraged and assisted to participate wherever practicable.
- S 208(h) entitles children to special protections during the court of criminal investigations.
- Robust protectios in s 213-232 around questioning
    - Inadmissibility of evidence as the sanction for police non-compliance.
- Detailed nature of the explanations to be given before questioning.
- Then just goes through the whole reasonable compliance thing etc.
- This appears to have had the effect that there has been more significant judicial statements about the importance and scope of these protections.

- S 208(h) has provided a protective lens through which these provisions have been viewed and interpreted by the court.

Effective participation at trial:
- A new s 11 has been inserted which sets out the positive duties of courts, of FGCs and other bodies taking decisions about children under the legislation to encourage and assist children to participate in the proceedings, to facilitate the direct hearing of the child and to provide assistance to any child who has difficulties expressing his or her views.
- Number of distinguishing features that bear on participation:
    - FGC is significant - where a charge is put and it is not denied, an FGC must take place.
    - Primary decision making function in relation to the measures to be taken is vested in the FGC, and the plan submitted to the YC for approval.
    - The FGC as the main forum raises a number of procedural points when it comes to the participation of the CYP.
        But not always facilitative
        Issues have been raised about the extent to which the process is based on principles of voluntariness and consent, lack of consistent practices in providing YP information about their rights prior to FGCs and lack of sufficient involvement of YP in the FGC process.
    - Large caseload for ppl.
- In the YC itself:
    - Lack of information, use of legal jargon being hard to understand.
    - Judge and YA important.
- The OTA requires YJ judges to have a high degree of specialisation - s 435.
    - Judges are considered a real asset in the system.
- Advocates should also be suitably qualified.
- Obv also can have the lay advocate.
- NZ draws attention to the role of the professionals in supporting young people to participate meaningfully in court processes.
    - Relatively small number of ppl appearing before the YC might contribute to the positives.
- FGC as primary forum has the potential to provide a less formal, more participatory space.

Conclusion:
- Need legislative statements that reflect international standards.
- Implementation must be paid attention to - and appropriate sanctions required e.g inadmissibility.
- Need for the judiciary to be willing to interpret statutory and constitutional guarantees in a manner consistent w the requirements of the international standards.
    - E.g where s 208 provides a set of guiding principles that are often invoked.
- Need to examine the systemic barriers that prevent participation.
- Need for adequate training of professionals.
- Inclusion of non-legal professionals e.g the lay advocate in NZ.

***C v Police* (2000)**
FACTS:
- C, a YP, faced multiple charges.
- FGC could not agree on whether he was to be transferred to the DC for a custodial or community-based sentence.
- Charges were not denied.
- Given the seriousness of the offending, Judge said he had no alternative but to send him to the DC.
- Charges were recorded as having been admitted.
- C appealled against the judge's decision the grounds that the convictions could not be entered for the 'denied' and 'admitted' pleas.

HELD:
(1) A statement that a charge is 'not denied' is not sufficient for the purposes of s 283(o) of the CYP Act, or s 25(c) of NZBORA.
- Such a statement at an FGC did not necessarily represent the legal merits of a case, conference was not presided over by a judge.

- When it moves to the YC the judge cannot safely conclude that a conviction may safely be entered because a YP has not changed his or her stance.
- Legal language generally has well-settled meanings and reliance on a formula other than 'guilty or not guilty' when a YP might go to prison is unwise.

(2) The use of the term 'not denied' cannot support the entry of a conviction. If there is no plea of guilty an accused person is entitled to require the prosecution to prove its case to the required standard, regardless of whether the charge is denied.
(3) The term 'admits' is more problematic than guilty because it still leaves the issue of the necessary intent open.
(4) Although s 67(2) of the Summary Proceedings Act does not apply to proceedings under CYPF Act, s 67(1) still specifically requires a YP to plead before a charge is formally heard.
- By the point in time that a judge is considering whether to remove a YP to the DC for sentence, the YP must have formally been asked for a plea of guilty or not guilty.
- Only if they plead guilty that the YC can properly enter a conviction to transfer the person to the DC for sentence.

(5) The process used by the judge cannot be cured by s 440 as there was a fundamental defect of jurisdiction. Case remitted to DC for proper pleas to be taken.

***Police v M* (2001)**
FACTS:
- M charged with sexual violation by unlawful sexual connection and indecent assault on a child under 12.
- At initial court appearance, did not deny the charges and indicated an intention to plead guilty.
- Remanded to attend and FGC and admitted to the charges. PAFGC was noted.
- Police applied for an order authorising the taking of a blood sample, under s 40 of th4e Criminal Investigations (blood Samples) Act 1995 needed the person to be convicted of certain specified offences.
    - Issue was whether M had been 'convicted'.
- Under s 2(a) of the DNA outlines that a conviction includes a finding by the YC that a charge against a person is proved (does PAFGC suffice)?

HELD:
(1) The plain words of s 2 include a finding by the YC that a charge against a YP is proved within the definition of 'conviction'. No particular method of proof is required.
(2) Although the CYPF Act provides express recognition of the special positions of YP, that is a process which precedes a finding that the charge has been 'proved'. There is no reason why young persons who are found to have committed serious relevant offences should be excluded from the provisions that are relevant to the whole population for the future prevention of crime.
(3) The finding of a charge proved in the YC contains inherent safeguards to ensure the protection of the YP.
(4) Guilt is only found by the YC under s 283(o) before a transfer to DC for sentence.
- If DNA were able to be obtained by YP who were transferred to the DC there would be no need for the extended definition of 'convicted' in the DNA Act.

(5) There does not appear to be any proper basis to distinguish between relevant offences proved by a defended hearing in the YC and admitted on the other. In both cases, the Court is satisfied to the same standard and the record noted is the charge 'proved'.
(6) s 2 satisfied either by a finding by the YC that the charge has been proved after a defended hearing, or by the positive acceptance in cour tof th admission of the charge reported as a result from the FGC, usually as a PAFGC.
- Taking a soccer ball analogy: admission of having taken the ball is 'not denied' and the admission to the charge of theft as such, with the necessary intent and legal consequences the PAFGC notation after the admission at the FGC.
- Implications:
    - Admission at the FGC can support outcomes such as the FGC plan (agreed plan) OR
    - Formal orders made later (s 283) OR
    - transfers to the DC under s 283(o) OR
    - DNA orders

Rangatahi Court - Khylee Quince

- The YJS considers young offenders within the context of their families, whanau, hapu and iwi and places responsibility for addressing the offending with the YP's family group in a FGC.
- FGC is the primary decision-making process for young offenders aged 14-16.
    - Ideally, a YP will only appear in court for the initial arrangement of the FGC and then at the end upon completion of the plan for a discharge.
- Been successful at providing a diversionary response to youth offending.
- But still misses the mark in terms of appreciating the cultural dislocation and socio-economic marginalisation suffered by Māori over the past century and a half.
    - Loads of ppl don't have that connection to a whanau, hapu or iwi.
- Assumes that there are support networks and that they have the social, economic and cultural capacity to navigate themselves out of more punitive punishments.

Development:

- There has always been the legislative will to promote and assist the capacity of communities and family groups to deal with YP who engage in offending behaviours.
- They are not a wholly separate system, so cannot be called an indigenous court.

Rationale:

- Lack of success of the system for early onset Māori offenders is one justification.
- Fits in with the reimagining of the law to allow its processes and personnel to assist in the addressing of social problems that underlie offending behaviours.
- Example of flax-roots empowerment, having regards to indigenous models of well-being.
    - Centering the court on a marae is the gateway to opening up the Māori world.
- Can be viewed through the cultural deprivation thesis of critical criminology.
    - Explains offending behaviour within the context of cultural dislocation and a disrupted identity.
- Final rationale are the obligations owed by the Crown under TTOW.
    - Arguably, community responsibilisation in YJ reflects the measure of self-determination guaranteed in Art. 2.
    - Problem is this means little when there is no equality.
- Maybe putting it in a more private forum prevents the public discourse required to effect change.
- But it is more of a partnership.

Implementation:

- Established in 2008.
- Supposed to address a 'lack of self-esteem, a confused sense of self-identity and a strong sense of resentment'.
- Currently 15 in operation.
- Judges who preside over them are all Māori.
- Operates as an intensive monitoring process, overseeing the implementation of plans agreed upon at an FGC.
    - After initial YC screening, the YP can elect to have the monitoring process transferred out to the Rangatahi Court.
- The close monitoring is supposed to plug up the gaps that are left when there are practical barriers.
- Blend of protocol from western and Māori law.
- Replicates some of the features of a court room.
    - Can be accompanied by a lay-advocate.
- One of the objectives is to integrate the YP into the marae community and provide support for the fostering of a positive Māori identity.

Evaluation and critique

- Positive factors:
    - Increased attendance of fathers
    - Feeling welcomed and respected
    - Self-identity and cultural identity strengthened.
    - Cultural relevance

    - Role of kaumatua and lay advocates in establishing and maintaining relationships of respect and lines of communication w the various stakeholders.
- Those who go to RC are 11% less likely to re-offend.
- Are we just colonising the space - ceding control to people outside of the community can be seen as being really detrimental.
    - Still maintaining the hegemony over the justice system.
- Co-opted to fit the state agenda.
- But they have all been imposed with consent and in some places there are competitions between the marae to be the hosts for the courts.
- Could be challenging for those whose first encounter w their identity is within the justice system.
- Reflects manaakitanga and whanaungatanga.
- We are moving towards broader understandings of hapu and iwi and whanau now as well.

ORDERS OF THE YOUTH COURT AND PARENTAL LIABILITY

9.4 ORDERS OF THE YOUTH COURT

- **YC has the power to make certain orders, typically on the recommendation of the FGC or where the FGC plan has not been fulfilled or has been fulfilled only in part – offence must be proved.**
    - Usually there is like a 3 month period for the FGC to be completed.

9.4.1 s 282 discharge
- Does not have equivalent in the adult system/other jurisdictions.
- Can be given at any stage - offence does not have to be proved.
- Amendments in 2013 specified that the order could be made for cat 1-3 offences.
- The implications of it is that it is as if the charge was never filed in the first place.

(1) *Conditions of a s 282 discharge*
- If the offence is found to be proved, the Youth Court may combine a s 282 discharge with certain of the s 283 orders (contribution to costs, reparation, restitution, forfeiture of property, disqualification from driving or confiscation of motor vehicle).
- May not be given for cat 4 offence except where a 12 or 13 year old child is being prosecuted.
- Nothing on the statute but need to take into account ss 4, 5 and 208.
- S 284 factors also provide some structure.
- Usually will be picking between s 282 and s 283.
- Discretion to grant the discharge is extremely wide.
- Seriousness doesn't preclude something from getting a 282 discharge (*Police v H*).

(2) *Sexual offending and keeping the record*
- The s 283(a) order provides a record of the offending which may be relevant where the offending is serious, particularly in sexual offending cases, where the harm to victims is particularly serious, and concerning patterns of behaviour should be identified early.
- A number of decisions have granted 282 discharges for reasonably serious sexual offending e.g *Police v J*
    - Young person there addressed the offending and risk factors to the satisfaction of the court.
    - *Police Youth Aid v CJK:* particular emphasis was put on the underdevelopment of the adolescent brain and the potential for rehabilitation.

