“Hurt people, hurt people”: YouthLaw Aotearoa Submission to Te Uepū Hāpai i te Ora - the Safe and Effective Justice Advisory Group

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YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout Aotearoa / New Zealand.

YouthLaw Aotearoa was established in 1987 as a national centre providing free legal advice and advocacy specifically for children and young people under 25 years of age. We're the only organisation operating across NZ where children and young people can access free legal services just for them.

We provide four main services to children and young people:

- Legal advice via our 0800 UTHLAW (884 529) advice line;
- Legal information on our website and through other resources;
- Education sessions for young people and those who work with them; and
- We work to make law changes that will improve access to justice for children and young people.

This submission is informed by YouthLaw Aotearoa's insights through working with children and young people across New Zealand.

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1. Introduction: "Hurt people, hurt people"

Iosefa[1] is 16 years old. He has been neglected by his mother throughout his life - she has always been too busy with her latest boyfriend to take any interest in him. Iosefa does not know who his father is. He struggles with concentrating and communicating because of his traumatic brain injury. None of the professionals supporting him know what caused the injury, but they suspect his mother had something to do with it.

Iosefa started committing crimes when he was 10 years old. It started out with small things, like stealing from shops. But as he got older, things got worse. By the time he was 14, he was a regular in the Youth Court after committing violent crimes, including serious assaults.

Today, Iosefa is graduating from his local Pasifika Court, where Judge Malosi has been monitoring his most recent supervision order. Oranga Tamariki has applied to discharge his supervision order three months earlier than planned, because Iosefa has "turned his life around".

In the last year, Iosefa has formed a relationship with a girl, whose family has taken him in. Being part of a family unit, say his social workers, has transformed Iosefa: he has not committed any new offences in almost a year; he is going to counselling every week; he has abided by his curfew and the other conditions of his supervision order;

[1] Not his real name.

and he has completed all of the rehabilitation programmes that he was required to undertake ahead of schedule.

A member of the YouthLaw team was in the Pasifika Court during Iosefa's graduation. Judge Malosi congratulated him and said: *"You are an outstanding success story. Cases like yours are the reason every professional in this room gets out of bed in the morning".*

Judge Malosi went on to tell Iosefa - and everyone else in the court - that it was not surprising that he had fallen into a life of crime at a young age because *"hurt people, hurt people."*

Judge Malosi's words sum up why the majority of young people end up in the youth justice system. Before they start offending, most such children and young people have experienced high rates of criminal abuse, neglect and violence - often from infancy - and have also been witnesses to crime and violence. They therefore need support and trauma-recovery services before offending begins.

Iosefa's path to offending will be familiar to anyone working in the youth justice system. But his success story – sadly - is the exception, not the rule. Normally, by the time a young person reaches the Youth Court, it is too late: the youth justice system operates merely as an ambulance at the bottom of the cliff they have fallen off. Most young people in Iosefa's shoes graduate to the District Court, not to a loving family home.

YouthLaw's view is that not enough is being done in New Zealand to reduce the risk of children offending before they begin. No intervention is too early, and that is our core recommendation to the Safe and Effective Justice Advisory Group: more and better early intervention is required to tackle the health, family, welfare, societal, educational and other problems that lead to young people offending.

More investment is needed to support parents and carers before their children begin offending. In order to break the cycle of intergenerational disadvantage, at-risk parents require parenting courses, support into adequate housing, and support out of poverty through gainful employment or access to adequate welfare benefits.

Some children will need support and trauma-recovery services from birth. Others will require intervention if they are displaying behavioural problems in early childhood education or primary school. If it gets to the point that children under the age of 10 are coming to the attention of the police, more investment should be made to try to stop them from entering the criminal justice system after their 10th birthday.

It is time the youth justice system – and society as a whole – moved away from viewing the commission of crimes as a problem with the individual, and instead tackled it as a problem with society as a whole. If we fail to do so, we are destined to failure because we will have failed to address the root causes.

The children and young people caught up in our youth justice system at present will also be the parents of the next generation. Their contact with the youth justice system should be viewed with that future in mind as an opportunity to break the cycle and ensure that their children do not enter the prison pipeline.

2. Overview

YouthLaw agrees with the observation of the Safe and Effective Justice Advisory Group ("the Advisory Group") that the criminal justice system in its current form is not working and is in dire need of reform. However, although the Advisory Group is reviewing the criminal justice system as a whole, this submission will focus on youth justice given our expertise.

We also strongly believe that any review of the criminal justice system must start with our children and young people much as the 'justice pipeline' starts with children and young people who have contact with Oranga Tamariki (for their own care and safety) and/or are excluded from the education system. If we are to create change in the justice system as a whole, we must create change for these children and young people.

In order to prepare this submission, YouthLaw consulted with a number of youth advocates and academics specialising in youth justice and our comments and recommendations are informed by their expert views, as well as our own expertise as the only specialist law centre for children and young people in New Zealand.[2]

(a) Importance of collaboration with other work across Government

As the Advisory Group will be aware, a significant amount of work is underway regarding a range of areas of policy and the law including the Government Inquiry into Mental Health and Addiction, the Welfare Expert Advisory Group's work on the future of the welfare system, consideration of the Independent Oversight of children's issues and the Oranga Tamariki system, the development of the Disability Action Plan 2019-2020, and the Tomorrow's School's Taskforce's review of the education system. In addition, New Zealand now has a Child Poverty Reduction Act, our first Child and Youth Wellbeing Strategy is under development and the first wellbeing budget will be released in May.

Many of the issues raised in these pieces of work will overlap with the issues raised in this review. Between 50 and 75% of young people involved in the justice system meet the diagnostic criteria for at least one mental disorder compared to around 13% in a community sample.[3] Most of the children and young people who were referred for a youth justice FGC between 2009/10 and 2016/17 had previously been the subject of a report of concern to Oranga Tamariki about their care and protection, and the proportion has been trending upwards.[4] A "school to prison" pipeline has also been identified for children as young as 7 or 8 showing challenging behaviour who

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[2] We are very grateful to Mary-Rachel McCabe for her work speaking to other experts, researching and drafting this submission. Mary-Rachel is a barrister from the United Kingdom who volunteered with YouthLaw in January to March 2019.

[3] Office of the Prime Minister's Chief Science Advisor, Professor Sir Peter Gluckman, "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand." 12 June 2018. Retrieved from: https://www.pmcsa.org.nz/wp-content/uploads/Discussion-paper-on-preventing-youth-offending-in-NZ.pdf at page 9 (accessed 22 February 2019)

[4] Youth Justice Indicators Summary Report, April 2018 https://www.youthcourt.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-201804.pdf (accessed 22 February 2019).

disengage with or are excluded from school.[5] We also see the same overrepresentation of rangatahi Māori in school stand-downs, suspensions and expulsions[6] as we do in the youth justice system.[7]

Given this, we strongly advocate for the members of this Advisory Group to engage with those considering these interrelated issues of policy and law and work together to develop coherent recommendations for systemic change. Law and policy-making simply cannot continue to operate in silos if we wish to see real change.

