10 Suggested Characteristics of a Good Youth Justice System

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Introduction

A "good" youth justice system is a specialised system, created with the understanding that young people are not just "junior adults" but developmentally, almost a "different species of human being" with markedly different characteristics and responses than adults. A good system recognises their vulnerability and includes protections that enable them to desist from offending in the future.

It is beneficial to young people to offer them a response, interventions and treatment that is separate to that of adults. Why is this? What is a "youth specific" justice system? What is it that can be offered to young people through these processes that is so beneficial to them? What is it that makes a youth justice system effective?

The following is a summary of ten suggested characteristics that a good youth justice system might contain. Together they comprise what could be called a "Pacific specific, youth focussed, juvenile justice system".

1. Minimum and Maximum Ages for Youth Court Jurisdiction

a. The New Zealand Situation

In New Zealand, the age of criminal liability is 10.[1] A "child" is defined as someone under the age of 14 years and a "young person" is defined as an unmarried person aged 14 or over, but under 17 years of age.[2] Once aged 14, a young person can be charged with any criminal offence and almost all offence types must be brought before a Youth Court. Since 1 October 2010, some 12 and 13 year old offenders will also be heard in the Youth Court, if the offence is serious or the child is a repeat offender.

[1] Crimes Act 1961 (NZ), s 21.

[2] Children, Young Persons and Their Families Act 1989 (NZ), s 2.

Any child or young person who commits murder or manslaughter will have charges laid in the Youth Court. If there is sufficient evidence to proceed to a full trial, the matter is then transferred to the High Court.

New Zealand law also adopts the doctrine of *doli incapax:* a rebuttable presumption that children are criminally incapable. This provides flexibility to ameliorate the potential harshness of a minimum age of criminal liability. New Zealand's limits have been criticised.

b. Rationale for lower age limit

A leading principle in the United Nations Convention on the Rights of the Child ("UNCROC") is that States should set a minimum age below which children are presumed not to have the capacity to infringe the penal law.[3] No specific age is mentioned in UNCROC but the UN Committee on the Rights of the Child has criticised jurisdictions in which the minimum age is 12 years or below.[4] To assist with the difficult question of how the minimum age should be set, the United Nation's Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") explains:[5]

> The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless.

c. What should the lower limit be?

There is legitimate debate as to what is an appropriate lower age limit for the Youth Court's jurisdiction. Certainly, any age below 12 would be heavily criticised (with the exception, possibly, of 12 and 13 year olds who commit homicide offences). 14 could arguably be an appropriate age.

New Zealand has faced trenchant criticism from the UN Committee on the Rights of the Child, for lowering the Youth Court's jurisdiction to 12 and 13 in some circumstances.[6] A widely held rationale for not placing young people before the Youth Court until they are at least 14 is that children who offend are likely to have significant welfare needs that are causative of the offending and that need to be addressed. Placing the child before the criminal courts presents a number of risks such as labelling them an offender for life (or conversely, giving them a "badge of honour" and legitimising offending behaviour), or exposing them to "deviant peer contagion" (negative influences from other offending youth).

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[3] United Nations Convention on the Rights of the Child, Art. 40.3(a).

[4] Norman Tutt et al *Children and Homicide – Appropriate procedures for juveniles in murder and manslaughter cases*, (London, Justice, 1996) quoted in Gregor Urbas, "The Age of Criminal Responsibility, Trends and Issues in Crime and Criminal Justice" (No. 181) (Canberra, Australian Institute of Criminology, 2000) at 2.

[5] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), commentary to art 4.

[6] Committee on the Rights of the Child "Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Remarks: New Zealand" CRC/C/NZL/3-4 (2011) at [54].

d. Rationale for upper age limit

It is also of course a practical requirement, when determining the confines of a Youth Court, to determine an upper age limit. The upper age limit provides the "cut off" point for when a young person is to be treated as a mature and autonomous individual in the adult courts.

e. What should the upper age limit be?

New Zealand's upper age limit of 17 has been met with criticism by the United Nations Committee on the Rights of the Child.[7] The United Nations Convention on the Rights of the Child defines a "child" as a young person up to the age of 18.[8] An upper age limit of 18 would also be consistent with brain science, which makes plain that at 17, the brain is still very much in a state of development.[9] It is suggested that "maturity of judgment" measures (such as responsibility and perspective) are not fully attained until, on average, 20 years of age.[10] Areas of the brain that deal with higher level executive functions (such as impulse control, judgement and managing strong emotion) do not fully mature until well into the 20s.[11] As adolescents, 17 year olds are more prone to risk taking behaviour and peer pressure than adults.[12]

Most other western countries set their upper limit at 18. All of Australia (except Queensland), Canada, Great Britain and 38 states of the United States of America allow 17 year old offenders the right to appear before a Youth Court.[13]

2. Trained Specialists Working with Young People

As mentioned before, a strength of the New Zealand system is the availability of professionals who specialise in working with young people. Youth advocates (lawyers for young people) are universally available to all young people charged in the Youth Court, free of charge and irrespective of the means of the young person and his or her family.[14] The legislation also prescribes that judges should possess

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[7] See for example Committee on the Rights of the Child "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention" CRC/C/15/Add.216 (2003) at [49]; Committee on the Rights of the Child "Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Remarks: New Zealand" CRC/C/NZL/3-4 (2011) at [55].

