**The Child and Youth Wellbeing Jigsaw in Aotearoa/NZ:**

**Five missing pieces**

Reflections and Challenges by Judge Andrew Becroft,

Children’s Commissioner

1/7/2016- 31/10/2021

**Youth Justice: some stark injustices need fixing**

**Introduction**

One of the main reasons I was attracted to the role of Children's Commissioner was that it would give me a chance to speak about areas of reform and legislative change for the youth justice system, that I was constitutionally prevented from doing as Principal Youth Court Judge.

For this reason, a great early encouragement was the decision by the government in 2017, to include almost all 17-year-olds within the youth justice system. This was something for which our Office, along with many others, had campaigned strongly. If I have done nothing else, my time as Commissioner has been worth it for this alone.

However, there are other areas where change to the youth justice system is urgently needed. The status quo perpetuates injustice. I discuss five youth justice “injustices” next.

First, I need to stress that I believe in our youth justice system. There is much about the youth justice legislation and policy which was revolutionary for its time in 1989, and which I think is principled, effective and, as many academics would agree, world leading. For instance, there is a twin emphasis on: -

1. not charging young people wherever possible and using community-based interventions instead; and,
2. the use of well-resourced and well-coordinated family group conferences (FGCs) as a key decision-making mechanism for serious offending.

The former is based on the understanding that almost all young people, at a time in their lives when their frontal lobe is still developing, break the law at least once – usually in only minor or moderate ways. However, with good community-based interventions, led by New Zealand’s highly trained and respected Youth Aid police, almost all young people will quickly leave offending behind them.

The FGC is a restorative justice approach in practice. It assumes that families/whānau, together with victims and their supporters (and in the case of rangatahi Māori – with hapū and iwi), can when empowered to do so make highly effective and creative decisions which hold young people accountable and prevent further offending. That is not say that all is well with the FGC process. In some respects, it needs a blood transfusion in the land of its birth. See our Report: <https://www.occ.org.nz/publications/reports/state-of-care-2017-family-group-conferences/>.

Unfortunately, this excellent architecture of the system is sometimes misunderstood. In 2020, a Private Members Bill, *the Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill -* later withdrawn - sought to introduce a graduated system of demerit points for all young offenders. Though doubtless well intentioned, it was deeply misguided and could have had devastating consequences for many, including rangatahi Māori, Pacific and disabled young people. It would have destroyed the police discretion to develop tailored, community-based responses to deal with young offenders and replaced it with a paint by numbers approach. See our office’s submission against this Bill: <https://www.occ.org.nz/publications/submissions/submission-on-oranga-tamariki/>.

Even more unfortunately, real progress within the youth justice systems frequently goes unnoticed and unreported. For instance, a very significant trend is that over the last ten years, offending rates for children and young people have fallen by 63% and 64% respectively. And the rate of Youth Court appearances has reduced by 68%. The moral panic periodically generated about increasing youth crime is misplaced. See the more detailed Youth Justice Indicators report: <https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf>

There are also significant system’s failures outside the control of the youth justice system which occur much earlier in a child’s life. Everything I saw while I was Principal Youth Court Judge pointed to a lack of early, co-ordinated intervention. This was another reason that attracted me to this role: earlier support for a child would be half the cost of, and twice as effective as, [youth justice interventions](https://cpb-ap-se2.wpmucdn.com/blogs.auckland.ac.nz/dist/f/688/files/2020/02/Discussion-paper-on-preventing-youth-offending-in-NZ-1jhkfm4.pdf). I was keen to advocate the crucial importance of addressing issues in a child’s life that arise, for instance, in their first thousand days. This is our ultimate crime fighting tool. (See *Missing Jigsaw Piece* No 1.)

The other point to make is that virtually all children under 14 who commit serious offences are already known to child welfare/protection services. That is their most common characteristic. Most of these children “graduate” into the youth justice system, all with a constellation of unmet needs and disadvantage. This becomes a huge, but largely avoidable, challenge for the youth justice system. The serious weaknesses in Oranga Tamariki services for these children and our very poorly resourced “child-offender” system (quite different from our youth justice system) need urgent and radical attention. *(See Missing Jigsaw Piece No 4.)*

Nevertheless, there are five areas of legislation and practice specific to the youth justice system itself, where, I think, reform is urgently needed. Unaddressed, they will perpetuate significant injustice for children and youth people. The legislative suggestions made in respect of each area would “finish the job” started in 1989.

1. **The pressing need for “by Māori for Māori” approaches**

Some of the big issues facing the youth justice system are the issues facing our whole country (discussed in the *Prologue and Missing Pieces* 1 and 2, before).

