

# Court in the Act

Christmas Edition 2016

TE KŌTI TAIOHI O AOTEAROA • THE YOUTH COURT OF NEW ZEALAND

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## EDITORIAL

### Principal Youth Court Judge John Walker



This is an exciting time to be engaged in the youth justice arena. There are fundamental changes to structures underway with the creation of the new Ministry with all of the changes in policy and emphasis which are likely to occur, the refreshing of the Youth Crime Action Plan, and most significantly, the signalled increase in the Youth Court jurisdiction to include most 17 year olds. It is also a time of enormous challenge with Youth Court numbers showing a rising trend, an increase in serious offending in some areas and a general complexity of the young people coming to Court.

We talk a lot about the profile of the young people who come to the attention of Police and those who go on to appear in Court. We talk about the violence they have suffered, the alcohol and other drugs in their life, the neurodisabilities under which they labour, the incidence of fetal alcohol spectrum disorder, and the list goes on and on. We quote these statistics and the prevalence rates, and we need to do that when we are formulating effective responses. Behind these profiles and statistics are children and young people for whom Christmas is a time of heightened danger and stress, a time of stress for their families, a time of increased family violence, and a time when advertisements which flood us all show what they do not have.

And so it is right to think of those young persons and their families at this time, and think what might be done over the next 12 months to make a difference for them, and to formulate plans towards making that difference.

Those of you in our youth justice community, who work in such a dedicated way with these young

people, know all of this only too well. You deal with it daily and you have my greatest respect.

We, Judges, touch the cases before us, but briefly, and we have our part to play, but the sustained hard intervention work day after day is what the youth justice teams do and do so well.

You all richly deserve a restful time with your families and friends, refreshing yourselves, ready to face next year's challenges.

On behalf of the Youth Court, I thank you for all that you do, as members of the youth justice community, for our children and young persons. My very best wishes to you and your families for Christmas and the year ahead.

Ngā mihi o te Kirihimete me Te Tau Hou.

## PRESS RELEASE



### Lower risk 17 year olds included in youth jurisdiction

The following press release was issued by Hon Amy Adams, Minister of Justice and Hon Anne Tolley, Minister of Social Development on 7 December 2016. It first appeared at [www.scoop.co.nz](http://www.scoop.co.nz).

The youth justice system will be extended to include lower risk 17 year-olds, Justice Minister Amy Adams and Social Development Minister Anne Tolley have announced today.

The changes will ensure that all 17 year-old offenders are dealt with according to which jurisdiction is best suited to the particular case.

The vast majority of 17 year-old offenders are lower risk. They will be dealt with in the Youth Court where the interventions are more targeted and lead to better results.

17 year-olds who are serious, violent offenders who commit a range of offences like murder, manslaughter, sexual assaults, aggravated robbery, arson, or serious assaults will continue to be dealt with by adult courts.

In addition, the existing ability to transfer young offenders from youth to adult jurisdiction will be strengthened so that other serious or repeat offenders aged 14 – 17 years-old are individually assessed as to whether they are better dealt with in either the adult or youth jurisdiction.

“The Youth Court is not a soft option. Instead it offers our best opportunity to break the cycle of reoffending. It's shown that it is effective at reducing crime and holding young offenders to account, by giving them tough but targeted punishments when they commit crime,” says Justice Minister Amy Adams.

The Youth Court offers young offenders rehabilitation and wraparound support to tackle the underlying causes of their offending. The changes will have a particularly positive impact for Māori, who are over-represented in the justice system.

“We know the Youth Court can provide effective incentives to steer youth away from a lifetime of crime. It will take 4873 cases out of the adult system, which will give the adult court greater capacity to deal with serious offences. As a result of these changes, it's estimated around 265 fewer 17 year olds will reoffend every year, meaning less crime and fewer victims,” says Ms Adams.

“Raising the youth justice age was a recommendation of the independent expert panel which advised me on the overhaul of care and protection,” says Social Development Minister Anne Tolley.

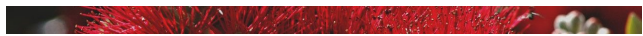
“At the moment many of these young people are written off at the age of 17. We know that once many of them go to an adult prison and associate with gang members and hardened criminals it increases the chance of them reoffending, creates more victims and costs the taxpayer even more money.

“For those who are charged with lower level offending, if the Ministry for Vulnerable Children, Oranga Tamariki can work with them in different ways then it can improve their long-term life outcomes and their communities.”

Existing services and resources will be expanded and increased to support frontline staff and others involved in the youth justice system, before this change takes place by 2019. This includes numbers of Police youth aid officers, social workers, family group conferences, and programmes to address the

complex needs of young people with mental health and drug issues. ■

## Investing in Children programme: updates



The following two items were written by the Ministry of Social Development's Investing In Children (IIC) unit for Court in the Act, to inform readers about changes underway in the youth justice sector.

### Investing in Children Programme: Transformational change

#### IIC Unit

As many of you will be aware, there's a major transformation programme underway in response to the Expert Advisory Panel's review of the care and protection and youth justice systems. It's being led by MSD's Investing in Children programme, who are working closely with a range of partner agencies, organisations and individuals, including those in the youth justice sector, to create a better way of doing things.

Fully achieving the new system will be a four-five year process, to allow the time needed to get things right.

One of the first things the Programme is focused on is setting up the new Ministry for Vulnerable Children, Oranga Tamariki, which takes a whole of sector approach and includes youth justice as one of its five core services. The new Ministry will incorporate Child, Youth and Family, some Community Investment functions, and the Children's Action Plan Directorate, including Children's Teams, ViKI and the Vulnerable Children's Hub. It will be up and running on 1 April next year.

A new independent connection and advocacy service will also become operational on 1 April 2017. The service will enable the voices of young people in care to be heard and influence decisions that are made about them, at an individual and systemic level. It will also help connect them with others with similar experiences, giving them a community to belong to.

