An Immature Step Backward for New Zealand's Youth Justice System?

A Discussion of the Age of Criminal Responsibility

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CONTENTS

INTRODUCTION

> [They] frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.
>
> *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S.Ct. 2242, 2250 (2002)

In this paper I will consider the age of criminal responsibility in New Zealand's youth justice system focusing primarily on the 'serious youth offender'[1]. Recent amendments[2] to New Zealand's youth justice legislation – the Children Young Persons and their Families Act 1989, the prevalence of serious youth crime in New Zealand and the politicised nature of the debate surrounding it makes this a pressing issue. Children who commit serious offences pose a peculiar challenge to every criminal justice system. Children may commit "adult" crimes but their immaturity and lack of understanding mean that they cannot be dealt with as "small adults".[3]

This raises problems for the criminal law. Questions arise as to whether a child offender in these circumstances should be considered responsible for their actions. Notions of responsibility can conflict with concerns for protection of the public, and the need to reduce such offending .

Youth Justice reform, alongside general justice reform, was a central plank of the National Party's 2008 election campaign. In John Key's pre election campaign – it was

[1] For the purposes of this paper the 'Serious Youth Offender' = those offenders aged 12 - 17 that commit offences which bring with them a maximum penalty of at least 10 years. This definition includes a wide range of offences, from assault with intent to rob (s 236, Crimes Act), wounding with intent to cause grievous bodily harm (s 188(1)) burglary (s 231) and robbery (s 234) etc etc), Although this may seem restrictive it will allow me to keep in mind the same "offender" when discussing the change in age of criminal responsibility and other discussions with regard to offenders before youth court and transfer of principles in the Adult courts.

[2] The Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010. ('The Amendment')

[3] Discussed further in Chapter three

made clear that if elected, National would get "tough" on youth offenders.[4] On March 6 2010 the National Government passed The Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 (The Amendment). This new legislation came into force on 1st October of this year. As its name suggests, the Amendment Act focuses on the Youth Court. It not only introduces new powers, orders and increased jurisdiction, it also represents a significant shift in the underlying theoretical principles of the youth justice system. The proposal to include some 12 and 13 year olds within the Youth Court, albeit it on a very limited basis, has been said to represent "the most fundamental change to New Zealand's present youth justice system since its inception in 1989".[5]

This paper will provide the basis for an informed and principled critique of the current amendment to the age of criminal responsibility. Recent international, scientific and behavioural evidence will be summarised and linked to the discussion of the amendment. It will suggest how the system can work towards mitigating the affects of this legislation, suggesting that by increasing the jurisdiction to include 17 year olds, providing the Youth Court with the powers of the Family Court and having a qualitatively different approach towards youth at sentencing will provide for tangible reductions in offending and will protect the rights of these vulnerable serious child offenders.

Overall, I aim to make a practical contribution to scholarship in this area, encouraging a reasoned and transparent approach to the much politicised issue of the age of criminal responsibility in the youth justice realm.

[4] Key, John: State of the Nation Speech, 29 January 2008
http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10489424
[5] The Youth Court of New Zealand "Submission to Social Services Select Committee on the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill".

CHAPTER ONE

Background

Setting an age for the acquisition of certain rights or indeed, the loss of certain protections, is a complex matter. A thorough understanding of the underlying theories of youth justice and the notion of criminal responsibility is required if an informed consideration of the criminal age of responsibility is to be undertaken. In this chapter I will provide a brief introduction to the concept of the age of criminal responsibility. I will then look to identify the underlying theories of youth justice at play in New Zealand's criminal justice system.

1.1 An introduction to the "age of criminal responsibility"

The 'age of criminal responsibility' is the "age at which a person becomes subject to the full penalties provided by the criminal law".[6] Children below the minimum age of criminal responsibility are considered to be *doli incapax*,[7] that is "incapable of committing an evil act" and as a result cannot be held legally responsible for their behaviour.[8]

There are at least two ways of conceptualizing criminal responsibility.[9] The first refers to criminal capacity, criminal intention or mens rea; the age at which the child is considered sufficiently competent to distinguish 'right' from 'wrong'. In this respect, setting the age of criminal responsibility implies that children under that age are presumed to be unable to fully appreciate the real nature of the 'offence' and, as such, are not liable to criminal prosecution. Conversely, children above the age are fully 'responsibilised' and subject to the provisions of the substantive criminal law in precisely the same way as adults, although sentencing options may differ.[10] The threshold here is inextricably linked with the notion of the limited accountability of children and young persons; reflected by their physical, intellectual, and social immaturity in comparison to

[6] B Goldson "Counterblast: Difficult to Understand or Defend: A Reasoned Case for Raising the Age of Criminal Responsibility" (2009) 48(5) The Howard Journal of Criminal Justice at 514

[7] The doctrine of doli incapax which presumes that children are criminally incapable is a useful means of providing some flexibility to ameliorate the potential harshness of a minimum age of criminal liability. The presumption allows the Court to consider the individual child's capacity in the difficult "in between years". (Principal Youth Court Judge, Andrew Becroft).

[8] A Raymond *Young Offenders and the Law* (Taylor & Francis, Hoboken, 2010) at 43

[9] B Goldson, above n 6, at 515

[10] A Raymond, above n 8 at 43

adults.[11] This is recognised in law by the principle of 'criminal capacity'.[12] Accordingly, the setting of an age of criminal responsibility is a formal recognition that children do not possess the same mental capacity as adults to understand the extent of the criminality of their actions, and their implications as adults. If adolescents have less developed decision-making capabilities, then the rationale for a juvenile justice system that holds adolescents to adult-like standards of criminal responsibility and culpability is challenged.[13]

A second way of interpreting and applying criminal responsibility is less concerned with criminal capacity in itself and more interested in the principle of immunity from prosecution. In other words whether or not the child is deemed to have 'capacity' is not the primary question. Rather, the appropriateness or otherwise of the formal criminal justice apparatus as a means of addressing children's transgressions is the key point at issue. The fundamental submission advanced here is that criminalising children is problematic for reasons that extend far beyond arbitrary constructions of criminal capacity. This paper will be looking at the age of criminal responsibility from both the idea of criminal capacity and the appropriateness of the criminal arena for dealing with the issue of serious child offending.

Undoubtedly any such legal threshold which abruptly deems a chid 'criminally responsible' upon the dawning of a birthday is inherently artificial and arbitrary. Accordingly, the concept of an age of criminal responsibility is a necessary legal fiction. No child suddenly attains the requisite emotional, mental and intellectual maturity upon his coming of age as dictated by law. Yet the imposition of an age threshold to define criminal responsibility, and formally recognise the incapacity of children who are too young to comprehend the implications of their actions, is an absolute necessity in order to have a functioning system of accountability.

Over the years the arbitrary line of the age of criminal responsibility in New Zealand has been manipulated to redefine the problem of youth offending, to accommodate changing attitudes to youth lawbreakers and moved towards which approach should be

[11] B Goldson above n 6 at 515

[12] which is the "age at which a child is deemed capable of committing a crime and, thus, becomes criminally responsible".

[13] Carrie S Fried and Dickon N Reppucci "Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability" (2001) 25 Law and Human Behavior at 1

pursued.[14] The problem is that once this line is established it is easy to overlook the fact that it is arbitrary[15] and therefore changing it becomes difficult.

1.2 Justice and Welfare Approaches

An examination of the theories underlying systems of juvenile justice is invaluable to any such discussion of the age of criminal responsibility. Indeed, an analysis of the so-called 'models of juvenile justice' can be seen as integral to understanding why a particular threshold for criminal responsibility has been chosen by a State over a younger or older age. Moreover, by using these models as barometers in order to assess the measures used by states in the tackling of youth crime, it is possible to gain an accurate impression of the precise impact of such provisions upon children in relation to the set age of criminal responsibility. The two foremost approaches to offending by children and young people in modern criminology are known by the shorthand descriptions of the justice and welfare models.[16]

The welfare approach is a care based approach - it concentrates on factors which lead a young person to commit crime, and mainly focuses on the offender's needs. It is founded on the positivist philosophy of criminology, which assumes that young offenders commit offences as a result of factors beyond their control.[17] Proponents of this view advocate a variety of therapeutic approaches in order to help young offenders cope more effectively with their personal problems.[18] The welfare model gives priority to the protection and rehabilitation of juvenile offenders, while vehemently shunning

[14] The notion of the age of criminal responsibility first entered New Zealand's statute books via s22 of The Criminal Code Act 1893 – in line with English practice at the time – it provided that no person under the age of 7 could be convicted of an offence. This provision was repeated in s41 of the Crimes Act 1908, and it was not until 1961 that the age at which a child could be held criminally responsible was raised to 10. The Criminal Code also gave the benefit of the *doli incapax* rule, a defence which has remained available ever since.

[15] Academics over the years have observed that the line is a purely legalistic device as there is no set age at which a child suddenly matures and becomes a responsible adult. International comparisons help to highlight the capricious nature of the line as different countries draw the line at very different ages. A survey of various countries reveals a wide disparity in the ages of criminal responsibility. For example in Sweden the age of criminal liability is 15; in Japan it is 14, in Russia, it is 16, for Portugal 18, in the UK it is 10, and for most offences and Scotland's age of criminal responsibility is only 8.

[16] Joy Wundersitz and Christine Alder *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994)

[17] Nicholas C Bala *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing, Toronto, 2002) at 6

[18] Lynch, Nessa "The Rights of the Young Person in the New Zealand Youth Justice Family Group Conference" (PHD Thesis, University of Otago, 2008) at 15

the use of harshly punitive custodial measures as a means of dealing with child offenders. Indeed, as the United Nations Convention on the Rights of the Child (UNCROC) dictates,[19] States must take into account "the desirability of promoting the child's reintegration and the child assuming a constructive role in society."[20] Where the focus is on the child's welfare, the lines between justice and child protection are easily blurred and there is only limited recognition of a child's legal rights.[21]

The welfare model faces enormous criticism. Opponents argue that a range of abuses are concealed under the guise of the term 'welfare'. First of all, critics disapprove of the limited resource recognition of due process and the young person's legal rights.[22] Second, the broad discretion exercised by the authorities may lead to disparities through subjective, and possibly discriminatory, decision-making and can have a net-widening effect.[23]

The welfare and the justice model are often described as "two polarities on a theoretical continuum of possible models of regimes of juvenile justice.'[24] Indeed, the justice approach was penned as a response to critics of the 'welfare' approach. As a result many of its principles are the exact opposite of those underlying the welfare approach.[25] The justice model, follows the notion that the punishment given out for a crime should be proportionate to the crime committed and has retribution as its primary goal.[26] It is based upon the assumption of an equal balance between the rights of society to protection from criminal behaviour, and the rights of the individual charged to fair treatment under the law.[27] It focuses upon due process and the 'just deserts' principle – essentially the assignment of punishment that is proportionate to the crime. Punishment under the justice model is thus seen as deserved, and is not determined by the offender's needs, as under the welfare model. Instead, punishment is prescribed in order to reflect the magnitude or severity of the crimes committed. This theory of

[19] *United Nations Convention on the Rights of the Child* (opened for signature 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990). (The 'UNCROC') The UNCROC is discussed in more depth at Chapter 3.3
[20] The UNCROC Article 40(1)
[21] N, Bala, above n 17, at 5
[22] ibid, at 6
[23] Gabrielle M Maxwell and Allison Morris *Family, Victims, and Culture: Youth Justice in New Zealand* (Social Policy Agency and Institute of Criminology, Victoria University of Wellington, Wellington, 1993) at 165
[24] N, Bala, above n17, at 6
[25] G Maxwell and A Morris, above n 23, at 167
[26] N, Bala, above n17, at 7
[27] A Raymond, above n8 ,at 43

proportionality (connecting the crime and the guilty mind to the severity of the punishment) however, can be highly problematic when applied to child offenders, when the child is too young to fully appreciate the seriousness of their actions and the legal implications that necessarily follow.

Achieving the appropriate balance between "justice" and "welfare" is one of, if not the most intractable issue facing youth justice.[28] There is a wealth of research material which suggests that it is not only unjust, but unrealistic, to deny that child offenders are the product of their upbringing and environment and bring with them unresolved care and protection issues which are at the root of their offending. Yet at the same time these offenders are required to be held accountable and face sanctions for offending which is the result, at least in part, of an element of personal choice.[29]

There is little doubt that the welfare and justice model constructs are particularly important in understanding the historical debate over the appropriate form of youth justice system. In practice no youth justice system fits perfectly into either of the two models. While they may be classified according to the models, actual systems are based on a combination of philosophical rationales, and numerous overlaps between those characteristics defined. Additionally, political, logistical and administrative concerns intrude upon the theory to modify the application of any youth justice model. The Children, Young Persons and Their Families Act 1989, New Zealand's youth justice legislation, is largely an example of a 'justice' approach as it seeks to separate justice and welfare processes.[30] Section 1.3 will examine New Zealand's current youth justice legislative setting and discuss where its underlying principles and purposes fit in accordance with these models.

1.3 New Zealand's Youth Justice Legislative Setting

[28] Andrew Becroft "2010, a big year for the Youth Court – Turning 21 and getting the most out of the Act" (Triennial Youth Court Judges Conference 2010, Waipuna Lodge, Auckland)
[29] ibid
[30] With the introduction of the new Act, Doolan argues that New Zealand has shifted towards the justice model "without embracing some of the models more doctrinaire aspects." Justice McElrea agrees with this thesis, but takes it one step further, by propounding that "we have created a new creature altogether… a model of responsible reconciliation." See Doolan, Mike *Youth Justice: Legislation and Practice* in Borwn, B J and McElrea F W M (Eds.) *Youth Court in New Zealand: A Model of Justice* (Report no 34, Legal Research Foundation, Wellington, 1993) at 15

Terms such as 'world renowned'[31] and 'new paradigm'[32] are frequently used in connection with the current New Zealand youth justice system and its primary legislation – the CYPF Act. Until this year's Amendment this legislation and the substance of the youth justice provisions had remained unchanged since its enactment in 1989. The history of youth justice in a general sense,[33] and in a specific New Zealand context, is well rehearsed.[34] Prior to the creation of the CYPF Act,[35] New Zealand followed a welfare based approach through the Children and Young Persons Act 1974. This Act dealt with care and offending cases in a similar welfare based manner, where the primary focus in both cases was on care and protection.[36] In the 1990s with the advent of the CYPF Act, New Zealand youth justice practice began pursuing a justice based approach and two entirely separate jurisdictions were born: the Family Court and the Youth Court, making a strict delineation between children and young people in need of care and protection and those offending.[37]

The 1989 legislation was unprecedented in the English speaking world,[38] in the sense that it was designed to develop community alternatives to institutions in order to respond more effectively to the needs of victims, to provide better support for families and their children, to respond to demands from Maori for an increased involvement in decisions about their children, and to reduce the number of minor offenders appearing before the court.[39] Empowering families to deal with offending by their young people, particularly through the use of the youth justice family group conference was

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[31] Judge Andrew Becroft "Youth Justice Family Group Conferences: A Quick 'Nip and Tuck' or Transplant Surgery – What would the Doctor order in 2006" (paper presented at the International Conference on the Family Group Conference - Coming Home, Te Hokinga Mai, Wellington, New Zealand 27-29 November 2006).

[32] Allison Morris and Gabrielle Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26 Australian and New Zealand Journal of Criminology at 81

[33] See generally John Muncie, Gordon Hughes and Eugene McLoughlin (eds.), *Youth Justice: Critical Readings* (London: Sage, 2002), Harry Hendrick, 'Histories of Youth Crime and Justice' in Barry Goldson and John Munice (eds.), *Youth Crime and Justice* (London: Sage Publications, 2006).