As is well understood, the shadow of poverty; the legacy of colonisation together with modern day racism and systemic bias; abuse and neglect issues; unidentified neuro developmental disabilities[[1]](#footnote-1); and educational disengagement hang over most young people with serious offending behaviour.

But there is one issue that the youth justice system can and must respond to urgently: Māori disproportionality. Again, “moral panic” or exaggeration must be avoided. First, the good news: -

* The number of young Māori aged 14 to 16 who offend and who appeared in the Youth Court (which only deals with the most serious offending) reduced by 41% from 2016/17 to 2019/20. The number fell from 1,375 to 810. In comparison the number for European/Other fell by 33% over the same period - from 438 to 295.
* The Youth Court appearance rate decreased by 47% from 2016/17 to 2019/20 for Māori compared with a 27% reduction for European/Other.

The bad news is that despite a reduction in disparities between Māori and non-Māori, indigenous Māori children and young people still come into conflict with the youth justice system at severely higher rates than any other ethnic group.

* The proportion of Māori children whose offending was serious enough to lead to an FGC or court action was 2.1 times higher than that for European/Other.
* The percentage of young Māori proceeded against who appeared in the Youth Court was 1.8 times higher than that for European/Other.
* The Youth Court appearance rate for Māori young people was 8.3 times higher than that for European/Other.
* The percentage of Māori children and young people remanded in custody was 1.7 times higher than that for European/Other.

As if to emphasise this deeply concerning reality, I well remember visiting the newest of the four youth justice “residences” - Te Maioha o Parekarangi, in Rotorua in 2018 (which is for young people from the whole country). This is a secure detention centre for our most serious young offenders - both on remand and sentenced. Twenty nine of the thirty young people there were Māori. The experience was sobering and not unusual.

It is imperative that innovative, government resourced, Māori-led ‘by Māori, for Māori,’ approaches that respond to offending behaviour by rangatahi Māori are promoted.

After all, that was exactly the vision of the original 1989 legislation, at least partially inspired by Puao-te-Ata-tu[[2]](#footnote-2), not to say Te Tiriti, which set out a revolutionary vision for dealing with young offenders. For instance, s208(c) of the Act emphasised as a specific youth justice principle…

that any measures for dealing with offending by children or young persons should be designed—

1. to strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
2. to foster the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

This provision strongly points to “by Māori, for Māori” approaches. It was a basis, if one was needed, for the establishment of Ngā Kōti Rangatahi. It should also have provided a basis for the development of a wide range of other “by Māori for Māori” approaches within the wider youth justice system. Sadly, the vision of the 1989 Act, which specifically mentioned whānau, hapū and iwi and family groups 28 times, quickly stalled, and was not realised. Thirty-one years later, we now have a second chance for a revolution with the promised transformation of Oranga Tamariki. We cannot fail a second time.

The rationale and need for “by Māori, for Māori” approaches is just as strong in youth justice as it is for care and protection (see Missing Piece 4, before) and the case for this transformative change in our *Te Kuku o te Manawa* reports: <https://www.occ.org.nz/publications/reports/te-kuku-o-te-manawa/> and <https://www.occ.org.nz/publications/reports/tktm-report-2/>

1. **A fully self-contained, standalone, Youth Court.**

Nothing less should be our vision.

Paradoxically, a small number of charges against young people - the least serious and the most serious - currently must be dealt with in the adult District or High Courts. In terms of the least serious cases (driving related and other offences proceeded with by “infringement” notices which the young person wants to defend), this is a result of muddled thinking and poor drafting in the 1989 legislation. As for the most serious cases (murder and manslaughter), it is the result of inconsistent and overly cautious thinking. Albeit this was before the ratification of the UN Convention on the Rights of the Child.

Also, sentencing for offending where the Youth Court options are considered “clearly inadequate” can be transferred by the Youth Court Judge to the District Court for sentencing - (usually by the same judge, but sitting in the adult jurisdiction where a penalty of imprisonment is available). Similarly, the election of a jury trial necessitates an adult court trial.

These exceptions should not exist. They are not necessary. The Youth Court should be empowered to deal with all offending by under 18-year olds, including jury trials and murder and manslaughter.

All sentencing options should be available to the Youth Court. (It could be that a small number of Youth Court judges are specifically warranted to conduct murder and manslaughter cases. There are several former crown prosecutors and senior defence lawyers in their ranks who could easily handle the small numbers of these usually high profile cases). But life imprisonment, as currently defined, and the current mandatory minimum parole period, should be abolished. The responses should be individually tailored to the young person, their background and the circumstances of the offending.