(b) The voice of the child

YouthLaw seek to empower children and young people by advocating for greater opportunities for them to have a voice in matters which affect them. This position stems in part from the UN Convention on the Rights of the Child (UNCROC) and, in particular, the right of children and young people to be heard in all matters affecting them.[8]

Children and young people who have been or are currently in the youth justice system are the people who will be most affected by the system remaining as it is, or by any changes made as a result of the Advisory Group's recommendations. They are also the experts in their own lives and are uniquely qualified to speak of what will work, or not work. As pointed out by a recent report by Oranga Tamariki and the Children's Commissioner, which collected the views of more than 6,000 children and young people: [9]

> *"Children and young people have valuable insights…Listening to [their] views regularly and meaningfully is the best way to respond to their needs, wants and aspirations."*

We consider that the Advisory Group must listen to the various and diverse groups of children and young people whose lives are touched by the justice system. It simply cannot be assumed that the views of one child of young person, or one group of children and young people, represent the views of all. For example, there will be differences (and similarities) between urban and rural youth, rangatahi Māori and pakeha youth, youth with disabilities and their able bodied peers to name just a few.

We know that this work is challenging and resource intensive if it is to be done well. However, the importance of including youth voice in decision making that has an impact on their lives is so great that the challenge must be met and resources must be found.

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[5] Gluckman, *above cit*; See also Mallett CA. The school-to-prison pipeline: A critical review of the punitive paradigm shift. *Child and adolescent social work journal* 2016; 33(1):15-24.
[6] Education Counts. (2017). Stand-downs, suspensions, exclusions and expulsions from school. Retrieved from http://www.educationcounts.govt.nz/statistics/indicators/main/student-engagement-participation/Stand-downs-suspensions-exclusions-expulsions (Accessed 5 March 2019).
[7] Ministry of Justice. (2018). Youth Prosecution Statistics: Data highlights for 2017. Retrieved from https://www.justice.govt.nz/assets/Documents/Publications/youth-prosecution-statistics-data-highlights-2017.pdf (Accessed 5 March 2019).
[8] Article 12
[9] Oranga Tamariki and Children's Commissioner, "What makes a good life?" February 2019. Retrieved from: http://www.occ.org.nz/assets/Uploads/What-makes-a-good-life-report-OCC-OT-2019-WEB2.pdf (accessed 6 March 2019)

(c) Amendments to Oranga Tamariki Act 1989

YouthLaw broadly welcomes the amendments to the legal framework for the youth justice system due to be introduced on 1 July 2019, pursuant to the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017. We set out below those amendments with which we do not agree.

(d) The scope of this submission

The Advisory Group has been tasked with identifying the types of changes needed to New Zealand's criminal justice system and, with the Government, identifying principles to guide its future development.[10] As set out above, our submission is limited to the youth justice system only, in light of our expertise.

It is beyond the scope of our resources to draft a submission that addresses every possible reform required to improve New Zealand's youth justice system. Indeed, a number of text books and theses have been cited in this submission, demonstrating the breadth of discussion on this topic. We have therefore attempted to limit our submission to the core areas of our youth justice system that we view as being in need of urgent reform.

While our submission focuses on the rights of young people who offend, we are acutely aware of the need for our criminal justice system to respond to the emotional and procedural needs of child victims and witnesses. As stated above, many of the young people who enter the youth justice system as offenders have themselves been victims of physical, sexual or psychological abuse, so these voices are often one and the same.

In particular, child victims and witnesses face significant barriers to participating effectively in the criminal courts, such as long delays – before and on the day of trial – and poor questioning from lawyers. We urge the Advisory Group to consult with experts in this field, such as Kirsten Hanna and Emily Henderson, whose proposals for practical reforms to improve the experience of child witnesses are set out in *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice.*[11]

(e) Summary of recommendations

We set out below a summary of our recommendations. The rationale behind our recommendations is then set out in the body of our submission.

1. **Young adults:**
    a. The jurisdiction of the Youth Court should be extended to incorporate young adults aged 18-24; **or**
    b. A transitional court should be set up for 18-24 year olds, operating under the same or similar principles as the Youth Court; **or**

[10] The Safe and Effective Justice Programme Advisory Group Terms of Reference.
[11] Hanna, Kirsten and Henderson, Emily, "Child witnesses in the Criminal Courts", 2017, in A. Deckett and R Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*.

c. The procedure in the District Court should be adapted and judges should be trained to respond to (a) the distinct needs of 18-24 year old offenders who appear before them and (b) young adults with neuro-disabilities, so that the District Court is more akin to the Youth Court for these groups.

2. **Youth advocates at intention-to-charge FGCs:** The Oranga Tamariki Act 1989 should be amended to include an obligation for a youth advocate to be appointed before any intention-to-charge FGC occurs, regardless of the maximum sentence for the specific offence.

3. **FGC coordinators:** The Government should take the following steps to improve the FGC process for all young people:
    a. More investment into youth justice coordinators so that:
        - More youth justice coordinators are recruited in order to ease current workloads;
        - Suitably qualified candidates are recruited into the role;
        - The role receives better remuneration, thereby attracting stronger candidates.
    b. Introduce comprehensive training for *all* youth justice coordinators (not just new recruits) in:
        - What their role entails;
        - Dispute resolution;
        - Māori tikanga, kaupapa and te reo Māori.
        - How to work with and engage Māori and Pacific young people.

4. **Review of FGC process:** The Government should commission a comprehensive review of FGCs throughout New Zealand, analysing the procedures, protocols and outcomes of the FGC, and making recommendations for further change if necessary. The research should also analyse the process and outcomes of FGCs in terms of cultural and ethnic variables and whether there is less participation from young people of certain ethnic backgrounds. It should include proposals for how to improve participation of Māori and Pacific Island young people in the FGC process, the implementation of processes by Māori and Pacific organisations, if it is found that the process is less effective for those groups.

5. **Screening for neuro-disabilities, mental health and communication disorders:** The Government should introduce screening of young people for neuro-disabilities, mental health disorders or communication disorders upon entry to the youth justice system. Resources and mechanisms should be put in place so that young people assessed as having a neuro-disability, mental disorder or communication disorder are provided with appropriate support.

6. **Urban rangatahi Māori & the Rangatahi Court:** The Government should commission research, consulting with Māori young people who have been or are currently in the youth justice system, and with their whānau and youth advocates,

to better understand why urban Māori may feel reluctant to have their case processed in the Rangatahi Court, and instead opt for the mainstream Youth Court. Once a better understanding of this issue has been obtained, solutions as to how to increase the number of urban Māori attending the Rangatahi Court can be explored.

7. **Cooperation of community members in specialist courts:** The Government should invest more in Rangatahi and Pasifika Courts to (a) ensure that community members currently involved in the courts do not have to self-fund their travel or other expenses, (b) expand the role of community members in those courts and (c) ensure that the funding provided covers all costs of holding the Court.

8. **Remand of young people in cells:** The Oranga Tamariki Act 1989 should be amended to remove the option for the Youth Court to remand young people into police custody under s.238(1)(e).