[34] John A Seymour, *Dealing with Offenders in New Zealand: The System in Evolution* (Auckland: Legal Research Foundation, 1976), Allison Morris, and Warren Young, *Juvenile Justice in New Zealand: Policy and Practice* (Wellington: Institute of Criminology, Victoria University of Wellington, 1987) Emily Watt, *A History of Youth Justice in New Zealand* (Department of Courts, Research Paper, 2003) available at www.justice.govt.nz/youth/history

[35] specifically in the 1970s and 80s

[36] Emily Watt *A History of Youth Justice in New Zealand* (Department of Courts, Research Paper, 2003).

[37] There is a clear-cut physical demarcation within the statute itself between Care and Protection issues in Part II and Youth Justice issues in Part IV

[38] G Maxwell and A Morris, above n 23, at 165

[39] ibid

stressed.[40]A heavy emphasis was also placed on procedural rights, proportionate responses, graduated sanctions, and the timely intervention of Police diversionary practices to focus the young person and their family on their offending.

The CYPF Act gave a legislative base to a 'comprehensive set of general principles,' which were to guide the exercise of powers in relation to young people (s 4) and more particularly the operation of the youth justice provisions of the CYPF Act (s 208).[41] This Act was unique at the time in codifying the principles on which the youth justice system was based.[42] Section 4(f) of the CYPF Act sets out principles for dealing with children and young people who commit offences. The first clause maintains that such children or young people must be held accountable and encouraged to accept responsibility.[43] The second clause states that their needs must be acknowledged so that they can be encouraged to develop in "responsible, beneficial, and socially acceptable ways".[44] This is a clear example of an attempt to combine both the welfare and justice approaches. Principal Youth Court Judge Becroft refers to these twin objectives as addressing the 'need' and the 'deed'.[45]

Prior to the Amendment, all young offenders under 14 years of age (except when facing murder or manslaughter charges)[46] were dealt with on the basis that care and protection issues are the primary cause of their offending. They were thus dealt with in the Family Court and could not be charged in any criminal court.[47] The Crimes Act 1961 established that children aged under 14 have a diminished capacity in respect of criminal

[40] The family group conference which enabled victims and offenders to meet together with the members of the enforcement agency, and the family in order to decide on an appropriate penalty. The family group conference enables the involvement of the family, the young person, and the victim in decision-making at a venue and using a procedure of their own choice and in accordance with their culture.

[41] G Maxwell; V Kingi; J Robertson; A Morris; C Cunningham, *Achieving Effective Outcomes in Youth Justice* Final Report (ISBN: 0-478-25142-4, Wellington Ministry of Social Development, 2004) at 7

[42] Although statements of principles now appear in the youth justice legislation of other jurisdictions. See for example s96 of the Childrens Act 2001 (Ireland), s3 of the Youth Criminal Justice Act 2002 (Canada), s3 of the Young Offenders Act 1993 (South Australia), s3 of the Young Offenders Act 1997 (New South Wales). In addition, statements of principles are now increasingly common in other types of New Zealand legislation

[43] example of the Justice Approach.

[44] example of the Welfare Approach

[45] Principal Youth Court Judge Andrew Becroft, 'Youth Justice – The New Zealand Experience Past Lessons and Future Challenges'. Paper presented at Australian Institute of Criminology/ NSW Department of Juvenile Justice Conference: *Juvenile Justice: From Lessons of the Past to a Road for the Future,* Sydney, 1-2 December 2003, 10.

[46] Prosecutions of children aged 10 or more and young persons for murder and manslaughter are heard in the High Court after a preliminary hearing in the Youth Court.

[47] Under Care and Protection provisions of the CYPF Act 1989 – Part II

responsibility, with s 21 of the Crimes Act 1961 providing that children aged under 10 cannot be held criminally responsible and thus criminal prosecution cannot be brought against them. Children under 14 could only be charged with Murder and Manslaughter.

Section 22(1) of the Crimes Act 1961 also states that children aged from 10 to 13 cannot be held criminally responsible unless it is proved that the child knew what they did was wrong or contrary to law. This is complemented by the common law doctrine of *doli incapax* which was also retained in New Zealand. It applies to children aged 10 -14 and operates as a rebuttable presumption. A child is presumed not to know the difference between right and wrong and to be generally incapable of committing a crime because of lack of understanding. Thus in order to maintain a murder or manslaughter conviction of a child between ages 10 and under 14 the prosecution had to show not only that the child committed the crime with the requisite mens rea - but that the child appreciated that what he was doing was seriously wrong (i.e. prove the child's guilty knowledge). Any presumptions as to the nature of the offence itself will not suffice to prove knowledge.[48]

A distinct set of principles or 'signposts' to guide youth justice are provided in s 208 of the CYPF Act.[49,50] Section 208(b) of the CYPF Act sets out the principle that criminal proceedings should not be instituted with the sole purpose of advancing the welfare of the child, or young person, or their family. This is strengthened through s 284 which

[48] *C v DPP* [1995] House of Lords

[49] Mike Doolan, 'The New Youth Justice - Legislation and Practice' in BJ Brown and FWM McElrea (eds.), *The Youth Court in New Zealand: A Model of Justice* (Auckland Legal Foundation, 1993), 25.

[50] The specific principles guiding youth justice provide that:

- Criminal Proceedings should not be commenced with the sole purpose of providing welfare assistance to the child or young person or their family (s208(b) CYPF Act),
- Any sanctions imposed on children or young people should seek to promote their development within their families and take the least restrictive form appropriate in the circumstances (s208(f)(i) and (ii)), CYPF Act),
- Any measures dealing with offending should seek to strengthen the family and to foster the ability of families to deal with offending by their children and young people (s208(c)(i) and (ii), CYPF Act),
- Children and young people should be diverted from the formal criminal justice system unless it is in the public interest not to (s208(a) CYPF Act),
- Measures imposed should have due regard to the interests of victims of offences (s208(g) CYPF Act),
- Age is to be a mitigating factor in deciding whether sanctions should be imposed and what those sanctions should be (s208(e)(i) CYPF Act),
- Unless public safety is at issue, children and young people who commit offences should be kept in the community (s208(d) CYPF Act),
- The vulnerability of children and young people entitles them to special protection during the investigation of offences (s208(h) CYPF Act)

prevents the Youth Court from ordering supervision, community work, supervision with residence, supervision with activity, or transfer to the District Court for sentencing on the sole grounds that the young person is in need of care and protection.

Furthermore, the Youth Court is entirely separate from the Family Court and so care and protection issues are not to be pursued in the youth justice forum.[51] As Maxwell and Morris argue "…. The New Zealand system attempts to move some way towards a justice approach without abandoning the desire to achieve positive outcomes for young who offend."[52] After 14 years of age, a youth offender could be brought into the Youth Court's jurisdiction. But, even then, there was a process whereby care and protection issues may be referred to a Care and Protection Family Group Conference Co-ordinator at the direction of the Youth Court Judge (with the option then of further referral to the Family Court). When that happens, the criminal charges can be adjourned, and then the offender discharged absolutely. When young people are discharged in the Youth Court, the twin emphasis is on accountability and addressing the underlying causes of offending, but there remains a strong emphasis against welfarising the response.[53]

The Youth Court process is thus reserved for a minority of young offenders.[54] Its establishment underlines the importance of the principle that the offending of young people should be premised on criminal justice not welfare principles.[55] A justice orientated approach is also seen as necessary for older youth offenders who are more culpable than their child counterparts. Young people are able to be transferred to the adult criminal courts at the age of 15. Such transfer is possible in two circumstances. Firstly when the offence committed is purely indictable and the Youth Court does not

[51] The CYPF Act 1989 s 208(b)

[52] G Maxwell and A Morris, above n 23, at 2.

[53] Judge Andrew Becroft Principal "Children and Young People in Conflict with the Law: Asking the Hard Questions" (XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, Ireland, 31 August 2006).

[54] The Youth Court deals only with the most serious offences and offenders, but there has been acknowledgement from the Principal Youth Court Judge Andrew Becroft that New Zealand now has a persistent underclass, three generations long from which many of these offenders are drawn. Hence it is a mixed bag of results for New Zealand society: on the one hand, progressive legislation to keep children out of the court and the penal system and towards diversionary forms of sentencing like community service, but on the other hand, small but persistent cohorts of youth who are on pathways towards serious criminality. There is a significant ethnic component to this pattern, with Maori over-represented in the negative statistics. The Maori youth apprehension rate is more than three times that of Pacific or NZ European Youth (Child Youth and Family Offending Statistics in New Zealand 2010 at 42).

[55] That is, on notions of accountability and responsibility for actions, due process, legal representation, requiring judges to give reasons for certain decisions, and imposing sanctions which are proportionate to the gravity of the offence

believe it has the requisite tools to deal with the offending, or alternatively when the offence is punishable by imprisonment for a term exceeding 3 months and the young person elects trial by jury under s 66 of the Summary Proceedings Act.

New Zealand's youth justice system was also the first legislated example[56] of a move in the direction of a restorative justice approach towards offending - and thus away from the traditional justice and welfare responses.[57] It focuses on repairing harm, reintegrating offenders, and restoring the balance within the community affected by the offence. Both family group conferences and restorative justice give a say in how the offence should be resolved to those most affected by it – victims, offenders, their families, and wider whänau - with the model of decision-making advocated to be by group consensus. Emphasis is put on the need to address the offending and its consequences in meaningful ways.[58] The key element of this progressive restorative practice is that the offender is not marginalised but accepted as a key contributor to decision-making. Therefore in New Zealand family group conferences are not simply used in trivial cases but also serious offending involving burglary, arson, rape and offences of a similar nature.

New Zealand's youth justice system appears philosophically sound. Indeed it is frequently considered world leading.[59] It can be seen that the 1989 legislation was based upon the need to incorporate the justice model whilst acknowledging that on some level a differentiation had to be made between care and protection issues and those where the Youth Court and the criminal justice system were the appropriate forum for dealing with the young person's transgressions, and thus an arbitrary line was drawn at the age of 14. In practice, it faces problems of adequate resourcing and difficulties in adequately meeting both the accountability and welfare needs of child and youth offenders.[60;61]

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[56] Within a country that operates under the Westminster system

[57] The New Zealand system, especially the Family Group Conference, has been practised as a restorative justice system, although this was not necessary in order to conform with the provisions of the Act. Restorative Justice is not mentioned in the CYPF Act, yet a restorative justice approach is entirely consistent with its objects and principles. In fact restorative justice thinking and practice had barely begun at the time the CYPF Act was being discussed. Thus the system follows restorative justice techniques although the black letter law did not explicitly envisage this outcome.

[58] Gabrielle Maxwell and Allison Morris "Youth Justice in New Zealand: Restorative Justice in Practice?" (2006) 62 The Journal of Social Issues at 21

[59] Andrew Becroft, above n 53

[60] ibid

Such inadequacies include: inadequate Government funding, inadequate allocation of resources within departments, poor training of social workers, and poor transfer of information between agencies; Judge Andrew Becroft, Principal Youth Court Judge "Youth Justice in New Zealand: Future

Challenges" (paper presented at the New Zealand Youth Justice Conference, New Zealand Youth Justice Conference: "Never Too Early, Never Too Late" Wellington, 17 —19 May 2004) at 7

[61] This is discussed further in Chapter 3.3

CHAPTER TWO

The Amendments

On March 6 2010 the National Government passed The Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 ('The Amendment'). This new legislation came into force on the 1st October 2010. As its name suggests, the Amendment focuses on the Youth Court. It not only introduced new powers, orders, and extended the Youth Court Jurisdiction; it arguably also represented a significant shift in the underlying theoretical principles of the youth justice system discussed above. This chapter will explain the Amendments and will endeavour to understand the motivation behind such a fundamental change.

2.1 Changes for the serious child offender

The most far-reaching change that the Amendment provided was to the child offender provisions of the principal Act. Under the Amendment the age of criminal responsibility remains at 10 years and children may still be prosecuted for homicide, but children aged 12 and 13 years are now prosecutable in two further circumstances.[62] The first is where the child is alleged to have committed an offence with a maximum penalty including imprisonment for life or for at least 14 years.[63] The second is where the child is alleged to have committed an offence where the maximum penalty is or includes at least 10 years' imprisonment but less than 14 years' imprisonment and the child is a previous offender.[64] These child offenders retain the protections of *doli incapax*.

The provision allowing 12 and 13 year old children to be prosecuted for certain serious or persistent offending is a considerable theoretical shift. The restrictions on prosecution of under 14 year olds has been in place since the 1974 Act and since this time, the theoretical basis of the treatment of child offenders has been the presumption

[62] s14 Jurisdiction of Youth Court (See Appendix A)

[63] This definition includes a wide range of offences, from assault with intent to rob (s 236, Crimes Act), wounding with intent to cause grievous bodily harm (s 188(1)), to the lesser known offences of dealing in slaves (s 98) and piracy (s 92).

[64] Again, this covers a range of offences including burglary (s 231 of the Crimes Act) and robbery (s 234). "Previous offender" is defined in s 4(2) of the amending Act as being a child who has been declared in need of care and protection by the Family Court in relation to an offence attracting a maximum penalty of at least 10 years, or convicted by the High Court of murder or manslaughter or an offence with a maximum penalty of life or at least 14 years' imprisonment, or proved before a Youth Court to have committed an offence with a maximum penalty of life or at least 14 years.

that offending stems from difficulties in the home life of the child, and thus should be resolved through alternative action or the care and protection process.[65] The starting point has been that children who offend do so, in the first instance, because of serious inadequacies in their upbringing. While at that age there is certainly an element of deliberate and personal choice involved, the philosophy prior to the amendments was that unless there are significant interventions into the child's family system then there will be little chance of turning a child away from crime.[66] This is considered especially so for very serious child offenders.[67] The philosophy has been that simply holding such child offenders to account and using a punitive/ rehabilitative paradigm within the Youth Court is unlikely to produce enduring change.[68]

2.2 Youth Offenders in the Adult Court

The age at which a young person may be transferred to the District Court jurisdiction for trial and sentence has been reduced from 15 to 14 years - making such 14 year olds liable to sentences of imprisonment.[69] By electing trial by jury 12 and 13 year olds can also enter the adult criminal justice system. On transfer to the adult courts the principles of the CYPF Act cease to apply and the principles of the Sentencing Act 2002 kick in. This became clear in July of this year when in *Pouwhare v R*[70] the Court of Appeal made a judgment on the application of youth justice principles in the District Court and High Court.[71] The appeal here was on a question of law from the High Court against a sentence of two and a half years imprisonment of an offender transferred to the High Court for a conviction of aggravated robbery.[72] The Appeal asked the question: when a young person is sentenced in the District Court or the High Court, having been transferred for sentence by the Youth Court, must youth justice principles under the CYPF Act 1989 as well as those in the Sentencing Act 2002 be taken into account by the sentencing judge?

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[65] With the noticeable exception of homicide

[66] G Maxwell and J Robertson (1995) *Child Offenders: A report to the Ministers of Justice, Police and Social Welfare.* Wellington: Office of the Commissioner for Children; R Boshier (1996) *Child Offenders Manual*. A practical guide to successful intervention with child offenders.

[67] ibid

[68] The Youth Court of New Zealand "Submission to Social Services Select Committee on the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill".

[69] The Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 ("The CYPF Amendment Act 2010) New s 283(o)

[70] *Pouwhare v R* [2010] NZCA 268

[71] This Judgment was given on the 2nd of July 2010 after the Amendment had been passed.