I urge strong consideration of this change for which there is precedent. See, for example, Western Australia where there is a model of a standalone Youth Court. Of course, some nuanced policies would need to be addressed. For instance, where a young person was a co-accused with many other adults, an ‘interests of justice’ provision might allow the trial to take place in the adult court. But in such situations the Youth Court protections e.g. name suppression would continue and if a guilty verdict was reached then sentencing of the young person would be returned to the Youth Court.

The youth justice system is far from perfect. But a youth specific approach which retains a full suite of sentencing responses, including imprisonment where necessary, will work better for all under 18-year olds than retaining an adult court approach for some young people.

This step would be better for our communities and our country. The original vision of the 1989 youth justice system would be realised. The circle would be completed.

Part of the necessary reforms for a standalone, universal and fully principled Youth Court system are two jurisdictional amendments. In my view both, discussed below, must now be considered long overdue.

1. **Extending the top end age for the Youth Court.** Including most seventeen-year olds in the Youth Justice system in 2017 was the right thing to do. As I said earlier, this goal was the main reason I took this role. However, in 2017, a small list of very serious offences committed by 17 year olds were held back from Youth Court jurisdiction - mainly to assess if the youth justice system and the Court could cope with the feared “influx” of a new 17 year old age cohort. Predictably, the fears failed to materialise. The system managed just fine. We must now complete this second step - always anticipated and very straightforward.

If I could, I would argue strongly that the adult courts should also have the power to transfer some 18- and 19-year olds into the Youth Court where the interests of justice justify it. For example, “developmental lag”, previously unidentified neurodevelopment disability and/or the nature of the offending would all be reasons why the Youth Court would be a better forum to resolve the offending. My hesitancy to advocate for this additional change, is because the age jurisdiction of the Commissioner is under 18, unless the person is in Oranga Tamariki care under section 386AAA of the Act in which case the definition of young person is extended to age of 21.

I do put this forward as a step worth considering for others to take up.

1. **Raising the minimum age of criminal responsibility (MACR).** In New Zealand the MACR is 10 – and has been since at least 1961. That, unarguably, is too low. It is out of step with what we know of child development and with the age in many (but by no means all) other countries. It is contrary to strong, recent guidance from the United Nations. See: <https://digitallibrary.un.org/record/3899429?ln=en>

* The MACR should be 14. Our Office has a position brief on this matter. See: <https://www.occ.org.nz/publications/submissions/position-brief-its-time-to-stop-criminalising-children-under-14/>
* In practice, the current MACR is actually 12, because 10 and 11 year olds cannot be charged with any offences apart from murder and manslaughter and to my knowledge since at least 1975, no 10 or 11-year-old ever has been. So, it would be a very easy step to urgently legislate for a MACR of 12. It is outrageous this has not been attended to earlier.
* Until 2010, the MACR was 14 in all but a very few cases, because likewise no 12 and 13-year-old could be charged with any offence except murder or manslaughter. (However, an exceedingly small number of 12- and 13-year olds have been charged with these homicide offences in the last 30 years).
* All that changed as result of penal populism. Without any demonstrated need to do so (indeed, with child offender numbers in decline) the newly elected government amended the law as from 1/11/2010 to allow 12- and 13-year olds to be charged in the Youth Court with a small list of very serious offences. A push back provision was included (as a failsafe) allowing the Youth Court to direct that the 12 or 13-year-old be transferred into the care and protection system if the real issues were underlying welfare needs. In the ensuing years since 2010 only a very few 12- and 13-year olds have been charged, and if so, most have been pushed back to the care and protection system.
* In my view, the law change in 2010 has proved unnecessary.
* The only practical problem with a 14 year old MACR is choosing the right and effective response to the behaviour of under 14-year olds which is currently considered criminal offending. If the MACR was 14, such behaviour (which would otherwise have been called offending behaviour) now has to be described and dealt with differently, because logically it can no longer be called criminal.
* In New Zealand, we know that the only current choice is the care and protection system, which considers this behaviour the result of unmet or unresolved welfare needs. I agree with, and understand, this philosophical assumption. However, the problem is that currently the care and protection system is in need of substantial improvement (including closure of the four large secure residences), particularly for Māori – who are over-represented in the care and protection and youth justice systems as it is.
* Therefore, until the care and protection system is transformed, including “by Māori, for Māori” approaches, the MACR should be raised to 12 - but only as a first and incomplete step.
* In the meantime, our current system for dealing with children who offend “the child offender system” (and who are not charged in the Youth or adult court, as outlined above), needs urgent improvement. It is not fit for purpose, is poorly resourced, with little interagency co-ordination, and no clear leadership. See our Office’s report on this issue:- <https://www.occ.org.nz/publications/reports/children-with-offending-behaviour/>.

