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FOUR URGENT LAW CHANGES FOR THE YOUTH JUSTICE SYSTEM

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PREAMBLE

This paper makes four recommendations for legislative reform in Aotearoa's youth justice system. Implementing these changes would immediately reduce harm to those children and young people currently tried and sentenced in the adult criminal justice system and remove younger children from the criminal justice system entirely.

There are of course deeper and more profound concerns with the way in which our system responds to children and young persons who cause harm to others. These remain to be sufficiently addressed and include the disproportionate number of tamariki and rangatahi Māori coming into the youth justice system and the lack of for Māori, by Māori approaches.

The lead authors are Pākehā and tauīwi and we come from backgrounds of law and psychology. We acknowledge our views and findings reflect our particular worldviews and fields of expertise. Any legislative and policy reform must be in partnership with Māori and involve a range of perspectives and include the voices and views of children and young people themselves.

Our aims in this paper are to raise awareness of these significant gaps in the legislative framework and provide a resource that can be used in advocacy for reform. We note that while the age of criminal responsibility is regularly raised as an issue, the situation of children and young people currently excluded from the youth jurisdiction, particularly those accused or convicted of murder and manslaughter, has received much less attention in advocacy.

The proposals in this paper are amendments to the formal legislative framework that we believe would make an immediate impact in some key areas. This does not lessen the need or

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urgency for transformational responses to the systemic issues endemic in the youth justice system and beyond.

1. SUMMARY OF ISSUES AND RECOMMENDATIONS

First, no child or young person should be tried in an adult court. At present the Youth Court's jurisdiction is incomplete. Numbers of children and young people tried in the adult courts are few, but these children and young people are likely to be those facing the greatest adversity and with the highest and most complex needs. These children and young people can benefit most from the specialised procedures, processes and personnel of the Youth Court.

Second, we recommend a removal of the Youth Court's power to remand young people to the police cells, whatever the circumstances.

Third, no child or young person should be sentenced in the adult criminal justice system. Punitive adult sentences, such as life imprisonment and minimum non-parole periods, should not be available for children and young persons. These sentences are harmful and ineffective. Outcomes should be anchored in reintegration, and where it is absolutely necessary that a child or young person is deprived of their liberty, it should be for the shortest possible time and in a secure, therapeutic and safe environment.

Fourth, the minimum age of criminal responsibility should be immediately raised to 12 years and 12- and 13-year olds should only be subject to the criminal justice system in exceptional circumstances. Work should then begin on preparing the system to raise the age to 14 years within a reasonable timeframe.

The current minimum age of criminal responsibility was set at 10 years over half a century ago in 1961. It is contrary to human rights standards and does not reflect contemporary evidence on developmental and cognitive psychology, nor brain development. We make related recommendations to ensure that children under the age of criminal responsibility who cause harm can be appropriately dealt with.

Though these proposed changes are incremental and not an aspirational vision for what 'justice' could be, we believe that addressing these four gaps could immediately reduce the harm which the justice system causes to children and young people. Tamariki and rangatahi Māori, as well as children and young people with neuro-diversities such as communication

difficulties, are disproportionately over-represented in our justice system and in transfers to the adult justice system. Te Tiriti o Waitangi, along with Aotearoa New Zealand's obligations under the United Nations Convention on the Rights of the Child "The Children's Convention", the United Nations Declaration on the Rights of Indigenous Peoples "UNDRIP", and the United Nations Convention on the Rights of Persons with Disabilities "The Disabilities Convention" require that children and young persons' interests are centred and that they receive age-appropriate outcomes. The rights and interests of victims of crime and the public interest are also best served by age-appropriate accountability and specialised reintegration and treatment.

2. THE CURRENT SYSTEM

First, we will review the current system.⁵ The law is complex and is contained in a number of Acts – the *Oranga Tamariki Act 1989*, the *Crimes Act 1961*, the *Sentencing Act 2002*, and the *Criminal Procedure Act 2011*. For children and young persons with mental health conditions or with intellectual disabilities, the *Criminal Procedure (Mentally Impaired Persons) Act 2003*, the *Mental Health (Compulsory Assessment and Treatment) Act 1992* and the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* may also be engaged.

We will discuss age parameters, the legal responses to offending by children and by young persons and the key differences between the adult and youth systems. This demonstrates that where it is necessary to use a criminal justice response for a child or young person, it should never be in the adult system.

2.1. Current Age Parameters

The minimum age of criminal responsibility in Aotearoa New Zealand is 10 years old.⁶ This means that no child under the age of 10 years may be attributed any form of criminal

⁵ For more detailed information see Office of the Children's Commissioner, *State of Care: Children with Offending Behaviour* (2020). <https://www.occ.org.nz/publications/reports/children-with-offending-behaviour/>; Nessa Lynch, *Youth Justice in New Zealand* (3rd edition), Thomson Reuters, 2019.

⁶ *Crimes Act 1961*, s. 21.

responsibility, even through informal processes such as police diversion or restorative justice. Children under 10 who cause harm may be subject to care and protection measures.⁷ As we discuss later in this paper, the current minimum age of criminal responsibility is demonstrably too low and should be raised to 12 years immediately, with a medium-term move to age 14.

Aotearoa New Zealand has a complex graduated system for age-related responsibility and liability in the criminal justice system. The system distinguishes between ‘children’ (aged 10 to 13 years) and ‘young persons’ (aged 14-17 years). Children may only be subject to formal measures in restricted circumstances and the key underlying principle is that offending is symptomatic of welfare issues.⁸ Available responses to offending by young people are more expansive with an increased focus on individual accountability and formal measures.

2.2. Current Responses to Children Who Offend (10-13-year olds)

Most child offending is minor and is dealt with through informal means such as warnings or police diversion.⁹ Children may also be referred to the care and protection system where the “number, nature or magnitude” of their offending gives rise to care and protection concerns.¹⁰ This can result in formal orders in the Family Court.

There are only a few situations where a child will appear in the criminal courts. If a child is charged with murder or manslaughter, the case will be in the High Court.¹¹ There have been three children convicted of murder or manslaughter in the last five calendar years to 2020.¹²

Since the law was changed in 2010, 12 and 13-year-old children who meet the legislative test of ‘serious’ or ‘persistent’ offender may be prosecuted in the Youth Court but are not subject to the full range of Youth Court powers.

⁷ *Oranga Tamariki Act*, s 14(1)(d).

⁸ For more detailed information see Office of the Children’s Commissioner, *State of Care: Children with Offending Behaviour* (2020). <https://www.occ.org.nz/publications/reports/children-with-offending-behaviour/>

⁹ Ministry of Justice, *Youth Justice Indicators*, 2020

<https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf>.

¹⁰ *Oranga Tamariki Act*, s 14(1)(e).

¹¹ Cases are thankfully rare. Examples of 12 and 13-year-old children convicted of murder or manslaughter include *Kurariki* (2002), *Nelson* (2012), *DP* (2013). There are no reported recent cases of 10 or 11-year olds convicted of murder or manslaughter, to our knowledge since at least the late 1970s.