[72] *Pouwhare v R*, 16 April 2010, High Court, Wanganui, CRI 2010-483-11, Justice Miller

The Court held that it is the Sentencing Act provisions and principles which apply to the sentencing of a young person who has been convicted and transferred for sentence. While a young person's vulnerability, impulsiveness and lack of maturity will always be relevant, and sometimes decisive to their sentencing in an adult court, the Sentencing Act 2002 analysis would be rendered incoherent if its purposes, principles and aggravating and mitigating factors did not effectively displace the youth justice sentencing principles in s208 CYPF Act. In short, youth justice principles are now not required to be taken into account when sentencing a young person in the adult court.

The Court of Appeal held that, under the Sentencing Act, a Court must weigh the young person's age and the reasons why he or she offended as mitigating factors against the seriousness of his or her offending and prospects of rehabilitation. This sentencing also had to accord with the United Nations Conventions on the Right of the Child where consistent with the Sentencing Act.[73]

This decision also reinforced the Court of Appeal's commitment to young first offenders who, by implication, have good chances of rehabilitation. In fact, the Court confirmed that, despite tariff cases such as *R v Mako* [2008] DCR 70 (HC) being indispensable, the effect that age can have on the length of a sentence is "unconstrained by any normative percentage". This opens the way for combined discounts for youth and guilty plea to exceed 50% of an adult starting point. In this case the Court of Appeal upheld the decision of Miller J in the High Court, and the appeal against the sentence of two and a half years was dismissed.

Despite the fact that the Court of Appeal set no limit on the maximum discount that could be given for youth as a mitigating factor, the possibility still arises of child and youth offenders being sentenced to substantial sentence of imprisonment due to lengthy starting points being set by guideline judgments.[74]

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[73] This is discussed further in Chapter three at 3.2.
The UNCROC provides that children under 18:

- Should have their best interests treated as a primary consideration;
- Must be treated in a way that promotes their sense of dignity and worth;
- Must have their respect for the human rights and fundamental freedoms of others reinforced; and
- Must be given a sentence which takes into account their age and desirability of promoting their reintegration and assuming a constructive role in society.

[74] This is discussed further in Chapter 4.3

2.3 Guiding Principles

As mentioned above, the guiding principles contained in s 208 of the 1989 Act are the backbone of the youth justice system. Two changes to s 208 are contained in s 6 of the Amendment.[75] First, the status of the victim is strengthened. While under the principal Act measures must take due regard of victims' interests, now "proper regard" has to be given to the interests and wishes of the victims and the "impact of the offending" on them. Second, any measures must now address the causes of offending. This is evident in the nature of new orders available to the Youth Court: these are designed to tackle the quality of parenting and the extent of substance abuse problems.

Three new orders reflect this change in their underlying principles to address the causes of offending. It introduces through s 30 parenting education orders,[76] drug and alcohol rehabilitation programme orders and mentoring orders (of up to 12 months).[77] These new principles show an additional theoretical shift in the Act. An innovative feature of the principal Act was the primary role given to the family in decision-making, as it took the revolutionary step of partially transferring power from the state to families, victims and communities through its Family Group Conference.[78] It is arguable that following its Amendment the Act has moved closer to the justice model of youth justice through emphasising the victim's rights and that the locus of power has gravitated slightly towards the state by removing the element of self-direction previously present in the Act.[79]

2.4 General Re-organisation

The Amendment also provided for a general re-organisation of s 283 of the principal Act (dealing with Youth Court orders), creating a hierarchy of orders from Group 1 (discharge

[75] Section 6 The CYPF Amendment Act 2010, See Appendix A
[76] These programmes are apparently modelled on programmes in England and Wales. If the parent fails to complete the requirements of the order, the Youth Court Judge is empowered to order that a care and protection family group conference be convened in respect of every child or young person in the family. If the young person is a parent or soon-to-be parent, he or she can be required to attend a parenting education programme, and breach will be dealt with as is the breach of any other order.
[77] The CYPF Amendment Act 2010, s 30 – See Appendix A
[78] Judge McElrea "New Zealand Youth Court: A Model for Development in other Courts? " (National Conference of District Court Judges, Rotorua, New Zealand, April)
[79] Nessa Lynch. "Changes to Youth Justice" (2010) 4(May) New Zealand Law Journal at 130

or admonishment) to Group 7 (transfer to the District Court for trial or sentence). The parameters of the top-end Youth Court order (supervision with residence) are changed to a minimum of three months and a maximum of six months (s 36).[80]

A recognised lacuna in the principal Act was the procedure when a young person breached the terms of an order.[81] The amending legislation provides for a graduated system of responses to breaches of orders.[82] If a child or young person has failed to comply with a court order,[83] the Youth Court is empowered to make another order, or - if the young person is already subject to judicial monitoring due to a previous breach - make an intensive supervision order.[84] Furthermore the Youth Court is now empowered under the amended s311 to make a supervision with residence order subject to the condition that the young person undertakes any specified programme or activity. The Government proposed to develop and implement highly specialized residential programmes that involve but are not limited to, military style discipline. Reference to the introduction of these military-style activity camp programmes is made in the Regulatory Impact Statement included in the explanatory note to the Bill.[85] However it is useful to note that the Bill does not propose a specific military-style activity camp programme order.[86,87]

[80] Section 36 CYPF Amendment Act 2010 See Appendix A

[81] For example, currently the family group conference has a wide discretion in its recommendations, but under the amending Act it will be statutorily required to consider recommending drug and alcohol rehabilitation orders, mentoring orders and parenting orders.

[82] Section 29 CYPF Amendment Act 2010 See Appendix A

[83] This includes parenting education orders, mentoring programme, alcohol or drug rehabilitation programme, supervision, community work or intensive supervision order

[84] This may include curfew, possibly with electronic monitoring

[85] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009) at 29

[86] These camps were tagged in the media as "boot camps" and were a prominent part of the National election campaign in 2008.

[87] Ministry of Social Development *Children, Young Persons, and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill - Departmental Report* (October 2009) at 51, Ministry of Social Development *Children, Young Persons and Their Families (Youth Court Jurisidicition and Orders) Amendment Bill - Initial Briefing to the Social Services Committee* (April 2009), Ministry of Social Development "Fresh Start Package for Young Offenders" (press release, 26 August 2009). The Fresh Start Package put aside $5.3 million for these camps, describing such camps as "places in army-type facilities targeting more serious young offenders. Up to three months residential training followed by up to 9months intensive support."

s6 New section 311 substituted –The CYPF Act 1989 – See Appendix A

2.5 Contra-flow evident

Finally, while New Zealand has been a world leader in youth justice policy since the inception of the unique and pioneering 1989 Act, the contra-flow' of youth justice policy is now evident.[88] The amendment bears more than a passing resemblance to England's New Labour reforms of the early 1990s, particularly in the lowering of the age of prosecution, the development of new forms of control such as intensive supervision and curfews and in moves to make parents accountable for offences committed by their children.[89]

What must be asked is in light of such a fundamental change, whether there was good reason to abandon the philosophical framework for serious child offenders present since the Act's inception in 1989?

2.6 The Roots of the Amendments

The legislation is concerned with the small hard-core group of 5 - 15% of offenders[90] sometimes called "early onset offenders."[91] These offenders pose a greater challenge to the system because it is more difficult to steer them away from a life of crime. No system in the world has had great success with these difficult youth.[92] Their characteristics paint a very gloomy picture.[93] They are typified by backgrounds of

[88] Nessa, Lynch, above n 79, at 130
[89] David, Smith "New Labour and Youth Justice " (2003) 17 Children & Society 226 - 235
[90] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009).
[91] Terrie E Moffit "Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy " (1993) 100(4) Psychological Review 674 - 701.
[92] Judge Andrew Becroft "Alternative Approaches to Sentencing " (CMJA Triennial Conference, Toronto, Canada, 12 September 2006).
[93] Judge Andrew Becroft, above n 53
"Looking at the hardcore offenders who commit serious and multiple offences we can observe the following characteristics

- 83% are male, however the number of young women who offend, especially violently seems to be increasing
- Many, estimated up to 70-80% have a drug and/ or alcohol problem, and are significant number are drug dependent/ addicted.
- Most, estimated up to 70% are not engaged with school – most are not even enrolled at a secondary school. Non-enrolment, rather than truancy is the problem. – 45% have been excluded/ expelled from school.
- Most experience family dysfunction and disadvantage; and most lack positive male role models.

poverty, abuse, drug and alcohol problems, mental health issues, educational disengagement and most are already known to the Child, Youth and Family Services (CYFS).[94]

The number of 12 and 13 year olds who are considered serious young offenders by committing the threshold offences, however, are very low.[95] The Bill's regulatory impact statement states that Police apprehension statistics indicate that around 80 12 – 13 year olds are apprehended in respect of these offences yearly.[96] These figures do not disaggregate those apprehensions where the offence was admitted or proved. Given that Police apprehensions across age groups total over 200,000, these children constitute a tiny segment of the total population apprehended by police.[97] In addition, there does not appear to be any evidence that points to a significant rise in criminal offending by 12 and 13 year olds.[98] The question thus needs to be asked; what was the impetus behind this Amendment?

2.7 The Politicised Nature of Youth Justice

- Many have some form of psychological disorder, especially conduct disorder, and display little remorse, let alone any victim empathy. Some will also have a specific learning disability, eg. Dyslexia, although research is required to establish the extent of this problem.
- At least 50% are Maori and in some Youth Courts; in areas of high Maori population the Maori appearance rate is 90%.
- Many have a history of abuse and neglect, and previous involvement with Child, Youth and Family Services.
- 12% are living with both parents, 28% with one, and the majority with none"

[94] G Maxwell, Addressing the Causes of Offending: What is the Evidence? (Institute of Policy Studies, Victoria University, Wellington, 2009) at 62

[95] Evidence on the nature of circumstances of children who become involved in anything other than minor offending at the ages of 12 and 13 years show that they are relatively few in number. In October 1995 when similar proposal was made, Maxwell conducted a study to establish how many children in the previous year met criteria to indicate that they were of serious concern to the police as indicated by being referred for an FGC or having a declaration filed in relation to offending, committed more than one offence excluding minor matters or committed a serious offence such as attempted murder, kidnapping, aggravated robbery, grievous or serious assault, major arson or sexual violation. A total or 109 children were identified but only 11 of these had committed offences that were categorized as maximum seriousness but none of these resulted in serious or permanent harm to another person. Since that time there has been no evidence that the number of children coming to the attention to the police who would fit the same categories has increased and the overall number of children coming to attention has remained stable or declined in that time.

[96] Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 - 2008* (Ministry of Justice, April 2010).

[97] Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 - 2008* (Ministry of Justice, April 2010). para 3.2 – total 2006 police apprehensions 203,484.

[98] Ibid – Over the 1995 to 2008 period violence apprehension rates increased for youth and adults, while the children's rate remained relatively stable : 40 violent offences in 2007 and 39 in 2008.

It is clear that public attitudes about youth crime play a significant role in fashioning youth justice policy.[99] In an age where the public reaction towards youth violence has reached new proportions,[100] and is encapsulated by phrases such as 'zero tolerance',[101] governments have reacted by legislating increasingly punitive measures for the tackling of youth crime. In New Zealand 'getting tough' on crime has become a mantra adopted by many political parties and is not associated with left- or right-wing, mainstream or minor parties.[102] As in other jurisdictions, politicians from across the spectrum have sought political capital from adopting a tough on crime stance.[103]

Current societal concern inevitably also reflects the amount and type of media coverage - particularly that given to the most violent and distressing crimes.[104] Commenting on the influence of the media, the BBC has recently reported that in the United Kingdom, crime statistics have gone down even though two thirds of people in England and Wales believe crime is going up.[105] New Zealand data collected just before the Olympics on the television news showed that on average about 20% of the main television news stories were about crime and about half were stories that dealt with either crime or disasters.[106]

Jeremy Rose of Media Watch recently presented data comparing the emphasis on crime and violent deaths in selected lead newspapers around the world; New Zealand came third in the number of such stories.[107] It is not only the amount, however, but also the

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[99] L Steinberg and A Piquero "Manipulating Public Opinion About Trying Juveniles as Adults: An Experimental Study" (2010) Crime and Delinquency at 487

[100] This is not to imply that instances of recorded crime amongst young offenders have increased, only that public reaction concerning youth crime has reached new proportions

[101] New Zealand National Party, Justice Policy (2010) <http://www.national.org.nz/PolicyAreas.aspx?S=43>.

[102] Michael Rowe "Policing and 'cracking down on crime': tough questions and tough answers" (IPS Forum Addressing the Causes of Offending, Wellington, New Zealand, February 2009).

[103] Left governments, beginning with Clinton and Blair particularly, have reshaped the politics of law and order to such that tough on crime is a non-negotiable component of the third way for centre left parties, as well as continuing as a more familiar component of conservative politics. For example British Labour introduced some 14,300 new offences since taking office in 1997 and the new government continues to do so. The Conservative Government in Canada has also taken action to get tough on criminals.

[104] Maxwell, Dr Gabrielle "Changing Crime Rates 1998 - 2007" (IPS Forum Addressing the causes of offending, Wellington, February 2009).

[105] Easton, M (2008) *Crime: Lies and Statistics.* http://www.bbc.co.uk/blogs/thereporters/markeaston/2008/07/crimes_lies_and_statistics.html

[106] G, Maxwell, above n 104

[107] J Rose Addressing the Causes of Offending: What is the Evidence? (Institute of Policy Studies, Victoria University, Wellington, 2009) at 179

type of coverage that is a problem.[108] The sensational, partisan and dramatic media reporting of certain incidents concerning children, has also provided much of the impetus behind these cultural and policy shifts. There is a discernible irony here when the UN Convention suggests that the prime function of the media should be "to disseminate information and material of social and cultural benefit to the child ….. especially [materials] aimed at the promotion of his or her social, spiritual and moral well being".[109] But it is difficult to read headlines which describe children as "Yobs"[110], "baby-faced rapist"[111], "unexploded human time bombs",[112] "New Zealand's Youngest-ever Killer",[113] or "thuggish losers"[114] and conclude that these are "beneficial to the child".[115] The outcome is to distort society's perception of youth crime, unwarrantedly increase fearfulness about personal safety and undermine public confidence in those who are responding to it.[116]

Youth Justice reform, alongside general justice reform, was a central plank of the National Party's 2008 election campaign.[117] In John Key's pre election campaign it was made clear that if elected, National would get "tough" on youth offenders,[118] and it

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[108] N, Bala, above n 17, at 14

[109] Article 17 *United Nations Convention on the Rights of the Child* (opened for signature 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990).

[110] Sinead O'Connor "Fair Takes Fire From Drunk Yobs" *Manawatu Standard* (New Zealand, 22 December 2008) at http://www.stuff.co.nz/dominion-post/national/771806.

[111] Editor stuff.co.nz "Coached Teenage Rapist to be Freed" *The Dominion Post* (Wellington, New Zealand, 23 April 2009) at <http://www.stuff.co.nz/national/crime/2356195/Coached-teenage-rapist-to-be-freed>.

[112] John Key: State of the Nation Speech, 29 January 2008 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10489424, Honourable Simon Power "Drivers of Crime Ministerial Meeting Opening Address" (Wellington, 03 April 2009).

[113] Youngest killer's bid to be free http://www.stuff.co.nz/national/crime/4072333/Youngest-killers-bid-to-be-free

[114] Sinead Boucher group online editor "Patches Identify Thuggish Losers" *The Dominion Post* (Wellington, New Zealand, 30 September 2008) at <http://www.stuff.co.nz/dominion-post/opinion/editorials/652584>.

[115] Article 17 *United Nations Convention on the Rights of the Child* (opened for signature 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990).