9. **Imprisonment of children and young people:** Spending should be directed towards introducing more therapeutic, life-skills based programmes in the community, rather than on building more youth prisons.

10. **Specialist criteria for youth advocates:** It is critical that the specialist criteria for appointment of youth advocates, and their separate funding by the court, remains.

11. **Appointment and review procedure for youth advocates:**
    a. A minimum period of three years practising as a *criminal* solicitor and/or barrister should be introduced.
    b. Judges should be required to provide a short report / reference about the youth advocates appearing before them as part of their three-yearly review.
    c. A compulsory training programme for all new youth advocates should be introduced.
    d. A requirement for the mentoring of new youth advocates by youth advocates with at least five years' experience, for a period of at least one year following their appointment, should be introduced.

12. **Overrepresentation of rangatahi Māori in the youth justice system**
    a. **Treaty obligations:**
        i. The Crown[12] and Māori need to work together to design and develop a strategy to address the existing disparities and reduce the number of rangatahi Māori in the youth justice system. This strategy should include measurable targets and be supported by a dedicated budget.
        ii. Senior level staff at the Ministry of Justice, the Ministry of Education, Department of Corrections, Oranga Tamariki and the Ministry of

[12] Including all relevant Ministries and Departments.

Social Development need to be given appropriate advice and training in how to incorporate mātauranga Māori and awareness of the Crown's Treaty obligations into their practice and operations. This includes more Māori in leadership positions across these agencies.

b. **Institutional racial bias:**
    i. The police should be required to report to the Crown and public by ethnicity, specifically Māori and non-Māori, on every decision comprising the exercise of discretion to prosecute.
    ii. A new body or bodies should be established to look at prosecution decisions to determine whether bias against Māori might have had an influence.
c. **Early intervention:** We adopt the recommendations of Professor Sir Peter Gluckman, the Prime Minister's Chief Science Advisor in the executive summary of his June 2018 report, "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand."

13. **Amendment to section 284 Oranga Tamariki Act 1989:** The new section 284(1A) (inserted by section 119 of the Oranga Tamariki Legislation Act 2017) should be removed and section 284(1) Oranga Tamariki Act 1989 should remain as it is currently drafted.

3. Jurisdiction of the Youth Court

From 1 July 2019, some 17 year olds will be included in the Youth Court jurisdiction. Although this amendment is welcome and much-needed, our view is that it does not go far enough. We also seek the extension of the jurisdiction of the Youth Court to include young adults up until their 21st birthday, or the introduction of a transitional court for 18-21 year olds.

(a) Neurological and psychological evidence

A substantial and growing evidence base has found that young adults aged 18 to 25 are a distinct group, largely because they are still maturing. These young adults face an increased risk of exposure to the criminal justice system compared to older adults but are not afforded the protections given to children, despite their distinctive needs.

The neurological and psychological evidence that development of the frontal lobes of the brain does not cease until around 25 years old is particularly compelling. It is this area of the brain which helps to regulate decision-making and the control of impulses that underpin criminal behaviour.[13]

[13] Blakemore S-J, Choudhury, S (2006), Development of the adolescent brain: implications for executive function and social cognition. Journal of Child Psychology and Psychiatry, 47:3, 296–312.

Such evidence has led to calls from senior paediatricians to redefine 'adolescence' as the period between ages 10 and 24, and to reframe laws, social policies and service systems accordingly.[14]

The current system assumes that when a person technically becomes an adult at 18 years old, they dramatically change overnight.

This is simply not the case. The current system does not cater for young adults appropriately by automatically having their cases heard in the district / high courts - using the same procedure as for adults - during a phase in which they are still maturing and developing, and thus are facing many of the issues common to those under 18.

(b) Prevalence of neuro-disabilities and mental Illness

It is also now widely accepted by those working in the youth justice system that many of the young people in the Youth Court have a neuro-disability or mental illness. No prevalence study of this issue has been undertaken in New Zealand but a study by the Children's Commissioner for England in 2012 canvassed several studies on specific conditions worldwide.[15]

The report points out the overrepresentation of neuro-disability amongst youth offenders, especially when compared with the wider population. For example, one study found a 15% prevalence rate of conditions on the autistic spectrum among young people in custody, compared with between 0.6% and 1.2% in the general population. It also noted rates of between 10.9% and 11.7% of Foetal Alcohol Syndrome Disorder (FASD) among young offenders, compared to 0.15% in the general population.[16] Overall, the report found that youth offenders in the UK are 10 times more likely to have a learning disability than young people generally: 60 to 90% have a communication disorder.

The Prime Minister's Chief Science Advisor, Professor Sir Peter Gluckman, published a report last year on preventing youth offending in New Zealand[17], which stated that between 50% and 75% of young people involved in the youth justice system meet diagnostic criteria for at least one mental or substance use disorder compared with 13% of youth generally, and many have two or more disorders.

Sir Gluckman's report also states that one in five young offenders has a learning disability, with young offenders three times more likely than non-offenders to have experienced a traumatic brain injury.

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[14] Sawyer, S.M., Azzopardi, P.S., Wickremarathne, D. and Patton, G.C. (2018), The age of adolescence. The Lancet Child & Adolescent Health, 2(3): 223-228.

[15] Children's Commissioner, "Nobody made the connection: the prevalence of neurodisability in young people who offend", October 2012. Retrieved from: https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Nobody-made-the-connection.pdf (accessed 22 February 2019)

[16] Kesia Sherwood, a PhD student at the University of Otago, is currently researching the lack of appropriate legislation for dealing with young offenders with FASD, with the aim of drafting policy that could give the justice system a mandate to check for FASD, then deal with young offenders accordingly. See: https://www.stuff.co.nz/national/health/90139279/foetal-alcohol-spectrum-disorder--an-invisible-generation-of-sufferers (accessed 5 March 2019)

[17] Sir Peter Gluckman, *op cit,* p18

(c) Transitioning from the Youth Court to the District Court

A number of problems for young adults (aged 18-24) transitioning from the Youth Court to the District Court were identified by the youth justice experts that we spoke to in the course of preparing this submission. They can be summarised as follows:

- Overly formal environment: this is intimidating, especially compared to the Youth Court. It is not 'youth-friendly': judges no longer address offenders by their first name.
- Professionals (including the judge) speak in 'legal jargon' rather than plain English[18]. Young adults often cannot understand what is being said.
- Transactional, 'disposal orientated' nature of the District Court: things move faster than they should; it is difficult for young adults to keep up, especially if they have communication difficulties.
- District judges do not have the same focus on rehabilitation that Youth Court judges do.
- There is no real consideration of a young adult's circumstances in the round in the District Court. Once a young person leaves the jurisdiction of the Youth Court, the judge will no longer be appraised of their full background and family circumstances.
- The Department of Corrections is not properly resourced to provide an appropriate level of intervention for young adults in order to properly rehabilitate them in the community.

