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Diverted from Counsel: Filling the Rights Gap in New Zealand's Youth Justice Model

Prepared by
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Established by the
New Zealand government in 1995
to facilitate public policy dialogue
between New Zealand and
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In *Māori Boy: A Memoir of Childhood*, Witi Ihimaera uses the image of a spiral shell, circling back on itself, to show the past influencing the present, and the present colouring our view of the past, people coming in and out of our lives—a re-ordering of linear timelines used to organise our memories. My experiences here in New Zealand are the result of many circling conversations and relationships.

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Ziyad Hopkins
Wellington, August 2015

EXECUTIVE SUMMARY

In 1989, New Zealand radically changed its approach to young people in conflict with the law. The *Children, Young Persons and Their Families Act 1989* (CYPFA) sought to re-balance the relationship between the state and those facing interventions on the basis of alleged criminal behaviour. New Zealand is now a mature model to study, known as a laboratory for restorative justice, beginning with the family group conference for young people, and actively promoting positive youth development as a guiding force in the administration of justice.

In October 2013, the Government of New Zealand released the *Youth Crime Action Plan 2013-2023* (YCAP), a ten-year plan to reduce crime by children and young people. The second of the three major YCAP strategies focuses on reducing escalation, limiting the further involvement of youth in the justice system. In New Zealand, 80 per cent of the youth offending charges are resolved before being officially brought to court. Youth Advocates, free specialised lawyers for young people facing criminal allegations, however, are only available at the court stage. This report builds on the YCAP deliverable to explore the merits of expanding the role of Youth Advocates before formal court involvement.

Although CYPFA recognises and addresses the special vulnerablity of children and young people facing state intervention, the structure and implementation of youth justice processes in New Zealand does not provide sufficient oversight of the pre-court space. Simply calling a state intervention "informal," however well intentioned by the youth justice sector, deserves scrunity and demands, to the extent possible, the full consent of young people. Ironically, requiring an escalation into Youth Court to access a Youth Advocate for legal support in the face of a looming intervention undermines the benefits of pre-court processes. The multi-systemic nature of supporting positive youth behaviour provides an opportunity for Youth Advocates to collaborate with their individual clients to de-escalate involvement in the youth justice system. Youth Advocates, with an ethical duty to the client, are uniquely suited to serve as a real-time check on state intervention. New Zealand can promote young people's early and sustainable exits from the justice system, and encourage positive youth development outcomes, through increased attention to their rights by providing meaningful access to legal representation in this pre-court space.

The following five policy recommendations seek to maximise young people's rights within New Zealand:

- The Youth Court, in collaboration with New Zealand Police (NZP), should ensure that a Youth Advocate is appointed to represent children and young people within twenty-four hours of any arrest, regardless of when charges are formally filed or the young person's detention status.
- CYPFA should be amended to only allow statements of a young person to be admitted into evidence if a lawyer is present during the police interview and, in the interim, the nominated persons should be directed to give specific advice to young person that consultation with a lawyer is the best course of action.
- In the process of offering an alternative to prosecution to a young person, NZP should provide information to the young person and the family about how to contact a Youth Advocate for advice and an independent monitoring group should be empowered to review and audit Youth Aid

files to report both on diversionary practices and ensure compliance with NZP guidelines.

- When convening an "intention to charge" family group conference, the Children, Youth and Family (CYF) youth justice coordinator should send an invitation to a Youth Advocate, who will have the responsibility to coordinate with NZP, CYF, and the young person to determine the appropriate level of involvement.
- The New Zealand Law Society Youth Justice Committee should review and update Youth Advocate practice standards.

The ability to consistently apply restorative justice principles within a rights-based system of law offers a way to promote the community-oriented, holistic approach to representation not currently available in Massachusetts. Without the New Zealand-like framework and workforce culture imbued with restorative principles, and keeping in mind the cautions raised in this report, Massachusetts could still benefit from considering the following adoptions from New Zealand to move towards a less retributive approach to young people in conflict with the law:

- Practitioners should engage in family group conferencing style processes to reach agreements about disposition that can be presented to a judge for approval.
- Judges should be empowered to grant a disposition similar to New Zealand's "Section 282" discharge that (almost) completely erases a record of court involvement.
- State-wide principles encouraging and governing pre-court diversion should be developed.

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PREFACE

> "It is unclear what would happen if restorative justice were delivered on a widespread basis, rather than in small pilot groups that affect a small fraction of cases in any local [juvenile] justice system."[1]

For the last twenty-five years, the *Children, Young Persons and Their Families Act 1989* has guided adults when they respond to allegations of a child or young person's criminal behaviour in Aotearoa New Zealand.[2] It has tempered law enforcement's punitive inclinations, insisted on humility from social workers and limited judges' power. New Zealand's "world leading" status in the area of youth justice is well deserved. It is also the best example of a sustained and systematic application of restorative justice principles to youth in conflict with the law.

Successful, and indeed widely publicised, programmes in the USA offer restorative justice alternatives to traditional juvenile court. Federal assistance for restorative justice programmes has been in effect since 1997.[3] However, in the United States, there is still a lack of practical knowledge about what it means to operate an entire juvenile justice system bounded by restorative justice principles, yet also contending with due process concerns. The juvenile defence bar in the United States, of which I am a member, is very active in juvenile justice reform efforts. It is incumbent on us to look to New Zealand to understand the promise, and the peril, of incorporating restorative justice into an individual rights based system.

The audience of this report is three-fold. First, people interested in social justice can use this report to engage in debate about different approaches to young people in conflict with the law. Second, New Zealanders in the youth justice sector can hopefully benefit from an outsider's perspective and continue to work together to improve outcomes for young people. Third, I hope my colleagues in Massachusetts (and beyond) are encouraged to re-imagine our juvenile justice framework. It is informed by my own perspective and experience as a public defender for poor young people in Boston, Massachusetts, working both for individual clients and for systemic improvements in the justice system.

This report is based on observation, semi-structured interviews, statistical review, and literature research. The themes, emotions and even the fact patterns of the cases in the New Zealand youth justice system are similar to the caseload of any juvenile court in Massachusetts. My observations of various New Zealand youth justice processes—from alternative actions to youth court, as well as reviews of NZP and CYF files, revealed that New Zealand, while enjoying lower raw numbers and rates in all official youth justice measures, is legitimately compared to Massachusetts in the issues faced by young people in conflict with the law, including the reality of racial and ethnic disparities.

During my time in New Zealand, I was privileged to have access to processes, files and discussions about children and young people in the youth justice system. References to these events are made in this report with the absolute need to protect their privacy.

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[1] Committee on Assessing Juvenile Justice Reform, *Reforming Juvenile Justice: A Developmental Approach* (Washington, DC: National Research Council, 2013), p. 207.

[2] Aotearoa, in te reo Māori, and New Zealand, in English, are the official names of this country. The report will use the English name.

[3] "Juvenile Justice Reform Initiatives in the States, 1994-1996: Program Report" (US Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 1997).

INTRODUCTION

> "…the appearance as well as the actuality of fairness, impartiality and orderliness -- in short, the essentials of due process -- may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[4]

The *Children, Young Persons and Their Families Act 1989* (CYPFA) transformed New Zealand's youth justice sector into a world-leading model. It impacted the work of law enforcement, social services, courts and the legal profession. Almost overnight, between 1988 and 1989, the Youth Court's caseload dropped by two thirds.[5] The family group conference, as it evolved, became synonymous with restorative justice in the public eye. CYPFA sought to re-balance the power between the state and young person.[6] It legislates certain aspects of police powers—in arrest, detention and questioning—and establishes a preference for pre-court resolution through family empowerment. Over the last quarter century, about eighty per cent of criminal charges against children and young people have been resolved without the involvement of lawyers.

With so many young people experiencing justice informally at the hands of professionals from the police and social service sector, the protection of rights is left to the discernment of state officials, an issue that has vexed the youth justice sector since at least 2004.[7] Although CYPFA recognises that children and young people are vulnerable and in need of legal protections, the youth justice system also sees lawyers as the embodiment of the disfavoured formal process and has limited access to them, either by design or practice, to court proceedings. However, "[T]he state ought, of fairness to the people in respect of whom its coercive powers are being exercised, to insist on 'rule of law' principles and so ensure consistency of response to offences. Insofar as restorative justice approaches are adopted, the state's responsibility should be to impose a framework that guarantees these safeguards to [young people]—an aim no less worthy in those societies where state legitimacy is contested."[8]

In October 2013, the government of New Zealand released the *Youth Crime Action Plan 2013-2023*[9] (YCAP), a cross-sector initiative to improve the administration of youth justice, partly to address the continued over-representation of Māori in youth justice statistics. One of the twenty-eight actions that make up the plan is a review of the proposal to include specialised lawyers for young people—Youth Advocates-- in a specific pre-court event, the "intention to charge" family group conference, that determines if charges can be resolved before they are formally filed in New Zealand's Youth Court. This report explores the merits

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[4] In Re Gault, 387 US 1, 26 (1967).

[5] Andrew Becroft and Sacha Norrie, "Signed, Sealed-(but Not yet Fully) Delivered," October 2014, https://www.courtsofnz.govt.nz/speechpapers/Signed-%20Sealed%20-%20-but%20not%20yet%20fully-%20Delivered.pdf, p. 16.

[6] CYPFA specifically defines "child" and "young person." Unless otherwise noted, this report uses the terms interchangeably.

[7] Gabrielle Maxwell et al., "Achieving Effective Outcomes in Youth Justice" (Wellington, New Zealand: Ministry of Social Development, February 2004), p. 23.

[8] Andrew Ashworth, "Responsibilities, Rights and Restorative Justice," *British Journal of Criminology* 42, no. 3 (2002): 578–95, p. 582.

[9] Ministry of Justice and Ministry of Social Development, "Youth Crime Action Plan 2013-2023," October 2013, http://www.justice.govt.nz/publications/global-publications/y/youth-crime-action-plan-full-report.

of expanding the role of lawyers in the entire pre-court youth justice space as a means to ensure the rights of young people.

My thesis is that increasing meaningful access to counsel[10] in all of New Zealand's pre-court processes reflects human rights values and has the potential to promote a young person's early and sustainable exits from the youth justice pipeline, a goal of YCAP. Simply calling a state intervention "informal," however well intentioned, should not divorce it from due process principles. Conversely, requiring an escalation into Youth Court to access a Youth Advocate for legal advice undermines the benefits of pre-court processes. Mindful that the administration of justice is often limited by budgetary concerns, the report attempts to offer pragmatic responses to this gap in rights protection. The following five recommendations seek to maximise young people's rights within New Zealand's youth justice sector:

- The Youth Court, in collaboration with New Zealand Police (NZP), should ensure that a Youth Advocate is appointed to represent children and young people within twenty-four hours of any arrest, regardless of when charges are formally filed.
- CYPFA should be amended to only allow statements of a young person to be admitted into evidence if a lawyer is present during the police interview and, in the interim, the nominated persons should be directed to give specific advice to young person that consultation with a lawyer is the best course of action.
- In the process of offering an alternative to prosecution to a young person, NZP should provide information to the young person and the family about how to contact a trained Youth Advocate for advice, and an independent monitoring group should be empowered to review and audit Youth Aid files to report both on diversionary practices and ensure compliance with NZP guidelines.
- When convening an intention to charge family group conference, the Children, Youth and Family (CYF) Youth Justice (YJ) coordinator should send an invitation to a Youth Advocate who will then have the responsibility to coordinate with NZP, CYF, and the young person to determine the appropriate level of involvement.
- The New Zealand Law Society Youth Justice Committee should review and update Youth Advocate practice standards.

The ability to consistently apply restorative justice principles within a rights-based system of law offers a way to promote the community-oriented, holistic approach to representation that can feel like an upstream battle in the United States. Based on New Zealand's history, making a wholesale change will require a concerted community effort and political will at the highest levels. The current climate of criminal justice reform in the US does offer an opportunity to seriously debate how to incorporate the New Zealand youth justice experience into Massachusetts' approach to young people in conflict with the law. In the interim, without the New Zealand-like workforce culture imbued with restorative principles,

[10] New Zealand, like Massachusetts, has a process of licensing individuals to practice law in the courts of New Zealand. Counsel, in this report, refers to trained and licensed legal professionals—lawyers-- subject to oversight and discipline. In Massachusetts the Supreme Judicial Court, through the Board of Bar Overseers, is responsible for the conduct of lawyers. In New Zealand, lawyers practice pursuant to the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Massachusetts could still benefit from considering the following three adoptions from New Zealand to move towards a less retributive approach to young people in conflict with the law:

- Practitioners should engage in family group conferencing style processes to reach agreements about disposition that can be presented to a judge for approval.
- Judges should be empowered to grant a disposition similar to New Zealand's "Section 282" discharge that (almost) completely erases a record of court involvement.
- State-wide principles encouraging and governing pre-court diversion should be developed.

Chapter One of the report focuses on the common history of the youth justice systems in Massachusetts and New Zealand, as well as the shared framework of positive youth development. Chapter Two provides a practitioner's overview of CYPFA, with a focus on case processing. The chapter includes commentary about how Massachusetts practice and law, short of wholeseale adoption, could benefit from borrowing three elements of New Zealand's practice of youth justice. Chapter Three explains the role of the Youth Advocate in New Zealand, including highlighting some of the tensions faced in the CYPFA framework and my own views based on experiences as a juvenile public defender. Chapter Four discusses the merits of increasing access to counsel in New Zealand and proposes five modest measures to fill the rights gap in CYPFA pre-court processes. Chapter Five concludes with a summary of recommendations for both New Zealand and Massachusetts.

1 AN INTERTWINED HISTORICAL CONTEXT

The history of juvenile court both in the United States[11] (including Massachusetts) and New Zealand[12] are well traversed topics. The legal system in each country was part of the general European movement beginning in the mid-19th century to create separate institutions to deal with children and young people in conflict with the law. Today, each country is grappling with the ramifications of European-dominated social, economic and political structures.[13] The complexities, and indeed differences, of each country's history in perpetuating these inequities—including the myriad of ways that non-dominant communities in each country influence and cause change are still contested. In roughly the last generation, both Massachusetts and New Zealand are known for taking relatively bold, revolutionary steps in reforming the administration of youth justice. Both jurisdictions are now in the process of change in this area—through litigation, institutional re-evaluation and shifting political priorities. In the United States, practitioners describe the current climate as the *fourth wave* of juvenile justice.[14] In New Zealand, youth justice sector professionals are in the midst of reflecting on a quarter century of a radical re-imagining of the *welfare-justice divide*, focused on implementing YCAP.

A brief history of juvenile justice in the United States and Massachusetts

The *first wave* of youth justice in the United States is marked by the establishment of the first juvenile court in Chicago, Illinois, in 1899. Differentiating treatment of young people began earlier, however, in opposition to the co-mingling of adults and children in penal institutions. States established various 'reform' and 'industrial' schools throughout the USA in this vein, including in Massachusetts. The state intervention from these new juvenile courts was considered to be treatment, rather than punishment. As such, the proceedings were deliberately informal and excluded legal professionals in favour of trained social workers, psychologists, and probation officers. The doctrine of *parens patriae*—acting as the parent—justified the state's interest in acting in a child's best interest.

The *second wave* of juvenile justice in the United States reacted to the informality—manifested in the lack of due process—that characterised the juvenile court. The Supreme Court of the United States decision *In Re Gault*, held that the US Constitution required that young people facing liberty infringements in juvenile court were, like adults, entitled to certain basic, due process protections: notice of charges; right to counsel; protection against self-incrimination; and the right to cross-examine witnesses. The US Supreme Court justified its decision, in part, after an exhaustive review of the negative impact of the over-institutionalisation of youth. The majority opinion explained that "[J]uvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[15] The case was part of an explosion of judicially and legislatively recognised individual and community rights, sparked by the US Civil Rights movement across a variety of spheres of life. This was an

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[11] See, generally, Richard Lawrence and Craig Hemmens, *Juvenile Justice: A Text/Reader* (Sage, 2008).
[12] See, generally, Emily Watt, "A History of Youth Justice in New Zealand" (Wellington, New Zealand: Youth Court, January 2003), http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf.
[13] See, generally, Michael King, *The Penguin History of New Zealand* (New Zealand: Penguin, 2012) for a pithy history of New Zealand in this regard.
[14] National Campaign to Reform State Juvenile Justice Systems, "The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century," 2013.
[15] In Re Gault, 387 US 1, 18 (1967).

era marked by a re-negotiation of the relationship between the government and its citizens—particularly minorities. Among lawyers for young people in conflict with the law, the applicability of a range of constitutional rights to children also shifted the focus of representation from "best interests of the child" to zealous advocacy based on the client's wishes.

In Massachusetts, this focus on the fairness (both of procedure in court and conditions of 'treatment') led to the rapid de-institutionalisation of youth. Reports about the conditions for court-committed youth had been issued around the time that *In Re Gault* was in litigation.[16] Dr Jerome Miller, hired to reform the various reform and industrial schools, closed the big, overcrowded institutions and placed the young people back in their neighbourhoods or in small community-based facilities. The revolutionary experiment, which did not lead to increased crime rates, forced a re-evaluation about the dependence on confinement for young people who have committed crimes.[17]

Ironically, perhaps, as juvenile court proceedings mimicked adult criminal court, the *third wave* of juvenile justice in the USA focused on punitive measures to control youth.[18] In the late 1980s and early 1990s, experts argued that an onslaught of "super predators"—violent youth—would increase already rising crime rates.[19] Media attention and the resulting political priorities pushed through a series of changes that made it easier to charge young people as adults.[20] The incarceration of youth rose through the end of 1990s.[21] This era was also defined by the increased adoption of "zero tolerance" school discipline policies.[22]

In Massachusetts, the 1990s "tough on crime" era resulted in a change in the laws about exposing juveniles to adult penalties. The 1995 arrest and eventual conviction of 15-year-old Edward O'Brien for the murder of his next door neighbour in Somerville, Massachusetts, galvanised support for a change in how juveniles were treated. The revision of Mass. Gen. Laws c. 119, s. 54 and 58, through the Juvenile Justice Reform Act of 1996 repealed the previous transfer law, essentially shifting the power of the transfer from a judge to a prosecutor. As a result, all juveniles fourteen and older can now be indicted as 'youthful offenders.' Although taking place in the Juvenile Court under a Juvenile Court judge, the court proceedings are treated as open proceedings, unlike Juvenile Court, and court files are open for public inspection. Mass. Gen. Laws c. 119, s. 60A. In addition, the 1996 change statutorily required all murder cases (for youth fourteen and older) to be processed directly in adult court. Mass. Gen. Laws c. 119, s. 74.

In the last decade, the United States generally, and Massachusetts specifically, is in the *fourth wave* of juvenile justice. The seminal Supreme Court of the United States decision, *Roper*

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[16] See, generally, Task Force on the Juvenile Justice System, "The Massachusetts Juvenile Justice System of the 1990s: Re-Thinking a National Model" (Boston Bar Association, 1992), https://www.bostonbar.org/prs/reports/majuvenile94.pdf.

[17] Ibid.

[18] Elizabeth S. Scott and Thomas Grisso, "The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform," *Journal of Criminal Law and Criminology* 88, no. 1 (1997): 137–89.

[19] Lawrence and Hemmens, *Juvenile Justice: A Text/Reader*, p. 33.

[20] Patrick Griffin et al., "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting" (US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, September 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[21] Scott and Grisso, "The Evolution of Adolescence."

[22] American Psychological Association Zero Tolerance Task Force, "Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations.," *American Psychologist* 63, no. 9 (2008): 852–62.

v. Simmons[23] represents the shift away from the punitive model towards an adolescent developmental approach to youth justice. Along with *Graham v. Florida*,[24]and *Miller v. Alabama*,[25] *Roper* represents the acceptance of brain development science in establishing age as a mitigating factor in sentencing—and indeed legal treatment—of young people. Youth, as a matter of law, are less culpable than adults. In this same period, the decision of *JDB v. North Carolina*[26] applied these principles in analysing constitutional protections for young people during police questioning. In *JDB*, the Supreme Court held that a young person's age was relevant in the "custody" analysis that triggers constitutional rights under police questioning. Now, courts must consider that a young person perceives whether they are free to walk away from the police differently from an adult.

The highest court in Massachusetts, the Supreme Judicial Court (SJC) extended the *Roper-Graham-Miller* reasoning of the Supreme Court of the United States. In the case of *Diatchenko v. District Attorney for the Suffolk District*,[27] the SJC held, under state law, that juveniles sentenced to non-parole life sentences (for first degree murder) are entitled to parole hearings. Recently, the retroactivity of the ruling also led to an extension of the right to counsel at parole hearings; expert witness funds; and an opportunity for judicial review as explained in *Diatchenko and another v. District Attorney for the Suffolk District*.[28]

Additional recent SJC juvenile law opinions about the administration of justice in the juvenile courts also reflect this *fourth wave*. In *Commonwealth v. Magnus M.*,[29] the SJC held that even after a jury verdict of delinquent (equivalent to guilty), a juvenile court judge is nevertheless empowered to dismiss the charges—removing a 'conviction'-- after a successful period of probation. The Court wrote that:

> "In doing so, it extends to judges a final opportunity to reflect on the child's social history and potential for rehabilitation, and entrusts to judges the decision to shield a child from the stigma and collateral consequences of a delinquency adjudication."

The SJC later acted to protect a juvenile's official record of any court involvement in the case of *Commonwealth v. Humberto H.*[30] The Court affirmed the power of a juvenile court judge to dismiss a case for lack of evidence before the arraignment, which would have triggered an entry in the young person's official criminal history record. The SJC noted that the Juvenile Court has a mission to "[P]rotect[ing] a child from the stigma of being perceived to be a criminal and from the collateral consequences of a delinquency charge…" Finally, in *Commonwealth v. Ilya I.*,[31] the SJC refused to find probable cause that a young person intended to distribute marijuana. It noted that "the juvenile's age detracts from the probative value that otherwise might be accorded to his nervous demeanour and his association with other young black males on a street corner." This line of cases illustrates a changing approach to young people, from sentencing for the most serious charge of murder to the daily mechanics of policing and juvenile court.

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[23] Roper v. Simmons, 534 US 551 (2005).
[24] Graham v. Florida, 560 US 48 (2010).
[25] Miller v. Alabama, 567 US ___ (2012).
[26] JDB v. North Carolina, 564 US ___ (2011).
[27] Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013).
[28] Diatchenko and another v. District Attorney for the Suffolk District, 471 Mass. 12 (2015).
[29] Commonwealth v. Magnus M., 461 Mass. 459 (2012).
[30] Commonwealth v. Humberto H., 466 Mass. 562 (2013).
[31] Commonwealth v. Ilya I., 470 Mass. 625 (2015).

In addition to the judiciary's reflection of the *fourth wave*, recent changes in practice have been influenced, at least in part, by these new brain science understandings of adolescent development. With the passage of H.1432 on September 18, 2013, Massachusetts raised the age of juvenile court jurisdiction to include 17 year olds. Additionally, state law has moved away from the 'zero tolerance' school discipline laws that contributed to the 'school to prison' pipeline. As of 1 July 2014, student rights around suspension and expulsion have been extended with the goal of retaining students in school. Mass. Gen. Laws c. 71, s. 37H, 37H ½ and 37H ¾. This change coincided with efforts at the federal level on the issue of school discipline.[32] On a process level, the state's Department of Youth Services partnered with the public defender office's Youth Advocacy Division to provide counsel at juvenile parole revocation hearings.[33] In addition, there are *ad hoc* alternatives to typical processes, such as the Lowell Juvenile Court restorative justice project.[34]

The crest of interest in new frameworks for juvenile justice coincides with interest in general criminal justice reform.[35] Recent events of police violence (from Ferguson, Missouri, to Baltimore, Maryland) against African-American civilians highlight the increasing frustration with "business as usual." President Obama[36] and political candidates[37] in the United States speak of criminal justice reform—away from punitive measures— and open acceptance of the problem of over-incarceration.

A brief history of youth justice in New Zealand

New Zealand's passage of CYPFA marked a clearly articulated vision of when and how to intervene with young people in conflict with the law. The passage was the culmination of efforts to reform an existing system that relied on over-institutionalisation and disproportionately impacted minorities—particularly youth from the indigenous Māori communities. Today, New Zealand is refreshing the youth justice sector through the YCAP. Rather than the metaphor of "waves" of juvenile justice, New Zealand commentators have framed the development of the youth justice policies more directly as *welfare versus justice*.[38]

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[32] US Department of Education, "Guiding Principles A Resource Guide for Improving School Climate and Discipline," January 2014, http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf.

[33] "Revocation Panel | Youth Advocacy Division," accessed 14 May 2015, https://www.publiccounsel.net/ya/revocation-panel/.

[34] "Juvenile Court Restorative Justice Diversion," *Juvenile Court Restorative Justice Diversion*, accessed May 14, 2015, http://jcrjdlowell.wix.com/jcrjd.

[35] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2012), now a standard tome sparking debate about how the criminal justice system perpetuates racial hierachies.

[36] Peter Baker, "Obama Finds a Bolder Voice on Race Issues," *The New York Times*, May 4, 2015, http://www.nytimes.com/2015/05/05/us/politics/obama-my-brothers-keeper-alliance-minorities.html; "President Obama: 'Our Criminal Justice System Isn't as Smart as It Should Be,'" *The White House*, accessed 22 July 2015, http://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be.

[37] Amy Chozick and Michael Barbaro, "Hillary Clinton Laments 'Missing' Black Men as Politicians Reflect on Baltimore Unrest," *The New York Times*, 29 April 2015, http://www.nytimes.com/2015/04/30/us/politics/baltimore-forces-presidential-hopefuls-to-confront-a-jarring-crisis.html.

[38] See, generally, Mike Doolan, "From Welfare to Justice: Towards New Social Work Practice with Young Offenders: An Overseas Study Tour Report" (Wellington, New Zealand: M.P. Doolan, 1988).

Like the United States, and Massachusetts, New Zealand's early history of juvenile court was characterised by 'reform' and 'industrial' schools.[39] In 1867, the Neglected and Criminal Children Act established a system of confining young people deemed 'criminal' separately from neglected children. In 1905, legislation provided for private hearings for young people accused of criminal activity—to keep them away from the contamination of adult proceedings.[40] In 1925 New Zealand formally established a separate juvenile court, called "Children's Courts." All of these developments, similar to, and indeed influenced by the United States, were supported by the welfare approach to young people in conflict with the law.[41] Despite some reported concern about due process,[42] the procedures were informal, the burden of proof needed to order an intervention was low, and access to counsel limited.

The welfare ethos dominated the implementation of the existing legislation, including a conscious effort by police and social workers to divert young people from (more) formal processing. Police Youth Aid started in the late 1950s—under a different name-- and over the next decade increased its work in schools and began developing a culture of prevention and diversion, albeit sometimes against the current of more traditional front-line police practices of arrest and detention.[43] The *Children, Young Persons and Their Families Act 1974* formalised these diversionary practices. "Children's Boards," made up of professionals, decided on the intervention. It also created a legal distinction between children (those under 14) and young people (14 to 16) that persists today. This change in legislation, moving towards the justice model, ultimately fell short of the public's expectations.[44]

Social movements, both to assert New Zealand's independence in world affairs and to address the continued legacy of colonial policies that negatively impacted Māori, the indigenous people of New Zealand, flourished in the 1970s and 1980s.[45] The New Zealand anti-apartheid movement, sparked by the South Africa-New Zealand rugby rivalry and opposition to playing South Africa on an international stage, captured the mood of the country during this time.[46] New Zealanders also recognised the centrality of the 1840 Treaty of Waitangi in understanding relations between the central government and the various iwi that make up the Māori community.[47]

During this period, two reports narrating the Māori experience of the youth (and criminal) justice system influenced the eventual passage of CYPFA. Moana Jackson's 1987 report, *The Māori and the Criminal Justice System, A New Perspective: He Whaipaanga Hou*, highlighted the disproportionate impact of criminal justice enforcement on the Māori community. It argued that the imposition of a foreign legal system—British—on the Māori

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[39] See, generally, Brenda Ann McKinney, "The Potential and Challenges of New Zealand-Style Youth Justice and The Family Group Conference Model" (Faculty of Law, University of Otago, 2015).
[40] Alison Cleland and Khylee Quince, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (Wellington, New Zealand: LexisNexis NZ Limited, 2014), p. 52.
[41] Watt, "A History of Youth Justice in New Zealand.", p. 3.
[42] Cleland and Quince, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*, p. 78.
[43] Kim Workman, Author discussions and interview with Kim Workman, former Youth Aid Officer, May 2015.
[44] Nessa Lynch, *Youth Justice in New Zealand* (Wellington, New Zealand: Brookers Ltd., 2012), pp. 10-14.
[45] King, *The Penguin History of New Zealand*.
[46] Ashley Shearar, "'At the Heart of the Matter': A Comparative Analysis of Youth Justice Transformation between New Zealand and South Africa" (Victoria University of Wellington, 2013), http://researcharchive.vuw.ac.nz/handle/10063/2872.
[47] Te Ara The Encylopedia of New Zealand, Principles of the Treaty of Waitangi – ngā mātāpono o te tiriti, http://www.teara.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapono-o-te-tiriti (accessed 29 June 2015).

community led to poor outcomes for Māori, particularly after the 1950s mass migration of Māori from rural to urban communities. Jackson notes that "[T]he possible existence of unfair or even prejudicial practices, within or outside the justice system, is not contemplated."[48] The report argued that Māori processes and procedures would be more just and fair. Similarly, the 1988 *Puao-Te-Ata-Tu (Daybreak)* report, commissioned by the Department of Social Welfare (now Social Development), included themes from scores of meetings with Māori communities.[49] It highlighted the pervasive and corrosive effect of structural racism against the Māori community. Although the hearings focused on care and protection interventions, the findings were eventually applied to youth in conflict with the law. The final report, led the government of the day to revisit the working draft of legislation that later became CYPFA. Like Jackson's report it amplified the voice of the Māori community in designing welfare and justice processes.

In 1989, the final version of CYPFA pulled together these various initiatives to re-frame youth justice. Some in the Māori community sought a separate system of justice for Māori, but the government was wedded to a single administrative structure.[50] The working draft of the legislation up to that point, while focused on diversion and informal mechanisms, still very much placed decision-making power in the hands of professionals—police officers, social workers, psychologists, and paediatricians. Realising that the political climate required an increased recognition of Māori autonomy and decision-making power, the *process* was changed. The emerging consensus, at least at the political level, adopted the family group conference—originally conceived as a care and protection process-- at the centre of the youth justice administration.[51] It gave a young person and their family an active role, and responsibility, to discuss, plan and negotiate appropriate responses to criminal offending.

Michael Doolan's report *From Welfare to Justice* was key to this conceptualisation.[52] On the study tour that led to his report, Doolan saw that similar jurisdictions were moving away from the "welfare" model in favour of a "justice" approach. From a social work lens, the report argued for youth justice to remain focused on justice sanctions. Doolan wanted to avoid the temptation of officials to "help" by using welfare interventions as criminal sanctions—a phenomenon that particularly undermined Māori communities. He explained that "Māori people were starting to say that what you are doing might be the best will in the world, and you might have good intentions, but it is harming us in huge ways."[53] The existing practice, he continued, had "violate[d] children's civil rights by introducing a level of interference within their lives out of proportion to the seriousness of the behaviour that initially prompted the intervention."[54]

Doolan's study tour took him to Massachusetts for a short visit. Dr Miller's bold move to close the reform schools and use small, dispersed community-based programmes for youth in conflict with the law had attracted international attention. More than a decade removed

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[48] Moana Jackson, "The Maori and the Criminal Justice System, A New Perspective He Whaipaanga Hou" (Wellington, New Zealand: Ministry of Justice, February 1987).
[49] "Puao-Te-Ata-Tu (Daybreak): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare" (Wellington, New Zealand: Department of Social Welfare, September 1988), http://www.rethinking.org.nz/assets/Young_People_and_Crime/Puaoteatatu_1988.pdf.
[50] Michael Doolan, Author Interview, 23 April 2015.
[51] Shearar, "'At the Heart of the Matter.'"
[52] Doolan, "From Welfare to Justice."
[53] Shearar, "'At the Heart of the Matter.'"
[54] Ibid.

from the experience, Doolan visited Massachusetts in order to prepare for what he hoped would be a similar rapid de-institutionalisation of young people.