[116] Scott, E., & L. Steinberg. 2008. Rethinking Juvenile Justice. Cambridge, MA: Harvard University Press at 102. As Scott and Steinberg describe, moral panics have led to many policy changes, including the passage of Proposition 21 in California, a ballot initiative that greatly expanded criminal court jurisdiction over juveniles and limited the authority of the juvenile court in several ways. As they noted, Proposition 21 was the result of the interaction among intense media interest in violent juvenile crime, public outrage and fear in response to the perceived threat and politicians seeking to capitalize on these fears to win elections or retain popularity.

[117] New Zealand National Party, Justice Policy (2010) <http://www.national.org.nz /PolicyAreas.aspx?S=43>.

[118] John Key 29 January 2008. 2008: A Fresh Start for New Zealand, A State of Nation Speech

moved swiftly to introduce legislation to honour its commitment.[119] The Minister of Social Development and Employment, Paula Bennett expressed that "New Zealanders have been appalled that some of our most serious young offenders are as young as 12 or 13."[120] National argued that the "Family Court simply does not have the tools and solutions to deal with these extremely complex cases."[121,122] The objective of the reforms was thus aimed to "reduce re-offending by [these] serious and recidivist child and youth offenders and thereby improve community safety."[123] It was argued in the regulatory impact statement that the Amendment, including the lowering of the age of criminal responsibility "fits within the existing youth justice framework in that it focuses on holding children and young people accountable and acknowledging their development needs."[124]

Support was given to the lowering of the age of criminal responsibility by the New Zealand Police Authority who made reference to current care and protection proceedings as complex, lengthy and unlikely to deliver an effective response to offending (from either a victim satisfaction point of view or in addressing the offender's behaviour). As a result, the police response is more likely to err towards the informal: warning the offender and delivering them home, even in relatively serious circumstances.[125]

Despite this support however, the majority of submissions, including those from the Youth Court, Law Committee, Children's Commissioner, psychologists and those that have extensive experience in the youth justice arena - felt there was no case for lowering the age arguing that there is a wealth of credible international and local research which shows that bringing younger offenders into the youth justice system will

[119] This legislation was introduced as a Bill to Parliament on the 18/02/09 by the Honourable Paula Bennett less than 100 days after National came became the Government of New Zealand.
[120] Hansard (10 Feb 2010) 660 NZPD 8777.
[121] ibid
[122] Chapter 3 argues that the Youth Court also does not have the tools to deal with these offenders.
[123] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009) at 2
[124] ibid
[125] New Zealand Police Association "Submission to Social Services Select Committee on the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill".
"This leads to the frequently reported assertion that police 'can't touch', child offenders, and have to wait until they're 14 before they can do anything. While not strictly true, there is enough substance to the belief and it is repeated so often that it is, in [their] view, likely to be contributing to the apparently increasing brazenness of child and young offenders."

not reduce offending.[126] Furthermore they did not feel that such amendments fitted with the general principals behind the CYPF Act.[127]

Those objecting to the changes argued that this apparent 'toughness' of contemporary political policy – not just associated with the National Party – actually evades some of the most important questions and challenges in responding to crime in contemporary society.[128] As a consequence, there has been an absence of rational decision-making based on any critical examination of the issues and the evidence available.[129]

This is clear the Amendment as at no point in the legislative process or supporting documentation is any reference made to evidence, reviews, and meta-analysis about the likely effectiveness of lowering the age of criminal responsibility nor the likely consequences or costs. The only comment that bears on the justification of these amendments was provided in the Regulatory Impact Report which notes (without reference) that a previous review of the Youth Court found that the length of the current orders does not provide a credible response to the behaviour of most serious offenders, it provides no discussion as to the decrease in the age of criminal responsibility.[130] The same report, however, also notes that these provisions expose New Zealand to possible criticism by the United Nations Committee on the Rights of the Child.[131] The lack of evidence on the justification and effectiveness of this Amendment coupled with potential international criticisms clearly calls some of these amendments into question.[132] This dissertation seeks to challenge the evidential basis for the lowering of the age of criminal responsibility when the majority of research indicates that alternative strategies are more effective in dealing with this particular age group.[133]

It must be noted that a review of all of the legislative amendments is outside the scope of this paper, nevertheless they will be discussed where appropriate in regards to their affect on the Youth Court's new jurisdiction. A cursory view of the Amendments exhibits

[126] 35 submitters made comment on the Bill's proposal to change the jurisdiction of the Youth Court to include 12- and 13 year olds. Of those 6 supported it, 2 predominately supported it and 22 clearly opposed it.
[127] Ibid.
[128] M Rowe, above n 102 , at 185
[129] M, Smith, above n 107, at 250
[130] Ministry of Social Development "Fresh Start Package for Young Offenders" (press release, 26 August 2009).
[131] This is discussed further in Chapter 3.3
[132] This is discussed further in Chapter 3
[133] This is discussed further in Chapter 3

substantial support for the lengthening of and increase in the orders available to the Youth Court, particularly by the Youth Court judges who saw them as necessary to provide for tangible interventions in serious offender's lives.[134] The amendment that received the most negative response was the new s311 which relates to a supervision with residence order which could pertain to a "military-style activity camp".[135] The issue was the most commented on overall and most submitters were united in their opposition to the proposal.[136]

2.8 A Principled Approach

New Zealand, like the rest of the world, needs to understand the underlying causes of offending and the effectiveness of different strategies if it aims to put in place strategies that will lower the risk of offending, and will avoid actually escalating the offending rates.[137]There is now a large pool of research in the area of lowering the risk of offending. This however, appears to have been vastly outpaced by a political and public interest in serious offending by young people and children. One of the temptations, especially when dealing with the 5% of young offenders who are serious recidivists, is to move too rapidly from a treatment focus, towards deterrence, control, compliance and incapacitation. The original vision of the CYPF Act provided that minimising involvement in the formal criminal justice has been proven to produce better outcomes, and secondly, that in most cases families are best placed to hold their young people accountable and to make the enduring changes in a young person's life that will secure better life-course outcomes.[138] This original vision has clearly been blindsided for the 12 and 13 year olds now entering the criminal justice system. Lord Falconer stated that:[139]

> an effective penal policy is one in which the public has confidence where communities can see that justice is being done. But it is much more than that. They must see that the system delivers real reductions in re-offending and improvements in the way we protect them from dangerous offenders. The

[134] Ministry of Social Development *Children, Young Persons, and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill - Departmental Report* (October 2009) at 40
[135] ibid
[136] The reason most consistently cited for this opposition was international research into "boot camps" and New Zealand research into the (repealed) sentence of corrective training, pointing to the fact that such camps might actually increase rates of re-offending.
[137] Judge Carolyn Henwood, above n 94, at 116
[138] ibid, at 34
[139] Lord Falconer, then Secretary for State for Justice, United Kingdom, 2007

> public needs confidence that they are being kept safe from harm, while offenders are not only being effectively rehabilitated, and their offending behaviour addressed.

It is contended that any new approaches to youth justice should be: effective in reducing reoffending, based on sound evidence, represent value for money and be open to systematic evaluation. Policy that directly contradicts the majority of available research in the area or is based on weak or flawed evidence does not pursue such goals.[140]

The next chapter looks at available research; asking what evidence is relevant to make the decision of where to draw this arbitrary line of the age of criminal responsibility. It is acknowledged that the importance of reducing youth offending by the most serious young offenders is pertinent because of the disproportionate amount of crime they commit. However, the level of recidivism and degree of seriousness of the offending does not take away the responsibility of government to deal with youth offending in the most effective ways.

The point was made during the legislative process that "International research shows that even small reductions in offending by serious and persistent young offenders have significant cost and social benefits."[141] It was also acknowledged that the main risk with the reforms, given that they are aimed at a difficult group to turn around, is that they will not reduce re-offending for this group as the causes of recidivism are complex.[142]Both these points acknowledged by the very legislators who passed this Amendment show just how crucial it is that we figure out how to make tangible reductions in this area via evidence and not just the whims of politics.

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[140] Kerry Baker *Multi-Agency Public Protection Arrangements and Youth Justice* (The Policy Press, Bristol, 2009) at 5

[141] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009) at 3

[142] ibid

CHAPTER THREE

An Evidential Approach

As mentioned in chapter one there are at least two ways of conceptualising criminal responsibility.[143] The first questions at which age a child attains the capacity to face the criminal law, in other words it questions at which age the child is able to fully appreciate the real nature of the 'offence' they committed. The second questions the appropriateness of the criminal justice apparatus as a means of addressing children's transgressions. This chapter looks at both these conceptions asking firstly: what neuroscience can tell us about the culpability of 12 and 13 year olds' criminal actions. Secondly the chapter questions what available research tells us about the use of the youth justice apparatus as a tool for reducing re-offending, and hence what does this imply about the age at which to set criminal responsibility. Finally it asks what New Zealand's international human rights commitments indicate that the age of responsibility should be.

This chapter is premised on the idea that there is ample research available to guide an evidence based approach to youth justice. This wide array of evidence will be reviewed and used to confirm that there was no principled case for lowering the age of criminal responsibility. The most salient reasons being that the Amendment fails to recognise the limited developmental immaturity of 12 and 13 year olds; is unlikely to reduce the rate of serious child offending; and furthermore it fails to respect the rights of such children.

3.1 The Serious Child Offender's Limited Culpability

Interest in adolescents' relative maturity in comparison to adults, whether pertaining to debates about the age of criminal responsibility, how the US should treat young individuals at Guantanamo Bay,[144] or other matters such as whether the driving age ought to be raised,[145] has been greatly stimulated during the past decade by the rapid

[143] See chapter 1.1
[144] Laurence Steinberg was asked to evaluate the behaviour of a Guantanamo Bay detainee, Omar Khadrm using developmental science.
[145] Land Transport (Road Safety and Other Matters) Amendment Bill - Parliament: 49 Bill no: 213-1

expansion of knowledge about adolescent brain development.[146] As a consequence explicit reference to the neuroscience of adolescence is slowly creeping into policy discussions as well as legal decision making.[147] What can this neuroscience tell us about setting the age of criminal responsibility?

As set out in chapter one the age of criminal responsibility needs to be set at an age that appropriately reflects the diminished culpability of the child offender. In actual fact, the sole basis of our separate system of justice for children and young people is the principle that we should not expect humans whose brains are not yet mature and fully developed to be fully capable, nor the recipient of adult responses.[148] It is well documented in developmental science literature that the brain is not fully developed until the early 20s and many scientists believe that full cognitive maturity is not achieved until at least age 25 years.[149] The New Zealand Court of Appeal has acknowledged this developmental immaturity stating that "it is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults."[150] This statement exhibits the integral connection between the developmental immaturity of youth and their level of culpability. Developmental neuroscience evidences the extreme immaturity of 12 and 13 year olds brain development in comparison to older adolescents and adults. Entry into the youth justice arena may be entirely inappropriate for young offenders as a consequence of this developmental immaturity. Regrettably despite this research being of direct relevance to any measure of criminal responsibility such evidence was not followed by the Government when passing this Amendment.

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[146] L Steinberg "Should the Science of Adolescent Brain Development Inform Public Policy?" (2009) The American Psychologist [739] at 741

[147] ibid

[148] This has been the philosophy of the Act up to now (see Chapter 2)

[149] J Giedd and others "Brain development during childhood and adolescence: a longitudinal MRI study" (1999) 2 Nature Neuroscience 10 at 861.

[150] *R v Slade & Ors* [2005] 2 NZLR 526, p 533, para 43

> " Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffit, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent."

Drawing age boundaries on the basis of developmental research cannot be done sensibly without a careful and nuanced consideration of the particular demands placed on the individual for "adult-like" maturity in different domains of functioning.[151] In other words, the notion that a single line can be drawn between adolescence and adulthood for different purposes under the law is at odds with developmental science. Instead when using such evidence, the focus needs to be on the particular functions of the brain that are relevant to the policy in question – here that being the age of criminal responsibility. On many of the cognitive capabilities relevant to making an informed choice about whether to have an abortion for example, adolescents do not look all that different from adults.[152] However on many of the psychosocial capacities relevant under the law for judging criminal responsibility, adolescents lag considerably behind adults.[153,154] The approach to such policy decisions should necessarily be quite different, and thus generalisations as to when a child reaches maturity cannot be made. In the November 2009 edition of the American Psychologist, Professor Steinberg continued his mission to connect adolescent brain development to public policy regarding teenagers stating:[155]

> It is entirely possible for adolescents to be too immature to face the death penalty, but mature enough to make autonomous abortion decisions, because the circumstances under which individuals make medical decisions and commit crimes are very different, and make different sorts of demands on individuals' abilities.

[151] L Steinberg and others "Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"" (2009) 64(7) The American Psychologist at 583

[152] Ibid, at 592 – Furthermore by age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychological functioning (which is relevant to the commission of crime), even at the age of 18 is significantly less mature that that of individuals in their mid 20s. In this regard, it is neither inconsistent nor disingenuous for scientists to argue that studies of psychological development indicate that the boundary between adolescence and adulthood should be drawn at a particular chronological age for one policy purpose and at a different one for another.

[153] L Steinberg and others "Reconciling the Complexity of Human Development with the Reality of Legal Policy: Reply to Fischer, Stein, and Heikkinen" (2009) 64(7) The American Psychologist [601] at 694

[154] It is interesting to note that the legal age for abortion is set higher than the age of criminal responsibility when the functions required to make informed decisions such as abortions, develop earlier than those used in crime.

[155] L Steinberg, above n 151

The brain and commission of crime

In order to pursue an evidential approach when determining the culpability of youth offenders the parts of the brain which are relevant to the decision to commit crime must be identified and studied. Writing for the majority of the United States Supreme Court in *Roper v Simmons*[156] whilst discussing the application of capital punishment to a youth defendant, Justice Anthony Kennedy drew attention to three specific aspects of adolescents' immaturity that diminished their criminal culpability: their underdeveloped sense of responsibility (and difficulty controlling their impulses), their heightened vulnerability to peer pressure, and the unformed nature of their characters.[157] All of these can be traced back to changes in the function and structure of the brain. [158] [159]

[156] *Roper v Simmons* (2005) 543 US.

[157] As Justice Kennedy wrote:

"First as any parent knows and as the scientific and sociological studies respondent and his amici cite then to conform, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." … The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure… The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed… these differences render suspect any conclusion that a juvenile falls among the worse offenders. (Roper v Simmons, 2005, pp 15 – 16).

[158] L Steinberg, above n147, at 741.

There are five specific and noteworthy anatomical changes that occur in adolescent brains.

- A decrease in grey matter in prefrontal regions, likely due to synaptic pruning.
- Changes in the concentration of dopamine receptors, especially during puberty, which may cause potentially rewarding stimuli to be experienced as even more rewarding, even in situations where rewards and costs are present.
- An increase in connections between cortical and sub-cortical regions of the brain, which is especially important for emotion regulation.
- A gradual increase in white matter in the prefrontal cortex, due to 'myelination', is one of the last parts of the brain to develop. This is the process of improving the efficiency of neural signalling within the prefrontal cortex.[158] This increased connectivity is important for executive functions such as response inhibition, planning ahead, and weighing risks and rewards. This is where reasoned judgment and impulse control occur. The frontal lobes when fully mature can curb impulses such as those that control aggression and impulsivity which are central to many aspects of criminal culpability.[158]
- Furthermore a significant feature of adolescent development is the neutral integration of the left and right hemispheres of the brain. This integration facilitates the development of the capacity to understand the consequences of behaviour, control impulses and undertake reasoned, logical and rational decisions.[158]

[159] In addition functional studies indicate that adolescence is also a time of important change in patterns of brain activity.