With all of this in mind, our view is that it is clear that the distinct needs of young adult offenders will not be met in the District or High courts, particularly those with a neuro-disability or mental illness.[19]

(d) Recommendations

We accordingly recommend that:

(1) The jurisdiction of the Youth Court is extended to incorporate young adults aged 18-24; or
(2) A transitional court is set up for 18-24 year olds, operating under the same or similar principles as the Youth Court; or
(3) The procedure in the District Court is adapted and judges are trained to respond to (a) the distinct needs of 18-24 year old offenders who appear before them and (b) young adults with neuro-disabilities, so that the District Court is more akin to the Youth Court for these groups.[20]

We also recommend screening for neuro-disability on entry to the criminal justice system as discussed further below.

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[18] As they are required to do in the Youth Court, pursuant to section 10 Oranga Tamariki Act 1989.
[19] We recognise that it is also questionable whether these courts meet anyone's needs. However, we have not focussed on the adult justice system for the reasons noted above.
[20] The proposal of a specialist neuro-disability court has recently been canvassed by Chief District Court Judge Doogue and Principal Youth Court Judge Walker. More detail is available here: https://www.adls.org.nz/for-the-profession/news-and-opinion/2019/2/22/judges-call-for-specialist-neuro-disability-courts/ (accessed 28 February 2019)

4. Family Group Conferences (FGCs)

(a) Youth advocate at intention-to-charge FGC

Legitimate concerns have repeatedly been raised by those working within the youth justice system that intention-to-charge FGCs are frequently convened prior to the appointment of a youth advocate. Young people are therefore presented with allegations of offending from the police, without having had the benefit of legal advice.

These circumstances lend themselves to pressure on the young person to admit responsibility for offending, in particular as a means of gaining access to the diversionary outcomes of a successful FGC.[21]

The amendments to the Oranga Tamariki Act 1989 coming into force on 1 July 2019 include an obligation for a youth advocate to be appointed where an intention-to-charge FGC occurs involving a charge with a maximum term of 10 years or more imprisonment.[22]

YouthLaw wholeheartedly welcomes the spirit of this amendment but we consider that it does not go far enough. Our view is that children and young people should have the benefit of advice from a youth advocate both before and at any intention-to-charge FGC, regardless of the level of their alleged offending.

Former Principal Youth Court Judge Becroft commented in a 2015 case on the importance of the attendance of counsel at an intention-to-charge FGC, particularly when the young person is especially vulnerable.[23] Ziyad Hopkins, in his thesis on New Zealand's youth justice model, explored this issue in detail. Mr Hopkins stated that "New Zealand's youth justice sector recognises the gap in legal counsel at [intention-to-charge] FGCs" and that the issue had already been discussed for over a decade by the time he was writing his paper in 2015.[24]

We believe that the youth advocate should be appointed before the intention-to-charge FGC takes place, so the youth advocate has the opportunity to read any papers, prepare appropriately for the FGC, and discuss the possible charge with the young person ahead of the FGC. We consider that having a young person meet their youth advocate for the first time on the day of the FGC may defeat the purpose of representation at that stage, given that the environment lends itself to pressure on the young person to admit the offence. The youth advocate will also need to discuss possible plans with the young person before the FGC, to give them the best chance of obtaining a good outcome at the end of the process.

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[21] If the child or young person does not admit the offence, then the FGC cannot proceed with any plan or recommendation that requires them to assume that they committed the offence.
[22] New section 248A Oranga Tamariki Act 1989, added by section 108 Oranga Tamariki Legislation Act 2017
[23] *NZP v JB* [2015] NZYC 488 at [113] – [117].
[24] Hopkins, Ziyad, "Diverted from Counsel: Filling the Rights Gap in New Zealand's Youth Justice Model", 2015. Retrieved from: https://fulbright.org.nz/wp-content/uploads/2016/07/HOPKINS-Ziyad-complete-report.pdf (accessed 5 March 2019)

We therefore recommend that the Oranga Tamariki Act 1989 is amended to include an obligation for a youth advocate to be appointed before any intention-to-charge FGC occurs, regardless of the maximum sentence for the specific offence.

(b) The voice of the young person

The FGC has been described as "the hub of the entire youth justice process".[25] Other than for murder and manslaughter, it is intended to be the primary decision-making forum for all types of offending.[26] It is therefore essential that FGCs are well-coordinated.

A repeated criticism of the FGC process is that it doesn't permit the voice of the young person to be sufficiently heard, because of the intimidating nature of the environment: the young person is asked to speak in a room full of adults, usually including an array of professionals and their family members. The victim is also sometimes present. Given the large numbers frequently in attendance at the FGC, it is essential that every effort is made to facilitate discussion, and ensure that the voice of the young person is at the centre of the process.

Our view and that of the youth advocates we consulted in the process of preparing this submission is that the success of an FGC is in direct correlation with the effort made in coordinating and convening it by the youth justice coordinator. Common problems identified with coordinators include:

- Coordinators lack the level of skill, experience and training to facilitate an agreement: they are not trained in mediation or conflict resolution. They therefore fail to ensure that everyone in the room has the chance to speak.
- Youth advocates are expected by coordinators to run the FGC.
- Insufficient effort is made to contact the young person's family or whānau, despite coordinators' statutory obligation to do so.[27]
- Little or no effort is made by the coordinator to contact the victim / facilitate their attendance, despite coordinators' statutory obligation to do so.[28]
- Often, if the victim does attend the conference, the other parties have not been notified in advance and therefore they have not had the chance to properly prepare for the restorative aspect of the FGC.
- Coordinators are unprepared for the FGC and they have a complacent attitude.
- A lack of understanding from coordinators about what their role entails.

One youth advocate thought that coordinators often angle for non-agreement rather than trying to facilitate negotiation, as this involves less work: they can simply write "non-agreement" on the form they are required to complete following the FGC.

Another had experience of coordinators being "actively obstructive" to reaching a resolution. This youth advocate gave the example of an FGC taking place without the

[25] Cleland, Alison and Quince, Khylee, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique,* (Lexis Nexis, Wellington, 2014) at p140
[26] Section 273, Oranga Tamariki Act 1989
[27] S.250(1) Oranga Tamariki Act 1989
[28] S.250(2) Oranga Tamariki Act 1989

young person's family because they were apparently on holiday. Just before the conference was due to finish - as decisions had been made regarding a plan for the young person - some family members entered the room, explaining that they had just heard about the FGC.

According to the youth advocate in attendance, the coordinator said "I'm stopping this conference. The decisions have already been made." The youth advocate advised the coordinator that the family's views must be heard, given the centrality of the family to the FGC process.[29] The coordinator apparently continued to refuse to hear the family's views while the youth advocate attempted to argue otherwise for a further ten minutes. Eventually, the coordinator allowed the FGC to continue, the family's views were heard and "they were very helpful in sourcing other whānau members to come and support the young person through the process", according to the youth advocate.

A further recent example of a youth justice coordinator making insufficient effort to contact the young person and their family can be found in the case of *Police v IH* [2018] NZYC 2[30]. In that case, the coordinator had made a phone call to the young person's mother, which was unanswered, and one home visit, with no one answering the door. The coordinator then went ahead and convened the FGC, which proceeded in the absence of the young person and any whānau. The judge found that the coordinator had failed to make "all reasonable endeavours"[31] to contact the family prior to convening the conference, and accordingly the FGC had been invalidly convened.