(3) *DNA Retention*
- Person's DNA can be retained for up to four years if there is a 282 discharge after finding that the offence is proved.
- Doesn't sit well w reintegration.

(4) *Concluding remarks*
- Aligns with RJ practices.
- Promotes reintegration, recognises reduced capacity and maturity of young people.

- But what did parliament intend esp re serious offences - or where the offending is done against another child?

9.4.2 Section 283 orders
- Can only be imposed in respect of proved offending.
- Grouped by level of restrictiveness.
- Under s 289, the court must assess the proposed orders against the hierarchy and impose the least restrictive outcome unless clearly inadequate. Factors to be taken into account listed in s 284.
- Generally standard sentencing considerations: nature and circs of offence, circs of young person and their attitude towards the offence, effect of offending on victim, any previous offences or orders, requirement to take into account recommendations of FGC, address causes of offending, consider the response of the YP's family and any measures that have already been taken up or will be.

(1) *Group One Orders*
(a) s 283(a) discharge
- Similar to 282 except it is on record.
- More appropriate due to the type of offending.

(b) s 283(b) Admonishment
- Warned about behaviour - not really used.

(2) *Group Two orders*
(a) Come up if called upon - s 283(c)
- Like a suspended sentence - allows the court to call on the YP to appear before the court within 12 months for a further order to be imposed.

(b) Financial penalties
- Can't impose imprisonment in respect of non-payment.
- Maximum repayment time is 12 months.
- The YP (or under 16s parent guardians) may be required to contribute towards the cost of the prosecution.
- Disqualification from driving provided.
- Restitution may be ordered.
- Reparation may be ordered, but it is limited to direct loss.
    - Can be ordered against parent where the YP is less than 16 years old.
- Complex questions arise where parents are required to make a payment.
- *Police v Z:* whilst acknowledging that parents were doing their best, the judge ordered them to pay reparations for $10k.
    - Placed reliance on the parents' failure to advise the police of the young person's breach of his bail conditions.
    - Mallon J overturned the order in the high court - it would not be reasonable to order reparation unless there was parental fault and this was causatively linked to the offending.
    - Police appealed against - issue being the need for a causative link.
    - CA held that parental fault and causative link were not pre-conditions to the imposition of a reparation order, but were valid considerations (quashing of the reparation order stood).

(3) *Group Three Orders*
- Entirely new orders brought about by the 2010 amendment - focus on addressing the perceived causes of youth offending.

(a) Parenting education order
- Compulsory parental education.
- Imposition of this type of measure is more likely to be related to the parent's ability to pay.
- YC does have the power to summon parents/guardians to appear before the YC and be examined.
    - Only condition is that the offence has to be proved.
- Failure to appear may result in fine or conviction - s 297A.

    - Although it is not strictly a crime for parents not to turn up - OT can start an investigation against you.
- Directly influenced by schemes in England and Wales.
- Can be imposed when an offence is proved before the YC.
- Unlike in England, no criminal sanction for non-compliance.
- The very parents (frequently solo mothers) who are financially stressed due to welfare and support cuts, and contending with back-to-work requirements in strained economic times, are the ones who are most likely to be held liable under the parenting education order.

(b) mentoring order
- S 283(jb): order a young person to take part in a specified mentoring programme for a period not exceeding 12 months.
- Sparse and does not give specific guidance on suitable mentors or the content or frequency of the mentoring relationship.
- Good mentoring relationships are usually voluntary and both parties usually want to get something out of it.
- So this might be at odds with how we conceptualise a mentoring process
- These are very rarely made because everyone realises that a good mentoring relationship depends on voluntariness and trust.

(c) alcohol and drug rehabilitation programme orders
- S 283 (jc): requiring the YP to attend for a period of time not more than 12 months a specified programme.
- Long been part of FGC plans, but these orders are new.
- Programmes may be residential, involve counselling or like holistic programes.
- Consent is an issue here.
    - Consent to medical treatment is 16, but the common law exception (*Gillick* competence) holds that those aged under 16 may consent without parental involvement where the YP has sufficient intelligence and understanding to comprehend what is involved.
- Consent can be given by parents or guardians for those under 16 (s 297B(3)), or where no P/G, a DCJ or CE of OT can give it.
    - Seems to go against the whole Gillick thing.
- Whilst it may be in the interests of the young person to undergo rehab, **the best interest of the YP is no longer the guiding principle of the YJS.**
- Referral to a voluntary programme is always preferrable, but where a compulsory order is made, it should be proportionate to proved offending and it should be clear that alcohol or drug use contributed directly to the offending.

(4) *Group Four Orders*
(a) Supervision Order
- S 283(K) - YP can be placed under the supervision of the CE of the MSD for a period not exceeding 6 months.
- Social worker can then be appointed.
- Useful alternative to the supervision with residence order.
- Often combined with supervision with residence order.
- Whether or not the supervision order is combined with a supervision with residence component, the social worker has considerable powers to impose conditions on the young person, including the power to enter and visit the young person's residence, direct the young person to report to the social worker, require non-association with undesirable peers and keep the social worker advised of the address of the young person's residence.
- The Youth Court has further discretion when making the supervision order to impose additional conditions on the young person, including payment of reparation or restitution in instalments, a non-association order, or requiring that the young person undertakes psychiatric, psychological or medical examination or treatment, and indeed such other conditions that the court thinks fit.
- Coercive power - esp around non-association and place of residence.
- Order should only be used in situations where the alternative would have been to impose a custodial sanction.

(b) Community work order
- S 283(l)
- 20-200 hrs over 12 months max
- Most FGC plans include this too.
- If the work is imposed by thecourt, it is essential that the work is reintegrative and educational in nature (rather than simply making up the hours).

(5) *Group Five Orders*
- Supervision with activity order.
- Highest non-custodial order, should be given real consideration where a supervision with residence order is contemplated.
- Can be made for a period of up to 6 months with a further period of supervision for up to six months.
- As has been argued above in relation to the supervision order, this order should not be imposed unless a custodial sentence would otherwise have been made. 173 This is particularly important as a custody order may be made where the programme cannot be delivered while the young person lives at home.
- The difference between a supervision with activity order with a residential component, and a supervision with residence order is minimal, the only difference being that the venue is the secure Youth Justice Residence.

(6) *Group Six Orders*
- Supervision with residence order. Only custodial order available.
- YJ residence for a min period of 3 months and a max period of 6 months.

(7) *Group Seven*
- Transfer to the adult system for conviction or sentence.

9.4.3 Effect of Youth Court Orders
- Section 283 orders may only be imposed in respect of proved offending, but s 283 orders (other than s 283(o)) do not equate to a criminal conviction.
- But they do not disappear, nor are they sealed.
- So people who have a s83 order should answer yes in documents which ask whether the person has ever been charged with an offence or has been in court in connection with criminal charges.
- 283 orders can be considered in DC or HC if there is further offending.
- Criminal record checks through MoJ do not include YC orders or outcomes, except where the CYP is finalised in the ault courts.
    - Copies of such records only available on application by the individual involved or third parties who have the formal written permission of the individual. The records reveal the conviction history, the date of the offence, the sentence imposed, the location of the court and details of the offence itself.
- Vetting is more complex:
    - Again, searches of police or Ministry of Justice information must be authorised in writing by the individual concerned.
    - The situation would seem to be that the only information that can be released in relation to police vetting on offending carried out while the individual is a child or young person, is if that individual was sentenced in the adult courts.
    - But police can use their discretion and discharge such information anyway.

<u>CHAPTER 12: 12.4 Section 283(o) - transfer for conviction and sentence</u>
12.4.1 Operation of the Provision
- Just need to be over 15:
    - Over 14 and under 15 and the charge is cat 4 or cat 3 where sentence is 14 yrs minimum (14 year olds)
    - Charge is cat 4 or life imprisonment and the judge thinks that sentence may actually be appropriate, over the age of 14
- Usually for people where the offence was really bad or they have shown a bad attitude, then just get sentenced at the DC.

- Before October 2010, s 290 laid down strict conditions for the imposition of a s 283(o) order. A young person aged 15 or over could only be transferred in respect of a purely indictable offence and where the nature and circumstances were such that if the young person was an adult, a sentence of imprisonment would have to be imposed, an order of non-custodial nature must have been clearly inadequate and the judge must have considered the alternatives.
- Pursuant to the 2010 amendments, these conditions were removed, apart from the requirement on the judge to record his or her reasons in writing.
- As with all s 283 orders, s 283(o) is subject to s 289, which requires that the least restrictive outcome appropriate in the circumstances is imposed, and the judge must consider alternatives.
- A major change was that 14-year-olds may now be transferred to the District Court under s 283(o), but the offence must be "in respect of a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years".
- But the amount of transfers has gone down.
    - Likely due to the availability of expanded supervision with residence orders within the youth jurisdiction.
- As for the case of 14-year-olds who have committed a purely indictable offence (now known as category 3 and 4 offences), under the former legislative provision, 14-year-olds were sometimes left in a worse position than older young people.
- Because a young person in this position could not previously have been subject to a s 283(o) order, it was less likely that he or she would be offered Youth Court jurisdiction under s 275.
- Thus, such a young person would be subject to the full range of sentencing options at original jurisdiction in the District Court, rather than the more limited options available on the basis of a s 283(o) order.
- Amendments which took effect on 1 July 2019, place additional responsibilities on the judge considering a s 283(o) order. Under s 284 of the Act, the judge is required to "consider and give greater weight" to four particular factors: the seriousness of the offending, the criminal history of the young person, the interests of the victim and the risk posed by the young person to other people.
- Sometimes there may be good evidence based reasons for transfer
    - YC - terms of the orders are deliberately short
        Max custody time is 6 months, largest combination of order is 18 months (6 months custody + 12 months supervision)
    - Sometimes there is not enough time to affect behavioural change.
    - THIS DOES NOT NECESSARILY MEAN THAT YOU WILL GO TO PRISON: can just mean different rehabilitative services or a longer order that are required to effect change.

12.4.2 Effect of the OT Act after transfer
- Whether the principles continue to apply after you have been transferred out.
- In the case of *X v Police,* argued that the principles travel with the young person.
    - Reliance placed on s 208 which states that subject to s 5 any court exercising powers conferred by or under the YJ part of the Act shall be guided by the s 208 principles.
    - Court taken to mean any court.
    - Said that because sentencing only happens as a result of a YC order, that means it is a power conferred in the relevant part of the act.
- Opposing view in *R v Patea-Glendenning.*
    - Said you can take the principles into account, but not required to.
    - S 283(o) states that the sentencing Act applies.
    - Sentencing court not exercising power under the OTA - DC exercises its own jurisdiction.
- *Pouwhare v R:* Said because of the conflicting authority, not required to take s 208 into account. Decision upheld in high Court. At the CA said not a requirement to take them into account - Sentencing Act displaces OTA.
    - Youth really important to take into account
    - No maximum percentage discount for youth.
    - Talked about the CRC and consistency w the sentencing act but this seems a bit sus.
- Interplay between Sentencing Act and the OT Act.
    - What is the difference between s 208 principles and the SA, s 7 principles?
        Can you be sentenced in the DC but have some YJ principles apply? If under 18, do convention on the rights of the child apply to the adult courts? No :3

Key differences between the principles?