[8] United Nations Convention on the Rights of the Child, art 1.

[9] See for example Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Office of the Prime Minister's Science Advisory Committee, Wellington, 2011) at 24; Sarah-Jayne Blakemore and Suparna Choudhury "Development of the Adolescent Brain: Implications for Executive Function and Social Cognition" (2006) 47 Journal of Child Psychology and Psychiatry 296 at 300; Sara Johnson, Robert Blum and Jay Giedd "Adolescent Maturity and the Brain: The Promises and Pitfalls of Neuroscience Research in Adolescent Health Policy" (2009) 45 Journal of Adolescent Health 216.

[10] Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Office of the Prime Minister's Science Advisory Committee, Wellington, 2011) at 25.

[11] Ibid, at 24.

[12] Ibid.

[13] See for example Australian Institute of Criminology "Chapter 5: Criminal Courts" in *Australian Crime: Facts and Figures* (Canberra, Australian Institute of Criminology, 2011) at 82 <www.aic.gov.au/en/publications/current%20series/facts/1-20/2010.aspx>; Youth Criminal Justice Act 2002 (Canada) , s 2 (definition of "young person" for the jurisdiction of the court), Crime and Disorder Act 1998 (UK), s 117 (definition of "young person"); Robert Regoli, John Hewitt and Matt DeLisi "The Juvenile Court" in Delinquency in Society: The Essentials (Jones and Bartlett, MA, 2011) at 414 (United States context).

[14] See Children, Young Persons and their Families Act, ss 323 – 352.

special skills for working with young people.[15] There are also specialist Family Group Conference Coordinators[16] who specialise in youth justice, specialist youth justice social workers and a specialist division of the New Zealand Police.

What is the benefit of this? It means that people working in the Youth Courts bring a "youth-centric" approach with them. Without a small amount of knowledge about the characteristics of young people, and of youth offenders in particular, it is all too easy to treat young people simply as "junior adults". First, this can result in responses which may not be fair: as brain science indicates, young people are often not as responsible for their actions as an adult might be. Second, if professionals have some knowledge of young people and how to work with them, they are able to make the process more accessible to young people. It is impossible for young people to engage with the criminal justice system, and make it a meaningful process, if they do not understand it.

3. Limitation upon charging children and young people (and options to discharge young people who perform well in court)

a. Not Charging

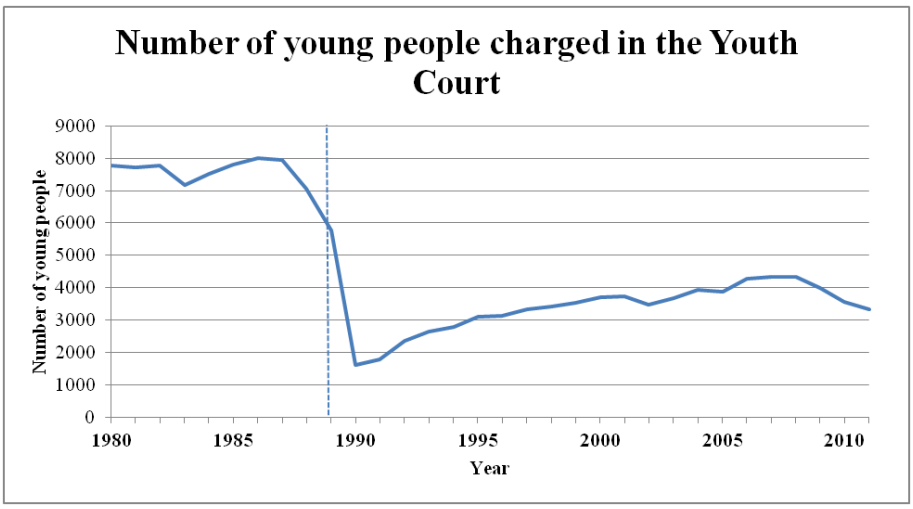
A core principle of the New Zealand Children, Young Persons and their Families Act[17] (and indeed most modern youth justice systems) is that:

> "… unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter."

This legislation, unusually, places the emphasis on *not* instituting criminal proceedings. In New Zealand, this means that young people are referred to the specialist youth division of the police force (Police Youth Aid) instead.

As you can see from the graph below, following the introduction of legislation in 1989 (that has an emphasis on not instituting criminal proceedings), the number of young people before the courts in New Zealand plummeted. Approximately 80% of youth offenders never come to court, meaning that four out of five young offenders are never charged.[18]

[15] See Children, Young Persons and their Families Act, s 435(3)
[16] See Children, Young Persons and their Families Act, ss 425-426.
[17] Children Young Persons and Their Families Act 1989 (NZ), s208(a).
[18] See for example Ministry of Justice "Trends for Children and Youth in the New Zealand Justice System: 2001-2010" (Wellington, Ministry of Justice, 2011).