All of the youth advocates consulted by YouthLaw agreed on the following:

- There are, of course, some very good coordinators who do an excellent job of facilitating FGCs. This makes a huge difference to the process.
- The most successful FGCs are usually those at which the victim is present, and the other parties have been informed of their attendance with adequate notice.
- The widespread problem of poor quality coordinators is likely to be a resource issue: it appears that coordinators are overworked and underpaid.

We recommend that the Government takes the following steps to improve the FGC process for all young people:

- More investment into youth justice coordinators so that:
    a. More youth justice coordinators are recruited in order to ease current workloads;
    b. Suitably qualified candidates are recruited into the role;
    c. The role receives better remuneration, thereby attracting stronger candidates.
- Introduces comprehensive training for *all* youth justice coordinators (not just new recruits) in:
    a. What their role entails;
    b. Dispute resolution;
    c. Tikanga Māori, Te Reo Māori and Te Ao Māori.

[29] S.250(1) Oranga Tamariki Act 1989
[30] Available at https://bit.ly/2T5ovA7 (accessed 28 February 2019)
[31] S.250(1) Oranga Tamariki Act 1989

d. How to work with and engage Māori and Pacific young people.

While we consider investment and training in youth justice coordinators to be the most urgent step to be taken by the Government in order to improve the effectiveness of the FGC process for young people, other reforms may be required.

We therefore agree with Alison Cleland and Khylee Quince's recommendation that a comprehensive review of FGCs throughout New Zealand should be commissioned by the Government, analysing the procedures, protocols and outcomes of the FGC, and making recommendations for further change if necessary

(c) Particular problems for Māori and Pacific young people

The voice of the young person

YouthLaw's view is that the most fundamental challenge of the FGC process is one of communication: firstly, ensuring that the young person's voice is heard, and secondly, ensuring that they understand everything that is being said by other parties in the FGC. This challenge applies to all young people engaging in the process, and better facilitation by youth justice coordinators (as set out above) would help to improve this.

That said, we agree with youth justice academic experts Alison Cleland and Khylee Quince that, underlying the principle of consensus decision-making - which is at the heart of the FGC process - is a fundamental assumption in respect of the democratic value of a young person's voice. If their culture, religion or belief system does not affirm that same value, then young people are on the back foot in terms of engaging meaningfully in the conferencing process.[32]

We also share their view that more research is needed in this area, for example analysing the outcomes of FGCs in terms of cultural and ethnic variables and whether there is less participation from young people of certain ethnic backgrounds.

YouthLaw is aware of the perception that the FGC process is potentially less effective for Māori and Pacific Island children for the following reasons:

- The culturally defined way in which rangatahi Māori express shame or whakamā may be misunderstood or missed altogether by non-Māori participants in cross-cultural conferences;
- The implicit norms concerning the giving of apologies and expressions of remorse are grounded in the dominant cultural and linguistic traditions of the British common law system and Pākehā people (e.g. appropriate body language, standing up straight, looking at your victim in the eye);
- There may also be misunderstandings in relation to notions of individualised versus collective culpability for wrongdoing. In Māori and other Pasifika cultures, responsibility for harm is perceived collectively.
- Accountability may therefore be accepted by family and community members present at a conference – in recognising their role in the offending behaviour of their young relative. In cultural terms, the young person may be the least

[32] Cleland and Quince, *op cit,* p119

important person present, and therefore their individual admission of culpability may be insignificant.[33]

While it is possible that the FGC process is less effective for Māori and Pacific Island young people for the above and/or other reasons, the lack of research in this area means that we cannot be sure whether this is the case. In those circumstances, we believe it would be dangerous to propose any solutions on how to improve the effectiveness of FGCs for Māori and Pacific Island young people.

With that in mind, we recommend that the Government urgently commissions research analysing the process and outcomes of FGCs in terms of cultural and ethnic variables and whether there is less participation from young people of certain ethnic backgrounds. The research should include proposals for how to improve participation of Māori and Pacific Island young people in the FGC process, if it is found that the process is less effective for those groups.

(d) Particular problems for young people with neuro-disabilities, mental health disorders or communication disorders

As set out above at 3(b), it is now widely accepted that many young people in the youth justice system have – often undiagnosed - neuro-disabilities. These include communication disorders.

There is also considerable reliable international research evidence about the extent to which children and young people involved in offending behaviour suffer from mental health and psychosocial problems. Young people with mental health disorders cannot be fitted easily into the accepted diagnostic categories used for adults, and they often have several disorders simultaneously.[34]

As regards communication disorders, Snow and Sanger[35] have pointed out that most studies deal with children whose language impairments have been detected and, more often than not, diagnosed as specific language impairment. However, children who do not meet diagnostic criteria, but whose patterns of reduced oral language competence might be termed ‘non-specific language impairment’ face a raft of disadvantages, including that they may be mistakenly labelled as unmotivated, rude or lazy, resulting in further alienation from mainstream values and opportunity.

FGCs are, by definition, conversational processes. The basic medium by which the business of an FGC is transacted is the verbal exchange between parties of information, experiences and feelings. The FGC is therefore a process that inherently and significantly taxes a young person’s language skills.

Snow and Sanger point out the tendency of children with specific language impairments to make inappropriate comments in FGCs that show their lack of understanding of the other person’s perspective, and/or to revert to clichés. These

[33] *Ibid,* p156
[34] *Ibid,* p185
[35] Snow, Pamela and Sanger, Dixie, *Restorative Justice conferencing and the youth offender: exploring the role of oral language competence*, International Journal of Language & Communication Disorders, May-June 2011, Vol.46, No.3, 324-333.

behaviours are not facilitative of the FGC process: they serve to create an impression of shallowness, low credibility and/or low empathy for the victim.

Snow and Sanger recommend routine referrals for speech and language pathology assessment of young people on entry to the justice system, as this would provide an opportunity to assess language functioning and the young person's suitability for cross-examination, the FGC process and for educational/vocational training.

We would go a step further than this and suggest that young people should be screened for any neuro-disabilities, mental health disorders or communication disorders upon entry to the youth justice system. We agree with Khylee Quince and Alison Cleland that early screening is essential because of the immediate impact that any such disorders may have on the young person's case.[36]

We recommend that full assessments for neuro-disabilities, mental disorders and communication disorders should be based on several methods of evaluation and input from multiple sources (e.g. an assessment by a suitably qualified professional, interviews with carers, family medical history and education history).

We also recommend that resources and mechanisms are put in place so that young people assessed as having a neuro-disability, mental disorder or communication disorder are provided with appropriate support. For young people with mental disorders, they should be provided with appropriate mental health services. For those with a neuro-disability or communication disorder, a communication assistant should be provided to facilitate their understanding of the FGC process and beyond.

5. Specialist courts

As a starting point, YouthLaw wishes to acknowledge the admirable job done by both Rangatahi and Pasifika Courts in attempting to tackle the overrepresentation of Māori and Pacific in youth offending statistics.

