

# COURT IN THE ACT

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THE YOUTH COURT OF NEW ZEALAND

TE KŌTI TAIOHI O AOTEAROA



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## Editorial



Young females make up only a small percentage of the total number of youth offenders. However, although they are a small group, they have complex risks and needs and require an intensive response from the justice system. Young female offenders are more likely to have experienced trauma and abuse, particularly in relation to witnessing or experiencing family violence. They have often had an extremely difficult upbringing and mental illness is prevalent. Young Māori women are further overrepresented in the justice system. The intersectional discrimination that young Māori women face increases the complexity of their needs.

There is a misconception that offending by young females in New Zealand is increasing. Young female offenders attract a disproportionate amount of media attention, especially where the offending involves violence. However, the reality is that the offending rate for young females in New Zealand is decreasing, but at a lower rate than that of male offenders.

One of the major challenges facing the youth justice system is the severe lack of interventions and programmes with a female-specific lens. Early interventions are crucial to prevent young females

from beginning or continuing on the trajectory into the adult criminal justice system. However, there are currently insufficient interventions to prevent this happening. Where such interventions do exist, they are often geographically dispersed around the country. A female in one location may be able to access services completely absent in another area, creating disparities.

Programmes need to be tailored to the specific and complex needs of young female offenders. Ideally, programmes should be individualised. Females may face problems in group programmes such as potential triggering of past abuse or clustering with other anti-social teenage girls. Where interventions and programmes do exist, we are seeing effective results, with young females experiencing a positive interaction with the justice system.

There is a pressing need to keep young female offenders in the education system. Young people in the justice system are often disengaged from education and have high rates of suspensions and expulsions. Dislocation from education should be viewed as a red flag and one of the first needs that we address. The young women that we see in court are bright and intelligent and we need to assist them in reaching their

full potential. While alternative education may be available, there is a high demand for this and some young females would benefit more from being in mainstream education.

It is well established that young female offenders have specific and complex needs; now is the time to take action and address them.

Judge Clark  
Acting Principal Youth Court Judge for New Zealand\*

Assisted by Kat Werry, Judge's Clerk

*\*Judge Clark was the Acting Principal Youth Court Judge during July and August 2020 while Principal Youth Court Judge Walker was on leave.*

## Rotorua Hui

On Friday 10 July, a youth justice hui was held at Te Maioha o Parekarangi Residence. The hui was attended by the Principal Youth Court Judge and representatives from Oranga Tamariki, Ministry of Justice, Police, Corrections, the Office of the Children's Commissioner, Parekarangi Trust and Te Ikaroa Rangatahi.

The purpose of the hui was to discuss lessons learnt from the system response to Covid, and the future of youth justice residences and custodial settings. The participants emphasised that Covid has provided an opportunity to be brave and think differently. Below is a summary of the main themes discussed.



Hui Participants

### Community-Based Delivery

The hui discussed the importance of focusing on community-based and whānau/hapū delivered options, de-institutionalisation and "keeping our kids in our backyard".

The Mahuru Initiative in Tai Tokerau was given as an aspirational example. Mahuru is a Ngāpuhi-led collaboration between Ngāpuhi Iwi Social Services and Oranga Tamariki that supports young offenders on remand through a kaupapa Māori approach.

### Remand Population

At present, around 75% of those in youth justice residences are on remand. The participants discussed the pressing need to reverse the ratio of remand to sentenced young people, as it is harder to obtain positive outcomes for those on remand.

### Siblings - Red Flag

The appearance of young people in the youth justice system should be viewed as a red flag for their siblings. Young people who offend often also have care and protection needs. Their offending should sound an alarm bell and provide an opportunity to support their siblings.

The Oranga Tamariki Act 1989 is a revolutionary piece of legislation that enables a vision of community-based, iwi or whānau-led remand options. The hui discussed the importance of not shrinking a revolutionary Act. The framework is visionary – it is now up to people in the system to determine how brave and deliberate youth justice can be.

The large group that assembled in Rotorua demonstrates the commitment of those in the system to being brave and thinking differently. The passion in the room was tangible and the respectful discussion was reflective of the collegial nature of youth justice in New Zealand.