- There are so many OT act principles that you could probably find a cause of action for literally anything lol
- Uses the word offender in the SA - which they don't use in the OT stuff
- Individualised and aggressive language e.g the denouncing, deterring
- OT principles go back to the vulnerability, SA goes back to the offence itself.
- Very clear on diversionary stuff in OT, focus on family, age being a mitigating factor - this does not come up in the SA principles, they are not so holistic

Similarities:

- Not imposing overly harsh sanctions
- Victim's interests
- Sense of responsibility stuff is in both acts, reintegration and accountability also

Police v HGBH

FACTS:

- Defendant admitted a charge of operating a vehicle on a road carelessly thereby causing the death of C.
- H was learning to drive under the instruction of C, failed to notice warning signs and didn't reduce speed for gravel. Hit the gravel and pressed the accelerator instead of the breaks.
- Lost control and they crashed, killing C.
- Issue of whether s 282 discharge was appropriate.

JUDGE BECROFT:

- Court retains discretion to pick which one is the most appropriate.
- Need to consider all the s 284 factors.
    - Also need to consider s 208.
- General principles in s 4 and s 5 are also relevant.
- Each case must turn on its particular facts, circumstances and considerations.
- Discretion is extremely wide and can be applied to anything apart from a purely indictable offence.
- In terms of the application the key balance here is between:
    - Degree of driving fault
    - Dead guy
    - Victim's family's view that the value of that life might be discounted and the seriousness of the situation undervalued if 282 given.
- Against:
    - Positive response, first offender,
    - Remorseful
    - At the time a learner driver.
- S 284 factors:
    - Nature and circumstance of the offence: panicked and hit the GA$.
        Did not see the warning signs, neither did the instructor.
    - Degree of carelessness needs to be analysed:
        She wasn't told to slow down.
        Careless and below the standard expected of a reasonably prudent driver.
        Real carelessness is not seeing the signs.
        The placement of the signs was a bit dodgy tho. So only moderate carelessness.
- But all the other 284 factors are in her favour.
    - Reasonably mature young woman with no previous offending, her attitude towards the offence has been excellent.
    - Remorseful.
    - Carried out every FGC thing to the letter - done more community work than was required of her.
- But obv the victim family is feeling a bit sadbois about it.
- The FGC convener is of the view that there should be a discharge.
    - Principles in s 208 support this approach.
- Prepared to grant a 282 discharge by a fine margin.

Police v CJK

FACTS:
- Took pics of young boys in a changing cubicle next to his (think he was 16).
- Admitted at the FGC. Undertook a programme.
- Completed it w flying colours.

JUDGE TURNER:
- **S 284 factors:**
  - **Nature and circs of the offending**
  - **Level of involvement in it**
  - **Effects of your offending on the victim**
  - **Personal circs and family background**
  - **Attitude to the offending and the family's response**
  - **Cause of the offending**
  - **Previous orders or convictions**
  - **Recommendations from the FGC**
- Also needs to be the least restrictive outcome appropriate in the circs, and what will strengthen the family group. Must consider age. Must also regard the views of the victim and their family.
- Nature and circs:
  - Serious offending
- Effects on victim:
  - Traumatised
  - Still reluctant to get changed in public.
- From a dysfunctional family. Subject to some care and protection orders.
- Seemed to be cavalier about the offending at first but there has been a complete shift in attitude.
- Family has remained supporive.
- Distorted sexual thinking was the cause.
  - These have been canvassed through the STOP programme.
- No previous convictions, subject to bail for arson at the time of this offending, which also received a 282 discharge.
- "Though they can act in adult ways, a young person's emotional, psychological and cognitive development is delayed and does not match their physical abilities".
  - Brain not fully developed in males until 25.
  - Impulsive and risk-taking behaviour.
- There are dynamic and static factors.
  - Dynamic factors - STOP reckons that there are not at play.
    - Will be followed up in 3 and then 6 months.
- Concern is that the community is protected in a 283(a).
  - But don't actually know if s283(a) even meets this end
  - Not a conviction, and don't know an employer would even be able to see it.
  - Police will know though, they have discretion to release.
- Also know sometimes police do have to tell ppl of any relevant matter when there is employment regarding children.
  - So the concerns can be met without imposing a sentence.
- So 282 entered.

***Pouwhare v R* (2010)**
FACTS:
- P, aged 16, entered guilty pleas in the YC to charges of aggravated robbery, robbery and possession of cannabis.
- The Judge in that court decided he had no option but to convict her, and transfer her to the DC for sentencing.
- The sentencing judge in the DC held he was bound as a matter of law by the tariff of 4-6 years' imprisonment.
- Said he couldn't apply the YJ principles.
  - Said this would've made a difference to the sentence.
- He said there could be a max 50% discount for youth and related factors, and a 33% discount for entering into a guilty plea.

- P sentenced to 2 1/2 years on the agrob charge. Convicted and discharged for the others.

HELD:
(1): The question of whether the principle must be taken into account when sentencing is transferred from the YC turns on three sections; s 283(o), s 5 and s 6 which states the principles governing the exercise of power within the YJ regime.
- Sentencing act says nothing directly to the point.

(2): Two conflicting HC decisions on this issue.
- *R v Patea-Glendenning* held that the sentencing court was not bound to consider youth justice principles. The youth justice regime created by the CYPFA is a carefully weighted and circumscribed amalgam of objects, principles, rights, processes, remedies and sanctions.
- Not an exclusive code for the administration of YJ.
- Caters for young offenders who do not offend to a super serious level - not for ppl who are close to 17 who have some serious offending.

(3) 283(o) is to be taken literally - once a young person is transferred for sentence to the DC or the HC, the SA will apply.
- Effectively displaces the s 208 principles.
- Don't look at the balance between offence and offender; SA looks to the seriousness of the offence and then look to the offender.

(4) YP under the CYPFA is a child under the UNCRC stuff.
- So should act in accordance with it to the extent that it is consistent w the SA.
- Best interests should be a primary consideration.
- Must also treat them in such a way that promotes their sense of dignity and worth, must reinforce the YP's respect for the human rights and fundamental freedoms of others, and must impose a sentence which takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.
- Must weigh age and reasons for offending against the objective seriousness of his or her offending and prospects of rehabilitation.
- Aggravating and mitigating factors must be weighed.
- Sometimes the offender's age will be a mitigating factor of high or decisive significance, not to be limited by any fixed top percentage, even when offending is serious.

(5) The sentencing judge was incorrect in assuming there was a top limit on discounts for youth. This would be inconsistent with the judge's duty pursuant to the UNCRC.
(6) So no you don't have to take into account the principles in the CYPFA.

- Post-2019 Trends in s 283(o) Case-Law - transfer cases
    - *R v OZ* [2018]
        Wounding w intent to cause grievous bodily harm, wilfully taking a motor vehicle and unlawfully getting into a vehicle
        Considerable harm to the V and the young person was a previous offender and exhibited a propensity to violence
        Public protection important, second time in eleven months that he committed a really serious offence so transfer
    - *R v PG* [2020]
        Serious charges including wounding, sexual connection with a young person, strangulation and male assaults female
        18 years old
        Hadn't kept up with previous plans
        So sent out
    - *Police v YV* [2020]
        Sexual offences
        Soon to turn 18 and YV's high culpability and effect on the victims
        Consel for YV emphases the significant amendments to the principles of the OT act which took effect in 2019.
        Kept the matter in the YC. Interests of the public could be addressed without transfer
        Culturally appropriate mentoring and support was available to YV
    - *Police v AN* [2020]

Wounding with intent to cause grievous bodily harm
Young woman - sought info directed from corrections, asking if I sentence her and transfer her to adult court, what facilities will she get in corrections.
Corrections said like don't have that many youn women so she's gonna be on her own.
Supported the conclusion that the public interest was better served by retention of AN in the YJ system

Holding Parents to Account: Tough on Children, Tough on the Causes of Children?

- Crime and Disorder Act 1998 in UK:
  - Govt effectively lowered the age of criminal responsibility to 10.
  - Introduced new systems of reprimands and warnings to make cautiouning considerably tougher.
  - Introduced anti-social behaviour orders (ASBO's).
- Part of their communitarian approach has been in emphasising the effect of good parenting on CYP.
  - Attendance at programmes can be recommended after early indications of problem behaviour, or it may be required as part of a parenting order.
  - They even have parenting contracts lmfao.
- Where there is persistent bad behaviour and parents have made no effort, the contract will be made for a parenting order.

Holding parents to account:

- Govt placed too much emphasis on enforcement and punishment issues in setting the agenda for local partnerships, instead of focusing on causes of anti-social behaviour.
- Don't know why we need to go to court to do something like this with the treat of imprisonment for breach to the C or YP, and the threat of eviction from their homes to the parents, before the appropriate remedial action and support is provided by families.
- ASBOs, acceptable behaviour contracts and action taken against parents will frequently be at the 'increased risk and cost to the well-being of already fragile family units'.
- Govt asserting a general moral responsibility.
  - Notions of individual responsibility and punishment presuppose the existence of free will and choice in relation to wrongdoing.
  - In recognition of this, there needs to be a closer examination of the individual circumstances of parents and their children and the economic disparities between different sections of society.
  - Misleading to focus on individual failings, whilst refusing to acknowledge the need for structural and political solutions to deep-rooted problems.

The meaning of parental responsibility

- Used in the 1989 legislation to mean the "distance btween the parent and others in making provision for the child".
  - This was responsibility in the sense of parental autonomy in raising the child.
  - Parents as some kind of moral and social guarantor.

Anti-social behaviour legislation in practice

- ASBOs more commonly given to CYP than adults.
- Critiques of the system note that there might be stigmatisation and potential criminalisation of young people with learning difficulties or behaviour problems.
  - May teens suffered multiple disadvantages - e.g having learning difficulty, behavioural problems and unstable home life.
- In making the decision whether to issue an ABC or an ASBO, it was obvious that the perceived attitude of the parents to their child's behaviour was very influential.
  - The responsiveness of the parent to offers of help and support was seen as part of the judgment of whether the parent is acting responsibly.
- Parents might feel like they are the scapegoats for what is ultimately state inadequacies in education or healthcare.
- Failure to take into account the circs of parents in disadvantaged areas.
- This approach is concerned with welfare, rather than behaviour.
- Seems based on some weird vicarious liability.

- Ignores the fact that many disadvantaged families are victims as well as perpetrators of anti-social behaviour.

Parental liability in English law
- Speaks more to dual or vicarious liability
- Parental/criminal compensation orders
- Parenting programmes
- Parenting contract (voluntary)
- Parenting order (compensation orders, child convicted of criminal offence or subject to an ASBO - compulsory. If breach, criminal proceedings may be commenced against parent).
- Breach of child's ASBO.