While the gains made under Dr Miller, Massachusetts, and the United States, were lost to the *third wave* of juvenile justice, New Zealand committed itself to developing a culture of diversion from formal court for youth offending. On 27 May 1989, CYPFA went into effect. In 2010, however, New Zealand amended some key CYPFA provisions that reflect a tendency towards welfare responses as well as extending the jurisdiction and power of the Youth Court in a manner that was intended to appear more punitive. CYPFA now specifically incorporates a consideration of the 'underlying causes' of a child's behaviour in designing interventions, seen by some as a re-introduction of welfare approaches to criminal behaviour. In addition, twelve and thirteen year olds, under certain circumstances became subject to Youth Court criminal proceedings. Finally, the Youth Court was granted additional powers to order interventions, including longer commitment orders (up to six months) and orders against parents. However, the number of children in Youth Court has been limited[55] and the increased Youth Court sentencing options have actually coincided with a drop in adult court sentences. The youth justice professionals in New Zealand, generally steeped in principles of positive youth development reflect the less punitive aspects of the Act, so when these amendments were passed, the impact was muted.

Massachusetts and New Zealand: positive youth development

Both Massachusetts and New Zealand—the latter more explicitly-- have adopted positive youth development (PYD) as a tenet of youth justice. PYD is a framework for working with young people. Sometimes also referred to as the "Youth Development Approach", "[it] is a comprehensive way of thinking about the development of adolescents and the factors that facilitate their successful transition from adolescence to adulthood."[56] PYD sees adolescence as an opportunity, rather than a risk, and focuses adults on interacting with young people from a developmental perspective.[57] The definition of youth as continuing to age 24, consistent with the brain science, also encourages a more patient view of adolescent development. PYD is based on psychological and sociological understandings of childhood and adolosecent development, buttressed by new and emerging understandings of brain development.

New Zealand, as a whole, actively promotes positive youth development strategies for all youth, not just those involved in the justice system. The Ministry of Social Development developed an explicit PYD plan about a decade ago.[58] Currently, the MSD's Youth Policy wing, where I am hosted, addresses a wide variety of youth issues, including youth justice. The cross-fertilisation of issues for New Zealand youth—around health, civic engagement, tertiary education access, arts, sports and more— helps to position justice-involved youth in

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[55] Nessa Lynch, "The 'Pushback' of Child Offending Cases to Family Court," *New Zealand Family Law Journal* 7, no. 12 (2013): 1–6.

[56] Jeffrey A. Butts, Gordon Bazemore, and Aundra Saa Meroe, "Positive Youth Justice" (Washington, DC: Coalition for Juvenile Justice, 2010), https://positiveyouthjustice.files.wordpress.com/2013/08/pyj2010.pdf., p. 9.

[57] See, generally, Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* (New York: Houghton Mifflin Harcourt, 2014).

[58] Ministry of Youth Affairs, *Youth Development Strategy Aotearoa: Action for Child and Youth Development.* (Wellington, New Zealand: Ministry of Youth Affairs, 2002), http://www.myd.govt.nz/documents/resources-and-reports/publications/youth-development-strategy-aotearoa/ydsa.pdf.

a strength-based context. YCAP explicitly embraces "[A] positive youth development approach focusing on the strengths of children and young people…"[59]

Although well known for at least a generation in general youth development circles, in the United States, application of PYD to youth in conflict with the law has come to the forefront during the *fourth wave* of juvenile justice. In the context of Massachusetts, the Department of Youth Services, which handles all young people placed in custody (either pre-trial or after a custodial sentence) explicitly embraces PYD in its programming.[60] In the public defenders' Youth Advocacy Division (YAD), staff has been trained to work within a PYD model since the mid-1990s. In investigating the background and life circumstances of each client, staff (lawyers and social service advocates) identify strengths in five domains: nurturing adult relationship(s); health; safety; education; and community involvement. Staff members are expected to work in collaboration with each young person to maximise opportunities in each of the five domains.

As with the legal case, it is a client-centred approach so that all decisions about what sorts of programmes to access, people to contact, measures to take are made by the client, including to what extent to share the information outside of the attorney-client relationship. A key aspect of this approach is that a staff member must act as a trusted, albeit transitional, adult for the young person. The goal of the PYD approach is to identify and develop protective factors that will both help the young person weather any stress of facing criminal accusations as well as restraining the more intrusive and punitive elements of the juvenile justice system. This requires a holistic approach to lawyering that moves beyond purely zealous courtroom advocacy.[61] However, while the approach to individual cases and issues may be influenced by the PYD framework, the legal structure in Massachusetts, in and of itself, is not oriented towards it. In comparison, in New Zealand, whether intentional or not, many aspects of CYPFA align with principles of positive youth development, which in turn has encouraged a pragmatic approach to young people in conflict with the law.

[59] Ministry of Justice and Ministry of Social Development, "Youth Crime Action Plan 2013-2023," p. 11.

[60] "Mission Statement," *Health and Human Services*, accessed July 18, 2015, http://www.mass.gov/eohhs/gov/departments/dys/mission-statement.html.

[61] Robin G. Steinberg, "Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients," *NYU Rev. L. & Soc. Change* 30 (2005): 625–36.

2 YOUTH JUSTICE CASE PROCESSING IN NEW ZEALAND

CYPFA is designed to divert youth away from formal justice processing and to achieve and maintain youth de-carceration through the empowerment of their families. It is an "[A]ct to reform the law relating to children and young persons…who offend against the law…to make provision for matters…to be resolved, wherever possible, by their own family, whānau, hapū, iwi or family group."[62] In recognition of the special vulnerability of young people, CYPFA legislates arrest powers; interrogation of young people; prosecutorial discretion; charging processes; admissions of offending; sanctioning; and trial.[63] Two recent books provide a complete overview, analysis and critique of CYPFA.[64] This section provides context for the discussion of access to counsel in the pre-court space raised by the current structure and implementation of CYPFA (see also Figure 1).[65] In my role as a practitioner, commentary on aspects of CYPFA as it relates to PYD, juvenile justice practices and statutes in the Commonwealth of Massachusetts will be included in this section, as well as three specific recommendations for aspects that could be adopted in the Massachusetts context.

The three government institutions that are directly regulated by CYPFA are the New Zealand Police (NZP); the Ministry of Social Development's Children, Youth & Family Services (CYF) and the Youth Court (within New Zealand's Ministry of Justice). NZP are responsible both for investigation of reported crime and prosecution in court. CYF is responsible for community-based programming for justice-involved children and youth, detention facilities, as well as organising the family group conferences (FGC) by Youth Justice (YJ) Coordinators, described below. The Youth Court hears cases that involve formal prosecution. CYPFA also recognises the role of counsel in its specific provisions regulating the qualifications and appointment of the Youth Advocate (YA), a lawyer for young people in conflict with the law.

CYPFA's youth justice provisions apply only to individuals between the ages of 10 and 16 facing allegations of criminal conduct.[66] A person 10 to 13 (at the time of the alleged offence) is defined as a "child" and is subject to a process through the care and protection provisions of CYPFA, handled by New Zealand's Family Court.[67] In addition to the care and protection requirements, proof beyond a reasonable doubt of criminal conduct is required, as well as a finding that the child appreciated the wrongfulness of any act.[68]

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[62] *Children, Young Persons and Their Families Act 1989*, 1989, http://www.legislation.govt.nz/act/public/1989/0024/latest/whole.html#whole.

[63] Given that CYPFA addresses allegations of criminal behaviour by children and young people, it also interacts with various other sections of New Zealand law including: New Zealand Bill of Rights Act 1990; Bail Act 2000, Victim Rights Act 2002; Criminal Procedure Mentally Impaired Persons Act 2003; Evidence Act 2006; Criminal Disclosure Act 2008; the Criminal Procedure Act 2011; and the Vulnerable Childrens Act 2014.

[64] Lynch, *Youth Justice in New Zealand*; Cleland and Quince, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*.

[65] All figures in this chapter are from the New Zealand Youth Court website, www.justice.govt.nz/courts/youth/information-for-young-people/process-flowchart (accessed 1/7/2015).

[66] *Children, Young Persons and Their Families Act 1989*.

[67] Ibid., s. 14(1)(e).

[68] Ibid., s. 198.

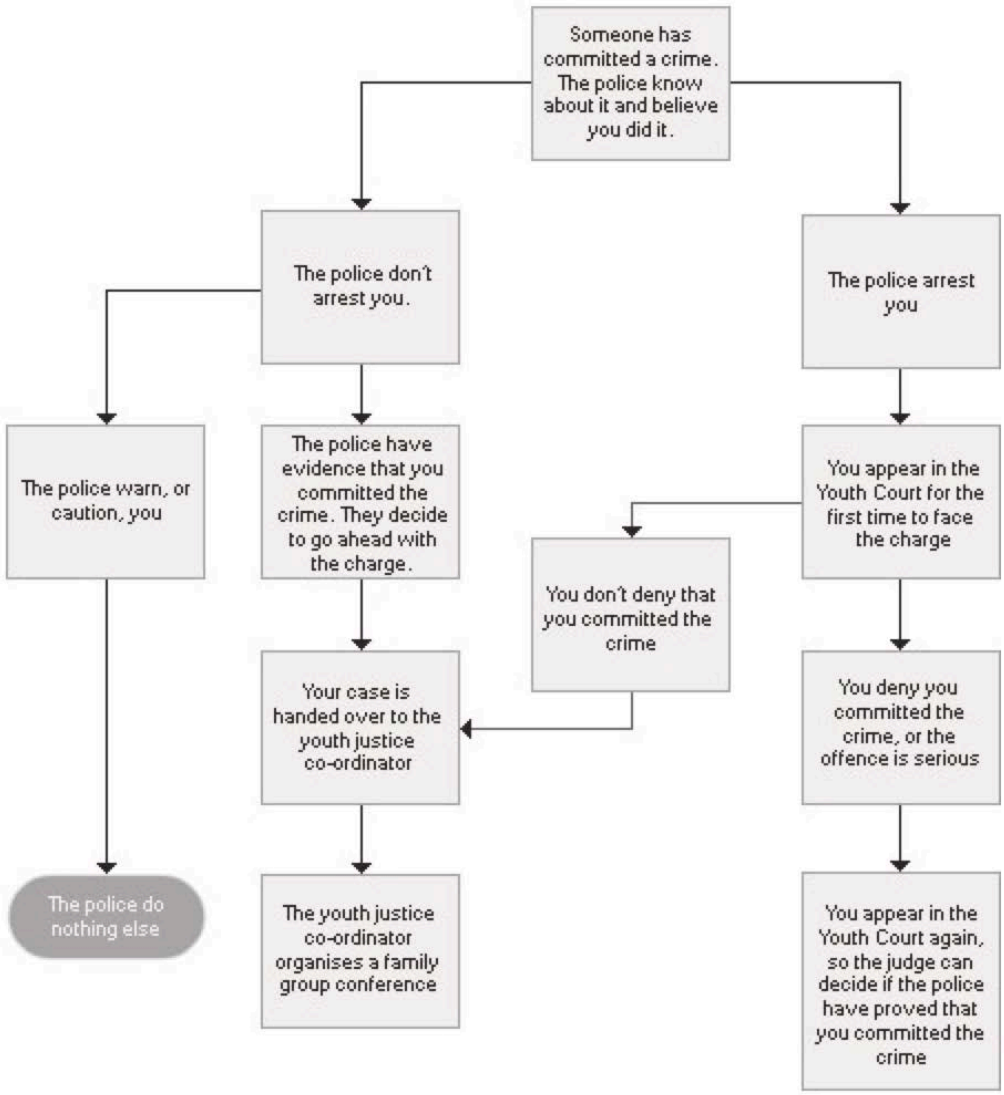

Figure 1

The Youth Court only has jurisdiction over 12- and 13-year-olds if the child has a previous offending history and/or faces more serious charges (defined in New Zealand as crimes with a fourteen year penalty in the Criminal Procedure Act 2011).[69] A person between 14 and 16 is defined as a "young person" and is subject to Youth Court jurisdiction for any criminal charge. Allegations of murder and manslaughter for all people 10 and older fall outside Youth Court jurisdiction and are handled in adult courts (other than brief initial hearings). Children under ten years old cannot be prosecuted for committing a crime, nor deemed in need of care and protection by reason of "offending behaviour."

After a law enforcement determination that a person between 12 and 16 committed a crime, the NZP have five choices:

[69] Ibid., s. 272.

- Arrest the young person (with certain additional restrictions for 12- and13-year olds) and directly file charges in Youth Court;
- Request an intention to charge FGC led by CYF to determine if the case can be resolved short of filing charges in Youth Court (or, for 12- and 13-year-olds, if a care and protection conference is appropriate);
- Offer the young person an "alternative action," which is currently led and monitored by NZP Youth Aid division in lieu of escalating the matter[70];
- Give the young person a warning/caution either on the street, or more formally in writing; or
- Do nothing.

The Youth Court does not have any jurisdiction for children ages 10 and 11 (or 12 and 13 who are not 'child offenders' pursuant to section 272 of CYPFA). Instead, under certain circumstances, NZP can request an FGC for the purposes of addressing any co-occurring and related care and protection concerns.[71]

Compared to Massachusetts juvenile courts, then, New Zealand Youth Court jurisdiction is limited to a narrower age band, but excludes 17-year-olds. New Zealand, although a signatory, is not in compliance with the United Nations Convention on the Rights of the Child (UNCROC), which sets 18 as onset of adult criminal liability.[72] New Zealand still charges 17-year-olds in its adult courts despite almost universal agreement in the youth justice sector that the age of adult criminal liability should be 18. Interestingly, Massachusetts does not allow the prosecution of children under 14 in adult court, even for murder, while New Zealand requires that such charges proceed in adult court for children as young as ten, but retains the rebuttable presumption of *doli incapax* (that the child could not form the intent to commit the crime).[73] Another key difference is the explicit New Zealand use of care and protection proceedings to address allegations of criminal behaviour by children ages 10 to 13. The care and protection provisions of CYPFA also address situations that Massachusetts juvenile courts might address as "Children Requiring Assistance" matters pursuant to G.L. c. 119, s. 39E—behaviour that triggers state intervention only because of a person's status of being a certain age (such as truancy, running away from home, etc.).

The object and principles of CYPFA

Three different sections of CYPFA set out the principles that guide application of CYPFA to children and young people in conflict with the law. Explaining the purpose of the

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[70] There is an argument that 10-13 year olds who don't fall under Youth Court jurisdiction, section 272, are not eligible for a police led "alternative action" because Youth Court prosecution is not possible—hence it is not truly an alternative.

[71] *Children, Young Persons and Their Families Act 1989*. 247(a).

[72] United Nations, *Convention on the Rights of the Child*, 1989, http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.

[73] Recently, two children, 12 and 13 and the time of murder charges, were tried in adult court. The younger was acquitted and the older convicted of manslaughter. See, "Kumar Trial: Jury Reaches Unanimous Verdicts," *New Zealand Herald*, June 23, 2015, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11469762. The trial court instituted elaborate protections, including a communication specialist for each child and a lawyer specifically to monitor understanding and participation.

legislation, section 4(f) reads that the "object of the Act is to promote the well-being of children, young persons, and their families, and family groups by--

> "ensuring that where children or young persons commit offences,—
>
> (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and
> (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways"

The object's explicit embrace of an "opportunity to develop in responsible, beneficial and socially acceptable ways" is remarkably modern, compared to the outdated *parens patriae* Massachusetts phrasing that "the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents…[and]… as children in need of aid, encouragement and guidance."[74] A key phrase in this object is that "where children or young people *commit offenses*…" (emphasis added). From a legal perspective, this points to the necessity for actual criminal wrongdoing, including the intent (*mens rea*) to do so, as a prerequisite to youth justice-based state intervention. "At risk" young people, in and of themselves, are not the target of CYPFA's youth justice provisions.

CYPFA's general principles are listed in section 5. CYPFA specifically excludes the accused's welfare and interests as the primary consideration from the youth justice provisions ("In all matters…(*other than* Parts 4 and 5 [the Youth justice and Youth Court sections]) the welfare and interests of the child or young person shall be the first and paramount consideration.") The main values imparted from the general principles are the participation of family (widely defined and incorporating concepts of Māori social structure of ever-expanding circles of family and relations from whānau, to hāpu, to iwi) in decision making; supporting the stability of family structures; soliciting and including the views of the young person; and consideration of a young person's sense of time in resolving the matter.

In particular, section 5(f) recognises the importance of timeliness in making decisions about how to respond, if at all, to a young person's alleged criminal activity. This principle is supported by section 322, which allows a Youth Court to dismiss charges "if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted." A body of case law[75] has developed from section 322 that, at least, recognises the distinct experience of the passage of time in a young person's life.

In *Miller v. Alabama*, the US Supreme Court used this distinction in ruling against mandatory life without parole sentences for homicide cases. Here, however, CYPFA applies it to the actual administration of justice, not just the sanctions—a youth-specific right to a speedy trial, in a fashion, in order to maximise the benefits, and minimise the harm, of a youth-

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[74] Mass. Gen. Laws, c. 119, s. 53.

[75] See, for example, *The Attorney-General of New Zealand v The Youth Court at Manukau*, HC Auckland CIV 2006-404-2202, 18 August 2006, and citations therein. A review of the printed decisions shows that many judges, applying a four-part test, are reluctant to grant section 322 dismissals.

specific justice model. Given the concern that the process itself can be the punishment, this approach of focusing adults (even defense attorneys) on addressing issues as quickly as possible is developmentally appropriate.[76]

CYPFA also sets out youth justice specific principles. Section 208 reads that "any court which, or person who, exercises any powers conferred by or under this Part…shall be guided by the following principles:

> (a) the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
>
> (b) the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whānau, or family group:
>
> (c) the principle that any measures for dealing with offending by children or young persons should be designed—
>
> > (i) to strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
> >
> > (ii) 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:
>
> (d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:
>
> (e) the principle that a child's or young person's age is a mitigating factor in determining—
>
> > (i) whether or not to impose sanctions in respect of offending by a child or young person; and
> >
> > (ii) the nature of any such sanctions:
>
> (f) the principle that any sanctions imposed on a child or young person who commits an offence should—
>
> > (i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapū, and family group; and

[76] Liana J. Pennington, "The Role of Parents and Parens Patriae: Developing Views of Legitimacy and Justice in Juvenile Delinquency Court" (Northeastern University, 2013), p. 113.

(ii) take the least restrictive form that is appropriate in the circumstances:

(fa) the principle that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending:

(g) the principle that—

(i) in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending); and

(ii) any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them:

(h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person

The principles are an essential touchstone for every discussion among young justice professionals, ideally muting more punitive instincts and shifting power (and responsibility) to each young person and family. However, like "the Bible," as the Act is referred to by youth justice sector professionals, there is disagreement about how to apply these principles in any given case, particularly in balancing welfare and justice responses to young people. The 2010 introduction of Section (fa)("address the causes underlying the…offending") has highlighted the tension that runs between justice- and welfare-tinted interpretations of CYPFA, explicitly allowing a more (though still limited) welfare approach.

The family group conference

The family group conference (FGC) is at the heart, symbolically, procedurally and functionally, of New Zealand's youth justice system. It is a process to make or inform agreements about formal prosecution, pre-trial detention, interventions for criminal behaviour, and responses to any failure to abide by any agreement. The centrality of the FGC is intended to maximise opportunities for a family and young person to meaningfully participate in the various decision-making processes of a youth justice system response. An FGC is held under the following circumstances with the goal of producing a plan to intervene in a young person's life:[77]

- To determine appropriate responses, if any, to criminal behaviour by 10- to 13-year-olds
- To determine if the matter can be resolved before charges are filed in Youth Court, an "intention to charge family group conference" (ITC FGC)

[77] *Children, Young Persons and Their Families Act 1989*., s. 247(a)-(f).

- To determine if alternatives to pre-trial detention are available (custody FGC)
- To determine appropriate responses, if any, to charges filed in Youth Court in lieu of a trial/defending hearing (not denied/court ordered FGC)
- To determine appropriate responses to a finding by a Youth Court judge that the Police proved their case beyond a reasonable doubt after a trial (charge proved FGC)
- To respond to any concerns about the completion of any plan or to aid the Youth Court in exercising its discretion.

The only situations in which an FGC does not take place are if the NZP divert the matter (by warning or an alternative action, discussed below) or if, after choosing to defend against the charges, then government is unable to prove its case at a Youth Court trial. The vast majority of FGCs are either ITC or not denied FGCs.

The FGC, whether intended or not, has become iconic as restorative justice in practice. It is a meeting where the accused and the named victim(s) meet to determine an appropriate response to alleged criminal activity. The Youth Justice (YJ) Coordinator from CYF is responsible for organising and facilitating the conference. The location and the structure of the meeting are negotiated between the participants. Section 251 enumerates the entitled members of an FGC. In addition to the coordinator, the entitled attendees include: a representative of NZP; the young person and family—defined to include Māori kinship structures; the victim (although improving victim participation rate is a constant area of attention); an attorney for the young person (if retained or appointed); and representatives of certain government agencies who have an official relationship with the young person (such as social workers or iwi officials holding guardianship-like responsibilities). Additional people may join the conference by previous agreement (such as potential community providers and a limited number of supporters for the victim), and CYF routinely includes its own Youth Justice Social Workers based on an internal assessment of the young person's needs, but only entitled attendees are voting members of the conference.

Although there is no fixed format for a conference,[78] an FGC tends to unfold in a typical order, although the personalities and dynamics of each group impact the actual parameters:

- Introductions of the conference attendees, including any rituals or protocol requested by the various attendees;
- A recitation of the police evidence and charges, followed by an admission (a denial ends the process);[79]
- An account of the harm caused by the behavior, by the named victim if present;
- An opportunity for the young person to express remorse, usually through an apology in the conference;
- A discussion about the young person's circumstances and how to repair the harm and provide supports for pro-social development;
- Based on the discussion, a period of family time where the young person and family (and if invited, Youth Advocate) meet in private to finalise a proposed response; and

[78] Ibid., s. 256.
[79] Ibid., s. 259.

- A discussion about the response (the 'plan') and an attempt to reach consensus.

During observations, for example, a YJ Coordinator prepared an agenda that included: "Introductions; Summary of Facts; Admit/Deny; Victim views; Family views/what needs to happen to make this right; Information Sharing; Family Time." The coordinator also listed categories for the anticipated plan under "Accountability; Preventing Further Offending; and Disposition & Duration."

As described in the CYF on-line video explaining the process, the goal of the FGC is "to put things right." The Ministry of Justice's Youth Court posters—used in courts throughout New Zealand— emphasise the centrality of the FGC to its mission with the tag line: "Accountability. Resolution. Restoration."[80] An FGC reaches its decision about the plan through consensus by the participating entitled members. In other words, any one entitled person can veto an agreement.

Not all FGCs reach consensus. Aside from the instances when a young person does not admit to the charges, a conference may not agree on an appropriate response. For an ITC FGC, the NZP must then decide whether to file charges in Youth Court or decline to prosecute. For a not denied FGC that doesn't reach agreement, the young person returns to Youth Court and the matter is processed as a criminal case with Youth Court provisions.

All discussions at an FGC (including an ITC FGC) are privileged and cannot be published.[81] Statements made during the discussions are also inadmissible in any court "or before any person acting judicially."[82] Of course, the fact that the same professionals operate in the youth justice space means that the information gleaned at the conference can influence their attitudes towards a young person and is inevitably used in making decisions about not only the young person, but others in the young person's orbit.

A typical FGC plan has punitive, restorative and rehabilitative elements.[83] The punitive element restricts the young person's liberty in some way, such as curfews, reporting requirements, limiting who a young person can spend time with, driving restrictions, and staying away from certain geographical zones. The restorative element, often missing from Massachusetts juvenile justice practice, includes an apology and reparations (either through payment, gift or community service). This element is focused on naming and repairing the harm to an individual and/or a community. It aims to re-balance the relationship between the young person and those impacted by the behaviour. Rehabilitative aspects of a plan include opportunities for positive youth development—and can be quite creative, such as a weekly fishing outing with an uncle, but also include expected elements such as school attendance or addressing an underlying health issue (drug addiction). The FGC is conceived as a place where "families are asked to come up with solutions for managing the young person's behaviour and righting the wrong to the victims."[84]

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[80]Ministry of Justice, "Youth Court Posters," accessed 29 June 2015, http://www.justice.govt.nz/publications/global-publications/y/youth-court-posters/publication.
[81] *Children, Young Persons and Their Families Act 1989*, s. 271.
[82] Ibid., s. 37(1).
[83] Carolyn Henwood and Stephen Stratford, *New Zealand's Gift to the World: The Youth Justice Family Group Conference* (Wellington, New Zealand: The Henwood Trust, 2014), pp. 3-4.
[84] Ibid., p. 17.

In some ways, the elements of an FGC plan are remarkably similar to a standard set of probation conditions in Massachusetts Juvenile Court. In the standard form documenting a young person's probation conditions, a judge can include information about:

- Curfew
- School/Employment
- Substance Abuse Evaluation/Treatment
- Drug/Alcohol Testing
- Mental Health Evaluation/Treatment
- Cooperate with (social services)
- No contact (particular named individuals)
- Stay Away from (particular named individuals)
- Community Service

Nevertheless, more so than an argument by a lawyer for a particular disposition in front of a judge after a plea negotiating session with a prosecutor, the FGC process can support several important PYD domains. CYPFA explicitly encourages youth participation during the youth justice process. In the FGCs, young people are expected and encouraged to express themselves. Section 11 tasks the judge and the lawyer to facilitate the young person's active involvement in court processes. This offers an opportunity—perhaps not always realized, but certainly more than the usual court based processes-- for a young person to build and practice skills around self-expression and advocacy.

The involvement of a young person's (widely defined) family in decision making allows for the identification and active involvement of trusted adults in the process.[85] The young person is also supported in developing relationships by providing 'family time' to discuss issues privately. The ability to include specific rituals and cultural references recognises the importance of identity. The provision to allow additional, non-professionals, to join the conference and/or help support the young person encourages social connectedness. From a holistic, and youth development, lawyering point of view, this structure offers a forum for the client to address his or her prioritised needs and insist on proper support to meet them.

An FGC is also a forum in which a young person can learn accountability. In best practice, an FGC is "designed and implemented in a developmentally informed way, [with] procedures specifically designed for holding adolescents accountable for their offending [not condemnation, control and confinement and] can promote positive legal socialization, reinforce a prosocial identity, and facilitate compliance with the law."[86]

FGCs, however, are not fact-finding tribunals. Instead, they are used to determine the appropriate response to admitted criminal offences either before (and ideally to avoid) Youth Court filed charges (intention to charge FGC); in lieu of a trial after charges have been filed in Youth Court; or after a trial in which the government has proven its allegations beyond a reasonable doubt.[87] For cases filed in Youth Court, a young person can plead "not denied"

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[85] Pennington, "The Role of Parents and Parens Patriae," p. 243.

[86] Committee on Assessing Juvenile Justice Reform, *Reforming Juvenile Justice: A Developmental Approach*, pp. 4-5.

[87] Under section 273 of CYPFA, young people are entitled to choose a jury trial for certain more serious charges. However, in choosing a jury trial, the matter is transferred to an adult session, losing CYPFA protections, including the possibility of an FGC. From a Youth Advocate perspective, explaining the benefits and drawbacks of choosing a jury trial (in the US often seen as preferable to a judge only trial) to a young person, then, is an important task and requires future orientation thinking as well as the ability on the part of the young person to parse through different hypothetical scenarios.

(neither an admission nor a denial) to access the FGC process before a trial/defended hearing. The "not denied" plea is designed to allow the actual contour of the admitted wrongdoing to be negotiated, ideally before the actual conference itself where the focus is on the response to the admitted criminal behaviour.

Although the accused young person does not have to plead "guilty" to trigger the convening of the FGC, she must admit to the offense(s) at the conference itself. If there is no admission at the conference, then the FGC does not continue. In alignment with restorative justice principles, the accused young person must take responsibility for the harm. Subject to NZP discretion, charges can be modified, to reflect a young person's alternate version of the events, including a denial of some charges.[88] The practical effect in the context of an admission in a court ordered FGC, however, is most assuredly a finding of criminal guilt on the specific admitted charges; the opportunity to defend against the charges is waived in this process.

Once the case returns to court to report an agreed upon proposed plan, the Youth Court stamps the file with "Proved by Admission at the Family Group Conference (PAFGC)." There is no requirement for a formal judicial inquiry into the change of plea; it is accepted at face value if the conference reports that the young person admitted to a particular set of charges.[89] After a "PAFGC" stamp in the file, a young person could be subject to escalating sanctions depending on their ability to fulfil the elements of the plan.

In contrast, in Massachusetts, any change of plea requires a plea colloquy. The young person, placed under oath, must answer a series of questions so that the judge can ensure that they are changing the plea "after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission."[90] The judge must also find a factual basis—evidence that the crime was committed-- for the change of plea. It should be noted, though, that even in the New Zealand adult courts judges accept a defendant's change of plea without any inquiry. It is assumed that the person has been counselled appropriately by the lawyer. Nevertheless, the New Zealand system requires an FGC before a judge can make any dispositional decisions, muting (although not eliminating) judicial power (see Figure 2).

The closest standard practice to an FGC available in the Massachusetts youth justice sector is a Department of Youth Services (DYS) classification (or 'staffing'). It is a process governed by agency regulations, although the details of the practice can vary from location to location. A staffing, however, is only available *after* a young person has been given the highest-level sanction in Juvenile Court—an indeterminate commitment to DYS. DYS uses the staffing to determine how long and where a young person is detained while in the care and custody of DYS, followed by a grant of conditional liberty until the age of 18 (or 21 for certain charges). Generally, in a staffing a young person, along with their lawyer, meets with DYS professionals and their families to determine the length and place for their secure treatment (e.g., in detention). The process includes acceptance of responsibility for the criminal behaviour and a discussion of the young person's needs. Although young persons

[88] Restorative justice practitioners distinguish 'responsibility for harm' from legal criminal liability—so that the specific narrative of events including any specific intent to cause harm is of lesser import than an acknowledgment that there was a "harm."

[89] There are particular factual and procedural circumstances, see, e.g., *C v. Police*, 19 FRNZ 357 [2000] where young people have successfully argued that an admission at an FGC was not equivalent to a guilty plea, most Youth Court cases are 'proven' by admission at an FGC and, for the purposes of youth justice sector intervention, are treated as such.

[90] Mass. R. Crim. P. 12, Mass. Gen. Laws, c. 119, s. 55B, Mass. Gen. Laws, c. 263, s. 6.

are expected to speak and present their goals and plans, and the family members are typically invited to comment, the range of possible outcomes is narrower than in an FGC and are announced by DYS. Its similarity to an FGC largely rests on the active preparation and involvement of the young person, and, in my experience, like FGCs, it can produce profoundly pivotal moments.

However, if the admission is made at an intention to charge family group conference, it is not converted into the Youth Court equivalent of a guilty plea ("proven"), thus offering some protection against uncounselled admissions leading to physical detention. Only a Youth Court judge can stamp a file with "PAFGC" and an ITC FGC plan does not involve Youth Court approval because it is held with the goal of avoiding criminal proceedings. If there is a breach of the agreed upon plan, then NZP may choose to file charges in the Youth Court. From a procedural point of view, the case proceeds as if the ITC FGC never occurred and the young person still has the right to put the government to its burden of proof, or engage in a court-ordered FGC.