1. **Abolish the option to remand a young person to a police cell after first Youth Court appearance (s 238(1)(e) of the Oranga Tamariki Act) .**

This power, introduced in 1989, is understood to have been a stop gap, last resort, until sufficient facilities for “secure” or “custodial” remand for young people were built or re-purposed. This never eventuated. Thus, by the early 2000s, police cell remands had become a parallel custodial option to CYFS secure residences. Remands of 5-6 days were not uncommon. Good management, and the recent statutory obligation introduced in 2019 for the Youth Court to review police cell remand orders every 24 hours, brought these numbers down. But they ebbed and flowed over the last ten years. In the last year, the numbers of Youth Court police cell remands have become very low. The power is currently virtually defunct.

Now is the perfect time to abolish this provision.

Police cell remands, always in adult police cells, usually in solitary confinement, can quickly lead to mental and emotional harm and the real risk of suicide. At the very least, young people are likely to experience poor hygiene facilities, inadequate food, sometimes round the clock lighting to maintain “line of sight” for the police and limited access to appropriate support. And it is worth noting that at least 70% of young people in police cells are Māori.

Young people who are violent or who may abscond can still be held for short periods in police cells under two other sections of the Act:-

* prior to first court appearance (s236(1)); and,
* after court appearance for up to 24 hours to enable transportation etc to a more suitable facility (s242(1)(b).

I am not proposing that these provisions be changed. See our Office’s position paper: <https://www.occ.org.nz/publications/submissions/oranga-tamariki-act-1989-limiting-the-use-of-police-cells/>.

1. **Phase out and then abolish the use of the four large scale youth justice detention centres.**

The four big youth justice residences, Korowai Manaaki (40) in Wiri, Te Maioha o Parekarangi (30) in Rotorua, Te Au rere a te Tonga (30) in Palmerston North and Te Puna Wa ō Tuhinapo (40) in Rolleston, totalling 140 beds, demonstrate an outdated and inappropriate model which harks back to the 19th century. (Note, there is an additional new residence for very young offenders, Whakatakapokai, in Weymouth. With 14 beds, this brings the total to 154).

Segregating young people from the mainstream community and aggregating them together in large numbers in a big concrete detention centre is not a recipe for enduring rehabilitation. It increases risks of violence, bullying and abuse. Their attempted justification has a purely (but flawed) cost saving basis. As residences are ineffective and cause harm – they actually increase cost downstream for the health, education, social welfare and adult corrections systems.

Quite contrary to their original purpose, these residences have become mainly remand centres for young people awaiting finalisation of their cases. Up to 80% of those in the residences can be on remand.

They should be replaced with much smaller, well supervised, and, in some cases, very secure community homes. See two reports from our Office about these residences: <https://www.occ.org.nz/publications/reports/state-of-care-2017-a-focus-on-oranga-tamarikis-secure-residences/> and <https://www.occ.org.nz/publications/reports/supporting-young-people-on-remand/>

Mahuru, a remand initiative developed by Nga Puhi Social Services in Kaikohe, provides community-based 1 on 1 care. It is a good example of a “by Māori for Māori” approach. Well supported volunteer family homes in the community are used to provide a stable living environment. Trained youth mentors and youth workers are available 8am-5pm weekdays and in the weekends. It has shown very promising early results. See our Office’s report on supporting young people with offending behaviours to live in the community: <https://www.occ.org.nz/publications/reports/supporting-young-people-on-remand/>.

1. **Reform current areas of unacceptable police practice affecting children and young people**

* **Police urgently need to develop an over-arching specific child and youth strategy.**

This would guide a coherent “whole of police approach” to interacting with all children and young people. It should avoid a sometimes inconsistent issue by issue approach. It should also allow for the voices and experiences of children and young people to be heard and factored into policy making.

* **Discontinue the use of restraint chairs for children in police cells.**

Between 2015 and 2020, police strapped 38 young people into restraint chairs in police cells, some more than once. This included two thirteen-year-old tamariki Māori. The real problem is insufficient crisis mental health services for young people. It shouldn't fall on the police to be using outdated, old fashioned, almost draconian restraint chairs. The United Nations has recommended their use be abolished. We must do better.