## Te Kōti Rangatahi Update



The newest Rangatahi Court in New Zealand will be located at Te Aranga Marae in Flaxmere. It will be the country's sixteenth Rangatahi Court. The first sitting will occur on October 15 with a localised launch planned on the same date.

Plans for this latest court have been underway for many months, with a hui held at Te Aranga Marae in November 2019. The launch of this Rangatahi Court has unfortunately been delayed due to Covid-19.

*Ngā mihi nui to the Te Aranga Marae Facebook group for their permission to use this photo.*

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## Recommencement of Te Kōti Rangatahi and Pasifika Courts

Rangatahi and Pasifika Courts were unable to be held under Alert Levels 3 and 4. The first of these courts recommenced at the start of July, with others following later that month and into August. After the recent resurgence of Covid-19, it has been left to the local marae and participants to decide whether they are comfortable operating.

## Young Adult List Opening Ceremony

A judge-led initiative which provides a new approach to young adults appearing in court has had its official launch. A pilot of the Young Adult List began at the Porirua District Court in March 2020, but the COVID-19 pandemic restrictions delayed its official launch till 31 July.

Local iwi Ngāti Toa gifted the name **Iti rearea teitei kahikatea ka taea** to the Young Adult List at a ceremony held at the court and attended by more than 100 guests.

Five new carved panels were unveiled in the main courtroom telling of the links between the Crown and Ngāti Toa, and other communities who have made a home in the city.

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*Iti rearea teitei kahikatea ka taea*

*The little rearea (bellbird) is one of the smallest birds in the forest, yet it can reach the top of the tall kahikatea tree*

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The panels are the latest addition to those installed in 2009 by local carver Hermann Salzmann (Ngāti Toa Rangatira, Ngāti Koata, Ngāti Raukawa), depicting the history, people and communities of Porirua.

A sixth panel was carved in honour of Principal Youth Court Judge Walker and his association with the Porirua District Court community.

Before the court ceremony Ngāti Toa kaumātua Dr Taku Parai led a pōwhiri at the Takapūwāhia marae.



Official Launch



Carved Panel Unveiled



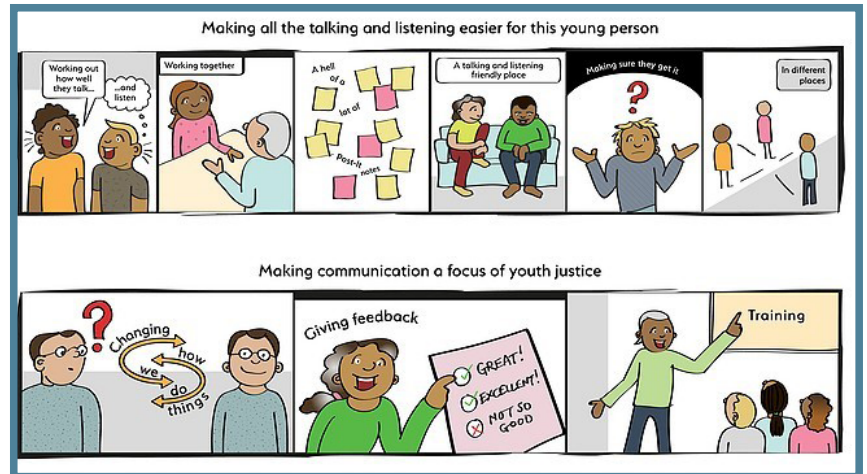
Pōwhiri

# Communication Assistance

*Kelly Howard\**

## What is communication assistance?

Communication assistance is a form of specialist support for witnesses and defendants in justice settings who have been identified as having communication difficulties. It has existed in New Zealand since 2012 and is provided pursuant to section 80 of the Evidence Act 2006. Communication assistance in New Zealand is modelled on the role of the intermediary in England and Wales. I have recently completed my doctoral research evaluating communication assistance in the New Zealand youth justice system.



The image above summarises how communication assistance was described by the youth justice professionals I interviewed.