- Brain systems involved in self-regulation are still developing during this period.
- Adolescents are particularly sensitive to rewards.
- Adolescents do not process emotional information as well as adults, i.e. they are deficient in the synchronisation of cognition and affect: L Steinberg, above n 147, at 724.

Overall these developments in the brain provide that the younger an offender the less likely they are able to make reasoned decisions and control their impulses and emotions. Thus in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced, adolescents' decision making, at least until they have turned 18, is likely to be less mature than that of adults. This set of circumstances likely characterises the commission of most crimes perpetrated by adolescents (which are usually committed in groups and are seldom premeditated.)[160] These circumstances may also be typical of other situations where adolescents are emotionally aroused: in groups, absent adult supervision, and facing choices with apparent immediate rewards and few obvious or immediate costs – the very conditions that are likely to undermine adolescents' decision-making competence.[161]

This developmental immaturity is further compounded by some of the developmental features of 12 and 13 year olds and the unique characteristics of these serious young offenders. Many of the serious child offenders that will appear before the Youth Court are likely to have an intellectual disability, learning difficulties or poor achievement due to specific factors such as Foetal Alcohol Syndrome or family/ life circumstances and therefore may be chronologically aged 12 or 13 years, but mentally much younger than this.[162] Tendency towards impulsivity is also compounded for young people who have experienced trauma.[163] Persistent trauma such as abuse and neglect causes a young person's brain to adapt in order to ensure survival. This often results in hyper vigilance, elevated heart rate, and elevated levels of stress-related hormones in a child or young person.[164]As chapter two explained the likelihood of the serious young offender being a product of abuse and neglect is extremely high and as a result, it is expected that such children are even more developmentally immature, and hence are inherently less culpable for their criminal actions.

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[160] D Farrington (2003) "Developmental and life-course criminology: Key theoretical and empirical issues" 41 Criminology at 221, F Zimring *American Youth Violence* (Oxford University Press, New York, 1998), at 221.

[161] L Steinberg "Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science" (2007) 16(2) Current Directions in Psychological Science [55].

[162] Linda A. Gow notes in her submission to the Select Committee that "a recent informal discussion with the staff at Korowai Manaaki (Youth Justice North) suggested that many of the young people in their care aged 14 -17 years are mentally functioning at primary school age (i.e.<10 years old).

[163] Perry, B (1997) "incubated in terror: Neurodevelopmental factors in the cycle of violence", in JD Osofsky, *Children in a violent society* (pp. 124 – 149) New York: The Guillford Press at 131.

[164] Ibid.

Science's role in legislative decisions

Whether and how these findings should inform decisions about adolescents' treatment under the law depends on the specific legal issue(s) under consideration. To various degrees, such decisions rely on value judgments (e.g. about what aspects of maturity are relevant to a particular decision or about what is mature "enough" to warrant autonomy and/ or culpability), which science alone cannot dictate. Nevertheless, the legal treatment of adolescents should at the very least be informed by the most accurate and timely scientific evidence on the nature and course of psychological development.[165]

Developmental psychologists and neuroscientists with expertise in adolescence are frequently called on to provide guidance about the appropriate treatment of young people under the law and about the proper placement of legal age boundaries between those who should be treated as adults and those who should not.[166]

The law in New Zealand has developed over the years to reflect both the scientific evidence around the criminal culpability of children and young people[167] and to address the root causes of their offending, through processes designed to provide greater preventative measures[168], support[169] and in many respects accountability[170]. Furthermore there is now "incontrovertible evidence of significant changes in brain structure and function during adolescence. Although most of this work has appeared just in the last 10 years, there is already strong consensus among developmental neuroscientists about the nature of this change."[171] New discoveries provide scientific confirmation that the teen years are a time of significant transition. Such evidence demonstrates that adolescents have significant neurological deficiencies that result in stark limitations of judgment. Research suggests that when compounded with risk factors of these serious child offenders (neglect, abuse, poverty, etc.), these limitations can set the psychological stage for violence and offending behaviour. These discoveries

[165] L Steinberg, above n147, at 592 - When it comes to the role of developmental science in influencing policy debate, Professor Steinberg is adamant that the science of brain development should "inform" not dictate policy.[165]
[166] L Steinberg, above n151 at 592
[167] Crimes Act 1961, s22, CYPF Act 1989 s208(e) and (h)
[168] CYPF Act s208(a),(c)(ii) and (f)(i)
[169] CYPF Act s208(c)(i) and (ii)
[170] CYPF Act s208(g)
[171] L Steinberg, above n147, at 531.

support the assertion that adolescents are less morally culpable for their actions than competent adults and are more capable of change and rehabilitation. It follows that lowering the age of criminal prosecution, even taking into account the thresholds and provisos contained in the Bill, is a retrograde and devolutionary measure, the essence of which runs contrary to scientific developments. Although legal lines will be drawn whether scientists weigh in or not, it is submitted that using science to inform the law – even in the form of educated guesses – is better than using no science at all.[172]

3.2 The appropriateness of the Youth Justice system for reducing re-offending

Another way to evaluate at which age criminal responsibility should be set is to decide at which age the criminal justice apparatus becomes a useful means of addressing children's transgressions. One of the objectives of lowering the criminal age of responsibility for serious offenders was to reduce reoffending and act as a deterrent for this age group.[173] Evidence however exhibits that bringing 12 and 13 year olds into the youth justice arena will not reduce offending for four salient reasons. Firstly, research has shown that deterrence is unlikely to work for such young adolescents; secondly, the problem of deviant contagion (negative peer influence) arises when children enter the system; thirdly as a result of stigmatization and the 'labeling' process, re-offending is more likely to increase; and fourthly, the Youth Court may not have the ability to deal with the root causes of the child's offending.

Deterrence

It would be difficult to sustain the proposition that the existence and use of the machinery of criminal justice does not prevent some young persons from committing certain types of crime. However, the way that the law achieves this objective is open to doubt. When a serious young offender is caught up in the criminal process many factors operate, and the task of identifying their deterrent impact is not easy. The shock of apprehension, subsequent dealings with the police, the experience of trial and conviction, the reactions of others and the embarrassment, which these cause the

[172] L Steinberg and others "Reconciling the Complexity of Human Development with the Reality of Legal Policy: Reply to Fischer, Stein, and Heikkinen" (2009) 64(7) The American Psychologist at 601.
[173] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009).

young offender, may or may not come into play. How much each of these factors affects and determines the subsequent behaviour of a young offender is unknown; how this combination of threatened consequences affects the conduct of a 'would-be-offender' is an even more difficult question.[174] Although the shock of a formal process at an early age might be expected to deter children from re-offending, research shows that the majority of youth who are inclined to commit crimes, especially serious and repeat offenders, lack the judgment, foresight, and self-control to be in any way deterred by the prospect of longer sentences, or sentences at all.[175]Most studies have failed to uncover any reductions in youth crime rates that can be linked to laws subjecting young people who offend to criminal prosecution.[176]

More specifically there is no evidence to indicate that criminal prosecution of 12 and 13 year olds who offend is an effective way to deter crime generally or reduce the likelihood that a child would be less likely to commit further offences as a result of these measures.[177] In actual fact some research shows that young people who believe they will be caught and punished severely actually commit more crime.[178] Evidence from the United States of America shows that children who offend, commit more violent crimes as a result of their experience in the criminal justice system, while they are also more likely to commit more serious new offences than their counterparts, and at a faster rate,[179] continuing into adulthood.[180] Furthermore studies in the United States have shown that the negative effects on children entering the criminal justice system are more likely for those who come from impoverished backgrounds or those who are black.[181] This throws doubt on the suggestion that formal prosecution through the youth justice system is the most effective way of holding serious child offenders accountable

[174] L Steinberg and A Piquero "Manipulating Public Opinion About Trying Juveniles as Adults: An Experimental Study" (2010) Crime and Delinquency [487], at 48

[175] N, Bala, above n 17, at 15

[176] Griffin, P. (2008) *Different from adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Law with Recommendations for Reform.* National Centre for Juvenile Justice.

[177] Children's Commissioner "Submission to Social Services Select Committee on the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill ".

[178] McLaren, K "Youth Offending Teams: What Works to Reduce Offending by Young People"at 4

[179] E Kooy. (2008) *Challenging Course: A Review of the First Two Years of Drug Transfer Reform in Illinois.* Illinois Juvenile Justice Initiative.

[180] Jon Gunnar Bernberg and Krohn D Marvin "Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood" (2003) Criminology 1287 - 1318. At 19

[181] ibid, Bernberg, Gunnar and Krohn conclude that contact with the formal juvenile justice system has been shown to have a reasonable likelihood of increasing the level of criminal activity in early adolescence. Studies found that the effect of police intervention on crime is stronger among males who have impoverished family backgrounds.

for their crimes, when the majority of serious child offenders who will be subjected to the system are likely to be Maori and come from impoverished backgrounds.[182]

Deviant Contagion

Involvement in the youth justice system may also carry the risk of increasing recidivism due to exposure to more detrimental behaviours through association with other young offenders, whether through programmes, residences or court appearances.[183] The majority of 12 and 13 year olds are highly susceptible to peer influence,[184] and bringing them under the Youth Court jurisdiction exposes them to further anti-social peer influences and increases the opportunity for peer influences to operate. Contact with antisocial peers is one of the biggest risk factors in children developing and maintaining conduct problems (of which a large proportion of serious child offenders are likely to have).[185,186]

Recent research on residential and group interventions for youth offenders has indicated the large degree of influence a group of "like-minded" peers has on a young person.[187] Known as "Deviant Contagion" or "Negative Peer Influences,"[188] such influences reinforce the maintenance of anti-social beliefs and attitudes that support further offending. These concepts originated from outcome studies which showed that some residential and group type programmes for young offenders actually increased offending rates rather than reduced them.[189]

When 12 and 13 year old offenders appear before the Youth Court a supervision with residence order can be made, resulting in their being detained for up to six months in a Child, Youth and Family residence. While such residences are less austere than adult

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[182] 2008 figures show that Maori apprehension rates are more than 5 times that of Pacific or NZ European. Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 - 2008* (Ministry of Justice, April 2010).

[183] John Braithwaite, 'What is to be done about Criminal Justice' in BJ Brown and FWM McElrea (edss), *The Youth Court in New Zealand: A New Model of Justice* (Auckland: Legal Research Foundation, 1993) at 33.

[184] L Steinberg, above n151, at

[185] Ian Lambie, above n94 , at 64

[186] See chapter 2 for further discussion of the characteristics of the serious child offender.

[187]Kenneth A Dodge, Thomas J Dishion and Landsford, and Jennifer E *Deviant Peer Influences in Intervention and Public Policy for Youth* (A Publication of the Society for Research in Child Development, 2006) at

[188] ibid

[189] ibid

prisons, they involve loss of liberty, separation from friends and family, and mixing with 14 to 16 year olds. There is a considerable amount of research which shows that placing young children in institutions is damaging to their normal development and particularly due to mixing with other youth offenders, it is likely to increase the risk of further offending.[190] Subsequently, it is necessary that such serious child offenders should be kept out of such residences wherever possible.

With the increased jurisdiction of the Youth Court there is also the limited possibility of 12, 13 and 14 year olds now appearing before the Adult Courts and being given sentences of imprisonment. This too rapidly increases the chance of being manipulated by the negative influences of older and hardened criminals. The risks of moving young people from youth to adult jurisdiction is well documented in literature, with increased recidivism rates apparent.[191] Imprisonment is a particularly poor response to youth crime because of a number of negative psychological and behavioural consequences which occur in young people who are imprisoned as adults, and with adult offenders. In particular, due to their vulnerability, marginalised youth learn to fit in to the prison culture and continue to use that culture's norms upon release.[192] 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.[193] 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, or lack "streetwise" knowledge.[194] Further, juveniles in adult prisons are at greater risk of suicide.[195]

The 'labeling process'

[190] Scotland., Criminal Justice Social Work Development Center for, Buist, Maureen and White, Bill *International Evidence about decision making and services for children and young people involved in offending.* (2004).
[191] Bishop, D.M. 2000. Juvenile offenders in the adult criminal justice system. *Crime and Justice* 27: 81 – 167
[192] Andrew Becroft, Principal Youth Court Judge of New Zealand "Children and Young People in Conflict with the Law: Asking the Hard Questions" (XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, Ireland, 31 August 2006). → any evidence of this other than reoffending??? – any evidence of this other than re-offending? n53
[193] ibid
[194] ibid
[195] ibid

Evidence also shows that not only does mixing with other delinquents through the system increase the chance of re-offending, confirming a criminal identity early in life also risks attracting these very young children to an anti-social ethos and entrenching behaviour that will lead to further offending as adults.[196] Studies have found that the mere processing of a young person in the Youth Court systems has adverse effects on subsequent criminal offending (controlling for prior offending). This suggests the influence of virtual association with deviant peers through labeling of youth as a member of a deviant category.[197] Principal among the negative effects of involvement in the formal justice arena is the effect of stigmatising the child or young person by labeling him or her as a criminal.[198] The stigmatisation of criminality is highly likely to 'hurt and harden' these very young offenders, alienate them from their family and community, and have a detrimental effect on their motivation to avoid further criminality.[199] This occurs to a more extreme extent due to the sensationalism of the media, who react so vehemently to serious child offending, due in part to the shockingness of such young children involved in such callous and violent crimes.[200] Publicity of the names of child offenders inhibits their rehabilitation by assisting in the 'labelling' process of the child.[201] Such labelling makes reintegration back into society more difficult for the child. The international outcry over the release of the two boys' names in the Bulger trial, or the case of Bailey Junior Kurariki are testimony to such a process.

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[196] Lambourn, Barbara (ed) *Young and Accountable? Should NZ lower the age of criminal prosecution?* (Summary Position Paper, UNICEF NZ, October 2008).

[197] Johnson, L. M., Simons, L., & Conger, R. D. (2004). Criminal justice system involvement and continuity of youth crime: A longitudinal analysis. *Youth & Society.*

[198] Allison Morris and Henry Giller, *Understanding Juvenile Justice* (Kent: Croom Helm, 1987), 138. Allison Morris and Warren Young, *Juvenile Justice in New Zealand: Policy and Practice* (Wellington: Institute of Criminology, 1987) at 62.

[199] Lambie, I. (2006) *The Negative Impacts on Juvenile Offenders Incarcerated in Adult Prisons,* quoted in Becroft, A.,Thompson, R.: *Symposium Child and Youth Offenders. What works.,* 22 August 2006, Wellington. Downloadable from http://justice.org.nz/youth/media/speeches/child-youth-offenders-what-works-august-2006.pdf.

[200] L Steinberg and A Piquero "Manipulating Public Opinion About Trying Juveniles as Adults: An Experimental Study" (2010) Crime and Delinquency [487].
A prominent New Zealand example of this is that of Bailey Junoir Kurariki who was thrown into the spotlight after the Michael Choy murder, and has been flouted as this country's "youngest killer" ever since. The names of the older youths – in particular those were found guilty of murder received no where near the same amount of publicity.

[201] The labeling theorists basically propound that if the child is stigmatized by the criminal justice process, and his family, friends and the media label him as 'delinquent', then the child is likely to accept and reflect this label in his behaviour.