¹² Derived from data provided by the Ministry of Justice, all errors in interpretations are ours.

In the years 2016 to 2020 – the following trends can be observed in the children who appear in the Youth Court under these provisions:

- Numbers increased 2010-2018 but have fallen 2018 – 2020,
- Most received a section 282 order under the *Oranga Tamariki Act 1989* (an absolute discharge),
- Tamariki Māori are over-represented,
- Nearly a quarter of appearances were sexual assault and related offences,
- Just over a half were robbery, extortion and related offences.

For this group, there is a ‘push-back’ mechanism, where a Youth Court Judge can recommend that the child’s case is resolved in the care and protection system, where the child is in need of care and protection and this would be in the public interest.¹³

All children benefit from the legal presumption of ‘*doli incapax*’.¹⁴ This means that the Crown must prove that the child knew that what they were doing was wrong or contrary to law. This could include evidence such as the child’s behaviour after the offence or the child’s previous contact with the criminal justice system. This is generally more easily proved for serious offences as even a young child knows that killing or seriously harming someone is wrong.¹⁵

2.3. Current Responses to Young People Who Offend (14-17-year olds)

Most young people coming to notice for offending are dealt with through diversion or other informal responses.¹⁶ Where young people are prosecuted, most charges are dealt with in the specialized Youth Court.

Trends in the data related to young people who commit serious offences are as follows:

- Numbers of convictions in the adult court has been trending downwards since 2010,
- Rangatahi Māori are over-represented,

¹³ Nessa Lynch. The "Pushback" of Child Offending Cases to the Family Court. (2013) New Zealand Family Law Journal, 7(12), 1-6.

¹⁴ *Crimes Act*, s 22

¹⁵ Nessa Lynch, *Doli Incapax*. (2011) New Zealand Law Journal, 245.

¹⁶ Ministry of Justice, *Youth Justice Indicators*, 2020, <https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf>.

- There were 12 convictions of young persons for murder and manslaughter in the last decade (noting that up to 2019, 17-year olds were defined as adults).

However, for very serious offences such as murder and manslaughter or where jury trials are elected, cases are tried and finalised in the adult High or District Courts. There can be other situations where a young person’s case is transferred out of the Youth Court to the adult court for sentence.¹⁷

2.4. *The Youth Justice System v. the Adult Criminal Justice System*

The following table summarises the major differences between the adult and youth jurisdictions. This is important to show the implications where children and young persons’ cases are resolved in the adult system.

Key Differences Between the Youth Justice System and the Adult Justice System

| Youth Justice System | Adult Justice System |
|--|---|
| Youth justice principles in the <i>Oranga Tamariki Act 1989</i> focus on diversion and reintegration with formal measures and custodial orders as a last resort. | Principles of the <i>Sentencing Act 2002</i> focus on retribution, deterrence and rehabilitation. |
| Principal focus is diversion from formal measures, through alternative action, police diversion and partnership with iwi and community organisations. | Some diversionary processes, but formal measures often used. |
| Principles require decision-makers to prioritise and support the well-being of children, young people and their families, whānau, hapū and iwi above all else. Support may look like fostering the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with youth offending. This is a overarching principle as stated in Sections 208(2)(c)(i) and 208(2)(c)(ii) of the <i>Oranga Tamariki Act 1989</i> . | Individual accountability. |
| The Youth Court has a specialized layout and specially selected and trained judges and lawyers. Youth Advocate (specialized youth lawyer) provided to all defendants free of charge. | |

¹⁷ Section 289(1)(b). The Ministry of Justice’s 2020 figures indicate that 249 children and young persons were convicted and sentenced in the adult court. Ministry of Justice, *Youth Justice Indicators, 2020*, <https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf>.

| | |
|---|---|
| Lay advocates available to support young defendants and represent interests of whānau, hapū, iwi and wider family groups. Oranga Tamariki are represented with specialized social workers. Each Youth Court has a health clinician present. A significant amount of hearings may have a Ministry of Education representative and/or a communication assistant. | |
| Family Group Conference's are a key decision-making mechanism that involves victims in decisions. | Proof and other decisions determined through adversarial process. Restorative justice may be available. |
| Legislative requirements to explain the proceedings to the child or young person and others and encourage and assist the child or young person's participation and views including giving reasonable assistance. | No legislative requirement to ensure understanding. |
| Youth Court Judges receive specific training and support to communicate with children and young persons. | |
| Decision-makers must respect and uphold the rights of the child or young person under the Children's Convention and the Disabilities Convention. | |
| Automatic name suppression and strict restrictions on media reporting. | Name suppression not automatic, media may report freely on proceedings. |
| Court closed to the public. | Court open to the public. |
| Ngā Kōti Rangatahi and Pasifika Courts are an option in most areas of the country. "Cross-over lists" available for the large numbers of children and young persons with co-existing care and protection status. | A few areas have special courts e.g. Matariki Court. |
| Most cases resolved through absolute discharge. Youth Court orders do not appear on the young person's formal record and are not considered 'convictions'. ¹⁸ | Convictions will remain on young person's record (subject to the <i>Criminal Records (Clean Slate) Act 2004</i>), affecting employment and travel prospects. |
| Age- appropriate accountability with maximum of six months in custody. Admission to a place of detention is seen as a last resort and custody time will be spent in youth justice residence. | Adult sentences include imprisonment, life imprisonment and minimum non-parole periods. Sentence of imprisonment likely to be served in Department of Corrections facility, or in some circumstances a youth justice residence. |

¹⁸ Though may be taken into account as part of a person's behavioural history if later sentenced in the adult courts *Kohere v Police* (1994) 11 CRNZ 442 is authority for saying that the adult court can take such notations into account as being part of a person's behavioural history.

3. THE PILLARS OF PRINCIPLED REFORM

3.1. *Te Tiriti o Waitangi*

Te Tiriti o Waitangi is the central starting point for considering principled reform of the youth justice system. Te Tiriti establishes the framework for the co-existence of tino rangatiratanga¹⁹ and kāwanatanga²⁰ within which the rights of tamariki and rangatahi Māori must be read. The legislative gaps which we outline in this paper disproportionately impact tamariki and rangatahi Māori.

Aspects of the nature of the Crown’s obligations in relation to tamariki and rangatahi Māori in the care and protection system and their whānau, hapū and iwi were considered by the Waitangi Tribunal in *He Pāharakeke, he Rito Whakakīkinga Whāruarua* (Wai 2915). We particularly note the Tribunal’s recommendations for transformational change of Oranga Tamariki. Our recommendations to raise the age of criminal responsibility will involve the alternative of tamariki and rangatahi who cause harm having their cases resolved through the care and protection system. It is vital that the care and protection system is a safe and appropriate alternative to the criminal jurisdiction for these tamariki and rangatahi. We also note the overarching recommendation from the *Te Kuku o Te Manawa* reports²¹ authored by the Office of the Children’s Commissioner that Government commits to transferring power and resources to enable “by Māori, for Māori” approaches.