Family Group Conference

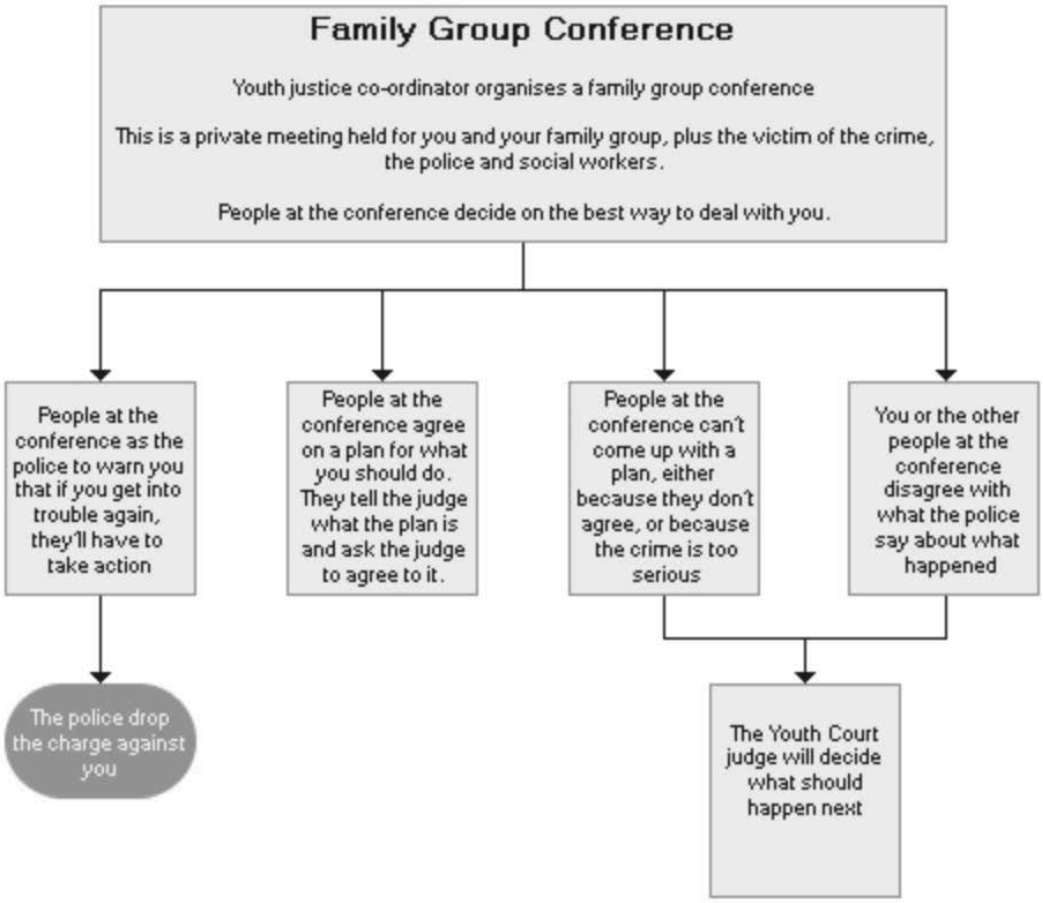

Figure 2

While FGCs are at the heart of New Zealand's youth justice system, an agreed upon FGC plan does not end a young person's involvement in the youth justice system. An ITC FGC is monitored as agreed in the plan (usually by a combination of NZP, CYF, and adults in the young person's life), ultimately reporting back to the CYF YJ coordinator to confirm that

the plan is completed. Based on my observations, an ITC FGC plan may also decide to have the charges lodged in court for the sole purpose of imposing bail conditions as a facet of the response to a young person's behaviour.

For court-ordered FGCs, the plan is approved (or modified) by a Youth Court judge and monitored either by some combination of the conference members with the Court sometimes retaining oversight through adjournments for regular progress reports. Many practitioners report that plans are almost always accepted by the Youth Court, although no data is collected in this regard. Nevertheless, it is not clear if plans are crafted to pass judicial review or if Youth Court judges defer to the FGC plan.[91] During observations of youth justice processes, three examples illustrate the positioning that is practised in this regard:

- A judge doubled the number of hours of community service in a young person's FGC plan.
- A conference urged a young person to agree to a particular curfew based on the anticipated reaction of the judge scheduled to review the plan.
- A judge accepted a plan but noted that it was a "bit of a light touch."

These examples illustrate that plans are negotiated not only between the young person and the harmed, but also with the approval of various representatives of the state in mind.

Given the similarity to plea bargaining, the adoption of an FGC-like process provides a space to incorporate restorative justice practices, in lieu of lawyer driven negotiations, and offers an opportunity for Massachusetts to develop a less retributive and more restorative approach to youth in conflict with the law. It can also offer a forum for families and supporters of young people to be involved in the process of finding and monitoring the best possible intervention—much more so than is allowable in the current context. Like New Zealand, however, complete confidentiality must be assured[92] so the participation of prosecutors and/or police must be carefully considered. If a conference can agree on a plan, a joint recommendation for disposition can be presented to a judge, including whether to officially offer a change of plea pursuant to Mass. R. Crim. P. 12 or be placed on a pre-admission probation status through Mass. Gen. Laws. c. 276, s. 87.

Recommendation for Massachusetts: *An adoption of an FGC-like process to reach dispositional recommendations to the court would promote the youth development approach and encourage the practice of restorative justice*.

Restorative justice and FGCs

Restorative justice and family group conferences are practically synonymous.[93] Tony Marshall's oft cited definition for restorative justice is "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[94] Restorative justice

[91] Lynch, *Youth Justice in New Zealand*, p. 110-111.

[92] Mass. R. Crim. P. 12(f) provides a basis for the inadmissibility of statements made during plea negotiations, although a mutual understanding of the scope of this rule should be clarified.

[93] See, generally, Allen MacRae and Howard Zehr, *The Little Book of Family Group Conferences New Zealand Style* (Intercourse, PA: Good Books, 2004).

[94] Eve Hanan, "Decriminalizing Violence," *New Mexico Law Review* 49, no. 1 (January 2016); Nessa Lynch, "Respecting Legal Rights in the New Zealand Youth Justice Family Group Conference," *Current Issues in Criminal Justice* 19, no. 1 (July 2007): 75–89.

encompasses a wide range of practices focused on accountability, repairing harm, and forgiveness. It is often positioned in juxtaposition to a rights based approach.

A rights based approach to youth justice is focused on Western principles of criminal law and procedure—due process in the US, and natural justice in New Zealand. This framework refers to the individual rights accorded to each person facing prosecution by the state. For the purposes of this report, focused on the merits of expanding the role of the youth advocate in New Zealand's youth justice system, a rights-based system focuses on the following principles:

- The right to remain silent
- The right to put the state to its burden of proof
- The right to participate in youth justice processes

Each of these rights implicates a number of additional rights. For example, the right to remain silent includes the right to prompt judicial review of any detention. The right to put the state to its burden of proof includes the ability to review the state's evidence as well as to present evidence which casts doubt on any accusation as well as the presumption of innocence. The right to participate means that the assistance of counsel is essential to understanding and responding to processes and norms around a state's response to alleged criminal behaviour. In short, the principles enshrined in the United Nations Universal Declaration of Human Rights form the scaffolding of the rights-based approach.

Restorative justice, in its ideal form, offers advantages to both victims and offenders:

> "The benefit to victims is both therapeutic and material- they have an opportunity to express themselves to those who have caused them harm, and the opportunity to be compensated for their losses…[I]t also offers the offender an opportunity to make amends, to learn accountability, to develop empathy for others and, ideally, to experience forgiveness."[95]

The basic assumption is that by de-professionalising state processes, the community will be empowered to reach resolutions that reflect societal norms. "Decisions are made without reference to substantive criminal law or criminal procedure and, rather than sentencing the guilty, the participants attempt to agree to a mutually acceptable resolution."[96] A key aspect of restorative justice theory is that the participants fully engage in the process with full, and informed, consent. Given the wide range of practices associated with the restorative justice movement, Howard Zehr poses six questions to analyse where a practice falls on the restorative justice continuum[97]:

1. Does the process address harms, needs and causes?
2. Is it adequately victim-oriented?
3. Are offenders encouraged to take responsibility?
4. Are all relevant stakeholders involved?
5. Is there an opportunity for dialogue and participatory decision-making?
6. Is the model respectful to all parties?

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[95] Hanan, "Decriminalizing Violence."
[96] Ibid.
[97] Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002), p. 55.

However, the drafters of CYPFA had never heard of restorative justice.[98] The inclusion of victims—a hallmark of restorative justice—was largely a means to bring transparency to a sceptical public for a process in which families were empowered to address children's behaviour.[99] Further, the FGC is not a traditional, or Māori, restorative justice practice, as is often believed (and at times, promoted). The FGCs were a response to the demand of the Māori community to be included in decision-making about the fate of their children, but it is not in and of itself a "Māori form of justice."[100] Tauri writes that

> [T]he family group conferencing process as practiced in New Zealand, can be viewed as a hybridised social control mechanism on the part of the state, because it involves the mixing of formal (European) with informal (Māori) justice processes, within a forum that severely restricts Māori judicial autonomy.[101]

By coincidence, however, the rise of the restorative justice movement coincided with New Zealand's implementation of the FGC. Early youth justice practitioners in New Zealand found that FGCs were a space in which the ideals of restorative justice could be implemented. Restorative justice's focus on informal processes meshed with CYPFA's aim to limit young people's exposure to in-court processes. Also, the idea that restorative justice practice was a means to allow participants to find a solution appealed to the CYPFA principle of devolving power from the state. Former Youth Court Judge F.W.M. McElrea has described the FGC as reflecting restorative justice by:

- Transferring power from the court to the community;
- Producing a negotiated, community response; and
- Involving victims as key participants, making possible a healing process for both offender and victim.

Some theorists disavow the possibility of any state involvement in restorative justice, a process specifically intended to completely de-couple dispute resolution from government control. Chris Marshall, Chair of Restorative Justice at Victoria University explains the fear of some—although he disagrees– that "[R]estorative justice is imperiled by the possibility of institutional capture and control, and by the dilution of its distinctive values."[102]

Regardless of its fidelity to "pure" forms of restorative justice or its origin myths, the FGCs are, and have been, very consciously positioned on the restorative justice continuum, complete with New Zealand government standards and measures.[103] From this practitioner's point of view, an FGC is a potentially restorative process and it is also a mechanism to impose punishment.[104] The FGC, as it is practised, certainly represents an attempt to meld

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[98] Doolan, Author Interview; Michael Doolan, "Restorative Practices and Family Empowerment: Both/and or Either/or?," *Court in the Act*, no. 21 (2006), http://www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/issue-21.
[99] Doolan, Author Interview.
[100] Henwood and Stratford, *New Zealand's Gift to the World: The Youth Justice Family Group Conference*, p. 89.
[101] Juan Tauri, "Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System," *Current Issues Crim. Just.* 10 (1998): 168–82, p. 177.
[102] Chris Marshall, ed., "Restoring What? The Practice, Promise and Perils of Restorative Justice in New Zealand," *Policy Quarterly* 10, no. 2 (2014): 3–11, p. 10.
[103] Appendix 1: Family Group Conferencing Standards.
[104] Lynch, *Youth Justice in New Zealand*, p. 126.

restorative justice principles into a system-wide approach to youth in conflict with the law. However, given the different developmental needs and capacities of an individual youth, a fully realized engagement in the restorative process may be limited. Nevertheless, even though it is consistent with a positive youth development framework, the entire scheme retains the monopoly on the denial of liberty, leaving young people in an implicit, and perhaps unavoidable, coercive relationship with the youth justice system.

The usual response to due process concerns in this "extra-court" restorative justice space is that the formal, court process is the forum to raise such legal issues—in New Zealand, the Youth Court is the backstop that ensures that individual rights are respected and is available to those who prefer to press such issues. While the Youth Court does, in fact, offer these protections, this does not account for the fact that so much of youth justice in New Zealand is administered informally not just extra-court, but also pre-court, an idea further developed in Chapters 3 and 4 of this report.

Youth Court involvement

A criminal case against a young person is formally filed in court in one of two ways. First, if NZP arrest a young person, the matter must be brought to court (even though charges may be withdrawn by the government at the first appearance).[105] Second, if an intention to charge family group conference fails to reach agreement, the young person does not complete an ITC FGC plan, or the ITC FGC agrees that charges should be filed, then a case can be formally lodged in Youth Court (see Figure 3). If a charge is filed in court, the young person invariably has some bail terms—conditions of release-- during the pendency of the case.[106]

Unlike in Massachusetts, a cash bail is not used. In other words, a young person is either detained or released with conditions, the bare minimum being a physical address (which, in my observation, could include a homeless shelter). Typical bail conditions– curfews, non-association with certain individuals, stay away from certain areas and other state enforced restrictions on personal liberty– are monitored by NZP. There is no available data about the frequency and variety of bail conditions. In my observations, a curfew was used in every case, with the most common requirement to be at an address or under the supervision of designated adults from 7 p.m. to 7 a.m. Bail conditions typically remain open until plan completion (and may be revisited if there are plan failures). The NZP cannot arrest a young person for the first two instances of violating conditions of release.[107]

Youth Courts may also directly oversee the completion of a plan. Many Youth Courts are in the practice of scheduling cases for periodic reports so that the judge can personally inquire into the progress of the plan, encouraging the young person and the adults responsible for monitoring (and implementing) the plan to move towards completion. Current Youth Court judges are influenced by the therapeutic jurisprudence literature, including the role a judge can have in causing behaviour change in the young people who appear in court. Certainly as Youth Court caseloads drop—the once busy Porirua Youth Court reportedly has an active caseload of less than 15—judicial officials have increased ability to involve themselves in the more difficult cases. Some Youth Advocates report that judges can be effective, in particular, with ensuring that the adults responsible for implementing elements of a plan—usually CYF-- actually do so. The countervailing

[105] *Children, Young Persons and Their Families Act 1989*, s. 245.
[106] Ibid., s. 238.
[107] Ibid., s. 214A.

concern is that repeated legal appearances undermine the ethos of CYPFA by unnecessarily exposing young people to formal court procedures and protocol in a disempowering *parens patriae* model of oversight.

A variation of therapeutic court monitoring is manifested in the Ngā Kooti Rangatahi ("Youth Court" in te reo Māori). This initiative was conceived and is implemented by the Youth Court itself and has met its own goals successfully.[108] An FGC plan can include a request to the Youth Court to transfer supervision to Kooti Rangatahi. These are sittings of the Youth Court, using the power granted under section 4A of the District Courts Act 1947, that take place on, and under the sponsorship of, a marae. A marae is a community institution, "the hub of a Māori community, the place where people gather in times of joy and celebration, and times of stress and sadness. It generally has a wharenui (meeting house), a wharekai (dining room with attached kitchen) which serves and oversees its members."[109] Led by a judge, usually Māori, joined by kaumātua (community elders from the marae), the sessions encourage young people to engage in and connect with Māori heritage. Lay advocates, appointed pursuant to ss. 326 to 328A, help young people express their cultural heritage and encourage family participation and voice in the process (a practice that also includes 'regular' Youth Court). For Māori youth, in particular, this serves to strengthen cultural identity and social connectedness, two goals that research shows promote pro-social behaviour. Any changes—beyond minor modifications– in the young person's legal status, however, are returned to the sending Youth Court, and addressed in accordance with CYPFA.

[108] Kaipuke Consultants, "Evaluation of the Early Outcomes of Nga Kooti Rangatahi" (Wellington, New Zealand: Ministry of Justice, December 17, 2012), http://www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi.

[109] *Te Ara The Encyclopedia of New Zealand*, http://www.teara.govt.nz/en/marae-management-te-whakahaere-marae/page-1 (accessed 19/6/15).

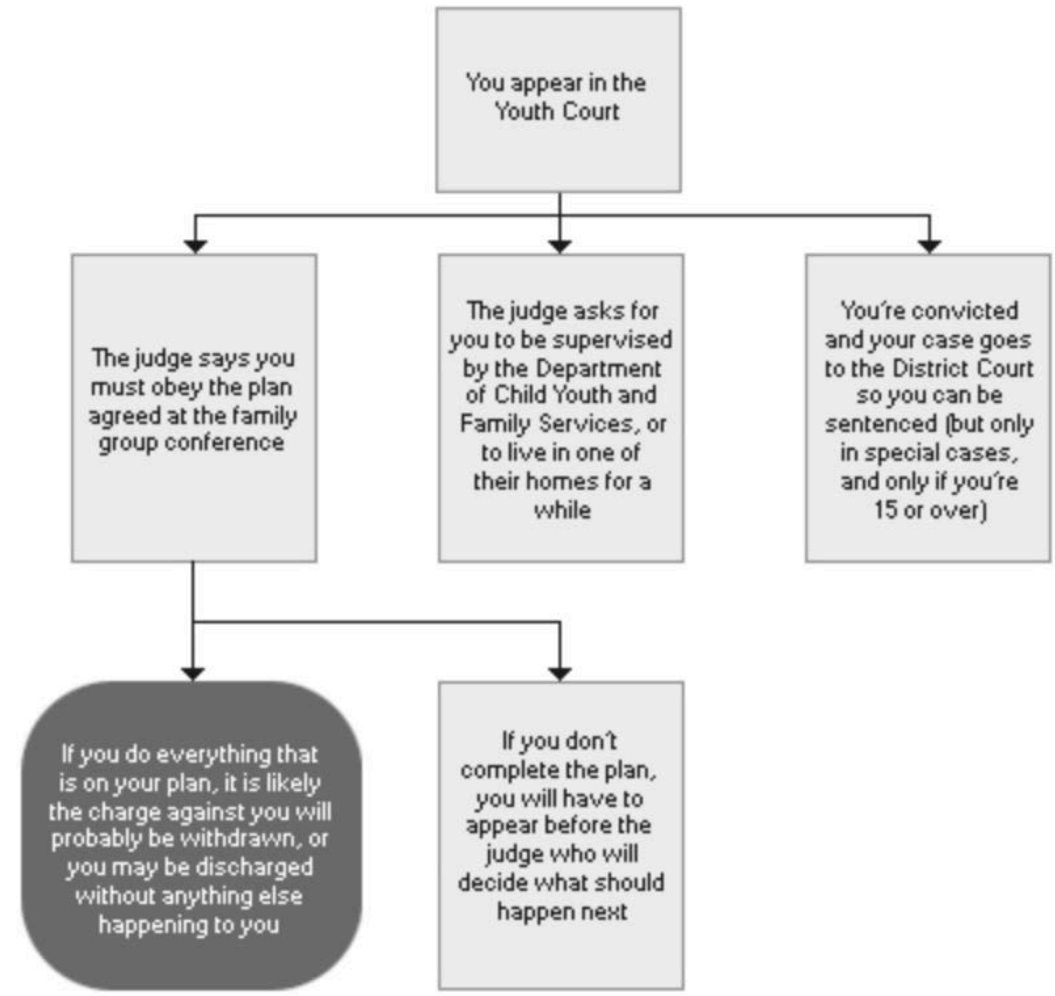

Figure 3

Akin to a probation violation hearing, an FGC can be reconvened to consider new circumstances that require modification of the plan.[110] New Zealand practitioners report that violations of punitive elements of the plan tend to lead to escalation more than failure to complete restorative or rehabilitative elements, which are more likely addressed informally. However, there is no specific data regarding the reasons for re-convening of FGCs. According to the CYF case management system, in the last year, there were (depending on definitions) 500 to 600 re-convened FGCs, although a "new" FGC for a subsequent offence may in fact address failures on previous plans. A new offence lodged against a young person with a plan is reportedly the most common reason why a matter is escalated.

[110] As noted, the usual consequence of failing an ITC FGC conference plan is the filing of charges in Youth Court. This starts the FGC process anew with an opportunity to reconsider whether to put the government to its burden of proof.

If there is a failure to complete a court-directed plan, a Youth Court has a series of orders, placed in seven groups of increasing punitiveness in section 283 of CYPFA. The purpose of creating an explicit tiered structure is to promote the least restrictive court intervention. For the most serious circumstances, a Youth Court can order that the young person face an adult court sentence imposed by a District or High Court judge.[111] A Youth Court, however, must consider the FGC's recommendations before issuing any orders. If the FGC is unable to reach agreed upon recommendations (including any requests for a Youth Court order), a Youth Court can act independently.

CYPFA provides the Youth Court with an additional powerful tool. When a young person in Youth Court completes an FGC plan, the primary judicial decision is whether to grant a discharge with or without a record. A discharge under section 283(a) leaves a record that the government proved that a young person violated criminal laws (either through an admission or a trial), similar to the Massachusetts practice of dismissal after a continuance without a finding. Under s. 282, however, a Youth Court can discharge a young person completely, removing any official record of the prosecution, even after the charge has been proven (by admission or hearing). In New Zealand, under s. 282(2), the order is described as a case that "is deemed never to have been filed." However, the three youth justice agencies (NZP, CYF and the Youth Court) all maintain records of such discharges and routinely use the information to make decisions about responses to any subsequent allegations of criminal behaviour (such as whether to grant an additional '282' discharge or bail). Nobody outside the youth justice system—employers, educational institutions, government agencies– has access to the information about such a case, similar to an expungement in Massachustts. Even adult court judges, for example, cannot see an entry on the young person's criminal history record indicating Youth Court proceedings—let alone the outcome.

The prospect of a '282 discharge' is a powerful incentive to engage in the FGC process.[112] In the last calendar year (2014), out of 2082 dispositions, 903 '282 discharges' were granted, 43 per cent of all disposed cases.[113] New Zealand Youth Court judges have allowed discharges for serious offences. For example, during court observations, the following range of cases were granted discharges:

- Three 13-year-olds causing NZ$2.5 million in damage to their school after a reckless—not intentional—arson (over the objection of the government)
- A 15-year-old who along with three others, used the threat of force to steal a cell phone from a tourist, then returned to find him and (successfully) demanded he provide the access code to unlock the phone
- A 16-year-old who assaulted a parent (mother)

The willingness to grant the total and complete discharge is a laudatory application of PYD because the courts are willing to contextualise even serious cases in the framework of adolescent development.

There is no equivalent disposition available to Massachusetts Juvenile Court judges. Although criminal records are protected to a certain degree, Juvenile Court judges have little power to protect young people from the collateral consequences—including the softer

[111] *Children, Young Persons and Their Families Act 1989*, s. 283(o).
[112] "Statistics New Zealand Tatauranga Aotearoa," n.d., http://nzdotstat.stats.govt.nz/wbos/Index.aspx.
[113] Ibid.

stigma—of court involvement.[114] Certainly, there is no ability to offer immediate relief to young people. The incentive of a 282 discharge is a powerful motivating force to engage in services, and appropriately rewards positive adolescent development.

Recommendation for Massachusetts: *Providing judges with the power to order a New Zealand-like "section 282 discharge" would help to alleviate the harmful effects of court involvement while also recognising the need to keep much more limited records.*

Warnings and alternative actions

Although the FGC is at the heart of CYPFA youth justice provisions, most matters in New Zealand are resolved through police-led diversion without any conference whatsoever. CYPFA legislates prosecutorial discretion across the entire juridiction. In addition to the first principle of Youth justice in s. 208(a) ("criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter"), section 209 of the law specifically directs that

> [W]here an enforcement officer is considering whether to institute criminal proceedings against a child or young person for an offence alleged or admitted to have been committed by that child or young person, that officer shall consider whether it would be sufficient to warn the child or young person, unless a warning is clearly inappropriate having regard to the seriousness of the offence and the nature and number of previous offences committed by the child or young person.

NZP are responsible for all prosecutions in New Zealand, including adult. As in adult court, prosecution is handled by NZP– through the Police Youth Aid officers-- with more complex or serious cases handled by Crown Prosecution. NZP's Youth Aid runs a comprehensive programme of diversion.[115]

Front-line NZP—patrol officers and detectives– are responsible for the investigation and apprehension of young people in conflict with the law. Once complete, they transfer their investigative files to Youth Aid. The files contain a "Youth Justice Checklist,"[116] as well as the various documents or evidence necessary to prosecute the case (such as police officer notes, formal witness statements, forensic evidence, surveillance footage, etc.). Youth Aid generally requires that files are received within two weeks of an incident, unless the charges are a result of an on-going investigation.

The Youth Aid officer will review the file to ensure it meets the standards for prosecution. A case should not be prosecuted unless it passes the "evidential test."[117] At its core, "[T]he evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law."[118] Any evidence that is inadmissible should not be considered in making the decision. Youth Aid officers reported to me that late or inadequate files are returned to the investigating officer.

If a file passes the evidential test, then the Youth Aid officer must apply CYPFA principles in deciding the next course of action—warning, diversion, or prosecution in Youth Court.

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[114] Commonwealth v. Humberto H., 466 Mass. 562 (2013).
[115] Much of the information in this section is based on my interviews with various NZP Youth Aid officers.
[116] Appendix 2: Youth Justice Checklist (NZP)
[117] Crown Law, "Solicitor-General's Prosecution Guidelines" (Attorney General New Zealand, 1 July 2013), pp. 6-7.
[118] Ibid., p. 7.

As part of YCAP, Youth Aid, along with CYF, developed a decision making guide for its officers.[119] NZP consider the seriousness of the offence, including the alleged role of the young person, and the young person's history of involvement in criminal behavior. NZP also use the "Youth Offending Risk Screening Tool" (YORST) to aid in decision-making.[120] As a matter of NZP policy, not law, Youth Aid officers are the officers responsible for exercising prosecutorial discretion in youth justice cases. Crown prosecutors exercise their own discretion when they handle a matter.

The highest-level police-led diversion is the alternative action (AA), named after the clause in section 208(a) that encourages "alternatives" to criminal proceedings. Although CYPFA does not specifically designate NZP as being responsible for alternative actions, the existing Youth Aid structure in NZP assumed those responsibilities at the passage of the Act in 1989.

Youth Aid officers initiate an AA by speaking to the alleged victim, the accused and the accused's family. Best practices require the AA plan is finalised within 21 days of receipt of a file (e.g. up to 35 days after an alleged incident).[121] With a NZP emphasis on named victims based on the Victim Rights Act 2002, Youth Aid officers have been soliciting victim input more often—senior police management tracks data relating to consultation with the reported victims. However, Youth Aid officers will only develop an AA if the young person agrees they committed the offence(s) for which they are charged.

As part of the process, then, Youth Aid officers ask young people to admit to the offence(s), including recording any disagreements with the allegations. Youth Aid officers can re-assess the merits of the case (including asking the charging officer to re-open the investigation) and/or prosecution based on the young person's account of events. In addition, Youth Aid speaks with the family and may also meet with collaterals in the young person's life (school, extended family, etc.).

Youth Aid officers operate very much as quasi-social workers. Similar to an FGC plan, an AA intervention includes rehabilitative elements.

> Decisions on what needs to address in Alternative Action plans are usually made on the basis of professional opinion rather than objective, evidence-based assessment tools. The YORST can, however, assist Police staff in identifying some offending-related needs (mixing with anti-social peers, disengagement in education or employment, drug and alcohol abuse, socio-economic status of their community and other parenting and family factors) and these needs can be addressed in Alternative Action Plans.[122]

Each plan is intended to be specific. Although the aim of the plan is to avoid prosecution and deal with the matter outside of the formal justice system, the final outcome of an alternative action plan can look very much like an FGC plan. Plans are recorded as being successfully completed or not and any extra-police level of resolution (ITC FGC, Youth

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[119] Appendix 3: Youth Resolutions Model

[120] Appendix 4: NZP Youth Offending Risk Screening Tool (YORST)

[121] Youth Services Group, "Alternative Actions That Work National Guidelines" (Wellington, New Zealand: Police Youth Services Group, New Zealand Police, 2011), p. 18.

[122] Kaye McLaren, "Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action with Children and Young People" (Wellington: Police Youth Services Group, New Zealand Police, 2010), http://www.police.govt.nz/about-us/publication/alternative-actions-work, p. 16.

Court) is also recorded in police databases. The standard templates that guide NZP in determining agreements include[123]:

- A letter of apology to the victim
- Reparation or financial restitution to the victim
- A donation to a nominated charity
- Community work (best practices limit the work to 20 hours, or up to 40 hours after consultation with a supervisor)
- Attending a programme or counseling related to the perceived needs of the child or young person
- Re-enrolling in school or a training course
- Curfew; commitments not to associate with certain peers; and driving restrictions

In addition, as noted in the Youth Advocate Manual (2011), a training guide for lawyers for children and young people in conflict with the law, NZP will also ask youth for voluntary fingerprints.[124] Young people and their families can ask to have the records destroyed. In my observations, some officers use fingerprinting in their repertoire of alternative action responses on the basis that it is a deterrent, while others decline to do so. A specific consent form is used, which explains the process for destroying the prints as well as the fact that the prints can be used to aid in investigation of both past and future criminal allegations.

The advantages of a single diversionary approach are clear policy directives and unified training. Although individual variations across regions inevitably arise, the use of guidelines can help to focus oversight and consistency in an area—prosecutorial discretion—that requires a high level of discernment. Despite the regional variations in New Zealand, it nevertheless provides a common foundation from which to make prosecutorial decisions. In Massachusetts, different District Attorneys (and their assistants) and police departments impose varied, inconsistent and uncoordinated diversionary responses to youth in conflict with the law.

Recommendation for Massachusetts: *A state-wide shared set of principles encouraging and governing diversion from Juvenile Court in Massachusetts would standardise opportunities for positive youth development*.

[123] Youth Services Group, "Alternative Actions That Work National Guidelines," p. 7, pp. 25 et seq.
[124] "Youth Advocates Manual" (New Zealand Law Society, 2011), chapter 2, p. 6.

3 CURRENT ACCESS TO COUNSEL

Legally trained counsel is perceived in the US and New Zealand as an imprimatur of formal adversarial processes. The US Supreme Court in *In re Gault* described the role of the lawyer is "to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[125] The Court noted approvingly that "Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[126] In New Zealand, CYPFA itself guarantees counsel to a young person, but only after NZP have filed charges in Youth Court. New Zealand, unlike the United States, is also signatory to the United Nations Convention on the Rights of Child. Art. 40, states that each child is guaranteed "to have legal or other appropriate assistance in the preparation and presentation of his or her defence."

CYFPA's provision of counsel

CYPFA specifically requires the appointment of a Youth Advocate (YA)—a lawyer—only when charges are officially lodged in court. As discussed above, the state can lodge charges by arresting, charging and bringing a young person to Youth Court either after being granted bail at the police station or, if in custody, to District Court if the Youth Court is not in session. If the young person is brought to District Court, a duty solicitor may be appointed for the purposes of arguing bail status until the Youth Court is in session. Youth Court sessions vary in frequency, but mostly run for a single day every other week. Youth Court judges also serve as District Court judges so, even out of session, may be called upon to hear bail arguments, although District Court judge and Justices of the Peace can sit as Youth Court judges[127] for the purposes of bail, meaning that access to a Youth Court trained judge may be limited as well. Alternatively, charges can be filed after an 'intention to charge' conference held pursuant to s. 247(b)—either because the conference agrees to do so or because NZP insist on it-- and a summons is used for the next available Youth Court session.

Administratively, as soon as the Court Registrar (in Massachusetts, the Clerk-Magistrate or her assistants) is notified of the charges by a court filing, the YA is assigned, regardless of when the actual first appearance is scheduled. Each young person is automatically appointed a YA (unless they have hired a lawyer) without inquiry into financial eligibility and without any fee assessed. Ideally, a YA is appointed with sufficient time for a meeting before court, although the practice is not consistent. Under CYPFA, the YA's work continues on a case through the completion of any custodial sentence, which includes periodic Youth Court reviews, as well as certain proceedings in adult court or at the appellate level.

The Youth Court itself administers the process of recruiting, appointing, paying and overseeing the Youth Advocate panel.[128] The administrative structure is separate from the provision of counsel for adults charged with criminal offences. Adults charged with committing a crime apply for legal aid administered by the Ministry of Justice and, if they qualify, are provided an attorney based on a rotating roster, including any local office of the Public Defender Services. Youth Advocates, on the other hand, submit their bills directly to the Youth Court registrar. They are paid $155 per hour and authorised to complete up to six

[125] In Re Gault, 387 US 1, 36 (1967).
[126] Ibid. at 38.
[127] *Children, Young Persons and Their Families Act 1989*, s. 436.
[128] Andrew Becroft, "Appointment and Review Procedures for Youth Advocates," in *Youth Advocates Manual* (Wellington, New Zealand: New Zealand Law Society, 2011), Tab 1.

hours of work. Although a YA can request additional hours, and many do, they also report that they routinely do not bill for additional time.

Section 323(2) governs the role and qualifications for counsel, and recognises that working with young people is itself a skill. It reads that:

> "Where the court appoints a barrister or solicitor…it shall, so far as practicable, appoint a barrister or solicitor who is, by reason of personality, cultural background, training, and experience, suitably qualified to represent the child or young person."