## Why does communication assistance matter?

Research shows that at least 60% of young people who offend have communication difficulties. Communication is key to safe and effective justice. Strong talking and listening skills are required at every step in the process: from being questioned by police, talking to a lawyer or youth advocate, being part of a Family Group Conference, a court hearing, and any rehabilitation processes. It is important that we find effective solutions that enable rangatahi and whānau to participate in youth justice processes. Communication assistance might be one solution.



Kelly Howard

\*Kelly Howard has recently finished her Doctorate of Clinical Psychology at the University of Auckland, New Zealand. Her research involved speaking to rangatahi (young people), whānau (family) and professionals about communication assistance. More detailed information can be found in her published articles. See her website for details and links to her articles: <https://kellyhoward2.wixsite.com/youthjustice>

Carol Green, Auckland based illustrator and designer, drew the images for this research.



## Rangatahi and their whānau

I interviewed five rangatahi and five whānau members who had experienced communication assistance in at least one youth justice process (for example, in meetings with a youth advocate, in a Family Group Conference or in court). The main finding was that communication assistance was a transformative and empowering experience for the rangatahi and whānau interviewed. They considered that communication assistance made it “easier” in a youth justice system that

was otherwise “hard”. For them, communication assistance meant sharing in and being part of the process, rather than being an outsider to whom the process was done. The findings overall suggest that communication assistance has a valuable and ongoing role to play in the New Zealand youth justice system and may be one means of addressing the needs of those with communication difficulties.



## Professionals

I interviewed 28 professionals who work in the New Zealand youth justice system: judges, lawyers, social workers, youth justice co-ordinators, lay advocates, psychologists, police, a court registrar, and communication assistants. Professionals were overwhelmingly in support of communication assistance and shared encouraging stories about young people who were better able to share their views and participate in justice processes affecting them as a result.

He was suddenly a participant in his process as opposed to being on the outside of it. He felt that he had some level of control. He could understand.

He could appropriately respond to me whether he wanted something because he understood what we were talking about. Whereas none of that would have been possible without the CA [communication assistant] being there (lawyer).

Professionals did highlight however challenges in relation to how communication assistance functioned in practice. These challenges included being a new profession with a developing identity, figuring out who needs help and when, no standard practices or processes exist, and not everyone knows about it.

# New Zealand Police v FG

*In New Zealand Police v FG [2020] NZYC 328, Judge FitzGerald considered whether two written statements and two DNA samples obtained by the police were admissible as evidence in a case involving a young person with a communication disability.*

## Facts and Background

### *Intention to Charge DNA Sample*

In September 2019, FG was apprehended following a burglary. Constable 3 had the task of obtaining an intention to charge DNA sample from FG (ITC DNA Sample).

FG chose his mother, HG, as his nominated person. HG arrived at the Police Station at 5:00pm after finishing work and was given the Duties of a Nominated Person Form (NP Form) by Detective 1.

Constable 3 went through the intention to charge DNA notice form (ITC DNA Form) with FG and HG, in a manner she believed they could both understand. However, HG said in evidence FG did not understand the form fully and just wanted to go home. HG was under the impression that the Police did not require FG's consent for a DNA sample simply because he was 14 years old. The ITC DNA Sample was taken just before 6:00pm.

### *First Written Statement*

Directly afterwards, Detective 1 spoke to FG and HG to obtain a statement from FG (First Written Statement) in relation to two aggravated robberies. Detective 1 gave FG the youth rights caution (Caution) and said she believed he understood his rights.

However, HG said FG was "overwhelmed ... tired and restless". HG did not have a confident

understanding of the Caution herself and was exhausted and not in a good frame of mind. FG signed a statement recorded in Detective 1's notebook admitting involvement in one of the aggravated robberies.

### *Suspect DNA Sample*

In October 2019, Detective 1 and another officer visited FG at his home late one afternoon. She gave HG the NP Form again and said FG's DNA had been found on an item of clothing, linking him to the robbery he had denied.

Detective 1's evidence was that both police officers, FG and HG were all sitting at the dining room table when HG read to FG the Suspect DNA Form 2 (Suspect DNA Form). FG consented to the taking of the sample and both FG and HG signed the Suspect DNA Form.

