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DOES SCIENCE KNOW US BETTER THAN WE KNOW OURSELVES?

THE UTILITY OF EVIDENCE-BASED POLICY FOR LAW REFORM ON THE COMPETENCY AND CAPACITY OF CHILDREN

LAWS526: Law Reform and Policy

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Contents (References - table of contents)

Table of Contents

I Introduction

In an era where science, evidence and facts reign supreme, we may believe ourselves to be free from the days of policy founded upon "ideological standpoints" or "speculative conjecture".[1] Yet, the process of creating and developing the law cannot be fixed. Rather, it is dependent on the way political and social pressures have shifted to give a certain approaches or viewpoints ephemeral precedence. Significant advancements in science and technology have allowed for unprecedented insights into children's development. In the legal sphere, age limits demarcate society's determination of when a child is sufficiently developed to be considered competent. New Zealand's current law contains a jumble of age limits forcing a conclusion that the law reflects starkly differing perspectives of what competency means. Legions of research have been conducted into the area of children's competency and capacity. However, these scientific investigations have yet to impress themselves upon policy-making in a meaningful way.

Many Western nations are aiming to modernise their governments to accord with an increasingly active constituency.[2] Evidence-based policy (EBP), bolstered by the United Kingdom Blair Government of 1997, has offered governments a golden pathway to revolutionise their processes. It advocates for the substitution of opinion-based policy with a process defined by the gathering, appraising and utilisation of high quality research in decision making.[3]

The idea of using evidence to inform policy-making is not new.[4] Indeed, there is little controversy over the idea that policy should be evidence-based. However, the paramountcy of evidence in policy and law reform remains contentious. EBP emerged from processes of evidence-based medicine, which enshrined the randomised control trial as the "best" form of evidence. In this area, there is a clear benefit to the robustness of scientific findings when randomised allocations determine who receives a treatment and who does not, compared with observational studies where participants elect to do so.[5] However, the context of medicine (and more specifically, clinical trials) is drastically different to that of

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[1] Phillip Davies "Is Evidence-Based Government Possible?" (Jerry Lee Lecture 2004, Campbell Collaboration Colloquium, Washington DC, 19 February 2004) at 3.

[2] Giada De Marchi, Giulia Lucertini and Alexis Tsoukiàs "From evidence-based policy making to policy analytics" (2014) 236 Ann Oper Res 15 at 16.

[3] Davies, above n 1, at 3.

[4] De Marchi, Lucertini and Tsoukiàs, above n 2, at 23.

[5] Adam La Caze and Mark Colyvan *Evidence-Based Policy: Promises and Challenges* (2006) at 2.

policy-making. The difficulty arises in attempting to translate the "hierarchy of evidence" put forward by evidence-based medicine to social policy.

The nature of policy problems means this framework is likely to be unsuitable. Understanding the causal process for a problem is key.[6] However, while regulatory impact analysis requires the demonstration of a strong case for change[7], we rarely, if ever, have a stable theoretical basis for an intervention. Determining the competency of young people is an inherently dynamic problem. It rests upon social constructions of childhood and adulthood, and accompanying societal attitudes. The most widely accepted child development theory assumes development is individual and multifaceted. The interaction between multiple systems means it is almost impossible to show causal directions in development.[8] Setting age limits is an arbitrary exercise, and determining whether they have "worked" is not easily achieved. Randomised control trials also involve a control group, that is, a group who did not receive the intervention. This is simply impractical and inconceivable for law reform. Comparisons can be made with other nations, but this presents a host of other difficulties. Despite these issues, governments have advocated for implementation of EBP. Albeit practically, the use of EBP is relatively superficial.

Therefore, other approaches to law reform must involve a different focus than evidence—instead placing human rights, culture, history, general ideologies or feelings at the forefront. This paper will demonstrate that these alternative approaches provide the foundation for law, while evidence simply acts as a complement. However, an evidence-based approach may still be desirable. This paper will proceed by outlining the nature of the problem, and presenting a case for the use of EBP. Secondly, the use of evidence in law reform over time will be evaluted. The focus of later sections will investigate how an evidence-based approach may work in this area.

II Competency and Capacity

Competency and capacity both relate to a person's ability to do something. Capacity refers to the personal or legal factors that enable a person to achieve a legal outcome—including knowledge, skills, sound mind and age.[9] Generally, this means having the mental ability to understand the nature and effect of one's act.[10] Having capacity gives the status of being

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[6] La Caze and Colyvan, above n 5, at 6.

[7] "Regulatory Impact Analysis" (21 September 2015) The Treasury <www.treasury.govt.nz>.

[8] Laura E Berk *Child Development* (9th ed, Pearson Education, New Jersey, 2013) at 26–27.

[9] *Australian Law Dictionary* (2nd ed, 2013) Capacity.

[10] *Black's Law Dictionary* (10th ed, 2014) Capacity.

legally capable, and therefore, competent. They will be used interchangeably within this paper.

Age (youth) and mental instability or insanity (unsoundness of mind) are typical exceptions to finding of competency. However, they differ in an important way. While youth creates a presumption of incapacity, insanity or mental disorder operate to defeat a presumption of capacity in adults. This paper will be focused solely on incapacity due to age.

A Youth

For a young person to be competent, they must have the ability to understand information required to make a decision, and appreciate the consequences of a decision.[11] Competency is typically tied to age limits. It becomes an issue when the law is concerned about the rights of an individual to be free from harm. Children's status as right holders, and their supposed vulnerability due to age, purportedly founds the power to legislate for their protection.

The current law reflects an assortment of the diverse reasoning and understandings that informed legal reform throughout history. Exploring what the issue is for policy-making in this area will be the focus on the following section.

III The Problem

There is an inherent tension in the area of children's competency and capacity. One the one hand, there is a need to protect children from harm, and on the other, to allow for their increasing autonomy and capabilities. New Zealand's grappling with this issue has resulted in a variety of age limits and a mixture of both bright line determinations and case-by-case assessments.[12]

[11] Debbie Schacter, Irwin Kleinman and William Harvey "Informed Consent and Adolescents" (2005) 50 Canadian Journal of Psychiatry 534 at 535; Thomas Grisso and others "Juveniles' competence to stand trial: a comparison of adolescents' and adults' capacities as trial defendants" (2003) 27 Law and human behavior 333 at 334.

[12] Compare, for example, the age limit for learning to drive (16) and the *Gillick* test for determining whether a child is competent to consent to medical treatment.

Some of the key age limits are as follows:[13]

Age	Abilities or responsibilities
10	• May be prosecuted for murder or manslaughter.
12	• May also be prosecuted for other serious offences or child is a 'previous offender'.[14]
14	• Considered to be a 'young person' rather than a child in criminal law • Can be prosecuted for any criminal offence • Can be left at home alone
16	• Can begin learning to drive • Can get married with parental consent • May consent or refuse to consent to medical treatment • May leave school or home without parental consent • Can apply for a firearms licence • Can consent to sexual intercourse
17	• Can join the Navy, Army or Air force with parental consent • No longer within the jurisdiction of the youth justice system
18	• Will no longer be subject to guardianship jurisdiction • Can get married without parental consent • Can purchase alcohol and tobacco products • Can enter into binding contracts • Can vote
20	• Official Age of Majority • Can gamble or work in a casino • Can apply to adopt a child related to you

The Age of Majority Act 1970 holds that, prima facie, young people do not become adults until the age of 20. However, as set out above, young people are endowed with a variety of rights and responsibilities before this time. These inconsistencies clearly demonstrate that Parliament has floundered somewhat in determining the competency of young people.

The development of the law and any future reforms must take into account the differing perspectives from which these tasks could be approached. They produce different

[13] Citizens Advice Bureau "Legal ages and ID" (24 June 2016) <www.cab.org.nz>.

[14] See Crimes Act 1961, s 272(1).

outcomes, and may even be in conflict with each other.[15] A societal conception that sees adolescence ending in the mid-twenties would incline towards emphasising immaturity and protecting children until as late as possible. In contrast, a populist punitive approach to youth crime would view children as autonomous, problematic beings that must be held harshly accountable for their actions. Another perspective would view protective mechanisms as interfering with their human rights.[16] This demonstrates the clear divergence in how different approaches could shape policy decisions regarding age limits in the law.