The YA acts "in relation to the representation of that child or young person in those proceedings and on any other occasion on which that youth advocate represents that child or young person, the same rights, powers, duties, privileges, and immunities that the youth advocate would have had if he or she had not been appointed…but *had been retained by that child or young person to provide legal representation.*"[129] A young person has the power and responsibility to instruct her YA and a YA (within legal ethics) is required to carry out the instructions. YA do not, therefore, act on a 'best interests' model of representation and use their own judgement about how to proceed in a case.

In addition, CYPFA specifically tasks Youth Advocates to ensure that the young person understands the proceedings in Youth Court.[130] Finally, under section 11, the Youth Advocate must—in the context of Youth Court-- "encourage and assist the child or young person to participate in those proceedings to the degree appropriate to the age and level of maturity of the child or young person." In other words, a YA must educate and work with a young person to effectively engage in the Youth Court process.

Understanding the Youth Advocate role

The Youth Advocate is a unique and specialised role. In addition to New Zealand Law Society's Youth Advocates Manual (2011), three reports discuss evolving and settled notions of the role of the Youth Advocate.[131] Each of the documents reflect my discussions with Youth Advocates, particularly managing the balance between adversarial training and the restorative principles of CYPFA. In many instances, this was discussed by youth justice professionals as how to be a member of the same youth justice 'team,' made up of CYF, NZP and the Youth Court. It is recognised that furthering the client's stated goals can conflict with the 'team' approach. From my public defender point of view, grounded in a holistic, client-centred approach, the YA role involves three main tasks: legal; restorative; and equitable.

Legal

As expected, a key role of the Youth Advocate is to protect a young person's rights through legal advice and litigation. Leaving the issue of bail conditions for now, the first course of action, according to Youth Advocates, is to determine if the young person wishes to accept responsibility or defend against the charges. They explained that this primarily involves

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[129] *Children, Young Persons and Their Families Act 1989*, s. 324(1)(emphasis added).
[130] Ibid., s. 10(2).
[131] Alison Cleland, "Youth Advocates in Aotearoa New Zealand's Justice System: Exploring the Roles, Functions & Responsibilities of Laywers for Young People" (Wellington, New Zealand: The Law Foundation New Zealand, August 2012); Gabrielle M Maxwell, "Youth Advocates Role," 2004; Allison Morris, Gabrielle Maxwell, and Paula Shepherd, "Being a Youth Advocate: An Analysis of Their Role and Responsibilities" (Wellington, New Zealand: Institute of Criminology, Victoria University of Wellington, 1997).

reviewing the circumstances of any arrest to ensure that police followed CYPFA specific procedures; examining the circumstances of any interviews; and checking the sufficiency of the evidence—a familiar criminal defence attorney best practice.

From a practical point of view, Youth Advocates needs disclosure (discovery in the Massachusetts context) from NZP. The initial summary of facts is a prosecution, not an evidentiary, document. Full (and timely) disclosure allows for a legal analysis of the quality of the police investigation, including whether there is sufficient evidence to prosecute, whether a client's rights were violated, and/or an exploration of possible defences. In CYPFA's justice-oriented model for youth in conflict with the law, the burden of proof beyond a reasonable doubt is squarely on the government.

Generally, but not uniformly, Police Youth Aid are seen as diligent in providing the necessary documents, with a few noted bottlenecks. Disclosure delays are important to address—particularly given that CYPFA recognises the very real need to consider a young person's sense of time in processing cases, but such delays are common to many jurisdictions. Police Youth Aid are very attuned to their responsibilities in this regard and are keen to avoid judicial sanction but can be stymied by internal issues within NZP. NZP is structurally oriented towards providing disclosure to adult defendants with dedicated staff fulfilling disclosure duties, although based on my discussion with public defenders in the adult defence bar, there is varied success in prompt and timely disclosure in the adult courts as well. Indeed, YA involvement in this process is a significant advantage, from a rights perspective, not only to evaluate the quality of the evidence but also to ensure complete and timely disclosure to ensure compliance with CYPFA section 322. Under section 322, the Youth Court can dismiss a charge because "the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted."

Because of the need to review disclosure, once appointed, Youth Advocates usually (but not always) wait to enter a plea on behalf of their client until after the first court appearance. Pleas are often entered by the next court session, even where the client's final decision about accepting responsibility or defending the charges may be pending. The 'not denied' plea starts the FGC process—including the strict time limit on convening it (seven days for youth in custody; 14 days for youth not in custody).[132] "Convening" is a technical term which refers to the setting of the time and place of the conference; the conference may in fact be held sometime later, but no longer than a month (and less if the young person is in custody). During this time, a YA can negotiate the final charges and/or the summary of facts with NZP based both on disclosure and the client's own position about the incident.[133]

Youth Advocates report that NZP are generally receptive to both legal arguments and, through counsel, factual revisions that reduce or eliminate some charges. The result of these consultations is that FGC processes are much more efficient, particularly for the families and the victims, limiting the need for any discussions about the charges or narrative of events during the FGC itself so that the focus can be turned to the restorative aspects of the process. Given the perceived benefits of FGCs and the NZP's willingness to reduce or eliminate charges informally, many Youth Advocates tend not to mount 'technical defences.'

> "One of the things that any experienced youth advocate finds really difficult is there are times when pursuing a denial which may be technically and

[132] *Children, Young Persons and Their Families Act 1989*, s. 249.
[133] Cleland, "Youth Advocates in Aotearoa New Zealand's Justice System: Exploring the Roles, Functions & Responsibilities of Laywers for Young People," p. 16.

> legally justified is not going to result in the best overall outcome for the young person."[134]

A number of Youth Advocates confirmed to me the belief that mounting a 'technical defence' can undermine a young person's development. In my discussions, they expressed the belief that defended hearings (trials) are generally reserved for situations of claimed innocence. At some point during the process of client relationship building, if the client tells the attorney that they committed the offence, a YA tends to counsel the young person to seriously consider the restorative FGC process precisely because positive outcomes—from a legal and life perspective—are seen as more assured.

Restorative

In order to promote the restorative justice practice that has become a part of CYPFA's implementation, the YA is also expected to ensure understanding of the FGC process and help young persons express themselves in that forum. For a YA, this role is just as important as providing legal analysis and advice. It is perceived as a distinctly different set of skills that are triggered only after the legal role is complete. It often combines the different roles of "mentor/supporter" and "information giver" and during the actual FGC, "protector" from overzealous participants.[135] The YA explains the purpose of the FGC, the structure of the FGC and encourages participation.

Best practice for a YA at the FGC is to allow young persons to express themselves rather than the traditional lawyer role of speaking for the client. After the admission that begins the process, a YA is expected to remain silent, only to interrupt to protect the young person by asking for a break or identifying any bullying of the young person during the conference discussions. One YA explained, for example, that a particular YJ coordinator tended to lecture—and scold-- young people about their behaviour, a practice that led to asking for breaks on behalf of the client.

Youth Advocates reported to me that many young people appear disengaged from the meeting and participate with one word answers or phrases. This is confirmed by qualitative research as well.[136] They also note that the more the young person actually participates, the more successful the FGC is in arriving at a plan that is accepted and completed. Among youth justice professionals in New Zealand, it is seen as the role of the CYF Youth Justice coordinator to help a young person substantively prepare for the conference.

The power of the process, it is thought, is based in its dynamism and the rawness of emotion. The 'magic' of the conference comes from the genuine involvement of the young person. Helen Bowen, a youth advocate in Auckland, as well as a prominent proponent of restorative justice, has critiqued the FGC process (before the current revision of standards) inasmuch as

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[134] Ibid. p. 28.
[135] Ibid. p. 24.
[136] See, generally, Gabrielle Maxwell, "The Youth Justice System in New Zealand: Restorative Justice Delivered through the Family Group Conference," in *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Wellington, New Zealand: Institute of Policy Studies, Victoria University of Wellington, 2007), 45–68; Nessa Lynch, "The Rights of Young Person in the New Zealand Youth Justice Family Group Conference" (University of Otago, 2009).

the young person needs to engage in sufficient reflection on the impact of their behaviour prior to the meeting.[137]

Although there is a real perception that the young person must not be 'rehearsed' for the FGC, practically, then, a YA must assess whether the young person deserves additional support, especially where that preparation can be provided in the context of the lawyer-client privilege. First, given the tendency of FGCs to explore "underlying causes" of behaviour, government agencies, whether NZP of CYF, may not always engender trust. This is exasperated by the reality that many young people, in my experience, may be hesitant (rightfully or not) to discuss historical issues such as abuse, personal issues such as educational struggles or knowledge of previous misdeeds by themselves or others. This is particularly true for Māori youth—and requires particular sensitivity from a YA-- in New Zealand:

> "Given the nature and complexity of the lives of Māori young people, it becomes evident that it is a big ask to expect them to be able to assert themselves in the context of an FGC, to navigate through a process that is at best quasi-Māori, and to forge solutions that are possible and acceptable within the very constrained limits of their lives and family resources."[138]

Indeed, a YA, presumably skilled in building rapport and communication with a diverse group of young people, could help sort out important decisions about how to—or even whether to-- frame experiences without the fear of reprisal. For example, a young person may choose to request a bifurcated conference to ensure justice responses to the alleged criminal behaviour and welfare responses to care and protection needs—an option that also removes NZP and the victim from perhaps more sensitive discussions.[139]

Second, participation in an FGC requires considerable cognitive, social and emotional skills. It is an oral process. It assumes working memory to process statements. The ability to accurately read social cues– such as tone and body language— aids in emotional engagement. Indeed, cross-cultural mis-communication, particularly in expressions of remorse, could undermine the effectiveness of an FGC. Stamina to work through difficult issues, including weighing long-term consequences of committing to different elements of a plan and playing out alternative scenarios, are skills that many young people are still developing.

New Zealand's youth justice sector is increasingly considering language-based difficulties in working with young people.[140] The organisation "Talking Trouble" has raised the issue from a youth development perspective and was mentioned repeatedly in my interviews with youth justice sector professionals.[141] Michael Doolan explains this phenomenon from a social work lens:

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[137] "Report Finds Shortcomings in CYF Handling of Family Group Conferences," *Radio New Zealand*, accessed 29 June 2015, http://www.radionz.co.nz/national/programmes/ninetonoon/audio/20144200/report-finds-shortcomings-in-cyf-handling-of-family-group-conferences.

[138] Cleland and Quince, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*, p. 181.

[139] Doolan, Author Interview.

[140] Nathan Hughes and Huw Williamns, "Neurodisability and Youth Offending: Recognising and Responding to the Crimilaisation of Neurodevelopmental Impairment" (Youth Advocates Conference 2015, Auckland, New Zealand: New Zealand Law Society, 2015); Brigit Mirfin-Veitch and Emily Henderson, "Duct Taping the Apollo 13: Facilitating Positive Communication with Disabled Young People" (Youth Advocates Conference 2015, Auckland, New Zealand: New Zealand Law Society, 2015).

[141] Sally Kedge, "Talking Trouble NZ," *Court in the Act*, no. 66 (July 2014): 7–9.

> I believe that some caution needs to be applied in considering the full restorative model as a response to offending by young people, particularly where the young persons lack capacities of personal insight, guilt and remorse that makes the restorative approach such a powerful influence on offenders generally.[142]

Given the skills necessary for this participation, this is best accomplished by reviewing the preparation of the young person in the context of an intimate knowledge of their situation and concerns. A YA, assuming best practice, is positioned to evaluate—and indeed support--- this preparedness. In the appropriate circumstances, for reasons of a young person's maturation, temperament, cultural background, or even trauma, a YA may also need to push back against attempts to characterise a young person's participation as minimisation of their behaviour or inadequate.

It may also be necessary to raise fitness to plead (competency to stand trial) issues pursuant to the Criminal Practice Mental Illness Act 2003.[143] Although an FGC is an out-of-court process, it is structurally tied to a legal outcome and is arguably a critical stage of the criminal proceedings.[144] To admit to criminal wrongdoing, as must happen at an FGC, and to agree to a series of obligations, a young person should have the ability to understand the process and its alternatives. It may be the case that a different, non-justice, intervention is more appropriate. Even where a young person's developmental immaturity or cognitive ability might not impair participation to the point of raising a fitness to plead issue for an FGC, an attorney can re-calibrate the expectations for the FGC and the plan.

It is through a young person's preparation for an FGC that a fair and proportionate response is better assured. With a duty to the client, just as a defence lawyer checks whether police followed law enforcement protocol, a YA should review and supplement CYF preparation of a young person for an FGC in order to maximise its potential restorative justice benefits.

Equitable

Finally, a YA can promote equity. While a hallmark of restorative justice is the ability to individualise responses to youth in conflict with the law, ensuring equity across the system promotes community notions of fairness. Most plans include an element of punitiveness in the form of liberty restrictions.[145] Given the role of the state to justify and oversee FGC responses, notions of fairness are important to quality. A quality FGC plan is understood as appropriate to the young person's situation as well as consistent with others in a similar position, particularly around the elements that are punitive. "Individualization [can be] simply a euphemism for subjectivity, arbitrariness, and discrimination."[146] The YJ Coordinator, as the facilitator of the conference, can, and should, raise issues of equity.[147] However, a YA also has a 'vote' in the conference and can veto a plan by withholding consent.

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[142] Doolan, "Restorative Practices and Family Empowerment: Both/and or Either/or?"
[143] Gary Earley, "Young People and the Criminal Procedure (Mentally Impaired Persons) Act 2003" (Youth Advocates Conference 2015, Auckland, New Zealand: New Zealand Law Society, 2015).
[144] The issue of whether participation in an FGC is part of the court process is litigated in the Youth Courts for the purpose of fitness to plead inquiries and I thank Gary Earley for sharing his pleadings with me on this important issue.
[145] Lynch, "The Rights of Young Person in the New Zealand Youth Justice Family Group Conference."
[146] Barry C. Feld, "The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make," *Journal of Criminal Law and Criminology* 79, no. 4 (1989): 1185–1346, p. 1317.
[147] Doolan, Author Interview.

The YA, with a duty to the young person first and foremost, can counterbalance any possible biases of the other voting members. While not best practice to do so, NZP and CYF representatives may nevertheless focus on favoured programmes or budget priorities in responding to or proposing plan elements. In order to exercise a YA vote, there must be considerable consultation and trust between the YA and the young person. This is a decision where the obligation to follow a client's instructions may conflict with a YA's own sense of the correct course of action. From a legal duty perspective, a YA should defer to a young person's decision about a plan.

Instead of making the YA "vote" irrelevant, this deference should force authentic collaboration. This collaboration is necessary precisely to ensure that a young person's agreement to a plan is as consensual as possible. A YA, through experience and training, can provide a young person with a sense of system equity (including—perhaps especially--over-promising by the young person and/or family). Within a formal legal system, judges are expected to ensure consistency of sanctions (and while not always a reality, it is at least possible to appeal to such an ideal). Because FGCs are a closed process, a young person's main recourse to actual or perceived inequity is refusal to acquiesce to a plan—not always a realistic option given the alternative. With the institutional privilege accorded to agreement (and the accompanying expected restoration of community), the potential of imposed, rather than agreed, plans must be acknowledged. Even though coercion is inherent in any state-run system, and can never be eliminated, one of the roles of the YA is to empower a young person, with full and complete information, to make judgements about providing consent to participate in an FGC plan. Consent is a key element in successful interventions.

Representation as youth participation

Effective youth participation is a bedrock principle of the youth development approach, CYPFA, and indeed New Zealand's Ministry of Social Development. Within the youth justice system, the lawyer holds a very particular responsibility: confidentiality. A component of this confidentiality is that the young person is responsible for making decisions about how to proceed through the justice system—in New Zealand terminology "to give instruction" to the YA. Nevertheless, it is difficult for adults, including Youth Advocates, to wholeheartedly act on this concept.

In selecting new lawyers to be on the YA panel, one senior advocate includes a hypothetical case that raises the issue of taking instructions regardless of the adult's view on the appropriate course of action. Some potential panel members have struggled to separate their own views of what is 'best' from following a client's instructions. The Youth Advocate Manual (2011) noted this issue as well: "While cooperation [with other people in the youth justice sector] is to be encouraged, there is risk that your independence may be compromised or that the child or young person will see you as just another series of authority figures, and part of the system."[148] In other words, best practice for YA is to engage in representation that amplifies a young person's voice, rather than over-riding it. A YA must provide good information based on a quality relationship that recognises (and even uncovers) a young

[148] Robert Ludbrook, "The Role of the Youth Advocate," in *Youth Advocates Manual* (Wellington, New Zealand: New Zealand Law Society, 2011), Tab 2.

person's strengths. Using MSD's own framework for assessing the quality of youth participation,[149] Youth Advocates can play an essential role in maximising engagement.

The role of counsel in New Zealand youth justice is perceived and practised as distinct from that of adult criminal defence lawyers. A very experienced YA explained that his youth advocate work encourages relationships with young people—in a way he finds difficult in the adult court—and that one of the hallmarks of a successful representation is continued contact as young people grow into adults, absent from the criminal justice system. He described his YA work as the part of his practice that "keeps him going."

Nevertheless, Youth Advocates are perceived as symbols of the disfavoured formal process. CYPFA assumes informality requires counsel only at the point when charges are filed in the courthouse. Of course, there is no bar—other than financial-- to an individual young person engaging counsel before court. Increased, and equal, access to quality counsel in the pre-court space could promote engagement in informal youth justice processes and improve early and/or sustainable exits from the youth justice pipeline, a key goal of YCAP.

[149] Ministry of Social Development, "Youth Participation in Decision Making - MYD" (Ministry of Social Development), accessed 30 June 2015, http://www.myd.govt.nz/working-with-young-people/youth-participation-in-decision-making/index.html.

4 GAPS IN ACCESS TO COUNSEL

Despite some very real innovations—particulary relative to the pre-1989 era-- in protecting children and young people during police investigations, access to counsel is lacking, either in practice or by design, in three critical stages in the pre-court youth justice pipeline. While these gaps are known, studied and discussed in New Zealand, many in the youth justice sector rely on the culture created around CYPFA to protect children and young people from substantive injustice. For New Zealand, where budget choices may limit complete and full access to counsel from the moment of police contact, regular independent review of the pre-court processes, and transparent reporting about the space, will ensure good practice and adherence to the heritage of CYPFA that cautioned against interventions out of proportion to the alleged behaviour, whether labeled as welfare or restorative justice. In adapting and implementing these systems in a jurisdiction that might not share New Zealand's CYPFA-based culture of practice, access to counsel should be incorporated into the entire youth justice process, formal or informal. As currently practised in New Zealand, there is limited access to Youth Advocates in three key areas: arrest, detention and investigation; alternative actions; and intention to charge family group conferences.

Arrest, detention and investigation

CYPFA specifically addresses two aspects of front-line policing to help protect vulnerable young people's rights, but otherwise the police are governed by general criminal law, processes and internal policy considerations. First, a series of sections address detention, from arrest without a warrant, s. 214, to pre-court custodial status decisions, s. 234 to 237. Second, sections 215 to 231 govern police interrogation of young people suspected of criminal offending.

Limiting the power of arrest & detention

Reflecting its diversionary focus, CYPFA section 214 admirably discourages the use of arrest for young people suspected of committing a criminal offence. Assuming sufficient evidence that a crime has been committed, a young person can only be arrested to ensure an appearance in court; to prevent further offending; or to prevent the loss of evidence (including interference with witnesses). In addition, an officer may arrest a young person for certain higher level offences enumerated in s. 214(2) if the arrest is "in the public interest." Each officer who arrests a young person must also file a report specifying the reason(s) for the arrest. Youth Advocates can review disclosure and other evidence as part of the process to determine if the arrest meets s. 214 requirements.

The specific legislative directive to limit arrests of young people informs police decision making. The reasons for arrest, however, are still discretionary and open for interpretation. For example, during my observations, a young person was arrested for shoplifting because the police noted he had run from the store when confronted by a clerk. In addition, he had been charged with shoplifting (from a different establishment) on a previous instance some months earlier. Therefore, even with a minor offence, the police arrested the young person on the basis that he might abscond (since he ran when confronted) or shoplift again (because he had done so some months earlier). Arguably, this was a stretch of the intent of the law. On the other hand, Youth Court judges will dismiss charges associated with an arrest that doesn't meet the requirements. For example, in *Police v TW*,[150] the Youth Court dismissed a charge after a young person was arrested in court for defacing court property (carving a

[150] Police v. TW, YC Rotorua [2011] 13 (2011).

design in the wooden prisoner's dock) in plain view of all courtroom participants. The Court (reluctantly) noted that the young person was in custody for another matter (so would surely not abscond) and the instrument used for the defacement had been confiscated (so would both neither re-offend nor destroy evidence).

An additional concern for young people under arrest is the potential use of police cell detention. The youth justice sector is well aware of this issue and a thorough Crown agency report identifies shortcomings in practice.[151] According to CYPFA sections 235 and 236 a young person may be detained either by CYF in a CYF residence or, in certain circumstances, in police cell custody, until the next Youth Court is in session. Section 234 empowers NZP, after an arrest, to release a young person, set bail conditions (until a court appearance) pursuant to Bail Act 2000, or deliver the young person to the family, iwi or other approved person after an arrest. The initial custody decision is made by NZP, although to detain a young person in a police cell beyond twenty four hours after an arrest, CYF must agree. Given that a Youth Advocate is not appointed until, at the earliest, an appearance before a judicial official, the young person may not have legal counsel at this decision point, although CYF generally seeks to limit detention through exploring alternatives within the young person's family and its own resources.

NZP and CYF present the young person to a judicial officer the next available day. The judicial officer can either be a justice of a peace or a District Court judge sitting as a Youth Court for the purposes of who can issue an order for police cell custody remand to be reviewed every 24 hours until the next available Youth Court session.[152] The young person is not guaranteed the services of a specialised Youth Advocate in these circumstances, so may be represented by a duty solicitor until the Youth Court's involvement. From a practice point of view, CYF representatives report that the duty solicitor is often not involved during the repeated 24 hour reviews that take place until the Youth Court is back in session.

New Zealand is in a similar situation to many jurisdictions in the US, including Massachusetts, in having limited sittings of youth justice-specific judicial officers. However, this need for increased and earlier access to Youth Advocates for young people who have been arrested—regardless of custody-- has been noted as an issue since at least 1997.[153] During my court observations, I saw a case where after a weekend arrest (and release by NZP on bail until court five days later), the Youth Advocate was not appointed until the actual court appearance.

For those youth detained pending their first Youth Court appearance, a panel Youth Advocate can help reduce the use of detention. CYF tries to limit detention of young people and seek alternatives to both police cell custody and youth justice residences (both secure and staff supervised facilities). However, a duly appointed Youth Advocate is in a position to aid in this process. In the case of *Police v CG YC Upper Hutt*,[154] for example, NZP executed an arrest and detained the accused young people for over 24 hours (including a 16 year old who was breastfeeding). Although the charges were dismissed for illegal arrests, and the NZP admonished for the extended police cell stay, an early appointment could have

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[151] Human Rights Commission, Children's Commissioner, and Independent Police Conduct Authority, "Joint Thematic Review of Young Persons in Police Detention" (Wellington, New Zealand: Independent Police Conduct Authority, October 2012).
[152] Ibid.
[153] Morris, Maxwell, and Shepherd, "Being a Young Advocate: An Analysis of Their Role and Responsibilities," pp. 48-49.
[154] Police v CG Youth Court Upper Hutt, [2012] NZYC 8 (2012).

averted some of the real harm. Besides reviewing the strength of the case (including the arrest) and the protocols, the rapport afforded through the attorney-client relationship might provide alternatives to detention—either from a police cell or a CYF facility-- that are overlooked or even more appropriate in the circumstances. Youth Aid officers have also noted that a Youth Advocate is helpful to ensure understanding of bail conditions. In 24 hour police cell review instances, the Youth Advocate can also ensure that both NZP and CYF are making every effort to find alternatives, as well as seeking review of remand orders pursuant to s. 241.

With the requirement that all arrested youth must eventually appear in court,[155] and the need to take into account a young person's sense of time, section 5(f), a system to monitor and measure timely appointments seems prudent. Some matters may be able to be withdrawn by Youth Aid police after consultation with counsel without the need to even appear in Youth Court, thus meeting a YCAP goal of reducing escalation into the youth justice system. In my experience, also, early appointment reduces anxiety for the young person and family.

Recommendation for New Zealand: *Given the eventual appearance in court for all arrested youth, the goal should be to appoint a Youth Advocate within 24 hours of arrest, the limit on police custody, regardless of detention status.*

Questioning of children and young people

CYPFA sections 215 through 231 recognise the vulnerability of young people when questioned by police. As with adults, young people are entitled to remain silent when questioned by police. The New Zealand Police have a standard warning that should be provided to those subjected to police questioning. Unlike in Massachusetts, and the United States, the warnings must be provided regardless of whether the person is free to leave or not. If the young person is not under arrest and free to leave, the young person must be advised that they can refuse to accompany a police officer (or can leave the station), as long as they provide their name and address information to the police.

CYPFA s. 218 requires that the warnings be explained "in a manner and in language that is appropriate to the age and level of the child and young person." This is interpreted to mean that a mere recitation of the rights is not sufficient. Police are expected to ask young people to explain their understanding of the rights, although the thoroughness of this step can be a subject of litigation. The "Youth Justice Checklist"[156] also reminds officers to consider "whether questioning is taking place at age appropriate times/circumstances." In addition, a young person must consult with a "nominated person" to help them understand their rights and to be present during any questioning. A lawyer may also advise the young person and be present during questioning and, if so, may replace the nominated person (but a nominated person does not preclude legal counsel).

Before questioning a young person, the police are required to instruct a young person that they must nominate a parent or guardian; an adult family member; or any other adult to be present at the interview. If the young person does not, or cannot, nominate a person—or the police make a determination that the selected nominated person will likely "pervert the course of justice" (and no other nominations are made) the police can select an 'independent nominated person.' Whether a youth-nominated person or independent, NZP provide the

[155] *Children, Young Persons and Their Families Act 1989*, s. 245.
[156] Appendix 2.

nominated person with a sheet explaining their responsibilities, referred to a "POL-388A."[157] This information sheet was drafted in cooperation with Sonja Cooper, senior Youth Advocate (although it is my understanding that direct lawyer participation is preferred in the interview process). A nominated person's role, according to the NZP instructions is:

- Ensure the child/young person understands their rights;
- Ensure that the child/young person can leave at any time, if not under arrest;
- Find out whether the child/young person wants to answer questions or make a statement;
- Support the child/young person during any questioning;
- Inform the interviewer if the nominated person doesn't understand the requirements or how to fulfill the role; and
- If the child/young person is not being treated fairly, tell the interviewer immediately and, if concerns remain, inform the police officer in charge of the station.

In order to carry out this role, the nominated person must, of course, understand the various rights guaranteed by sections 215 to 231.

Currently, the New Zealand Police are responsible for maintaining a list of the independent nominated persons (INP), training them as to their duties, and paying them for their services when called. Each police station processes their own payments, so there is no uniform billing system that would allow a review of how often the system is used. One station for example, lumps its expenditures for interpreters and INPs into one line item. INPs are not paid at the same rate across the country. Anecdotal information suggests that some INPs don't seek payment at all—they perceive their role as a community service– so even with billing records, it would be difficult to assess the extent of the use of INPs. The NZP can decide which INP to call, often relying on the local Justice of the Peace. In some stations, NZP will allow the young person to choose from the list. In one such case, the young person just pointed at the first name on the list. Some stations have outdated or even non-existent lists of INPs and others may use favoured INPs rather than randomly selecting from a list. There is no data about how often young people need independent nominated persons versus a family nominated person. Although a nominated person is always a part of the process, the young person must affirmatively request to speak to a lawyer.

New Zealand does provide for telephone consultation with a lawyer through the Police Detention Legal Assistance (PDLA), administered and financed through the Ministry of Justice. The budget for PDLA for last fiscal year was $400,700 with 162,209 reported apprehensions by NZP (averages to $2.50 per offence, although not used for every offence). A PDLA lawyer is paid a flat fee of $35 for any telephone consultation, regardless of the length of the telephone call. PDLA lawyers may also exercise their own discretion and appear in person at a police station if a telephone consultation is inadequate. Lawyers can bill for time and travel when appearing in person at the rate of $98/hour and $147/hour for nights and weekends. PDLA lawyers are not necessarily Youth Advocates and acceptance into the programme does not require any special training or expertise in CYPFA or in communicating with young people (although many Youth Advocates are in the PDLA-list of approved lawyers). The PDLA guidelines recommend that if a child or young person

[157] Appendix 5: POL388A (Nominated Persons Duties and Instructions)

seeks legal advice through the PDLA scheme, then the lawyer should appear in person because of the client's special vulnerability as a young person.[158]

Despite the provision in the Ministry of Justice's PDLA scheme, it does not appear as though young people utilise it. Anecdotally, NZP and Youth Advocates generally agree that young people rarely seek legal advice. A comparison to adult use of PDLA shows that young people are particularly vulnerable in this regard. I conducted a manual review of recent hard copy PDLA billing records for the Wellington region (there is no machine readable data). The count reflects that young people used PDLA services in about 0.5 per cent of the Wellington police district youth apprehensions, compared to 7.5 per cent of adults for apprehensions of people seventeen years and older. According to the PDLA records, (based on lawyer self-reporting, so subject to data quality concerns), for the completed year of 2014, youth used PDLA a total of 8 times over the course of 1190 offences (for 14-16 year olds) or 1586 offences (for 10-16 year olds), and never in person (as recommended in the guidelines). In contrast, adults used the scheme 929 times with a total of 12,356 offences. Although there may be explanations for the difference (including that much of the adult use was for advice about requests for breathalyzer tests after an arrest for driving while intoxicated—a particularly adult offence), this exploratory analysis certainly conforms to other jurisdictions' experience in this regard.[159]

The post-apprehension interview appears to be a standard NZP practice for both young people and adults. Based on estimations of the NZP and Youth Advocates I spoke to, however, young people provide statements to the police in 80 per cent of all cases—with close to 100 per cent in "more serious charges." The young people who assert their rights are referred to as experienced and savvy. In my observations (including court, Youth Advocate, CYF and NZP files), I found only a single case where a young person was not interviewed, and NZP specifically wrote that the interview was not conducted because the eyewitness, upon further investigation after the arrest, exonerated the young person.

NZP are encouraged to plan out their interrogation strategy, using a checklist and planning tool, in order to maximise the value of the information. However, there is no data about the actual rate of interviewing young people (or adult). It is also unclear how dependent police are on the statements to prove their case and to what extent interviews merely add to a robust and complete police investigation, or indeed whether an interview in which denials are made lead to the withdrawal of charges. In Massachusetts, my *impression* is that police attempt far fewer interviews, although research in the US also suggests the waiver of rights—when asked– is quite common.[160] In the case of young people, since so few cases even appear in Youth Court, it is difficult to assess the role of the interview in police practice even by the number of published decisions on the topic.

The legal community also has consistently asked for a review of the nominated person practice, citing anecdotal evidence of abuses, listing it as a concern in the Criminal Practice Committee since 2010 and repeated through 2012 (the latest available annual report).[161] Youth Advocates have reported to me instances where the INP is sleeping; badgering the

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[158] Ministry of Justice, "Police Detention Legal Assistance Service: Operational Policy (updated March 2015)," 2012, http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/information-for-legal-aid-providers/documents/manuals-and-policies/pdla-operational-policy, p. 12.

[159] Lynch, *Youth Justice in New Zealand*, p. 69.

[160] Hayley Cleary, "An Observational Study of Interview Characteristics and Miranda in Juvenile Interrogations" (Georgetown University, 2010), https://repository.library.georgetown.edu/handle/10822/553220.

[161] Youth Services Group, "Alternative Actions That Work National Guidelines" (New Zealand Police, 2011).

young person "to tell the truth"; or sitting passively in the face of overly aggressive police. In my observations of recorded interviews, a young person provided one-word answers alternating with eyebrow raises to an explanation of his rights. The only person more passive than the young person was the INP, who sat without a gesture or word. The rest of the interview consisted of agreements with the police questions and provided no detail which indicated independent knowledge. Because charges were filed in court, when the Youth Advocate was appointed, she raised the issue of following CYPFA in regards to the statements, and the Youth Aid prosecutor did withdraw the statement. Much of the negotiation and litigation in Youth Court centres on admissibility of statements, particularly with the quality of INP, but also the family-nominated person.