Source of Image: Ministry of Justice

Police Youth Aid can take two main forms of "alternative action":

1. *Warning:* often given by the attending officer and followed up by a letter from the Youth Aid Officer acknowledging the warning.

2. *Alternative Action:* a diversion plan put in place by the Youth Aid Officer that may include an apology, reparation and/or community work. There is scope for the plan to be as creative and imaginative as the minds of the police that devise it. Usually components of the plan will draw heavily on local resources.

Even if the Police wish to charge a young person, but cannot do so (because the young person has not been arrested) the Police must ask the Government's Child, Youth and Family Service to conduct an "Intention to Charge" Family Group Conference ("FGC"), which is a diversionary option in itself. About one third of the 8,000 FGCs held annually are of this type – they are known as "Intention to Charge" FGCs.

So what is the benefit of taking "alternative action" and not bringing young people before the court? Most fundamentally, it works. It is estimated that around 83% of young people who go through alternative action never reoffend. Alternative action recognises that many young people who offend are acting in a way that brain science indicates they are predisposed act: taking one bad risk or acting on an impulse. They are "desisters" who, if treated appropriately, do not run a risk of offending again.

However, once in the formal criminal justice system young people are far more likely to reoffend. Why? First, the formal criminal justice system runs the risk of labelling them as an offender, which can shape their future behaviour. Formal punishment runs the risk of exposing them to "deviant" peers, who can also shape their future behaviour. Second, it gives them a criminal record which can greatly affect their future prospects, hindering, for example, career opportunities.

In summary, firm, prompt, community-based alternative action, outside of the formal criminal justice system should be a core focus of any good youth justice system.

b. Ability to Absolutely Discharge a young offender

In New Zealand, if a young person who appears before the Youth Court has completed a Family Group Conference ("FGC"), there is an opportunity for a discharge: "as if the charge were never laid".[19] This means that if a young person fulfils the plan set out in the FGC, that young person can enter adult life with a clean slate, a "second chance". Discharge without conviction is a way to mitigate the potentially harsh long-term effects of exposing a young person to the criminal justice system. For example, it reduces the risk of "labelling" the young person as an offender for life, and is better for their long term prospects (e.g. employment). It also provides an incentive for young people to successfully carry out their FGC plan in the first instance. The ability to discharge without conviction provides a way to positively reinforce the values and goals contained in the FGC plan.

4. Timely decision making and resolution of charges

Scientific research consistently presents the idea that a young person's sense of time is different to that of an adult.[20] This means that in most circumstances, a protracted legal proceeding will seem longer to a young person than it will to an adult. This can directly impact on both the young person's ability to credibly participate in proceedings and carry out key functions of a trial such as giving evidence. It can also cause great stress to the young person.

New Zealand's legislation expressly acknowledges this by providing that wherever practicable, decisions affecting a child or young person "...*should be made and implemented within a time-frame appropriate to the child's or young person's sense of time".*[21] Furthermore, the legislation recognises the potentially detrimental effects of a significant delay in proceedings. It enables a Youth Court Judge to dismiss any information charging a young person with the commission of an offence if the Judge finds that the time elapsed between the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.[22]

5. Delegation of decision making to families, victims and communities

The New Zealand youth justice response takes the revolutionary step of (partially) transferring decision making power from the State to families, victims and

[19] Children, Young Persons and their Families Act, s 282.
[20] See for example *Churchward v R* [2011] NZCA 531: the court acknowledged a clinical psychologist's report which stated that young people have "less future orientation" than adults (at [11]) and discussed the need to consider a young person's sense of time (at [87]). See also for example James E Bruno "Time Perceptions and Time Allocations Among Adolescent Boys and Girls" (1996) 31 Adolescence 109, and B J Casey, Rebecca Jones and Todd Hare "The Adolescent Brain" (2008) 1124 Annals of the New York Academy of Sciences 111(discussion of young people's perceptions of future outcomes at 118 and 122).
[21] Children, Young Persons and their Families Act 1989, s 5(f).
[22] Children, Young Persons and their Families Act 1989, s 322.

communities through its Family Group Conferencing system.[23] Family Group Conferencing was introduced with the Children, Young Persons and their Families Act in 1989 and is often described as the "lynch-pin" of New Zealand's youth justice system.

Family Group Conferences ("FGCs") allow the offender, the offender's family, the victim, the Police and other youth justice professionals to meet to discuss and make decisions, recommendations and plans for the young person.[24] FGCs may take place both pre-charge, to determine whether a prosecution can be avoided, and also post-charge to determine how to deal with cases admitted or proved in the Youth Court. At a standard FGC which results from a charge that is "not denied" in the Youth Court, the young offender is given the opportunity to discuss the offence and accept responsibility for it, discuss possible causes of the offending, to take part in the formulation of a plan to rectify those causes and to put right the harm caused by the offending.

Why is this (partial) transfer to families, victims and communities such a positive characteristic in a youth justice system?