B The Case for Evidence-Based Policy

EBP aims to help people make well informed decisions, by placing the best evidence available from research at the centre of policy development and implementation.[17] Since being popularised in the United Kingdom, governments in the United States of America, Australia, and New Zealand have all endorsed the use of EBP.[18] The manifesto of the EBP movement is that:[19]

> … policy decisions should be based on sound evidence … Good quality policy making depends on high quality information, derived from a variety of sources …

Social trends and technological advancements such as higher levels of education and the advent of the internet mean citizens are increasingly involved in the policy process. [20] New Zealand's strong belief in democracy also requires a high level of accountability by the executive sector. EBP has come to represent a commitment to high quality policy development, and fulfils accountability requirements through greater transparency and rationality in the decision-making process.[21] The use of evidence in policy-making then creates a feedback loop between policy-makers and researchers, and ought to result in a culture of using and producing reliable, rigorous evidence.[22] EBP offers a way to objectively determine how, and whether a government's mandate has been fulfilled so that

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[15] David Pimentel "The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence" (2013) 46 Tex Tech L Rev 71 at 74–85.

[16] See part VI.B.

[17] Davies, above n 1, at 3.

[18] Rob Watts "Truth and Politics: Thinking About Evidence-Based Policy in the Age Of Spin" (2014) 73 Australian Journal of Public Administration 34 at 34.

[19] Cabinet Office *Modernising government* (TSO, CM4310, 1999) at 31.

[20] De Marchi, Lucertini and Tsoukiàs, above n 2, at 16.

[21] Brian W Head "Reconsidering evidence-based policy: Key issues and challenges" (2010) 29 Policy and Society 77 at 78.

[22] At 79.

the public may hold them to account. At first glance, it would appear that EBP offers an answer to all policy-making woes. Hence, policy-makers should be using this framework to develop laws.

IV How is Evidence Used in New Zealand?

EBP is typically used to assess the validity or effectiveness of an intervention. The New Zealand policy development framework requires policy-makers to produce regulatory impact statements (RISs) and disclosure statements.[23] A RIS provides information about the impacts of different policy options, and disclosure statements include quality assurances, and significant provisions of a proposed policy. Their public availability is designed to provide assurances that there is a robust case for change, and ensures transparency in the decision-making process.[24] The aim is to improve legislative quality and create enduring, principled, effective legislation.[25] There is a clear overlap in the underlying aims and principles between this and EBP. In fact, the implementation of these requirements demonstrates a commitment to EBP by the New Zealand Government. Therefore, the following section will investigate whether evidence has been used in development of New Zealand's current law on competency and capacity.

A Foundational Concepts

Many of New Zealand's age limits appear to be simply arbitrary constructions of socially pleasing policies. The following areas are highly politicised, and are often used as justifications or comparators for other areas of law. Therefore, they will preface the discussion regarding why and how the current age limits exist.

1 Marriage

Under English common law (which applied in colonial New Zealand), children could marry when they became "of age" (12 for girls; 14 for boys).[26] This related to early conceptions of children 'maturing' upon the onset of puberty.[27] However, marriage at this age was rare. Regulation of marriage began in England after the basic requirements (the

[23] "Developing a Regulatory Proposal" (21 September 2015) The Treasury <www.treasury.govt.nz>.

[24] "Regulatory Impact Analysis", above n 7; The Treasury *Disclosure Statements for Government Legislation: Technical Guide for Departments* (June 2013) at 3.

[25] The Treasury, above n 24, at 3.

[26] Leah Leneman "The Scottish Case That Led to Hardwicke's Marriage Act" (1999) 17 Law and History Review 161 at 162; Megan Cook "Marriage and partnering" (25 May 2015) Te Ara Encyclopedia of New Zealand <www.teara.govt.nz>.

[27] Don Cipriani *Advances in Criminology : Children's Rights and the Minimum Age of Criminal Responsibility : A Global Perspective* (Ashgate Publishing Limited, Surrey, 2009) at 73.

parties being of age and consenting), resulted in many difficulties in proving the existence of a marriage.

The first legislation in New Zealand was the Marriage Act 1854, after the Marriage Ordinance of 1842.[28] In 1933, a minimum age for marriage of 16 (for boys and girls) was introduced, after women's groups had noted an issue of marriages for girls under 16.[29] The current Marriage Act retains this minimum age.[30] However, the definition of minor means that a young person may only marry without consent once they are 18.[31] This change aimed to create consistency across the age for marriage, civil unions, and contractual capacity.[32]

The age for marriage acts as the foundation for many other pieces of legislation. This seems logical as it was once seen as the essential unit of family and society. However, the concept of marriage indicating competency is now antiquated. Very few young people in a modern society are married at 16 (or even before age 20), reflecting the concept that that young people reject adulthood for longer than ever before.[33] It is particularly notable that a prerequisite for marriage at 16-17 is parental consent.[34] This raises serious doubts about policy-makers' perceptions of a young person's capacity to make this decision for themselves. The legal age for marriage and determinations of competency ought to be divorced. Yet, as will be discussed, marriage remains a foundational concept to the development of the law in this area.

2 Armed forces

The age for enlisting voluntarily in New Zealand is 17.[35] Presumably the historical age for involvement in wars and other battles was linked with the age of majority.[36] Since then, it would appear that age for enlistment depends on social need. The age for compulsory conscription (from 1845 to the Second World War) has ranged from 18-20.[37] There is little

[28] Cook, above n 26, at 2.

[29] Marriage Amendment Act 1933, s 2; Cook, above n 26, at 3.

[30] But see: Marriage Act 1955, s 17.

[31] Marriage Act, s 2(1).

[32] Relationships (Statutory References) Bill 2004 (151–2) (select committee report); cl 2.

[33] *Demographic Trends: 2012* (31 January 2013) at 17; Jeffrey Jensen Arnett "Emerging adulthood: A theory of development from the late teens through the twenties" (2000) 55 Am Psychol 469 at 471.

[34] Marriage Act, s 18.

[35] New Zealand Defence Force "What age do I have to be to apply to join the New Zealand Defence Force?" Defence Careers <www.defencecareers.mil.nz>.

[36] Michael DA Freeman *The Rights and Wrongs of Children* (Frances Pinter, Dover, 1983) at 6.

[37] Mark Derby "Conscription, conscientious objection and pacifism" (29 October 2013) Te Ara Encyclopedia of New Zealand <www.teara.govt.nz>.

research available into why such ages were chosen. The author's interpretation is somewhere between the ages of 17-20, young men were deemed sufficiently competent and the specific decision of a lower age limit rested upon an arbitrary decision. The ability to join the military and the ability to vote were once tied. All military personnel were entitled to vote regardless of whether they met the age of majority.[38] This demonstrates that the nature of military service granted or enabled some level of competence that others had not yet achieved, similarly to marriage.

B Age of Majority Act 1970

New Zealand's age of majority is 20 years of age.[39] However, there are few notable rights granted exclusively upon the reaching of 20 years—one typically associated with this birthday is the ability to bet in a casino.[40]

1 Why 20?

The first age of majority in New Zealand was 21. This most likely came with the adoption of English law. In medieval England, the age of majority differed depending on classes. Knights attained the age of majority at 21, when they were deemed strong enough to bear armour. Lower classes reached maturity at 14 or 15—when they became capable of working the land. By the 13th century, 21 became the prevailing age of majority.[41] This enlightens the notion that there is "nothing particular God-given about the age of 21".[42] New Zealand absorbed the English common law with the English Laws Act 1858, and it was not updated in either England or New Zealand until 1970, 112 years later. This is strong evidence for policy-making (or lack of) on the basis of tradition. It seems unlikely that any law would retain its currency for such a period, particularly given the magnitude of change that occurred in New Zealand's formative years.

The Age of Majority Act 1970 reduced the age from 21 to 20. The surrounding environment almost certainly influenced these changes. In 1969, the National Government had reduced the voting age from 21 to 20 after mounting pressure from higher levels of education, demographic changes, and student protests against the Vietnam War.[43]

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[38] "Age of Reason?" (15 February 2013) Electoral Commission <www.elections.org.nz>.

[39] Age of Majority Act 1970, s 4.

[40] "Legal ages: When you can do what" Community Law <www.communitylaw.org.nz>.