Financial liabiility - *Police v Z*
- Parents DID have means here unusually
- Reparation order of around $10,000
- FACTS:
    - Had a curfew - on bail
    - Required to be at parent's house unless he is in the presence of approved persons
    - Left the house and burgled somewhere, arrested
    - Sentenced to residential stay but the crown also wants a reparation order of 10k.
- What was the key issue for the court?
    - Were the parents at fault at all?
    - Did the parents cause or have any link in the situation?
    - Question of whether there needed to be parental fault for a reparation order to be ordered.
    - Was there a sense that the parents were at fault:
        They knew that he left
        Knew about the curfew
        Question about whether they should have called the police at that point?
- What was Judge Ross's finding in the YC?
    - Needed to be something more than the genetic link - needed fault
- Mallon J in the HC?
    - She thought that it was a requirement that the parent's be at fault, and that there be a link between parental fault and the harm that the victim has suffered.
- CA finding?
    - You can get a reparation against you even if you don't have fault and not necessarily at causal link.
        Fault not explicit in the legislation but the judge should take it into account.
- Do you think this was the right decision?
    - No
- Should this parental reparation section even exist.
    - No
    - Seems a bit absurd
    - What about parents who have done everything they could?
    - Does it really deter the offending?

PARENTAL LIABIILTY - ADDITIONAL LECTURE NOTES
Conceptual shift
- Expansion of police power
    - No statutory bases for diversion
    - But 7/8 young people coming to notice are dealt with in diversion
    - This might deny the statutory involvement of family and whanau
        Even though they should involve them - but they are not required to
- Family group conference reforms
    - Statutory process
    - Has to happen
    - Right people have to be there
    - Returning power to the family

- Edging out of family as a statutory concept in the act and the return of police power
- Amount of FGC's has been going down, diversions up
    - Dealing things at a lower level which is good
    - But some visions about statutory responsibility and consulting family and whanau might be receding
- Lost potential of FGC
    - Venues - originally thought it would happen at people's homes and community facilities
        Vast majority take place on OT premises
    - Consultation
    - Whanau participation
    - Tokenism
    - Model sometimes doubly penalises a young person where family support is not present.

Concepts Relating to Parental Liability:
- Vicarious Liability
    - Traditionally the criminal law wants to stay away from this.
- Dual liability
    - The CYP and their parent can be held liable for the same offence e.g in *Z,* he got residence order or whatever and the parents got a reparation order.
- Causative link
    - To what extent should the parents or guardians have causative link or fault in the situation.
    - Idea that you can end up with an order just because of your genetic link.
- Fault
    - Again in *Z* - should they have called the police?

Support rather than liability:
- Should the state help parents?
- Article 18.2 of the UNCRC
    - There are issues and needs within families, and the duty of the state is to support rather than penalise.
- These orders in the UK have shown pretty little success - if you don't want to change/not actually addressing underlying issues, it's no good.

THE ROLE OF THE LAWYER

8.2 Historical Context
- Debate about whether legal assistance is required at all.

8.3 The importance of legal assistance
- Helps w the protection of rights and interests
- Can encourage participation.
- But their presence may result in more formal orders.

8.4 The right to legal assistance
- Guaranteed by domestic and international rights.
- The right to legal assistance during judicial proceedings is clear cut.
- Application of the right to informal proceedings like the FGC is less clear-cute.
- The Oranga Tamariki Act does provide for the appointment of lay advocates to support and advise the young person and their family in the Youth Court, but this is in addition to, rather than a substitute for, legal assistance from a Youth Advocate.
    - All the international CRC stuff just needs to have a lay advocate.

8.4.2 Extrajudicial Proceedings
(1) *NZBORA*
- S 24 applies to those who are involved in a court-referred FGC.
- The position after an ITC FGC is a little less clear, as the young person will not yet have been charged.
    - S 245(1) of the OTA states that a young person who is subject to the ITC FGC is alleged to have committed an offence but no charge has been brought before the YC.

- So the YP participating in an ITC FGC has not yet been formally charged.
- So an application of s 24 depends on the meaning of the word 'charged'.
- *Gibbons:* Goddard J - preference for the Canadian position where the meaning of charged for the purposes of the Charter meant when formal court processes were initiated.
    Salient because w an ITC FGC, they must have formed the intention to charge before reffring to the YJC.
    Concluded that 'charged' must refer to an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face.
    So the right to a lawyer would not apply to an ITC FGC as the YP has not been arrested.
- But by the reasoning of *Fischer J* in *PK* - might apply because he thinks that charge just means taking a formal step of confronting the accused with an alleged offence in a way that identifies for the accused the offence for which the accused stands in jeopardy of conviction in a proposed or current prosecution.

(2) *International Standards*
- CRC generally designed with formal proceedings in mind.
- Not clear whether the FGC would be considered part of formal court proceedings for this purpose.
- But recently strengthened their advice as to legal assistance in formal proceedings and also provided recommendations for less formal diversionary proceedings.
    - Should have some form of other appropriate assistance - this can be legal representation and if they can, they should.

8.5 The Youth Advocate Role

8.5.1 Appointment of the Youth Advocate - s 323.
- State-appointed YA's are the main ones used
- Should be suitable "by reason of personality, cultural background, training and experience" to represent the young person.
    - The Youth Court Practice Note relating to the appointment of the Youth Advocates gives further detail on the qualities desirable in a Youth Advocate.
- These include:
    - Knowledge of, and experience in, criminal law;
    - Knowledge of the objects, principles and provisions of the Act, including a knowledge of the provisions relating to child offenders before the Youth Court;
    - Knowledge of police obligations and requirements as they apply to the arrest, questioning and processing of young people;
    - Knowledge of the roles of the various participants in the youth justice system;
    - Knowledge of care and protection issues as they apply to youth justice procedures;
    - Ability to relate to and communicate with young people and their families;
    - Awareness of community groups and resources available;
    - Knowledge of education and training facilities available in local areas;
    - Evidence of knowledge and experience of local cultural organisations;
    - Knowledge of restorative justice principles and practice;
    - Relevant qualifications, and training and a commitment after appointment to attend all relevant training and education programmes offered by the New Zealand Law Society at a local, regional or national level;
    - Knowledge of cultural matters; and
    - Any other evidence, including references.
- Back in the day, used to be one of the jobs that they put juniors in.
- But now its mostly senior practitioners who have quite specialised experience.

8.5.2 Models of Representation
- Best interests model: when adults decide what is best for the young person.
    - Views the YP as lacking in capacity and unworthy of consultation and participation.
    - Inconsistent w the idea of the competent young person.
    - No longer the paramount consideration for the YJS in NZ, but evidence that this paternalistic attitude may still prevail.

- Direct-representation model: lawyer fulfills the traditional role - protecting rights, providing legal advice and being guided by the instructions and interests of the client.
    - Might hinder participation by the CYP though.
    - Scope for some middle ground.

8.5.3 The Role envisaged by the OTA
- Codified in the OTA as the normal lawyer and client relationship.
- Has the normal "rights, powers, duties, privileges and immunities" of NZ legal practitioners.
    - Not exempt from professional standards.
    - Ethical duty to represent the client to the best of their ability.
    - The OTA prefers a direct representation model as to a best-interests model.
- There are certain extra duties from 2019
    - To explain and ensure understanding
    - Facilitate effective and meaningful participation.
- As to the first duty, under s 10, the Youth Advocate (or any other barrister or solicitor representing a young person) shall:
    - explain in a manner and in language that can be understood by that person,
    - the nature of the proceedings, including, in the case of proceedings in the
    - Youth Court, the nature and legal implications of the allegations;
    - satisfy themselves that the person understands the proceedings; and
    - where the court makes any order under s 83(1) or s 84 or s 283 of this Act, explain to the person in a manner and in language that can be understood by that person:
        the nature and requirements of the order:
        any provisions for variation of the order:
        the existence of rights of appeal against the order or the finding on which the order is based.
    - Must consult w the young person before they say denied/not denied when they arive at the YC for their hearing - s 246.

- Second duty comes under s 11, also applies to FGC's:
    - the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity; and
    - except where section 10 (relating to proceedings) applies, the child or young person must be given reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker and how these options could affect them; and
    - the child or young person must be given reasonable opportunities to freely express their views on matters affecting them; and
    - if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood; and
    - any views that the child or young person expresses (either directly or through a representative) must be taken into account; and
    - any written decision must set out the child’s or young person’s views and, if those views were not followed, include the reasons for not doing so; and
    - the decision, the reasons for it and how it will affect them must be explained to the child or young person.
- It is an admittedly difficult balance between the traditional role of the lawyer in the adversarial system, and dealing with troubled young people who (for example) may benefit from enrolment in a particular programme only accessible through the criminal justice system.
- 323(2): we want the YA to be a very specific type of person
    - Personality makes them suitable to represent.
    - Expectation of consistency - if you have been represented by someone you should be represented by them again.
- 324(1): YP receiving the same standard of representation if they were a private lawyer in a private court.
    - refers to having the same advocate if you can.

8.6 Legal Assistance at the FGC

- Argument that this will alter the restorative potential of the process.
    - Might discourage participation.

8.6.1 Why legal assistance is important at the FGC
- It is still the principal forum for important aspects of the process such as fact-finding, the admission of the offence and decisions around sanctions.
- Important that they know what's going on and have informed consent because they are essentially waiving their right to a trial.
    - Need to have someone that can explain these options to them.
- In the ITC FGC, there is no judicial oversight whatsoever.
    - Controlled by the police.
    - Overseen by YJ but obv almost all plans are accepted.
    - Formal justice systems criticise the investigative measures of the police.
- Prone to police pressure.
- Can be argued that the YJC has the duty of informing ppl of their rights - but at the end of the day they are OT workers.

8.6.2 Attendance by Youth Advocate at the FGC - the current position
- Still a matter of discretion, but accepted that those people participating in a court-referred FGC should have legal assistance.
    - Can attend by virtue of s 251.
- Current best practice guidelines is that they should attend the FGC.
    - Esp important if the CYP wishes them to attend, if the matter is a serious one, if the CYP is a youth offender or if there are more complex legal issues involved.
- Esp important because they are admitting to criminal liability.

8.7 The role of the Youth Advocate at the FGC
- Some argue that the traditional role of the lawyer is inconsistent w the FGC model.
    - Theoretically premised on informality and group consensus decision-making.
- Although you can't get rid of a lawyer's duties, they do not need to be combative or adversarial.
- Should just be confined to the core duties eg protection of rights and provision of information, but this does not mean that they have to take a strictly representative role.
    - More holistic approach taking into account the circumstances of the FGC.
- The reason that they are there is to assist the YP to share their views.
    - Some ppl argue that this is in conflict w the principle of taking responsibility (Morris et al).
- Part of the point of RJ is to transcend "adversarial legalism".

8.7.1 A more prescriptive provision?
- E.g in NSW, suggests that the lawyer cannot speak for the young person, but that the young person can seek advice.
- The current wording of the lawyer's role in the FGC is not in line w standards for participation by the Young Person.
- Protection of rights does not mean adversarial behaviour.
    - Protector of rights and giver of information, rather than an advocate in the formal sense of the word - Walgrave.
- Should act in an advisory role, intervening only if the YP's rights are being infringed.

