The Youth Courts of New Zealand in Ten Years Time: Crystal Ball Gazing or Some Realistic Goals for the Future?

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Introduction

When I accepted the invitation to prepare a paper about what the Youth Court might look like in the future, it seemed a relatively straight forward assignment. After all, who could resist the temptation to indulge in some crystal ball gazing? As it turns out crystal ball gazing is not all that easy or even useful. Instead this paper assumes the more modest aim of suggesting what our Youth Courts might look like in just ten years time.

The difficulty with crystal ball gazing is that the lens through which one views the future is inevitably shaped, and limited, by current practice, experience, understanding and a sense of what is realistic today. But all this will change, probably significantly and certainly rapidly. The Youth Court in several decades time will therefore be unimaginably different. For instance, it has been said that the 2010s will be the decade of the teenage brain. We are experiencing an unprecedented change in our understanding of teenage development. The major changes to our Youth Court will be shaped by these new understandings, and other factors that we cannot even predict. So my crystal ball exercise, without knowledge of these “unimaginable changes”, would only be to think of a more perfect or developed model of our current Youth Court. So that is why I am settling for something less ambitious in this paper. I have restricted myself to five observations as to what our Youth Court might look like in 10 years time.

Mind you, if I did allow myself some entirely personal judicial dreaming, I could easily enough imagine a quite different Youth Court. It would be fully self-contained with a small group of specialist full-time Youth Court Judges, all drawn from the ranks of experienced District Court Judges. A Court where all youth offending is dealt with under the same roof. Jurisdictionally, it would be a fully self-contained and standalone Court. A Court with qualitatively different processes in every way. The bizarre jurisdictional inconsistencies that we currently endure would long have been removed. For instance, non-imprisonable traffic offences (not now within the Youth Court jurisdiction unless associated with imprisonable offences arising out of the same circumstances) would all be heard in the Youth Court. Boys in short trousers would not be mixed up in the adult court lists for careless driving with the likelihood of a conviction – when they would have received a better outcome (a possible absolute discharge) if they had assaulted the police officer at the time and thus been within the Youth Court’s oversight. Murder and manslaughter charges could also be dealt with in the Youth Court, with properly authorised High Court Judges – just as they do now in Western Australia. Jury trials could be heard in the Youth Court. And all “fine only” traffic infringements would be recorded in youth justice statistics. Young people undergoing an “Intention to Charge Family Group Conference” would be provided with legal representation by Youth Advocates in the same way as current practice when they are charged in the Youth Court, as is recommended in the 2002 Youth Offending Strategy. The minimum age of criminal responsibility would not be 10 but more like 12, as recommended by the United Nations. The maximum age of Youth Court jurisdiction, based on our current brain science alone, and not taking into account what is probably to come, would be 17, as mandated by the United Nations instruments. I would dream of a New Zealand youth justice system which would be United Nations compliant – just as we have signed up to be.

I could also dream about every young person coming to the Youth Court with his or her own MRI scan, gene map, and full brain chart revealing all known neuro-developmental disorders and with precise calculation of their actual developmental age rather than relying upon the rather arbitrary age limits we currently use. In other words, a young person would be dealt with in the Youth Court jurisdiction after a clear scientific examination assessing the actual state of their psycho-social and cognitive development. All Youth Advocates, Lay Advocates, Judges, and, for that matter, all those
involved in the field, would be fully trained and experts in brain science and interpreting scientific brain mapping – in much the same way we now all use Google Maps. These scientific advances will be all within our reach in the next 50 years.

But while I could share some dreams for the future like this, I won’t. This sort of dreaming would probably be put down to a Judge’s flight of fancy. And I need to be careful not to breach constitutional conventions and well understood restraints on judicial activism. These are all issues that I hope can be debated within the youth justice, and wider, community. These issues are outside of the judicial scope and are properly matters for the legislature to make final decisions about. However, these are all matters of current international debate and so it is important that we also identify areas for discussion and development in Aotearoa New Zealand.