[41] Freeman, above n 36, at 6.

[42] Committee on the Age of Majority *Report on the Committee on the Age of Majority* (Her Majesty's Stationery Office, Cmnd 3342, July 1967) at 22.

[43] "Age of Reason?", above n 38; "Voting age reduced to 18 years in 1974" (22 August 2014) New Zealand Parliament <www.parliament.nz>.

The argument was that young people must hold the requisite maturity to vote if they could fight in wars. The change also occurred in an election year, and reducing the voting age would have acted as a voting incentive. Given the political scene, the same reasoning would also have to apply to the age of majority. This is reflected in statements that the Government would undertake a review of the age of majority as a consequence of lowering the voting age and the age for drinking on licensed premises.[44] The "will of the people" seems to have dictated what the shape of the reform ought to be, reflecting a 'populist' approach to policymaking.

Comparatively, populism also worked to immobilise later reforms. Initial reforms were tied to a lowering of the voting age, but the Act was left behind when the voting age was reduced to 18 in 1974.[45] Lowering the age of majority would have resulted in an accompanying reduction in the alcohol purchase as they had become synchronous.[46] Given the strong debates invoked for policies surrounding alcohol, the government of the day presumably wished to avoid these issues. Although the law already demonstrated deviance from the age of majority by this point, no change occurred as "the Government feels that 20 is low enough at present."[47]

Since that time, the Age of Majority Act has simply been ignored. Traditionally, the age of majority carried with it a variety of consequences:[48]

- the right to vote,
- full contractual capacity,
- capacity to deal with and dispose of property,
- cessation of guardianship,
- the right to marry without consent, and
- the right to the adult wage.

The Act has become increasingly obsolete as parliament erodes its use by setting alternative age limits in the law. In 2009, Jacinda Ardern MP noted the inconsistencies in the legal

[44] (9 July 1970) 367 NZPD 1707.

[45] "Age of Reason?", above n 38.

[46] (30 August 2012) 683 NZPD 4997; Paul John Christoffel "Removing Temptation: New Zealand's Alcohol Restrictions, 1881-2005" (Doctoral Thesis, Victoria University of Wellington, 2006) at 20.

[47] (18 November 1970) 370 NZPD 5115.

[48] At 5115.

position: "In New Zealand legislation we have consistently moved around the point at which we consider a young person to be an adult in the eyes of the law…" [49]

The 1970 thinking was that there would be considerable opposition to a proposal to end minority at 18: parents would be "unwilling" to let their child marry without consent, and economic consequences would flow from earlier entitlements to adult wages.[50] Since that period, nearly all of the traditional rights associated with the age of majority have undergone an age reduction to 18. The exceptions are the Property Law Act, which retains the age of majority of 20, but allows persons aged 18-20 to do certain things; the Trustee Act, and the right to the adult wage, although an adult wage can be earned earlier.[51] The markers of maturity flowing from the age of majority now leave the Act as an anomaly. Legislative proposals and reforms indicate that government often forsakes consistency with the Age of Majority Act in favour of provisions granting entitlements at 18.[52]

C Criminal Law

The law concerning the criminal responsibility of children has been a central foci of research into children's competency. The current law holds that children can be criminally prosecuted from the age of 10 for murder and manslaughter (the minimum age of criminal responsibility or MACR).[53] At 12-13, children can be held liable for offences other than murder or manslaughter where the maximum penalty is at least 14 years imprisonment, or the chid is a 'previous offender' and the current offence has a maximum penalty of 10-14 years imprisonment.[54] Children aged between 10-14 years are also subject to the *doli incapax* presumption—which requires the prosecution to prove that the child knew the act or omission was wrong or contrary to law.[55]

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[49] (4 August 2009) 665 NZPD 5379.

[50] (18 November 1970) 370 NZPD 5115.

[51] Property Law Act 2007, s 22; Trustee Act 1956, s 40; Law Commission *Review of the law of trusts: A Trusts Act for New Zealand* (NZLC R130, Law Commission 2013) at 82.

[52] Law Commission *Review of the law of trusts: A Trusts Act for New Zealand* (NZLC R130, Law Commission 2013) at 82; (4 August 2009), above n 63; Relationships (Statutory References) Bill 2004 (151–2) (commentary).

[53] Crimes Act 1961, s 21.

[54] Children, Young Persons, and Their Families Act 1989 s 272(1).

[55] Crimes Act, s 22.

1 Why these ages?

Criminal responsibility flows from the assumption that people act rationally, and with free will.[56] The MACR signifies the point at which people are assumed to have these abilities—ergo, having capacity.[57]

Until the 19th century, there was little difference between the treatment of young people and adults for offending. The *doli incapax* presumption was the only feature recognising children's lesser capacity.[58] The operation of this system reflected the *patria protestas* principle. Children derived status from their father, and were not considered to have independent wills upon which to attach criminal responsibility.[59] By the time of The Children, Young Persons and Their Families Act 1989, there had been significant changes to the underlying values of the youth justice system. The Act aimed to empower families and communities to take charge of a young person's offending, evidencing a shift away from the previous interventionist state role.[60]

New Zealand's first MACR was 7 years of age, appearing in statute for the first time in 1893.[61] These provisions were re-enacted in the Crimes Act 1908. By 1957, a Crimes Bill (the precursor to the current Crimes Act) was introduced. However, after the release of a report by Sir George Finlay a new bill was prepared and introduced in 1959. The 1957 and 1959 Bills both contained a MACR of 7. The Statutes Revision Committee recommended that the age be increased to 10. The 1961 Crimes Bill reflected this recommendation, although no reasoning for why this occurred could be discovered. [62] The MACR has not changed since the enactment of the Bill. While there have been expert recommendations to increase the age to 12, citing "developmental differences" between 10 and 12 year olds[63], these suggestions have been rejected on the basis that the public may think the Government "does not take offending by children seriously".[64]

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[56] Cipriani, above n 27, at 10.

[57] At 11.

[58] Nessa Lynch *Youth Justice in New Zealand* (Brookers, Wellington, 2012) at 3.

[59] At 2.

[60] At 5–14.

[61] Criminal Code Act 1893, s 22.

[62] Crimes Bill 1961 (82–1), cl 21.

[63] Ministry of Social Development *Expert Panel Final Report: Investing in New Zealand's Children and Their Families* (December 2015) at 98.

[64] Cabinet Social Policy Committee *Paper Two – Final Report of the Modernising CYF Expert Panel: Policy and Legislation* (April 2016) at [61].

This kind of rhetoric has surrounded the National Party since its targeting of youth justice as an election policy in 2008. To appease the public thirst for harsher youth crime punishments, it introduced legislation broadening the scope of punishment to 12 and 13 year olds. This was in explicit rejection of evidence, favouring erroneous perceptions that youth crime was increasing.[65] Clearly within the sphere of criminal law, legislation has been influenced by political and social desires, rather than being founded on evidence. This is ironic given that the law surrounding competency of children in the criminal sphere has produced the much of the research into competency more generally.

D Contract Law

Early 20th century common law held that a person lacked contractual capacity until the age of majority (then 21). Contracts entered into with "infants" (anyone under this age) would only be enforceable in specific circumstances.[66] However, uncertainty in the law resulted in the effective exclusion of a class of responsible "infants" from contractual relations.

In 1967, the Committee on the Age of Majority in the United Kingdom released a report (the Latey Report), which endorsed the reduction of both the age of majority and contractual capacity to 18.[67] Reasons for lowering the age were described as:[68]

- An increase in maturity.
- The majority of young people are responsible adults by 18.
- Young people thought of themselves as "of age" at this time.
- Many other freedoms are granted upon reaching the age of 18.

These reasons operate more like social justifications for a pre-decided position than constituting evidence. This style of reasoning is evident in many of the arguments surrounding competency. While they initially read as precursors for action, they are simply reflections of whichever construction of childhood and adulthood is currently prevalent.

The Latey Report was highly influential on New Zealand policy makers. The Minors' Contracts Bill 1969 was set against a political backdrop which indicated a disposition towards granting young people rights earlier.[69] The Minors' Contracts Act sought to rectify

[65] Hannah Wilson "Swings and Roundabouts: Evaluating the Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010, s 14" (2011) 42 VUWLR 561 at 570.