(a) Rangatahi Courts

A number of youth advocates have informed YouthLaw that Rangatahi Courts are better at engaging rural Māori, whereas there is a disconnect with a lot of urban Māori. This is for a range of reasons, including that urban Māori are not living close to the area that their whānau is from, and so do not have the same links to their marae that rural Māori young people generally have.

In particular, we are aware that some suggest that urban Māori see being Māori as a negative and that they don't want to go to marae because of their negative perception of their culture, and/or because they feel ashamed that they cannot speak te reo. However, we consider that this is an assumption that needs to be tested through research. We are also mindful of the fact that the loss of te reo is an impact of colonisation to which the Crown response should be providing appropriate ways to connect the young person to their whakapapa and identity.

[36] Quince and Cleland, *op cit,* p185

Accordingly, YouthLaw's view is that a better understanding of why urban Māori may feel reluctant to have their case processed in the Rangatahi Court, and instead opt for the mainstream Youth Court, is required as is research in relation to what can be done to support their participation in the Rangatahi Court process.

We recommend that research is undertaken, consulting with Māori young people who have been or are currently in the youth justice system; their whānau, where appropriate; and with youth advocates whose role includes advising Māori young people on the options open to them (i.e. whether the Youth Court or Rangatahi Court should monitor their sentence). The research should also consider what support should be provided to Māori young people before their case is transferred from the Youth Court to the Rangatahi Court, so that they better understand and are prepared for the different processes in the Rangatahi Court.

We believe that a better understanding of the court and additional support will help to alleviate the potential alienation and intimidation that urban Māori may experience before entering the Rangatahi Court. This, we hope, will increase the numbers of urban Māori opting to have their sentences monitored by the Rangatahi Court.

(b) Rangatahi and Pasifika Courts

Cooperation of community members in FGC and agreed plans

We believe that more resources should be directed at specialist courts to expand the role of elders and other community members.

At present, community elders are only involved in the court hearings – normally held in marae or Pasifika community centres - where FGC plans are monitored. However, our view is that the quality of the young person's engagement with their community would improve if resources were devoted to involving members of their community in the drafting of FGC plans, and indeed in the completion of plans.

We consider that linking young people to members of their communities outside of court, so that they may educate them on – for example - their language, the meaning of the carvings in the marae / community centre, and on their culture generally, would help to bridge the gap between Māori / Pacific young people and their communities including urban Māori youth as discussed above. Promoting a better understanding of their culture via their communities would also help to foster a more positive cultural identity for Māori and Pacific young people, and therefore better engagement with the Rangatahi or Pasifika Court.

YouthLaw understands that the elders currently involved in Rangatahi Courts are required to self-fund their travel expenses which is a considerable and inappropriate burden. We also understand that the funding provided for Rangatahi Courts is insufficient to cover the costs of holding the Court drawing resources. We consider that elders and other community members participating in specialist courts should have all of their expenses covered and that funding should fully cover the costs of operating the Court.

We therefore recommend further investment by the Government in Rangatahi and Pasifika Courts to (a) ensure that community members currently involved in the courts do not have to self-fund their travel or other expenses (b) expand the role of community members in those courts and (c) ensure that the funding provided covers all costs of holding the Court.

6. Remand Issues

(a) Remand of young people in police cells

We agree with the Children's Commissioner that young people should no longer be able to be remanded into police cells by the Youth Court after their first court appearance.[37]

Unfortunately, the opportunity for such an amendment via the 1 July 2019 reforms has been missed. Nevertheless, we recommend the removal of section 238(1)(e) Oranga Tamariki Act 1989, which makes provision for the detention of children in police cells while waiting for an Oranga Tamariki bed to become available.

Police cells are not an appropriate custodial environment for anyone for more than very short periods. Yet at present there is no limit on the amount of time a young person can be held in police custody under section 238(1)(e) of the Act. As pointed out by the Children's Commissioner:

> *"Young people held in adult police cells will almost certainly experience solitary confinement, and are likely to experience poor hygiene facilities, inadequate food, round-the-clock lighting to maintain line of sight, and limited access to appropriate support. Being held in a police cell for extended periods can quickly lead to physical, mental, and emotional harm, and a real risk of self-harm."*[38]

Article 37(c) of UNCROC states:

> *"Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.*
>
> *In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."*

We appreciate that, at present, there are not enough alternative options available to safely place young people who are being remanded into police custody. Removing

[37] Office of the Children's Commissioner, "Limiting the use of police cells to hold young people on remand", June 2018. Retrieved from: http://www.occ.org.nz/assets/Uploads/Youth-Justice-Police-cells-June-2018.pdf (accessed 21 February 2019)
[38] *Ibid,* p1

s238(1)(e) would create a strong incentive to invest in and prioritise the development of community-based alternatives.

We accordingly recommend that the Oranga Tamariki Act 1989 be changed to remove the option for the Youth Court to remand young people into police custody under s.238(1)(e), in line with the Office of the Children's Commissioner's June 2018 position brief and Article 37 UNCROC.

(b) Treatment of remand in custody

Unlike adults, young people who are remanded in custody do not receive a "credit" for any period of remand once sentenced for an offence. When an adult is remanded in custody, that period of remand is taken into account when the eventual sentence imposed. This is not the case with young people. The supervision with residence order contained in sections 283(n) and 311 which is a response available when a charge is proved by the Youth Court. The duration of the residence aspect of that order is required to be no less than 3 months and no more than 6 months in duration.

The clock starts from the time the order is made and does not take into account any time that the young person may have spent in remand. Given the nature of the more serious charges and the general length of time matters can be before the Youth Court, that remand can be considerable. There is a clear inequity here in the way a young person is dealt with in comparison to an adult who may have been in custody and would receive the benefit of that remand when a sentence of imprisonment is imposed.

7. Imprisonment of children and young people

In our view custody is no longer seen as a last resort and it is being overused, with little or no benefit to the young people who have been incarcerated, their families or to society as a whole. The evidence is clear: harsh punishments have little deterrent effect on young people.

However, the latest figures show that youth justice residences are operating "close to full capacity" and that Oranga Tamariki must build new residential homes in order to meet the increased demand. Official statistics show that, while Youth Court appearances have dropped by more than 40%, the custodial remand rate has continued to increase.[39]

Professor Sir Peter Gluckman's report to the Government last year stated:

> "*Young offenders can find the 'thrill', or 'emotional high' of violent offending, and the social rewards (such as admiration from their peers), more important to them than concerns about being caught or facing social disapproval. Youth need alternative, prosocial ways to achieve engagement and social approval."*[40]

As discussed when we met with the Advisory Group, our experience has also been that young people in the youth justice system have a need for attention that is met

[39]Statistics cited here: https://bit.ly/2Ttye2C (accessed 22 February 2019)
[40]Professor Sir Peter Gluckman, *op cit,* p7 (accessed 22 February 2019)

through the court process whether that attention is negative or positive (and it can be both depending upon the Court environment).