So, enough. I return to my self-imposed 10 year time limit and simply suggest where our Youth Court could be in 2025. Unavoidably, I start with our existing legislation, framework and processes in mind. Legislation which is usually regarded as sound, but not yet fully implemented. Twenty five years since its introduction, its original vision and promise is not fully delivered upon. On that basis, the five areas I have identified where the Youth Court could look somewhat different in 10 years time, may be seen as unimaginative and rather dull. But, they are all important areas where I hope progress can and will be made. What I suggest are not five futuristic predictions about a wholly different Youth Court, but five areas which develop current trends and issues. The five areas that are identified in this paper are:

1. Greater understanding diagnosis and response to neuro-developmental disorders;
2. Addressing disproportionate Māori offending rates in the youth justice system and in the Youth Court in particular;
3. Wider, more developed role and more supported input for Lay Advocates;
4. A fully therapeutic Youth Court with monitoring for all serious young offenders and an end to a two-tier and rather regional idiosyncratic approach; and
5. Significant advancement in our response to female offenders, role of education in addressing youth offending and developing the academic and jurisprudential youth justice arena.

If New Zealand’s Youth Court was transformed to fully address and implement changes in each of these five areas, it would be a significantly improved and enhanced Youth Court, certainly from the standpoint of our 2015 perspective. We would have made some enormous strides and could say truly that the vision and promise of the 1989 legalisation had been signed up for, sealed and delivered upon. At any rate, it is my hope that having settled for this rather modest list, it will stimulate thinking and lead to practical change.
1. Greater understanding, diagnosis and response to neuro-developmental disorders

The cognitively challenged are before our Courts in unknown numbers.
We prosecute them again, and again, and again.
We sentence them again, and again, and again.
We imprison them again, and again, and again.
They commit crimes again, and again, and again.
We wonder why they do not change.
The wonder of it all is that we do not change our expectations rather than trying to change them - Judge Carlie J. Trueman, Provincial Court of British Columbia

Youth justice has entered the era of the teenage brain. The connection has now been made between neuro-developmental disorders and youth offending, and there is no going back. A recent study by the Office of the Children’s Commissioner for England\(^2\) has found a staggering prevalence of neurodisability is the youth offending population. While no similar comprehensive research has taken place in New Zealand, there is every reason to suggest that similar prevalence rates exist.

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

We now know that many young offenders will have some form of neurodisability such as Traumatic Brain Injury (TBI), Foetal Alcohol Spectrum Disorder (FASD), Autistic Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), speech and communication disorders, a specific learning disability (eg dyslexia), or often, a combination of these. Some will also have a neuro-psychological disorder, particularly conduct disorder.

A Neurodisability in the context of youth offending?

Neurodisability is related to a number of risk factors for the development of criminal behaviour patterns.\(^3\) This is because those with neurodisabilities have characteristics that increase the likelihood of offending, such as hyperactivity and impulsivity, low intelligence and cognitive impairment, alienation and aggressive behaviour.\(^4\) The effect of conditions such as low impulse control and social immaturity may contribute, for example, to harmful sexual behaviour. They can also lead to life

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\(^4\) Hughes and others, above n 1, at [3.5].
choices that increase the likelihood of offending; young people exhibiting a sense of alienation, combined with cognitive impairment, are particularly vulnerable to gang culture and anti-social behaviours. A young person with a neurodisability is also less likely to have protective factors that “moderate the effects of exposure to risk”, such as resilience, a sense of self-efficacy, a positive and outgoing disposition, and high intelligence.

Judge Catherine Crawford of the Western Australia Children’s Court, has conducted studies that show that children adversely affected by neurodisability, resulting from alcohol exposure during pregnancy, are at an increased risk of committing crime or being a victim of crime. Such outcomes are “… doomed to be repeated when there is systematic failure to identify and appropriately accommodate their disability into adulthood.”

B How do we identify it?

Professionals working in the youth justice field are perhaps most acutely aware of the need to identify and respond to neurodisability and are already attempting to do so. Many youth justice personnel can testify to the importance of knowledge about neurological functioning in order to make appropriate youth justice decisions. Qualitative research by Alison Cleland found that Police Youth Aid Officers, Youth Court Judges, and Youth Advocates had an “extremely sophisticated and detailed” understanding of the relevance of personal information to youth justice decisions. One aspect of “personal information” that was repeatedly highlighted as important was that relating to intellectual functioning. Youth advocates are shown to be “acutely aware of the importance of ascertaining the intellectual functioning of their clients, both to take instructions from them and to identify the resources that might be appropriate to meet the client’s needs”.