Youth Court lacks the necessary ammunition to deal with care and protection issues

Perhaps the most salient reason not to bring 12 and 13 year olds into the Youth Court is the inability of the Youth Court to deal with the roots of the offending of these young children. Most serious child offenders, in one way or another, bring with them past and/or present care and protection deficits.[202] Attempts to reduce the offending of such children are best done in the community, and better still in the context of the environment which probably contributed to the offending and to which the child will have to return.[203] Such an attempt is likely to reduce the child's chance of re-offending rather than stigmatising the child and placing them amongst others who will reinforce their criminal behaviour. By bringing such children into the Youth Court it raises the profound risk of criminalising what is essentially a welfare issue.[204] 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.[205]

There is real concern by Youth Court Judges that the Court will be assuming the responsibility for the worst child offenders, "who by definition will have the most serious care and protection issues, but that the Youth Court will not have the necessary statutory "ammunition" to deal with the inevitable care and protection concerns."[206] To be given the jurisdiction to deal with these child offenders is one thing, but to be given the responsibility to deal with them without the powers to address what are likely to be the root causes of their offending (care and protection) is quite another. The Amendment in its finality provided that the Youth Court judges were able to divert children to the Family Court's jurisdiction if they consider that it is appropriate for the child to be dealt with under its care and protection provisions. Despite this, it is arguable that it would be better for the Act itself to prescribe laws which are appropriate to the

[202] As mentioned in chapter two
[203] Sending out an SOS – Youth Justice needs the Community, Judge Becroft, Working Together Conference, November 2007-
[204] As mentioned in chapter two, previously in all cases of child offending, the matter had to be dealt with by way of a Family Group Conference and if necessary an application could be made to the Family Court that the young persons was in need of care and protection. This reflected the philosophical assumption that children who offend must be viewed in the context of their family.
[205] This option is discussed in Chapter 4.2.
[206] The Youth Court of New Zealand "Submission to Social Services Select Committee on the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill".

ages and stages of children, rather than relying on the discretionary powers of the judges to ensure that children are treated appropriately.[207]

Conclusion

The point to be made here is that bringing serious young offenders into the youth justice arena is unlikely to work in the sense of reducing reoffending and may in fact make the situation worse. Legislators and policy makers need to know much more about effective policy choices for reducing serious offending by 12 and 13 year olds before that goal can be used as a substantive reason to lower the age of criminal responsibility. It is arguable that until evidence is provided that bringing 12 and 13 year olds into the youth justice system will actually fulfill tangible policy goals, it might be best to adopt, as a preliminary solution, the view that, in devising strategies for dealing with young offenders – particularly child offenders – we should not sacrifice other objectives such as upholding the rights of the child in the pursuit of the populist aim.

3.3 International Human Rights Instruments

The above summaries of developmental evidence and brain science have established that lowering the age of criminal responsibility to 12 is unlikely to reduce the rate of re-offending in this selected group of children, and neither does it adequately reflect their capacity to comprehend their actions. The third element of the age of criminal responsibility that needs to be analysed is the rights of these children recognized through law. The current Principal Youth Court Judge Andrew Becroft has challenged New Zealand society stating that:[208]

> rather than succumb to simplistic public pressure to "get tough", child and youth justice systems must take as their foundation the principles that uphold the rights of children and young people.

[207] refer to chapter 4.2.
[208] Andrew Becroft, above n53

International obligations have also challenged jurisdictions to be more transparent and evidence led in their approach to children and young people and to demonstrate effectiveness in their practices.[209]

Although there is no categorical international standard regarding the age at which criminal responsibility can reasonably be imputed to a child,[210] key international conventions on youth justice contain a number of principles that are vital for a measured and dispassionate response to child offending.[211] Three specific international instruments are relevant to New Zealand's treatment of youth offenders: The United Nations Conventions on the Rights of the Child ('UNCROC'),[212] The Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'),[213] and the International Covenant on Civil and Political Rights (ICCPR)[214].

Forty-two years ago New Zealand ratified the ICCPR and thereby undertook to ensure that the rights and freedoms contained in the covenant were recognised by government. Most of the rights in the ICCPR were embodied in the New Zealand Bill of Rights Act 1990 (NZBORA).[215] Whilst the NZBORA does not provide any special rights for young offenders, it does state that children are to be 'dealt with in a manner that takes account of their age', which implies that young offenders should be treated differently and more leniently than adults.[216]

In accordance with s 7 of the NZBORA the 2010 Amendment Bill was reviewed for consistency with the NZBORA.[217] The Attorney General reported to Parliament that while issues under ss 11, 17, 22 and 25(1) of the NZBORA arose, in respect of the Bill, it

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[209] Buist, Maureen and White, Bill *International Evidence about decision making and services for children and young people involved in offending* (Criminal Justice Social Work Development Center for Scotland, 2004) at 3.
[210] B Goldson, above n 6, at 8
[211] Andrew Becroft, above n 53
[212] *United Nations Convention on the Rights of the Child* (opened for signature 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990).
[213] *United Nations Standard Minimum Rules for Administration of Juvenile Justice*, GA Res 40/33, UN Doc A/40/53, Annex, 40 U.N. GAOR Supp.No.53 (1985) at 207.
[214] International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16th December 1966, entry into force 23rd March 1976 in accordance with art. 49)
[215] G Maxwell above n94, at 93
[216] ibid
[217] Casey, Victoria *Advice to the Attorney-General on the Consistency with the New Zealand Bill of Rights Act 1990 of the Children Young Persons & Their Families (Youth Courts Jurisdiction & Orders) Amendment Bill* (Crown Law, 5 February 2009)

concluded that these issues gave rise to no inconsistency.[218] The review noted that the lowering of the age of prosecution for certain offences under the Bill requires consideration of the fair trial rights guaranteed in s 25 of the Bill of Rights Act, and in particular the right in s 25(i) "... in the case of a child, to be dealt with in a manner that takes account of the child's age."[219]

The report also noted that a 12 or 13 year old (as well as 14, 15, 16 and 17 year olds) charged with a serious offence may opt for trial by jury, which will remove the hearing from the Youth Court and place it into the Adult Court. In that situation the presiding Judge will be under an obligation to ensure compliance with s25(i),[220] and the principles underlying the Youth Justice regime will generally continue to be applied.[221] It is arguable however, that this proposition no longer exists with the decision of the Court of Appeal in – *R v Pouwhare* which held that when sentencing a child in the adult Courts the judge cannot have regard to the principles set out in the CYPF Act, instead only the Sentencing Act 2002 is of relevance.[222]

Looking further afield the UNCROC is the most relevant piece of international law in regards to New Zealand's youth justice system. It gives the rights of children and young people, at least in theory, a central place in international law. By signing and ratifying the UNCROC, New Zealand has signified its willingness to be bound by its principles.[223] Whilst the status of the UNCROC in domestic law remains interpretive rather than

[218] s11 – the right to refuse to undergo medical treatment, s17 – freedom of association, s22 – liberty of the person, s25(1) – minimum standards of criminal procedure

[219] See also United Nations Convention on the Rights of the Child, article 40.

[220] See, for example, SC v United Kingdom (2005) 40 EHRR 10, [29].

[221] *R v C* (CA312/91, 28/09/91)

[222] Whilst age is still considered a mitigating factor under the Sentencing Act it is likely that those convicted to these Courts for the commission of serious offences may receive substantial sentences due to such sentencing processes as starting points and guideline judgments which "bind" the court.

[223] Subject of course to the three reservations which New Zealand has entered. The New Zealand Government ratified the UNCROC in March 1993, following a comprehensive review of legislation. In doing so, New Zealand became the one hundred and thirty-first country to ratify the Convention. The New Zealand Government entered three reservations to UNCROC when ratifying the convention in 1993. These reservations which still stand were made in respect of the following Articles of the Convention:

- Article 22.1 – requires State Parties to take appropriate measures to ensure that children seeking refugee status are provided with the same rights under the UNCROC as other children as well as appropriate protection and humanitarian assistance.
- Article 32.2 – requires, inter alia, State Parties to provide a minimum age of entry into employment.
- Article 37(c) – requires, inter alia, that State parties ensure that children deprived of their liberty are separated from adults unless it is in the child's best interest not to do so.

definitive, it has a vital role in providing a benchmark against which the New Zealand youth justice system can be measured.[224]

Article 3(1) of the UNCROC – amongst the most widely adopted international human rights instrument in history provides:[225]

> in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

More specifically, Article 40 of UNCROC establishes a set of minimum international juvenile justice standards, including:[226]

> That children and young people shall be treated in a manner which takes into account their age and the desirability of promoting reintegration and their assuming a constructive role in society[227] … That State Parties shall establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

The United Nations Committee on the Rights of the Child[228] recommends "the age of 12 years as the absolute minimum' and encourages governments to 'continue to increase it to a higher level".[229]

The provisions of UNCROC are complemented by the UN Guidelines for the Administration of Juvenile Delinquency "The Riyadh Guidelines",[230] the United Nations

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[224] Nessa Lynch, 'Youth Justice in New Zealand: A Children's Rights Perspective' (2008) 8 *Youth Justice* 215.

[225] *United Nations Convention on the Rights of the Child* (opened for signature 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990).

[226] UNCROC (Article 40.3(a))

[227] UNCROC (Article 40.1)

[228] United Nations Committee on the Rights of the Child 2007, para. 16)

[229] B Goldson, above n6, at 8

[230] United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), G.A res 45/112, annex, 45 U.N GAOR Supp. (No49A) at 201 U.N Doc. A/45/49 (1990).

The Riyadh Guidelines insist that young people should have an active role and partnership within society and should not be seen as "objects of socialization or control." Anti-social behaviour should be seen as "part of the maturation & growth process" that will disappear with the transition to adulthood.

Rules for the Protection of Juveniles Deprived of their Liberty,[231] and the United Nations Standard Minimum Rules for Administration of Juvenile Justice "the Beijing Rules" being the most relevant.[232] The Beijing Rules are not a legally binding treaty of themselves, being simply United Nations recommendations on minimum standards for national youth justice systems, however they expand on the international norms set out in the UNCROC, stating at clause 4.1:[233]

> in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

The Commentary to clause 4.1. of the Beijing Rules provides further context stating:

> The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility… if the age of criminal responsibility is set too low or if there is no lower age limit at all, the notion of responsibility becomes meaningless … Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

Although these documents provide no precise indication what that age should be – and different ages attract criminal responsibility in different countries,[234] the UN Committee responsible for monitoring compliance with UNCROC has already commented negatively on the age at which a child can be charged with a serious criminal offence in New Zealand.[235]New Zealand's age of criminal responsibility was considered by the UN in 2003, as part of the New Zealand Government's reporting obligations under UNCROC. Rather than finding that New Zealand's current laws conformed with international juvenile justice norms, the UN Committee on the Rights of the Child instead expressed

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[231] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res 45/113, annex, 45 U.N. GAOR Supp. (No.49A) at 205, U.N. Doc A/45/49 (1990)

These rules describe optimal custodial arrangements for children. These include imprisonment in small open facilities with individualized treatment, contact with family members, and staff trained in child welfare and human rights.

[232] United Nations Standard Minimum Rules for Administration of Juvenile Justice, G.A. res. 40/33, Annex, 40 U.N. GAOR Supp.No.53, at 207, U.N. Doc. A/40/53 (1985). Hereinafter the Beijing Rules

[233] Beijing Rules Clause 4.1

[234] see above n15

[235] United Nations Committee on the Rights of the Child 2003, 2007 reports.

its concern at New Zealand's low age of criminal responsibility[236] and recommended that the Government:[237]

> raise the age of criminal responsibility to an internationally acceptable age and ensure that it applies to all criminal offences[238]; and … extend the Children, Young Persons and Their Families Act of 1989 to all persons under the age of 18.

Furthermore in its 2007 General Comment on Children's Rights in Juvenile Justice, the UN Committee on the Rights of the Child strongly recommended that the lowest age for criminal responsibility be set at 14 or 16 years and expressly urged State Parties against lowering the age of criminal responsibility to 12:[239]

> Rule 4 of the Beijing Rules recommends that the beginning of the Minimum Age of Criminal Responsibility (MACR) shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level…. **the Committee urges State Parties not to lower their MACR to the age of 12.**A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system, which in accordance with Article 40(3)(b) of CRC , deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected[240] [emphasis added]

Thus although the human rights instruments refrain from specifying an arbitrary age of criminal responsibility, it can be assumed that the practices of unequivocally 'responsibilising' and 'adultifying' children from the age of 12 years is clearly at odds with the core principles underpinning the 'Beijing Rules', the UNCROC and several other authoritative statements of children's human rights.[241] This is especially so when one bears in mind the evidence discussed earlier which states that the emotional, mental

[236] CRC/C/15/Add.216 at para. 20.
[237] ibid. at para. 21(b).
[238] ibid. at para. 21(a).
[239] CRC/C/GC/10, 2007, at paras. 32 and 33
[240] ibid, at paras.32 and 33
[241] See for example, United Nations Committee on the Rights of the Child 2007, Council of Europe Commissioner for Human Rights 2009, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

and intellectual maturity of these serious child offenders (aged 12 and 13) is so low. If a 12 year old must face the adult court process or something similar to it, it can hardly be said that the international principles are being upheld.

It follows that by lowering the age of criminal prosecution, the Amendment moves in an opposite direction from the international youth standards and principles that the New Zealand Government has pledged to implement. As a result this Amendment may bring New Zealand a degree of international disrepute while also damaging our reputation as a nation which takes its international human rights obligations seriously.

During the Select Committee process much criticism was directed at the Bill due to the inconsistency between the Amendments and these International Human Rights Instruments. The response repeatedly given to such criticisms was that "because such a high threshold has been set,[242] the lowering of the age of criminal responsibility does not unduly increase costs or unnecessarily expose child offenders to the criminal justice system."[243] In spite of this it is clearly a concern that the aforementioned rights have been dismissed by officials, as seen in the explanatory note to the Bill, on the premise that only a few young people will be prosecuted under them. The Amendments do not comply with international human rights standards irrespective of how many young people are prosecuted.

3.4 Conclusion

In summary, this evidence suggests that lowering of the age of criminal prosecution represents a major legislative failure. The most salient three reasons being; it does not match with scientific evidence regarding the capacity of 12 and 13 year olds (particularly those likely to be brought before the Court); further, it is unlikely to lead to a reduction in serious child offending and, finally, it does not comply with the international agreements regarding the rights of children to which New Zealand is a party. Such evidence and documents clearly have a role to play in the legislative decisions of New Zealand's Government.

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[242] Offences punishable by a sentence of 14 years imprisonment or more and repeat offending for offences punishable by 10 years imprisonment or more.

[243] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009) at 2

Despite these reservations it is recognised that the amended legislation has been passed and came into force on 1st of October this year.[244] These serious child offenders will become an integral part of the New Zealand Youth Justice system for the foreseeable future. The next chapter acknowledges this and suggests legal and policy changes to the current youth justice system that can mitigate these flaws.

[244] Date of Assent = 6 March 2010.

CHAPTER FOUR

The Way Forward

As evidenced in chapter three bringing 12 and 13 year old serious child offenders into the Youth Court jurisdiction has multiple flaws. Firstly it may bring New Zealand's international reputation into disrepute; secondly it is likely to fail to reduce re-offending; and thirdly such reduction fails to recognise the limited culpability of these individuals.

This chapter sets out to offer some practical suggestions to combat these problems. Whilst an obvious option would be to repeal the legislation - this is unlikely and thus other alternatives must be put forward. In order to stop the Youth Court from falling short of its potential it is suggested that Parliament legislate to expand the Youth Court's jurisdiction to include 17 year olds, and also to provide the Youth Court with s 83 powers of the Family Court which will give them the ability to deal with care and protection issues at the root of the child's offending. Finally this chapter will attempt to foreshadow a principled approach to the sentencing of serious child and youth offenders taking into account the scientific evidence discussed in chapter three with regard to the culpability of the serious child offender.