Our recommendations would involve all tamariki and rangatahi who are currently tried and sentenced in the adult system being moved into the youth jurisdiction. This would mean that s 7AA of the *Oranga Tamariki Act* is engaged. This provision makes much more explicit a

¹⁹ Tino rangatiratanga is interpreted as “absolute authority, including freedom to be distinct peoples, right to territorial authority, and the right to exercise autonomy and self-government.” Whaia te Mana Motuhake Report on the Māori Community Development Act Claim, Waitangi Tribunal (2014), 2

²⁰ Kāwanatanga describes the Crown’s right to govern the country which is neither absolute nor exclusive but includes “power to make law for peace and good order” and to “pursue the policy agenda upon which they were elected to office.” Whaia te Mana Motuhake Report on the Māori Community Development Act Claim, Waitangi Tribunal (2014), page 35-36

²¹ Office of the Children’s Commissioner, *Te Kuku O Te Manawa Ka puta te riri, ka momori te ngākau, ka heke ngā roimata mo tōku pēpi* (Report one of two) June 2020 <https://www.occ.org.nz/assets/Uploads/TKTM-JUNE2020-Final.pdf> and *Te Kuku O Te Manawa Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki* (Report two of two) November 2020 <https://www.occ.org.nz/assets/Uploads/Te-Kuku-O-Te-Manawa-Report-2-OCC.pdf>

commitment on the part of Oranga Tamariki to develop effective partnerships with Māori. When addressing issues for Māori tamariki and rangatahi, Oranga Tamariki will be expected to delegate functions and resources and to devolve power and responsibility to iwi and Māori authorities. This provision has been described as ‘problematic’ and ‘having some real limitations’.²² There is also no obligation to properly resource these partnerships. The Office of the Children’s Commissioner has recommended that Te Tiriti o Waitangi be explicitly incorporated into the Oranga Tamariki Act.²³

Nonetheless, the legislative changes post-2019 have seen Youth Court judges increasingly using Te Tiriti o Waitangi to support their decision making, for example to support keeping rangatahi in the community rather than in residence and requiring Oranga Tamariki to provide appropriate services for them.²⁴

Based on the principles of partnership, equity and protection, more work is needed to ensure the rights of tamariki and rangatahi Māori under Te Tiriti o Waitangi and the Children’s Convention (as discussed below), are upheld in the youth justice system.

3.1. Human Rights

Aotearoa New Zealand is required to comply with the international human rights instruments which it has signed up to. These require special treatment for children and young persons in the youth justice system. Section 5(1)(b)(i) of the *Oranga Tamariki Act 1989* draws the attention of decision-makers to their duty to respect and uphold the Children’s Convention and the Disabilities Convention in the exercise of any power.²⁵ Judges have also used the

²² Office Of The Children's Commissioner, *Submission On The Oranga Tamariki Urgent Inquiry* - 16 July 2020 <https://www.occ.org.nz/assets/Uploads/OCC-written-submission-Wai2915-16-July-2020.pdf>

²³ Office Of The Children's Commissioner, *Submission On The Oranga Tamariki Urgent Inquiry* - 16 July 2020 <https://www.occ.org.nz/assets/Uploads/OCC-written-submission-Wai2915-16-July-2020.pdf>

²⁴ See decisions of Judge Fitzgerald, *Police/OT v LV* [2020] NZYC 117; *Police v AN* [2020] NZYC 2020 609; *Police v JV* [2021] NZYC 248 and of Judge Davis in *Police v JH*; *NZ Police v EL* [2020] NZYC 45.

²⁵ Nessa Lynch (2019), *Youth Justice in New Zealand* (3rd Edition), Thomson Reuters, Wellington, New Zealand.

Children’s Convention temper punitive legislation where the child or young person is tried or sentenced in the adult system.²⁶

Based on a critique of the international human rights framework as being largely Western-centric, King et al have developed an alternative framework which integrates international human rights frameworks, including indigenous peoples’ frameworks, and the inherent rights of Māori as tangata whenua. Others see the Children’s Convention and Te Tiriti as complementary.²⁷ But, as the current Children’s Commissioner has noted “talk of children’s rights does not mean ousting the fundamental importance of family and whanau [extended family] in the life of a child.”²⁸ This is an approach endorsed by the United Nations Committee on the Rights of the Child in its General Comment on the rights of indigenous children, where the Committee notes that “considering the collective cultural rights of the child is part of determining the child’s best interests”.²⁹

In the youth justice system, Article 40 of the Children’s Convention requires age appropriate treatment and an adapted system of justice that safeguards the rights and interests of children and young persons. In the youth justice system, children and young people have the same minimum rights as an adult but also have additional rights and protections based on their characteristics as children or young people.³⁰ Youth justice systems must assure young people have their rights under various articles of the Children’s Convention upheld including the right to:³¹

- Respect for children and young peoples’ rights to dignity and privacy (Art. 40(1); 40(2)(b)(vii)),
- Non-discrimination (Art. 2),
- Children’s evolving capacities (Art. 5),

²⁶ *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306; *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306; *Whitcombe v Police* [2018] NZHC 1409; *R v Carmichael* CA 521/94 23 March 1995.

²⁷ Dr Claire Achmad “Children Families and the State” (School of Government Seminar 3, VUoW, 2019). Judge Davis in *NZ Police v JH* [2020] NZYC 396 at [49].

²⁸ A. Becroft “Getting it right for children in Aotearoa: Commentary on the Children’s Convention” November 2017, at p.2. <https://www.occ.org.nz/assets/Uploads/Getting-it-Right-NOV-2017-Commentary.pdf>.

²⁹ United Nations Committee on the Rights of the Child. (2009). General comment No. 11: Indigenous children and their rights under the Convention [on the Rights of the Child], 12 February 2009, CRC/C/GC/11, para. 32.

³⁰ UN Committee on the Rights of the Child (2019), *General Comment No. 24: Children’s rights in the child justice system* (CRC/C/GC/24), 18 September 2019.

³¹ *Ibid.*

- Treatment consistent with age and desirability of reintegration (Art. 40(1)),
- Best interests must be a primary consideration (Art. 3(1)),
- Duty to hear and take account of the views of the child or young person in all matters affecting the child (Art. 12(1); 40 (2)),
- The child or young person’s right to a fair trial, with procedures and institutions specially adapted to the needs and circumstances of the child or young person (Art. 40(2)(b); 40(3)).
- Custody should be used only as a last resort and for the shortest appropriate period (Art. 37(b)),
- In custody to be treated humanely and kept apart from adult prisoners (Art. 37(c); 37(d)),
- Sanctions and outcomes to be consistent with the promotion of the child’s sense of dignity and worth...and appropriate to well-being (Art. 40).