The issues associated with neurodisability are also well-recognised by the key agencies and across government. In November 2011, the Ministry of Health invested $33 million into youth forensic mental health services, to be rolled out over four years. It is expected that by the end of this year, every Youth Court in New Zealand will be equipped with youth forensic services. The mandate of the youth forensic services includes, but is not limited to, screening and assessment of young offenders, court liaison services, delivery of specific mental-health and drug and alcohol treatment, clinical care for young people in youth justice residences, and specialist consultation for health and justice personnel.

“Identifying and addressing alcohol and drug issues, as well as any underlying mental health conditions, as part of the court process could help turn young lives around … The new services will help improve youth mental health and break the cycle of offending by ensuring early intervention, and where necessary, treatment in a secure environment.

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5 Hughes and others, above n 1, at [3.8].
6 Kate Peirse-O’Byrne “Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector” (Bachelor of Laws (Hons) Dissertation, University of Auckland, 2014) at 8.
7 “Fetal alcohol spectrum disorder kids 19 times more likely to cause trouble” The New Zealand Herald (online ed, Auckland, 26 May 2015).
9 At 578.
10 At 592.
12 Coleman, above n 10.
C How should we respond?

The youth justice system, its key players, and particularly the Youth Court process, have the ability to better respond to young people with neurodisability. We know that young people should be held to account to the degree their disability gives the capacity to allow. We know that punishment doesn’t change brain impairment. We know that what does assist is structure, support and supervision.

Specific neurodisabilities may challenge current practice. For example, current research shows a high prevalence (up to 60%) for Oral Language and Communication (OLC) difficulties in young people within the youth justice system. The Youth Court, and especially FGC processes, rely heavily on the oral language abilities (everyday talking and listening skills) of the young offender, who needs to listen to complex and emotionally charged accounts of the victim’s perspective and formulate his/her own ideas into a coherent narrative. This narrative is then judged by the parties affected by the wrongdoing as either adequate or not. A language or speech difficulty will significantly impact upon a young person’s ability to understand and positively engage with Youth Justice processes.

Our challenge is to better recognise and support young people with OLC disabilities, to take into account that a young person in the Youth Court may only have the level of comprehension of a 7 or 8 year old, and consequently might struggle to participate in the FGC and Court process. This will influence the appropriate support provided and strategies for breaking down information e.g. what the FGC plan means he or she has to do, presenting information visually, checking understanding and comprehension, teaching important vocabulary (for example, what “breaching bail” means). Individually tailored education plans will need to be made that are explicitly aimed at building oral skills. Ideally, the young person will be supported by a Speech-Language Therapist. Finally, our response will be specific to and will cater to our unique cultural and linguistic environment of Aotearoa New Zealand.

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

2. Addressing disproportionate Māori offending rates in the youth justice system, particularly in the Youth Court

The disproportionate overrepresentation of young Māori in our youth justice system is long-standing, well documented, and worsening. Most research is clear that this disproportionality is the result of a combination of both long term social and economic disadvantage dating back to New Zealand’s colonisation and current systemic discrimination. The extent to which each of these factors contributes to the disproportionality is unknowable.

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

In New Zealand, 23% of the 14–16 year old population are Māori.\textsuperscript{14} The vast majority do not come into contact with the youth justice system. However, those who do come into contact with the youth justice system are disproportionately represented at every stage of the process. The number of young Māori aged 14–16 who appear in the Youth Court is 5% of the total population of 14-16 year old Māori.\textsuperscript{15} However, Māori make up 52% of apprehensions of 14–16 year olds,\textsuperscript{16} and 55% of Youth Court appearances.\textsuperscript{17} Māori youth offenders are given 66% of Supervision with Residence orders (the highest Youth Court order before conviction and transfer to the District Court).\textsuperscript{18} In some Youth Courts the percentage of those Māori young offenders appearing in the Youth Court is over 90%.

This disproportionalilty is unacceptable. These figures have long term implications and tell their own quiet story of deep-seated disadvantage. Recent research from the longitudinal study conducted by Canterbury University and Professor David Fergusson tends to suggest that Māori young people who are disconnected from their culture and cultural roots make up the vast proportion of Māori youth offenders.\textsuperscript{19} In reality this may just be another way of pointing to the effects of long term socio-economic disadvantage: i.e. those Māori families who are most disadvantaged are most likely to be disconnected from their culture. At any rate, the issue of disproportionate Māori youth offending is more complex and subtle than is often recognised in this vitally important discussion.