First, a Judge sitting in Court can never fully understand a young person and their situation in the way the young person's family does. The best and most relevant solutions to youth offending are often found in a young person's community. There may be unresolved issues in that young person's life or family that need to be addressed before any Youth Court order can be effective. The FGC empowers families and communities to take some responsibility for the young person and their offending, and to use their extensive knowledge to find the best solution for the young offender.

Second, the FGC process allows for a more culturally appropriate response to offending for young people and their families. For example, it allows for the family to meet wherever they feel most comfortable, which can mean better engagement in the process from the young person and their family. In New Zealand, this approach has been found to accord better with Māori notions of collective, rather than individual, responsibility. The FGC model is more consistent with Māori worldviews than the formal criminal justice response, but is not an overtly Māori model.

Further, victims often find the restorative justice process helpful in coming to terms with what has happened to them: they are central to the process, have the opportunity to speak directly to the offender, and to be involved in the final decision. Some find it a healing experience. In a survey of 100 victims who attended FGCs in New Zealand, 90% reported having been treated with respect, 88% reported understanding what was going on, 83 % reported having had a chance to explain the effect of the offending on them, 86% reported having had the opportunity to say what they wanted, and 71% claimed that their needs were met.[25]

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[23] Judge McElrea , "*New Zealand Youth Court: A Model for Development in other Courts*?", Paper prepared for the National Conference of District Court Judges, Rotorua, New Zealand 6-9 April 1994, at 3-4.

[24] For a full list of who can attend a Family Group Conference, see Children, Young Persons and their Families Act, s 251.

[25] Gabrielle Maxwell, Venezia Kingi, Jeremy Robertson, Allison Morris and Chris Cunningham *Achieving Effective Outcomes in Youth Justice: Final Report* (Wellington, Ministry of Social Development, 2004), 155.

This is not to say that the FGC process always functions perfectly. Far from it. The effectiveness of an FGC is compromised when key players, such as family members and victims, cannot attend. The same research that showed victims were satisfied with FGCs also showed that victims only attend around half of all FGCs held.[26] A strong FGC process requires good attendance (often which there is not: victims, in particular, often do not attend) and a strong FGC co-ordinator who facilitates the conference in a way that is appropriate for the family involved. It must also meet timeframes that are young person friendly.

Nonetheless, delegation of responsibility to families, victims and communities is a vital, and effective, characteristic of a good youth justice system.

6. Duty to encourage participation

The following discussion of participation by young people will address both participation in the "out of Court" process (in New Zealand, the FGC) and participation in the actual Court hearing.

Article 12 of UNCROC states that young people must be given the opportunity to both express their views and to have them taken into account in all matters affecting them, particularly in any judicial or administrative proceedings. Article 12.2 articulates:

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Why is it so important to encourage young people to participate?

a. Encouraging Participation in the Family Group Conference Process

The Family Group Conference process provides the main forum for participation by young people. FGCs are intended to increase the offender's awareness of the human impact of their behaviour and provide them with an opportunity to take responsibility for their offending. Therefore, FGCs endeavour to make young people feel a part of, rather than apart from, the proceedings.[27] The face-to-face meeting with the victim forces the young person to confront the effects of their conduct in human terms.[28]

FGCs expect and facilitate active participation by the young person in discussions. The young person is invited to:

- openly discuss possible causes of offending;

[26] Ibid, at 84.
[27] Allison Morris and Gabrielle Maxwell, *Juvenile Justice in New Zealand: A New Paradigm* (1992) Submitted to the ANZ Journal of Criminology, 7.
[28] His Honour Judge DJ Carruthers *Restorative Justice and Juvenile Justice: A Comparison of the Singapore and New Zealand Experience*, (Unpublished, 2002)13.

- participate in the formulation of a plan to rectify the causes of offending and repair the harm caused by it;
- present the plan to other FGC participants;
- apologise and express remorse to the victim;
- answer any questions posed by the victim; and
- where relevant, present the plan to the Judge when the matter returns to the Youth Court.

The physical inclusion of the offender in the sanctioning process reaffirms that they have a vested interest in the outcome. In contrast, exclusion from the process signals that the offender's concerns are minor or unworthy of consideration, perpetuating feelings that often underlie offending. Importantly, the offender's inclusion is not a result of an intention to shame, but rather an intention to help them to understand the harm caused and to support them in taking full responsibility for that harm.[29]

Beyond that, the active participation of a young person in an FGC also has highly positive flow on effects. At an FGC a young person is given the autonomy to participate in the decision-making process and the freedom to accept or reject a particular decision. Allowing the young person to have some degree of control over sanctioning procedures can empower that person. Importantly, it can instil a sense of "ownership" in the process and outcome, and can engender respect for both the outcome itself and the parties who worked together toward a resolution.[30] Allowing young people to have a say in how best to deal with their offending also aids in holding young offenders accountable for their actions.[31]

Active participation by the young person in an FGC can also facilitate an expression of genuine remorse by the offender,and initiate healing. By accepting responsibility for the offence and acknowledging the harm caused, the offender signals an affirmation of the community's legal norms and the desire to be part of the wider community. It thereby provides the first step towards re-integrating the young person back into the community.[32]

b. Encouraging Participation of Young People in the Court System

While the FGC is the central mechanism for ensuring participation by young people, their involvement in formal Court processes is also important. In New Zealand, involvement from the young person is useful in decisions such as confirming an FGC plan, and determining what formal orders should be made (if any).