While there's a long-term approach to introducing change across the sector, there will be some initial enhancements that will be in place by 30 June 2017. These include:

- raising the age of care to include 17 year olds and enhanced transition planning and support;
- design of child-centred and trauma-informed practice frameworks – both system wide and agency specific;
- reducing custodial remand through decision support tools and specialist foster care (see item below about research study into youth remand decision making);
- enhancing participation in decision making processes, by strengthening things like FGC coordination, hui-a-whanau and whakapapa searching;
- enhanced access to universal and targeted services for children and young people in care;
- better access to information, training and support for caregivers;
- national care standards to provide guidance and clear expectations for the quality of care; and
- strategies to widen the pool of caregivers.

As signalled above, we're drawing on the experience and expertise of professionals, communities, caregivers, young people and families to inform the development of our work, and there will be many opportunities for people to be involved in the service design process over coming years. You can find out more about the new child-centred care and support system, including the proposed legislation changes, the Connection and Advocacy Service, and design of the service and practice models, via the Investing in Children Programme page on the MSD website.

#### Upcoming legislation changes

Making major and far-reaching changes to the care and protection and youth justice system also requires similar changes to the legislative framework, to enable the new operating model to work effectively.

*Continued overleaf.*

This is being managed through two phases of legislation reform:

The first phase - The Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill - is expected to be passed in December.

The second phase - Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill – was introduced into the House on 8 December.

The amendments in the second Bill will provide the foundations for a child-centred system and support the operation of the new Ministry’s five core services, including proposals relating specifically to the youth justice sector. These aim to help children and young people live crime free lives through:

- increased availability of legal representation to young people
- strengthened community-based options as alternatives to remand
- ensuring support for transition from the Youth Justice system
- requiring consideration of whether a child or young person would benefit from referral to prevention or intensive intervention services
- extending the youth justice system to include 17-year-olds, and non-imprisonable traffic offences and strengthen existing requirements.

The extension of the youth justice age acknowledges the good work being done in the youth justice sector and brings New Zealand in line with other jurisdictions overseas. It’s also supported by international best practice as the best way to reduce the number of adult offenders in the long-run, leading to lower overall crime and few victims.

You can find out more about the new child-centred care and support system, including the proposed legislation changes, the Connection and Advocacy Service, and design of the service and practice models, via the Investing in Children Programme page on the MSD website. ■

## Understanding the Use of Custodial Remands in Youth Justice

### IIC Unit

The Investing in Children Programme (IIC) has commissioned a study examining youth remand decision-making and levers for change. The aim is to better understand the remand decision-making process and identify opportunities to safely increase the use of alternatives to custodial remand. The Youth Crime Action Plan identified addressing the high use of custodial remand to youth justice residences as one of its priorities.

**Custodial remand admissions to youth justice residences have increased - up 24% since 2011/12.**

While Police apprehensions, referrals to Youth Justice Family Group Conferences and court cases have all been trending downwards over the last five years, custodial remand admissions to youth justice residences have increased - up 24% since 2011/12 - whereas Youth Court volumes have dropped by 40%. Remand admissions have also increased proportionally more for girls than boys, and more for young Māori than other ethnic groups. Māori youth accounted for 72% of remand admissions in 2015/16.

The research is being undertaken by the Insights group within the Ministry for Social Development, will be reviewed by the Youth Justice Governance Group, and is proactively supported by the Principal Youth Court Judge, Judge Walker.

This study involves gathering information from Police, Youth Court, residences and other relevant sources, and will focus on key factors driving bail and custodial remand decisions. It will also look to identify opportunities for ensuring custody is used as a last resort, for as short a period as possible.

Key research questions include:

- Are community based alternative provisions used effectively and what influences decisions about whether and how to use them?

*Continued on page 6*



# Christchurch's New Youth Justice Space

A new youth justice space for the people of Christchurch will soon become a reality, with the Christchurch Justice and Emergency Services Precinct close to being completed.

The Precinct brings together all justice and emergency services in one purpose-built precinct in central Christchurch. It is made up of three buildings: the Justice building, the Emergency Services building and a car park for operational vehicles.

The Youth Court will be included in a dedicated youth justice hub, which will have a separate entry from courts that work with adults. This hub will also include a range of associated youth justice services to support the daily workings of the Youth Court.

This is an exciting opportunity for those working in youth justice in Christchurch. Designed in consultation with the Youth Court judiciary and youth justice sector workers, the youth justice hub provides the sector with a space to implement the "team approach" that has become the mark of the Youth Court system. It is our hope that this new space will help the sector in its aims of working together to find real solutions for the troubled young people before us.



## Youth Court in International Press

The following extract is from an article published on the Juvenile Justice Information Exchange ([www.jjie.org](http://www.jjie.org)), by US reporter Gwen McClure.

### New Zealand Sees Success With Culture-specific Youth Courts, Family Group Conferences

“AUCKLAND, New Zealand — It’s midmorning on a Friday in Manukau’s Youth Court, and Judge Philip Recordon is sitting behind the bench, speaking to Thomas, a young teenage boy (his name has been changed to protect his privacy). The others in the room, including police prosecutor Sgt. Richard Spendelow, a lawyer, and representatives from Child, Youth and Family (CYF), are discussing Thomas’ case while he stands quietly. *Continued overleaf.*”



Computer simulated projection of the Precinct.

Continued from previous page.

Recordon tells Thomas he can sit down, then sets his curfew: He isn't allowed out between the hours of 7 p.m. and 7 a.m. unless he's with his mother or aunt, and he's not allowed any contact with the friends he was with when he got into trouble.

Thomas' mother sits behind him, her forehead furrowed. They've recently lost their house, and though they have short-term, emergency housing, the stress of that situation is clearly compounded by her son's court case.

Spendelow looks at her and asks that if her son breaches curfew, she call the police. She nods.