[66] *Peters v Fleming* (1840) 6 M & W 42 (Exch) at 46; James Gilbert "A Major Misunderstanding of Minors' Contracts? Enforcement and Restitution Under the Minors' Contracts Act 1969" 40 VUWLR 721 at 723.

[67] Committee on the Age of Majority, above n 42.

[68] At 40.

[69] For example, Bills and discussions regarding lowering the age of majority were circulating; (4 June 1969) 360 NZPD 496–497.

the problems plaguing the common law by broadening the capacity of young people to contract. Full contractual capacity only came at age 21. However, certain types of contracts with those aged 16-18 would generally be enforceable, except in cases of unconscionability or oppression.[70] Aside from general mentions to "increasing maturity", little time was spent discussing the evidential foundations for this policy. Instead, the focus was on the Latey Report, the other political changes pushed by young people, and the potential of England lowering their age of majority to 18.[71]

This law remained unchanged for about 40 years. In 2004, the Relationships (Statutory References [RSR]) Bill was introduced, contemporaneously with the Civil Union Bill. The aim of the RSR Bill was to have neutral laws on all relationships, but a requisite precursor was the enactment of the Civil Union Bill.[72] The legal age to enter into a Civil Union was set at 18 (equivalent to the legal age for marriage), and the age for contractual capacity was amended to fall in alignment. The amendments removed the exception for full majority under the Minors' Contracts Act if a person was married with a general age distinction in substitute.[73] There was hardly any discussion of this change, and it was a rather subsidiary component of the overall policy. Marriage was traditionally a marker of adulthood, and historically couples required contractual and proprietary capacity to facilitate the setting up of a life together. However, relationships in a modern society are drastically different to earlier eras. Many couples would "set up" together before marriage, and most likely would have attained the requisite capacities legally long before considering serious relationships. The presumption is that marriage requires an element of competency that will translate into all other areas of life.

However, it seems anomalous to have excluded the age of the majority from this discussion. By 2004, the age for purchasing alcohol, which was a barrier to lowering the age of majority in 1974, had already been lowered to 18. The RSR reform again seems to be based on social justifications, rather than evidence. In addition, having the Minors' Contract Act subsumed as part of the Civil Union movement essentially allowed parliament to have this change go unchecked. There are other potential explanations for lowering the age for contractual capacity—such as numerous exceptions creating de facto capacity at 18, or a desire to capitalise on the increasingly powerful force of young people with disposable income. If these were considerations, they were not expressed in any form. This change

[70] Minors' Contracts Bill 1969 (17–1), cl 5; (explanatory note).

[71] (4 June 1969) 360 NZPD 496–497.

[72] Relationships (Statutory References) Bill 2004 (151–1) (explanatory note).

[73] Relationships (Statutory References) Bill 2004 (151–2) (select committee report), cl 6.

could involve serious potential liabilities for young people. It is concerning that this change was hidden behind a much larger, controversial reform that undoubtedly took precedence.

E Trust Law

The status of young people's involvement in trusts is not statutorily defined. Section 40 of the Trustee Act sets out the only age limit regarding trusts. Essentially, where minors have an interest in property they may only gain access to entitlements directly once they are 20 years old, or married/in a civil union below this age. The ability to receive these entitlements earlier than 20 if a person was married or in a civil union has been criticised.[74] Whether a young person has done this does not confer additional levels of capacity. Overall, a proposal to lower of the age of majority to 18 (at least in regards to the Trustee Act) is supported.[75]

There is currently no bar on minors being appointed as trustees, although it is unlikely an appointment would survive an application to the court.[76] The Law Commission has recently considered such a proposition, citing the fact that other jurisdictions prohibit minors from acting as trustees.[77] In New South Wales, the precursory report to a reduction in the age of majority (and the bar on minors as trustees), saw the age of 18 was seen as being "without risk", whereas any lower age was seen as unsafe.[78] Interestingly, the Commission recognised that the evidence in support of their proposition was slight, and expressly stated that their recommendation was based on observations and experience as members of the community.[79] Such insights offer an additional element of transparency in the decision-making process, a goal of EBP.

In New Zealand, the reasoning behind wanting to impose a bar on minors was based on surrounding legislation. Minors cannot enter into contracts or deal with real property until they are 18, meaning their abilities to manage trust funds would be somewhat constrained.[80] However, the overarching argument rests on capacity. Incapacity to act as a trustee generally arises from one of two factors: youth and mental incapacity. Both groups

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[74] Law Commission *The Duties, Office and Powers of a Trustee* (NZLC IP26, 2011) at [5.60].

[75] Law Commission, above n 51, at 119; Law Commission, above n 74, at [5.60].

[76] Law Commission, above n 74, at [4.20].

[77] E.g. Trustee Act 1925 (NSW), s 6(2); Minors (Property and Contracts) Act 1970 (NSW), s 10; Trustee Act 1925 (ACT), s 7A; Law of Property Act 1925 (UK), s 20.

[78] *Report of the Law Reform Commission on Infancy in Relation to Contracts and Property* (LRC6, VCN Blight 1969) at [26].

[79] At 11.

[80] Law Commission, above n 51, at [8.8].

are subject to the same underlying concern of an inability to manage the "onerous duties and responsibilities" stemming from the fiduciary relationship.[81] Yet, there is a systemic difference—capacity in youth is aimed at "achievement", whereas in situations of mental impairment, the consideration is whether it can be "restored".[82] However, this distinction has not been emphasised. In the New Zealand Law Commission's view, this achievement seems to coincide with a young person's 18th birthday, rather than at 20 as the Age of Majority Act 1969 would suggest:[83]

> An 18 year old has the same legal capacity and the same capability as a 20 year old for most purposes. It would be discriminatory to leave the age of majority under the trusts statute at 20 years because there is no objectively assessable reason for distinguishing between 18 and 20 year olds.

Whether this is a scientifically valid conclusion is debatable. While discussions surrounding the position of minors have mentioned the concept of "capacity" in the scientific sense, other factors have arguably been more determinative to decisions—such as the position of other countries and the wider legislative scheme.

F Family Law

This section will discuss the rights of children to make key decisions concerning them. The competency of a child becomes relevant in relation to the concept of guardianship.[84] This involves all the rights and responsibilities that a parent has in relation to the upbringing of a child, including "determining for or with the child … questions about important matters…"[85] The statutory scheme clearly envisages a changing role of parents in children's decisions on important matters, which include non-routine medical treatment, culture, language and religion.[86] Section 16 of the Care of Children Act 2004 (COCA) has

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[81] Law Reform Commission *Trust Law: General Proposals* (December 2008) at 21; Law Commission, above n 74, at 42.

[82] Grisso and others, above n 11, at 360; Jodi L Viljoen, Kathleen L Slaney and Thomas Grisso "The use of the macCAT-CA with adolescents: An item response theory investigation of age-related measurement bias" (2009) 33 Law and Human Behavior 283 at 284.

[83] Law Commission, above n 51, at [6.16].

[84] It is noted that there will be other areas of family law that raise questions of children's competency. However, guardianship is the example that will be discussed here.

[85] Care of Children Act 2004, s 15; 16(1).

[86] Section 16(2).

been hallmarked as indicating that children under 16, who have sufficient understanding, can make their own choices on such matters.[87]

Highly relevant is the concept of *Gillick* competence from *Gillick v West Norfolk Area Health Authority*. Lord Scarman's judgment has often been held out defining *Gillick* competence: "… the parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding to be capable of making up his own mind on the matter requiring decision."[88] While the decision originally focused on a hypothetical provision of contraception, its use has been significantly broadened. *Gillick* competence now speaks to the law on medical treatment for those under 16, and the concept of parental rights more generally.[89]

However, focusing on the example of medical treatment, consent (or refusal to consent) can be given by a child of or over 16.[90] The position of those under 16 to give effective consent is not addressed. This offers scope for *Gillick* to apply, as it has not been expressly applied to New Zealand, nor has it been expressly rejected.[91] The result is that it has been applied in an ad hoc fashion through case law, policy and guidelines.[92]

New Zealand courts have come close to declaring *Gillick*'s applicability to guardianship disputes.[93] *Moore v Moore* actually included *Gillick* into the test for child capacity.[94] *Moore* held that where there is a clash between the Bill of Rights Act (BORA) rights of a child, and a parent wanting to exercise guardianship, the child must be deemed *Gillick*

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[87] Pauline Tapp, Nicola Taylor and Jacinta Ruru *Family Law Policy in New Zealand*, Bill Atkin and Mark Henaghan (eds) (4th ed, LexisNexis NZ, Wellington, 2013) at 41.