New Zealand has given legislative effect to these principles in sections 10 and 11 of the CYPF Act. Under section 10, where a young person appears before the Youth Court, the Court and counsel are under a duty to explain, in a manner and in

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[29] Erik Luna "Restorative Justice" NZIDR Lecture, 5 July 2000 <www.scoop.co.nz/stories/GE0007/S00014.htm>.
[30] Ibid.
[31] Allison Morris, *Family Group Conferences: Revisiting Principles, Practices and Potential*, in *Youth Justice in Focus: Conference Proceedings,* Institute of Criminology, Victoria University of Wellington, 1998, 177.
[32] Luna, above n 29.

language that the young person can understand, the nature and legal implications of the allegations and ensure that the young person understands the proceedings.

Participation is encouraged by section 11 CYPF Act which states:

> Where, in any proceedings under this Act, a child or young person appears before a Family Court or a Youth Court, that Court and the barrister or solicitor representing the child or young person shall, where necessary and appropriate, encourage and assist the child or young person to participate in those proceedings to the degree appropriate to the age and level of maturity of the child or young person.

In New Zealand, encouraging young people to participate in Youth Court hearings has proven to be more difficult than getting them to participate in the FGC process. Youth Court Judges often encourage families and young people to participate but the success of this is very dependent on the presiding Judge and, as ever, time constraints. In the past, the Court has been challenged for its formality and alienating processes. Morris & Young showed that young people and their parents did not feel able to participate in proceedings and did not understand them properly. For example, one young person spoke of having been "abolished and discharged".[33] Participation by young people in the Youth Court process is a fundamental tenet of New Zealand's Youth Court system and encouraging meaningful participation should continue to be a priority.

Encouraging participation in the court system is a means of encouraging the young person to take ownership of their actions and assisting in their reintegration back into society. Also, as the court system can be technical and complicated, encouraging young people to actively participate provides a means of ensuring understanding of the process.

7. "Evidence-based" therapeutic approaches to offending

Therapeutic approaches to offending aim to address underlying issues that may be causative of offending. A truly therapeutic approach would involve creating programmes for young offenders that are "evidence-based" (ie there is research to say that they work). It could also involve the provision of special courts, or a special list within the mainstream court system, to deal with specific problems that young people who have offended may face. For example, New Zealand has specialist Drug Courts for young people, which provide intensive monitoring of young people with addictions to drugs.

It is important to identify approaches that are considered to be "evidence-based" and therapeutic.

[33] Emily Watt, *A History of Youth Justice in New Zealand* (Wellington, 2003) <www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf/view?searchterm=emily%20watt>.

a. What Doesn't Work?

Research shows that responses to youth offending that are focussed solely on deterrence, supervision and punishment are often ineffective.[34] There will be times when, in the interests of protecting the community, punitive responses and prison will be necessary. These responses do not work to reduce re-offending and may in fact make the situation worse. Treatment is a vital component of most youth offending responses. Many approaches, such as intensive supervision and drug testing, only effect change in the young person's behaviour if they are coupled with a rehabilitative element.[35]

This is probably because punishment and deterrence do not address factors that put young people at risk of offending, or teach them new skills to succeed in conventional life. Having a "fear of punishment" has not been found to have any relationship to offending and, in fact, some research shows that young people who believe they will be caught and punished severely actually commit *more* crime.[36] For this reason programmes designed to scare young people "straight", including prison and morgue visits are usually ineffective. It is important to remember that young people may have a myriad of reasons for offending - thrills, impulsiveness, substance abuse, mental unwellness, poverty, peer pressure and the influence of family members to whom going to prison may seem like a normal part of life. Fear of punishment is insufficient to overcome these factors.

Programmes that intervene in children and young people's lives must deal with as many of the identified needs as comprehensively as possible – and they must target the problems and strengths that are related to the actual offending.[37] Programmes that build fitness or increase self-esteem are useful but are unlikely to have any impact on recidivism. Effective services must also set out clearly defined goals, co-ordinate well with other service providers and use a variety of techniques and approaches. For example, "boot camps" or "military style camps" for young offenders are a perennial favourite with politicians, but numerous studies have shown that they have little effect in reducing offending. If a "boot camp" approach is used, it is important that the programme targets the needs of the young person and issues related to the actual offending.

Of itself, a curfew is usually ineffective in reducing offending but when combined with parental rules, affection and positive attention by parents, a curfew can be a useful intervention. Restitution is another intervention that must be combined with other services such as probation, supervision, rehabilitation, family/parent counselling and academic enhancement in order to have a positive impact.

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[34] This section is based on K McLaren, *Youth Offending Teams: What Works to Reduce Offending by Young People, e-flash 18* (Ministry of Justice, Wellington, New Zealand, 2005) and K L McLaren, *Youth Offending Teams: What Doesn't Work to Reduce Offending by Young People, e-flash 19* (Ministry of Justice, Wellington, New Zealand, 2005).