- The lawyer's role in police questioning:
    - As opposed to the role of the nominated person (whanau member, holistic support)
    - Importance of the layer in giving objective advice that perhaps a nominated person can't give
        Sometimes NP doesn't always act in the best interests of the child.
    - E.g in group offending - kids don't really understand party liability
        Lawyer rly important in these kinds of situations
    - Two forms of support available
        Holistic support and the technical legal objective suppor

8.8 Lay Advocates

- S 327
- Making the court aware of cultural aspects to do with the proceedings.

Youth Advocates in Aoteroa - Cleland

- After establishing rapport, main business is discussing charges.
- Confidentiality and legal aid is often discussed.
- All they really said was that the YP had a lawyer and that the lawyer worked for them and not for the court/police.

Diverse aspects of the role:

- Criminal defence lawyer: most obviously distinct part of their role.
    - Had to ensure that they understood the difference between denying/not denying etc.
    - Explaining to them when a jury trial might be better.
    - Need the technical knowledge to be able to defend appropriately.
- Information giver:
    - Both to the YP and of the situation of the YP to the court.
    - Wanted the YA to provide as much information about the CYP as early as possible.
    - They knew of community groups/programmes that would help and could provide this info where the YJC did not.
- Facilitator/mediator:
    - Mediate between the different people involved.
    - But also didn't want to get too involved in the FGC process.
- Mentor/supporter
    - They also wanted to find good outcomes for the young people.
    - Support in relation to the FGC plans they needed to complete.
- Protector:
    - Being alert to any unfairness or pressure that might arise in the proceedings.
    - Arguing against punishments that seem disproportionate to the offence.
    - Need to step into an FGC where there was behaviour that was making it difficult for their clients.
    - Watchful of attempts to get the YP to admit more than they previously have/need to.
- Representing the client's broader interests
- Finding the best outcomes
    - Not just descriptive of the FGC, but what parts of it they can utilise and would be helpful to them.
    - These outcomes also needed to suit the YP's needs - not just the best legal outcome.

Useful skills and training for YA's

- Criminal law experience.
- Abilities to relate to YP, to listen and to explain things in a way that they could understand were essential.
- Pro-youth approach.
- Understanding demographics of where you work.

YJ CUSTODY

11.2 The use of custody for children and young people

11.2.1 Purposes of custody

- Overarching aim of the welfarist approach preceding the OTA was to cure the YP of their offending behaviour.
- Range of arguments are used in contemporary justifications:
    - Public protection/safety
    - Effecting change in the YP's life
    - Opportunity to intervene intensively in the YP's life.
    - Take them out of the environment that contributes to their offending.

11.2.2 Effects of custody

- Custody can have a damaging effect by warehousing damaged young people in damaging environments.
    - Negative effect on family life.

    - Can disrupt education (but some people also start education in there).
    - Risk of self-harm/harming others.
    - Expensive.
    - Congregating serious offenders.
    - Cementing YP's criminal identity.
    - Provide a conduit to adult prison.
- Custody disproportionately effects certain groups:
    - Ppl with additional needs
    - Rangatahi Māori make up the majority.
    - Abuse and neglect of children in State care.

11.2.3 Legislative principles:
- OTA tries to limit use of custody.
- S 208(d): YP should be kept in the community so far as that is practicable and consonant w the need to ensure the safety of the public.

11.2.4 International Standards
- International standards also urge that custody is used as a last resort where necessary for the protection of the public.
    - Art 37(b) of the UNCRC.

11.3 Pre-Trial Custody
- Both national and international standards talk about avoiding pre-trial custody unless absolutely necesssary.
- Not yet found to have committed an offence, so that the presumption is that a YP will be released, with or without conditions.

11.3.1 Police powers - options (s 234)
- The constraints on police when it comes to arrest is itself an important control on the use of pre-trial custody.
- S 237 of the OTA requires that YP are brought before a court ASAP.
- Preferred option is release without conditions, or deliver to the P/Guardian.
- Can be released on bail.
    - Can also be released to iwi, cultural social service or another approved person.
- Can be placed in the custody of the CE, but not more than 24 hrs after arrest.
    - Must believe on reasonable grounds that the YP is unlikely to appear before the court, or is likely to commit furher offences.
    - Custody must be necessary to prevent interference w witnesses/evidence.
    - On the receipt of the YP, OT may place the YP in a residence or in the care of asuitable person.

11.3.2 Youth Court Powers
- YC has a number of options post-court appearance but pre-trial.
- Similar to what is available to the police.
    - Released without conditions
    - Delivered to parent/guardian
    - Released on bail - subject to s 8 of the Bail Act.
        Special conditions e.g electronic monitoring may be imposed.
    - **May be remanded to the custody of the CE (s 235), iwi or cultural service where particular conditions are met.**
        YP likely to either abscond, commit further offences or cause the loss or destruction of evidence or interfere w witnesses.
- Ppl are sometimes put in remand literally just because there is no other resourced option for them.

11.3.3 Remand to the police cells - s 238(1)(e), 236 (pre-trial)
- May be detained in police custody in two instances in pre-trial period:
    - Likely to abscond or be violent and no suitable placement is found

- Where the YC orders a remand to custody but no suitable placement is available.
  YP must be likely to abscond or be violent.
- Higher statutory test that simple non-availability of facilities.
- Preferable option is obv remand to YJ facility.
- Young people cannot be remanded to an adult penal institution.
  - Unless clearly impractical, YC mut review a remand to police custody at least every 34 hours.
- When they do end up in remand, they end up in holding cells.
- Left in situations that are inhumane and degrading
  - No access to education
  - Hard to arrange suitable contact w family
  - Come in contact w adult offenders.

11.3.4 Alternatives to pre-trial custody
- The Youth Crime Action Plan: aims to reduce the number of YP held on remand, as well as the length of such placements, and to place more YP on bail in the community.
- Programmes are to be developed and extended as alternatives to remand:
  - Supported bail programme: six week intervention
    Ppl who have been charged in the YC and are awaiting determination.
    Assist the YP in complying with the terms of ther bail, and assist and empower families to supervise and control the YP.
  - Electronic monitoring: gotta wear a monitoring device.
    Restrictive condition as an alternative to a cutodial placement.
- Used where the YP would otherwise be remanded to a residence.
- In recent years, OT has developed a network of community-based remand homes, which act as an alternative to remand to a residence.
- But remember that nothing has been proven - to avoid net-widening and to comply w due process, should not impose conditions that are not directly related to fulfilling bail conditions.

11.4 Supervision with residence order
- Ultimate order in the YC jurisdiction - just below transfer to DC.
- Placement in of the YP in residence for a period not exceeding 6 months.
  - [can be put in adult court when tried in adult court i.e murder/manslaughter]

11.4.1 Conditions for supervision with residence order
- Number of pre conditions - as for all the s 283 orders, the charge must be proved.
- S 290 provides that written reasons must be given by the judge when imposing a supervision with residence order.
  - Mandatory for the judge to consider the s 284 sentencing factors.
  - A provision aspect brough in by the 2010 amendments is the condition that the YP undertakes a specified programme or activity while in the residence - s 311(2).
    6-9 Day camp conducted outside the residence by the army, as part of the overall supervision with residence sentence.
- The supervision component of the supervision with residence order does not have to be made at the time the original order is made.
  - Split sentencing - allows the supervision component to be imposed at the time that the young person is released or any time before the order expires.
  - Allows supervision to match the situation of the YP.
- New early release provision is more complicated.
  - Amendments essentially turn the YC into a parole board.
    Have to show that they were not involved in any additional offending, including in the residence
    Can't have absconded
    E.g *Police v MQ:* riot in the Auckland YJ residence - he was involved in the riot and came up under early release in 314. Couldn't be an allegation of having offended again, had to have been proved.
    - Further offending meant not just an allegation but it had to be proved or accepted charges.

    - Question of fact as to whether they had absconded (because some had escaped from their own little unit)
    - MQ also had ADHD and FASD which meant he was easily led by others.
- S 311(2A): where a supervision with residence order is made, the YCJ must fix a date for an early release hearing, which is not more than when 2/3 of the period of order will have passed.
- Section 314(1) provides that the court must release the young person from custody if the young person has served two-thirds of the supervision with residence order and has not absconded nor committed any further offences and his or her behaviour and compliance with the s 335 plan in the youth justice residence has been satisfactory or any misbehaviour and non-compliance has been minor.
    - About earning the early release.
- No research on the effects of prolonged custody in NZ xxx.

11.4.2 The YJ residences
- 4 in NZ.
- House people completing supervision with residence orders, those on remand and CYP serving prison terms.
- As of 30 June 2019, there were 140 children and young people in the youth justice custody of the Chief Executive. The majority (88 per cent) were males, and 64 per cent identified as Māori.

11.4.3 Standards of Young People in the Residences
- Governed by the Oranga Tamariki (Residential Care) Regulations 1996 and the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018.
- International standards provide rules for the treatment of YP in custody - foundational principle must be the inherent vulnerability of YP in a custodial environment.
- Maintaining contact w family is a particular issue in an elongated country such as NZ where a YP can be in a residence that is far away from where they usually are.
- Right to education still in force - usually there are special schools on site.
- Use of restraint powers is a particular issue.
    - Powers of restraint must be used in a manner that safeguards the bodily integrity and dignity of the YP.
- Under NZ regulations, there is a strict test for when force can be used.
    - Reasonable use of force in self-defence or in the defence of another person; to protect YP from injury; to prevent the YP damaging any property; to prevent YP from absconding from the residence; or to carry out an authorised search.
- Further, any disciplinary process may not involve inhuman or degrading treatment and must be transparent, reasonable and fair.
- Independent monitoring - each residence has a grievance procedure and independent inspections may be made.

Imprisonment
- What are the conditions under which a CYP can be sentences to imprisonment?
    - Someone under 14 - only for murder/manslaughter
        Presumptive sentence for murder for some form of custody.
        This is very rare
- Corrections does not regularly report numbers of under 18s.
    - Can OIA it but takes ages.
    - They don't give a breakdown of the under 18s though
- Any children (v rare) would be under OT operational supervision in a YJ residence but in Corrections custody. Some young persons held here also.
    - In the Akl residence now - 6/7 beds that are technically corrections custody but in an OT residence.
- Unusual internationally to allow under 18s to be sentenced to adult imprisonment
    - Trend in other jurisdictions is to not have under 21s in adult prisons.
    - In remutaka prison, there is a young adults section.

Age mixing

- The CRC says that children and adults don't want to mix in custody.
- Three reservations to the CRC treaty when we signed up to it:
    - Age-mixing
        Because of the young women thing - don't have separate facility for young women sentenced to imprisonment.
    - Minimum age for employment
    - Children who are here without valid visa.
- Males: Youth Units -Youth units prioritise the placement of young men under the age of 18 years, followed by a small number of 18 and 19 year olds assessed as vulnerable in the mainstream prison, and who do not present a risk to people under the age of 18 in the units.