[88] *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) 1 AC 112 (HL) at 186.

[89] Bill Atkin "A Blow for the Rights of the Child – Mrs Gillick in the House of Lords" (1985) 1 FLB 35 at 38.

[90] Care of Children Act, s 36(1).

[91] Kathryn McLean "Children and competence to consent: *Gillick* guiding medical treatment in New Zealand" (2000) 31 VUWLR 551 at 553.

[92] Fiona Miller "Wake up COCA! Give children the right to consent to medical treatment" (2011) 7 NZFLJ 85 at 85.

[93] *Re SPO* FC Wellington FAM-2004-085-1046, 3 November 2005; *ARB v KLB [Guardianship Dispute]* [2011] NZFLR 290 (FC); *Hawthorne v Cox* [2008] NZCA 146, [2008] NZFLR 1 (HC).

[94] *Moore v Moore* [2014] NZHC 3213, [2015] 2 NZLR 787. The dispute concerned two children (then aged 4 and 6) who were introduced to the Jehovah's Witness faith by their mother. The father sought guardianship directions to constrain the children's participation, whereas the mother sought permission for participation. The children themselves had expressed interest in furthering the faith.

competent for their BORA rights to be infringed.[95] Even if children are deemed competent, their decisions may still be overruled if exercise of their own rights would "likely result in physical or emotional harm …"[96]

If *Gillick* allows children under 16 to make certain decisions, this makes the area of family law fairly distinct. It is the only area which allows for individualised assessment, although findings of competence may vary across situations.[97] Therefore, some discussion must be had of how the legislature came to develop s 36, and how *Gillick* operates to determine competency.

1 Reasoning behind age limits & findings of competency

(a) Care of Children Act 2004

Section 36 essentially re-enacted s 25 of the Guardianship Act 1968 but included refusal of consent. Hence, the history of the section before 2004 will be relevant. The Guardianship Bill echoed similar thinking to *Gillick*, noting that "we cannot look after our children indefinitely … at some point the children must be allowed to lead their own lives …"[98] The choice of 16 for the age to consent to medical treatment appears to be based on a combination of anecdotal evidence and an aim for consistency. It was simply a "lawyer's opinion" that children over 16 ought to be able to consent to medical treatment, despite the fact that "many people feel that young people are not generally mature enough to look after themselves in all respects until they are in their fairly late teens".[99]

Another key driver was clarity in the law. Many medical professionals struggled with the uncertainty left by the common law, and a bright-line test was desirable. Additionally, there is likely a link between the age of consent for medical procedures and the age for legal marriage. Sixteen year olds are permitted to marry with parental consent.[100] At the time of the Guardianship Act, marriage was an exception to many age restrictions in legislation, including medical consent (which remains today). Marriage was and is a strong compass for how the law in this area should develop. In some ways, consistency is not with the Age of Majority Act, but with marriage.

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[95] *Moore v Moore*, above n 94, at [136].

[96] At [136].

[97] *ARB v KLB*, above n 93, at [8]; BD Inglis *New Zealand Family Law in the 21st Century* (Brookers, Wellington, 2007) at [14.33].

[98] (26 November 1968) 368 NZPD at 3389.

[99] At 3390.

[100] But see Marriage Act 1955, s 17(1)-(2).

The COCA itself was envisaged as an overhaul of the Guardianship Act, yet did not live up to its original objectives.[101] There was no discussion of s 36 in Hansard. Remarkably, in the face of public and ministerial submissions indicating that *Gillick* ought to be adopted, parliament decided not to clarify the position of young people under 16.[102] *Gillick* is in line with the general scientific consensus that children develop competencies gradually.[103] However, even those advocating to adopt *Gillick* into the law did not rely on such evidence.[104] This demonstrates that there may not be problems of an evidence base, but rather that it is not used. Overuse of the tools of scientific research and statistics may simply desensitise the value of information so that it is no longer compelling. In recognition of this, the public creates more legalistic, practically-based arguments when evidence is not a sufficient spark for action.

(b) Case law

Case law currently directs the scope of the law as there has been little legislative guidance in this area. While the judiciary is not involved in policy-making in its traditional form, the use of evidence in case law would be beneficial for the same reasons—such as greater transparency in decision-making.

Perhaps the House of Lords in *Gillick* based their reasoning upon a foundation of evidence. However, if such a foundation existed, it is obfuscated behind judicial insight into parliamentary will, and legislative interpretation.[105] Heath J in *Hawthorn* sets out the idea of the evolving responsibility of parents, and then compares that with relevant empirical research. He finds his conclusions consistent with the evidence before formulating a test for competency, providing an example of judicial employment of evidence in decision-making.[106] In *Moore*, a psychologist's comments about the developmental maturity of the children (then aged 4 and 6), and the influence on their competency appeared to be highly influential upon the Judge.[107]

[101] Bill Atkin "The Care of Children Bill" [2004] 1 NZLJ 44 at 44.

[102] Miller, above n 92, at 85; Deborah Wilson and others *Brookers Family Law - Child Law* (online loosleaf ed, Thompson Reuters) at [CC36.02].

[103] McLean, above n 91, at 557.

[104] Atkin, above n 101, at 44; McLean, above n 91, at 559; Miller, above n 92, at 86.

[105] *Gillick v West Norfolk and Wisbech Area Health Authority*, above n 88.

[106] *Hawthorne v Cox*, above n 93, at [68]-[71].

[107] *Moore v Moore*, above n 94, at [139].

Therefore, there is some indication of using objective evidence in these cases. This presents some interesting issues. On the one hand, *Gillick* is envisaged as an individualised assessment. Alternatively, it is desirable that there is some evidential foundation to prevent arbitrary decisions—and typically this will arise from comparisons to others of a similar age group. Perhaps evidence-based decision-making for *Gillick* type assessments, results in a generalisation of development—exactly what *Gillick* sought to prevent.

Children are more likely to be deemed competent only if their choices are seen to be "right". Issues tend to arise where a child wishes to refuse a certain treatment, as this clashes with the principle that the welfare and best interests of the child must be paramount.[108] Parliament and the courts both make decisions about competency. The judiciary is involved in law-making in this area to the extent that they override children's (and parents') views on competencies under the guise of "best interests". [109] In one case, a 12 year old child's views about refusing chemotherapy were dismissed "notwithstanding her maturity".[110] There is little justification of why such views are disregarded. Similar patterns occur in custody disputes. Judges explain away children's views on the basis of age, signalling that children are unable to express "real" or "mature" views on the situation.[111] The courts have demonstrated a paternalistic attitude. They seem willing to interfere with what may be a competent child's wishes to impose their own subjective assessment upon them, all in lieu of evidence. This has implications for a child's BORA rights, which ought to prevail over the "welfare and best interests" principle once a child is *Gillick* competent.[112]

The reasoning in *Moore* assumed that children must be sufficiently competent to exercise (and perhaps hold) BORA rights. The mentally incapable are often also deemed as lacking capacity. While society would feel outraged if a mentally incapable person was not allowed to choose their own religion, like children, their treatment decisions may also be questioned. This again demonstrates that perhaps some human rights are not universal.

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[108] Gillick did not expressly apply to refusal to consent, but arguably capacity to consent indicates capacity to refuse. See Tim Grimwood "Gillick and the consent of minors: contraceptive advice and treatment in New Zealand" (2009) 40 VUWLR 743 at 757; Care of Children Act 2004, s 4.

[109] *Auckland Healthcare Services Ltd v T* [1996] NZFLR 670 (HC); *Auckland Healthcare Services Ltd v Liu* [1996] BCL 1011 (HC).

[110] *Auckland Healthcare Services Ltd v T*, above n 109, at 671.

[111] Antoinette Robinson "Children: Heard But Not Listened To? An Analysis of Children's Views in Decision Making Under S6 of the Care of Children Act 2004" (LLB (Hons) Dissertation, Otago University, 2010) at 39–42.

[112] *Moore v Moore*, above n 94, at [136].