Rangatahi Courts are sittings of the Youth Court that are held on the marae, following Māori kaupapa (ideology) and tikanga (culture). The Rangatahi Court initiative was established in 2008 as a response to the disproportionate rates of young Māori in the Youth Court.\textsuperscript{20} The aim of the Rangatahi Courts is to reduce reoffending by young Māori and to provide the best possible rehabilitative response, by encouraging strong cultural links by involving local Māori communities in the youth justice process.

Attempts to tackle the issue of Māori overrepresentation in the youth justice system must necessarily consider the, often debated, wider historical and modern context of Māori social, economic, political and cultural marginalisation and, also often highly politicised, Māori aspirations for self determination. Consequently, therapeutic and restorative theories do not always fit comfortably with the Rangatahi Court model:\textsuperscript{21}

The theory of restorative justice implies that offending has disrupted an otherwise functional life – that offending is abhorrent and abnormal, to the offender and their community. Arguably, it is also predicated upon homogeneity and shared values across society. The language of such theory is instructive – to restore, repair,

\textsuperscript{17} Calculated using statistics for the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) “Child and Youth Prosecution Tables” “Multiple-Offence Type Prosecution”.
\textsuperscript{18} Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand (www.stats.govt.nz) “Child and Youth Prosecution Tables” “Multiple-Offence Type Youth Court Order”.
\textsuperscript{20} For a comprehensive discussion on the Rangatahi Court refer to Judge Heemi Taumaunu “Rangatahi Courts of Aotearoa New Zealand: an Update” (paper presented at the International Indigenous Therapeutic Jurisprudence Conference, University of British Columbia, Vancouver, 9-10 October 2014).
\textsuperscript{21} Alison Cleland and Khylee Quince Youth Justice in Aotearoa New Zealand (LexisNexis, Wellington, 2014) at 251.
rehabilitate, reconcile. All of these terms assume a state of functionality before the harm – a state to which we desire the offender to return. This belies the reality of the lives of many offenders (emphasis added).

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

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

Additional thoughts not yet fleshed out, but which will require resolution in the next 10 years include:

- That it is asking a lot of indigenous communities to put their faith in the law as a healing agent. The CYPF Act which provides for significant iwi involvement may need to be more fully implemented

- Restorative justice is predicated upon there being some kind of conditions that we are “happy to return to.”

- What of young people not dealt with in the Rangatahi Court process, but who have the same challenges, and often worse circumstances? What of the relevance of Māori identity and particularly circumstances of inequality, in the disposition of offenders who have not been dealt with by way of an FGC plan?

- So far, the Rangatahi Court is still a monitoring body, which means that the young person has managed to gather up some kind of whānau support to formulate an FGC and a plan. What if the young person does not have those resources, the “social and cultural capital”, at their disposal?

**Iwi remand services**

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

This provision affirms the aspirations for increased Māori self-determination and protection that were originally incorporated into the Act, and which are increasingly affirmed in modern legal and

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22 Cleland and Quince, above n 20, at 251.
23 At 251.
constitutional discourse in New Zealand. However, this provision has been dormant for 25 years and, by and large, has remained unused to date.

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

However, it would be remiss not to acknowledge the contemporary and principled relationships of partnership between the government and Māori. It is thought that the Treaty of Waitangi is a touchstone against which all Crown actions, including law, policy and practice within New Zealand should be evaluated.\(^\text{24}\) Therefore, in reality, if Māori are to be able to tap into the processes enabled under the Act, arguably the government has a duty to participate in the growing of resources, such as iwi and community services.

*Cultural and community reports*

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

In the Youth Court, the Judge’s powers to obtain a cultural report under s 336 are the same as the powers granted in the Family Court under s 187. There is currently no Youth Court protocol in place to guide a Judge as to when a cultural report might be appropriate, the process for selecting an appropriate cultural report writer, or what might be within the scope of a cultural report. However, the Family Court does have two comprehensive sets of guidelines available for cultural report writers, one of which is specifically for Māori cultural report writers, which the Youth Court “borrows” in the absence of its own protocol.\(^\text{25}\)

With respect to Māori, the provision for the consideration of cultural factors when sentencing, in both the adult\(^\text{26}\) and youth jurisdiction, is a legislative attempt to engage with the asymmetry of Māori representation through culturally specific sentencing to fit the circumstances of the offender. Indeed, when reflecting on Māori overrepresentation in the criminal justice system, Justice Williams has noted that “the statistics suggest trying to do something different on a wider scale cannot possibly do any harm”.\(^\text{27}\)

Justice Williams has argued that culture and background will *always* be relevant to sentencing, if the sentence is to fit not just the crime but the offender: \(^\text{28}\)

\[\text{[…] while there is no longer room for tikanga-based approaches to the criminal verdict inquiry, there is substantial room for tikanga to speak in the sentencing}\]

\(^{24}\) Alison Cleland and Khylee Quince, above n 8, at 256.