Spendelow turns back toward Thomas.

"You can tell the judge whether your mom's going to have to make the call that will break her heart," he says.

**Read the rest of the article at: [www.jjie.org](http://www.jjie.org).**

### Understanding the Use of Custodial Remands in Youth Justice - *continued from p 4*

- What does current practice tell us about how to build future alternative community provision?
- How can the system better meet the needs of the communities and young people it is designed to protect?

The first phase of the research, planned for March - June 2017, will focus on two geographical areas. This will include Youth Court and police observations, interviews with key stakeholders including professionals involved in the court and wider remand process, and youth on remand in residences.

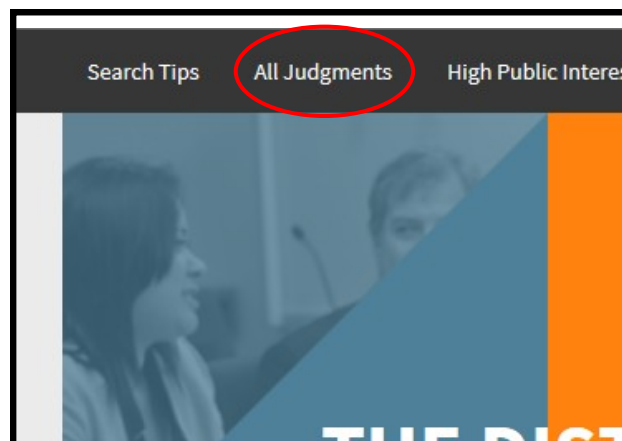
The findings from this first phase will help inform initial youth justice service design, inform further exploration and research in this area, and provide insights about factors influencing remand processes and decision making. ■

## Full-text Youth Court decisions now online

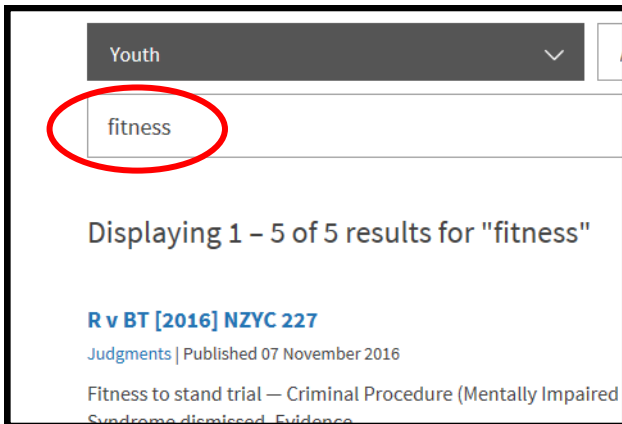
More than 20 Youth Court decisions are now available online at [www.districtcourts.govt.nz](http://www.districtcourts.govt.nz), thanks to the work of Chief District Court Judges' Chambers Publications Unit.

Youth Court decisions are selected based on an agreed set of criteria, including where decisions would attract high public interest and where decisions address new questions of law. Decisions published to date are on a range of topics including admissibility of evidence, sentencing in the Youth Court, jurisdictional issues, bail issues, fitness to stand trial, and mode of evidence applications. These can be accessed through a search on the new District Courts website.

If you would like to see all available Youth Court judgments, go to [All Judgments](#) and select [Youth](#):



Alternatively, if you would like to search for a particular topic - for example, "fitness" (to stand trial) - you may use the filters on the Home page to select 'Youth' and then enter your search term:



### Further search tips:

<http://districtcourts.govt.nz/youth-court/youth-search-tips/>

## Carvings at Porirua

On Monday 5 December carvings by Hermann Salzmann were revealed in courtroom 1 at the Porirua District Court.

They are a continuation of the court and community project commenced in 2009 by Judge Jan Kelly and Judge John Walker. The carvings are an example of the strong relationships that have been established between the Porirua Judges, court staff, stakeholders and the community.

The carvings tell the story of Kupe's arrival at Porirua, the struggles that were faced and how, in

the face of adversity, perseverance won out.

Present on the day with Porirua Court staff and stakeholders were Judges Walker, Kelly and Doyle, Judicial Administrator, Tania Ace, Naomi -Blaire Ngaronoa and Kate Peirse-O'Byrne.

A brief description of each carving is to be placed on the Bar inside the courtroom for members of the public to read throughout the day. Two examples are provided below.

7. The head of a taiaha represents the warrior tribe Ngati Toa – tangata whenua. The pattern on the left represents their journey from Hawaiki to Kawhia and down to Porirua. The pattern on the right represents their three guiding kaitiaki.



8. *Awarere and Awarua* (Albatross and Taniwha). Taniwha became friends with the albatross and asks if he would teach him to fly. Taniwha is clumsy and crashes time after time, creating *Whitireia* and flattening *Mana Island* before learning to fly.



Perseverance is the moral of the story. The pattern in the middle represents never ending stories. ■



Judge Kelly, Judge Walker and Hermann Salzmann (carver)



# SPECIAL REPORT

## International standards for youth justice – relevance and application in the Youth Court

Nessa Lynch | Senior Lecturer at the Victoria University of Wellington



International standards for youth justice provide a benchmark for best practice and protect vulnerable young persons in state processes. This edited version of a presentation given at the Youth Court Judges’ Triennial Conference gives an overview of international standards relevant to the Youth Court, and distils key principles that are applicable in New Zealand.

### THE INSTRUMENTS:

#### QUICK REFERENCE GUIDE

##### International Covenant on Civil and Political Rights (ICCPR)

The ICCPR provides some specific rights for children and young persons, and was the first international human rights convention to impose an express obligation on States Parties to provide a separate and different procedure for children and young persons involved in the criminal justice system.



International Covenant on Civil and Political Rights

The provisions of the ICCPR are largely imported into New Zealand law through the Bill of Rights Act 1990. See particularly s 25(i) which provides for the right in the case of a child to be

treated in a manner that “takes account of the child’s age”.