Courts have expressed concern about the performance of INP.[162] In *Police v LM YC Rotorua*,[163] for example, the Youth Court found that even though the INP testified that he had spoken to the young person, his responses when asked about his rights by the officer showed a lack of understanding. There is reluctance by the appellate courts to impose a requirement that the family-nominated person's role is to advise young people to seek legal counsel—even where it might be considered "best practice."[164] This is similar to Massachusetts, where the advice of an "interested adult" is not measured against the advice an attorney might (or should) provide.[165] While it is beyond the scope of this report to exhaustively review the judgments of New Zealand courts on this issue—each case turns on its own facts and applies existing law-- the policy question remains whether New Zealand should do more to protect the rights of young people during questioning. There is long-standing consensus within the youth justice sector that the nominated person system might benefit from revision.

There is no standard training for INPs, or indeed for family-nominated persons. As late as 2011, there was confusion among the justices of the peace about their role when called as INPs, describing it as a passive witnessing.[166] The misinformation sparked a response from Principal Youth Court Andrew Becroft, noting that

> "public training for such a role [INP] is not widely available. In the absence of training, we strongly recommend that no JP act as a nominated person without having first been fully briefed by your association on the role and responsibilities that it entails. A youth advocate may also be to assist you with this. The issue of training is currently under review, and such training may become more widely available in the future."[167]

Some NZP Youth Aid personnel do engage in a comprehensive training of INPs, a clear sign that NZP are attuned to the principles of CYPFA. In Counties Manakau, one of the highest crime areas of New Zealand, for instance, Youth Aid Sergeant Michael Fulcher uses a curriculum for INP, including videos and role-playing that encourages the exercise of the right to remain silent. In his presentation, he provides examples of INP intervening and stopping questioning, as well as explicit encouragement to call a lawyer. In one video for

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[162] R v Z, [2008] 3 NZLR 342 (2008).
[163] Police v. LM YC Rotorua, [2011] NZYC 55 (2011) ("Whatever might be considered best practice [positive advise to speak to a lawyer]," the police followed existing law.).
[164] Campbell v. Queen (R), [2014] NZCA 376 (2014).
[165] Commonwealth v. Philip S., 414 Mass. 804 (1993).
[166] Sarah Loftus, "Witnessing: What Should a JP See?," *Justices' Quarterly*, Summer 2011, p. ED14.
[167] Andrew Becroft, "Role of the 'Nominated Person,'" *Justices' Quarterly*, Winter 2012, p. 6.

example, the training criticises a common police technique to solicit statements that it is 'good to tell the truth':

> "[Video shows] Police officer reminds child or young person that it's important to tell the truth, and that honesty is the best policy. INP reminds officer that the child or young person should not be pressured to answer any questions, and reminds young person that they can choose to answer (and also may get legal advice, and explains the nature of legal advice)."

The training also emphasises the ability to stop questioning:

> "[Video shows] Police officer asks fundamental question, where it seems that child or young person may make fatal admission. INP interjects and reminds child or young person of the vulnerable situation they're in and of their right to get legal advice (and how a lawyer can help them)."

The training also includes the following role play exchange:

> *Nominated Person*: [speaking in private to young person] I'm here to support you. I have to try to make sure you're treated fairly and that you understand everything, okay?
>
> *Young Person*: Yes.
>
> *Nominated Person*: But it's important to remember that I'm not a lawyer—I'm not an expert on the law or what you should or shouldn't say. If you want a lawyer you can get one for free. Do you understand?
>
> *Young Person*: Yes.
>
> *Nominated Person*: Are you sure you don't want a lawyer? It's usually a good idea like I said, and you are in a bit of trouble [then when young person says he wants a lawyer] I'll go and tell the police that you want a lawyer. You might have to tell them as well."

The training privileges the right to remain silent, and indeed models a supportive assertion of access to counsel with the INP taking on the responsibility to inform the police of the young person's decision—an interaction that may be difficult for a young person in the face of authority. It, in fact, promotes the positive obligation to seek legal advice. This training, though, is *ad hoc* and subject to the initiative and delivery skill of a local officer. The NZP itself, according to Ross Lienert, National Manager for Youth, wants to transfer the responsibility of overseeing the nominated-person training and appointment process, noting that it is a clear conflict of interest and clouds perceptions of NZP adherence to young people's rights.[168]

As a result of the above concerns, the Ministry of Justice convened a working group that arrived at cogent arguments to revise the current scheme. The working group collated much of the research showing that young people have difficulty understanding their rights and that family members often are put in the untenable position of being both protector of rights and a good parent who evidences cooperation with police with the aim of "making things right." The working group arrived at two basic possible approaches, improving training for nominated persons or using lawyers. The Canadian approach, noted approvingly, but not

[168] Question and answer session at the Youth Advocates Conference 2015 held in Auckland, New Zealand July 13-14, 2015.

adopted, in court cases,[169] and considered by the Ministry of Justice working group, seems to be disfavoured because of its perceived onerous requirements for police to explicitly advise youth to utilise free and accessible legal counsel, despite it being a best practice.

A short-term solution, nevertheless, is to re-word POL388A ("Advice to and Duties of a Nominated Person") to strongly encourage the use of existing PDLA services—and ensure that PDLA lawyers are trained to give advice to children and young people. Using the spirit of the Counties Manakau training, a possible revision is to have the nominated person give additional advice that includes the following exonerations to the young person:

- A lawyer is the best person to help you figure out if you should answer questions the police ask you
- The police will NOT punish you or treat you differently if you ask to speak to a lawyer
- If you ask, a lawyer will talk to you, on the phone, right now—and you don't have to pay
- You will be able to talk to the lawyer without anyone else around and everything you talk about will be private (nobody else will know what you talk about)
- The lawyer will come to meet you face to face after you talk on the phone and you don't have to pay anything
- After you speak to a lawyer, you will have the best information to make your decision about answering questions from the police now, later or not at all
- Young people who have been in your situation feel better after talking to a lawyer

In New Zealand the youth justice sector has a clear view of the rights and vulnerabilities that are at stake when police question children and young people. Like most jurisdictions, including the US, there is a reluctance to complicate law enforcement needs by limiting questioning of suspects. The CYPFA emphasis on quickly ensuring accountability—and the privileging of restoration-- runs at cross-currents with the right to remain silent.

However, the pragmatic and informal approach can also support the second option to address the concern over nominated persons. Section 221(2)(c) of CYPFA could be amended to require that "the child or young person makes or gives the statement in the presence of a solicitor or barrister" rather than the current "in the presence" of a lawyer *or* a nominated person.[170] This would eliminate the requirement for an independent nominated person altogether and encourage, but not require, a family nominated person to support the young person as described in section 222(1).

To the extent that New Zealand (and other jurisdictions) want to ensure that interviews with young people are consensual and fair, legal counsel should be provided and required before a waiver of the right to silence and not leave the question of understanding to law enforcement, whose implicit bias is to obtain a statement. As art. 40 in UNCROC suggests, an explicit adherence to rights models behaviour for young people and promotes legal socialisation (youth justice systems should work to "reinforce[s] the child's respect for the human rights and fundamental freedoms"). Although requiring lawyers for all interviews is

[169] R v Z, [2008] 3 NZLR 342 (2008).
[170] *Children, Young Persons and Their Families Act 1989*, s. 221 (2)(c) only requires the presence of one adult, either a solicitor/barrister or a nominated person for a statement to be admissible, although both may be present.

beyond current practice both in New Zealand and the US—and UNCROC's more general "legal assistance," it is consistent with a rights-based focus on youth justice that recognises the special vulnerability of children.

Currently, there are over 200 Youth Advocates in New Zealand. With the low number of cases in Youth Court, there is an underutilisation of their expertise. An advantage of using lawyers, from an operational point of view, is that they are already trained—eliminating the need to operate an INP scheme and to create special training for family-nominated persons (who of course could still attend any interview and, subject to lawyer-client privilege, be a part of a decision-making process about waiver). The shift of the resources currently provided to INPs– $25 to $50 minimum, with expenses for transportation—can offset the money paid through the PDLA scheme for a phone call, $35, with additional costs for face to face discussion, so as a total expenditure it may not increase as much as feared. In addition, subequent litigation costs could drop, especially where the same lawyer providing assistance is appointed to the matter court. The Youth Court reports that many more attorneys seek to join the panel. Drawing on this pool to supplement a PDLA-like scheme of existing Youth Advocates provides an opportunity to develop future panel members—particularly as the many lawyers who have practised since the passage of CYPFA in 1989 wind down the practice of law.

Although Youth Advocates may not be available twenty-four hours a day, most cases do not require an immediate interview with a young person. Also, given the discouragement to interview young people at odd hours and places as a potential violation of their special vulnerabilities, a delay to more regular hours is consistent with a developmentally informed rights-based focus. It is true that the inability to immediately and directly question children and young people will impact police practice.

The default legal advice to young people facing police questioning is to exercise the right to remain silent. In particular, Youth Advocates note that the current rules of evidence (as in Massachusetts) don't allow a young person to introduce exculpatory statements into evidence, limiting the incentive to "tell their side of the story." Without an immediate law enforcement need for a young person's statement (the "public safety exception" which already allows evidence of statements made without warnings), requiring legal counsel at police questioning (whether operationally or legislatively) promotes the primacy of rights.

Because of the restorative justice approach of CYPFA, New Zealand's youth justice system does offer developmentally-appropriate opportunities for young people to take responsibility for their behaviour, as well as for Youth Aid officers to reconsider the efficacy of charges. If a case is weakened, or even unsustainable, by the lack of admissible statements, a young person, with the aid of a lawyer, may very well choose to submit to an interview and engage in a restorative process after collaboration with their lawyer. It is essentially a question of maximising the value of the rights of children and young people versus the desire for law enforcement efficiency in determining the level of protection afforded during questioning.

The fact that the right to remain silent during questioning appears to almost always be waived by children and young people suggests a rather empty right. Without a reliance on confessions, investigation may need to depend on witness testimony and forensic evidence rather than interviews with the accused. It may lead to fewer apprehensions, but also fewer entrances into the youth justice pipeline. Given the basic CYPFA assumption that most young people desist from delinquent behaviour without any state intervention at all, even assuming that a young person "gets away" with an unproveable offence, it is unlikely to increase reported crime. Further, even if the ability to prosecute a particular incident is limited without an interview, it still does not limit a young person's family from addressing

any behaviour within its own social structure—including making any reparations, utilising community resources, or (re)engaging with iwi. It just does so without the oversight of the state. In fact, to require an active case for such services only draws more youth into the justice pipeline.

A Youth Advocate related an anecdote in which, after succeeding in excluding a statement that ended the prosecution, the Youth Advocate arranged, through the Youth Aid officer, a meeting with the victim so that the young person could nevertheless apologise. New Zealand is fortunate to have a culture of trust among youth justice professionals—even those who are typically 'adversarial.' Many issues are resolved through negotiation without recourse to formal litigation. Given the trust that has developed under the CYPFA framework, there should be a renewed emphasis on rights at the investigative state during police interviews.

Recommendation for New Zealand: *CYPFA should be amended to only allow statements of a young person to be admitted into evidence if a lawyer is present during the police interview and, in the interim, the nominated persons should be directed to give specific advice to young person that consultation with a lawyer is the best course of action.*

Alternative actions

Alternative actions serve to limit a young person's involvement in the youth justice system and address about 80 per cent of all youth apprehensions in New Zealand.[171] As discussed above, section 208(a) of CYPFA is the basis—and only legislative guidance-- for NZP's Youth Aid division practice. A rights-based interpretation of the section requires a legitimate basis of prosecution—for "criminal proceedings"—before there can be "an alternative means of dealing with the matter."[172] Youth Aid best practice also requires "sufficient evidence to mount a successful prosecution."[173] Alongside the well-earned and widespread faith in New Zealand's Youth Aid, access to legal counsel at this stage might shorten a journey in the youth justice pipeline.

Without impinging on the benefits of the informality of the alternative action process, the reality of the power dynamic between a uniformed Youth Aid officer and a young person and that person's family must be acknowledged—even in New Zealand with its culture of community support. The police officer has the authority to file charges if a proposed plan doesn't meet NZP requirements or is uncompleted.

Many Youth Aid officers note that it can be difficult to build trust with young people, particularly because 'front line' police officers can poison attitudes. Māori youth, in particular, are impacted by policing. Many initiatives and studies confirm that police and Māori, youth in particular, are distrustful of one another.[174] The reasons and context for this

[171] Andrew Becroft and Sacha Norrie, "Out of Court (And Sometimes In)-Playing to Win: Restorative Practices and Processes of the New Zealand Youth Justice System" (Restorative Practices in Action: A Conference for School and Justice Practitioners, New York, 2015).
[172] Lynch, *Youth Justice in New Zealand*, p. 85-101.
[173] Ministry of Justice and Ministry of Social Development, "Youth Crime Action Plan 2013-2023," p. 25.
[174] Justine O'Reilly and New Zealand Police, "A Review of Police and Iwi/Maori Relationships: Working Together to Reduce Offending and Victimisation" (Wellington, New Zealand: New Zealand Police, 2014); Gabrielle Maxwell and Catherine Smith, "Police Perceptions of Maori, A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri" (Wellington, New Zealand: Institute of Criminology, Victoria University of Wellington, 1998), http://www.rethinking.org.nz/assets/Maori%20and%20the%20CJS/22%20Police-Perceptions-of-Maori.pdf; Pania Te Whaiti and Michael Roguski, "Maori Perceptions of the Police" (Wellington, New Zealand: New

relationship are complex, and reflect similar trends to those in the US between law enforcement and minority communities. It is beyond the scope of this report to analyse the origins and reproduction of this phenomenon. For these purposes, the dynamic when a Youth Aid officer offers an alternative to prosecution to a young person (and family) are impacted by past experiences with police, including those negatively influenced by cultural biases.

Consultations with young people confirm the difficulty in negotiating a diversion plan.[175] Some of the comments from young people include "They think we are young and dumb and that they can overpower us"; "They should lay out our options so we can come up with a better plan so it will work for both of us"; and "They can be intimidating which makes building relationships hard." On the other hand, they report that "police that talk to you like normal and give you a second chance are good" and "Writing an apology letter is good…"

The admission to the police allegations necessary to access alternative actions is not admissible in court,[176] but a discussion of the young person's behaviour is inevitable. This discussion addresses the crimogenic factors that Youth Aid seeks to address (such as peer associations, alcohol and drug use, and school success). Although an *investigative* interview—intended to be used in court and protected by section 215 and sequence-- is not part of the alternative action, there can also be a discussion of specifics of the criminal charges. The restorative and accountability elements of a plan[177] require clarity about the role of the young person in any behaviour. From a police point of view, this information is also helpful for intelligence gathering.

According to Youth Aid officers, most young people agree to participate in an alternative action. If a young person questions the evidence for the potential prosecution or is hesitant to agree to a plan, there are various responses. First, an officer may simply leave and decide whether or not to prosecute. One Youth Aid officer explained that he might just wait for another opportunity to intervene—usually if the young person was apprehended for a subsequent accusation—but sometimes just wait a few days and return with the offer. Second, the Youth Aid officer might go over the evidence in the file with the young person and explain the high likelihood of a successful prosecution. Third, a Youth Aid officer might simply state that a refusal will lead to NZP moving forward to an intention to charge FGC, with an eventual outcome that is comparable to the alternative action. The referral form to CYF for an intention to charge conference lists one of the reasons as "denied charge [after offer of alternative action]." None of these responses are misleading, but they all show the inherent coercive nature of the process—one that requires great sensitivity on the part of a Youth Aid officer to manage.

For historical reasons—there is no specific legislative mandate-- NZP have developed and manage the alternative action space, giving them a legitimate stake in the success of young people. All players in New Zealand's youth justice sector recognise that in this context, NZP act as "prosecutor, jury and judge." A YA explained that he trusts his local Youth Aid officer to talk and question young people, knowing that the officer is positive youth development focused, but if he heard that a 'frontline' officer was visiting a young client, he'd be on the

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Zealand Police, 1998), http://www.police.govt.nz/sites/default/files/publications/maori-perceptions-of-police.pdf.

[175] Zoey Caldwell, "'I'm Trying to the Do the Right Thing-Just Going about It the Wrong Way': Young People's Submission to the Youth Crime Action Plan" (Wellington, New Zealand: Office of the Children's Commisioner & JustSpeak, September 2012).

[176] Lynch, *Youth Justice in New Zealand*, p. 94.

[177] Youth Services Group, "Alternative Actions That Work National Guidelines," p. 17.

telephone 'in a heartbeat' telling him to get out. Upon the granting of bail to a young person, a mother who was the alleged victim of an assault by her son told a judge that she'd only call the Youth Aid officer if anything happened at home—she didn't trust the 'front line' police to intervene effectively as they tended to escalate the situation. Another YA explained this contradiction as a system where the direct unmediated police negotiation with a young person about criminal liability and the appropriate response violates fundamental concerns about rights but until something untoward is revealed, nobody will change it.

Alternative actions are at the foundation of New Zealand's youth justice system. The organic system developed by NZP embodies the diversionary goal of CYPFA, coupled with Youth Aid officers' keen understanding of youth development. For example, in the rationale for Standard 5 of Alternative Action ("Monitoring/Support"), it explains "[P]olice staff need to be realistic in understanding that there will be times when people struggle to comply with plans and not assume they are intentionally not complying. It will often be better to support the person to complete the plan than take an overly punitive approach in holding them accountable."

From a pragmatic point of view, allowing NZP to act alone, through the trusted Youth Aid, certainly simplifies processes. Certainly in my observations, I saw examples of thoughtful responses—and follow up– to young people's behaviour by Youth Aid. For example, a young person with multiple instances of shoplifting was assessed a single set of community work hours rather than piling on multiple sets for each offence. Another officer set up appointments with the caregiver to drive the family to register for housing benefits, allowing the young person to enrol in school. An officer accepted a caregiver's own reported response to alleged department store shoplifting (taking away a cell phone as punishment, grounding and payment) as sufficient and closed the matter. In certain areas, police are relinquishing specific plans in lieu of involvement in the local iwi—leaving the iwi to decide the specific relevant and appropriate response.

Nevertheless, the alternative action plan is not diversion from prosecution, but rather diversion from *formal* prosecution in a Youth Court. It is diversion to a process that looks very much like an FGC—without counsel.[178] Legal counsel—lawyers-- at the alternative action stage certainly cuts against New Zealand's youth justice culture. The assumption—and indeed some evidence[179]– that fewer formalities (and professionals) lead to better outcomes drives much of the practice.

However, a rights-based approach would ensure a check on NZP's discretion (including an unconscious bias to cherry pick or privilege certain responses), no matter how well-intentioned or framed in restorative justice language, thus ensuring more transparent consent. According to Maxwell's 2005 study, 12 per cent of young people reported that they accepted a diversion plan although they did not believe they committed an offence. "In each case…they came to resent what had happened when they experienced the impact of the consequences on their lives."[180] Over a third of all young people reported not being a part of the decision making around an alternative action plan. Fifteen per cent disagreed that they had been treated fairly in their diversion and a quarter felt that they were not treated

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[178] Lynch, *Youth Justice in New Zealand*.
[179] Gabrielle Maxwell and Judy Paulin, "The Impact of Police Responses to Young Offenders with a Particular Focus on Diversion: A Report for the New Zealand Police" (Wellington, New Zealand: Crime & Justice Research Centre, Victoria University of Wellington, 2005), http://rethinking.catalystdemo.net.nz/eserv/rcp:416/_The_impact_of_Police_responses_to_yo.pdf, pp. 84-92.
[180] Ibid.

with respect. While a majority of young people in Maxwell's study have positive alternative action experiences, it is not universal.

Although Youth Aid has a culture of informality and encouragement of innovation, the inherent coercive context must be acknowledged.[181] In the context of diversion, the United Nations Committee on the Rights of the Child, overseeing the treaty to which New Zealand is a signatory, commented that:

> "The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered…and on the possibility of review of the measure."[182]

Strict adherence to Youth Aid best practices—as described in the guidelines[183]-- will maximise fair outcomes, though human nature and history suggests that an independent counterbalance to police powers is useful. Even though the guidelines are laudatory, a change in leadership with no statutory or structural check, can lead to a different exercise of the diversionary powers. This coercion can be tempered by access to counsel.

New Zealand's adult diversionary scheme does incorporate access to counsel.[184] The adult diversionary scheme, governed by NZP's "Adult Diversion Scheme Policy", is available when eligible adults first appear in court for a charged offence. Based on certain criteria—which are stricter than for young people in the Youth Aid diversion practice—a person will be offered the choice to be diverted from formal prosecution. Instead, the diverted adult will write a letter of apology, pay restitution, and/or otherwise make the community whole—thereby addressing the harm through a restorative justice bounded approach. In the adult courts, however, there is a specific provision that counsel can—and should be—consulted:

> "At the first court appearance, the offender has access to speak to the duty lawyer and may also have the opportunity to discuss the case with the judge. However, in most cases an adjournment is sought by a registrar in the registrar's list before the offender appears before the judge. This process ensures that the scheme is transparent."[185]

Although technically not an investigation, offers of diversion implicate section 208(h) CYPFA, the principle that young people are particularly vulnerable during any investigation relating to the possible commission of a crime. The young person is asked to admit criminal liability, albeit with the practice that the admission is not used as evidence and reveal criminogenic factors that impact the quality and quantity of state invervention. The due process rights of young people should be as great as, or greater than, that as for adults offered diversion. Given the value of limiting escalation into the justice system, waiting until court for a YA may be too late—and inefficient.

Access to counsel at a diversionary stage can reduce escalation into the youth justice system. First, an attorney can review police evidence to ensure that an alternative action only occurs where an offence is proveable with admissible evidence. Youth Aid officers, to their credit,

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[181] "United Nations Standard Minimum Rules for the Administration of Juvenile Justice," 1985, Section 11. ("consent should be left unchallenged, since it might sometimes be given out of sheer desperation…care should be taken to minimize the potential for coercion and intimidation…").
[182] United Nations Convention on the Rights of the Child, "General Comment No 10 (2007): Children's Rights in Juvenile Justice CRC/C/GC/10," 2007.
[183] Youth Services Group, "Alternative Actions That Work National Guidelines."
[184] New Zealand Police, "Adult Diversion Scheme Policy" (New Zealand Police, March 2014), http://www.police.govt.nz/sites/default/files/publications/adult-diverson-scheme-policy_0.pdf.
[185] Ibid. p. 12.

report that if a young person provides information that raises doubts about the case, the information can be passed on to the investigating officer about next steps, including withdrawing charges. From a legal perspective, assuming a lay person can negotiate about criminal liability with a professional prosecutor is fraught with danger. For example, during my observations, a note that read "Evidence is weak, try to get agreement [for an alternative action]" was attached to a file. The good intentioned temptation to use weak cases as a basis to address crimonegenic risk factors undermines CYPFA's principles. An avenue to test cases before court involvement is a means to further promote positive youth development through less contact with the youth justice system—particularly where Youth Advocates report that good relationships with Youth Aid allow for informal resolutions. One senior YA reported to me that a phone call explaining why the evidence is insufficient for prosecution is enough to have charges withdrawn; there is no youth development reason why this same technique can't be used at an earlier stage.

Second, as in FGCs, counsel can help young people and their families understand the parameters of a reasonable alternative action plan to ensure the equity of interventions. One of the strengths of the alternative action structure is the freedom police officers have to work with families to design creative and unique responses. Many parents welcome the opportunity for help from Youth Aid. These plans often look very much like FGC plans, complete with restorative justice processes. Best practices call for meetings between the young person and the alleged victim, essentially a 'mini-FGC.' Like FGCs, then, a plan is a negotiated agreement and depends on the judgment and approval of a police officer. However, an anecdote was reported that a young person's family reluctantly acquiesced to required participation in a NZP-sponsored youth development programme for a first offence despite many arguably strong pro-social protective factors. In another alternative action, a young person completed sixty hours of community services—triple the amount in the guidelines, and twenty hours more than the maximum with a supervisor's approval. The practice of fingerprinting youth (and used to investigate past and future allegations) as part of an alternative action plan is also troubling, even with the consent information sheet, particularly where adolescent brain development science suggests its power as a deterrent is limited, leaving its only real value for police surveillance. A YA, embracing best practices of their unique role, can amplify a young person's participation in this process, even (or especially) with merely private, confidential advice—including with realistic appraisals about what might happen if the offer of diversion is refused.

Third, as noted in Maxwell's study, research about procedural justice suggests that counsel can promote acceptance of the outcomes. Procedural justice is the theory that justice-involved youth will engage in interventions if they perceive that they have been treated fairly by legal authorities.[186] During my discussions with Youth Aid officers, it was reported that families with higher economic status tend to seek legal advice more often than from lower economic background (even where the eventual outcome was to engage in an alternative action). A YA confirmed the phenomenon that wealthier families retain legal services to negotiate both police interviews and alternatives to prosecution. This suggests that an option for legal advice—when known and accessible—helps to either stop an esclation into the youth justice system or produce informed consent to engage in diversionary processes. To the extent that a family and its young person does not have the social and/or financial capital

[186] For a cogent explanation of procedural justice see, Pennington, "The Role of Parents and Parens Patriae," pp. 36-40.

to access advice, the lack of counsel can reproduce societal inequity, including the need to access services through the justice system rather than an alternative route.

Operationally, information about access to counsel could be provided at two points in the process. First, the template introduction letter[187] sent to families to organise the first meeting can include information about how to contact the local Youth Advocates. The letter could include a paragraph that reads:

> Because this meeting is about criminal offending, your child, with your help, can call a lawyer for free, confidential and independent advice about what to do. The following trained lawyers will take your call: [insert names and contact information for local Youth Advocate(s)].

In addition, the same information should be provided directly to the young person at the first face to face meeting, particularly to ensure the young person is aware of the information. As part of the Alternative Action national guidelines, under Standard 3 ("Engagement"), police are expected to conduct a face to face meeting with a young person and their family (Action 3.1) as well as offer an opportunity to make suggestions about the plan (Action 3.2) with an invitation to a meeting (Action 3.3) for final discussions and signing the AA plan (Action 3.4).

Because alternative action files are "prosecution ready," it should be relatively easy for Youth Advocates to provide advice by reviewing police materials (usually obtained via e-mail in Youth Court cases) and a discussion with the young person and family before Action 3.4. Youth Advocates would also have to be prepared to offer legal advice and support in a flexible and timely manner. Most alternative action plans are signed about a month after an apprehension (one to two weeks from police front line to Youth Aid and 21 days from receipt of file to agreement on a plan to achieve a distinction of 'excellence'). The inclusion of legal advice during this month-long process would not interfere with the timeliness of any police led intervention.[188]

Financially, the Youth Court oversees payment of Youth Advocates. The relationship between the bench and Youth Advocates is positive and collaborative. Some critics may suggest that Youth Advocates have an incentive to drag cases into court to extend billable hours. Based on my discussions with Youth Advocates, this seems unlikely; they are genuinely invested in young people's success. Many report routine under-billing in order to make themselves accessible. However, an out of court system appointment and billing protocol is necessary to ensure transparent oversight, whether through the Youth Court or the Ministry of Justice.

A more limited approach may focus only on those youth who have Youth Court cases—and hence Youth Advocates. Evidence suggests that most Youth Court defendants have had alternative action plans. Pragmatically, if a young person never progresses beyond the alternative action stage, then arguably the harm of any natural justice or equity violation is minimal (although injustice is difficult to measure). However, if the young person escalates into Youth Court, it is reasonable to examine any previous intervention for the purposes of arguing mitigation. A Youth Advocate should have full access to a young person's records,

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[187] Youth Services Group, "Alternative Actions That Work National Guidelines," p. 25.

[188] For all the reasons that parents tend to aid police during police interviews, as well as families that are too overwhelmed to carry through on seeking legal advice, it very well may be that very few use such a service. Coupled with independent oversight, described below, this is a pragmatic suggestion that at least acknowledges the importance of legal counsel in diversionary initiatives.

whether from NZP or CYF, to review interventions to date. From an advocate point of view, then, pointing to any shortcomings of previous plans—including any lack of fidelity to alternative action standards, violations of due process, or equity—could contribute to a more focused and relevant intervention (including withdrawal of formal charges). In the spirit of restorative justice, it also recognises any harm that is done to a particular young person in the context of administering youth justice.

Even in the absence of consistent and equal access to counsel, there are means of promoting transparency in the alternative action space. First, as in Ireland,[189] increased reporting of data about the alternative actions is important in any scenario. Within the youth justice sector there is a long-standing desire for NZP to provide Youth Aid with the ability to regularly report data about their work, particularly in conjunction with other players in the youth justice sector. Work to develop a minimum youth justice data set continues as part of the YCAP—a goal that has been pursued since 2004.[190] Also, recent emphasis on data collection and recording as a best practice for Youth Aid is an opportunity for NZP to provide more evidence in this regard. Certainly, more publically accessible information, including to researchers and academics, about practices across regions, ethnicities, charges, and other dimensions can help young people and their families understand their options as well as further public trust in the scheme.

Second, an independent auditor should review police records to ensure consistency and compliance with the guidelines. Currently, NZP has a system of internal supervision and oversight in Youth Aid. Each officer selects a file for the internal reviewer, and the internal reviewer selects a file from each officer. In addition, Police National Headquarters conducts annual file audits to provide feedback to each district on quality standards. However, with the confidentiality of the supervision process, it is difficult for *outsiders* to assess compliance with Crown Prosecution guidelines; with respect for individual rights for matters dealt with in extra-court processes (the vast majority of cases); and with adherence to the principles of the CYPFA in plans, particularly the restrictive elements.

Two Crown entities—independent but government-funded state agencies—in New Zealand could act as auditors. The Independent Police Conduct Authority[191] and the Children's Commissioner[192] are suited to report on and audit police led alternative actions. Respectively, both have mandates to review police activity and investigate allegations of violations of children's rights. The Children's Commissioner was initially established precisely to act as a 'watchdog' for CYPFA implementation and currently, in addition to ensuring compliance with UNCROC, under section 12(1)(l) is empowered "to inquire generally, into, and report on…any practice or procedure, that relates to the welfare of children." Their website does provide a free legal advice phone number, maintained by YouthLaw,[193] the community law centre for young people. However, only increased access to a local YA, with the ability to review disclosure and familiarity with local personalities, can address the "here and now" of advising a young person facing entry into the youth justice system through an alternative action.

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[189] Garda Youth Diversion Office, "Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme" (Dublin, Ireland: Garda, 2012).

[190] Philip Spier and Tanya Segessenmann, "Youth Justice Minimum Dataset: Data Integration Project" (Ministry of Justice, August 2004), www.justice.govt.nz/.../youth-justice-minimum-dataset-data-integration...

[191] *Independent Police Conduct Authority Act 1988*, 1988.

[192] *Children's Commissioner Act 2003*, 2003.

[193] "YouthLaw Aotearoa," accessed 22 July 2015, http://www.youthlaw.co.nz/.

Despite the best intentions of youth justice practitioners, as a signatory to the United Nations Convention on the Rights of the Child, New Zealand does not provide meaningful access to legal advice for young people in the alternative action space. The government statement that it is "generally consistent with the Beijing Rules and Riyadh Guidelines"[194] is generous in light of the clear directive to give young people access to legal advice in the diversionary space, before formal court proceedings.

Recommendation for New Zealand: *The youth justice sector should ensure that young people with alternative action diversion offers from NZP have access to free legal advice from local Youth Advocate panel members and that the pre-court diversionary systems are subjected to independent reporting and review*.

Intention to charge family group conferences

An intention to charge family group conference (ITC FGC) is designed to check the power of police to file charges against a young person and promote diversionary practices. Where a young person is not arrested, the police must first participate in an intention to charge conference to see if the matter can be resolved short of a Youth Court appearance. Although a Youth Advocate is an entitled member of FGCs, including ITC FGCs, CYPFA only requires counsel after charges have been filed. Privately retained lawyers do appear at ITC FGCs, as do panel Youth Advocates on an *ad hoc*, and often *pro bono*, basis.

New Zealand's youth justice sector recognises the gap in legal counsel at ITC FGCs. In my discussions with Youth Advocates, all have agreed that there should be meaningful access to legal counsel at ITC FGCs. YCAP raised the issue as an area of exploration. The Youth Court, through Principal Youth Court Judge Andrew Becroft, reports that this issue has been discussed for over a decade. The Government's 2002 Youth Offending Strategy highlighted the need to review the provision of youth advocates to represent young people at ITC FGCs.[195] The 2007 MSD discussion document "Safeguarding our Children: Updating the Children, Young Persons and their Families Act 1989" also highlighted the issue.