\(^{25}\) Ministry of Justice Guidelines for Writers of Cultural Reports in the Family Court and Guidelines for Writers of Māori Cultural Reports in the Family Court (October, 2006).

\(^{26}\) Section 27 of the Sentencing Act 2002 provides for pre-sentence cultural reports to be ordered.


\(^{28}\) A 29.
process and therefore, for whānau and hapū to wrest some measure of control back to the kin group. After all, in a whānaungatanga-based culture, kin group responsibility for the wrongs committed by a member of the group is assumed. The tikanga of muru (restitution) reflects that basic idea. Finding means by which that kin group can participate in sentence selection processes, whether therapeutic or otherwise, assists the kin group and therefore the wider community to take responsibility for offenders in a manner consistent with tikanga Māori and good criminal justice practice.

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

Lay advocates do allow a cultural dimension to be incorporated into the youth justice and the Youth Court process – as described in 3, below. Through lay advocates Youth Courts are obtaining the cultural advice and background which for too long was far from explicit in the Court process. In ten years time we look forward to national network of lay advocates, actively and effectively representing the interests of whanau, hapu and iwi.

**FGCs and Māori**

Evidence shows that the experience for Māori young people in terms of family involvement, and consequently consensus decision making, is different to the whānau, hapū and iwi network that the Act envisaged. The archetypal FGC in New Zealand involves “a young Māori boy and his mum” - which, in reality, is the whānau that many young Māori are raised in. This fact issues an immediate challenge to the goals of the Act, including the procedural objective to involve the offender’s whānau through consensus decision making, and the long term goal of strengthening their family. It has been argued that in order for these statutory goals to be realised, they need to go hand in hand with real social and economic commitment to change the condition in which offending behaviours are fostered.

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

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

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

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

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29 Alison Cleland and Khylee Quince, above n 20, at 163.
30 At 163.
31 At 169.
3. **A community of Lay Advocates; the “Conscience of the Youth Courts?”**

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

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

Despite this visionary new role created for the Youth Court being funded by the state, irrespective of means, lay advocates were simply not used in the youth justice process in any meaningful way until 2008. In that year, New Zealand’s first Rangatahi Court was launched. Lay advocates played a crucial role in the operation of that Court:33

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

Such has been the demonstrable value of lay advocates in the Rangatahi Courts, and the youth justice process generally, they quickly become ‘mainstreamed’ into many Youth Courts. Lay advocates are now an established and growing part of the Youth Court process and are adding real value to it. Reports provided by lay advocates often uncover family issues and dynamics that CYFS social workers cannot penetrate, especially when families take a “closed-rank” position to government agencies. Families are given a voice by lay advocates, relieving youth advocates of the dual, and often conflicting, tasks of presenting the views of young offenders and their families. Insightful advice as to cultural factors involved in the offending, or necessary as part of any subsequent intervention package, is being provided.34

This gives the court a deeper pool of information that it can use to craft appropriate responses to the young person and his or her family. It also helps the Judge and kaumātua (elders) in the Rangatahi Courts to draw connections to the young person’s family in a “strengths-based” manner. Often, elders can inform a young person, using the lay advocate’s information, of ancestors who have played an important role in the local community. A recent evaluation of Rangatahi Courts found that the role of the lay advocate was regarded as crucial by families and by professionals:35

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

The growing appointment and use of lay advocates constitutes one of the biggest changes in Youth Court operations in the last 20 years and more lies ahead. Recently, much energy and work has gone into the vitalisation off the use, coordination and training of lay advocates. These efforts have

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33 Alison Cleland and Khylee Quince, above n 20, at 121.
34 Principal Youth Court Judge Andrew Becroft Lay Advocates Handbook (Ministry of Justice, June 2014) at 6.
35 Kaipuke Ltd Evaluation of Early Outcomes of Nga Kooti Rangatahi (Report to the Minister of Justice, December 2012) at [7.5].
culminated in the publication of the first Lay Advocates Handbook in June 2014.\(^{36}\) This Handbook provides a comprehensive overview of the processes, boundaries and intricacies of the lay advocate role. There are currently 105 in the pool of lay advocates that are available for appointment to a Youth Court proceeding.\(^{37}\) It is expected that this number will grow in the years ahead. The ultimate goal is of course the provision of expert lay advocates available for families and as specialist cultural advisers in all Youth Courts in New Zealand.