##### Convention on the Rights of the Child (CRC)

The CRC was signed by New Zealand on 1 October 1990 and ratified on



6 April 1993 (subject to three formal reservations). New Zealand has not formally incorporated the CRC into domestic law, though some aspects appear in the Care of Children Act. It applies to ‘children’, which denotes all those aged less than 18 years. Patently this differs from the CYPF Act definition of ‘child’, which is “a boy or girl under the age of 14 years” (s 2(1)). Additionally, the current jurisdiction of the youth justice system ends at 17 - not 18.

The basic framework of the CRC for youth justice proceedings is that the child or young person has the same minimum standards as any individual in the criminal justice system, and should not be worse off in terms of due process than an adult in the same situation (e.g. presumption of innocence, right to legal assistance). However, the child or young person has certain extra rights based on their status as ‘child’ e.g. participation, more emphasis on reintegration, protective rights such as the right to have a nominated person present during police questioning, and the requirement that the best interests of the child or young person be a primary consideration. This is similar to the model of the CYPF Act.

##### Committee on the Rights of the Child

The CRC mechanism established a group of experts known as the Committee on the Rights of the



Child. This group reviews the Periodic Reports submitted by State Parties. New Zealand’s report was submitted in late 2015, and the Committee heard submissions from New Zealand in September 2016. See [www.msd.govt.nz](http://www.msd.govt.nz).



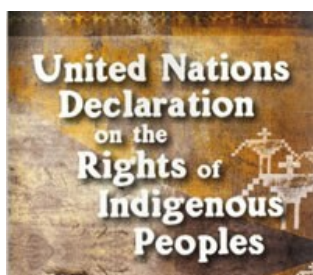
## UN Convention on the Rights of Persons with Disabilities



This treaty affirms the rights of persons with disabilities, rather than creating new rights. It was ratified by New Zealand in 2008.

## UN Declaration on the Rights of Indigenous Persons

The DRIP recognises the rights of indigenous peoples to self-determination and self-governance, and to maintain and develop their culture.



## Rules and standards

There are a number of relevant rules and standards which give further detail on the operation and principles of a youth justice system, for example the Beijing Rules, the Riyadh Guidelines and the Havana Rules.

## STATUS IN DOMESTIC LAW:

### WHAT POWER DOES INTERNATIONAL LAW HAVE IN NEW ZEALAND?

The international standards referred to above are 'unincorporated'. The traditional view of unincorporated international human rights treaties in New Zealand is 'dualist'. This means that to be binding, the provisions must be formally incorporated into legislation. Thus the provisions of international conventions cannot override the provisions of domestic legislation.

However, there is considerable authority on the use of international conventions as interpretative tools.

In *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266, Cooke P stated that:

"a failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism should extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms or obligations, the executive is necessarily free to ignore them."

There has been particular recent emphasis on using the CRC where the child or young person is dealt with in the adult system. In *Pouwhare v R* [2010] NZCA 268, Keane J stated that:

"...Judges should, to the extent that this is consistent with the letter of the Sentencing Act, act in accordance with the Convention and, in particular, should treat the young person's "best interests" as a "primary consideration".

In *DP v R* [2015] NZCA 476, para 10, the Court of Appeal stated as follows:

"When dealing with a child charged with a criminal offence, a Court **must** recognise the United Nations Convention on the Rights of the Child".

The line of cases ordering name suppression for children and young people "reflect a pattern of judicial recognition of the factors acknowledged by New Zealand's treaty obligations when determining name publication issues for a young offender". (*DP v R* at [16].

## KEY PRINCIPLES IN INTERNATIONAL LAW:

### QUICK REFERENCE GUIDE

On a pragmatic level, the principles and provisions of the CYPF Act are largely convergent with the principles and provisions of the relevant international conventions.

#### PRINCIPLE: Participation

The principle of participation is codified in art 12; 40 (2) (b) (iv), CRC, and in the Disabilities Convention.

The basis for this principle is that the young person is considered to be an individual with their own rights and interests, capable of having a role in any

decisions affecting them. Young person must be facilitated to participate effectively in proceedings and to have their views taken into account commensurate with their age and abilities.

Participation is said to involve:

1. The right to express his or her views freely
2. In all matters affecting the young person
3. In accordance with the age and maturity of the young person
4. Directly, or through a representative or an appropriate body.

It also includes the right *not* to participate.

### **PRINCIPLE: The Best Interests Standard**

Article 3 of the CRC requires that the best interests of the child or young person be a primary consideration in all proceedings concerning children and young people.

The principle requires a child-centred approach.

Note that this provision is divergent from the CYPF Act approach, in which s 6 (the paramountcy provision) does not apply to youth justice proceedings. Further, both the CYPF Act and victims' rights legislation in New Zealand recognise the rights and interests of victims. Thus, public safety and societal protection will sometimes require a measure (e.g. s 283(o) order) which may not be in the best interests of the young person.

Nevertheless, it is important to note that the wording of Art 3 is 'a primary consideration' not 'the primary consideration', so it does allow others' interests to be considered.

### **PRINCIPLE: Reintegration**

Like the CYPF Act, international standards promote a re-integrative approach, with a wide variety of dispositions available.

Article 40(1) of the CRC provides that sanctions and outcomes should be "consistent with the promotion of the child's sense of dignity and worth". It also provides that "[a] variety of dispositions ... shall be available to ensure that children are dealt with in a manner appropriate to their well-being".

Rule 5.1 of the Beijing Rules provides that sanctions and outcomes must emphasise wellbeing.

Reintegration rejects the assumption that the difficulties which children face are necessarily individual and considers the social environment of the child.

### **PRINCIPLE: Custody only as a last resort**

Article 37(b) of the CRC states that custody "shall be used only as a measure of last resort and for the shortest appropriate period of time".