HG however said the police officers and FG were at the table but HG's attention was divided between cooking in the kitchen, minding a young child and listening to what was being discussed. She again believed consent was not required because FG was 14 and she signed the form in FG's place.

### *Second Written Statement*

Immediately following this, Detective 1 gave FG the Caution and said she discussed FG's rights with FG and HG and was satisfied that he understood them.



Detective 1 said HG was “totally being involved” in the interview process. HG, however, said she was busy and preoccupied. She did not have any time alone with FG and did not talk to him about his right to a lawyer. FG admitted that he was at the scene of the robbery after HG reacted emotionally to hearing that a baby had been there when the robbery was happening.

Judge FitzGerald accepted HG’s version of the events, including all aspects of her evidence where there were inconsistencies between what she said and what the police officers said.

### **Communication Issues**

FG has a communication disorder and requires a communication assistant to enable him to participate properly in proceedings. He has limited understanding of legal terminology. For example, he did not know the meaning of “victim”, “guilty” or “remorse”. FG had difficulties understanding long and complex spoken information and struggled with listening and concentrating for more than 45 minutes at a time.

### **Relevant Law – Written Statements**

#### *The OT Act and current case law*

Judge FitzGerald first summarized ss 215 to 224 of the Oranga Tamariki Act 1989 (OT Act) and the principles established in the leading decisions of the Court of Appeal, *R v Z* and *Campbell v R*.  
**CRC**

His Honour then noted that the OT Act now requires that the rights of young people under the CRC must be respected and upheld, and so he considered that article 40 of the United Nations Convention on the Rights of the Child (CRC) was relevant.

### **UNGC**

When interpreting article 40 of the CRC, Judge FitzGerald looked for guidance to the United Nations General Comment on Child Justice, Number 24 (2019) (the UNGC) as well as other UN instruments; the Beijing Rules and the Havana Rules.

### **ECHR Cases**

Judge FitzGerald acknowledged that while ECHR cases are not binding, they are relevant and helpful in determining what it means to respect and uphold a young person’s rights under CRC.

In *Salduz v Turkey*, the Grand Chamber of the ECHR noted the fundamental importance of a young person’s right to legal representation from the first interrogation by police.

This was expanded on in *Panovits v Cyprus*, where the ECHR considered that the right of an accused minor to effective participation requires that he be dealt with in a way that gives due regard to his vulnerability from the first stage of involvement with the criminal justice system, especially during any questioning by the police.

As a consequence of these decisions, some countries have changed their approach to a young person’s right to consult with a lawyer at the police interview stage. For example, in the Netherlands, children aged 12 to 15 are unable to waive the right to prior consultation with a lawyer in cases involving alleged felony offending, and 16 and 17-year olds cannot waive the right for serious felony offences.

### **Relevant Law – DNA Samples**

The authority for taking both the ITC DNA and Suspect DNA Samples is found in the

Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act).

For the ITC DNA Sample, Constable 3 was required to give FG a written notice and to inform him of a detailed and complex list of particulars in a manner and in language he was likely to understand.

Similarly, in relation to the Suspect DNA Sample, Detective 1 was required to inform FG of a detailed and complex list of particulars set out in the Suspect DNA Form including that he was under no obligation to give the sample and that he may wish to consult a lawyer before deciding whether to consent.

Judge FitzGerald considered the Court of Appeal case *R v T*. In relation to the requirement to inform the suspect orally as well as giving them a form, the Court commented: "Importantly, it seems to us, Parliament is addressing the very real difficulty some people may have, in a stressful situation, in appreciating what they are being told and, particularly, in understanding the rights which they are being asked to waive". The court in *R v T* noted that there is no "reasonable compliance" saving provision.

### **Context and Discussion about Communication and Comprehension Issues**

Before turning to his findings and analysis specific to this case, Judge FitzGerald referred to international and New Zealand research on the prevalence of neuro-disabilities, including communication disorders, in the Youth Justice population and the large number who do not understand the Caution. He comments that the awareness of such vulnerabilities has seen efforts starting to be made by most professionals in the Youth Justice sector to cater for this problem to ensure young people do understand what is

happening and are able to participate properly in all aspects of the process.