3.2. Child and Adolescent Brain Development

The extensive evidence-base on brain development is another pillar of principled law reform.³² The scientific evidence on how children and young people’s brains develop into adolescence has been used successfully in advocacy and strategic litigation to overturn punitive laws and policies, particularly in the United States.³³ While the human rights lens and the scientific lens are different conceptions they arguably lead to a similar result – a recognition that it is right and justified to treat children and young people in an age appropriate manner and to emphasise outcomes which protect them and recognise their capability to change and re-integration.³⁴

Developmental psychology literature demonstrates that as children and young people develop through adolescence, they may exhibit impulsiveness, be temperamental and immature, and

³² Lambie, I. (2020). *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*. Auckland, NZ: Office of the Prime Minister’s Chief Science Advisor. Available from www.pmcsa.ac.nz.

³³ Steinberg, L. and Scott, E.S., 2003. Less guilty by reason of adolescence: developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, 58(12), p.1009.

³⁴ Lynch, N. and Liefaard, T., 2020. What is Left in the “Too Hard Basket”? Developments and Challenges for the Rights of Children in Conflict with the Law. *The International Journal of Children's Rights*, 28(1), pp.89-110.

may find it difficult to fully consider the feelings of others or understand the consequences of their actions. While there can be negative consequences, these tendencies towards risk-taking also make adolescence the 'age of opportunity'.³⁵ There are multiple influences on behaviour, but brain development research shows that the stages of brain development have an impact. Neuroscience research shows that, for many children and young people, this "stage" of anatomical and functional changes in the brain likely lasts well into their 20s.³⁶ It is apparently that brain pathways develop in such a way that young people engage in more risk-taking behaviour than their child/younger or adult counterparts. This has been recognised as relevant to debates of criminal responsibility and culpability,³⁷ both internationally³⁸ and to some extent in Aotearoa New Zealand.³⁹ Concerns have been raised about whether these findings are Western-centric,⁴⁰ and this is being explored through a developing cross cultural literature demonstrating these life stages of transition from childhood to adolescence.⁴¹ Article 5 of the Children's Convention requires us to consider children and young people's evolving capacities and the role of their parents, caregivers and family in supporting them.⁴²

We also note that the issue of age-related competence is nuanced and complex. Lynch and Liefwaard note that there may be cognitive dissonance in children's rights scholarship, where in fields such as education, medical decision-making, voice of the child, citizenship and gender identity, we consider and advocate that even young children are capable of exercising agency and autonomy and to appreciate the consequences of their proposed decisions.⁴³ However, children and young persons may be fully able to make decisions in certain supported and specific circumstance (such as consenting or refusing medical treatment) while in stressful

³⁵ Laurence Steinberg *Age of opportunity: Lessons from the new science of adolescence* (Houghton Mifflin Harcourt, Boston, 2014).

³⁶ Giedd JN. The teen brain: Insights from neuroimaging. *Journal of Adolescent Health* 2008; 42: 335–343

³⁷ Steinberg L. Adolescent brain science and juvenile justice policymaking. *Psychology, Public Policy, and Law* 2017; 23(4): 410-420.

³⁸ Steinberg L. The influence of neuroscience on US Supreme Court decisions about adolescents' criminal culpability. *Nature Reviews: Neuroscience* 2013; 52:13.

³⁹ Lambie I, Ioane J, Best C. 17 year olds and youth justice. *New Zealand Law Journal* 2014; 8: 316-320.

⁴⁰ Gerard Lansdown, *The Evolving Capacities of the Child* (Innocenti Insight) Save the Children/UNICEF, 2005.

⁴¹ Natasha Duell et al, "Age patterns in risk taking across the world" (2018) 47 *Journal Of Youth And Adolescence* 1052.

⁴² Keating, Daniel P. "The evolving capacities of the child: Neurodevelopment and children's rights." *Handbook of Children's Rights*. Routledge, 2016. 206-222.

⁴³ Lynch, N. and Liefwaard, T., 2020. What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law. *The International Journal of Children's Rights*, 28(1), pp.89-110.

situations such as those surrounding violence and other offending, children and young persons may not be equipped to deal with the situation. The reality is more nuanced. Whether a child or young person has the degree of maturity required to make an appropriate decision is strongly context specific. Available evidence supports the view that it is not inconsistent for legal age boundaries to vary according to the type of decision being made.⁴⁴

Children and young people's brains are still developing until early adulthood making their capacity for change and rehabilitation considerable. In criminal cases, this evidence can be employed at both the liability assessment and the sentencing stages. Recent United States decisions such as *Miller v. Alabama* (finding mandatory life without parole to be unconstitutional) have relied heavily on scientific evidence of adolescent brain development to support an argument of lesser culpability.⁴⁵ Further, children and young people's capacity for change and greater opportunities for re-integration justify finite and shorter sentences. Another use of brain development evidence is in the policy and law reform sphere. Here, brain development evidence underpins arguments to increase the minimum age of criminal responsibility, age-appropriate sentencing and the retention of the presumption of *doli incapax*.⁴⁶

3.3. Disabled Children and Young People⁴⁷

There is increasing knowledge of the prevalence of disabilities, neuro-diversities and cognitive difficulties amongst children and young people in the criminal justice system, particularly those who commit serious harms. Cognitive difficulties may arise from traumatic brain injury, abuse and neglect or neuro-disabilities such as autism, ADHD, foetal alcohol spectrum disorders,

⁴⁴ Laurence Steinberg "Should the science of adolescent brain development inform public policy?" (2012) 28 *Issues in Science and Technology* 67 at 71.

⁴⁵ Monahan, Kathryn, Laurence Steinberg, and Alex R. Piquero, "Juvenile Justice Policy and Practice: A Developmental Perspective," *Crime and Justice* 44 (2015): 577-619; Cohen, A.O. and Casey, B.J., 2014. Rewiring juvenile justice: The intersection of developmental neuroscience and legal policy. *Trends in cognitive sciences*, 18(2), pp.63-65.

⁴⁶ Steinberg, L., 2009. Should the science of adolescent brain development inform public policy? *American Psychologist*, 64(8), p.739.

⁴⁷ We acknowledge that some children and young people may prefer other terms such as 'children and young people with a disability', or children and young people who experience some form of disability but we use the term 'disabled children and young people' here to reflect the prevailing contemporary usage— see e.g. Office of the Children's Commissioner What Makes A Good Life For Disabled Children And Young People? A summary report in the What Makes a Good Life?: Children and Young People's views on wellbeing series (September 2021) <https://www.occ.org.nz/assets/Uploads/Disabled-Children-and-Young-People-Report.pdf>

intellectual disability and mental illness. Children and young persons with these conditions are highly over-represented in the criminal justice system, particularly in those in the custodial population.⁴⁸

Foetal alcohol spectrum disorders can appear as ‘bad’ or uncooperative behaviour and limit receptiveness to treatment when co-morbid with other mental health issues.⁴⁹ Brain damage caused by accidents or assault, can also have detrimental effects on young adults’ capacity.⁵⁰ Traumatic brain injuries (TBI) are most likely to occur when a person is young.⁵¹ TBI’s have potentially permanent effects on cognitive and social functioning; this can impact on a child or young person’s wellbeing and future financial and social stability.⁵²

There is a higher prevalence of disabled people in the population of people who have been harmed. It is also worth noting that many children who harm others have been harmed themselves. Too many disabled people remain living in long-term institutional care, lacking access to community-based services, including education, consistent with their right to whānau, community living, freedom of association, protection from violence and access to justice.