Within the last six months, both the Ministries of Social Development and Justice have presented clear and cogent advice to policy makers on this topic.[196] The advice pointed out that the lack of counsel at ITC FGCs contradicted both international and domestic and legal principles and created inefficiencies in the youth justice system. In New Zealand terms, Section 24 of the New Zealand Bill of Rights Act 1990 and case law suggest that the intention to charge stage triggers a right to counsel.[197] In Massachusetts terms, the practice of youth justice in New Zealand makes the ITC FGC a critical stage in a prosecution at which counsel should be provided pursuant to Mass. R. Crim. Proc. 8. It is not merely a charging mechanism, but also a place where admissions of criminal liability are made and plea negotiations—in the form of a plan-- take place.

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[194] Ministry of Social Development, "United Nations Convention on the Rights of the Child Fifth Periodic Report by the Government of New Zealand 2015" (United Nations, May 2015), https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/monitoring/uncroc/uncroc-report-for-public-consultation.pdf.

[195] Ministry of Justice and Ministry of Social Development, "Youth Offending Strategy: Preventing and Reducing Offending and Re-Offending by Children and Young People" (Wellington, New Zealand, April 2002), p. 50.

[196] I am endebted to the staff at the Ministries of Social Development and Justice who produced numerous documents on this topic. Their analysis and legal reasoning are gratefully adopted.

[197] Lynch, *Youth Justice in New Zealand*, p. 157.

The main substantive argument against ensuring meaningful access to counsel at ITC FGCs is that it undermines the restorative focus of a family group conference. A Youth Advocate will over-professionalise and formalise a process that is intended to empower families and their young people. There is fear that lawyers will make the process more adversarial, focused on technical details instead of a more holistic approach of repairing harm. Lawyers, it is thought, will dominate discussion.[198]

This position is based on an overly idealistic notion of how FGCs operate (whether ITC or not denied conferences). It incorporates the view of restorative justice as a practice where "[D]ecisions are made without reference to substantive criminal law…and participants attempt to agree to a mutually acceptable resolution."[199] FGCs do have the potential to be 'magical,' and there is good qualitative evidence that participants are moved to change positions by sharing information and emotions. Nevertheless, there is an element of 'plea bargaining' in the process.[200] One CYF staff member explained, for example, that a family didn't understand the seriousness of the offence because their proposed plan was too lenient and so was sent back for more family time to come up with a different intervention. In an interview, a family member who attended an FGC for a relative reported despair that their post-family time suggestion to provide panel beater training ('auto body repair' for US readers) for their young person was rejected as inadequate in a stolen car case—making the family feel that their investment of time and energy was for naught. Of course, lack of agreement is always possible in the FGC process, but the frustrations show that it is a negotiation.

The reality that CYF and NZP are entitled members means that an ITC FGC is firmly a government-run and sanctioned restorative justice process and the accused is faced with negotiating with representatives of the state. A recent Youth Court opinion expressed this idea. In *R v S N and Ors*,[201] Judge Walker reacted to the NZP decision to not participate in a court-ordered FGC (after reporting that the Crown Prosecutor insisted on an outcome that included court orders and leaving the conference). In addition to not being present to re-consider the charges—and hence the position on the outcome– based on a revision of the summary of facts, he explained that "[T]here is another unsatisfactory aspect of this Police withdrawal and that is to leave the victim of the offending to carry the burden of advancing its interests in the absence of the Police who were prosecuting the case, and as they would see it, on its behalf." Here, then, the role of the NZP as prosecutor in the FGC is articulated. The alleged victim is entitled to the benefit of professional aid in the intention to charge conference, while a young person and family—in an ITC conference—is left without the aid of a devoted professional. It is simply unfair to deny meaningful access to counsel when facing a prosecutorial agent from NZP and a judge in the form of a CYF coordinator—even ones who are steeped in CYPFA principles.

The New Zealand youth justice sector has struggled to quantify the impact of lack of counsel at ITC FGCs. However, during my observations, a youth justice response to a particular incident illustrates the perils of an uncounseled ITC FGC. The police apprehended one adult

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[198] See, generally, Lynch, "Respecting Legal Rights in the New Zealand Youth Justice Family Group Conference"; Lynch, "The Rights of Young Person in the New Zealand Youth Justice Family Group Conference."
[199] Hanan, "Decriminalizing Violence."
[200] Ibid.
[201] R v S N and Ors, [2015] NZYC 239 (2015).

and two young persons (Pat and Sam for this account) in the early morning hours. According to police documents, they were charged with burglary (s. 231 of the Crimes Act 1961) and unlawfully taking a motor vehicle (s. 226 of the Crimes Act 1961). The police questioned all three of the people, and based on their statements, wrote in the summary of the facts that, late at night, the adult took the keys from the owner's home while Pat and Sam waited outside. Sam then drove the car with the others as passengers. Sam was also charged with driving without an appropriate licence (as summarised in the ITC FGC process). NZP stopped the car before anybody had reported the car stolen. The police only then discovered that the car had been taken with a key burgled from the owner's home. An intention to charge conference was held for both young people. Neither had legal representation.

Pat's ITC FGC was seen as a success. The resident of the house, also the owner of the car, appeared. Pat, supported by two parents, admitted to the summary of facts and apologised profusely, including with a homemade art project. The victim accepted the apology and agreed to oversee Pat complete the community work part of the plan. Pat also engaged in screening for alcohol and drug abuse. Pat's family also asked that Pat only associate with Sam under their family supervision. Pat completed the plan, albeit with a short extension on the original deadline and after continuing to associate with Sam.

Sam's ITC FGC, held later in the week, was more challenging. The victim had been told by NZP that Pat was the follower in the group and Sam was 'tougher'—and more culpable. The process was interrupted at the beginning when the emotion of hearing an unexpected family member's voice on the speaker-phone (calling in for the ITC FGC) overwhelmed Sam. Sam offered a note of apology, which was accepted by the victim. The plan that was accepted, reasonable on its face, was articulated by the professionals in the room, albeit after CYF had met with Sam and family in preparation for the conference. The family agreed to it after a few minutes in family time. Both CYF and NZP reported that they had seen Sam driving (without the proper level of licence but with family permission) in the weeks before the conference, but after the apprehension. NZP insisted on charges being laid in court, along with proposed bail conditions, in anticipation of court supervision of the plan with the goal of a '282' discharge. The family was not keen on the bail conditions, which included a curfew and non-association orders with Pat. The professionals explained that the family could choose to disagree with the entire plan, enter a denial of the charges and be assigned a Youth Advocate—but that the likely outcome (bail conditions set by the judge at first appearance and re-convening the FGC) would be the same. Indeed, Sam was told that it was lucky in the initial allotment of community work hours that the regular NZP representative wasn't available because they "usually asked for three times the amount." They were persuaded to have the case go forward to court with the plan articulated by the conference, with a notation that the non-association with Pat was not agreed.

The final plan, extending for three months, required *x* number of community hours; an apology letter (brought to the conference itself); attending an education institution part time, followed by full-time enrollment; alcohol and drug assessment and treatment as directed; general health assessment; mentoring programme; multi-systemic therapy; and bail conditions (to be presented when charges filed along with the plan) that included curfew; no unlicensed driving; attend the educational institution; attend all appointments relating to the plan; and remain alcohol and drug-free.

It is impossible to know what impact a YA *would* have had on the eventual outcome of this ITC FGC. However, in using this scenario as a case study, and looking at what preceded and followed the ITC FGC, it provides an opportunity for a discussion about how a YA *could*

enhance positive youth development outcomes and uphold the principles of CYPFA, including the YCAP goals of reducing escalation with early and sustainable exits from the youth justice system. Functionally, an ITC FGC's chief distinction from an FGC is lack of counsel, creating an almost pre-*In Re Gault* like scenario of uncounseled informal procedures in the name of restoration/rehabilitation—albeit without the immediate threat of detention.

First, when CYF received the referral from the NZP, supervisors noted concern about the appropriateness of the charges. Arguably the two young people were not party (s. 66 of Crimes Act; similar to 'joint venture' in Massachusetts) to the offence of burglary as they were outside at the time the adult retrieved the car key. Second, the records reflect duplicative charges. The charges listed in various records are "[B]urgles other property over $5000 at night" and "Takes a motor vehicle." Assuming that the car key was taken from the home, it seems that adding a monetary value to the burglary (for the car) is unnecessary when the group was charged with also taking the car. They either committed a burglary resulting in a $5000 loss (the car) or they committed a burglary (by entering the home) and then also took a car. Should the matter wind its way to a bail hearing or court order, this inaccuracy on the charges for the young person's record could lead to collateral consequences (remand on the matter on a bail breach, higher Youth Court tariff orders, opposition to bail for subsequent charges, increased adult sentences, etc.). The Ministry of Justice's own "Seriousness Scale"[202] distinguishes burglary by the loss amount; with the listed charge double the level as the alternative. This is no doubt a 'technical defence'—and indeed the relevant legal section is merely burglary (with no indication of monetary loss), but the file portrays a different calibre of criminal culpability (even if from a restorative justice perspective, the harm is unchanged). A prompt correction of the record could limit future damage, but more importantly reinforces the justice basis for intervention, while still allowing for a restorative process that acknowledges the harm.

Second, the two most serious charges appear to be based on police interrogation. Had the two young people asserted their right to silence (or had a cognisable claim that their rights were violated when interviewed), certainly the burglary charge—the most serious of the three—could not have been proven. The victim had no idea that the key, let alone the car, was missing until the next morning when NZP knocked on the door. Even if the adult's fingerprints were discovered in the home it would not be sufficient to prove that the young people were party to the crime of burglary. Any statement by a co-accused against Sam is also likely inadmissible to prove the crime.[203] Further, the main evidence that the car was taken (the closest Massachusetts equivalent is between "receiving stolen motor vehicle" and "use without authority") is that it was missing for a short period of time (since the owner went to bed with the car outside the home). However, the car was driven with its own key. There was no damage to the ignition or drive shaft, signs of a stolen car. In other words, certainly for the two passengers (Pat and the adult), and possibly for the driver (Sam), without their explicit admission that they were using the vehicle "dishonestly and without claim of right,"[204] the mismatch between the driver/occupants identity and the registered

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[202] Charles Sullivan and Ong Su-Wuen, "Justice Sector Seriousness Score (2012 Revision): FAQs" (Ministry of Justice, December 13, 2013), http://www.justice.govt.nz/justice-sector/statistics/justice-sector-working-papers/justice-sector-offence-seriousness-score-faq.

[203] In the United States, *Bruton v. US*, 391 123 (1968) and in New Zealand, Evidence Act 2006, s. 27, limit the use of a co-defendant/offender statements.

[204] Crimes Act 1961 no. 43, s. 226.

owner was the only evidence of their knowledge. Proof that Sam had personal knowledge that the car was stolen, or taken, in the first place is essential to the analysis of legal culpability.

It is also unclear what led police to stop the vehicle in the first place. Sam's advanced physical development suggested a person who easily could have had a licence to drive. There was no indication of any traffic infringements. The make and model of the car suggested an unnoteworthy vehicle, easily accessible to young drivers. Of course, without further information (including a potential counter-narrative from Sam), it is not possible to determine whether the New Zealand Bill of Rights sections 21 and 22 (protection against unreasonable seizure and arbitrary detention) were violated when police stopped the car. Such a finding could have led to a ruling that the subsequent statements were inadmissible.

Again, while this criminal defence lens may seem like 'technicalities' that mask wrong-doing, they are based on the principle of burden of proof and the rights of the young people. Perhaps because restorative justice ideals encourage discussions that move away from technical definitions of crime, Youth Aid officers generally are willing to adjust charges—it is an easy compromise to achieve the same goal. This is no doubt helpful, but since these processes take place in a state-run justice system, it is also important to adhere to rules of criminal law, particularly where records of criminal liability can trigger collateral consequences. To the extent that a young person engages in the justice system—formal or not-- an informed choice about the assertion of rights requires confidential discussions with counsel. Nothing precludes a family from exercising its own authority over a young person after police contact, from the state offering voluntary (and accessible) services, or even a young person choosing to participate in restorative justice processes with fuller understanding of its role in a wider justice system.

Third, and relevant to the plan itself, during the ITC FGC, certain family dynamics and history were unveiled. Sam responded emotionally to the unexpected (speaker phone) presence of another family member. The conference was calm and respectful during this event, pausing for a break. The group, understandably, did not press Sam about the family history that triggered this reaction—an FGC may be therapeutic, but is not itself therapy--but this event may have impacted the ability to engage. There were mostly one-word answers from the young person during the process. The unique role of the Youth Advocate, trained to operate within restorative justice principles but with a legal duty to the young person, does not have to mean that the FGC will be turned into an overly formalistic court process. As one YA reported, the pre-FGC rapport with a young person contributes to the preparation that is key to an engaged process. A Youth Advocate can, however, serve as a check on both NZP—ensuring due process—and CYF—maximising preparation.

Sam's experience since the ITC FGC points to how early involvement by a Youth Advocate might contribute to positive youth development—or at least reduce the harm of over-involvement in the youth justice pipeline. When the case was referred, NZP stated it was keen on assessing Sam's behavior at the FGC because they felt the young person had displayed poor attitude and expected to insist that charges be filed to increase oversight via bail conditions. As an entitled member of the FGC, it is natural, though not required, to have an idea of a preferred outcome. In this scenario, there was not any discussion about the efficacy of filing charges in Youth Court. Professionals in the conference intimated that Sam was, on a previous occasion, suspected of taking a car and returning it before the owner knew about it, but also noted there was no evidence of such activity; it's not clear how much this impacted attitudes. Had a YA been present for the ITC FGC, perhaps this point might

have been discussed more thoroughly. Or, in this case, even when charges were filed, a YA might more effectively direct the Youth Court's attention to the principles of CYPFA and appealed to the court for some relief, thus reducing escalation into Youth Court. Arguably, the plan could have then been monitored by the conference members.

The 'coal face' reality is that by the time the YA is appointed at the post-ITC FGC court appearance (whether, ideally, sometime before the first court date, or on the court date itself), the momentum of an agreed ITC FGC plan is difficult to overcome. Emotionally and logistically, the parties are invested in continuing the course of events—even if there are arguments that rights were violated or the process was undermined by a lack of an open mind. Sam had already begun the plan by the time a Youth Advocate was appointed. It is a fine line to walk, at that point, between following a client's instructions to take the path of least resistance, and insisting on careful consideration about what *might* have been, particularly with an eye towards a young person's sense of time. A further delay to raise legal issues—at this point in the process—may not fit with a young person's preferred course of action.

In Sam's case, the plan from the ITC FGC was reported to the judge, and a court-ordered FGC was waived pursuant to s. 248, turning the uncounselled admissions into proven charges. The plan, already begun after the conference, was now subject to the court's oversight of the bail conditions, including a curfew. After a slow start and a bail breach, the court ordered another FGC and further curtailed the bail. Sam later breached the new curfew, presumably to see a friend. As a result, Sam was detained in police cell custody overnight. Police opposed bail but a non-Youth Court judicial official released Sam on a 24 hour curfew and a non-association with the friend, a status which lasted for a bit more than two weeks. After the additional FGC was convened to revise the plan, the court ordered that a curfew remain, stricter than original, but less than the 24 hours and the non-association order against the friend was lifted. Sam was further penalised for the bail breach by adding hours to community work requirement equal to the amount already completed (about a third of what the original plan called for) by that point.

Sam's education attendance has been slow. Sam was slow to make connections at the usual youth centre with whom community work is assigned, but about three quarters of the work—cleaning parks, cleaning the organisation's vehicles, and writing an essay—have been completed. Participation in substance abuse services is sporadic, but improving. Sam faces the possibility of additional FGCs and, now, court orders (placing the initial offenses firmly on an official record).

The well-intentioned interventions mark the tension in using justice systems to address welfare concerns. It is clear that Sam and family could benefit from services. Sam's self-reported alcohol and drug use fits into a pattern of family substance abuse. Sam is out at night and in the early morning hours. The youth justice system is providing access to services—for both Sam and family-- to address these behaviours. The prospect of further restrictions on liberty (curfews, non-associations and time spent in community work) and court orders are real possibilities for behaviour that has been, essentially, typical of adolescence: staying out late, not going to school, and unaddressed health issues in the form of substance abuse.[205] Sam has not, however, been charged with any new offences—a period

[205] See, generally, Jay Blitzman, "Are We Criminalizing Adolescence?," *Criminal Justice*, American Bar Association, 39, no. 1 (Spring 2015).

of more than half a year since the initial apprehension by police.

Denying Sam counsel at that early stage did not have any appreciable benefit. A Youth Advocate at the ITC FGC may have altered the course of Sam's youth justice escalation, including a period of detention (albeit relatively short, but arguably unnecessary). If nothing else, the ability to have engaged in the process more fully—with the benefit of legal advice from an individual whose loyalty is solely dedicated to the young person-- promotes perceptions of fairness, and hence engagement. Even a legal analysis that there was no viable defence allows a young person to become socialised to a system that respects human rights—and is an opportunity for increased civic awareness. Counsel can enhance a real opportunity to engage in restorative justice processes with fully informed consent. This case study shows how the provision of counsel at an ITC FGC for a standard youth justice case—riding around in a stolen car-- presents a real opportunity to maximise youth development. For a jurisdiction seeking to adopt New Zealand's youth justice model, a clear system to appoint counsel at the ITC FGC diversionary stage is essential.

There are financial implications to providing counsel at ITC FGCs. Based on analysis provided by the Ministries of Social Development and Justice, for the fiscal year 2012-13, there were 3,760 ITC FGCs. At cost of $930 (for the full six hour initial appointment rate, almost never to be reached if the matter ends with no further escalation), the estimated annual cost is $3.5 million. In the last fiscal year ending 30 June 2015, there were 2,486 ITC FGCs, dropping the annual cost to $2.3 million, about 65 per cent of the original cost.

Recent data from Youth Court outcomes suggests that there may be an opportunity to reduce escalation into the youth justice pipeline by providing counsel at ITC FGCs. Statistics New Zealand reports the number of outcomes in a year for Youth Court. Three outcomes potentially reflect the impact of Youth Advocates in reducing escalation: dismissals by a Youth Court; withdrawals by NZP; and "other" outcomes which include acquittals, fitness to plead issues and stays of proceedings. Dismissals suggest a successful legal argument that a matter should no longer be prosecuted. Withdrawals by NZP could reflect the influence of Youth Advocates in reducing or de-escalating matters. Over the last five years (2010 to 2014), about 8 per cent of all cases resulted in one of these three outcomes. If even 4 per cent of ITC FGCs in 2014 were eliminated because of Youth Advocate involvement as part of the youth justice team, about a hundred young people would enjoy earlier, and hopefully, sustainable exits from the youth justice system.

As noted, however, there are additional potential downstream cost savings. First, any matter that does proceed to court will require less time at that stage because of the early Youth Advocate involvement. Second, matters that are resolved short of Youth Court appearances will save money system-wide. In Sam's case, the costs of the brief detention and court time would have been eliminated. In addition, based on my discussions with Youth Advocates, most cases will require far less than the full six hours of billable time. Where the other members of the youth justice team, NZP and CYF, meet their best practice guidelines, the work of a Youth Advocate will be minimal—and where it needs to be corrected, better so that it happens earlier in the justice pipeline than later. Funding the Youth Court to institute a formal and transparent system of appointment to ITC FGCs will ensure compliance with the spirit and letter of UNCROC, as well as domestic legal concerns. The current climate of low caseloads offers the ideal opportunity to maximise the return on improved access to lawyers.

The Youth Advocate, as a barrister or solicitor, is the only role on the list of entitled members who does not receive an invitation to an ITC FGC. In fact, non-entitled professional members are routinely invited. Limiting access to counsel at ITC FGCs to certain categories of cases (based on lower age or more serious charges) could easily mask the impact of increased access to counsel for lower level cases—sometimes the ones that most often lead to unnecessary escalation. The facts of the case and the condition of the young person are more important to evaluate than a superficial distinction based on age or charges.

Recommendation for New Zealand: *A pragmatic solution to the lack of counsel is that the CYF Youth Justice coordinator should invite a Youth Advocate to each ITC FGC, whose responsibility it should be to coordinate with NZP, CYF and the young person to determine the appropriate level of involvement.*

Accountability of Youth Advocates

In the years before the passage of CYPFA, lawyers for children and young people were not held in high regard. During the hearings leading up to *Puao-Te-Ata-Tu (Daybreak)*, the influential report that shaped the final contours of CYPFA, Caroline Morgan, a community court worker spoke.[206] She explained that she was part of a movement to increase the Māori presence in court because "the city community felt that there was very little, you know that big mincing machine that's going through Childrens Court and District Court, was still happening to our people, and we felt that there needed to be Māori Representation, a Māori presence in Court all the time." One of the committee members, Donna Hall, a lawyer and well known Māori community leader, had the following exchange with her:

> *Donna Hall*: What do you think about [sic] Public Defender?
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> *Caroline Morgan*: Yeah, well we fear it, because at the moment in Children's Court, we've got a. [sic] like a Childrens Advocate Scheme going, you know, we're, now people are getting representation, but yeah we still feel there is a need for community based sort of, what would you call it, Community support to be acknowledged in our Courts.
>
> *Donna Hall*: Do you see the Public Defender as being some what from the community?
>
> *Caroline Morgan*: Hmm…
>
> *Donna Hall*: What would you say if I told you the Public Defender is, I understand it, is going to be a group of Lawyers, paid by Government.
>
> *Caroline Morgan*: yeah, well this is what's happening at the moment, in Children's Advocate Scheme, and it's giving better representation for our young people, but it still means that we're mediating. The community are doing all the work, we're actually carrying the whole thing, because we have liaise with the Lawyer and the Lawyer tell the Judge. Yeah cut him right out. Yeah, I mean the community should be recognised enough, to be able to make the statement themselves, because the Lawyers are doing things off the backs off [sic] a lot of our community people. We're going out finding Housing, we're going out finding the jobs, and the Lawyers are doing very little, but actually representing the young person, and we're doing all the Social Work and everything, that actually helping to get that

[206] *Maori Perspective Advisory Committee* (Boys Town, Auckland, 1985).

> person you know, through the Court, and we think that the community should be doing, having that direct contact with whatever is going to be happening with the young person.

The performance of Youth Advocates, as in any profession, can vary. Some differences are a matter of approach, personality or strategy, although some actions fall below the standard of practice as expressed in the varying sections of the Youth Advocate Manual (2011). Aside from the complexity of CYPFA, young people can be difficult to represent. They are apt to forget appointments, change phone numbers without notice, and confound adults. Still, a common complaint from clients, both in Massachusetts and in New Zealand, is insufficient time with an attorney.

In visiting the Te Au rere a te Tonga Youth Justice Residence in Palmerston North, holding mostly young men on remand and a few serving a supervision with residence order, staff reported that young people have sporadic contact with lawyers. It was exceedingly rare for lawyers to have face to face visits with young people—and the geography of New Zealand makes it very difficult for out of town Youth Advocates to reach the facility (where young people from throughout New Zealand may be detained). Nevertheless, the lack of regular face to face visits—even if through a local Youth Advocate agent-- certainly can impact the quality of representation and makes it more difficult to develop the trust and rapport necessary for effective representation. There are complaints from clients that they have insufficient time to consult with a Youth Advocate, sometimes meeting on the day of the court hearing or the FGC. During FGCs, some Youth Advocates leave after the admission to the police summary of facts. Other Youth Advocates have been reported to keep their physical distance from clients during the FGC, sitting next to NZP. A YJ coordinator recounted a Youth Advocate who, in his judgment, crossed the line from supporting the young person to take responsibility to badgering the client to admit to the police summary of facts.

A group of young people with a justice history spoke about their relationship with lawyers.[207] One young person said that he hated going to court because it's embarrassing, suggesting that pre-court access to lawyers could be helpful. Another young person felt like he was picked on by the police, but thinks lawyers have been good to him. Another person didn't like that the assigned lawyer only spoke to his mother—and trusts neither police nor lawyers. One young person felt comfortable with the Māori lawyer because they shared a common experience. In thinking about what they expect from lawyers, young people reported that they should be free (no cost), talk through the process, explain events in a way that can be understood, and take time to listen to young people's perspective and treat them like a person, not a criminal. They emphasised the need for lawyers to explain what was happening in the process because often they were confused—and to "search for the good in young people."

New Zealand's current Youth Advocates are senior attorneys and their replacements will benefit from a transition of clear practice standards. Legal Aid practitioners in New Zealand are covered by the Ministry of Justice's Practice Standards for Legal Aid Providers.[208] In

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[207] Based on discussions and email correspondence with fellow panel member, Law for Change (25 May 2015), Makere Derbyshire, Author Interview/Correspondence, 24 June 2015.

[208] http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/information-for-legal-aid-providers/documents/provider-services/practice-standards-for-legal-aid-providers/Practice%20standards%20for%20all%20Legal%20aid%20provider.%2015032012.docx.pdf

addition, both NZP's Youth Aid[209] and CYF's Youth Justice Coordinators have checklist best practices and guidelines[210] that re-enforce CYPFA principles and roles—a model that will be useful in developing a clear training and supervision tool for new YA panel members. In the United States, the more general National Juvenile Defense Standards,[211] and the jurisdiction-specific Massachusetts' Youth Advocacy Division performance standards,[212] could serve as helpful models for New Zealand practitioners. The comprehensive (but incomplete) New Zealand Law Society's Youth Advocates Manual (2011), provides a solid foundation for the standards (although the best practice guidelines have not been updated since 1998). The challenge in a scheme of best practices is to ensure quality representation whilst allowing for variation of style and circumstance. As with Youth Aid officers and CYF YJ Coordinators, the community also needs a verifiable trust in the discernment of Youth Advocates.

Recommendation for New Zealand: *In order to maximise the benefits of meaningful access to legal counsel, including in the pre-Youth Court space, an updated set of Youth Advocate standards should be promulgated by the New Zealand Law Society Youth Justice Committee.*

[209] Youth Services Group, "Alternative Actions That Work National Guidelines."
[210] Appendix 1.
[211]Patricia Puritz et al., "National Juvenile Defense Standards" (Washington, DC: National Juvenile Defender Center, 2012), http://jpo.wrlc.org/bitstream/handle/11204/3232/NationalJuvenileDefenseStandards2013.pdf?sequence=1.
[212]https://www.publiccounsel.net/ya/wp-content/uploads/sites/6/2014/11/Juv-Del-Performance-Standards-10-22-14-FINAL.pdf

5 CONCLUSIONS AND RECOMMENDATIONS

New Zealand allows restorative principles to flourish in the midst of a formal legal system. The involvement of state representatives from NZP and CYF—with the power to deny liberty, impose unwanted services or interfere with parental rights—requires great sensitivity and oversight. Although CYPFA does not allow the ultimate sanction to be imposed on a young person—custodial detention—without the approval of the Youth Court after appointment of a Youth Advocate, most young people in New Zealand experience justice informally without counsel. From a young person's point of view, the diversionary imposed conditions are remarkably similar to those imposed through a Youth Court. With little oversight in the diversionary stages—where the bulk of "youth justice" takes place-- the extent to which young people's legal rights are honoured is difficult to answer. Viewing the restorative justice principles of CYPFA and due process ideals as intertwined—rather than sequential or bifurcated—highlights the importance of meaningful access to counsel throughout the entire youth justice pipeline.

Increased access to counsel in the pre-court stages need not result in the over-professionalisation of the CYPFA framework of diversion. It would also align New Zealand with its obligations under the United Nations Convention on Children's Rights, as well as domestic principles around natural justice. Currently, the absence of counsel until the last stage of the youth justice pipeline—Youth Court-- puts young people in an untenable position. In order for young people to make decisions about how to respond to allegations of criminal wrongdoing by the State, they must negotiate alone with professionals from NZP and CYF. They are waiving counsel without counsel. Youth Advocates in New Zealand, with a keen understanding of the benefits of restorative justice framework, and part of the team of youth justice professionals, can help ensure that youth participation in the pre-court process is genuine, fair and effective.

Inspired by the admirable New Zealand pragmatic streak, the following five recommendations to improve meaningful access to counsel in New Zealand are made:

- The Youth Court, in cooperation with NZP, should ensure that a Youth Advocate is appointed to represent young people within twenty four hours of any arrest, regardless of detention status.
- CYPFA should be amended to only allow statements of a young person to be admitted into evidence if a lawyer is present during the police interview and, in the interim, the nominated persons should be directed to give specific advice to young person that consultation with a lawyer is the best course of action.
- In the process of offering an alternative to prosecution to a young person, NZP should provide information to the young person and the family about how to contact a trained Youth Advocate for advice, and an independent monitoring group should be empowered to review and audit Youth Aid files to report both on diversionary practices and ensure compliance with NZP guidelines.
- When convening an intention to charge family group conference, an invitation should be sent to a trained Youth Advocate, who will have the responsibility to coordinate with NZP, CYF and the young person to determine the appropriate level of involvement.
- An updated set of Youth Advocate practice standards should be promulgated by the New Zealand Law Society's Youth Justice Committee.

Massachusetts has much to learn from New Zealand's youth justice experience, not least the explicit privileging of decarceration and diversion. Wholesale policy transfer is a difficult process and often dependent on similar historical moments.[213] The conditions that resulted in CYPFA were particular, but not necessarily unique. Māori insistence on increased autonomy and general consensus for decarceration are similar to current conditions in the United States generally, and Massachusetts in particular inasmuch as a re-imagining of current practice in light of racial and ethnic disparities is underway. A more widespread consensus to overhaul current legislation is necessary. Even with the cautions raised in this report, many jurisdictions, shamefully do not enjoy the New Zealand level of trust and cooperation between law enforcement, social services and the legal community around juvenile justice issues. Given the training and intention necessary to create a workforce culture imbued with restorative principles, Massachusetts could benefit from considering the following to move towards a more restorative, and less retributive, approach to young people in conflict with the law, hopefully as a means to develop such a consensus:

- Adopt the court-ordered family group conference model to reach agreement about disposition. Although restorative justice practices have historically been seen only as a process to divert young people from court, New Zealand's experience shows that in-court, judicially supervised restorative processes can be effective, even, for more serious cases. For cases in Juvenile Court, Massachusetts practitioners can work within the current practice and, if a plan is reached, it can be presented to a Judge as an agreed-upon disposition—including whether or not the young person should formally change their plea pursuant to Mass. R. Crim. P. 12, or be placed on pre-trial probation under Mass. Gen. Laws c. 276, s. 87. Given that, like New Zealand, the discussions must be completely confidential in order to maximise opportunities for restorative practices, careful consideration about how police and/or prosecutors will be involved is necessary.
- Empower Juvenile Court judges to grant a disposition similar to New Zealand's "Section 282" discharge upon the completion of a term of probation to give young people a truly clean slate. Currently, as noted in the case of *Commonwealth v. Humberto H.*,[214] even the appearance of an arraignment in a criminal history has negative effects on young people.
- Promote and govern diversion through a comprehensive, state-wide framework, rather than the current *ad hoc* approach. Because of the multiple police departments and district attorneys, legislation emphasising out of court resolutions but allowing innovation, should be considered. However, especially for a jurisdiction without an established culture of practice built around restorative principles, distinctions between informal and formal processes should not limit access to counsel for young people to make fully informed choices about how to participate in diversion programmes.

[213] See, generally, Shearar, "'At the Heart of the Matter.'"
[214] Commonwealth v. Humberto H., 466 Mass. 562 (2013).

APPENDICES

1: Family Group Conferencing Practice Standards (CYF)

Family Group Conferencing Practice Standards

1. Meaningfully Engaged Family/Whānau	
Elements	**Descriptor**
1.1 Family/whānau are engaged with at the earliest stages of involvement and key members identified	• As soon as the referral is accepted, first contact letters are sent out to known family/whānau. • Letters are promptly followed up by contacting known family/whānau and arrangements are made to meet face to face with those willing and able to do so. • Prior to approaching family/whānau, the coordinator familiarises themselves with the known issues and circumstances of the mokopuna and their family/whānau in order to help build a good rapport. • All reasonable avenues are pursued to identify and contact additional family/whānau such as speaking to colleagues, community leaders, known family/whānau, and searching CYRAS records. • Consideration is given to the culture and circumstances of family/whānau when planning contact.
1.2 Family/whānau (maternal and paternal) should be met face to face prior to the family group conference	• Family/ whānau are met face-to-face. • When face-to-face meetings with family/whānau and mokopuna occur, these are held in a manner that is respectful and understanding of their needs and culture. • The use of hui a whānau and whānau hui is encouraged and supported where appropriate. • When it has not been possible to meet family/whānau or mokopuna face to face, the reasons for this are documented and family/whānau are fully consulted about the conference through other means.