Custodial interventions should not be imposed "unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response" (Rule 17.1 (c), and Rule 18.1 Beijing Rules).

Article 37(c) and (d) of the CRC requires that young persons in custody be treated humanely, be separated from adult prisoners in custodial settings and have appropriate access to family and legal advisors. The United Nations has a specialist set of Rules that provide standards for young persons in custody (Havana Rules) of which Rule 2 also emphasises that custody should only be used as a last resort.

The CRC also picks up on the principle that young persons are to be treated in a manner that takes into account their age and the desirability of promoting their reintegration and assuming a constructive role in society (Article 40.1).

International standards relating to pre-trial detention are particularly stringent. The United Nations Committee on the Rights of the Child recently stated:

the States parties [to the CRC] should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.

The Beijing Rules also state that pre-trial detention should be avoided except as a last resort and for the shortest possible period of time (Rule 13.2).

## PRINCIPLE: Appropriate timeframes

Article 40 (2)(b) CRC provides for the right to have the matter determined without delay.

Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible

This is echoed in the CYPF Act. By s 5(f), decisions affecting a child or young person should be made and implemented within a timeframe appropriate to a child or young person's sense of time.

In the case of *R v M* [2011] NZCA 673 (involving a significant delay in a sexual offending case) the Court of Appeal noted the different sense of time that children have as opposed to adults. The Court also noted that s 25 (i) of NZBORA (ICCPR) requires a child centred approach. The Court stated as follows:

“A delay that may be unexceptional for an adult may have a significant impact on the life of a young person because of their different perception of time relative to their life as a whole”.

The Court of Appeal made reference to the best interests of the complainant, noting that the CRC required state to take appropriate measures to protect children from abuse, must be balanced with the right to a fair trial.

Note that the requirement to adhere to appropriate timeframes applies to child victims also (see, in this regard, *Police v VT* [2015] NZYC 819; *Police v ET* [2015] NZYC 412).

## PRINCIPLE: Non-discrimination

This principle, codified in art 2 CRC, requires a focus on ensuring that particular groups of children and young persons such as female youth, homeless youth, disabled youth, ethnic minorities and indigenous youth are not discriminated against.

This is a central theme of the UN Declaration on Indigenous Peoples and the Disabilities convention.

As discussed above, it requires particular focus on effective participation for children and young

persons with disabilities and communication difficulties.

## CONCLUDING REMARKS

The status of the CRC and other international instruments in domestic law remains firmly interpretative rather than definitive.

**Unlike young people in European countries, young people in New Zealand are unable to take cases to an international human rights body.**

Nonetheless, the CRC has a vital role in providing a benchmark against which the New Zealand youth justice system can be measured. This is especially important in light of the fact that New Zealand lacks the protections

of a written constitution or the equivalent of a European Convention on Human Rights. Unlike young people in European countries, young people in New Zealand are unable to take cases to an international human rights body.

The reporting process to the United Nations Committee on the Rights of the Child has identified a number of major rights issues with the system – including a low age of criminal responsibility, mixing of adults and youth in custodial institutions and lack of meaningful participation by young people.

If you would like to find out more, the UN Committee 2007 review of the characteristics of a CRC compliant youth justice system provides useful detail. See: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> ■



**Following a s 283(o) CYPF Act transfer to the District Court, can children and young people undergo restorative justice pursuant to s 24A Sentencing Act 2002?**

**A Youth Court Judge recently enquired as to whether children / young people transferred from the Youth Court to the District Court could undergo restorative justice, as provided for in s 24A Sentencing Act 2002.**

*Continued overleaf.*



The following opinion was prepared by Kate Peirse-O’Byrne, Research Counsel to the Principal Youth Court Judge in response to the query.

## Law

Section 24A Sentencing Act 2002 is set out below:

### *Sentencing procedure*

#### **24A Adjournment for restorative justice process in certain cases**

(1) This section applies if—

- (a) an offender appears before a District Court at any time before sentencing; and
- (b) the offender has pleaded guilty to the offence; and
- (c) there are 1 or more victims of the offence; and
- (d) no restorative justice process has previously occurred in relation to the offending; and
- (e) the Registrar has informed the court that an appropriate restorative justice process can be accessed.

(2) The court must adjourn the proceedings to—

- (a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
- (b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.

## Analysis

Each of the five criteria from (1)(a) to (e) must be met in order for the section to apply. These are considered in turn below.

- (a) *The offender must have appeared before a District Court at any time before sentencing.*

There are two ways in which this criterion could be met. Firstly, the offender will appear in a District Court for sentencing, and therefore must be physically present in the District Court before the sentencing occurs. Alternatively, the Youth Court is a division of the District Court so could be classified as a District Court.

- b) *The offender must have entered a guilty plea*

In the Youth Court, a young person “does not deny” offending, which is then “proved by admission” at a family group conference. There are differing judicial opinions as to whether “not denying” offending and then “admitting” the offence at an FGC amount to a plea of guilty.

In *Police v C* [2000] NZFLR 769 (HC), Hammond J found that the fact that charges were “not denied” or “admitted” did not amount to a guilty plea and could not support a conviction. However, in *Police v B* [2001] NZFLR 585 (DC), *Police v M* [2001] DCR 385 (YC) and *Police v JL* [2006] DCR 404 (YC) the Judges declined to follow *C v Police*, considering that the “proved by admission at family group conference” mechanism amounts to a guilty plea.

In *Police v Grimwood* DC Christchurch CRI-2004-009-2203, 22 July 2015, the District Court Judge took a purposive approach to the application of s 24A. His Honour noted that an “initially literal interpretation of the provisions of s 24A is now yielding to a purposive and more flexible approach ... and a more pragmatic application”.

The Judge stated that the section serves to encourage the Courts to “specifically consider whether a restorative justice process is appropriate”(at [9]).