### **Findings**

#### *Written Statements*

Judge FitzGerald found that Detective 1 was not alert to the significant problems with FG's level of understanding and overestimated his comprehension of the Caution.

In relation to the First Written Statement, FG was past his concentration limit, overwhelmed, tired, and restless. HG was also tired, angry, and not in a position to give him adequate advice.

Judge FitzGerald found that it was completely inappropriate to take the Second Written Statement at FG's home at a time when HG was preoccupied and therefore unable to perform her duties as the nominated person adequately.

FG's response to Detective 1's questions about the meaning of rights, on both dates, did not show an adequate understanding of the right or how to exercise it.

The explanation of rights was not given in a manner and language appropriate to FG's age and level of understanding. The non-compliance was too serious to be saved by the reasonable compliance provision and the two written statements were therefore inadmissible as evidence.

Judge FitzGerald then assessed the adequacy of the special protections provided under the OT Act, in light of the current case law, and considered them not to be very special at all. In particular, young people, especially those with communication disabilities like FG, are not much better off than adults in similar circumstances.

Also, Judge FitzGerald suggested it is unrealistic and inappropriate to expect parents, as nominated persons, to ensure young people understand their legal rights.

His Honour then noted that if FG's rights under art 40 of the CRC were respected and upheld, he would have had a lawyer present on both dates as well as HG. In addition, appropriate accommodation would have been made for his communication disability.

Therefore, even if Judge FitzGerald had found the statements admissible under the OT Act, he would have found them inadmissible as being in breach of art 40 of the CRC.

### *DNA Samples*

His Honour found that FG was not informed of the contents of both DNA forms in a manner or language that FG could understand, and the samples were therefore obtained unlawfully. The Suspect DNA sample was taken without FG's informed consent, as neither Detective 1 nor HG informed FG of the contents of the form adequately. HG signed the form in FG's place.

The balancing exercise under s 30 of the Evidence Act 2006 was therefore carried out and a finding made that the exclusion of the evidence was a proportionate response to the impropriety, despite the quality of the evidence obtained and the seriousness of the charges.

Judge FitzGerald noted with concern the obligation under the CIBS Act to merely "inform" rather than "explain", the content of the DNA forms to young people and that the invasive procedures can be permitted without providing legal advice, in breach of the young person's rights under CRC which is not even mentioned in the CIBS Act.

### **Role of the nominated person**

Judge FitzGerald comments that it is completely unrealistic to expect parents as nominated persons to not only provide emotional support but also ensure young people understand their legal rights because most, like HG, do not understand the rights themselves, and they do not have the necessary objectivity and emotional detachment to carry out that function properly.

## Recent Research and Publications

### NEW ZEALAND

**Report title:** [Youth19 Rangatahi Smart Survey Initial Findings: Substance Use](#)<sup>1</sup>

*Authors:* T Fleming, J Ball, R Peiris-John, S Crengle, L Bavin, J Tiatia-Seath, D Archer and T Clark.

*Summary:* This report highlights findings from the Youth19 Rangatahi Smart Survey (Youth19) about smoking, vaping, alcohol use, and use of marijuana and other drugs. It is designed to be read with the Youth19 Rangatahi Smart Survey, Initial Findings: Introduction and Methods report, which explains how the survey was conducted, who was included and how to interpret the results. This document and other Youth19 outputs are available at [www.youth19.ac.nz](http://www.youth19.ac.nz).

**Report title:** [Young Witnesses in New Zealand's Sexual Violence Pilot Courts](#)<sup>2</sup>

*Authors:* Isabell Randell, Fred Seymour, Clare McCann, Tamara Anderson and Suzanne Blackwell.

*Summary:* The present research was initiated in response to the establishment of New Zealand's Sexual Violence Courts Pilot in late 2016. One of the stated intentions of the court was to improve the experience of complainants. This research aims to contribute to innovation in court processes and the further development of the Sexual Violence Court Pilot. It comprised two studies with a focus on young witnesses.