Human Rights Commission - Joint Thematic Review of young persons in police detention

- A lot of the time ppl are held in remand because there is no other option - but cannot allow pragmatism to become a justification for poor treatment.
    - Human rights obligations mean that we need to ensure ppl are treated in a fair and humane way.
- In NZ, should be held only as a last resort and for the shortest amount of time possible. NZ has ratified two international conventions that are particularly relevant to this review.
    - The Optional Protocol to the Convention Against Torture
    - UNCRC.
- Detaining young ppl is difficult from a human rights perspective, especially in ensuring that they will be dealt with in a way that meets their needs and entitlements.
- Issues w cells include:
    - Level of care and availability of basic, youth appropriate, amenities in police detention.
    - Whether the YP are shown respect and terated in a way that takes into account their particular rights
    - Age-mixing and other concerns
    - Potential for discrimination with regards to the adequacy of responses to children and young people from minority groups, and age.
- The sorts of practices that risk being inconsistent w human rights standards include:
    - Having lights on 24 hrs
    - Difficult for family to visit
    - A lack of ventilation and natural light
    - Cells being unclean
    - Lack of showering facilities/privacy
    - Inadequacy of food
    - Lack of access to exercise, recreation and education.
- Young ppl reported;
    - Being treated as an adult
    - Being treated unfairly
    - The use of force
    - Feeling discriminated against
    - Not having their medical/mental health needs met.

(i) Reducing the rates of youth detention:
The exercise of police discretion:

- Lack of information around how the police are exercising their discretion at each of the decision-making points.
- The decision to arrest without a warrant can only happen to ensure that the YP appears before the court, or to prevent the commission of future offences, the destruction of evidence or interference w witnesses.
- Can be arrested re a purely indictable offence where the offence is required in the public interest.
- But the way that the reporting of this is done to the Police National Headquarters Youth Services Decision is not in depth enough to decide whether there has been compliance w s 214.
    - Difficult to ensure consistency of practice between districts.
- The use of alternative action also varies significantly between districts and that this ultimately impacts on the number of young people in Police detention.

- Police together w CYF also exercise discretion when deciding whether to keep a young person in police detention for a period exceeding 24 hrs.
    - But again these often lack the detail necessary to make comprehensive reports.

Alternatives to police custody:
- Can only be held if:
    - Likely to abscond or be violent if released; and
    - Suitable facilities for their detention in safe custody are not available to CYF.
- Generally, options are pretty limnited for adolescents in trouble with the law.
    - Placement w local caregiver
    - Group home
    - Family homes
    - Can be remanded to iwi social services.
- Some bail alternatives, particularly supported bail:
    - Not being used as widely as it should be
    - Duration of the programme does not reflect the length of time the YP will spend on bail
    - Only a small number of CYP can receive the benefits because of a lack of resourcing.
- Should be a more coherent strategy around the provision of alternatives to custody.

S 283(1)(e) orders
- Judge or JP has to decide whether, under this, to keep a CYP in police custody for more than 24 hours.
    - Often get renewed because they can't find suitable placement within the 24 hours.
- Should look at what will happen if an order is made *before it is made* - put in a contingency plan when they are thinking about issuing it.
- Bail is also a potential alternative.

Young people's knowledge of their rights:
- Important that the police take care in each case to ensure that the YP understands their rights and has access to support. This needs to be continued to be emphasised in police training.

Youth Advocates and Nominated People
- Youth advocates play an important role in safeguarding the rights of young people both when the decision is made about potential police detention, and also while a young person is in custody.
- YP not always able to contact a lawyer when being detained.
- Role of the nominated person also important.

(ii) improving the treatment of YP in Detention
Training:
- General lack of training for those involved in the custodial care of young people in Police detention.
- Need youth-specific custody training

(iii) Monitoring for best practice: collection and sharing of information
- Need for data collection and reporting requirements to be improved so that a better understanding of the circs surrounding the decision to detain young people in police custody can be developed.

Then go through a bunch of recommendations :3

SENTENCING AND HOMICIDE
- Obv completely out of the YJ jurisdiction - so have to look at the Sentencing Act (*Pouwhare v R*).

The sentencing regime for murder:
- This applies if you are over the age of criminal responsibility (10)
- You are subject to the sentencing act - this is very structured for murder.
    1. Life imprisonment unless ‘manifestly unjust’ (s 102)
        - MUST be sentenced to this
        - Manifest injustice is a safety valve - but these cases are very rare

    - Presumption of life imprisonment
2. Set the minimum non-parole period. If life, must be at least 10 years (s 103)
    - (so not like ur whole life in prison - subject to recall to life)
    - Most ppl will serve 12-14 years
    - Before your 10 years are up you can't even apply for or be considered for parole
        Then become subject to the Parole act.
3. If an 'aggravated murder', minimum period must be at least 17 years unless 'manifestly unjust' (s 104)
    - E.g you killed a PO, the victim was particularly vulnerable, particularly brutal
    - If the murder hits the s 104 threshold, your minimum period is 17 years before you can apply for parole
    - But again given that safety valve.
4. Life without parole **(not available for under 18s)** (s.103 2 (A)).

What is manifest injustice? (safety valve)
- Only about 8 who have not gotten life imprisonment for murder
- E.g mercy killing, suicide pact, cases that would have been provocation (battered women cases), severe mental health issues.
- *Parish:* demonstrable injustice - has to be a serious case.
- Unjust "can only mean that in the context of a particular murder and a particular offender, the normal sentence of life imprisonment runs counter to both a Judge's perception of a lawfully just result and also offends against the community's innate sense of justice. "Manifestly" means that the injustice must be patently clear or obvious" *[R v O'Brien]*
- Minister of Justice, Phil Goff ((14 August 2001) 594 NZPD 10910–10911): .. in a small number of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate
- The sentencer must be able to reach a clear view of demonstrable injustice, because this is what the description 'manifestly' requires. Therefore, once one or more of the prescribed circumstances in s 104 has been identified, it is only in exceptional circumstances that the starting point of 17 years can be departed from. (*R v Parrish* (2003) 21 CRNZ 571 (CA))
- Something that strikes the judge and the community being out of order?? 2:12 pm

Manslaughter
- Usually sentences are much much less.
    - Because no presumptive sentence, can be much more tailored to their situation.
- R v McKenzie [2019] NZHC 2976 17 4 years, two months
- R v Kokiri [2019] NZHC 501 17 2 years
- R v Breakwell [2019] NZHC 3338 17 2 years, 8 months
- R v Sm [2018] NZHC 3345 15 2 years, 11 months
- Where you get a murder sentence, there is very little chance you will get name surpression - much more willing to give it out for manslaughter.

The prevailing approach to homicide [across common law jurisdictions]
- Similar across the CL jurisdictions that we usually compare ourselves to
- Exclusion from the youth jurisdiction
- Adult trial procedures, with some adaptation
- Exceptions to usual youth sentencing regime
- Indeterminate sentencing
- In Canada, YJ is a federal matter - deal w murder in the YC but with adult sentencing stuff

Churchward v R
FACTS:
- Churchward and her cousin were convicted in Nov of murder. At the time of death, the cousin was 14 and Churchward was 17.
- Trial judge sentenced Churchward to life with a minimum period of 17 years.

Appeal against conviction

Directions on Youth:
- First submission was that Venning erred by not directing on the relevance of youth to the question of intent.
- The report is a bit of a double-edged sword
    - Does point to difficulties that adolescents may face in hot (or real life) situations with understanding likely consequences and making good decisions.
    - On the other hand, says that adolescents are "less inclined to assign weight to consequences over the immediate risks and thrill of the current challenge".
        Less future-orientation.
- Preferable for a judge to draw attention to youth and the effect that this might have of intention.
    - But the counsel always talked about her being young, so don't think that the failure to direct on this point led to a miscarriage.
- So this ground fails.

Appeal against sentence
New Evidence
- Seeks leave to rely on a report by a clinical psychologist. Not contested so granted.

Ms Churchward's background
- Was brought up by her mother and stepfather until they separated. Felt rejected by the stepfather and biological father.
- Moved to Opotiki, she came under the influence of her cousins and began to drink and smoke week.
- Mother could not cope, so sent her to live with relatives in Gisborne, managed to settle into the school but not the relatives as they were very strict.
- Ran away to Rotorua. Police got her. She was anorexic and had depression.
- Went back to Opotiki, in school she didn't like.
- Mother essentially rejected her and she was placed in the guardianship of an aunt.
    - Was doing well but then was abused by a relative. Had suicidal thoughts.
- Returned to Opotiki where her mum had another baby.
- Moved back to Auckland and was then dismissed from her job.
    - She entered into an abusive relationship with a man associated with a gang. Became more involved in more serious drugs.
- Went back to Opotiki. Got into the wrong crowd essentially.

Expert's opinions
- Denied of stability of parenthood, and is susceptible to peer opinion.
- She had bad relationships w men and would put up with abuse.
- She has an underdeveloped sense of self.
- Does well in stable situations.
- Essentially they think that she poses a risk to herself and others.
    - She needs psychiatric treatment and medication for PTSD and depression.

Adolscent brain development
- During adolescence, much more influenced by social factors such as family stability and the use of substances.
- More oriented towards peers and responsive to peer influence.
- They are knowledgeable of risks, but attach little value to future ones - much more concerned with immediate gratification.

Sentencing remarks of Venning J
- Said life was appropriate - brutal murder.
- Considered minimum period of imprisonment.
    - Issue was whether there were crics which support a minimum period of 17 years. Judge said there was a number of such features:
        The murder involved a home invasion
        Committed in the course of another serious offence, robbery.
        Committed with a high level of brutality.

Particularly vulnerable.
- No manifest injustice in not sentencing her to this.

Life imprisonment
- *R v Rapira:* the conclusion that a sentence of life imprisonment is manifestly unjust is made on the basis of all the circs of the offence and the offender but that it is a conclusion likely to be reached in exceptional cases only.
- Reject the submission that life imprisonment was inappropriate - brutal murder as part of a pre-meditated home invasion in the course of a robbery.

Minimum period of imprisonment: submissions
- Submission that the presumption of a 17 year minimum period of imprisonment should have been displaced because the threshold of manifest injustice was met on account of age and personal circumstances.
- Age and mental health issues should be mitigating factors.
- Crown submitted that you can't have a discount of the magnitude argued for because:
    - At 17 years and 7 months, she was towards the end of the spectrum of what is regarded as youth
    - Her mental health issues were not causative of the offending
    - No guilty plea and the probation officers could not ascertain no remorse nor victim empathy.

Minimum period of imprisonment: the principles
- *R v Williams* is the leading case on s 104 (MPI of 17 years for murder)
    Two-step approach:
    - Sentencing judge is to consider the degree of culpability of the instant case in relation to that involved in the standard range of murders.
    - Whether imposing a 17 year sentence would be manifestly unjust.

    Manifest injustice has regard to all of the purposes and principles of sentencing that are in ss 7 and 9 of the SA.
    Those related to the offence rather than the offender bear more weight.

Effect of Youth
- Youth is relevant to this obv.
- Youth has said to be relevant in the following ways:
    - Age-related neurological differences between young people and adults - more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.
    - The effect of imprisonment on YP and the fact that long sentences may be crushing.
    - YP have a greater capacity for rehabilitation, esp considering that their character has not fully developed yet.
- Also don't wanna alienate them, convictions at this stage may disproportionately impact their ability to gain employment and play a worthwhile role in society.
- This does not mean that YP should not take responsibility for their actions - may mean that their actions are partly explicable (but not excusable) by their state of neurological development.
- *KT v R* (NSW): Taking into account their youth and not just their biological age.
- But as noted in *Rapira,* where the offending is grave, the scope to take account of youth may be greatly circumscribed.
    - This is because the very factors that may lead young people to offend may cause concerns about future public safety
    - There is also the need for denunciation and deterrence, both specific to the offender and general.
- Accepted that the effect of imprisonment on YP is different than for adults.
- Prospects for rehabilitation remain relevant [because they cannot get Parole jurisdiction where the YP receives the minimum sentence].