The appropriateness of a restorative justice process will depend in part on *whether the offender has accepted responsibility for their actions*. In this sense, “not denying” and then “admitting” the offending serves the same purposes as a guilty plea; both mechanisms indicate the offender’s willingness to accept responsibility for offending.

Applying the purposive approach endorsed and taken in *Police v Grimwood*, it is submitted that “not denying” and “admitting” the offending are

equivalent to a guilty plea for the purposes of s 24A Sentencing Act.

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c) *There must have been one or more victims.*

This will be case dependent.

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d) *There must not have been any previous restorative justice process.*

The central idea of restorative justice is that the offender will perform actions to repair the harm caused by the offending.

While there is no explicit mention of restorative justice in the CYPF Act, the FGC is commonly identified as an example of restorative justice in practice. However, Nessa Lynch has noted that levels of “restorativeness” vary between FGCs. Recent data indicates that only about 20% of FGCs are attended by victims. When the victim is not present, the repair of harm caused by the offending is diminished. It is therefore problematic to class the FGC as a restorative justice process where there is no victim presence.

To answer to the question of whether there was any “previous restorative justice process” may depend on the how restorative the FGC(s) were prior to sentencing, having particular regard to the presence or otherwise of victims.

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e) *The Registrar must have informed the court that an appropriate restorative justice process can be accessed.*

This will be case dependent. In *Police v Grimwood*, the Judge found that the only requirement of “can be accessed” is whether there is a local RJ provider with sufficient funding and capacity to take the referral (at [12]).

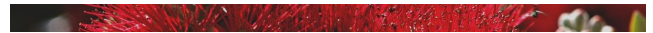
## Conclusion

Questions relating to young people transferred from the Youth Court to the District Court are of increasing relevance, as the sector prepares for all “high-end” 17 year olds to be processed in the Youth Court and transferred to the District Court.

It is submitted that s 24A Sentencing Act 2002 is not excluded from applying to young people transferred to the District Court pursuant to s 283(o), and its application will be case-dependent.

However, this issue may need clarification from the courts. ■

## RECENT RESEARCH AND PUBLICATIONS



### NEW ZEALAND

#### *Offending by children in New Zealand*

**Author:** Ministry of Social Development

**Available:** <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/child-and-youth-offending-patterns/index.html>

This research report aims to fill some key information gaps around the profile of child offenders in New Zealand and their patterns of offending and reoffending.

The findings from this research will inform future work under the cross-agency Youth Crime Action Plan in response to Government commitments made in September 2012 following the Social Services Select Committee’s Inquiry into the identification, rehabilitation, and care and protection of child offenders.

#### *Reoffending patterns for participants of youth justice Family Group Conference’s held in 2011 and 2012*

**Author:** Ministry of Social Development

**Available:** <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/child-and-youth-offending-patterns/index.html>

The Family Group Conference process seeks to hold children and young people accountable for their offending, while also encouraging them to change their behaviour and not reoffend.

This report examines the profile and patterns of reoffending for around 6,800 participants of youth justice FGCs held in the 2011 and 2012 calendar years.

### ***Reoffending patterns of Military-style Activity Camp graduates***

**Author:** Ministry of Social Development

**Available:** <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/child-and-youth-offending-patterns/index.html>

This report describes changes in the offending outcomes observed for 79 young people who between October 2010 and December 2013 graduated from 11 Military-style Activity Camps (MACs) held at Te Puna Wai ō Tuhinapo youth justice residence in Christchurch. All of these young people had a post-MAC follow-up period of at least 12 months so their follow-up offending could be observed.

### ***Reoffending patterns for recipients of Youth Court supervision orders***

**Author:** Ministry of Social Development

**Available:** <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/child-and-youth-offending-patterns/index.html>

This report describes changes in the offending outcomes observed for young people who received one of three types of Youth Court supervision orders in the 30 month period after the Fresh Start reforms were introduced (i.e. from 1 October 2010 to 31 March 2013). Reoffending patterns are examined for the 12 month period after orders were served.

### ***Adult gang members and their children's contact with Ministry of Social Development service lines***

**Authors:** Ministry of Social Development

**Available:** <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/research-on-gangs-and-their-cost/index.html>

**Abstract:** New Zealand a complex gang problem that spans social, economic and justice issues. Almost half of the serious offences committed by

gang members are family violence-related. A high proportion of gang members' children experience multiple incidents of abuse or neglect.

'Adult gang members and their children's contact with Ministry of Social Development service lines' seeks to quantify the scope and scale of the societal impact of adult gangs in New Zealand as it relates to contact with the Ministry.

The report establishes baseline figures on how many known adult gang members, and how many of their children, come into contact with the Ministry of Social Development's service arms, and the types and estimated total costs of contacts that occur. This report, as a first step, gives a much more comprehensive picture of the social costs associated with gang members.

There is further opportunity for government agencies to work more collaboratively to address the social harms noted throughout this report. Most notably, there would be an added benefit in incorporating further social sector data to enhance the profile we have of gang families.

### ***A Comparison of Pacific, Māori, and European Violent Youth Offenders in New Zealand***

**Authors:** Julia Ioane, Ian Lambie, and Teuila Percival

**Available:** International Journal of Offender Therapy and Comparative Criminology 60(6) 2016 657

**Abstract:** Pacific Island and Māori youth are disproportionately overrepresented in Aotearoa/New Zealand in violent offending. To date, research has not examined Pacific Island violent youth offenders in comparison with other ethnic populations. This study compared Pacific Island violent youth offenders with Māori and European violent youth offenders to determine whether similarities or differences existed in their offending, social, and demographic characteristics. Findings showed that Pacific Island violent youth offenders, in comparison with Māori and European violent youth offenders, were more likely to have grown up in the lowest socioeconomic deprivation areas in New Zealand, were more likely to be older when they first started offending, and their first offence was more likely to be of a serious, violent nature. Family violence was present among all three ethnic groups highlighting the ongoing importance of



intervention in this area. The findings of the current study are likely to have implications for government department policy makers, along with program providers and practitioners. Recommendations are made regarding clinical implications and future research on this population.