YouthLaw's view is that any further investment into the youth justice system should focus on holistic, therapeutic, life-skills based sentencing in the community; *not* on building more youth prisons. This will be more cost-effective in the long run, as it is more likely to re-engage young people with their communities and reduce reoffending rates. As Sir Gluckman put it:

> *"The scientific evidence is incontrovertible: it is preferable, more effective (and cost-effective) to focus on improving community, social and family environments; it will ensure many more New Zealand children flourish and stay far away from the prison pipeline."*[41]

We recommend that spending should be redirected towards therapeutic, life-skills based programmes in the community and away from building more youth prisons and the annual costs of custody. We urge the Advisory Group to draw the Government's attention to the report of the Prime Minister's Chief Science Advisor, which clearly and concisely makes the economic and social case for such a recommendation.

8. Youth advocates

Youth advocates are court-appointed, specialist lawyers for young people. They are paid directly by the court at an hourly rate, falling outside of the criminal legal aid system.

In 2012, the Government threatened to remove specialist criteria for youth advocates and bring them under legal aid, with general standards applying, under the Legal Assistance (Sustainability) Bill. These plans were dropped following lobbying from the Law Society and others.

YouthLaw's view is that it is critical that the specialist criteria for appointment of youth advocates, and their separate funding by the court, remains.

The expectation of high quality representation is fundamentally at odds with fixed fees and risks incentivising guilty pleas. YouthLaw is aware of the damage that has been done to the quality of representation in the adult criminal justice system as a result of cuts to legal aid. It is imperative that the youth justice system is protected from the same deterioration in quality.

Appointment and Review Procedure for Youth Advocates

The *Appointment and Review Procedure for Youth Advocates* was amended by Principal Youth Court Judge John Walker in April 2017.[42] While the revised Appointment and Review Procedure is commendable overall, YouthLaw considers that it is lacking in a number of respects, namely:

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[41] *Ibid* at page 10 (accessed 22 February 2019)
[42] Available at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0006/69765/YthAdvocates.pdf (accessed 22 February 2019)

1. There is no minimum period of practice in criminal law before one can apply to be a youth advocate – the criteria is simply "knowledge of, and experience in, criminal law". We recommend that a minimum period of three years practising as a *criminal* solicitor and/or barrister should be introduced.

2. There is no judicial input at the review stage. We believe that judges are best-placed to assess a youth advocate's standard of work. We recommend the introduction of a requirement for judges to provide a short report / reference about the youth advocates appearing before them as part of their three-yearly review.

3. There is no provision for training of new youth advocates. Training that has already been undertaken is relevant to the Youth Court's consideration of whether a barrister or solicitor is suitably qualified to be appointed as a youth advocate.[43] The Appointment and Review Procedure then expects a commitment to attend relevant training and education programmes offered by the New Zealand Law Society. We recommend that a compulsory training programme for all new youth advocates be introduced. We adopt the recommendation of Alison Cleland in her 2012 report on Youth Advocates in New Zealand's Youth Justice System[44] that the training should cover the following:

    a. Māori culture and tikanga;
    b. Cognitive and developmental issues relating to young people aged 12 to 18;
    c. Interviewing and communicating with young clients;
    d. Aims and principles of the youth justice system in New Zealand;
    e. Working with key players (youth justice coordinators, youth aid officers, etc);
    f. Youth advocate's role in Youth Court;
    g. Youth Advocate's role in FGC;
    h. Purely indictable offences;
    i. Jurisdiction issues – Youth Court / Adult court; and
    j. Finding solutions – drug and alcohol programmes, youth support programmes, supervision with activity programmes, education initiatives etc.

We also agree with Ms Cleland that a requirement that all new youth advocates be mentored by experienced youth advocates would ensure the transmission of the experience of others gained over a long time, and recognise that some things cannot be "trained", but should be experienced and understood.

We therefore recommend the introduction of a requirement for the mentoring of new youth advocates by youth advocates with at least five years' experience, for a period of at least one year following their appointment.

[43] Oranga Tamariki Act 1989, s323(2)
[44] Cleland, Alison, Youth Advocates in Aotearoa / New Zealand's Youth Justice System, August 2012. Retrieved from: https://www.lawfoundation.org.nz/wp-content/uploads/2012/10/Youth-Advocates-in-Aotearoa-Youth-Justice-System-2012-web-version.pdf (accessed 21 February 2019)

9. Overrepresentation of rangatahi Māori in the youth justice system

Despite being only 15% of the population, Māori make up 38% of all people prosecuted.[45] These figures are even worse in the youth justice system - in 2017/18 Māori children and young people made up 65% of all children and young people with charges finalised in court.[46] This overrepresentation is also getting worse - although the overall numbers of children and young people in Court have decreased over the last ten years, the number of rangatahi Māori has decreased at a lower rate resulting in increased disparity between Māori and non-Māori.[47]

(a) Treaty obligations

The Crown has an obligation under the Treaty of Waitangi to address this disparity in order to protect Māori interests. The Waitangi Tribunal, in its 2017 report on the Crown and Disproportionate Reoffending Rates[48], found that the overrepresentation of Māori in the criminal justice system was "clear, disturbing and in need of an urgent response".[49] It stated:

> *"The grossly disproportionate, decades-long, and increasing Māori overrepresentation in the nation's prisons is a devastating situation for Māori, and for the nation. Disproportionate Māori reoffending and reimprisonment rates contribute to this. That this has come to be seen as normal only heightens the need for the Crown to meet its obligations under the Treaty principles of active protection and equity."*[50]

We consider that the Waitangi Tribunal's findings and recommendations can also be applied to the youth justice system. That is, the current situation calls for an urgent response including the Crown taking active steps to reduce the existing disparities. In addition, this work should be done through a more thorough exercise of the Treaty partnership between the Crown and Māori that goes beyond the Crown simply informing itself of Māori interests.[51]

We also believe that addressing the overrepresentation of rangatahi Māori in the youth justice system cannot be done in the criminal justice system alone; this is a task that falls upon a large number of Government departments, and society as a whole. For any progress to be made, it is imperative that the system reflects upon the ways in which colonisation and systemic discrimination have contributed to Māori disadvantage, suppression of secure cultural identities and vulnerability to offending behaviours.

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[45] https://www.justice.govt.nz/justice-sector-policy/key-initiatives/hapaitia-teoranga-tangatal
[46] Youth Justice Indicators Summary Report, April 2018 https://www.justice.govt.nz/assets/Documents/Publications/children-and-young-people-in-court-data-highlights-jun2018.pdf (accessed 22 February 2019)
[47] Ibid.
[48] Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates*, 2017, (Legislation Direct, Wellington). Retrieved from: https://bit.ly/2TezYxD (accessed 1 March 2019)
[49] *Ibid* at 2.3
[50] *Ibid* at 5.1.2
[51] *Ibid* at 5.1.3

Drawing from the Waitangi Tribunal's recommendations, the steps taken should include:

(a) The Crown[52] and Māori working together to design and develop a strategy to address the existing disparities and reduce the number of rangatahi Māori in the youth justice system. This strategy should include measurable targets and be supported by a dedicated budget.
(b) Senior level staff at the Ministry of Justice, the Ministry of Education, Department of Corrections, Oranga Tamariki and the Ministry of Social Development being given appropriate advice and training in how to incorporate mātauranga Māori and awareness of the Crown's Treaty obligations into their practice and operations. This includes more Māori in leadership positions across these agencies.