4. 1 A Further Extension of the Youth Court's Jurisdiction

This paper recommends that the reach of the Youth Court be extended to incorporate 17 year olds into its jurisdiction.The exclusion of 17 year olds from the CYPF Act is inconsistent with the definition of a child or young person under UNCROC which defines adulthood as starting at a young persons 18th birthday. The UN Committee has recommended, on two occasions, that New Zealand should bring its legislation into line with UNCROC by raising the age that an offender can stay within the Court's jurisdiction[245].

This proposal is not new to Parliament. In December 2007 the Children, Young Persons and Their Families Amendment Bill (No 6) was introduced to Parliament and was returned to the House following a report by the Social Services Select Committee in August 2008. One of the

[245] United Nations Committee on the Rights of the Child 2003 and 2007 reports

key amendments this Bill proposed was to include 17 year olds in the Youth Court Jurisdiction.[246]

With their newly increased orders, such as the extended length of supervision orders and alcohol and drug programmes, the Youth Court is now better equipped to deal with 17 year old offenders; therefore arguably making it the ideal time to make this amendment. This amendment may also counterbalance the international disrepute New Zealand risks with the lowering of the age of criminal responsibility,[247] and finally it will allow for those 17 years that can be dealt with effectively in the Youth Court to remain out of the adult jurisdiction.

The proposed inclusion of 17 year olds in the Youth Court would bring New Zealand into line with the UNCROC, and most of the world's other major democracies, including most Australian States, 38 US States, Canada and Great Britain. Such amendment would bring New Zealand into equilibrium with other jurisdictions and "would be consistent with our international obligations".[248] It is New Zealand which is clearly out of step at the present.

The age of adult responsibility specified in many other New Zealand statutes is 18. One of the notable exceptions is under s 20 of the Land Transport Act, which allows 15 year olds to hold driver licences. It is no coincidence that the minimum age of driver licensing is also a frequent target for calls of law reform.[249] There are a significant number of New Zealand statutes that restrict activities and involvement for those under 18. For instance a person cannot vote, enlist in the military without consent, buy alcohol and tobacco or enter into contracts until they are 18. Presumably the basis for these laws is that until 18, it is not appropriate to treat young people as adults and they need guidance and protection. This amendment would therefore be perfectly consistent with this approach which is reflected in so many other areas, essentially that young people should not be dealt with in the adult courts until they are 18.

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[246] Currently young offenders lose the Youth Court's jurisdiction on the dawning of their 17th birthday

[247] As mentioned in chapter three, New Zealand is already out of favour with the UN Committee on the Rights of the Child due to our failure to accord with the provisions of the UNCROC. New Zealand is likely to be brought into even further international disrepute, as we are now conflicting with the UNCROC at both ends of the spectrum.

[248] December 2007 Court in the Act, Youth Court Newsletter, Judge Becroft

[249] Land Transport (Road Safety and Other Matters) Amendment Bill - Parliament: 49 Bill no: 213-1 Introduction: 13/9/10 First reading: 16/9/10 Referred to: Transport and Industrial Relations Committee

Chapter three provided that references to developmental science are useful when making legislative decisions regarding the drawing of lines in reference to age. Recent research into the development of teenage brains suggests that decision making and cognitive functions do not fully develop until a person reaches their mid twenties.[250] This suggests that 17 year olds should not be included in adult legislation. Furthermore including 17 year olds in the Youth Court jurisdiction extends the system's ability to apply youth justice solutions to this group of offenders and their families, and to promote meaningful and long lasting accountability.[251] Such change would also radically increase the opportunities for diverting less serious 17 year old offenders out of the criminal justice system, which has been used to such great effect by Police Youth Aid for 14 – 16 year olds.[252] This would also help to reduce the so called "pipeline" effect by restricting the entry of a 17 year old into the formal criminal justice system.[253] Furthermore the additional orders the Youth Court has received,[254] provide more ability for the Youth Court Judge to hold the older youth accountable for their offending, whilst also keeping them away from the negative effects of entering the adult jurisdiction.

It should also be emphasised that public concern that including 17 year olds within the youth justice system will result in a "soft approach" for 17 year olds, is ill founded. Section 4(f)(i)of the CYPF Act directs the Court and all involved in the youth justice system to ensure that young people are held accountable and are encouraged to accept responsibility for their behaviour. It is correct that 17 year olds would be entitled to the same protections and procedural safeguards as are currently enjoyed for 14 – 16 year olds if the Youth Court's jurisdiction were to be extended to include them. However, in one crucial respect, 17 year olds will be treated differently to 14 – 16 year olds. Section 18 of the Sentencing Act 2002 prohibits imprisonment being imposed on those who offend as under 17 year olds for all but purely indictable offences. Self-evidently, this restriction would not apply to offences committed by 17 year olds. Thus, 17 year olds who commit serious or persistent non-purely indictable offences, would still be liable to imprisonment just as they are now, through the operation of s283(o) of the CYPF Act which allows the Court to convict and transfer the young person to the District Court for sentence. In response to commentary which suggests that increasing the age of Youth

[250] discussed in more depth at Chapter 3.1
[251] Through such options as the Family Group Conference
[252] Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 - 2008* (Ministry of Justice, April 2010).
[253] As discussed in Chapter 3.2
[254] Parenting orders, counseling, alcohol and drug rehabilitation programmes, longer supervision etc.

Court jurisdiction to 18 will mean that 17 year olds will not be held to account for their offending, Judge Becroft has said that these ideas are "unhelpful, misleading, inaccurate and just plain wrong".[255]

An article in "Court in the Act"[256] from January 2009 summarises the work of Richard Redding and is entitled "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?" In summary Redding's review of six large scale studies found higher recidivism rates for young offenders transferred to the Adult Court than for those retained in the Youth Court. The article goes on to describe in detail the reasons why youth tried as adults have higher recidivism rates.[257, 258]

All the aforementioned discussion provides support for this legislative amendment to the jurisdiction of the Youth Court. Interestingly this Bill was reinstated in the 49th Parliament and is thus still technically on the Government's legislative agenda, but is currently stalled with the Social Services Select Committee.[259] This leaves the possibility of such legislative amendment as a genuine option, available to the Government of the day.

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[255] December 2007 Court in the Act, Youth Court Newsletter, Judge Becroft

[256] December 2007 Court in the Act, Youth Court Newsletter, Judge Becroft

[257] Richard Redding (2007) Juvenile Transfer Laws: An Effective Deterrent to delinquency? – Court in the Act, Youth Court Newsletter

[258] **Transfer laws do not lower youth crime** 1980s Jensen and Metsger (1994). Time-series analysis for 1976 to 1986 found 13% increase in arrest for 14-18 year olds in Idaho after that state introduced its transfer law in 1981.Steiner and Wright (2006) Multi- state (14). Time-series 1975-2000. Transfer laws had no general deterrent effect. 13 either increased or stayed same. Michigan decreased.

Transfer laws have no effect

Singer and McDowall (1988) in time series analysis, New Y ork no deterrent effect on youth crime 1974-1984. Lee and McCary (2005) in Florida. YP did not lower their offending rates upon turning 18 (adult sanctions not a deterrent).

Deterrence

The following studies examined the increase in recidivism for YP transferred to adult courts compared to youth courts:

Fagan (1996) examined 800 Y O charged with burglary 1981-82. 91% recidivism compared 73% in YC. Bishop (1996) compared 1 year recidivism rate of 2,738 young offenders in Florida. Rearrest rates were higher among transferred youth (0.54 versus 0.32). The average time to reoffending was shorter also (135 versus 227 days) Myers (2001, 2003) examined 18 month recidivism of 494 young offenders in Pennsylvania in 1994. Transferred youth were 2 times more likely to be rearrested and to reoffend. OJJDP funded studies. Lanza-kaduce and colleagues (2005): 950 young adult offenders studied. Half had been transferred and half committed in a Youth Court. Overall offences – 49% of transferred offenders reoffended compared to 35% of those retained in a youth court.

[259] Children Young Persons and Their Families Amendment Bill (No 6)

4.2 Transfer of Family Court's Care and Protection Orders to the Youth Court

This paper has argued that the Youth Court is not the correct jurisdiction for 12 and 13 year olds primarily because they should not be held criminally responsible for their actions, on the basis that the root causes of their offending are likely to be of a care and protection origin.[260] The offending is viewed as systemic of the environment the child is currently living in rather than being focused on the individual. Thus dealing with the child offender in a criminal jurisdiction, albeit a juvenile one, is inappropriate to reflect the limited culpability on their behalf. It is also likely to be ineffective at reducing their re-offending by failing to deal with the real causes of this serious offending. The few evaluations of programmes that focus on serious child offenders show that to be successful with rehabilitating them work must originate with their families and problems present in their upbringing.[261]

Chapter two of this paper discussed the clear line drawn in the CYPF Act between the separate jurisdictions of the Family Court and the Youth Court. Such strict delineation is essential to ensure that care and protection issues are not to be pursued in the youth justice forum.[262] There is a strong emphasis against welfarising the response to any form of offending.[263] Now that serious child offenders have been brought into the Youth Court's jurisdiction arguably the line between care and protection issues and offending behaviour has already been blurred.

The issue then becomes how is the Youth Court to deal with such offenders if the available sentencing options the Court has cannot address the basis of the offending – essentially that of their environment. During the Select Committee process the Youth Court expressed their apprehension that they "[do] not have the necessary

[260] See chapter two for further discussion on this.
[261] C Nee "The Offender's Perspective On Crime: Methods and Principles in Data Collection" in A Needs and G Towl (eds) *Applying Psychology to Forensic Practice*. (BPS Blackwell, London, 2004) at 91
[262] S208(b) CYPF Act
[263] The establishment of the Youth Court underlines the importance of the principle that the offending of young people should be premised on criminal justice not welfare principles; that is, on notions of accountability and responsibility for actions, due process, legal representation, requiring judges to give reasons for certain decisions, and imposing sanctions which are proportionate to the gravity of the offence.

'ammunition' to deal with the inevitable care and protection issues at the root of offending".[264]

As mentioned above, the CYPF Act provides the Youth Court with a range of 'sentencing' options referred to as Youth Court orders, including lower tariff orders such as admonishment, fines, reparation and restitution. Higher tariff orders are supervision, community work, supervision with activity and supervision with residence. The supervision with residence order is the sole custodial order available to the Youth Court. All of these orders provide for short term interventions aimed at pursuing the dual goal of the Youth Justice principles – making the offender accountable for their offending whilst pursuing their rehabilitation. None of these however, provide for the ability to intervene in the family life of the child.

The Family Court on the other hand when dealing with child offenders has a much wider array of orders and responses it can make. For instance, the Family Court has powers to make custody and guardianship orders,[265] and also counseling orders, in respect of parents, guardians and any person who is made the subject of a restraining order in respect of that child.[266] Service orders to provide services to the child or the person caring for the child,[267] and support orders, which can be ordered to monitor the standard of care been given to the child, can also be made.[268]Such orders, in particular, the presence of a Family Court custody order are often pivotal for a successful outcome for the child offender involved.[269] Evidence indicates that the type of support given to caregivers when children become serious offenders is crucial if these children are to reduce their offending.[270] Also the care and protection response can continue long after the need for the justice respond has ended.

The majority of these powers are provided to the Family Court through s 83 of the Children Young Persons and Their Families Act 1989.[271] This paper suggests that the

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[264] see above n 206
[265] Section 101 CYPF Act
[266] Section 83 CYPF Act
[267] Section 86 CYPF Act
[268] Section 91 CYPF Act
[269] McLaren, K *Youth Offending Teams: What Doesn't Work to Reduce Offending by Young People* (Ministry of Justice, 25 January 2005) http://www.justice.govt.nz/policy-and-consultation/youth/e-flashes/E-flash%2019.pdf
[270] Robertson, D (2009); Fergusson, D. (2009) in Maxwell (2009) op cit.
[271] **S 83 Orders of court on making of declaration**

'ammunition' in s 83 should be provided to the Youth Court to enable them to make interventions into the child's familial life where necessary.

Whilst conferring Family Court powers on the Youth Court is likely to blur their jurisdictions, it is contended that this has already been done by bringing child offenders across to the Youth Court. One of the youth justice principles of the Act is that criminal proceedings should not be used solely to address welfare concerns.[272] Section 284(2) of the CYPF Act prevents the Youth Court from making a supervision order, a community work order, a supervision with activity order, or a supervision with residence order, merely because the Court considers that the young person is in need of care and protection. It is arguable however that this necessitates the need for alternative orders that do not consign criminal sanctions on the child offender when the concerns as to the causes of their offending are of a welfare nature. The goal here would not be achieved by applying care and protection solutions to criminogenic issues (or vice versa), but by using the appropriate parts of the Act to address the issues they were designed to address (here care and protection provisions = addressing care and protection issues).

As already stated, crime reduction programmes for child offenders are generally more effective when they involve the family and whanau, particularly where an analysis of the offenders' risks factors indicates that there is a need to improve family communication

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(1) Where the court makes a declaration under section 67 relating to a child or young person, it may do 1 or more of the following things:
(a) discharge the child or young person, or any parent or guardian or other person having the care of the child or young person, or both, from the proceedings without further order:
(b) order that the child or young person, or any parent or guardian or other person having the care of the child or young person, or both, come before the court, if called upon within 2 years of the making of the order, so that the court may take further action under this section:
(c) order 1 or more of the following persons to receive counselling from such person or persons, and subject to such conditions, as are specified by the court:

- the child or young person:
- (ii) any parent or guardian or other person having the care of the child or young person:
- (iii) any person in respect of whose conduct a restraining order or an interim restraining order was sought or made in the proceedings:

(d) make a services order under section 86:
(e) make a restraining order under section 87:
(f) make a support order under section 91:
(g) make a custody order under section 101:
(h) make an order under section 110 appointing a guardian of the child or young person.

(2) Where the court makes an order under subsection (1)(c), sections 74 to 77 shall apply, with all necessary modifications, with respect to that order as if it were a direction made under section 74(1).

Compare: 1974 No 72 s 31(1)(b), (c), (d), (h); 1983 No 129 s 7(1)

[272] Section 208(b) CYPF Act 1989

or dynamics. Programmes which provide parenting training have proven to be effective.[273]The recent Amendments provide for the introduction of parenting orders which are clearly aimed at addressing the causes of the child's offending.[274] If criticisms were pointed at transferring the powers of s 83 to the Youth Court due to this blurring the separate jurisdictions, it could be argued that this has already been done by allowing parenting orders to enter the Court's array of options – clearly aimed at the welfare of the offender.

Parenting orders on their own however, are likely to be insufficient to deal with the care and protection issues that are present in the majority of these serious child offenders.[275] The powers given in s 83 on the other hand are much more extensive and enable comprehensive intervention into the child's life when necessary.[276] Additionally many of the Judges who sit on the Youth Court also have experience in the Family Court and thus are likely to have experience in deciding when such orders are appropriate.

Despite the history of boundary issues between care and protection and youth justice within the CYPF Act, it is submitted that it makes no sense for the Family Court and Youth Court to deal in isolation with the same young person whose offending and care and protection needs are intimately and intricately related.[277]

Such transfer of legislative power would have to be done by the means of legislative amendment. This could be done by either extending Part two of the CYPF Act which governs the care and protection of young people to include the Youth Court or alternatively by replicating the statutory powers in s 83 to be included in the Part Four of the Act which governs Youth Justice. Gaining powers under s 83 would also require that

[273] D Farrington (2003) "Developmental and life-course criminology: Key theoretical and empirical issues" 41 Criminology at 145
[274] see above n 80
[275] Ministry of Social Development *A Fresh Start for Young Offenders: Regulatory Impact Statement* (Executive Summary, 2009).
[276] Care and protection proceedings in respect of children and young people who are, or who are likely to be harmed, abused or neglected also encompass circumstances when there is serious concern for the wellbeing of a child aged 10 – 13 years as a result of the number, nature or magnitude of offences alleged to have been committed by that child.
[277] Judge Fitzgerald's Intensive Monitoring Group Court in Auckland City is an excellent example of how a collaborative approach can benefit both the Young person and the various agencies charged with his or her care.

the Youth Court to be given the ability under s 67 of the Act to make grounds for a declaration that child or young person is in need of care or protection.[278]

4.3 Bringing Scientific Evidence into Sentencing – A qualitatively different approach

Finally, this paper suggests that a qualitatively different approach to the sentencing of child and youth offenders in the adult courts is necessary. Such a sentence would use scientific evidence to tailor the sentence to reflect the developmental immaturity of the young offender in comparison to their adult counterparts.