Effects of Mental Health issues
- Position is summarised in *E v R:*
    - Condition may reduce the moral culpability of the offending conduct
    - May have a bearing on the appropriate sentence

- Whether general deterrence should be moderated or eliminated as a sentencing consideration
- Whether specific deterrence should be moderated or eliminated as a sentencing consideration
  [the two above depends on the severity of the symptoms and the effect of the condition on the mental capacity of the person].
- Might mean that a given sentence will weigh more heavily on them.
- Where there is a risk that imprisonment will have a serious effect on their mental health, this will be a factor tending to mitigate punishment.

Application of principles to Ms Churchward
- Mental health/upbringing might at least partly explain what is otherwise an inexplicable crime.
- Cannot excuse her actions though - but lower level of culpability.
- Prison might allow her to get her life on track, but a minimum 17 year period is almost as long as she has been alive and this might have a "crushing effect"
- Mental health issues mean this might weigh heavily on her.
- She has indications that she could be rehabilitated pretty well.

Conclusions on sentence appeal:
- Venning didn't have the same level of material available. So, the appropriate minimum period of imprisonment, but for s 104, would have been way less.
- Required to consider whether to impose a minimum of 17 years would be manifestly unjust
  - Q: where the circs of the offence and offender are such that the case does not fall within the band of culpability of a qualifying murder under s 104.
    Parliament did not make specific provision for youth.
  - Manifestly unjust for her to serve 17 years here.
    Appropriate minimum would have been 13 because of the powerful mitigating factors.
- This does not mean that she will be released at the end of that period, absenting clear rehabilitative steps.
- She is still subject to recall for life.

R v Nelson
FACTS:
- Was 13. Living w a dude who he considered to be his granddad. His partner lived with them.
- Killed her x.
- Premeditated essentially.
- Killed her, took some stuff and then ran away I believe.

Jordan's personal circs:
- At the time of the offending, he was subject to a care and protection order, meaning that his place of residence was determined by CYFs.
  - He believed that Mrs Kurth denied him the opportunity to spend time with his mother.
  - Angered by this mistaken belief.
- Established a bond w his mother and was upset that he could not see her.
- Did not have the ability to evaluate risk, consider outcomes or make informed choices.
  - Not equipped to rationalise solutions.
- He had early exposure to domestic violence - prob made him feel like he couldn't communicate his anger about not being able to see his mother.

Analysis:
- Might fall within the 17 MPI because K was vulnerable and the murder was premeditated.
- Can impose a finite sentence in substitution for one of life where a sentence of imprisonment for life would be "manifestly unjust".
- No aggravating factors:
  - She was not vulnerable in the sense meant by the legislation (frail, of ill health etc).
  - The murder did not involve calculated or lengthy planning.
- So can't get to 17 MPI, now look at if life is appropriate.
  - Manifest injustice.
- Jordan is a *CHILD.*

    - So have to get over doli incapax.
    - He knew that the killing was wrong - so this is passed.
- Has all the developmental issues e.g was vulnerable to coercion, deficient in decision-making, inability to process information, susceptible to emotional influences bad at calculating the consequences of one's actions.
- NZBORA says that a child must be dealt with in a manner that takes into account their age.
- In relation to the culpability:
    - Jordan was familiar with guns. Knew guns had a lethal effect.
    - Knew where the gun was kept. Took it to the sleep-out, adjacent to K. Waited until Mr Lock left.
    - Aimed at a close range.
    - Panicked, moved the body, found money, stole da car.
- Didn't realise what he had done until it had happened.
- The panicked actions are not those of a calculated killer.
- Difficult to reach any other conclusion than that he intended to kill K.
- Must be enough to "mark society's abhorrence of the act committed and to reinforce its belief of sanctity of human life".
- Manifestly unjust to sentence him to life - just need a lengthy determinate sentence.
    - At his age, indeterminate sentence gives no hope of release into the community and may indeed provide a disincentive for him to undertake programmes that led to the killing.
    - Mix of life imprisonment when couples with a min 10 year non-parole period is crushing.
- What sentence to impose - must regard:
    - Interests of the victims and the community in ensuring that the sanctity of life is protected.
    - Recognised the diminished culpability.
    - Must take into account the effect of the offending on the victim's family, and Jordan's personal circs.
    - Impose the least restrictive outcome that is appropriate in the circs.
- For the court to determine how much weight they give to each of these factors. No presumption that one has any greater weight than another.
- 18 yrs - takes into account guilty plea.
- Don't consider that there needs to be a minimum period of imprisonment to meet relevant sentencing goals.
    - Unlikely that the community requires further protection from him that could not be achieved through either service of sentence of 18 years or release into community after 1/3 or more of the sentence on the terms of the Parole Board.
- Need to give him incentives to address problems.

ADDITIONAL LECTURE NOTES:

Bulger case:

FACTS: James Bulger (2) was kidnapped from a Liverpool shopping mall and killed on the railway tracks by Venables and Thompson (both 10 years old) in February 1993. T &V were truanting from school at the time

- Lots of changes in the UK after this.
- Age of criminal responsibility at the time in E and W? 10 - same as us
    - If a 10 y/o commited murder would have to go to adult court.
- Doli incapax standard applied, but were dealt w in adult court (equivalent to our high court)
- Had to modify some procedure (e.g bring down the height of the dock)
- To be detained 'at her Majesty's Pleasure'
    - Essentially life in prisonment
    - Trial judge imposed a tariff (essentially non-parole of 8 years)
    - Raised by chief justice
- Massive outcry from the public to raise the non-parole period.
- Home secretary raised it to 15 years.
- HL quashed 15 year tariff
    - Home secretary had not taken into account their development
- Made its way to the European court of human rights:
    - Under the ECHR - has the same provision in NZBORA and US constitution around torture, inhumane and degrading treatment

- Alleged that putting them on a public trial at that age in front of the whole public contravened the above art. 3 rights
  And contravening fair trial rights - no privacy, named in the papers.
- Made the argument that the age of criminal responsibility of 10 is inhumane and degrading
- Failed on the above, but the ECHR did tell them that elements of the trial was not fair
  E.g the timetable was so long, subject to adult trial.

LORD CHIEF JUSTICE'S PRACTICE DIRECTION ON TRIAL OF CHILDREN AND YOUNG PERSONS IN THE CROWN COURT (2000) – MADE SIGNIFICANT CHANGES TO PRACTICE

- Court room visit beforehand
- Suppression orders before and during trial where possible
- Courtroom participants on the same level
- Should sit with family and within easy reach of legal counsel
- Age appropriate language and explanations
- Frequent breaks and appropriate timetable
- No robes, wigs or uniforms
- Attendance limited to those directly involved where possible, or at least a small number
- Media attendance limited, should be relayed by video link to another room
- [Take some of this into account when CYP in HC for trial in NZ]

Do European civil law jurisdictions treat homicide by CYP different than in the common law?

- the treatment of children as adults under the criminal justice system
- trying children in adult courts
- imposing adult sentences to children
- detaining children together with adults in closed facilities designed for adults
- Civil law jurisdictions had 'welfare responses'
  - Tbh they were doing the same thing as us but called it something different
  - E.g in the Netherlands - would not have more than 2 yr sentences but would 'reclassify' the cases and then put them in care facilities like a residence

The children's rights framework - best interests and public safety

- The Committee on the Rights of the Child (2019) sets out some broad principle for such cases:
  - The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.
- Doesn't give us much guidance tbh.
- Actually doesn't prohibit life imprisonment

What does a principles approach look like?

- Public safety
- The rights and interests of the YP
- Victims and society
- How to operationalise these principles?
  - Maybe putting them in specialised YJ settings for ppl who would otherwise have gone to adult prison and keep reassessing them
    But would this make the position of CYP worse
    - Similar for if we were to raise the MACR - have to raise the age of criminal responsibility.
  - Universal jurisdiction - don't get kicked out to adult court
  - People aren't offered re-intigration later in their sentence - or have no life to go back to
    Have to address both
  - Maybe bringing OT principles/FGC etc. into the HC
    Can resort to the HC higher sentences if need be but retaining the OT principles and YJ processes.
  - Presumption doesn't apply for under 18 and presumption doesn't apply e.g in manslaughter cases.
  - Extending rehabilitative and RJ approaches beyond 18.

Strands of Principle to Practice

- Approach must be child-centred, but must also vindicate the legitimate societal interest in accountability for serious offending, provide for victim participation and ensure that risks to public safety are appropriately mitigated.
- Unless advocates for children can clearly elucidate the foundations of a principled approach, and signal how such principles translate into legislation, policy and practice, the punitive status quo will persist

Age Appropriate Forum and Processes

- Can we fulfil processes e.g reassuring public, vindication, holding someone accountable in the YJ jurisdiction.
- Prevailing approach across common-law jurisdictions – homicide requires a public trial to vindicate the public interest
- Is it possible to vindicate the public interest and have child-friendly justice? Some lessons from civil jurisdictions

Privacy and the Public Interest

- Traditional conception - public safety is improved where the public know the identity of serious violent offenders, and that it may deter other potential offenders. See e.g. *R v Markham and Edwards* (2017)
- Child-friendly principle - public interest lies in the promotion of effective rehabilitation and reintegration of the child *(DP v R (2016))*
- Public might not have the right to know in furtherance of the long term interest

Age appropriate accountability

- The prevailing approach in homicide sentencing has been to mitigate the worst excesses of adult sentences for children, through legislative restriction or allowance for judicial discretion. These structures still begin from the assumption that a long sentence of imprisonment is the appropriate outcome for a child convicted of homicide.
- Child-friendly – custody as a last resort and for the shortest possible period of time
- Most of the solutions are 'rearranging the deck chairs' e.g taking away mandatory sentences, but not asking whether children should be in the jurisdiction at all.

Youth as different species

- Scientific approach in US
- "Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" US Supreme Court in Graham v Florida , 560 U. S.
- "children's diminished culpability and heightened capacity for change" Miller v Alabama (US Supreme Court)
- See also NZ Court of Appeal in DP v R decisions – youth as a temporal characteristic

Name suppression:

- *Kurariki* (2002): forever 'NZ's youngest killer'
    - Can't reintegrate because everyone knows who you are
    - Releasing names can be so detrimental to young person because you become infamous.
- *R v DP* [2013]:
    - DP has reasonable prospects of rehabilitation and reintegration back into society. In our judgment, also of a predictive nature and based upon inferences we must draw from available evidence, those prospects are likely to be severely compromised by name publication and associated publicity on his release. DP and the public generally will be reminded of serious offending which occurred at a time when he was open to suggestive and compulsive behaviour and in a state of developmental immaturity. Publicity will not allow him to move forward as he attempts to adjust to life in the community.