Finally, it should perhaps be observed that the statutory name ‘lay advocate’, viewed through a 2014 lens, now seems a little outdated. While the statutory language must be adhered to, there is the potential for it to convey the wrong impression in today’s climate. Lay advocates are no well-meaning amateurs, untrained do-gooders, or second-tier participants in the process. Rather they might be better understood as ‘community advocates’, ‘cultural advocates’, or ‘family/whānau advocates’. They will be highly trained in other walks of life and/or experienced in working with young people and their families/whānau. They will inevitably be highly respected within their communities. And they will have a highly developed knowledge of different cultural perspectives and values.\(^{38}\) In ten years time they will be making a significant contribution to the Youth Court process and will have become a vital and independent voice in the process. By 2025 lay advocates may become the “cultural conscience” of the Youth Court – and a true community voice in the process.

4. **Therapeutic jurisprudence, selective monitoring and the team approach. (And, the end of a two tiered Youth Court, with all Youth Court fully serviced by a suite of expert “clinicians”).**

Therapeutic jurisprudence examines the role of the law as a therapeutic agent in relation to legal rules, legal processes and the role of the legal profession. In relation to the court process, therapeutic jurisprudence focuses on the role of the court and court processes in improving the wellbeing of parties to its processes.\(^{39}\)

One of the basic premises of the therapeutic movement has been to refocus the court from merely an outcome to focus on the court process itself. The court response identifies the underlying causes of offending and takes a problem-solving and solutions focused approach to criminal offending:\(^{40}\)

> Therapeutic jurisprudence proposes a broadening of the role of the Judge, which has traditionally been limited to fact-finding and law-applying. Therapeutic jurisprudence asks why the judicial role should not extend to the search for solutions to an individual’s cycle of offending.

In the context of youth justice, the main therapeutic premise is that effectively reducing offending requires the underlying causes of offending to be addressed via a holistic approach and taking into

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\(^{37}\) Ministry of Justice data, September 2014.

\(^{38}\) Principal Youth Court Judge Andrew Becroft *Lay Advocates Handbook* (Ministry of Justice, Wellington, June 2014) at 6.


account family context, social background, mental health, drug and alcohol issues and other environmental factors.\textsuperscript{41}

The principles of the CYPF Act allow scope for a therapeutic response by providing that any measures for dealing with a child or young person’s offending should, so far as it is practicable to do so, address the underlying causes of offending.\textsuperscript{42} Perhaps more than any other court in New Zealand, the Youth Court and its founding legislation is best suited and placed to utilise a therapeutic jurisprudence approach. There are also clear efforts to incorporate therapeutic principles in the operation of the Youth Court, for example:

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

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

\textit{A Youth Drug Court}

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

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

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

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

\textsuperscript{41} Keith Evans “The Intensive Monitoring Group and Youth Justice” (Master of Philosophy Thesis, Auckland University of Technology, 2012) at 74.
\textsuperscript{42} Children, Young Persons and their Families Act 1989, s 208(fa).
- **Consistency of Judge**: The consistency of Judge means that each time the young person appears in Court he or she is faced with the same Judge. Not only does this mean that the Judge builds up a detailed knowledge of that person’s case, it enables a relationship to be established between the Judge and the young person which clearly enhances the treatment process. The fact that a single Judge is monitoring performance, reviewing the case on a regular basis and is knowledgeable about the circumstances surrounding the young person does not go unnoticed by the young person. It is usually the first time a person in authority has demonstrated such an interest. The positive recognition of progress and the responses to failures are effective tools employed by the Judge.

- **Immediacy of treatment**: Immediacy of treatment ensures that any level of motivation on the part of the young person engendered by the Court process is harnessed as early as possible. The paralysing debate between agencies as to who is going to be responsible for funding a treatment programme has to be avoided in order to ensure this immediacy of treatment. The team approach of the YDC and the agencies involved in it ensure immediacy of treatment.