4. ISSUE 1 – THE CASE FOR UNIVERSAL JURISDICTION FOR THE YOUTH COURT

Long term, lasting and transformational change in our justice system is required, but we make the case here that immediate legislative fixes can be used to ameliorate some of the most harmful aspects of our youth justice system.

The first law change that should occur relates to the jurisdiction of the Youth Court. We acknowledge the evidence that the criminal justice system is harmful and believe that

⁴⁸ Nessa Lynch Neurodisability in the youth justice system in New Zealand: How vulnerability intersects with justice (Neurodisabilities Forum, 30 May 2016) <www.neurodisabilitiesforum.org.nz>.

⁴⁹ Ian Lambie “What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand” (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at 26.

⁵⁰ Nessa Lynch Neurodisability in the youth justice system in New Zealand: How vulnerability intersects with justice (Neurodisabilities Forum, 30 May 2016) <www.neurodisabilitiesforum.org.nz>. See also Nathan Hughes et al. Nobody made the connection: The prevalence of neurodisability in young people who offend (Office of the Children’s Commissioner, 2012).

⁵¹ Lambie (2020), at 14.

⁵² Lambie (2020), at 16.

alternatives to prosecution should be used wherever possible and formal action should be a last resort. Our argument here is based on harm reduction particularly to the children, but also to whānau and victims: where a prosecution is strictly necessary, the matter should be resolved in the youth specific jurisdiction.

As set out above, Aotearoa New Zealand does not have a universal youth jurisdiction. This means that some children and young people on criminal charges can have their trial or hearing in the adult courts. This has significant impact on young people as the adult court is not designed for young defendants at all, including in terms of personnel, court-room design, timetable, communication methods or procedure. In this section, we set out these current exceptions to jurisdiction, explain the negative impact of these exceptions and recommend that the exceptions be abolished.

4.1. Current Exceptions to Jurisdiction

The four principal situations where children and young persons' charges will be resolved in the adult court are set out in sections 272 and 275 of the *Oranga Tamariki Act 1989*:

- **Homicide (murder and manslaughter)** – all homicide charges are automatically excluded from the youth jurisdiction. The child or young person will first appear on a preliminary hearing in the Youth Court, and then be transferred to the High Court.
- **Jury trials** - if a child or young person elects a jury trial (as is their right for offences attracting a potential term of imprisonment of two years or more), the matter must be transferred to the District or High Court. Numbers provided to us by the Ministry of Justice indicate that there were less than 15 instances of jury trial election per year in the years 2016 to 2019, with a jump to 31 in 2020.
- **Joint charges** – where a child or young person is jointly charged with an adult (this is a relatively common occurrence) – the trial may be held in the District or High Court.
- **17-year-olds on schedule 1A offences.** Most 17-year-olds are within the youth jurisdiction since 1 July 2019. However, 17-year-olds on schedule 1A charge (a list of

exceptions for serious offences) are automatically removed to the District or High Court.⁵³

- **Infringements** against the *Psychoactive Substances Act 2013*, the *Sale and Supply of Alcohol Act 2012*, the *Summary Offences Act 1981*, the *Local Government Act 2002* and traffic offences are infringements that will be dealt with in the District Court, where the child or young person wishes to dispute or defend the infringement notice. Numbers provided to us by the Ministry of Justice indicate that there were less than 50 appearances per year in the District Court on these types of matters over the last 5 years.⁵⁴

4.2. *The Youth Court is the Appropriate Venue for Children and Young People*

Where it is strictly necessary for a child or young person to be prosecuted, this should always take place in the Youth Court, including Ngā Kōti Rangatahi and Pasifika court processes where available and appropriate. Where a child or young person is tried in adult court, they are exposed to the full adversarial criminal trial, without the benefit of protective aspects such as closed court hearings, judges and lawyers who are trained in communicating with children and the specialist legislative principles which underpin the youth justice system. The effect on young defendants in these situations increases the harmful effect of the justice system, including trauma from the process itself and a lack of effective participation.⁵⁵

The public interest in resolving a serious charge against a child or young person also includes aspects like the child or young person offering the best possible evidence and being able to participate more effectively (to ensure that the correct perpetrator is identified and that the level of culpability is assessed accurately) and the child or young person taking an age-appropriate level of responsibility for the harm and wrong, where culpability is proved. Providing for the interests of transparency and public reassurance is possible within this framework, as non-identifying information can be reported.⁵⁶

⁵³ Our view is that it was always the intention that all 17-year-olds would eventually be included within the Youth Court. Inclusion of most 17-year-olds has been successful and has not resulted in significant problems or resourcing issues.

⁵⁴ Data provided by the Ministry of Justice, but all errors in interpretation are our own.

⁵⁵ Royal College of Psychiatrists (2006) *Child Defendants*, Occasional Paper 56.

⁵⁶ Lynch, N. (2018). Towards a principled legal response to children who kill. *Youth Justice*, 18(3), 211-229.

Participation of victims may also be accommodated in the Youth Court, with studies of victims reporting higher levels of satisfaction in youth justice proceedings, where more effective participation methods may be used.⁵⁷

The established system of Ngā Kōti Rangatahi and Pasifika Courts assist in providing a relatively more culturally appropriate venue and response for young defendants, albeit still within the legislative constraints of the *Oranga Tamariki Act 1989*.⁵⁸

There is considerable experience and knowledge amongst the Youth Court judiciary, many of whom often already preside over criminal jury trials in the District Court. The adult court system has already adapted case management and procedure for young defendants.

Other jurisdictions have universal jurisdiction: A model of universal jurisdiction for children and young people already exists in Western Australia, where the youth court has exclusive jurisdiction to hear and determine charges relating to child or youth defendants.⁵⁹ While children's cases are usually heard by a magistrate, where a serious offence like a homicide is prosecuted, the President of the Children's Court will hear the matter. In Canada, the Youth Court has exclusive jurisdiction over those aged 12 to 18, whatever the offence.⁶⁰

Aotearoa New Zealand's obligations under the Children's Convention require that children and young people's cases are heard in an age appropriate environment where their effective and meaningful participation can be assured. This includes culturally appropriate settings and for tamariki and rangatahi Māori that indigenous legal traditions and language are employed. It would remove the absurd situation that those children and young people who most need the protections and supports of the youth justice system are excluded from it.