Many "competent" adults make choices that others would find questionable, bad, or even wrong—but they are shielded by the ability to exercise human rights without interference. Ultimately, it appears that neither parliament nor the courts are using evidence to guide their decisions in the area of family law.

G Purchasing Alcohol

English law originally prohibited those under 16 from purchasing spirits.[113] The popularisation of distilled spirits in the 17th and 18th centuries led to many English-speaking countries attempting to regulate or prohibit alcohol. New Zealand's early history was characterised by extremely high rates of consumption of spirits and convictions for drunkenness.[114]

Additionally, there was a recognition worldwide that alcohol had negative effects. The "availability theory" held that increased availability of alcohol would increase drinking, and the associated harm.[115] Therefore, consumption could be reduced by restricting availability. The Licensing Act 1881, the first nationwide act regulating liquor in New Zealand, was set against a backdrop of restrictionist measures around the globe.[116] This introduced an age limit of 16 to purchase liquor in a bar.[117] The minimum purchase age was raised to 18 in 1904, and then to 21 in 1910.[118] These changes were due to the influence of an interventionist, partly prohibitionist Liberal government in power. Prohibitions were constantly suggested and restrictions trying to prevent the association of alcohol with enjoyment were rife.[119]

The purchase age was reduced to 20 in 1969 to bring it into line with the age of majority, and earlier restrictionist thinking was no longer in vogue.[120] In 1986, a report was released that recommended lowering the purchase age to 18—although this recommendation was

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[113] Licensing Act 1872.

[114] Christoffel, above n 46, at 16.

[115] Law Commission *Alcohol In Our Lives: An Issues Paper on the Reform of New Zealand's Liquor Laws* (NZLC IP15, July 2009) at 12.

[116] Christoffel, above n 46, at 6.

[117] Paul John Christoffel "Liquor laws" (13 April 2016) Te Ara Encyclopedia of New Zealand <www.teara.govt.nz> at 1.

[118] Jock Phillips "Alcohol" (18 March 2015) Te Ara Encyclopedia of New Zealand <www.teara.govt.nz> at 2.

[119] Christoffel, above n 46, at 9.

[120] (30 August 2012), above n 46; Christoffel, above n 46, at 20.

not adopted.[121] Ten years later, another report was released, again supporting the lowering of the purchase age. Similar arguments emerged: young people under 20 were drinking regardless of the official age, and the law should accept reality and allow young people to drink safely.[122] Notably, the traditional comparisons were made. At 18, a young person could:[123]

> have sex, enter into a marriage, serve in the military forces, vote … purchase firearms … be convicted as an adult … make their own wills … It cannot be disputed that at age 18 years, whether or not to consume liquor and the discipline of consuming in moderation requires any more age maturity than that required to discharge the responsibilities listed above

In addition, the law was "inefficient, unmanageable, confusing and frustrating" given the large number of exceptions to the purchase age of 20.[124] Recommendations to lower the age were adopted in 1999.[125]

The following decade was a period of disquiet about rising alcohol consumption and abuse, particularly by young people. The Law Commission was instructed to carry out a review, concluding that the purchase age should be increased to 20 as an easy way to reduce supply to young people.[126] The Law Commission appears to have been swayed by the EBP movement. The evidence discussed by the Law Commission indicated that people under 29 bear the greatest burden of alcohol related harms. For example, they experience more harm per standard drink, heavy and/or early initiation of drinking increases risk for poorer development, adverse life outcomes, and those in the 18-29 age bracket have the highest rates for alcohol-related mortality.[127] Unusually, the evidence showed that 20-24 year olds were the most likely to be involved in fatal crashes, above both 25-29 year olds and 15-19 year olds respectively. This would suggest that an age limit of 16 for learning to drive is inconsistent with the statistics based on the harm caused. Perhaps this is a product of the

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[121] George R Laking and others *The Sale of Liquor in New Zealand: Report of the Working Party on Liquor* (October 1986) at 41.

[122] John Robertson, Alan Dormer and Althea Vercoe *Liquor Review: Report of the Advisory Committee* (Ministry of Justice, March 1997) at 22.

[123] At 21.

[124] Ministry of Justice *Liquor Review 1996: A discussion paper* (July 1996) at 12.

[125] Sale of Liquor Amendment Act 1999.

[126] Law Commission *Alcohol In Our Lives: A Report on the Review of the Regulatory Framework for the Sale and Supply of Liquor* (NZLC R114, April 2010) at [16.35].

[127] Law Commission, above n 115, at 84.

staged driving laws in New Zealand. By age 20-24, more young people will be driving alone (rather than on a learner license which requires the presence of a licensed adult), which could increase their risk.

However, there was no evidence specifically looking at the outcomes of what had been proposed—such as the harm that would be prevented if the age were raised to 20. Ultimately, the Law Commission's recommendations were not implemented. Arguments raised in an early Cabinet paper noted the detrimental impacts on young people's rights, and the alcohol industry.[128]

While the same neurological evidence was raised in support of both sides (raising versus keeping the age), the arguments were slightly different. Those wanting to retain the age of 18 focused on the lack of evidence that there was a fundamental maturity or developmental difference between the ages of 18-20. In contrast, those in favour of increasing the purchase age pointed to the evidence that young people's brains are not fully developed under the age of 25, and so the purchase age should be as late as possible.[129] This group had scientific and medical research on their side. Yet, the purchase age remained unchanged. The arguments about the rights that young people are entitled to exercise were raised time and time again, as this argument has the force of legal and public resonance. However, it is not unlikely that industry pressure and economic effects would have acted as a disincentive to change.

Liquor laws in particular have what every reform wants—public engagement. They garner extreme, loud opinions that are actually voiced. As such, liquor laws can operate as a political weapon—reflected in the history of New Zealand's reform in this area. Hence, the law is not a reflection of evidence (as indicated by the flux in age restrictions in both directions), but rather of the social and political context.

However, whether science offers an alternative direction for the law has yet to be explored. The competency of children and young people under a scientific approach is the focus of the following section.

[128] Cabinet Paper "Alcohol Law Reform" (5 August 2010) at [188].

[129] (30 August 2012), above n 46.

V The Scientific Basis

A Child Development Theories

Theories describe, explain and predict behaviour.[130] As they are products of their surrounding context, scientific validation determines their continued validity. Theories arising from the child development discipline tend to address three main issues:[131]

- Whether development is continuous or discontinuous (occurs in stages).
- Whether there are one, or many courses of development.
- The relative influence of nature versus nurture.

Stage theories, such as Piaget's Cognitive Development Theory, see higher order skills like logical reasoning and abstract thought as occurring in the later stages of development. While stage theories offer some value, they operate using vast generalisations that can result in derogatory mind-sets about children's capacity.[132] Children and can learn certain tasks or skills that would exceed their supposed knowledge in certain stages, or alternatively, may lack knowledge that may have been expected in situations where they are not familiar with the task.

The most comprehensive theory is the Ecological Systems Theory. Developed by Uri Brofenbrenner, this conception views a child as developing within a system of relationships that influence and interact with multiple levels of the surrounding environment.[133] These systems range from immediate surroundings (such as family or school) to the wide systems of a society (laws, values or customs). This recognises that there can be no single route of development. Rather, a variety of factors, unique to every individual, will operate to change their course—with both nature and nurture having an influence.

Theories are relevant to discussions of the use of evidence in the area of children's competency as they provide research questions, and therefore have some control over the way the evidence base develops. In addition, the individuality of each child is noted. The law generally presumes adults to be competent in all situations, unless the contrary is shown. In contrast, children younger than an age limit are presumed incompetent, with few situations where they are able to demonstrate otherwise. However, the Ecological Systems Theory indicates that these presumptions cannot be universal. Theories indicate the complexity in attempting to link children's development and competency. Stage theories

[130] Berk, above n 8, at 6.

[131] At 7–10.

[132] At 21.

[133] At 27.

are more likely to align with the use of bright-line age limits, whereas the Ecological Systems Theory aligns with using more case-by-case assessments. A balance needs to be struck between the individual capacities of the child and practicality in the law. Our current law (with the exception of family law) most likely prefers a stage theory conception of development as there is a preference for clear age limits. However, with recognition of these theories, the following discussion will attempt to discern scientific thinking on competency.