**B Cross-over list**

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

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

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

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43 Centre for Social Research and Evaluation Te Rokapu Rangahau Arotake Hapori Crossover between Child Protection and Youth Justice, and Transition to the Adult System (July 2010) at 8 as cited in Judge Peter Boshier Achieving Equity: Our Children’s Right to Opportunity (Wellington 2012) at 4.
44 Peirse–O’Byrne, above n 5, at 47.
45 At 47.
A further example of therapeutic jurisprudence is Auckland’s Intensive Monitoring Group (IMG) Court. Established in the Auckland Youth Court by Judge Tony Fitzgerald in 2007, the IMG operates as a solutions-focussed court for young people considered to be at particularly high risk in terms of mental health concerns and/or alcohol/drug dependence.

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

There are four primary components that contribute to the effectiveness of the IMG:

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

All these initiatives have provided valuable lessons for the Youth Court as a whole. But too often they have been seen as separate from the Youth Court and a specialised part of it – while the Youth Court proper has reverted to an adapted form of the adult “criminal list” in the District Court. The challenge over the next ten years is to “mainstream” these lessons within the Youth Court. In 10 years time I hope the Youth Court itself will be regarded as New Zealand’s original “problem solving/therapeutic/solutions focussed Court.” Perhaps that was always the legislative dream – we just did not realise it nor have the language to describe it. In 2025 there will be consistency of judge, a team approach, consistency and immediacy of service delivery, regular monitoring and small case loads in the Youth Court - a Court restricted, as was always the aim, to our most serious and damaged young offenders.
In 2015 there are too many inconsistencies in the services available to Youth Court. Education Officers, Lay Advocates, drug and alcohol clinicians, and, to a lesser degree, forensic services are not available in every Youth Court – even the larger Courts. The value and importance of these services are unarguable and all of these services should be available in every Youth Court. It is wrong in principle that there is such variation in the availability of services for young offenders. Access to appropriate services should not depend on geographical good luck based on where a young offender lives. In 2025, immediate and comprehensive expert services will be available to all Youth Courts and the wider youth justice system.

5. Some Other Dreams: Significant Advances in our response to female offenders, Education Services in every Youth Court; and developing academic and jurisprudential youth justice area.

A Keeping young people in education

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

Any effective and meaningful youth justice response must include education. All those involved in the youth justice community accept that educational involvement is one of the most significant protective factors in a young person’s life. It builds resilience. Re-engagement in education is probably the most effective response that the youth justice system can make to repetitive youth offending. The statutory mandate contained in the CYPF Act to address the causes underlying a child’s or young person’s offending is a power vehicle to mobilise comprehensive and effective educational intervention. While there is no “magic bullet” to reduce youth offending, if there was, it would be to keep every young person meaningfully involved in education, preferably “mainstream” education, for as long as possible.

The increased provision of Education Officers in Youth Courts around the country has proven invaluable. There are now nine Youth Courts and four Rangatahi Courts that are serviced by specialist employees of the Ministry of Education, with a further seven Courts that are able to access written education reports. The Education Officer’s role is to:

- Provide timely, useful and accurate information about a young person’s education status for the Youth Court;
- Help address a young person’s education needs;
- Assist the FGC Coordinator to determine whether a more detailed education assessment is required; and
- Assist the young person to re-engage in education or vocational training (if suitable).

The Education Officer will draw on information such as:

- Enrolment status and schooling history;
- History of any suspensions or exclusions;
- Specialist education services received;
- Achievement data; and
- Relevant education information e.g. attendance, attitude, strengths etc.

In 2025, every Youth Court in New Zealand will benefit from the specialist expertise of an Education Officer. Judges and Youth Court stakeholders will be provided with comprehensive information about a child or young person’s educational history, specific educational needs, and learning or behavioural difficulties already identified flagged by the school. Young people that have become disengaged with education will be either transitioned back in to mainstream education or to some other vocational pathway or meaningful alternative. Every FGC plan will address the young person’s education needs. Youth justice professionals will work creatively and collaboratively with the Ministry of Education.

I am already encouraged by the growing and shared recognition of the importance of education for young offenders, and the commitment to prevention, early intervention and effective transitioning of young offenders back into education. Already there have been significant changes in the attitudes of New Zealand secondary schools to retaining their most difficult young people. Increasingly, it seems to be accepted that excluding or expelling a problem does not “solve” the problem for the community, it only “relocates” it. There really has been a sea change in the attitude of most schools and we are seeing the benefits in youth justice. Youth Court numbers have halved in the last 5 years. The rates of appearances in Court have reduced dramatically. While it is difficult to isolate a single factor, the view of most is that the increased commitment by the Ministry of Education and schools around New Zealand to retaining students within the school community has been a significant contributing factor. Long may this continue. And improve.