[35] K McLaren, *Youth Offending Teams: What Works to Reduce Offending by Young People, e-flash 18*, above n 34, at 2.

[36] K McLaren, *Youth Offending Teams: What Doesn't Work to Reduce Offending by Young People, e-flash 19*, above n 34, at 4.

[37] An exception to this is work skills which have been shown to effect long-term change as long as the young person finds employment.

Long periods of incarceration have been found to be ineffective in reducing offending but the New Zealand experience shows that when prisons provide effective treatment through programmes, a positive impact on offending can be achieved. Intensive supervision involves staff spending large amounts of time with clients and being very strict about rule breaking but it has not been found to be effective unless it is used alongside rehabilitative services.

b. What Works?

Where possible, programmes should specifically target the risk factors described. Ideally, all these needs and problems should be addressed by one intervention so that young people and families do not need to travel to several locations and can avoid issues with various services not providing co-ordinated services. Research shows that accessibility is an important factor in a young person completing a programme.

Effective programmes provide services which:

- Teach young people how to manage their emotions, particularly anger, and how to manage impulsiveness.
- Teach effective violence prevention skills, for young people and parents.
- Treat substance abuse using effective techniques.
- Teach relapse prevention skills.
- Teach parenting skills such as reasonable rules and discipline, the importance of knowing where their children are and what they are doing, affection and acceptance.
- Provide practical support for families with financial matters, particularly making sure they are not living in poverty.
- Increase social skills among young people and get them involved in positive activities where they can make law-abiding friends.
- Improve attitudes to school, attendance and academic performance.
- Help families cope positively with poor neighbourhoods or move to less risky neighbourhoods.

The most effective interventions target young people who have a longer, more serious offending history and who are more likely to offend again rather than youth who have committed few and/or petty crimes. Effective interventions also incorporate multiple components (e.g. education, work skills and substance abuse), address multiple needs and strengths (such as anger management, thinking skills and making law-abiding friends) and work in multiple environments. The more characteristics of effective practice that a programme incorporates, the more impact it has on offending. Programmes that work across several areas of a young person's life – such as family, peer group and school – are more likely to be effective than those that work in only one area.

For non-residential programmes, involvement with the young person for six months, with contact as often as once a day, is optimal. The same time frame appears effective with live-in programmes, but here continuous treatment is most effective – that is, having treatment incorporated into every aspect of the day-to-day regime. Long periods of residential treatment do not appear to be effective, in part because of the harmful impact of living alongside other criminally inclined youth.

Effective staff is a key determinant of the usefulness of programmes addressing youth offending. Staff who can relate to young people, who model good behaviour and who ensure that the programme in fact runs as it was intended to, can ensure that an intervention is effective – as long as the intervention is of the type identified under the "what works" section in the first place. Research has shown that programmes run by adults are more effective than those run by young people.

8. Ability to refer to Care and Protection where there is an overwhelming need

Most serious youth offenders, in one way or another, bring with them past and/or present care and protection deficits. International research confirms a causal connection between maltreatment of children and youth offending.[38] Such young people present a difficult challenge to the criminal justice system. On the one hand their backgrounds of abuse and environmental dysfunction categorise them as vulnerable victims in need of help. Often it is this background that is causative of offending in the first place, and it needs to be addressed to prevent future offending. On the other hand, their offending demands accountability. This raises the following fundamental questions. These questions can never be asked enough.

1. When and on what basis, should offences committed by children and young people be seen primarily as a result of care and protection failures (requiring resolution in the Family or Care Courts)? Put another way, when and on what basis should offences be dealt with as intentional breaches of the criminal law by autonomous, responsible individuals requiring resolution in the criminal courts? This raises the issue of how care and protection issues are to be recognised and importantly, how it is to be adduced that those issues have been causative of offending. It also raises the profound risk of criminalising what is essentially a welfare issue. More importantly still, it bears on the issue of the age of criminal liability because the younger an offender with care and protection issues is, the more they are seen as a product of their family and not fully culpable.

2. At the stage when the law does require that child and youth offenders are dealt with in the criminal Court, to what extent should any underlying care and protection issues that may have contributed to their offending be addressed, in the criminal Court rather than the Care or Family Courts? Addressing such issues in the Criminal Courts, especially to the extent necessary to fully resolve them, runs the risk of "welfarising" and prolonging the justice response, and compromising the principle of proportionality of response.

[38] Anna Stewart, Susan Dennison and Elissa Waterson, *"Pathways from Child Maltreatment to Juvenile Offending* (No 241)(Canberra, Australian Institute of Criminology, 2002).

A strong youth justice system enables flexibility to deal with both of these issues: the need for justice, and the need to address a young person's care and protection deficits. The criminal courts are unlikely to be the best, and are arguably not the most appropriate, place to deal with care and protection needs. In New Zealand, our legislation recognises this and states that "… criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau, or family group."[39] However, it also provides the opportunity for a referral out of the court and to welfare services if a young offender[40]or a child[41]is considered to be in sufficient need of care and protection. This means that where the need of the young person or child is overwhelmingly care and protection, this is able to be dealt with and the criminal court system is not overwhelmed with the task of solving problems that require care and protection to be addressed.