⁵⁷ Lynch, N. (2018b). "The other child" – The rights of the child victim in the youth justice system. *The International Journal of Children's Rights*, 26(2), 228-250. Ināia Tonu Nei – Hui Māori Report. (2019). *The time is now: We lead, you follow*. Wellington, New Zealand. Retrieved from <https://safeandeffectivejustice.govt.nz/news/latest-news/maori-perspectives-on-justice-report-released/>; Turuki!Turuki! Transforming our criminal justice system The second report of Te Uepū Hāpai i Te Ora Safe and Effective Justice Advisory Group (2020) <https://www.justice.govt.nz/assets/Documents/Publications/turuki-turuki.pdf>

⁵⁸ Quince, K. (2017). Rangatahi courts. In A, Deckert, & R. Sarr (Eds.), *The Palgrave handbook of Australian and New Zealand criminology, crime and justice* (pp. 711-723). Cham, Switzerland: Palgrave Macmillan. Taumaunu, H. (2014). Rangatahi Courts of Aotearoa/New Zealand - An update. *Māori Law Review*, 22(11), 1. Retrieved from <https://maorilawreview.co.nz/2014/11/rangatahi-courts-of-aotearoa-new-zealand-an-update/>

⁵⁹ Section 19 (1) of the *Children's Court of Western Australia Act 1988*.

⁶⁰ *Youth Criminal Justice Act 2002*, Part 2.

4.3. Reforms Required

The *Oranga Tamariki Act 1989* and *Criminal Procedure Act 2011* should be amended to remove any exceptions to Youth Court jurisdiction. This would mean that any criminal charge (or disputed infringement notice) against a child or young person over the age of criminal responsibility would be heard and resolved in the Youth Court, including any jury trials.

Work would need to be undertaken to consider appropriate judicial procedure where a jury trial is held in the Youth Court. As discussed, there are some models from other jurisdictions such as Western Australia,⁶¹ and many of the Youth Court judiciary already hold jury warrants. As the number of murder and manslaughter trials would be few, it may be possible to designate a small number of judges particularly for these situations. The Youth Court already can hear victim impact statements.

The issue of joint charges with adults is a more complex matter. It may be in the interests of justice and of complainants and witnesses not to hold two separate trials, and a single trial may be appropriate where young defendants have appropriate procedural modifications and support and name suppression. Section 277 of the *Oranga Tamariki Act* already provides principled guidance.

Automatic and permanent name suppression (which includes suppression of any identifying information or images) for offences committed while under the age of 18 should be assured even for serious offences.⁶² Ensuring that all children and young people are dealt with solely within the jurisdiction of the Youth Court would have this effect as the law already provides permanent identity suppression in the Youth Court. Notoriety has a particular impact on children and youth convicted of serious offending and impacts reintegration. This suppression should be permanent.

⁶¹ See the Canadian system where a judge of the superior court of the jurisdiction of the province can be designated a youth justice judge, where a young person elects trial by jury. Section 13(1), *Youth Criminal Justice Act 2002*.

⁶² It could be that the Crown would be able argue for publication where there is a strong public interest. This could take a similar form to s. 201 of the *Criminal Procedure Act 2011* which provides that the identity of a person accused or convicted of sexual offences will be automatically suppressed, unless the court orders otherwise.

5. ISSUE 2 – A PROHIBITION ON REMAND TO THE POLICE CELLS

At present, remand to the Police cells is one of five options available to the Youth Court when deciding where to remand a young person pending their next court hearing. While since 2019, this remand must be reviewed every 24 hours, historically it is not unusual for young people to be held in Police cells for several, or many, days.⁶³

Police cells are an entirely unsuitable place for young people.⁶⁴ This power also disproportionately affects rangatahi Māori. It is a breach of children and young people's rights under the Children's Convention.⁶⁵

Removing this power to remand requires increased investment in alternative options for community-based safe and secure placements for young people. This process is already well underway. Police cell remand numbers are currently low which makes this the ideal time to make this change. It is important to note that this recommendation only relates to the power to remand to a Police cell at or after the first court appearance.

6. ISSUE 3 – PROHIBIT PUNITIVE ADULT SENTENCES FOR CHILDREN AND YOUNG PEOPLE

The current system means that where children and young people are tried in the adult court, they must be sentenced as adults. The use of long sentences, particularly the indeterminate sentence of life, for children and young people is disproportionate to their youth and stage of brain development and is in direct contrast with the principles embedded in the *Oranga Tamariki Act 1989*.

The Children's Convention urges states to abolish "all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were below the age of

⁶³ Office of the Children's Commissioner, *Limiting the use of Police cells to hold young people on remand – Position Brief – June 2018* see: <https://www.occ.org.nz/assets/Uploads/Youth-Justice-Police-cells-June-2018.pdf>. Emile Donovan, "Use of police cells to hold young people 'unacceptable'" Radio NZ (New Zealand, 23 January 2017).

⁶⁴ David J Carruthers, Russell Wills and David Rutherford *Joint thematic review of young persons in Police detention* (Independent Police Conduct Authority, Wellington, 2012).

⁶⁵ Office of the Children's Commissioner "UN-funded report another reason to stop locking New Zealand children in police cells" (press release, 27 April 2017).

18 at the time of commission of the offence”.⁶⁶ According to the United Nations Special Rapporteur on torture and inhumane treatment:⁶⁷

Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child. Life sentences or sentences of an extreme length have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment.

As discussed above, international human rights standards hold that custody should be a last resort where public safety is at risk. The power to authorise detention of children and young people should be constrained by strict limits and the onus should be on the State to justify the continued detention on the grounds of risk to themselves or others, rather than simply for punishment or because there are not appropriate alternatives provided. As the Child Rights International Network establishes:⁶⁸

... the only justification for the detention of a child should be that the child has been assessed as posing a serious risk to public safety. Courts should only be able to authorise a short maximum period of detention after which the presumption of release from detention would place the onus on the States to prove that considerations of public safety justify another short period of detention.

As discussed in the preceding section, our recommendation is that the ability to sentence to adult sentences is completely removed. Because of the increased severity of the offending that would be within the jurisdiction, it is appropriate to discuss what age-appropriate outcomes for serious offending involve and what additional powers might need to be available in the Youth Court jurisdiction.

6.1. Current Situations Where Children and Young People are Sentenced as Adults

These will fall into one of the following situations:

⁶⁶ UN Committee on the Rights of the Child, General Comment no. 24, 2019: para 81.

⁶⁷ UNHRC, ‘Detention is inextricably linked with ill-treatment, children must be protected – UN expert’ 2015: 74. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15674&LangID=E#sthash.RrFDpO2m.dpuf>

⁶⁸ Child Rights International Network [CRIN]. (2015). *Inhuman Sentencing: Life Imprisonment of Children Around the World—Research Report*. [Online]. Available https://www.crin.org/sites/default/files/life_imprisonment_children_global_0.pdf. 5

- **Murder cases:** When a child or young person is convicted of murder, the judge must impose life imprisonment unless ‘manifestly unjust’ to do so.⁶⁹ The judge must also fix the minimum period which the offender must serve before they are eligible to apply for parole (MPI). Where life imprisonment is imposed, it will be a minimum term of 10 years. The judge is required to fix the MPI necessary for accountability, denunciation, public protection and deterrence.⁷⁰ A judge must also impose a 17-year MPI in cases where one or more of a list of 10 aggravating factors is present (e.g. particular vulnerability of the victim), unless it would be ‘manifestly unjust’ to do so.⁷¹ The MPI is the minimum period a person must serve before even being permitted to apply for parole.⁷²
- **Manslaughter cases:** When a child or young person is convicted of manslaughter, they are subject to adult sentences. There is no mandatory or presumptive sentence for manslaughter but it will almost always result in a sentence of imprisonment, sometimes with a minimum non parole period.⁷³
- **Category 3/4/jury trials:** When a young person’s case is dealt with in the adult court, they will be subject to an adult sentence. This can be mitigated through a youth discount, but the adult principles of the *Sentencing Act 2002* and the tariff sentencing guidelines will apply.
- **Section 283(o) order:** The ultimate order available to the Youth Court is to convict the young person and remove the young person from the Youth Court’s jurisdiction to the

⁶⁹ Section 102, *Sentencing Act 2002*.