1.3 Family/whānau are consulted about where and when the conference is held and any protocols they wish to adopt at the conference	• Options for where and when the conference could be held are widely explored and family/whānau are provided with this information. • Family/whānau are encouraged and supported to choose a time and place for the conference that meets their needs. • Family/whānau are encouraged and supported to identify protocols and procedures for the conference that meets their needs. • Māori whānau are encouraged and supported to use tikanga Māori protocols for the conference. • As far as possible, the wishes of the family/whānau are accommodated, whilst managing issues of practicality, safety, cost, and the needs of other participants. • Family/whānau are advised of the date, time and place for the conference as soon as it had been agreed.

1.4 Family/whānau are informed about what they can expect at the conference and assisted to think through what aspects of the conference may be difficult and how they will deal with this	• Family/whānau are provided with full information about the FGC process in a way that can be understood by all. • Family/whānau fully understand the issues and concerns that are to be addressed at the conference, and are supported and encouraged to come up with solutions and remedies that they can present to the conference. • Family/whānau understanding of the family group conference process, and of the issues and concerns to be addressed, is verified using approaches such as encouraging the family/whānau to reflect their understanding of the process. • Family/whānau has the opportunity to discuss any worries or concerns they have about the conference with the coordinator, and are supported to develop strategies to manage these. • Consideration is given to aspects of the conference that might be difficult and family/whānau are helped and supported to manage these in a way that works for them (e.g. bringing a support person, using different mediums for presenting to the conference).

1.5 When family/whānau are unable to attend the conference there is an effective means for presenting their views at the conference	• The views of all known family/whānau unable to attend the conference are clearly and succinctly recorded in CYRAS or in the mokopuna file. • All family/whānau unable to attend the conference are provided with different options about how their views can be presented at the conference, and are supported and encouraged to use the option that works best for them.

2. The Right Support People	
Elements	**Descriptor**
2.1 All people who are able to support and contribute to the family group conference, including professionals, iwi and caregivers, are identified and included in the process	• A pre-FGC consult takes place, informed by the known needs, strengths and risks of mokopuna, and this forum is used to identify the appropriate assessments, support people and the required next steps. • Professionals and support people are advised as soon as possible of their desired attendance or participation at the conference. • Health and education issues are considered and, if appropriate, health and education professionals are invited to participate in the conference. • Professionals and support people already working with the family/whānau are consulted about their level of participation. • When professionals and support people are new to or have limited understanding of the conference, every effort is made to consult with them face-to-face to explain the conference process and their role within it.
2.2 Participants arrive with a clear understanding of the family group conference process, their role and how they can best present their information	• Professionals and other support people have an opportunity to discuss the most appropriate way for them to present their information to ensure it is well understood by conference participants. • Professionals and other support people are provided with information about what they can expect at the conference, such as cultural protocols, potential risks and issues and how long they will likely need to be present. • Professionals can explain their role and are clear about their purpose at the conference.
2.3 Participants representing a service are able to provide details about what the service can offer the mokopuna and their family/whānau, and how and when their service can be accessed	• Professionals are prepared and encouraged to bring information and resources to the conference about services they represent and the assistance they may be able to provide the family/whānau. • During the conference, dialogue between professionals and the family/whānau is skilfully facilitated such that family/whānau are clear what services are available. • Entitled members have access to all relevant information from professionals about helping services and possible assistance to enable them to make the best decisions for mokopuna during family time.

2.4 For those unable to attend the conference there is an effective means for presenting their view/information at the conference	• Professionals and other information givers unable or unwilling to attend understand the conference process and there is discussion and agreement on the best way for them to present their information for this conference. • Professionals and other information givers unable or unwilling to attend the conference are supported to provide relevant information in a family friendly manner. • The views of professionals and support people unable to attend the conference are clearly and succinctly recorded in CYRAS or in the mokopuna file.

3. All Information	
Elements	**Descriptor**
3.1 Prior to the conference all relevant assessment and advice is gathered and appropriate assessments initiated	• Every effort is made to ensure all information relevant to the needs of the mokopuna is brought together. In particular, health and education information is considered. • Child, Youth and Family staff involved in the conference are familiar with any assessments or reports relevant to the conference and have conducted the appropriate consults. • The care and protection resource panel is consulted.
3.2 Comprehensive information about the mokopuna and their family/whānau is presented with respect and in a way that is appropriate to family/whānau taking into account cultural considerations	• Options are explored for how to best present information at the conference in a respectful and culturally appropriate manner. • The family/whānau and mokopuna are consulted about how they would like information presented at the conference and every effort is made to do so in a manner that meets their needs, is respectful and is culturally appropriate. • The family group conference consult takes place and is used to discuss how information can be presented in a manner that reflects the wishes of the family/whānau and mokopuna. • Professionals are supported to provide relevant information in a family friendly and culturally appropriate manner. • The family/whānau understanding of the information presented at the conference is verified before the family/whānau enter family time.
3.3 Consideration should be given to holding hui a whānau prior to the conference to share assessment information with the mokopuna and family/whānau so there are no surprises at the conference	• The potential benefits of holding hui a whānau and/or whānau hui are discussed with family/whānau, and family/whānau receive support and assistance to convene and hold these in cases where this is desired. • Family/whānau understand the concerns the conference will try to address, and have the opportunity to think about options and solutions prior to the family group conference.

4. Mokopuna Voices	
Elements	**Descriptor**
4.1 Mokopuna are enabled and encouraged to present their information at the conference in a way that is meaningful to them e.g. through pictures and letters	• Mokopuna are given the opportunity to express how they want to present their views, and are offered a range of options to do so appropriate to their age, gender, culture and development.
4.2 Mokopuna are assisted to identify people who can support and talk for them if they are unable to do this themselves	• Mokopuna are met face to face to explore who can support and talk for them if they are unable to do so themselves. • Where appropriate, age appropriate tools, such as the three houses, are used to assist mokopuna identify people who can support and talk for them.
4.3 Mokopuna are supported to talk in a language they feel comfortable with and to share how they feel about the decisions being made	• Family/whānau are encouraged to give mokopuna the opportunity to speak during family time. • Mokopuna are invited to share their views and feelings about decisions made at the conference in a way that keeps them safe (e.g. taking them aside with a trusted person), and are supported to share their views about proposed decisions. • Where appropriate, interpreters are engaged.
4.4 When mokopuna are too young, or are unable to participate, there is an effective means of including their needs in the conference process	• Every effort is made to ensure information givers present the right information, in a manner that emphasises the experiences of mokopuna, and describes the impact the concerns highlighted have on mokopuna e.g. the impact being exposed to family violence has for mokopuna. • The conference is facilitated in a manner that keeps the safety and needs of mokopuna at the centre of the conference i.e. skilfully bringing the focus back from adult issues to the safety and needs of the mokopuna.

4.5 Mokopuna are given information about what will be said in the hui a whānau and family group conference	• Mokopuna are provided with information about the conference which is appropriate for their age, developmental and cultural needs i.e. why, what, who, roles and process. This occurs as early as possible in the process. • Age/developmental/culturally appropriate mediums are used to provide the information e.g. word and picture stories. • Mokopuna understanding of what the conference is about is checked in an age, developmentally and culturally appropriate way such as asking them to repeat back in their own words or using scaling questions to ascertain the level of understanding.

5. Engaged Victims	
Elements	**Descriptor**
5.1 Victims are engaged in the way that works best for them to encourage and support their participation and contribution to the conference. Face to face contact is the desired approach to engage victims to prepare them for the conference	• The victim is invited to meet face to face prior to the conference and, if the victim wishes to do so, every effort is made to arrange the meeting in accordance with the victim's wishes. • The value of victim attendance for themselves, the mokopuna and the community is clearly explained. • In cases where the victim is reluctant to attend, high levels of influencing skills are used to manage and motivate the victim to move past an initial "no". • In cases where the victim is reluctant to attend, the victim's objections and barriers to attending are listened to and explored, and strategies are used to overcome these (e.g. meeting the needs of the victim, the use of motivational interviewing to move the victim through the stages of change).

5.2 Victims are consulted about where and when the conference is held and these views are taken into account	• The victim is invited to express their preference regarding the date, time and venue for the family group conference and efforts are made to accommodate the victim's wishes. • The victim's preferences regarding the date, time and venue of the conference are discussed with the family/whānau and police. • The victim is fully informed of the assistance and supports available to them to help them attend the conference e.g. financial support for travel, childcare and reimbursement of wages.

5.3 Victims are supported to have their say about how the mokopuna will be held accountable and what needs to be done to put things right	• The victim's confidence and readiness to tell their story and express their views about the offending is ascertained prior to the conference. • The victim is consulted regarding how they would like their story told and is offered a range of options to consider, such as speaking in person, reading from a letter, playing a pre-recorded video or asking someone else to present on their behalf. • The victim is informed of their right to bring support people and is encouraged to do so where appropriate.
5.4 Victims are assisted to consider what aspects of the conference may be difficult and how they will deal with this and what supports can be put in place to assist them with this	• Consideration is given to the aspects of the conference that could potentially be difficult for the victim, these aspects are discussed with the victim and the victim is offered strategies that could help them deal with any issues of concern e.g. developing a safety plan for the victim. • Victims are assisted to understand that family group conferences do not always provide the outcomes victims are seeking. • The victim is provided with information about support services. • The victim is encouraged to consider inviting someone to support them before, during and after the conference, and the role and limits of the support person at the conference are fully explained. • There is a plan in place for the arrival and departure of the victim at the venue (i.e. pre and post-conference) in order to promote the victim's well-being and safety. • The coordinator checks in with the victim immediately prior to and following the conference in order to promote their wellbeing and safety.
5.5 There is an effective means for presenting the views of those victims unable to attend, or who choose not to attend, the conference	• Victims unable or unwilling to attend the conference are informed of the conference process. • Victims unable or unwilling to attend the conference are informed how their information will be used and who is likely to hear this information. • Victims unwilling or unable to attend the conference are consulted regarding how they would like their story to be told and are offered a range of options to help them decide how to best present their information, such as writing a letter, playing a pre-recorded video or asking someone else to represent them at the conference.

6. Empowered Family/Whānau	
Elements	**Descriptor**
6.1 Family/whānau are aware of the objectives and principles of Children Young Persons and their Families Act 1989 and the importance of the family/whānau group participating in decisions affecting their mokopuna	• The background, purpose and principles of the Child, Young Persons and their Families Act, its emphasis of family-led decision making and the rights of family/whānau are explained to family/whānau in a clear and understandable way. • Where appropriate, resources are used to help family/whānau understand the family group conference, the reasons it came about and the rights of family/whānau, e.g. visual aids, the DVD, a copy of the principles and the rights of family/whānau, online or community resources. • Culturally appropriate support people and/or interpreters are used when necessary.
6.2 Family/whānau are encouraged and motivated to have started thinking about what they would like to happen for their mokopuna and what they would like to achieve from the conference	• Family/whānau are provided with enough information prior to the family group conference to enable them to consider options and develop solutions to the concerns that have been identified for mokopuna. This includes, where appropriate, information about helping services and resources, and examples of successful approaches used by other family/whānau. • The strengths of family/whānau are emphasised and family/whānau are encouraged to think creatively about how these can help develop a plan that keeps mokopuna safe and promotes their wellbeing. • Family/whānau are assisted to explore the resources available to support the plan by using approaches that are meaningful for the family e.g. the three houses, pictures, ecomaps, genograms, ecological systems theory. • Family/whānau are supported and encouraged to develop their own solutions to address the risks or concerns identified for mokopuna. • Family/whānau are encouraged and assisted to create a picture of what things will look like after the worries are resolved (solution focused).
6.3 Family/whānau are provided with written information as to the functions of the family group conference so they can refer back to this as required	• Family/whānau are provided with and taken through the family group conference brochure or other resources as appropriate (e.g. DVD).

6.4 At the conference the family/whānau have the right to family time to consider all information and develop a proposed plan	• Family/whānau are fully informed of their right to family time, what the time is for, and are supported and encouraged to use this time. • Family/whānau understand what is expected of them during family time and are clear about what the plan needs to address. • Family/whānau know how to access information during family time and all relevant information is available to them. • The facilities available at the conference support family time and are comfortable (e.g. mokopuna have access to toys, there are toilets and materials such as pens and a whiteboard are available).

7. Effective Facilitation	
Elements	**Descriptor**
7.1 A safe and interactive environment is established where all participants can contribute, are involved, able to voice their opinions freely and are listened to	• The coordinator maintains an objective, non-defensive and non-judgemental stance throughout the conference. • The coordinator is gender and culturally sensitive. • The coordinator actively promotes the participation of all in the conference and manages contributions to ensure that no one dominates the dialogue prior to and following family time. • The coordinator promotes the establishment of a positive environment for Māori whānau through the use of kawa, karakia, tikanga Māori as appropriate. • Conflict and disruptive behaviour is skilfully managed in the conference by means such as establishing 'ground rules', acknowledging tension and emotion, reframing, using breaks and 'time outs', and stopping the conference if it is necessary to do so. • The coordinator monitors levels of energy during the conference and applies strategies for managing low energy (e.g. taking breaks etc.). • The coordinator is able to 'sit with silence' when necessary. • Assumptions are challenged and people are invited to consider different points of view.

7.2 Participants are encouraged to consider ways in which mokopuna can be supported and their needs addressed	• The coordinator keeps the conference focused on developing solutions to address the needs of mokopuna. • As necessary, the coordinator intervenes to steer conversation away from adult issues unrelated to the needs, risks and strengths of the mokopuna. • The voices of mokopuna are meaningfully expressed in the conference and entitled participants are reminded to consider the views of mokopuna in family time.

7.3 Where mokopuna are at the conference because of their offending, the participants are encouraged to consider how mokopuna can also be held accountable for the offending and how things can be put right for the victim	• The views and expectations of the victim are clearly expressed in the conference and family/whānau are reminded to consider these in family time. • The mokopuna is encouraged to talk about how they feel about their offending behaviour and how they can start to put things right for the victim. • Participants are encouraged to consider what consequences are appropriate in the circumstances. • Information about reparation is provided to the conference and participants are encouraged to consider how the victim can be repaid.

7.4 Everyone leaves the conference with a clear understanding of the plan, their roles and responsibilities and the timeframes for actions to occur	• The written record of the plan is clear, complete and unambiguous. • Steps are taken to verify entitled members' understanding of the plan, such as walking through people's understanding of their responsibilities, tasks and timeframes. • The coordinator tells participants who is entitled to receive a copy of the plan, explains how this will happen and emphasises any tasks or actions that need immediate attention.

8. Active Plans

Elements	Descriptor
8.1 Needs, strengths and risks are specifically identified and addressed in the mokopuna plan	• The goals the plan seeks to achieve are clearly visible in the plan. • The goals of the plan are informed by the known risks and needs of mokopuna. • The plan reflects the strengths of mokopuna and family/whānau, and these have been drawn upon to support the outcomes the plan is seeking to achieve for mokopuna where appropriate.
8.2 Accountability and responsibility for offending is clearly addressed in an achievable way in the plan, and understood by the mokopuna and their family/ whānau	• The plan clearly outlines tasks, actions and/or consequences for the mokopuna in order to hold them accountable. • The tasks, actions and/or consequences for mokopuna have considered the age/maturity/developmental capacity, culture and resources available to mokopuna and their family/whānau, and have a realistic chance of being achieved. • The plan uses language that is understandable to mokopuna and their family/whānau.

8.3 Plans are Specific, Measurable, Achievable, Reviewable and Time framed in language the mokopuna and family/whānau understand. The plan details what is to happen if things go off track	• The plan meets the conditions of specific, measurable, achievable goals that are reviewable and time-framed i.e. the components of a SMART plan are present. • The plan describes the outcomes the plan is trying to achieve for mokopuna and family/whānau (e.g. behavioural changes, what will things look like when we have achieved our goals?). • The plan is written in strengths based language that emphasises achieving positive changes as opposed to reducing or removing negative behaviours. • The plan uses language that is understandable by mokopuna and the family/whānau. • The plan identifies the people responsible for monitoring the plan, outlines their roles and responsibilities and specifies what will happen if the plan goes off track. • The plan states how and when it is going to be reviewed.

8.4 Outcomes for mokopuna, identified in the plan, are realised in a timely manner	• The people responsible for monitoring the plan (e.g. the social worker) maintain regular contact with the services and people involved. They support people to fulfil their commitments, document progress and challenges, and act quickly and appropriately if things start going off track. • Updated Tuituia assessments are used to inform formal reviews of the plan. • The plan is reviewed in a timeframe appropriate to the age, developmental needs and circumstances of the mokopuna. • If the plan was not working for mokopuna, the family group conference is reconvened for the purpose of reviewing the plan.

2: Youth Justice Checklist (NZP)

POL 388 06/13

YOUTH JUSTICE CHECKLIST— STEPS FOR INVESTIGATION

Name of Child/ Young Person _____ DOB _____

Address _____

Parent/Guardian/Caregiver _____

Address _____

Date _____ Time _____ Location _____

(N.B. CIRCUMSTANCES WILL DICTATE SEQUENCE TO FOLLOW)

A Explanation of Rights. Subject to N.B.1 below, before questioning YOU NEED TO EXPLAIN THE FOLLOWING RIGHTS TO CYP in a manner and language appropriate to their age and understanding taking into account special characteristics of the CYP (e.g. English as a second language) and whether questioning is taking place at age appropriate times/circumstances:

- When you have reasonable grounds to suspect they have committed an offence.
- Before asking them questions intended to obtain an admission of an offence.
- When during questioning, you form reasonable grounds to suspect they committed an offence.

1. (If sufficient to arrest) THAT may be arrested if refuse name and address; and	YES	NO
2. THAT not obliged to accompany, and if consents, may withdraw consent any time; and	YES	NO
3. THAT not obliged to make statement; and	YES	NO
4. THAT if consents to make statement, may withdraw consent any time; and	YES	NO
5. THAT statement may be used in evidence, meaning if you are taken to court for [offence],what you say to me may be retold to the judge; and	YES	NO
6. THAT entitled to consult with lawyer and/or any person nominated by CYP in accordance with the Act and make or give a statement in their presence. Explain that a lawyer can tell them what their rights are and give advice about whether they should answer your questions; and	YES	NO
7. THAT you have a right to talk to a lawyer and you can do this for free. Explain the methods of finding a lawyer (duty list, telephone book); and	YES	NO
8. Have the CYP explain back to you in their own words what these rights means	YES	NO

N.B.1 Through explanation of rights are ALWAYS required but, in addition, if questioning a CYP about his/her involvement in an offence or suspected offence, and the CYP ask about any of his/her rights, explain all those rights relevant to the enquiry made.

1 and 2 do not apply if CYP is under arrest.

B WARNING

1. Has the warning been considered?	YES	NO
2. Have sufficient particulars been recorded for YAS to notify parents etc?	YES	NO

C WHEN MADE UP MIND TO CHARGE, OR CYP ARRESTED

Explain 1 to 8 in (A)

N.B.2 1 and 2 do not apply if CYP is under arrest. Does not apply if explanations have already been given within previous 1 hour.

D ARREST

If satisfied on reasonable grounds, that arrest necessary:

1. To ensure appearance before Court; or	YES	NO
2. To prevent CYP committing further offences; or	YES	NO
3. To prevent loss/destruction of evidence; or	YES	NO
4. To prevent interference with witnesses ; and	YES	NO
5. A summons will not achieve 1- 4, then arrest CYP	YES	NO
6. Where reasonable cause to suspect a category 4 offence or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years; AND believe on reasonable grounds that arrest required in public interest	YES	NO
Notification to Police Commissioner *YOUTH.	YES	NO

E NOTIFICATION TO PARENTS OR OTHERS

1. CYP at police station for questioning/after arrest Arrival time _____ Hours	YES	NO
2. As soon as practicable after arrival, person nominated by CYP informed Time informed _____ Hours	YES	NO
3. Person nominated advised that CYP at _____ station and may be visited there	YES	NO
4. Where nominee, is not parent/guardian/caregiver, or the CYP fails/refuses to nominate a person, the parent/ guardian/caregiver have been informed the CYP is at the station , unless impracticable	YES	NO

If impracticable, why? _____

_____

_____

_____

People of or over 20 years who can be nominated:

(i) Parent or guardian

(ii) Adult member of family/family group

(iii) Any other adult CYP selects, but if CYP fails or refuses to nominate one of this people then;

(iv) Then any adult nominated by Police (but not an enforcement officer)

5. When nominee/s arrived, 3-7 in (A) explained to them	YES	NO
6. Information sheet POL 388A given to nominee	YES	NO

F ENTITLEMENT TO CONSULT LAWYER

1. CYP at police station for questioning/after arrest Arrival time_____ Hours	YES	NO
2. As soon as practical after arrival CYP informed of entitlement to consult with lawyer (and or nominated person) Time informed _____ Hours	YES	NO

REASSERT 6-8 in (A) above

G STATEMENT ADMISSIBILITY

Any statement, oral or written, is inadmissible UNLESS:

1. Explanations 1-8 in (A) explained in appropriate language/manner/circumstances	YES	NO

N.B.3 1 and 2 of (A) do not apply if arrested or in custody.

2. CYP has consulted with		
(i) lawyer before making statement	YES	NO
(ii) nominated person before making statement	YES	NO
3. Responsibilities explained to the lawyer and/or any person nominated (use POL 388A)	YES	NO
4. CYP has consulted		
(i) with lawyer Time _____ Hours	YES	NO
(ii) with nominated person Time _____ Hours	YES	NO
5. Statement made in presence of:		
(a) Lawyer and/or	YES	NO
(b) CYP nominee; or where CYP fails, or refuses to nominate, statement made in presence of:	YES	NO
(i) Parent/guardian	YES	NO
(ii) Adult member of family/family group	YES	NO
(iii) Any other adult (not enforcement officer)	YES	NO

People of or over 20 years who can be nominated

(i) Parent or guardian;

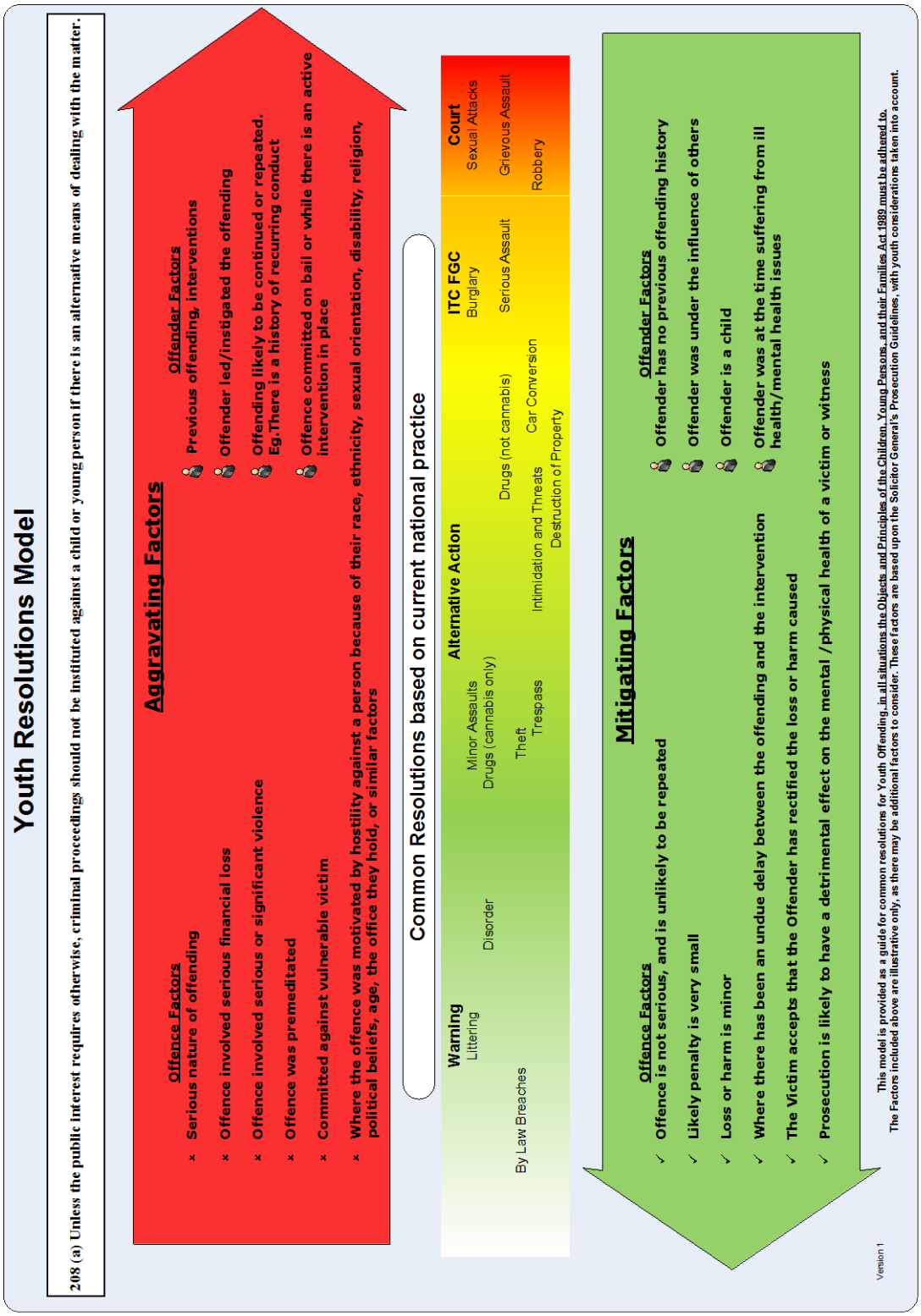
(ii) Adult member of family

(iii) Whanau family group;

(iv) Any other adult.

6. Statement made spontaneously and before reasonable opportunity to comply with 1-4	YES	NO

3: Youth Resolutions Model (NZP and CYF)



4: Youth Offending Risk Screening Tool (NZP)

7

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Unknown

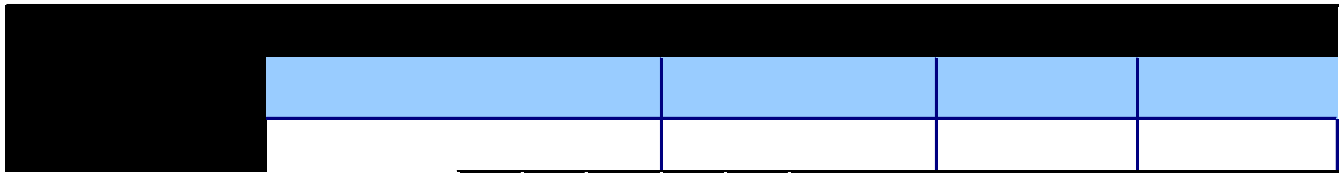
8a

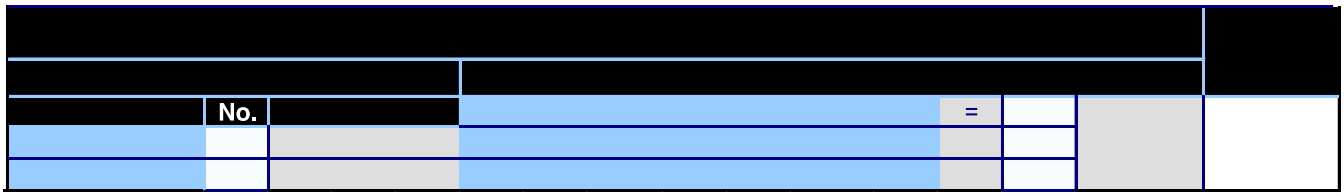
8b

Comments re Question 8

9

No

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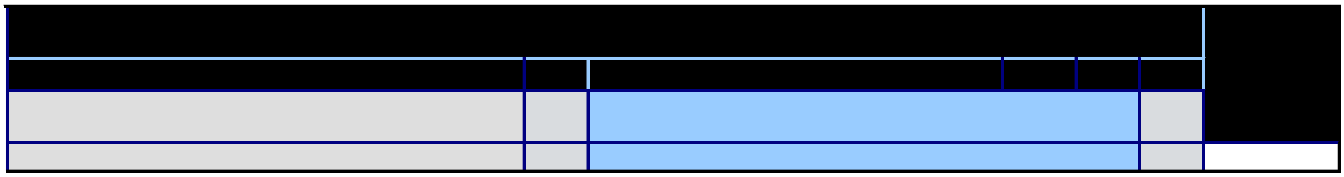

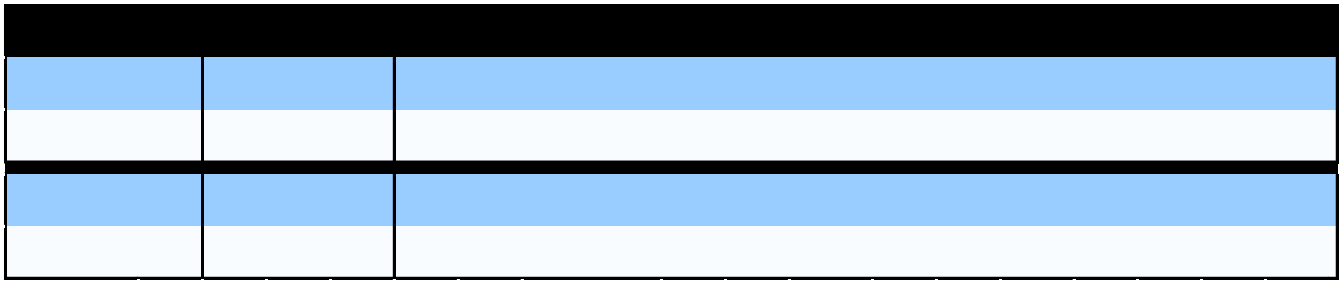

5: POL388A, Advice to and Duties of a Nominated Person (NZP)

If at any time you are not satisfied with the conduct of the interview:

A) Tell the interviewer of your concerns.

B) At the end of the interview, advise the police officer in charge of the station of your concerns.

DETAILS OF NOMINATED PERSON

NAME: _____

ADDRESS: _____

PHONE: _____(home)

_____(business)

_____(mobile)

POL 388A 01/13

CHILDREN, YOUNG PERSONS & THEIR FAMILES ACT 1989

ADVICE TO

AND

DUTIES OF A NOMINATED PERSON

Information sheet for people (of or over 20 years) supporting a child or young person during an interview

(The term "young person" is a boy or a girl under 17 years and a "child" is a boy or girl under 14 years of age)

New Zealand POLICE Ngā Pirihimana O Aotearoa

NOMINATED PERSON

A police officer wants to ask _____ (First name) _____ (Last name) some questions because they are suspected of committing an offence or offences. The child/young person **does not** have to answer any questions if he/she does not want to.

Because the child/young person is under 17, they **must** talk to an adult before the questions are asked, and will have that adult with them while they are being questioned if they choose to answer Police questions. You have been asked to be that person.

AS THE NOMINATED PERSON YOU MUST:

Represent the interests of the child/young person, support them and ensure they understand their rights.

You are not simply an observer. Your role is to assist the child/young person to ensure that they understand what is happening at the police station during the interview. You must tell the officer immediately if you believe the child/young person is not being treated fairly.

THE RIGHTS OF THE CHILD OR YOUNG PERSON:

When Police want to interview the child or young person, a police officer must explain to the child or young person in language they can understand that:

(A) A statement will only be taken if the child or young person wants to make one.

(B) If the child or young person wants to make a statement, he/she can stop at any time.

(C) Any statement the child or young person makes can be used as evidence meaning that if the child/young person is taken to court for this offence(s) what they say may be retold to the Judge.

(D) The child or young person is allowed to talk to a lawyer and yourself. A lawyer can tell the child or young person what their rights are and give advice about whether they should answer Police questions and the potential seriousness of the situation.