9. Minimal Use of Incarceration/Custodial Sentences

Detention in both adult prisons, and in facilities with other youth, is a particularly poor response to youth crime.

a. Imprisonment

There are numerous negative psychological and behavioural consequences for young people who are imprisoned as adults, and with adult offenders.[42] While adults adapt to the custodial system, children and young persons may be *adopted* by it.[43] Marginalised youth may learn to fit in to the prison culture and continue to use that culture's norms upon release. Stealing another person's shoes, violence or joining a gang are normal behaviours from the viewpoint of a "custody culture" which prizes power, status and indifference to the predicament of the other person.[44]

Although young people might be adopted by the custody culture, some find it is every bit as dysfunctional as their "birth" families. Young inmates may experience intimidation and bullying by older inmates.[45] Verbal, physical, sexual and emotional abuse is particularly likely for those incarcerated for the first time, those that are small, from a middle class background, are effeminate in behaviour or lack

[39] Children, Young Persons and Their Families Act 1989 (NZ), s208(b).
[40] Children, Young Persons and Their Families Act 1989 (NZ), s280.
[41] Children, Young Persons and their Families Act, s 280A
[42] Adams, 1992; Bishop & Fraser, 2002; Bishop et al., 1996; Calabrese & Adams, 1990; Lane et al., 2002; Taylor, 1996; Tie & Waugh, 2001 quoted in Dr Ian Lambie, *The Negative Impacts on Juvenile Offenders Incarcerated in Adult Prisons*, paper still currently in draft (Auckland, New Zealand).
[43] Barry Clark & Thomas O'Reilly-Fleming (eds) *Youth Injustice: Canadian Perspectives* (Toronto, Canadian Scholars Press Inc, 1993) 189, at 194 quoted in Ross Gordon Green and Kearney F Healy, *Tough on Kids: Rethinking Approaches to Youth Justice*, (Purich Publishing Ltd, Saskatoon, Saskatchewan, Canada, 2003) at 23.
[44] Jerome Miller, *Prison and Its Alternatives*, Ideas (CBC Radio transcript, 1996) quoted in Green and Healy, above n 43, at 23.
[45] Department of Corrections, *Young Male Inmates* (fact sheet) quoted in Judge Andrew Becroft "Alternative Approaches to Sentencing" (CMJA Triennial Conference, Toronto, Canada, 2006 < http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/alternative-approaches-to-sentencing>.

"streetwise" knowledge.[46] Further, juveniles in adult prisons are at greater risk of suicide.[47]

Young people do not have the same developmental level of cognitive or psychological maturity as adults.[48] They are more vulnerable to provocation, duress or threatening behaviour and are particularly influenced by peer approval and fear of rejection.[49] Accordingly, young people are more likely to react unlawfully to a threatening or provocative situation and, once in prison, are more likely to be negatively influenced by its "custody culture". It is little surprise then that incarcerated youth are at high risk of serious re-offending.[50]

Although many prisons provide some separate, specialist units to deal with vulnerable young people, which include rehabilitative programmes, counselling and vocational training, it is preferable for young people to be kept out of prison altogether. The benefits of incarceration do not outweigh the disadvantages and an adult prison is not a sufficiently rehabilitative option for youth.[51]

The majority of young people will grow out of offending if they are kept away from the criminal justice system, are made accountable for their actions and are given the right support.

b. Detention With Other Young People

Detention with other young people also poses many of these same risks to young offenders.

Furthermore, it poses the risk of "deviant peer contagion". Deviant Peer Contagion refers to 'inadvertent negative effects associated with intervention programmes that aggregate peers in the delivery of a therapeutic protocol, educational service, or community programme.' [52] The evidence for this phenomenon has been extensively reviewed and compiled in a recent volume from the United States.[53] The basic thesis is that the placement of high-risk young people in group settings with deviant peers has the potential to worsen his or her problems. Deviant behaviour is concentrated in groups such as gangs where deviant behaviour is committed. Apart from deviant peer contagion in naturally occurring groups, the recent hypothesis is that this

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[46] Maitland & Sluder, 1998 quoted in Dr Ian Lambie, *The Negative Impacts on Juvenile Offenders Incarcerated in Adult Prisons*, at 6, quoted in Judge Andrew Becroft "Alternative Approaches to Sentencing" (CMJA Triennial Conference, Toronto, Canada, 2006 <http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/alternative-approaches-to-sentencing>.

[47] Lambie, above n 42.

[48] Steinberg & Scott, 2003 quoted in Lambie, above n 42.

[49] Moffitt, 1993 quoted in Lambie, above n 42.

[50] Dr Nick J Wilson, *Assessment, Treatment and Management of High Risk Incarcerated Youth Offenders*, (Department of Corrections, Wellington, New Zealand), quoted in Judge Andrew Becroft "Children and Young People in Conflict with the Law: Asking the Hard Questions" (World Congress of the International Association of Youth and Family Judges and Magistrates, 2006) <http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/children-and-young-people-in-conflict-with-the-law-asking-the-hard-questions>.