B Brain Changes

During adolescence, four key structural changes occur in the brain.[134] Firstly, unused connections in the brain are removed (synaptic pruning), resulting in major improvements in cognitive skills. This process is typically finished by mid-adolescence. Secondly, dopamine receptors in the brain (important for experiencing pleasure) and the pathways they are connected to, are more active during early adolescence than at any other time during development. Thirdly, there is an increase in white matter in the pre-frontal cortex, as a result of myelination (a neuronal sheathing process that improves efficiency of brain connections). The prefrontal cortex is involved in higher-order cognitive functions, such as planning, weighing consequences, inhibition, goal-directed behaviour, working memory and attention.[135] This process occurs throughout adolescence and into early adulthood, meaning that the brain connections are not finished developing until this time. These changes make it clear to see why adolescence is a period characterised by pleasure seeking, impulsivity and risk-taking.

1 Cognitive differences

These neurological changes impact young people's cognitive abilities. The ability to understand and reason are the most important capacities required for decision-making. Largely as a result of the synaptic pruning, between ages 11-16, there are marked improvements in reasoning and information processing—allowing for abstract, multidimensional, deliberative and hypothetical thinking. In controlled, low-stress settings, adolescents' cognitive abilities reach levels comparable to adults (age 26-30) at around age 16.[136]

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[134] Laurence Steinberg "Should the Science of Adolescent Brain Development Inform Public Policy?" (2012) 28 Issues in Science and Technology 67 at 67.

[135] At 68; Sara B Johnson, Robert W Blum and Jay N Giedd "Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy" (2009) 45 Journal of Adolescent Health 216 at 217.

[136] Laurence Steinberg "Adolescent Development and Juvenile Justice" (2009) 5 Annual Review of Clinical Psychology 459 at 467.

2 Psycho-social differences

Adolescents differ from adults not only neurologically, but also in the way they think.[137] They are more likely to be suggestible to peer pressure or authority figures, and stress has a greater impact on their decision-making abilities.[138] Youth also tend to show poor abilities to balance short versus long-term consequences, and weight rewards more heavily than risks.[139] These psychosocial differences persist until late adolescence and into early adulthood. This aligns with the "temporal gap" in development—that the "reward" and emotional systems of the brain develop before systems for self-regulation.[140] Therefore, by age 16, adolescents' cognitive abilities are essentially indistinguishable from adults. However, in tasks that require the coordination of affect and executive functions their functioning remains immature at 18, and continues to develop until the early 20s.[141]

3 What does this mean for policy?

There can be no single age of when an adolescent neurologically becomes an adult. However, Steinberg tentatively affirms an age range of 15-22 as a likely age range at which neurological maturity is reached.[142] He argues a distinction in decision-making contexts should be made depending on whether a decisions allows for unhurried, logical reflection or not.[143] "Unhurried" decisions include situations such as medical and legal decision making. The other kinds of decisions are situations characterised by high levels of emotional arousal, social coercion and lack of consultation with more experienced others—such as reckless driving, binge drinking, commission of crime and unprotected sex.[144]

If a divided age limit based on decision type was not a feasible option, the mid-point of this range of competency is 18. This avoids fewer errors in classification as immature/mature

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[137] Laurence Steinberg and Elizabeth Cauffman "Maturity of judgment in adolescence: Psychosocial factors in adolescent decision making" (1996) 20 Law and Human Behaviour 249 at 249.

[138] Jodie O'Leary, Suzie O'Toole and Bruce D Watt "Exploring Juvenile Fitness for Trial in Queensland" (2013) 20 Psychiatry, Psychology and Law 853 at 855; Thomas Grisso *Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice* (Professional Resource Press, Saratosa, FL, 2005) at 25; Kim Taylor-Thompson "States of mind/states of Development" (2003) 14 Stanford Law and Policy Review 143 at 153.

[139] Steinberg, above n 136, at 469.

[140] Steinberg, above n 134, at 71.

[141] At 71–76.

[142] At 76.

[143] Laurence Steinberg and others "Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty and the Alleged APA 'Flip-Flop'" (2009) 64 American Psychologist at 592.

[144] Steinberg, above n 134, at 76.

than choosing an extreme as an age for general competency.[145] In addition, this is the presumptive age of majority in most western nations, including New Zealand.[146] The following discussion will address whether this evidence could be used to help formulate and inform policy decisions.

VI What Should the Role of Evidence Be?

A Does Evidence-based Policy Work?

Alternative ways of policy-making are characterised as judgments on the basis of dogma, belief or opinion.[147] EBP has been seen by some as upholding Enlightenment ideals—that the world can be improved through the application of rationality and reason. It is hallmarked as a "resource-rationing" tool, to avoid enacting ineffective and costly policies by focusing energy only on those that "work".[148] However, whether EBP has succeeded in improving the policy-making process is debateable. While this paper does not advocate for the abolition of EBP, in its current form it essentially acts to uphold opinions and personal judgments under a thinly veiled guise of "evidence". The focus on effectiveness and efficiency is a driving force, meaning results are concerned with procedural competence rather than substantive output.[149]

Evidence-based medicine rested on two key assumptions. EBP aims to transfer these "recommendations" of what an evidence-based approach ought to entail from medicine and practice into policy. Firstly, that evidence-based practice should offer a general method for decision making. This is relatively uncontroversial—policies should be based on and evaluated using evidence.[150] The second assumption is that EBP should identify and use the 'best' evidence.[151] This poses some controversial issues. What "evidence" means, how it should be identified, and what the 'best' forms are open questions without settled answers.

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[145] Steinberg, above n 134, at 76.

[146] Law Commission, above n 51, at [6.17].

[147] Peter Gluckman *The Role of Evidence in Policy Formation* (Office of the Prime Minister's Science Advisory Committee, September 2013) at 8.

[148] De Marchi, Lucertini and Tsoukiàs, above n 2, at 27; Greg Marston and Rob Watts "Tampering With the Evidence: A Critical Appraisal of Evidence-Based Policy-Making" (2003) 3 The Drawing Board: An Australian Review of Public Affairs 143 at 148.

[149] Marston and Watts, above n 148, at 148.

[150] La Caze and Colyvan, above n 5, at 3.

[151] At 4.

1 A proposed policy

Whether consistency is desirable is not the focus of this paper, but it warrants a brief overview. While it is recognised that age limits are arbitrary, and there is significant scope for individual differences, certainty in the law is a fundamental goal. Ms Ardern, speaking on the Limitation Bill, noted inconsistencies in the law and suggested it was "high time that we in this House made a decision as to what point a young person is a young person and at what point he or she is an adult".[152]

While there is some evidence of sex and gender differences in neurological, cognitive and psychosocial development, these findings are still controversial.[153] In some contexts, gender has been a sufficient basis to found disparate policies (such as vehicle insurance rates for men and women). However, insurance policies do not have the same effect on human rights as legal age limits. The law may only restrict people's rights and liberties for justified purposes.[154] Evidence alone may be insufficient to justify a reflection in the law. There should be greater weight placed on allowing all those who are competent to exercise their rights, even if by necessity some incompetent people will still have access to those rights. Gendered age limits conflict with the aim of clarity in the law. Further issues arise when diverse conceptions of sex and gender are considered. They would be highly contentious and unlikely to be adopted. Hence, this paper will proceed on the basis that age limits would still apply equally to all young people.

Having a separate age limit (e.g. 16) for medical and legal decision making is desirable, if the young person has objective information or support available. This structure already exists somewhat in the law with the right to consent/refuse to consent to medical treatment for young people over 16, and criminal acts by young people will be dealt with by the youth court (where a lawyer will be appointed). However, other areas of law, such as those discussed in part IV, could also be included. Steinberg indicates the "ideal" decision-making condition for young people is where the decision can be deliberated, influences on judgment are minimised, and where consultants (such as healthcare or legal professionals)

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[152] (4 August 2009) 665 NZPD 5379.

[153] Amanda J Rose and Karen D Rudolph "A review of sex differences in peer relationship processes: Potential trade-offs for the emotional and behavioral development of girls and boys" (2006) 132 Psychological Bulletin 98; Michael D De Bellis and others "Sex Differences in Brain Maturation during Childhood and Adolescence" (2001) 11 Cereb Cortex 552; David C Miller and James P Byrnes "Adolescents' decision making in social situations: A self-regulation perspective" (2001) 22 Journal of Applied Developmental Psychology 237; Alfredo Ardila and others "Gender differences in cognitive development" (2011) 47 Dev Psychol 984.