See: <https://www.rnz.co.nz/news/national/447684/police-strapped-38-youth-in-restraint-chairs-in-5-years-we-must-do-better>

* **Discontinue the use of spit hoods for children in police custody**

The use of spit hoods, with origins in the USA policing and reminiscent of those used at Guantanamo Bay, is profoundly concerning, traumatic for children, unnecessary and utterly unacceptable.

-Between 2016-2020 spithoods were used on young people 129 times.

- 53.5% of these incidents were Māori children, including a child aged just nine years old in 2018.

- 15.5% were Pasifika children

- 29.45% were European children

See: <https://www.rnz.co.nz/news/national/452078/spit-hoods-used-on-117-children-young-people-by-police>

It is worth noting that following the Royal Commission into the Protection and Detention of Children in the Northern Territory, Australia, there were grave concerns about the use of spithoods. Their use was recently banned in South Australia.

With the advent of Covid-19, there will be understandably greater concerns about police safety. However, the police are now much better protected with PPE, face shields etc., which may make the use of spithoods less easy to justify.

* **Restrict police practice of specifically photographing children and young people suspected but not charged with any offence.**

Concerns were raised in late 2020about the reported police practice in some areas of taking of photos of individual young people. These were photos – virtual “mug shots” - from close range, in public situations, where it was reported that the young people felt they had no choice but to participate in the process. Properly informed consent was not obtained from the young person nor from their parents/guardians – as is the basis of the current policy.

Photographing for identity purposes is permitted if a young person is in police custody having been detained for committing an offence: (s32 Policing Act 2008). In all other situations, the law seems cloudy. The common law provides a basis for taking photos in public unless there is a reasonable expectation of privacy.

The ethical (and legal) concern here is the ‘request’ for a close-range portrait photo in circumstances where consent is not obtained, and where police powers may be misrepresented. I doubt whether a child is ever capable of truly informed consent in these situations. Informed parental/ guardian consent should be the pre-requisite.

The current law is out of date and not fit for purpose. The whole collection and retention of biometrics by the police - and the entire justice system - needs to properly recognise children as a specific group requiring protections and strict practice guidelines. In the meantime, the police are reviewing current policy settings.

* **Change police vehicle pursuit practice and policy.**

Police should not pursue cars which are reasonably suspected as being driven by children and young people, or in which they are passengers, unless there is imminent risk of death or very serious offending.

To be honest, I have changed my mind on this issue. When I was Principal Youth Court Judge, I thought that every young person who drove away from the police should be pursued. I thought that the law should not be mocked or treated with impunity by young people. They should know there are immediate consequences.

Now, in view of the needless death and injury to children and young people to say nothing of innocent victims, I think it is better for the police to use the brake not the accelerator, and take the heat out of the situation. In my experience in the Youth Court, often young people want the thrill of the chase – that is the whole point. Often too, the original offending is minor to moderate and out of all proportion to the, sometimes deadly, consequences of the pursuit. We know that under pressure, including from the police or their peers, young people engage in reckless behaviour. And children and young people can usually be apprehended and held accountable the next day. The sophistication of modern technology makes this increasingly certain.

As a side note, it is interesting to observe, as is often the case, the way a problem is defined suggests its solution. Police call the issue “fleeing drivers”. Others use “police pursuits.” I think it is the police with the more developed pre-frontal cortex, who should act with adult restraint. By not embarking on, or pulling out of a chase, lives will be saved.

I should also say that the police, and the Independent Police Conduct Authority have treated this matter very seriously. The police have made clear that they are reviewing the research and overseas examples.

**Challenges.**

I strongly support our ‘youth specific’ youth justice system. When practiced well, and when we extract the best from the current visionary legislation, there are the seeds of genius in our system. The youth justice system is nowhere near the serious situation facing the care and protection system. However, action on some festering injustices is long overdue. Legislatively, we need to finish the job started in 1989. Also, some practice issues need prompt attention.

*Legislation*

* A self-contained, standalone Youth Court must now be fully established, with a MACR of 12 – to become 14 as soon as possible and including all14- 17 year olds and all offences.
* Abolition of the remand into police cell custody option after first Youth Court appearance.

*Policy*

* Phased closure, and eventual abolition of all the four current youth justice residences.
* ‘By Māori for Māori’ approaches must be prioritised.
* Police policy and practice when interacting with children needs coherence and specific unjust practices need reforming.

1. <https://cpb-ap-se2.wpmucdn.com/blogs.auckland.ac.nz/dist/f/688/files/2020/02/What-were-they-thinking-A-discussion-paper-on-brain-and-behaviour-in-relation-to-the-justice-system-in-New-Zealand-updated.pdf> [↑](#footnote-ref-1)
2. <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf> [↑](#footnote-ref-2)