Easy to criticise the use of long sentences, but have to think about if there are actually any other viable alternatives - legislative reform:

- A cap on sentences for CYP
- Re-conceptualise sentence towards risk to public safety rather than punishment (cf mental health provisions)
    - Held somewhere until you are not a rik
    - But obv having a definite end date can be quite nice lol
    - Alternatively you could be like u can apply for parole whenever but just up to us to decide whether or not you are a risk anymore.
- Remove minimum period of imprisonment for CYP.

NEUROSCIENCE AND THE LAW

Steinberg & the MacArthur project on juvenile justice and brain development

- Cross cultural findings
- Adolescence as a psychological and biological reality
- Lesser culpability
- Diminished decision-making
- Reduced impulse control
- Susceptible to peer pressure, but also to rehabilitation and reintegration
- Maturing until early 20s
- British Psychological Society Definition:
    - Childhood neurodisability occurs when there is a compromise of the central or peripheral nervous systems due to genetic, pre-birth or birth trauma, and/or injury or illness in childhood. This definition includes a wide range of specific neurodevelopmental disorders or conditions, with common symptoms including: muscle weakness, communication difficulties, cognitive delays, specific learning difficulties, emotional and behavioural problems and a lack of inhibition regarding inappropriate behaviour.
        Intellectual disabilities
        Specific learning difficulties
        Communication disorder
        Attention deficit hyperactivity disorder (ADHD)
        Autism spectrum disorders (ASD)
        Traumatic brain injury (TBI)
        Epilepsy
        Foetal alcohol spectrum disorder

UN Convention on the Rights of Persons with Disabilities

- Affirms the rights of persons with disabilities, rather than creating new rights. Particular focus on participation.
    - Required focus under the OT Act Particular emphasis on effective participation.
    - Article 7 deals specifically with children with disabilities, emphasising participation and best interests.
    - Article 13 provides for the right to access justice.

Neurodisability in the YC - police questioning and investigation

- *Police v TMW* [2013]
    - Statement excluded as YP did not understand right to a lawyer
    - Serious charge
    - Developmentally immature 16 year old w cognitive limitations
    - Police also knew about these conditions
- *Police v HR* [2015]
    - YP (14) had extensive history with C&P and Youth Aid, including diagnoses of a FAS disorder and a mild ID
        So the police knew about this stuff.
    - Statement from long interview excluded, HR's history should have been known to the police
    - HR required appropriate timeframes and support from the nominated person.

- *Police v FG* [2020]
    - Had a diagnosed communication disorder
    - Had a communication assistant but this wasn't here this time
    - Questioned him and his mum in a very vulnerable situation - agreed to give a DNA sample
        Using the principles of the ECHR that there was a duty to recognise that he was in distress and didn't know what was going on
    - Statement excluded.

Right to participate:
- What are some practical supports/procedural modifications that can make FGCs/court proceedings more accessible for YPs with cognitive impairments?
    - Standard for being fit to plead is pretty rudimentary - could look at bumping this up
        Just have to be able to communicate and understand what's going on.
    - Communication assistants - understanding what mode of communication is the best for the CYP and the proceedings are communicated in that way.
        E.g drawing out things
    - Depending on policy based funding

Neuro-disability in the CA
DP - At HC:
- 13 y/o convicted of manslaughter in the HC
- Really illustrated the profile of the children that end up in courts
- Had been knocked down at a Zebra crossing and had a really bad brain injury - said that he should've had very little stimuli but this was not the case.

At CA:
- Permanent name suppression ordered in order to aid reintegration
    - Back to public interest - best for him not to have notoriety.
- DP's brain injury means that he is particularly vulnerable
- Original sentence of 6.5 years w 3.5 years non-parole
    - Reduced on appeal to 3 years w no non-parole
- Talked about what was in the public interest
    - Could be quite dangerous
    - When he gets out - how do we best protect the public - thought the best thing would be putting him YJ and focusing on reintegration.

The double-edged sword
- Neuro-disabilities might reduce your sentence, but could also end up w a harsher outcome if ppl think that you are more risky.

Steinberg -
Summary and concluding comments
- Question was whether adolescents and adults differ in ways that warrant their differential treatment when they violate the law.
- Many of the social and emotional capacities that influence adolescents judgement and decision making continue to develop past adolescence.
- Important that sanctions do not hinder their development.
- Because diminished judgment mitigates criminal responsibility, it is reasonable to argue that adolescents are inherently less blameworthy than their elders in ways should affect decisions about criminal punishment:
    - As a class, less blameworthy.
- Some adolescents have adult like capabilities, but others may not.
- Should at least be informed by developmental science.
- Helps public safety in the long run by encouraging proper adolescent development.

Summary Points:
- In order to make the proper decisions, those involved in the justic system need to be familiar with the developmental changes that occur during childhood and adolescence in the capabilities and

characteristics that are relevant to their competence to stand trial, their criminal responsibility and their likely response to treatment.
- Brain maturation continues well into young adulthood - although they may perform like adults, most do not attain adult-like levels of social and emotional maturity until very late in adolescence or in early childhood.
    - More susceptible to adolescence
    - Less future oriented
    - Sensitive to short-term rewards
    - More impulsive.
- Research in cognition supports the view that adolescents are fundamentally different from adults in ways that warrant their differential treatment in the justice system.
    - Inherently less culpable and therefore should be punished less severely.
    - More likely to be incompetent in a criminal court.
- Punitive sanctions on adolescent development and behaviour, including prosecuting and sanctioning as adults, indicate that they do not deter adolescents from breaking the law and may in fact increase recidivism.
    - Family-based interventions are effective and cost-effective.

Lambie - A discussion paper on brain and behaviour in relation to the justice system in NZ

- Relating to neurological issues - not mental illnesses but can be from birth like FASD, or a TBI. ADHD, learning difficulties, autism etc.

Executive summary:
- All brains are different
- People with brain and behaviour issues are overrepresented in the justice system as both victims and offenders
    - Frontal lobe may not develop until 25
- Having brain and behaviour issues does not mean justice involvement is inevitable
    - Not to excuse offending, but to ensure that rehabilitation programmes, aimed at reducing reoffending, are well-targeted so as to be more effective.
    - Need support.
    - Where appropriate, also need preventative measures.
- The processes of the justice system itself may compound negative outcomes
- Early intervention is important
    - Education system needs to help with this.
- Diagnosis may not be simple but waiting for a diagnosis is not the poin
    - Screening individuals before they go through the justice process might be a good idea.
    - Assessment needs to take into account health and education, not just offending history.
- Justice-invovled people appear to have higher rates of brain and behaviour issues.
- There are challenges when people with these issues are incarcerated
    - Not understanding written information
    - Increased risk of victimisation for being different.
- There is a lack of culturally targeted services
- The ways we respond to these issues can be disabling to those who have them.
- Need evidence-based solutions
- Information for the general public is needed, plus specialist resources and training for health, education and justice staff.
- Early diagnosis can be affected by social disadvantage and inequity e.g lack of stable schooling, lack of culturally appropriate support, girls going un-diagnosed.
- Developmental milestones are complex and may be multi-faceted.
    - Sometimes ppl apear to have issues but grow out of them, or could have more than one.
- Working with targeted issues can be effective
    - E.g specifically time-management, problem-solving, regulating emotions.
- There are specialists and support staff who work with children on assessment and what to do.
    - There could be more communication assistants.
- One in trouble, it can be hard to tell there is something "wrong" or different.
    - So need more speech-language services.

- Not a lot of evidence around medication for these kinds of issues yet.
    - Obv things like ritalin also have black market value.

ADDITIONAL LECTURE NOTES

Brains and justice involvement

- Never to early for preventative measures.
- Justice system is not set up for people with disabilities.
- Brain and Behaviour issues can also hamper rehabilitation.
- 91% of people in prison in NZ have a lifetime diagnosable mental illness or substance-use disorder.
- The younger the child is at intervention the more effective it is
    - May be multi-faceted e.g getting an educator to help w reading difficulties, SLT for communication, occupational therapy could help w motor skills.

Young Adults

- A distinct group?
    - Age of opportunity - where the brain is susceptible to both risk-taking and rehabilitation
    - The Chief YC judge took the initiative to have a particular list out in porirua just for young adults (18-22, maybe some others)
        Run a slightly different court which is like the youth court
        Focus on participation, services and language that it being used
- YA's may present as fully capable in controlled settings, leading to the assumption they are fully capable in every situation
  BUT
- Similar issues w peer influence, 'hot processing' situations, maturity is context specific
    - Hot processing - emotional, quick decision making e,g a fight
    - YA show similarities to adolescents in these scenarios.
- Increased receptiveness to rehabilitative and reintegrative measures
- USA: the age of 18 is not massively related to your brain development
    - Society has developed hugely in this area
    - Ppl used to be married at 18
    - Also in the OT Act, the care are has been raised to 21 - can access state care until 21
        This is intended to replicate what happens in non-state care families.

Human Rights Framework - general comment no 24 - CRC

- Should thnk about applying YJ systems to people over 18
- At least for people who are particularly vulnerable

Current mitigations:

- Youth as a mitigating factor
    - *Slade:* accepted research findings that prison has more significant effects on the mental health of youth and increased victimisation, as well as the fact that adult prison programmes to no adequately cater for youth
    - *Churchward:* gave a strong indication that the court's recognise the relevant factors associated with youth are not limited to arbitrary age delineations
    - *Rolleston:* CA recognised that lack of remorse could be because of youthfulness (re sentencing)
    - *Wan:* HC - he was 24 but they found that his reasoning was really indicative of youthfulness
- In other jurisdictions, this is really well established
    - Germany - since 1953 the YJ system has been available for 18-21
        And can deal with more serious offences
        Where in custody, will be in youth system
    - Young adults in the netherlands who commit an offence before the age of 23 may also have the benefit of sanctions available in the juvenile justice system
    - Various US States e.g NY where most YA are out of adult prisons.
        Youthful offender statutes - over 18 but in their mid-20s

Expert panel recommendations:

- new duties, powers, principles and processes associated with the new transition support service through to 25, including extension of the upper care and protection age to 18, enabling 18 – 21 year-olds to stay in or return to care, and reform of financial support for care-leavers
- extending the upper-age jurisdiction of the Youth Court to age 18 and giving the adult criminal justice system the power to transfer cases involving 18-19 year-olds to the Youth Court, taking into account their vulnerability and nature of any previous offending.

Possible reform options:
- Ref Woodward and Lynch (forthcoming):
    - Extend jurisdiction to 19 year olds - do this first and then extend it to other young people
        Two separate exceptions that need to happen
        Nessa reckons no under-18s should be in adult court.
- Treating YA (or at least vulnerable ones) through the existing YC system or aspects of it
- Third system: seek to facilitate the transition from adolescence into adulthood for those who come into contact w the criminal justice system, and would have the advantage of not risking the integrity of YJ system
    - Have this in the US
    - The differences between this system and pure YJ would be sentencing outcomes, different corrections facilities, bringing in some YC procedures and having the process of rehab be a priority.
- Problems:
    - Deserving and undeserving young people - will silo them into this
    - Issue is that you might disadvantage younger ppl because you are blurring the lines of YJ