Perhaps the greatest challenge for this area of youth justice in the future will be for schools. Schools are the community’s ultimate, and certainly its frontline, “crime fighters”. Schools that engage and involve as many young people as possible, and for whom exclusions/expulsions are a rarity, provide an enormous service for the justice system and their country. Their efforts bring down the crime rate. Schools are not usually cast in this role. The language of crime fighting is seldom attributed to the educational community. But it should be. Simply put, young people who are at school, or who are able to access some form of meaningful educational or vocational training, are unlikely to become adult criminals.

B Female offenders

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

Violent offending by young female offenders has also been a particular concern. The rate of apprehensions of girls for violent offences has increased steadily in the last 20 years, reaching its peak in 2010. A positive development is that this rate declined in 2013, however continues to fluctuate.

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

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

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

In 2025, the New Zealand youth justice system will be fully equipped with a suite of female-specific intervention programmes that are based on current evidence as to what rehabilitation programmes and approaches work for young female offenders. These programmes will be accessible to all stages of the youth justice process, from community-based intervention, FGC referrals, through to formal Court intervention and custodial orders.

C Youth justice academic and jurisprudential development

New Zealand is home to some of the world-leading academics in the field of youth justice, and specialised youth justice courses are currently taught in two universities by top academics. Legal academics play a vital role in the functioning of our youth justice system. They provide independent and informed commentary on current policy, practice, research and evidence. They challenge the ways that we think and work. They are often harbingers of new ideas.

In the future, I look forward to a robust and expansive body of youth justice jurisprudence and academic learning in New Zealand. By 2025, every law faculty in New Zealand will have a youth justice course taught at undergraduate level and a range of post-graduate programmes that specialise...
in specific areas of youth justice, for example youth forensics. I also look forward to a distinct series of law reports that catalogue Youth Court decisions and cases involving children and young people.

**Conclusion**

*Imagine …*

*It’s easy if you try*

- John Lennon

In writing this paper, my aim was to encourage reflection on the current Youth Court and how it might be improved. While we may not be able to image what the Youth Court will look like in fifty years, I have no doubt that it will continue to be an exciting place to practice.

When we envisage what the Youth Court could look like in the future, we are inevitably influenced by our current understanding. Therefore, the five areas for improvement that I have identified are, in fact, small steps towards fully realising the framework currently provided for under the CYPF Act. While on paper they may seem obvious or incremental, I believe, if properly executed, these small changes will have profound and long-lasting implications for the young people and communities that we serve, and our wider system as a whole.

Imagine the profound change to our system if we were to properly identify, diagnose and respond to young people in the Youth Court that present with a single or number of co-existing neurodisabilities. If we held young people accountable to the degree that their disability and capacity allows. If we tailored Youth Court and FGC processes to accommodate oral language competency deficits. Imagine if the disproportionate representation of Māori in our Youths Courts and in our system generally started to decrease. Imagine what it would look like if those legislative mechanisms designed to allow Māori communities to respond to their own rangatahi were fully realised. Imagine a fully mobilised and professional community of Lay Advocates promoting cultural, family, whānau, hapū and iwi interests in all Youth Courts. Imagine a Youth Court where, no matter the geographical location, every young offender has access to the highest standard of professionals, clinicians, programmes and consistent therapeutic monitoring. Imagine more young people in school, and less coming into contact with the justice system. And if they do, imagine what it would look like to have Education Officers in each Youth Court to facilitate informed and effective transitioning back into some meaningful form of education. Imagine an expansive and thriving academic culture educating and training the next generation of youth justice practitioners and thinkers.

When we start to imagine what the Youth Court of 2025 might look like, perhaps we do not need a crystal ball to look further. We can already see that we have some challenging, but exciting work cut out for us in the not too distant future.

A conference such as this is the perfect opportunity for us to gather as practitioners and colleagues, to question and challenge current practice, to exchange ideas and to indulge in some big-picture visioning. As youth justice practitioners I believe that we are well equipped to meet these current challenges head-on and to come up with collaborative and innovative solutions.