### ***Criminal records in the youth jurisdiction***

**Authors:** Nessa Lynch and Kate Peirse-O’Byrne

**Available:** [2016] NZLJ 362

**Abstract:** This article considers the effect of criminal records gained while the individual is a youth (in criminal justice terms, aged 10 to 17 years) in the New Zealand system. The authors suggest that, with the expansion of electronic records and information sharing, and increased emphasis on checking and vetting, transparency around the status and lasting effect of criminal records is required.

### ***Hutt Valley Youth Survey 2015 - Results.***

**Author:** Regional Public Health, Wellington

**Available:** www.rph.org.nz

**Abstract:** 4444 young people from across the Hutt Valley participated in the HVYS, sharing their thoughts about living in the Hutt Valley. Young people identified: ‘things to do and places to go’, ‘close proximity to people and places’, and ‘a good community’ as the three best things about living in the Hutt Valley.

The results also revealed that the biggest issues for young people were: drugs, alcohol and the perception of safety/crime. Improving job opportunities was also a major priority for young people.

Regional Public Health’s Community Action on Youth Alcohol and Drugs (CAYAD) team led the development and implementation of the survey with support from individuals, groups and organisations to develop a survey that focused on localised information about living as a young person in the Hutt Valley.

CAYAD intends for this survey to be used by stakeholders to shape and support work carried out by the local community to enrich the lives of young people living in the Hutt Valley.

### ***Non-adversarial justice: re-imagining law as a healing profession***

**Author:** Warren Brookbanks

**Available:** [2016] NZ L Rev 337

**Abstract:** “The law in many jurisdictions is currently undergoing a sea-change as new models of legal problem-solving begin to occupy some of the spaces that were previously the preserve of a predominantly adversarial justice system. But more than this, a new language has emerged, perhaps counter-intuitively to many observers, whereby law is associated with healing, restoration and non-adversarial practices that are not typical of the ways in which the practice of law has been traditionally conceived. Expressions like restorative justice, collaborative law, holistic law and therapeutic jurisprudence are increasingly common in discourse around the exploration of new approaches to legal problem-solving, and may suggest the emergence of a wholly new approach to the role of law in society. Part of this discourse, as the title to this article suggests, is an investigation as to whether it is right, or even possible, to imagine law as a healing agent, and the legal profession as a healing profession. While I am not suggesting that law generally has reached such a sublime status, I want to test our imaginations to consider what law as a healing agent might look like, in the context of our current system of criminal justice.”



## **AUSTRALIA**

### ***Fighting like a girl ... or a boy? An analysis of videos of violence between young girls posted on online fight websites***

**Authors:** Ashleigh Larkin and Angela Dwyer

**Available:** Current Issues in Criminal Justice 27(3) [2016] 269

**Abstract:** How young women engage in physical violence with other young women is an issue that raises specific concerns in both criminological literature and theories. Current theoretical explanations construct young women's violence in one of two ways: young women are not physically violent at all, and adhere to an accepted performance of hegemonic femininity; or young women reject accepted performances of hegemonic femininity in favour of a masculine gendered performance to engage in violence successfully. This article draws on qualitative and quantitative data obtained from a structured observation and thematic analysis of 60 online videos featuring young women's violent altercations. It argues that, contrary to this dichotomous construction, there appears to be a third way young women are performing violence, underpinned by masculine characteristics of aggression but upholding a hegemonic feminine gender performance. In making this argument, this article demonstrates that a more complex exploration and conceptualisation of young women's violence is required for greater understanding of the issue.

### ***The adolescent brain: Implications for understanding young offenders***

**Author:** Dianna T Kenny

**Available:** Judicial Officers' Bulletin 28(3) [2016] 23

**Abstract:** This article discusses the many complex factors that influence the development of the human brain, highlighting specific aspects during adolescence, how risks to brain development and function affect the behaviour and maturity of adolescents, and implications for juveniles and those who come into contact with them in the criminal justice system.

### ***The relationship between atmospheric lead emissions and aggressive crime: an ecological study***

**Authors:** Mark Patrick Taylor, Miriam K. Forbes, Brian Opeskin, Nick Parr and Bruce P. Lanphear

**Available:** Environmental Health (2016) 15:23

**Abstract:** Lead is toxic to humans and there is emerging evidence linking childhood exposure with later life antisocial behaviours, including delinquency and crime. This study tested the

hypothesis that childhood lead exposure in select Australian populations is related to subsequent aggressive criminal behaviours.

The strong positive relationship between childhood lead exposure and subsequent rates of aggressive crime has important implications for public health globally. Measures need to be taken to ameliorate exposure to lead and other environmental contaminants with known neurodevelopmental consequences.



## **UNITED KINGDOM**

### ***Giving effect to young people's right to participate effectively in criminal proceedings***

**Author:** Raymond Arthur

**Available:** Child and Family Law Quarterly 28(3) (2016) 223

**Abstract:** Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 guarantees the right to a fair trial, including the right of all defendants to participate effectively in their trial. Although psychiatrists and psychologists frequently report that defendants in the youth court are 'unfit to plead', this concept has no formal application in the youth court. This article will examine how the criminal justice system responds to young people who are not capable of participating effectively in their own criminal proceedings as a result of their youth and immaturity inhibiting their understanding and participation in the trial proceedings.