[51] Lambie, above n 42, at 4.

[52] Kenneth Dodge, Thomas Dishion and Jennifer Lansford "Chapter 2: Deviant Peer Contagion in Interventions and Programs An Ecological Framework for Understanding Influence Mechanisms" in Dodge et al *Deviant Peer Influences in Programmes for Youth,, Problems and Solutions* (New York, Guilford Press, 2006) at 14.

[53] Dodge et al, above n 52. This research was developed over 3 years of collaborative research and systematic analysis of problems and solutions.

phenomenon occurs in groups designed to treat or reduce the behaviour. This is called the iotrogenic effect.

It can also be argued that group placements should be a last resort only, because young offenders will be negatively labelled, both internally, and externally as a result of their segregation. They will also find it harder to develop and practice social and relationship skills outside the residential environment.[54]

10. Keeping the Young Person with their Family and Community

The previous section has already detailed the many risks of aggregating young people in groups with others who exhibit similar behaviour.

Conversely, there are many positive outcomes that emerge from keeping a young person with their family and within their community. The young person does not have such a complex and long-term reintegration process to complete. The family and community are asked to take some responsibility for the young person. The family unit may even be given an opportunity to strengthen in the process.

Osgood and Briddell[55] point to studies of multi-systemic and multi-dimensional programmes that are non-residential and concentrate on developing connections between young offenders and key adults in their family and community. The authors quote a study that showed reductions in official and self-reported delinquency after participation in a 'multi-dimensional treatment foster care' programme (partly due to the fact that the opportunities for negative peer influence were reduced).[56] The particular programme in question also succeeded in improving youth-adult relationships, increasing discipline, and enhancing supervision.

In the justice context, Dodge, Lansford and Dishion recommend alternatives to incarceration and deviant group placement which involve family and community groups in the treatment of young people. Promising, cost-effective alternatives are Functional Family Therapy (FFT) and multi-systemic therapy (MST)[57] and Multidimensional Treatment Foster Care Evaluation.[58]

a. Functional Family Therapy

FFT targets youth who have problems with delinquency, substance abuse or violence and focusses on improving and strengthening the functioning of the family unit. FFT is a short-term programme delivered by therapists, normally in the home setting.[59]

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[54] Peter Greenwood "Chapter 15, Promising Solutions in Juvenile Justice" in Dodge et al, above n 52 at 289

[55] Osgood, W and O'Neill Briddell, L "Chapter 8, "Peer Effects in Juvenile Justice", in Dodge et al, above n 52, at 141-161

[56] Ibid, at 153.

[57] D Kenneth Dodge, Thomas Dishion and Jennifer Lansford "Chapter 20, "Findings and Recommendations: A Blueprint to Minimize Deviant Peer Influence in Youth Interventions and Programmes" in Dodge et al, above n 52 at 385.

[58] Wayne Osgood and Laine O'Neill Briddell "Chapter 8, "Peer Effects in Juvenile Justice" in Dodge et al, above n 52 at 153.

[59] Peter Greenwood "Chapter 15, Promising Solutions in Juvenile Justice" in Dodge et al, above n 52 at 287

b. Multisystemic Therapy

The purpose of this approach is to assist parents to deal effectively with their youth's behavioural problems. Help is provided to disengage youth from their deviant peers and with poor school performance. MST addresses barriers to effective parenting and helps parent build a support network. MST is generally provided in the home, school and other community locations.[60]

c. Multidimensional Treatment Foster Care Evaluation

This approach is based on close monitoring and supervision by trained foster parents so that the young person is not able to interact with deviant peers. In two randomised trials MTFC boys had "significantly lower rates of official and self-reported delinquency at the 12-month follow-up and lower rates of violent offending than did group care youth…"[61]

In summary, there are many viable alternatives to segregating a young person from their family and community, and many positive flow on effects that emerge for the young person and their family in doing so.

Another Ten Point Plan for Fair and Effective Criminal Justice for Children

Attached is a Ten-Point Plan recently released by the organisation, "Penal Reform International". It raises similar issues as are addressed in this paper.

Notes:

1. This paper was adapted from a joint paper by Principal Youth Court Judge Andrew Becroft and Judge Chris Harding for the The Pacific Judicial Development Programme, Family Violence and Youth Justice Workshop,12 – 15 February, 2013 in Port Vila, Vanuatu which was itself adapted from a paper by Principal Youth Court Judge Becroft , Conference on the Rehabilitation of Youth Offenders, "A New Zealand Perspective,"Singapore 20-21 November 2006.

2. The assistance of Emily Bruce former research counsel to the Principal Youth Court Judge, and Sacha Norrie, current research counsel, is acknowledged.

[60] Peter Greenwood *Changing Lives: Delinquency Prevention as Crime-Control Policy*, (The University of Chicago Press 2006) at 72.

[61] Kenneth Dodge and Michelle Sherrill "Chapter 6: Deviant Peer Group Effects in Youth Mental Health Interventions" in Dodge et al, above n 52 at 107.