⁷⁰ Section 103, *Sentencing Act 2002*.

⁷¹ Section 104, *Sentencing Act 2002*.

⁷² There are roughly 2-5 cases of murder sentencing of under-18s every year. Ministry of Justice, Homicide offences (2020) <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp> Recent examples of young people being sentenced for murder include: a 15 year old boy sentenced to life imprisonment with a minimum non-parole period of 11 years (*R v Cameron* [2020] NZHC 1488); a 15 year old boy sentenced to life imprisonment with a minimum non-parole period of 10 years (*R v Tihema* [2020] NZHC 2135) and a 14 year old boy sentenced to life imprisonment with a minimum non-parole period of 10 years (*R v Hanara* [2019] NZHC 78).

⁷³ There are between 5 and 10 cases of manslaughter sentencing with offenders aged less than 18 per year. Ministry of Justice, Homicide offences (2020) <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp>

District Court or the High Court for sentencing. This can result in imprisonment or other adult sentences.⁷⁴

6.2. Impact on Children and Young People

Where children and young people are sentenced through the adult system, they are sentenced under the *Sentencing Act 2002*. This legislation has mandatory or presumptive sentences for some offences and the principles emphasise retribution, deterrence and individual responsibility.

Adult sentences are inappropriate and traumatic for children and young people. The use of indeterminate or lengthy sentences of imprisonment solely for retributive purposes, as is now the case in Aotearoa New Zealand, contravenes the requirements in human rights standards to use detention as a last resort and where public safety is at risk.⁷⁵ In all but one of the cases involving children or young people convicted for murder since the *Sentencing Act 2002*, the offender has received the sentence of life, with at least a minimum period of imprisonment of 10 years.⁷⁶ These outcomes are harsh, disproportionate and completely unsuitable for children and young persons.

Children and young people sentenced to imprisonment are likely to spend some or all of their sentence in an adult prison. This is harmful and often detrimental to reintegration (noting that some children and young people are not integrated into society in the first instance). Sentencing inherently vulnerable children and young people to the harsh environment of an adult prison raises concerns about welfare and protection. The *Criminal Justice Act 1985* permits children and young people serving a term of imprisonment to be detained at a youth justice residence.⁷⁷ A child serving a term of imprisonment may only be detained in a youth

⁷⁴ In 2020, 75 young persons were transferred out under this section, 63 of these were aged 17 years. Ministry of Justice, Children and young people with charges finalized in any court (2020) <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp>

⁷⁵ Lynch, N. (2019). Protective Measures for Children Accused or Convicted of Serious Crimes. *W O'Brien and C Foussard (eds) Violence Against Children in the Criminal Justice System: Global Perspectives on Prevention (Routledge, 2019)*, 56.

⁷⁶ Lynch, N., 2018. Manifest injustice? The judiciary as moderator of penal excess in the sentencing of youth for murder. *The Howard Journal of Crime and Justice*, 57(1), pp.57-76.

⁷⁷ *Criminal Justice Act 1985*, s 142A(1).

justice residence.⁷⁸ Presently, there is a small number of higher security places available for children and young people serving a term of imprisonment at Te Puna Wai o Tuhinapo youth justice residence in Rolleston near Ōtautahi/ Christchurch and Korowai Manaaki youth justice residence in Tāmaki Makaurau/Auckland. There are no statutory requirements as to who should fill the small number of places available and places are not guaranteed. The decision is made by the Department of Corrections and Oranga Tamariki. As the youth justice system is only empowered in respect of young people aged less than 18, once the young person turns 18, they must be moved to the adult prison system. Young people in prison may be in physical danger from adult inmates. While those under 18 are to be kept separate from adults, the Chief Executive of the Department of Corrections may authorize mixing. While young males may be held in Youth Units, young females are always held in the general section of the women’s prisons as there are no designated Youth Units for young female prisoners.

Young people who have spent considerable time in prison have few points of reference to a stable, crime-free life as so little of their lives has been spent outside situations of incarceration. They are entirely dependent on the State to provide the courses, education and opportunities to prove that they are ‘safe’ to release.

Not all sentencings will result in a term of imprisonment, but any convictions in the adult court are on a person’s criminal record and can affect travel and job opportunities. Aotearoa New Zealand’s use of adult sentences for children and young people contravenes human rights standards and has a disproportionate effect on tamariki and rangatahi Māori.

6.3. *The Required Reforms to Ensure Age-Appropriate Accountability*

Our first call is for an immediate end to the ability to sentence children and young persons to punitive adult sentences. Amend the *Sentencing Act 2020* to abolish the sentence of life imprisonment for children and young persons in recognition of children and young person’s evolving capacities and state of brain development.

Establishing appropriate alternatives will require a radical reimagining of how we respond to such cases and a move away from individualised tariff-based sentencing to a child/youth-specific and culturally appropriate response. These responses must also consider the needs of

⁷⁸ *Criminal Justice Act 1985*, s 142A(1A).

those people who have been harmed by the child or young person's actions.

Should a child or young person need to be deprived of their liberty to avoid harm to themselves or others, this should be for the shortest appropriate period and not for retributive purposes. It should be regularly reviewed. The focus of the response should be to address the needs which have led to the harm occurring.

The current maximum period for a supervision with residence order in the Youth Court is six months. There will be a need to expand the powers of the Youth Court to respond to more serious offending which is currently dealt with through removal to the adult system.

For a child or young person who commits a very serious offence such as murder or manslaughter, we anticipate that a lengthy period of intervention and supervision will be involved, to ensure accountability and that the child or young person's needs are addressed. Our call is for the system to imagine responses that can address the need to respond without an automatic imposition of long periods of imprisonment. The current approach means little prospect of specialised therapeutic interventions for the child or young person or their family or the prospect of enduring reintegration.

7. ISSUE 4- AN APPROPRIATE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The fourth priority for reform is setting the appropriate age at which children should be held liable for a criminal offence.

7.1. Immediate Priority – Raise the Age to 12

Raising the minimum age of criminal responsibility to 12 immediately is an achievable step to protect children. It is immediately achievable and would have very little practical implication as all offending by 10- and 11-year olds is resolved by informal means (apart from murder and manslaughter).