(b) Institutional racial bias

YouthLaw has considered an urgent claim recently filed with the Waitangi Tribunal by Timothy Morrison[53], a Māori man who argues that that many of the crimes he was prosecuted for throughout his life might not have been pursued by police if he were Pākehā.

The claim contends that New Zealand police exercise the discretion to prosecute Māori significantly more than non-Māori, and that such bias is inconsistent with the Treaty principles of active protection and equity. The relief sought by Mr Morrison includes requiring the police to report to the Crown and public by ethnicity, specifically Māori and non-Māori, on every decision comprising the exercise of discretion to prosecute. He is also seeking the establishment of a new body or bodies to look at prosecution decisions to determine whether bias against Māori might have had an influence.

We consider that requiring the police to provide such data, and the establishment of such a new body, would be a significant step towards understanding and, potentially, addressing the overrepresentation of Māori in our criminal justice system. We hope that the Tribunal agrees to an urgent hearing of Mr Morrison's claim so that the wider issues raised by it can be thoroughly and promptly explored.

(c) Early intervention

As stated elsewhere in this submission, we believe that early intervention is the key to reducing the number of children and young people in the youth justice system overall, and this applies equally to rangatahi Māori as it does to all other young people.

We adopt the recommendations of Sir Gluckman in the executive summary of his report[54] and, rather than rehearse those recommendations here, invite the Advisory Group to read his report in full. While Sir Gluckman's recommendations relate to young

[52] Including all relevant Ministries and Departments.
[53] For background information, see here: https://bit.ly/2Et7DJK (accessed 1 March 2019)
[54] Professor Sir Peter Gluckman, *Op cit,* pages 6-7

people generally, we consider that the earliest possible intervention for *all* young people at risk of offending – including rangatahi Maori – will reduce the numbers of those young people in the youth justice system. We believe that the spirit and recommendations of Sir Gluckman's report are captured by the following passage:

> *"If unaddressed, problems in early childhood may become life-course-persistent issues. There is, however, strong evidence that interventions for this age group are effective. Crucially, evidence shows that the younger the child is at intervention, the more effective it is likely to be – it's never too early to make a difference."*[55]

10. Other suggestions for reform

(a) Amendment to section 284 Oranga Tamariki Act 1989

Section 284(1) Oranga Tamariki Act 1989 currently sets out the factors the Youth Court "shall have regard to" when deciding what sentence to impose when a young person's charge has been proved.

The factors (a) to (i) include: the nature and circumstances of the offence and the young person's involvement in it; the personal history, social circumstances, and personal characteristics of the young person, so far as they are relevant; the attitude of the young person towards the offence; the response of the young person's family to the causes underlying the young person's offending, the measures available for addressing those causes and the young person themselves as a result of that offending; any measures taken by the young person or their family to apologise or make reparation to the victim; the effect of the offence on the victim; previous offences; any decision or plan made in the FGC; the causes underlying the young person's offending, and the measures available for addressing those causes, so far as practicable.

We consider this list to be reasonable and in line with the restorative, rehabilitative principles of the Oranga Tamariki Act 1989.[56]

However, under section 119 of the Oranga Tamariki Legislation Act 2017, a new section 284(1A) is to be inserted, as follows [our emphasis added]:

(1A) If the court is considering whether to transfer a proceeding to another court for sentence or decision under section 283(o), in addition to the factors in subsection (1), the court ***must consider*** and ***give greater weight*** to all of the following:

(c) the seriousness of the offending;
(d) the criminal history of the young person;
(e) the interests of the victim;
(f) the risk posed by the young person to other people.

[55] Ibid, *p*age 19
[56] Section 4

We do not consider the language of this new provision to be in line with the broad principles of the Oranga Tamariki Act 1989.

The language used is deterrent language, rather than rehabilitative and restorative language. It is imposing an obligation on judges to give greater weight to the interests of the victim than the defendant, regardless of the circumstances of the young person – including those outlined above (possible neuro-disabilities, communication disorders, or mental disorders). We consider that this new provision ties the hands of judges and prevents them from properly exercising their judicial discretion. We believe that it will lead to more young people ending up in the District Court for sentencing.

We recommend that this amendment is removed and that section 284(1) remains as it is currently drafted.

(b) Te Pae Oranga

YouthLaw understands that the New Zealand Police is intending to pilot an extension of the Te Pae Oranga programme (previously referred to as Iwi Justice Panels) to rangatahi Māori.

Given the positive evaluations of the Te Pae Oranga programme for adults, we support a pilot of the extension of the programme to rangatahi in principle. Any pilot must be fully evaluated to determine its effectiveness for the children and young people participating in it. We look forward to seeing how the pilot develops and contributing to it in due course.

11. Obstacles to change

(a) Funding

The most obvious and major obstacle to any of the suggested reforms in this submission, and indeed any of the reforms suggested by the papers cited in this submission, is funding.

As stated at the beginning of this submission, children and young people do not offend in a vacuum: their behaviour is more often than not caused by a raft of economic, societal, educational and health problems. Tackling those problems early on, before the young person reaches the youth justice system, requires large-scale investment. This may seem expensive at first but the evidence is clear that tackling these problems before they reach crisis point is more cost-effective in the long-run. Plunging more resources into building bigger prisons, cutting public and health services and introducing American-style “three strikes” legislation is a false economy: the knock-on cost to our society is immeasurable.

(b) Political will

Pledging resources to rehabilitation and restorative justice, rather than “tough on crime” measures will inevitably be less popular with the electorate.

But drafting policies based on what will win the most votes is short-sighted. If the Government decides to implement any of the reforms proposed in this submission, it will have to stand firm against populist rhetoric and convince the public that its reforms will create a better New Zealand in the long run, with reduced reoffending and lower numbers of children and young people in prison. Creativity will be required for this, in light of research that providing the public with "more or better" information about effective criminal justice policy has little impact on their views about criminal justice.[57]

As the Prime Minister's own Chief Science Advisor, Sir Gluckman, concluded in his report to the Government last year:

> *"Although there is a need to continue to investigate the evidence around criminal justice, there is also a need for those working in the field – and across the government, iwi and community sectors (in justice, education, health and social services) – to be able to build their action on that evidence. For this to be not just another 'report'.*[58]

We urge the Government to boldly address the systemic issues that we have raised in this submission. We sincerely hope, like Sir Gluckman, that this is not just another submission and that the Advisory Group's report to Government is not just another report. Deeds, not words, are required for change.

[57] The Workshop & JustSpeak, "Reframing crime and justice" project. See: https://www.borrinfoundation.nz/grants/reframing-crime-and-justice (accessed 5 March 2019)
[58] Gluckman report, *op cit*, page 4