(E) If the child or young person makes a statement, you and/or the lawyer can be present.

(F) The child or young person can talk to a lawyer for free at no cost to you or the child or young person.

(G) The child or young person is allowed to talk to a lawyer without anyone else present.

CHECK THAT YOU KNOW:

(H) Why the child or young person is at the police station.

(I) If the child or young person is or is not under arrest.

(J) If the child or young person has been asked to give a statement about the offence

(K) Whether the child or young person wants a lawyer present.

NOTE: You can speak with the child or young person alone, but the police officer who is guarding the young person may remain if the police consider it necessary.

IT IS YOUR ROLE TO:

(L) Ensure the child or young person understands their rights (printed on the left of this page).

(M) Ensure they understand if they are not under arrest they can leave at any time.

(N) Find out from the child or young person whether they want to answer Police questions or make a statement.

(O) Support the child or young person before and during any questioning.

(P) If at any time you do not understand what is required of you or you are not sure how to fulfil your role you should:
- tell the interviewer immediately.

(Q) If at any time you feel that the child or young person is not being treated fairly:
- tell the interviewer immediately. Do not wait.
- if you still have concerns advise the Police officer in charge of the station immediately.

6: Descriptive Data

The themes, emotions and even the fact patterns of the cases in the New Zealand youth justice system are similar to the caseload of any juvenile court in Massachusetts. My observations of various New Zealand youth justice processes—from alternative actions to youth court, as well as reviews of NZP and CYF files, revealed that New Zealand, while enjoying lower raw numbers and rates in all official youth justice measures, is legitimately compared to Massachusetts in the issues faced by young people in conflict with the law, including the reality of racial and ethnic disparities. The descriptive data in this section is intended to highlight the compatibility of a CYPFA-like framework to Massachusetts, and its potential to impact formal court processing. It should not be used to compare relative success of one system over another. New Zealand's experience, though, does show that a sustained focus on restorative practices can, at the very least, reduce the harm of the formal juvenile justice system while promoting a positive youth development approach.

Case samples in New Zealand

The following scenarios, culled from my observations, file review and discussion, illustrate the variety of youth justice cases in New Zealand:

- A fifteen year old, in custody for about two weeks after violating his conditions of bail on a case where he allegedly assaulted his mother. He denied the most serious of the charges and sought release on bail but became increasingly frustrated, and loud, as his actual release from the cells was delayed for logistical reasons. He was given a 21-hour curfew (allowed to leave for 3 hours a day);
- A young person who had multiple arrests and charges whose home and room was the subject of search warrant. The police were looking for stolen goods because he was suspected of being involved in selling the items on-line;
- A young person, living with an older partner and their infant, who was accused of stabbed the partner during an argument. She had to find alternative living arrangements and share care and custody of the infant;
- A young person, cognitively delayed and with an experience of corporal punishment, charged with attempting to rob a convenience store with a weapon and masking his face;
- A girl who had ran away from foster home. She was charged with resisting arrest and assaulting a police officer when she was detained;
- A girl, charged with two male adults, of kidnapping a man and demanding payment from the man's friend for an undisclosed debt facing transfer to adult court to join the co-defendants for a jury trial;
- A boy, charged with stealing a car and then over the course of the next few days filling the car with gas and driving away from three different gas stations; at issue was his statements to the police; and
- A boy allegedly in a playground fight where he threw a bottle at his opponent after being mocked for his father's supposed gang affiliation.

Descriptive Data

New Zealand and Massachusetts are demographically comparable in terms of youth populations. Recent population data[215] in Table 1 provides the following picture:

Age Range	New Zealand (%)	Massachusetts (%)
All	4,353,198 (100 %)	6,547,629 (100 %)
7-17 inclusive (Massachusetts Juvenile Court jurisdiction)	638,574 (14.7 %)	878,060 (13.4 %)
10-16 inclusive (New Zealand CYPFA youth justice jurisdiction)	408,969 (9.4 %)	563,374 (8.6 %)
12-16 inclusive (New Zealand Youth Court criminal proceedings jurisdiction)	297,180 (6.8 %)	407,016 (6.2 %)
14-16 (New Zealand young person definition)	178,797 (4.1 %)	246,035 (3.7 %)
17 only (added to Massachusetts Juvenile Court jurisdiction 30 September 2013; treated as adults in New Zealand)	60,945 (1.4 %)	84,910 (1.2 %)

Table 1

In New Zealand, Māori make up about 20 per cent of the youth population, while people with origins in the Pacific Islands make up about seven per cent. In Massachusetts, about 30 per cent of youth are either African-American, Asian, Native American and/or are Hispanic. Asians and Native Americans make up a very small proportion of the population. In both jurisdictions, this 30 per cent of the population are disproportionately represented in negative social indexes ranging from criminal justice, to education, to housing, to income, to health, and more.

[215] Statistics New Zealand http://nzdotstat.stats.govt.nz/wbos/Index.aspx; 2010 US census data, www.census.gov/2010census/data/; US Office of Juvenile Justice and Deliquency Prevention, www.ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp (19/6/2015).

Court volume

In terms of court volume, New Zealand and Massachusetts, like most Western industrialised nations, have both seen declines in youth/juvenile court activity over the last decade. Figure 4 shows the number of charges (apprehensions in New Zealand) in each jurisdiction from 2002-2012 (the last year in which Massachusetts kept track of charge level data):[216]

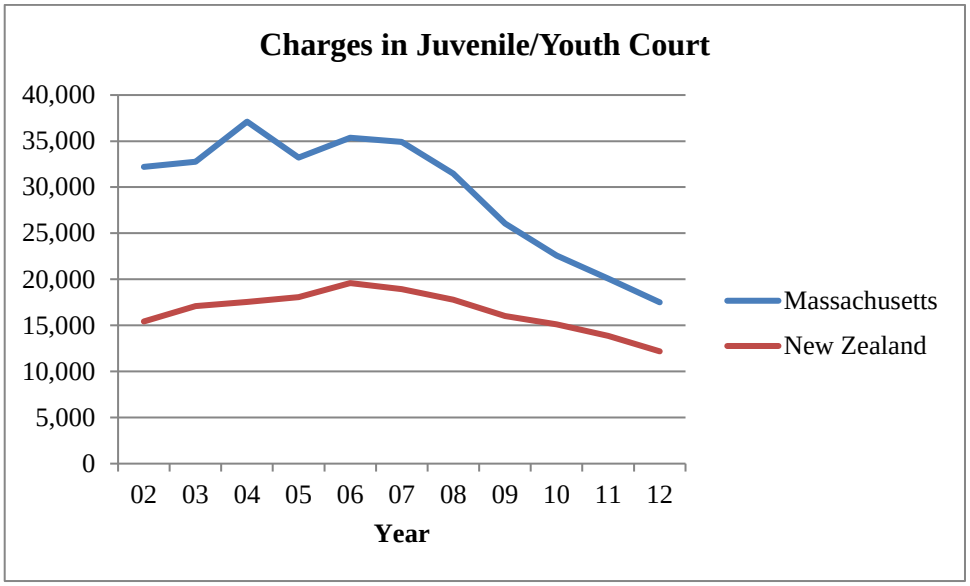

Figure 4

In the last two years, Massachusetts juvenile courts reported data on cases (rather than a charge) basis. There were 7,670 complaints heard in 2013 and 9,899 in 2014, the first full year in which seventeen year olds fell within the juvenile court jurisdiction. The New Zealand Youth Court, in contrast took in 3,516 cases in 2013 and 2,902 cases in 2014.

New Zealand uses adult sentencing data to measure the seriousness level of charges.[217] Based on the sentences actually meted out by New Zealand judges, each charge is given a numerical value based on the average number of days a person is sentenced for each charge. This metric is used in looking at Youth Court charges to gauge the level of criminal charges being addressed. For charges filed in New Zealand's Youth Court in 2014, the average seriousness level is 288 (with the overall average for all charges being 125).[218] Offences between 200 and 400 on the scale include robbery (of various types), burglary, assaults (with intent to and actual injury), some lower level sex offences and a selection of drug offences. Most charges, however, are addressed in the pre-Youth Court processes of alternative actions and intention to charge family group conferences.

Massachusetts does not have a seriousness level measurement, although, for juveniles facing commitment to the state's Department of Youth Services (DYS), charges are ranked in a grid from 1 (least serious) to 6 (most serious). While the Massachusetts Juvenile Court does

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[216] Data sourced directly from New Zealand Ministry of Justice, Massachusetts Trial Court Statistics at www.mass.gov/courts/court-info/court-management/case-stats. Note that the Massachusetts Juvenile Court changed its counting unit in 2013 (from charges to cases) so the last two years are omitted for this comparison.
[217] Sullivan and Su-Wuen, "Justice Sector Seriousness Score (2012 Revision): FAQs."
[218] Thank you to Phillip Speir, Senior Research Analyst, Care, Protection and Justice Team, Research and Evaluation Unit, Insights MSD, Ministry of Social Development for sharing his expertise on this topic.

not report charges based on grid levels, the public defender's Youth Advocacy Division (YAD), for whom I work as an attorney, does keep data about the DYS grid levels in its caseload. We take about 25 per cent of the cases state-wide, although we are often assigned to the most serious cases (either based on the charges or the issues faced by the young person). The information on our caseload for 2014 offers insight into the range of criminal allegations faced in Massachusetts. Based on a review of the most serious charge in a case, about a third of the cases (1,112) are level 3 and above— mostly felonies that are indictable if the defendant is an adult. In a little more than three hundred cases, about ten per cent of the total, the prosecution involves presumptively "Youthful Offender" charges, subjecting them to the possibility of an adult sentence depending on the factual allegations, representing the most serious level of allegations. About half of the cases (1,391) involve charges of violence against a person (from misdemeanours to serious felonies). More than half of all of the cases, however, are level 2 or lower—mostly misdemeanours—cases that would likely be diverted away from formal court in New Zealand.[219]

Recidivism

The most comprehensive research about New Zealand's youth justice system was led by Gabrielle Maxwell, an early proponent of CYPFA. In the 2004 report, *Achieving Effective Outcomes in Youth Justice*,[220] Maxwell and her team found that New Zealand was meeting the objectives set out in CYPFA. They reviewed the files of over 1,000 cases, including interviews with 500 young people, and 100 families and victims. There was an 85 per cent family participation rate—in terms of being present at FGCs. However, only about half of young people felt fully involved in the decision making process, and interviews also showed that there was often indirect pressure to agree to a plan with professionals dominating the discussion. In almost 100 per cent of the plans, there was an element of accountability, along with 84 per cent of the plans including aspects which could be described as "repairing the harm." Accountability in this context means taking responsibility and acknowledging the impact of criminal behaviour, while repairing the harm refers to making apologies, committing to community work, or paying reparations. Sixty per cent of the plans included aspects which were "fundamentally restrictive…although it is doubtful that these will have always been necessary for public safety." Restrictive elements—not detention—include curfews, non-association agreements (stay away from certain individuals), loss of licences, and geographical exclusion zones. In almost ninety per cent of cases, the elements of the plan were satisfactorily completed. In the six months prior to the follow-up interview (six years after their youth justice experience) eighty per cent of young people reported close personal relationships and seventy per cent had been engaged in work.[221]

Acknowledging that adolescence is a period of turmoil and change, a key goal of youth justice in any jurisdiction is to limit the number of young people who recidivate after they reach the adult minimum age of criminal liability.There are different definitions of "recidivism" so cross-jurisdictional comparisons are not helpful—even within the United States.[222] In addition, some proponents of restorative justice discount re-offending as a measure, arguing that a new offence reflects a flaw in the implementation, not the theory.

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[219] Some of the cases fall into more than one category and are counted more than once, so the total will exceed one hundred per cent.

[220] Maxwell et al., "Achieving Effective Outcomes in Youth Justice."

[221] Maxwell, "The Youth Justice System in New Zealand: Restorative Justice Delivered through the Family Group Conference."

[222] Melissa Sickmund and Charles Puzzanchera, "Juvenile Offenders and Victims: 2014 National Report" (Pittsburgh, PA: National Center for Juvenile Justice, December 2014), pp. 111-112.

Similarly, an FGC has limited ability to address societal inequities that may drive behaviour, or even account for future changes in the young person's circumstances from the initial FGC. [223]

The Ministry of Social Development, consistent with the now widely accepted scientific view of adolescent brain development, views the New Zealand youth population as extending to age twenty-four. On my request, the Ministry of Justice provided data for the last ten years (2004 to 2014) showing the proportion of people ages 14-24 facing formal criminal charges (in either Youth, District or High Court) who had previously appeared in Youth Court. Based on youth justice practice in New Zealand, the cohort of young people with previous Youth Court appearances consists of those who were deemed not eligible for warnings, alternative actions, or resolution at the ITC FGC level because of a perception of either persistent or serious offending, so represent the more challenging cases. The data does not include the seriousness of the subsequent charges, so its primary value is to measure any contact between the justice system and young people who have had a Youth Court appearance. Figure 5 shows the proportion of all individuals 14-24 charged in 2014 who also had a previous Youth Court history:

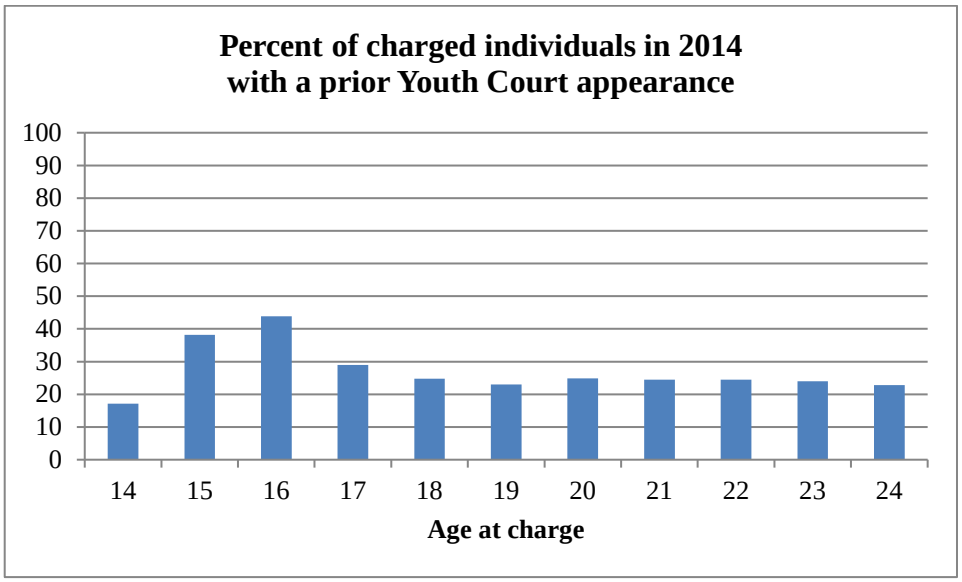

Figure 5

At any age, most young people who are charged did not have a Youth Court history. The proportion of repeat court appearances peaks during the Youth Court jurisdiction, but is still below 50 per cent. Youth Court 'veterans' comprise only one out of four individuals charged with an offence once they reach the age of UNCROC-mandated minimum adult criminal liability age of eighteen.

One explanation for the lower proportion is that the more persistent offenders are incapacitated during this age period so they are not charged. For example, in 2004, there were 3,191 young people (14 to 16) who appeared in Youth Court for the first time. Of this 2004 cohort, 804 had received an adult custodial sentence by the age of 24 (eight to ten years later). One view on this eventual 25 per cent imprisonment rate—50 per cent for those youth who received a section 283 Youth Court order—is that the youth justice system failed to

[223] Cleland and Quince, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*, p. 146.

adequately address the initial offending behaviour. For many young people with a Youth Court history, entrance into New Zealand's minimum age of adult criminal liability is followed by a prison sentence. Figure 6 reflects the New Zealand adult justice system's response to the familiar pattern of spikes in criminal behaviour in late adolescence:

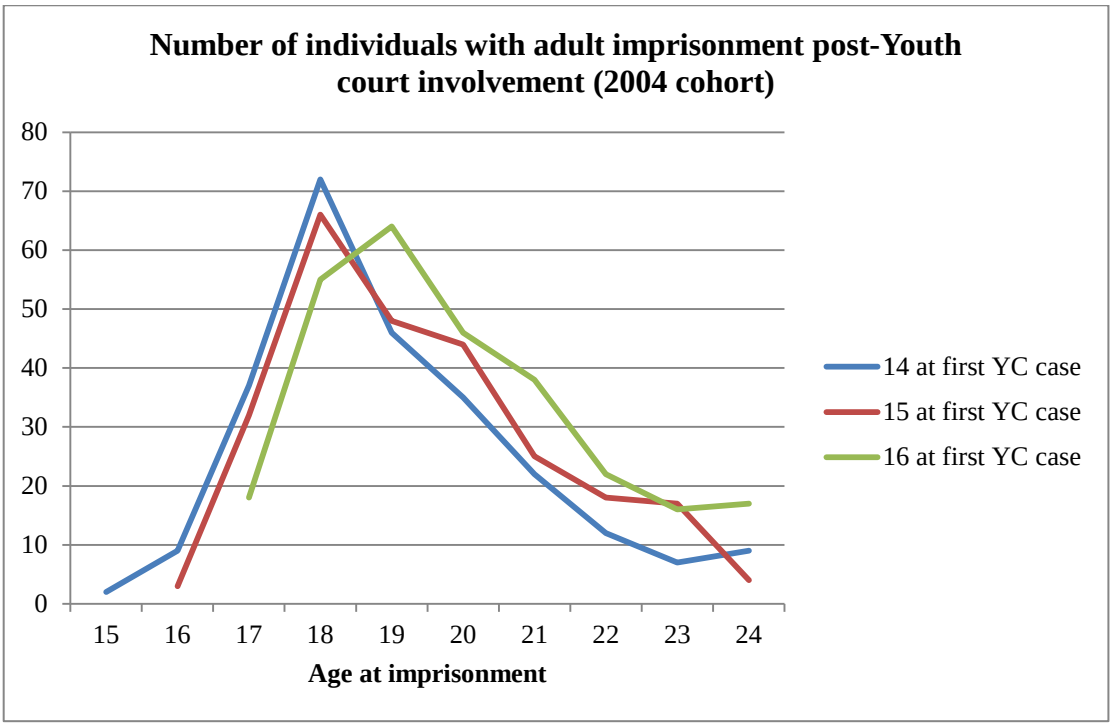

Figure 6

However, a countervailing argument is that extending the age jurisdiction of the restorative and youth development oriented CYPFA framework through the period of brain maturation and independence might help reduce adult incarceration rates. Additionally, given the number of young adults in the criminal justice system who may have never participated in youth development-focused restorative justice processes—as most 17- to 24-year-olds in court have not, it suggests an opportunity to consistently apply the CYPFA principles to the entire under twenty-five cohort as well. Regardless, given that the vast majority of Youth Court cases involve young people who either were identified by the state as persistent and/or were charged with more serious offending, three out of four of the highest-risk young people avoided costly imprisonment during the period of brain maturation.

In absolute numbers, there was a 28 per cent drop from 2008 to 2014 in the number of people under the age of 25 appearing in New Zealand adult courts who also had a Youth Court history. However, with a 60 per cent drop between 2008 and 2014 for all charges filed against young adults 17 to 24, the proportion who had been charged in Youth Court actually rose. Nevertheless, examined at the gross level, the number of Youth Court experienced people who come to police attention as young adults is falling—although it is perhaps also evidence of police attention on the smaller group of people who have attracted it through a Youth Court history.

With the Ministry of Justice data, it is possible to follow cohorts of young people from their first Youth Court appearance to subsequent court involvement. For example, 91 per cent of 14 year olds whose first Youth Court cases were disposed of in 2004 were prosecuted within 10 years (by the age of 24), although more than half of those were charged within the first two years while still under Youth Court jurisdiction. More recently, in 2010, with about the

same number of 14 year olds prosecuted in Youth Court as in 2004, there is an almost ten per cent drop in re-prosecution in the subsequent four years (the longest comparable time period), indicating a possible greater gain by 2020, when the 2010 cohort will be 24 years old. Five year rates of new prosecutions (charges filed in any court) against 14 to 16 year olds with a Youth Court history has fluctuated, but are trending down, as shown in Figure 7 below:

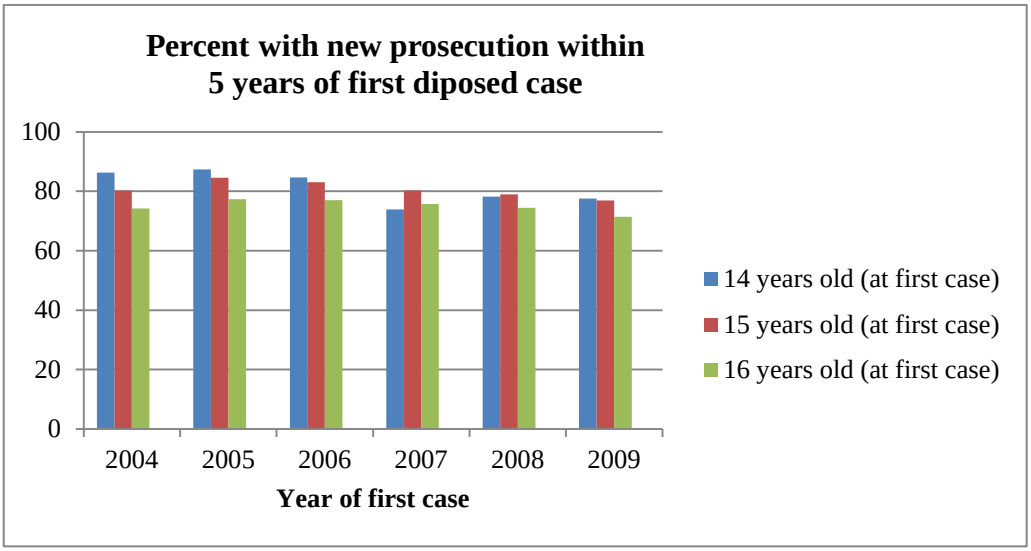

Figure 7

The use of incarceration for Youth Court veterans is also declining, suggesting either a reduction in seriousness of the new charges, a change in sentencing practice by New Zealand judges, and/or the increased efficacy of Youth Court interventions. In Maxwell's 2004 study (covering approximately the first half of CYPFA's existence), about one-fifth had received an adult custodial sentence by age 20. The proportion of Youth Court veterans with a subsequent adult incarceration by ages 19 to 21 (five years from a first case at 14 to 16 in the years 2004-2009), with the latest rate at less than 15 per cent for all age groups, is shown in Figure 8:

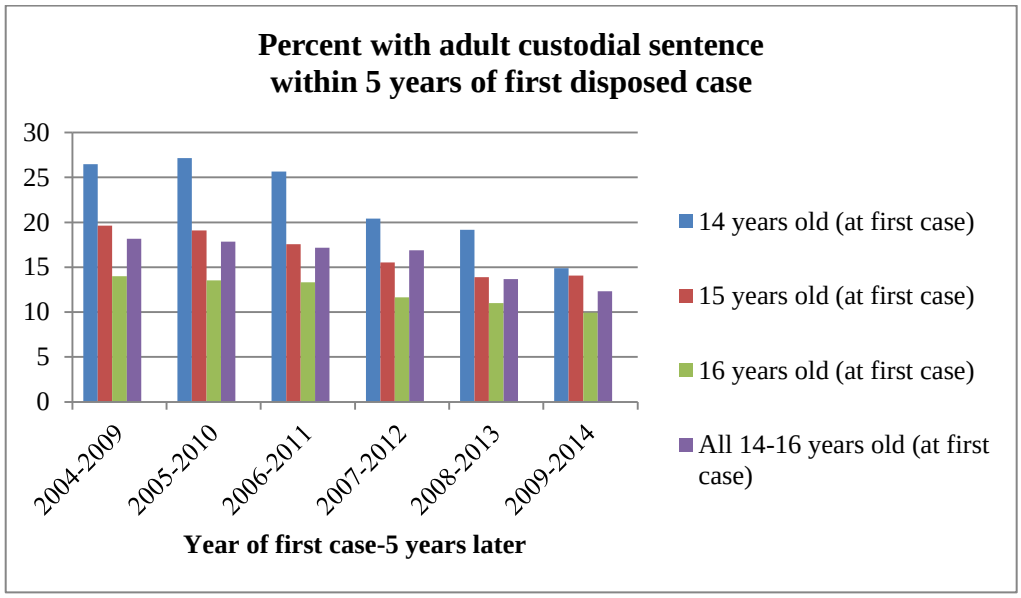

Figure 8

Part of the drop may be attributable to increased Youth Court powers to issue increasingly punitive orders pursuant to the 2010 Amendments to CYPFA in lieu of transferring a young person to adult court for sentencing, although this would only impact youth under the age of seventeen.

Another goal of any youth justice system is to limit criminal behaviour in the shorter term as well. MSD recently reviewed the post-conference reoffending of nearly 6,800 young people who participated in ITC FGCs and court-ordered FGCs in 2011 and 2012.[224] For these young people, four per cent received a custodial sentence within twelve months of an ITC FGC, while the corresponding figure for court-ordered FGCs was 12%. These rates suggest that post-conference, the vast majority of young people do not re-offend in a serious enough manner as to require the use of the most severe sanction.

However, young people do continue to come to the attention of the police. The review expansively defined "re-offending" as when NZP believe the young person has committed an offence—even if a charge is not filed in court, let alone formally proven (although an admission of guilt is a requirement of some key diversionary interventions). The reason for this expansive and inclusive definition is that the majority of cases are processed in the pre-Youth Court space, through warnings, and Police alternative actions as well as ITC FGCs. Using the Ministry of Justice's "seriousness scale" for offences, as well as the number of offences, the review found that in the subsequent twelve months about a third of young people did not re-offend, a further third were identified by police for offences at a lower level of seriousness than before, and the remaining third offended at a level at or higher than before the ITC FGC. For the subsequent 24 months after an ITC FGC, 77 per cent of all young people had re-offended (using the broadest definition).

For young people involved in court-ordered FGCs, Police data revealed a seventy per cent re-offence rate within 12 months and 82 per cent within 24 months. The severity of cases (measured by the sum of the seriousness scores for all charges in a case) more than halved in the 12 months after court-ordered FGCs compared to the 12 months before (from 1,273 to 622).

For Rangatahi Court-monitored youth, twenty-five per cent did not come to police attention at all while an additional 48 per cent reduced the seriousness level of offending. Youth who were monitored by the Rangatahi Court reduced the seriousness of charges by 60 per cent when they re-offended in police records.

Alternative actions and diversion

Information about re-offending for NZP-led alternative actions is also important to understand the impact of the restorative justice bounded system. About eighty per cent of all offences are addressed directly by NZP, either through a warning or an alternative action.[225] The CYF study noted that for participants in ITC FGCs—usually the next step from alternative actions—youth had previously come to the attention of NZP an average of two and half years earlier. The NZP computer system has only recently been enabled to retrieve data on a person level, so aggregate individual level data has yet to be released. In other words, whilst it is possible to count the number of offences disposed of through

[224] Philip Spier and Ryan Wilkinson, "Reoffending patterns for participants of youth justice Family Group Conferences held in 2011 and 2012" (Wellington, New Zealand: Ministry of Social Development, July 2015)(draft version subject to additional review).
[225] McLaren, "Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action with Children and Young People." p. 13.

diversion, there is not readily accessible information about how many people NZP diversion impacts or the patterns of re-offending after an alternative action.

At a local level, Youth Aid officers have a base of community knowledge about their youth population and the recurrence of individuals within their work. They are able to print out a history of police involvement for each young person, including the outcomes of an intervention, although apparently it is not available in a machine readable format for analysis. While not comprehensive, some Youth Aid officers reported that they keep their own information in spread sheets about their work. Officers claim that anywhere from 70 to 80 per cent of young people never progress beyond interventions at the alternative action level within the youth justice framework, but there is no comprehensive analysis. Unofficial data in one large urban area suggests a re-offence rate of 60 percent for young people engaged in an alternative action.

A 2005 study of police-led alternative actions by Gabrielle Maxwell sets an important baseline for future research.[226] Using data from 1998-99, ten years into the implementation of CYPFA, Maxwell and her team looked into re-offending rates over an 18 month period. Re-offending was defined in the study as an offence that led to an intervention higher than an alternative action (family group conference, Youth Court or a conviction in adult court). The re-offending rate for those with a police-led diversionary plan was 16 per cent. More recently, in the Hawke's Bay area, NZP have contracted with local iwi through Te Taiwhenuao Heretaunga to provide alternative action services. Over a period of three years, using a sample of 113 young people who were referred at different ages over a four year period, 50 per cent have not re-offended by age 17.[227] The period coincided with a 77 per cent drop in cases filed in the local Youth Court.[228]

[226] Maxwell and Paulin, "The Impact of Police Responses to Young Offenders with a Particular Focus on Diversion: A Report for the New Zealand Police."
[227] Tony O'Connor, "The Impact and Critical Success Factors of Te Taiwhenua O Heretaunga's Alternative Action Programme" (Point Research (for Te Taiwhenua o Heretaunga), April 30, 2015), p. 14.
[228] Ibid., p. 3.

Racial and ethnic disparities

Despite the solid theoretical foundation coupled with the general youth-positive culture among NZP, CYF and the Courts, the over-representation of Māori in New Zealand youth justice statistics persists. The data about Māori over-representation shows that while all the New Zealand youth justice measures indicate progress, the improvements are not as dramatic for Māori youth and, as a consequence, the disparity is actually growing. As noted from the initial impetus for CYPFA, this concern about over-representation, like racial and ethnic disparities in the US, has consumed practitioners for at least a generation.[229]

In Massachusetts, the Juvenile Detention Alternatives Initiative tracks racial and ethnic disparities.[230] The latest quarterly dashboard shows that African Americans are arrested at three times the rate as whites, charged 1.3 times the rate of whites; detained 1.5 times the rate of whites; and given a juvenile custodial sentence 1.7 time the rate of whites. Latinos are arrested at twice the rate of whites; charged 1.4 times the rate of whites; detained 1.6 times the rate of whites; and given a juvenile custodial sentence 1.3 times the rate of whites In Massachusetts, then, white youth are more likely to enjoy early and sustainable exits from the juvenile courts than African American and Latino youth.

In New Zealand, Māori make up 24 per cent of all youth between 10- and 16-years-old. In youth justice statistics, however, they are 58 per cent of all apprehensions (charges) and 61 per cent of Youth Court appearances (14- to 16-year-olds). Māori youth are also given 65 per cent of all juvenile custodial sentences ("supervision with residence" orders). The disproportionality has risen from 44 per cent in 2005 to 61 per cent in 2014.[231]

The disproportionality in New Zealand reflects the current and historical inequity between Māori and Pākeha (European) communities. Youth justice is one of the many Māori-Pākeha negotiated—even contested-- spaces in New Zealand. Because it addresses youth—and who they will become as adults—it reflects important questions about power, identity and ritual. The link between youth justice involvement and adult incarceration—where the disproportionality is even more pronounced-- exasperates this contest.

Conclusion

The range of cases, issues facing young people and the struggles for healthy youth development are very familiar to practitioners in Massachusetts. New Zealand's youth justice framework coincides with a dramatic decrease in Youth Court cases and apprehensions. Recent data suggests a hopeful long-term trend with more serious offenders, although not a miraculous transformation. Like the US, New Zealand struggles with the over-representation of minority groups. However, as New Zealand's youth justice sector moves towards a more integrated approach to data collection and reporting—one of the goals of YCAP— more nuanced quantitative analysis will lend more insight into the work in the youth justice sector.

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[229] James Bell and Laura John Ridolfi, "Adoration of the Question: Reflections on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System" (San Francisco, CA: W. Haywood Burns Institute, December 2008), http://www.burnsinstitute.org/wp-content/uploads/2013/12/Adoration-of-the-Question.pdf.

[230] "Juvenile Detention Alternatives Initiative (JDAI)," *Health and Human Services*, 22 January 2010, http://www.mass.gov/eohhs/gov/departments/dys/juvenile-detention-alternatives-initiative-jdai.html.

[231] "Latest Statistics: Maori Overrepresentation in Youth Court," *Rangatahi Courts Newsletter*, May 2015, Issue 6 edition, http://www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/rangatahi-courts-newsletter-issue-6/view.

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