7.1.1. Children under 12 who cause harm to others

If this change was made, children under 12 would then be deemed completely legally incapable of criminal responsibility. It would exclude children under 12 completely from the criminal jurisdiction, meaning that no child under 12 could be dealt with through police diversion or

other informal means. Nor would s. 14(1)e) of the *Oranga Tamariki Act 1989* be available (the care and protection response on grounds of offending).

For children under the minimum age of criminal responsibility who cause harm to others or to property, there are still avenues to respond. Police can undoubtedly arrest and question those aged less than the minimum age of criminal responsibility.

The police may make a referral to Oranga Tamariki under sections 14(1)(c) or (d) of the *Oranga Tamariki Act 1989*. These provisions relate to children (of any age) who are out of the control of their parents or caregivers or exhibiting behaviour likely to harm themselves or others. A care and protection Family Group Conference may be convened and an application may be made to the Family Court for an order that that the child is in need of care and protection. Note that this is purely a civil order and differs from the section 14(1)(e) of the *Oranga Tamariki Act 1989* process. Thus, there is no provision for reparation to anyone who has suffered harm as a result of the child's actions.

7.1.2. Work towards principled and culturally appropriate alternatives

People who are harmed by a child under the minimum age of criminal responsibility may benefit from ways of reconciliation and apology such restorative justice, a Family Group Conference, or culturally appropriate reconciliation processes. It is very important to ensure that these do not involve any form of sanction that could be considered to be criminal, including where a child agrees to a measure. It is very important not to replace the criminal jurisdiction with a quasi-criminal system with no due process rights.

There would need to be clear processes in place to ensure the safety of victims and other members of the public where serious harm has been caused. People harmed may have legitimate concerns, as it would not be possible to have criminal measures like bail conditions and non-association orders. Measures are available under the care and protection system and the mental health system (where relevant) to protect the safety of others.

7.2. *An Interim Response for 12 and 13-year-old Children*

Up until 2010, 12 and 13-year-old children could only be prosecuted in cases of murder and manslaughter. In 2010, the law was changed to also allow 12 and 13-year olds to be prosecuted

for serious and persistent offending. We consider that this change had a poor evidence-base, as offending by children was declining. It appears more likely to be an example of ‘penal populism’.⁷⁹

We have reviewed the use of this power and the facts of the reported cases since this power was introduced. Many of these cases which are prosecuted are eventually pushed back to the care and protection system through section 280A of the *Oranga Tamariki Act 1989*. This suggests that the issues are primarily welfare based and properly dealt with through the care system and demonstrates that there is no real need for the prosecution power.

Nonetheless, 12 and 13-year-old children are responsible for a very small number of intentional serious harm incidents including homicide and sexual violation. These types of offences involve a high degree of harm and there is a need to ensure that the mechanisms of the criminal justice system, such as proof, accountability and detention, are available to protect the interests of the public.

It is our view that the power to prosecute 12 and 13-year-old children should only be available in exceptional circumstances and the change made in 2010 could be reversed immediately. We consider that specific offences should not be named here,⁸⁰ but that the test be that there must be the consent of the Solicitor General and only where there was a clear public interest in a prosecution. This is based on the model used in Ireland. The protection of *doli incapax* should be retained.

The raising of the minimum age of criminal responsibility to 12, with the strict restrictions on prosecution just described, would mean that prosecution of those aged 12 and 13 years would occur only in exceptional circumstances. It would also allow the retention (for this small number of children) of existing measures such as the section 14(1)(e) of the *Oranga Tamariki Act 1989* power for a care and protection process on the grounds of offending and the option of referral for police diversion or alternative action.

⁷⁹ Lynch, N. (2012). Playing catch-up? Recent reform of New Zealand’s youth justice system. *Criminology & Criminal Justice*, 12(5), 507-526. Office of the Children’s Commissioner, *State of Care: Children with Offending Behaviour* (2020). <https://www.occ.org.nz/publications/reports/children-with-offending-behaviour/>

⁸⁰ See for instance Ireland, where homicide and sexual violation are specified offences. Section 52, Children Act (Ireland) 2001.

This is an interim step while reform occurs to the care and protection system to ensure that children who will be dealt with there in the place of the criminal jurisdiction are in a safe and culturally appropriate system, encompassing “by Māori, for Māori” approaches.

7.3. Medium Term – Raise the Age to 14 years

Aotearoa New Zealand’s minimum age of criminal responsibility is low by wider international standards.⁸¹ It does not reflect contemporary evidence on brain development and children’s capacities.⁸²

International human rights standards do not establish a specific minimum age of criminal responsibility, but there is a developing international norm of setting the age at 14 years. The UN Committee on the Rights of the Child updated their General Comment with evidence from brain development science to justify recommending a higher minimum age of criminal responsibility, noting that “documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing [...] States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age”.⁸³

Many European civil law jurisdictions have their minimum age of criminal responsibility set at 14, 16 or as high as 18.⁸⁴ Nonetheless, children may then be negatively impacted by alternatives – such as indeterminate measures taken through the welfare system.⁸⁵

To raise the age to 14, Aotearoa New Zealand will have to progress reform on the care and protection system.⁸⁶ At present, removing children from the criminal jurisdiction to the care

⁸¹ Howard League for Penal Reform (2008) ‘Punishing Children: a survey of criminal responsibility and approaches across Europe

⁸² Brown, Aaron, and Anthony Charles. "The minimum age of criminal responsibility: the need for a holistic approach." *Youth justice* 21, no. 2 (2021): 153-171.

⁸³ UN Committee on the Rights of the Child, 2019, para. 22.

⁸⁴ Cipriani, Don. *Children’s rights and the minimum age of criminal responsibility: a global perspective*. Routledge, 2016.

⁸⁵ van den Brink, Y & Lynch, N., (2021). Beyond the Life Sentence – A Children’s Rights Lens on Sentencing for Murder. *The International Journal of Children’s Rights*, 29(4).

⁸⁶ Office of the Children’s Commissioner (2020). “Te Kuku o Te Manawa” (reports one and two) <https://www.occ.org.nz/publications/reports/tktm-report-2/>

and protection system could result in worse outcomes and less protection in terms of due process rights, defined timeframes and legal representation.

8. OVERALL SUMMARY OF RECOMMENDATIONS

1. Remove all exceptions to Youth Court jurisdiction so that any child or young person who is charged with a criminal offence (which should always be as a last resort for serious offending) would have their case heard and finalised in the Youth Court.
2. Remove the ability to remand young people to the police cells with no time limit at or after the first Youth Court appearance by repealing section 238(1)(e) of the *Oranga Tamariki Act 1989*.
3. Implement age-appropriate sanctions for children and young persons convicted of serious offences by ensuring that custody is a last resort for the shortest possible time and that children and young people are dealt with through specific youth-focused principles and programmes. Abolish punitive sentences such as life imprisonment and minimum non-parole periods for children and young people.
4. As an interim step, immediately raise the minimum age of criminal responsibility to 12 and strictly restrict prosecution of 12 and 13-year old children. Once reform has progressed on care and protection, particularly in providing safe care placements, the age should be raised to 14 years.