### ***Transgender Juveniles and the Binary Custodial Divide***

**Author:** Nigel Stone

**Available:** Youth Justice 16(2) (2016) 181

Custodial populations are commonly categorised and segregated according to biological sex. In England and Wales (E&W), the Prison Rules 1999 (SI 1999 No. 728) specify (Rule 12(1)) that 'women prisoners shall normally be kept separate from male prisoners'. Invariably, women are held in separate establishments. Although more flexible use of the

prison estate would offer some prospect of locating incarcerated women closer to their home areas, recent experience of both sexes being located within the same establishment (though strictly segregated) has suggested mixed success.<sup>1</sup> That Rule is not replicated in the statutory Rules pertaining to two of the three kinds of establishment housing young offenders. The Young Offender Institution Rules 2000 (SI 2000 No. 3371) and the Secure Training Centre Rules 1998 (SI 1998 No. 472) each specify that trainees ‘may be classified, in accordance with any direction of the Secretary of State, taking into account their ages, characters and circumstances’.<sup>2</sup> Although juveniles have not featured prominently in recent developments in provision for transgendered people, imprisoned or otherwise, this Commentary seeks to take stock of this dimension of custodial justice, having regard to the particular vulnerability of young people who are not readily categorised in line with their biological sex.

***‘It’s harder to go to court yourself because you don’t really know what to expect’: Reducing the negative effects of court exposure on young people – Findings from an Evaluation in Scotland***

Authors: Ross Deuchar and Maria Sapouna

Available: Youth Justice 16(2) (2016) 130

In Scotland, the Whole System Approach to preventing and reducing offending includes the provision of court support for young people under 18 years. This article outlines the insights from an evaluation of one Scottish local authority’s support service. Semi-structured interviews conducted with 26 participants were combined with observation of interactions between support workers and young people, with some additional follow-up statistical analysis of key outcomes. The insights suggest that the court support helped to reassure young people and make them more aware of their rights. It helped many young people to avoid receiving custodial sentences, meet bail conditions, reflect upon their offending behaviour and begin to make alternative choices.

***Policy, Practice and Perceptions: Exploring the Criminalisation of Children’s Home Residents in England***

Author: Julie Shaw

Available: Youth Justice 16(2) (2016) 147

**Abstract:** The criminalisation of young people in response to children’s residential, home-based challenging behaviour remains a persistent problem in the United Kingdom. This article presents research which, through a series of semi-structured interviews and a focus group with professionals from the care and youth justice systems, sought to gain insights into why this might be the case. It was concluded that there is a need to empower residential staff; bring greater objectivity into decision-making processes and raise awareness of how system contact can impact children’s self-perception, and future prospects.

***Early Individual Prevention of Chronic Offenders: The Use of Criminological Theories in the Governance of Swedish Police and Social Services***

Authors: Anders Kassman, Filip Wollter and Lars Oscarsson

Available: Youth Justice 16(2) (2016) 113

Abstract: A national Swedish project was followed in 12 municipalities aimed at youth aged 15–20 years. Neither police nor social services systematically used the indicators based on criminological research and proposed by national authorities. The police and social services thought they had more contemporary and holistic intuitive knowledge than any systematic indicators could provide. Despite implementation difficulties, the project was described as a success at the political level and widely dispersed. The specific and systematic image of early indicators provided momentum at the policy level. The local authorities welcomed the opportunity to reach a group considered difficult to manage.

***Young People, Crime and Justice: Second Edition***

Author: Roger Hopkins Burke

Available: Routledge, 2016

**Abstract:** In the minds of the general public, young people and crime are intrinsically linked; wide-spread belief persists that such activities are a result of the ‘permissive 1960s’ and the changing face of the traditional nuclear family. Roger Hopkins Burke challenges these preconceptions and offers a detailed and comprehensive introduction to youth



crime and the subsequent response from the criminal justice system. This extended and fully updated new edition explores:

The development of young people and attempts to educate, discipline, control and construct them,

Criminological explanations and empirical evidence of why young people become involved in criminality,

The system established by the Youth Justice Board, its theoretical foundations, and the extent of its success,

Alternative approaches to youth justice around the globe and the apparent homogenisation throughout the neoliberal world.

The second edition also includes new chapters looking at youth justice in the wider context of social policy and comparative youth justice.



## UNITED STATES

### ***Fetal Alcohol Spectrum Disorders: Implications for Juvenile and Family Court Judges***

**Author:** National Council of Juvenile and Family Court Judges (NCJFCJ)

**Available:** <http://www.ncjfcj.org/FASD-Guide>

**Abstract:** This technical assistance brief is a publication of the National Council of Juvenile and Family Court Judges (NCJFCJ). The NCJFCJ created this guide with input from juvenile and family court judges and experts from around the country to increase judicial knowledge of FASD, including their implications for court proceedings and case dispositions involving children and families affected by FASD; increase awareness of available resources and services for children and families affected by FASD; and, provide guidance on judicial leadership. The ultimate goal of the guide is to improve outcomes for children, families, and communities affected by FASD.

### ***At Risk Youth, 6th Edition***

**Authors:** McWhirter, J Jeffries, McWhirter, Benedict T. McWhirter, Anna. McWhirter, Ellen Hawley

**Abstract:** This text provides the conceptual and practical information on key issues and problems that students need to prepare effectively for work with at-risk youth. The authors discuss the latest prevention and intervention techniques that will help future and current professionals perform their jobs successfully and improve the lives of young people at risk. New content discusses such new approaches as the flipped classroom and mindfulness approaches; expanded content covers LGBTQI youth, youth with disabilities, immigrant youth, and incarcerated youth, among other topics.



## CANADA

### ***Youth court statistics in Canada, 2014/2015***

**Author:** Zoran Miladinovic

**Available:** <http://www.statcan.gc.ca> (Statistics Canada website)

**Abstract:** Using data from the Integrated Criminal Court Survey (ICCS), this article presents information on youth court cases completed in Canada in 2014/2015. It highlights key youth court indicators such as the number of completed charges and cases, case decisions, sentencing outcomes, and case processing times. This article also presents trends over time and some characteristics of youth who appear in court.