**Report title:** ['It was more like easier': Rangatahi \(Young People\) and Their whanau \(Family\) Talk About Communication Assistance in the New Zealand Youth Justice System](#)<sup>3</sup>

*Authors:* Kelly Howard, Clare McCann and Margaret Dudley.

*Summary:* This qualitative study gives voice to rangatahi (young people) and their whānau (families) (n=10) who have experienced communication assistance in the New Zealand youth justice system. Communication assistance is a form of specialist support for witnesses and defendants who have been identified as having communication difficulties; and is modelled on the role of the intermediary in England and Wales. The findings overall suggest that communication assistance has a valuable and ongoing role to play in the New Zealand youth justice system, and may be one means of addressing the rights and needs of those with communication difficulties who offend.

### AUSTRALIA

**Report title:** [Youth justice in Australia 2018-19](#)<sup>4</sup>

*Author:* Australian Institute of Health and Welfare.

*Summary:* This report looks at young people who were under youth justice supervision in Australia during 2018–19 because of their involvement or alleged involvement in crime. It explores the key aspects of supervision, both in the community and in detention, as well as recent trends.

1 <https://youth19.ac.nz/publications/2020/8/12/youth19-rangatahi-smart-survey-initial-findings-substance-use>

2 <https://apo.org.au/node/305928>

3 <https://doi.org/10.1177/1473225420923763>

4 <https://aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/contents/summary>

**Report title:** [Crossover Kids: Vulnerable Children in the Youth Justice System Report Three: Sentencing Children Who Have Experienced Trauma](#)<sup>5</sup>

*Authors:* Felicity Stewart, Anna Chalton and Anusha Kenny.

*Summary:* This is the third and final report in the Council's series on "crossover kids": sentenced and diverted children known to the Victorian Child Protection Service. The series studied 5,063 children sentenced or diverted in the Children's Court and identified those known to child protection. The first and second reports, released in June 2019 and April 2020, have a statistical focus. This third report explores policy issues relating to sentencing children who have experienced trauma, particularly children who have had contact with the child protection system. The report draws on the findings of the first two reports, consultation on those findings and scientific evidence on the effects of childhood trauma. It canvasses possible changes to the youth justice system to more holistically and effectively address the causes of children's offending.

**Report title:** [Raising the age of criminal responsibility](#)<sup>6</sup>

*Authors:* Sophie Trevitt and Bill Browne

*Summary:* Research from The Australia Institute and Change the Record shows that most Australians agree children as young as 10 years old do not belong in prison, and that Australia's age of criminal responsibility should be increased from 10 years of age to the global median of 14 years of age, or higher. The Council of Attorneys-General (CAG) is set to meet for what may be the final time on Monday 27 July to consider the

outcome of a national review to raise Australia's age of criminal responsibility from 10 years old to bring it in line with the global median of 14 years of age, or higher. The CAG consists of the Federal, State and Territories Attorneys-General, and the New Zealand Minister of Justice.

## UNITED KINGDOM

**Report title:** [Young people's voices on youth court](#)<sup>7</sup>

*Author:* Carmen Robin-D'Cruz

*Summary:* This briefing paper highlights the experiences of young people in youth courts in their own words and draws from research conducted for our forthcoming research report, co-authored with the Institute for Crime & Justice Policy Research (ICPR), *Time to get it right: Enhancing problem-solving practice in the Youth Court*, which is due to be published in early July.

**Report title:** [Young Adult Advisors on Criminal Justice: Hearing from Young Adults in the Criminal Justice System](#)<sup>8</sup>

*Author:* Leaders Unlocked

*Summary:* This report has been co-produced by Leaders Unlocked and young adults with first-hand experience of the criminal justice system. This report is based on peer-led engagement with over 500 young adults in prisons, YOTs and community organisations across the country. It contains findings and recommendations on 5 key topics: Racial Disproportionality, Sentencing Young Adults, the Care System, Mental Health, Employment and Life after Prison.

5 <https://sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-in-the-youth-justice-system-report-3>

6 <https://apo.org.au/node/307114>

7 <https://justiceinnovation.org/publications/young-peoples-voices-youth-court>

8 <http://leaders-unlocked.org/publication/517/>