The general principles relating to sentencing young people in the adult courts are now embodied in the Court of Appeal decision *Pouwhare v R.* [279] *Pouwhare* concluded that:

- Youth Justice principles do not apply to young people sentenced in an adult court;
- Adult court tariff cases do apply when setting starting points for sentencing young people in an adult court; and
- There is no limit to the discount that can be given for age under the Sentencing Act.[280]

This approach was clearly mandated by the wording of the relevant legislation.[281] The combined effect of the above principles would probably have made little difference to the end result for most young people sentenced in the adult court irrespective of whether the Court had taken the different approach suggested by the defence to apply the CYPF Act.

Nevertheless, it was perhaps disappointing that the opportunity was not taken by defence counsel to introduce the most recent evidence regarding brain development at

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[278] s**67 Grounds for declaration that child or young person is in need of care or protection**A court may, on application, where it is satisfied on any of the grounds specified in section 14(1) that a child or young person is in need of care or protection, make a declaration that the child or young person is in need of care or protection.

[279] *R v Pouwhare* [2010] NZCA 268

[280] For more info see chapter two on sentencing

[281] The Court held that the Sentencing Act analysis would be rendered incoherent if its purposes, principles, and aggravating and mitigating factors did not effectively displace
the youth justice sentencing principles in s208 of the CYPF Act.

the sentencing stage.[282] It is submitted that if this evidence had been introduced, a different and principled approach could have possibly been foreshadowed for young people facing charges for serious offending. There was at least an opportunity, even given the current legislation, to consider whether a substantially different approach could be taken for serious youth offenders to treat them as children or young persons rather than junior adults. Such an approach would not necessitate adherence to adult tariff starting points and would give the courts flexibility to dispense with an adult starting point and to tailor the sentence to the developmental level of the young offender.

Recent decisions of the Supreme Court of the United States have used scientific evidence regarding brain development to provide for a qualitatively different approach to sentencing for juveniles due to their unique developmental maturity. In its landmark 2005 decision *Roper v Simmons,* which abolished the juvenile death penalty, the US Supreme Court held that the inherent immaturity of adolescents relatives to adults mitigated teenagers' criminal responsibility to the extent that it barred the imposition of capital punishment for crimes committed under the age of 18, regardless of their heinousness.[283]

Although the Supreme Court's decision in *Roper v Simmons*[284] did not specifically cite any developmental neuroscience, several of the amicus curiae briefs submitted in the case, including that of the American Psychological Association (2004), drew the justices' attention to that body of research, stating:[285]

[282] Chapter three clearly established that young people are not junior adults: developmentally they are markedly more immature.
[283] L Steinberg, above n151, at 583
[284] *Roper v Simmons* 543 US (2005)
[285] ibid "Why do adolescents show differences from adults with respect to risk-taking, planning, inhibiting impulses, and generating alternatives? Recent research suggests a biological dimension to adolescent behavioural immaturity: the human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood… of particular interest with regard to decision making and criminal culpability is the development of the frontal lobes of the brain. The frontal lobes, especially the prefrontal cortex, play a critical role in the executive or "CEO" functions of the brain which are considered the higher functions of the brain… they are involved when an individual plans and implements goal-directed behaviours by selecting, coordinating, and applying the cognitive skills necessary to accomplish the goal…. Neurodevelopment MRI studies indicate this executive are of the brain is one of the last parts of the brain to reach maturity.

> "When compared to an adult murdered, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." (560 US at 18)

Developmental science was also front and centre in another US Supreme Court decision from this year, *Graham v Florida*.[286] The Supreme Court ruled that juveniles who commit crimes in which no on is killed may not be sentenced to life in prison without the possibility of parole. The Court's ruling, which drew extensively on an amicus curiae brief submitted by the American Psychological Association was informed by a recent summary of relevant research on psychological development during adolescence. [287] The US Supreme Court made these comments:

> "Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. (560 US at 17) (amicus curiae 16 – 24 & 22 – 27)"

These recent decisions in the US Supreme Court[288] reinforce the conviction that brain science evidence is relevant to dealing with children and young people in Court. In an article published in the Journal of Adolescent Research late last year, DeLisi et al described the decision in *Roper v Simmons,* which ruled that the death penalty could not be applied to young people under the age of 18 (for reasons including their not yet fully developed and mature brain and personality), as "breathtakingly progressive."[289] The New Zealand courts should try and keep up with such progressive precedent.

The Sentencing Act currently allows for age to be brought in as a mitigating factor in the Sentencing Process under s9(2)(a), and it is seen as a factor of considerable importance when determining an appropriate sentence.[290] The Courts have held that "youth alone does not automatically justify leniency,"[291] but it is a highly relevant consideration and

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[286] *Graham v Florida* 560 US (2010).
[287] Are adolescents less mature than Adults? Steinberg pg pg 583
"Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. (560 US at 17) (amicus curiae 16 – 24 & 22 – 27)
[288] *Roper v Simmons* (2005) 543 U.S. 551; *Graham v Florida* (2010) 560 US.
[289] M, DeLisi. and others "Nature and Nurture by Definition Means Both: A Response to Males" (2010) [24] 25(1) Journal of Adolescent Research.
[290] *R v Autagavaia* [1985] 1 NZLR 398 (CA)
[291] *R v Accused* (CA 265/88); [1989] 1 NZLR 643 (CA) Bisson J, at 655 –

the younger the offender the more significant becomes the relevance of age.[292] It is contended however, that this is still insufficient to take into account the developmental immaturity of many serious child and youth offenders when they enter the adult criminal justice system. With the new Amendment children as young as 12 may enter the adult jurisdiction, albeit it on an extremely limited basis. These children may in actual fact be even more developmentally young due to lower intellectual capabilities, lack of schooling and mental and physical disabilities. The Court of Appeal has said that "what sentence is proper in type and in length is not constrained by any percentage." However, research shows that a reduction of up to 60 or 70 percent has never been countenanced on appeal before in New Zealand courts. Thus whilst such reduction is not precluded, it is unlikely to be given.

One technique for guiding judicial discretion in the search for uniformity of approach to sentencing is the guideline judgement. Such judgments often set starting points or benchmarks by scheduling penalties imposed in previous decisions of the Court. These bands and starting points then guide sentencing in future cases. It is submitted that such guidelines are inappropriate for many youth offenders who are fundamentally different to their adult counterparts in terms of their level of culpability.

Judge Becroft stated in the District Court hearing of that Youth Court Judges on transferring offenders to the Adult Courts have "want[ed] much more flexibility than a tariff approach can allow, especially to take into account, immaturity, what is called 'developmental lag', and to significantly reduce the periods of imprisonment that would otherwise apply."

In the District Court or High Court, under the Sentencing Act, the Judge is obliged to begin with the offence in its objective seriousness and only then look to the offender.[293] It is contended in the case of a child or youth offender, the focus should be on first ascertaining their level of developmental maturity, the focus being on the developmental age of the offender and their ability to comprehend their criminal actions.

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[292] *R v C* (CA 332/95, 28 September 1995, Richardson, Thorp and Williamson JJ) [1993-1995] BCLD 2161.
[293] *R v Taueki* [2005] 3 NZLR 372 (CA)

Thus a new approach could be developed by the Courts overtime. Such an approach would start from the premise that the youth is fundamentally developmentally different and thus not bound by adult starting points and the process set out in *Taueki*. Instead once evidence is submitted by counsel regarding the low developmental level of the defendant it would be left to the judges discretion to depart from established guidelines. The developmental immaturity of the offender would have to be shown to necessitate a departure from the bands suggested thus providing room for individual circumstances of the youth/child offender to be accounted for. Ultimately the courts "have large measure of discretion in determining sentences in individual cases"[294] and thus departure from guideline judgments when their use if seen as inappropriate is possible.

Real challenges would exist for counsel and judges wishing to bring brain science into their Court work with integrity and intelligence. Realistically, it is impossible to fully explore all the interconnecting, environmental, behavioural and developmental factors that contribute to the picture of a young person's culpability. However, treating young offenders in a "qualitatively different way" in order to reflect the UNCROC, rather than as "junior adults" with a greater discount for youth being factored into the sentencing process is, in my view, the more satisfactory approach.

294

CONCLUSION

This paper has insisted that treatment of child and youth offenders must be based on fundamental principles such as those found in the UNCROC. The setting of the age of criminal responsibility must attempt to accurately reflect research surrounding the limited culpability of the offender whilst ensuring that entrance into the youth justice system occurs when it can provide tangible outcomes.

It is never easy to answer the "hard questions" in relation to youth justice but, at the very least, a principled system should exhibit two key features. Firstly, children should be dealt with in a distinct youth justice system that is qualitatively different to its adult criminal justice counterpart in both treatment and sentencing in order to take into account the inherent immaturity of the young offender. This distinct system should uphold the rights of children by seeking to adhere to the principles found in international instruments. And secondly, youth justice professionals and policy makers should remain cognisant of relevant research into child offending and psychology and tailor their systems and legislation to accommodate the specific needs of children.

Whilst there is a place for a punitive response and the safety of the public must be paramount, the child offender must also be dealt with in a principled manner. Children in conflict with the law stand at a crossroads – they are either tomorrow's law-abiding citizens, or tomorrow's serious offenders. In many cases, which road they take is determined by the youth justice system. The Children, Young Persons and Their Families Act 1989 is a landmark in New Zealand's treatment of young offenders. New Zealand should resist any more moves to set the clock back.

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Appendix A: The Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010

S6 Welfare and interests of child or young person paramount

In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

Section 6: substituted, on 8 January 1995, by section 3 of the Children, Young Persons, and Their Families Amendment Act 1994 (1994 No 121).

s29 Family group conference may make decisions and recommendations and formulate plans

(1) A family group conference convened under this Part may make such decisions and recommendations and formulate such plans as it considers necessary or desirable in relation to the care or protection of the child or young person in respect of whom the conference was convened.

(2) In making such decisions and recommendations and formulating such plans, the conference shall have regard to the principles set out in sections 5, 6, and 13.

(3) Every care and protection co-ordinator who convenes a family group conference shall cause to be made a written record of the details of the decisions and recommendations made, and the plans formulated, by that conference pursuant to this section.

s30 Care and protection co-ordinator to seek agreement to decisions, recommendations, and plans of family group conference

(1) Where a family group conference makes any decision or recommendation, or formulates any plan, pursuant to section 29(1) or subsection (4) of this section, the care and protection co-ordinator who convened that conference shall,—

(a) where the conference was convened under section 18(1) on the basis of a report from a social worker or a constable,—

(i) communicate that decision, recommendation, or plan to that social worker or constable (or any person acting for that

social worker or that constable), and to every person who will be directly involved in the implementation of the decision, recommendation, or plan; and

(ii) seek the agreement of that social worker or constable (or any person acting for that social worker or that constable), and of every other person to whom that decision, recommendation, or plan is communicated pursuant to subparagraph (i), to that decision, recommendation, or plan:

(b) where the conference was convened under section 19(2)(a) on the basis of a referral from any body, organisation, or court,—

(i) communicate that decision, recommendation, or plan to that body, organisation, or court, and to every person who will be directly involved in the implementation of that decision, recommendation, or plan; and

(ii) seek the agreement of that organisation or body, and of every other person (other than a court) to whom that decision, recommendation, or plan is communicated pursuant to subparagraph (i), to that decision, recommendation, or plan.

(2) Where, pursuant to paragraph (a)(i) or paragraph (b)(i) of subsection (1), a care and protection co-ordinator meets with any person, body, organisation, or court for the purpose of communicating to that person, body, organisation, or court any decision, recommendation, or plan made or formulated by a family group conference, the care and protection co-ordinator may be accompanied by a person nominated by that family group conference.

(3) Where a care and protection co-ordinator is unable to secure agreement, under subsection (1), to a decision, recommendation, or plan made or formulated by a family group conference, the care and protection co-ordinator may, for the purpose of enabling that conference to reconsider that decision, recommendation, or plan, reconvene that conference.

(4) Any family group conference reconvened under subsection (3) may confirm, rescind, or modify its previous decision, recommendation, or plan, or rescind its previous decision, recommendation, or plan and make or formulate a new decision, recommendation, or plan.

(5) Any decision, recommendation, or plan confirmed or modified under subsection (4), and any new decision, recommendation, or plan made or formulated under that subsection, shall be deemed to have been made or formulated pursuant to section 29.

Section 30(1)(a): amended, on 1 October 2008, pursuant to section 116(a)(ii) of the Policing Act 2008 (2008 No 72).

Section 30(1)(a)(i): amended, on 1 October 2008, pursuant to section 116(a)(ii) of the Policing Act 2008 (2008 No 72).
Section 30(1)(a)(ii): amended, on 1 October 2008, pursuant to section 116(a)(ii) of the Policing Act 2008 (2008 No 72).

s36 Family group conference may reconvene to review its decisions, recommendations, and plans

(1) Where any decision, recommendation, or plan is made or formulated by a family group conference pursuant to this Part, the care and protection co-ordinator who convened that conference may from time to time, at that co-ordinator's own motion or at the request of at least 2 members of that conference, reconvene that conference for the purpose of reviewing that decision, recommendation, or plan.

(2) Sections 20 to 35 shall apply, with all necessary modifications, with respect to every family group conference reconvened under this section.

s311 Supervision with residence order

(1) If a charge against a young person is proved before a Youth Court, the court may make an order placing the young person in the custody of the chief executive for a period of not less than 3 months and not more than 6 months.

(2) If a Youth Court makes an order under subsection (1) in respect of a young person, the order may (subject to section 290A) be made subject to the condition that the young person undertake any specified programme or activity.

(2A) If a Youth Court makes an order under subsection (1) in respect of a young person, the court must—

- (a) adjourn the proceedings to a date before two-thirds of the period of the order under subsection (1) will have elapsed and on which it will consider early release; and
- (b) make an order under section 283(k) placing that young person under the supervision of the chief executive for a period of not less than 6 months and not more than 12 months.

(3) The order required by subsection (2A)(b) must be made either at the same time as the order made under subsection (1) or after that time but before the earlier of the following:

- (a) the expiry of the order made under subsection (1):
- (b) the date on which the young person is released from the custody of the chief executive under section 314.

(4) The order required by subsection (2A)(b) must come into force on the earlier of the expiry specified in subsection (3)(a) and the date specified in subsection (3)(b), and may be made subject to all or any of the following

conditions (which, if imposed by the court, apply in addition to the conditions required by section 305 and to any conditions the court imposes under section 306):

- (a) that the young person attend and remain at, for any weekday, evening, and weekend hours each week and for any number of months the court thinks fit, any specified centre approved by the department, and take part in any activity required by the person in charge of the centre:
- (b) that the young person undertake any specified programme or activity:
- (c) that the young person reside at an address specified by the court.

Section 311: substituted, on 1 October 2010, by section 36 of the Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010 (2010 No 2).