[154] New Zealand Bill of Rights Act 1990, s 5.

can provide costs and benefits of options.[155] These conditions seem (understandably so) to be erring on the side of caution. However, a lack of help may not be determinative to decision-making.

It seems that it is the type of decision, and the influence of external pressures that is likely to be detrimental. If a young person has the time and space to consider a decision, then at 16 they are likely to be able to discover information or seek help of their own volition. If help was seen as determinative, there would be little utility in distinguishing between the types of decisions. Yet decisions of this nature are either situations where help would not be required, or where help will almost always be available. For example, purchasing a car would fall into the "unhurried" decision category. However, if a bad decision was made in this situation the consequences simply become a learning curve for the young person. Alternatively, situations like medical and legal decision-making essentially statutorily guarantee assistance for young people, otherwise risking legal action. Policy ought to assume that help is desirable for "unhurried" decisions but may not necessarily be determinative, except in situations of medical or legal decision-making.

Yet based on research, the age limit for learning to drive, purchasing alcohol, and culpability for crime should be at least 18 (if not 20). This paper will proceed on the basis that two age limits in the law could be maintained—one for legal and medical decisions, and the other for more risky, emotionally-charged situations.

Using EBP to implement such a policy warrants an evaluation of the EBP process. Whether it fulfils its goals of rational, objective decision-making founded on the "best evidence" remains to be seen.

2 What is the best evidence?

The evidence-based medicine movement created a hierarchy of evidence, with the randomised control trial harked as the "golden standard".[156] However, creating a hierarchy of evidence for social issues is significantly more difficult. The evidence-based medicine movement was founded for drug trials and interventions. Here, the relevant "intervention" is whether parliament should adopt staged age limits granting young people rights depending on the type of decision being made. Unlike in an experiment, the intervention cannot be isolated from other potential causes of change (or non-change). Therefore, it will be incredibly difficult to show whether such an intervention actually reduces harm,

[155] Steinberg and others, above n 143, at 592.

[156] La Caze and Colyvan, above n 5, at 2.

increases harm, or has no effect at all. Using the example of liquor laws, 20 years on, research on the effects of lowering the purchase age is mixed.[157] Pointing to the intervention of lowering the age limit as the causative factor is even more fraught—it may be that young people's social attitudes towards drinking (and particularly drink-driving) are changing, resulting in increased or decreased levels of harm.

For now, science has offered us a solution: one age limit for legal and medical decision-making; another for driving, purchasing alcohol, and culpability for criminal law. Following this logic, almost all decisions in contract, trust and family law should be decided by young people from when they are 16. Yet these propositions are unlikely to ever be adopted. This distinction is unusual as it conflicts with the natural instinct to protect children. Arguably decisions that allow for logical, deliberated decision-making are those that are most significant—where parents and the courts are most likely to want to intervene. In this sense, the evidence conflicts with how parents view their role in their children's lives, meaning policies are unlikely to garner support with either the public or politicians.

A difficult situation to determine is the age of sexual consent. Depending on circumstances, this could be classified both as a decision allowing for logical reflection, but also one of high levels of emotional arousal and potential social coercion. If the latter is the case, then arguably a higher age limit should be set. However, young people are as logical, reality-based and accurate as adults in the way they think about risky activity, but they still tend to take more risks.[158] Steinberg argues that this is why educational interventions tend to fail, indicating a more effective approach is to reduce opportunities to engage in risky behaviour—such as by increasing adult supervision outside school hours.[159] Therefore, perhaps a higher age limit would do little to prevent young people from engaging in sexual activity—it is not that they do not know what the law is or what the risks are, but they choose to engage in them anyway. In addition, a lower age limit allows for consistency with the age for consent to medical treatment, ensuring sufficient access to services for young people. This demonstrates the difficulty in determining where to set age limits. Even if using the scientific evidence available, issues still present themselves because of the social context a law must operate within.

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[157] Law Commission, above n 126; Christoffel, above n 46.

[158] Laurence Steinberg "A Social Neuroscience Perspective on Adolescent Risk-Taking" (2008) 28 Dev Rev 78 at 3.

[159] Laurence Steinberg "A dual systems model of adolescent risk-taking" (2010) 52 Dev Psychobiol 216 at 223.

EBP, therefore, must rely on additional kinds of evidence. Brian Head states three types of knowledge are relevant for policy:[160]

- Political knowledge: The know-how, analysis and judgment of politicians in creating, adjusting, selling and accounting for policies.
- Scientific/research knowledge: The product of analysis of conditions, trends and inter-relationships. There is a preference for quantitative data, but qualitative data plays an increasingly important role.
- Practical knowledge: The experience and wisdom of professionals within their sphere.

A "hierarchy" of evidence would put scientific evidence at the top, and the other types as "complementary" to scientific evidence.[161] The United Kingdom Cabinet Office includes "expert knowledge; existing domestic and international research; existing statistics; stakeholder consultation [and] evaluation of previous policies" as types of evidence that can be used in EBP. This is a very broad definition of evidence, although in reality it is only the research-based evidence that tends to be used by governments.[162]

Arguably what has happened in the competency and capacity context is that governments intend or believe they are using scientific knowledge to create their policies, when in fact they are relying more on practical and political knowledge. The use of evidence becomes tokenised and EBP as a model therefore fails to achieve its purpose. EBP relies on a number of assumptions. However, these assumptions are flawed, and demonstrate a reason why EBP may not be a suitable model for law reform in this area.

3 The assumption of neutrality of evidence

Generally only scientific, research-based evidence is given priority. "Evidence" in New Zealand refers to knowledge generated from applied research, with standardised and approved methodologies.[163] Hence, certain forms of knowledge are seen as closer to truth, and are no longer neutral. At every step of the policy cycle, decisions are made that compromise the process' neutrality—such as the identification of policy issues, the methods for collecting evidence, and how that evidence is used. Whether the scientific evidence in this area actually offers the "best" solution is debatable. Science itself is changeable, and like other forms of knowledge, cannot be devoid of subjectivity.

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[160] Brian W Head "Three Lenses of Evidence-Based Policy" (2008) 67 Australian Journal of Public Administration 1 at 5–6.

[161] Gluckman, above n 147, at 7.

[162] Marston and Watts, above n 148, at 159.

[163] Gluckman, above n 147, at 7.

For example, within the class of scientific research, the brain scan is likely to dominate other forms of social science research in public perceptions (i.e. quantitative over qualitative data). The presumption is that these scans have an unparalleled level of objectivity and verifiability. However, many authors are careful to note that brain scans are not "better" evidence than other forms of research. For example, in neuroimaging, researchers decide on thickness of brain slices, level of clarity, how to filter data and the choice of samples—making choices that pierce a façade of objectivity.[164]

Privileging certain forms of knowledge invokes discussion of how that evidence is interpreted. Data means nothing without interpretation—which is subject to values, constraints, customs, history or social norms of the person or group involved. [165] For example, Steinberg's research has been relied on heavily in this paper. His viewpoints have been valued over others, here, and presumably in other pieces of research. His perspectives on child and adolescent development will influence his interpretations and his hypotheses. Therefore, the questions investigated are also subjective. It may be that research is conducted for a particular purpose—such as developing a government intervention or for the interest of that researcher. In this way, the research scope is limited to areas that researchers perceive as lacking. Social science research is also subject to a publication bias, whereby publication is based on the direction or significance of the finding. In particular statistically significant results are more likely to be published than non-significant results, which may never even be written up.[166] This means there is the potential that the body of research presents a greater effect than is actually present in the population. Furthermore, negative links are less likely to be seen as relevant (and hence published) unless they were related to the original hypothesis, further restricting the growth of the evidence base. These examples demonstrate that regardless of the type of evidence, research cannot, and will never be completely objective or neutral. Evidence cannot be seen as existing independently to a policy process, and this should not be assumed when formulating policies.

4 The assumption of rationality

EBP assumes that evidence will provide a rational, straightforward way to making decisions. In a traditional model, the lack of consideration of the role of emotion is

[164] Johnson, Blum and Giedd, above n 135, at 218.

[165] De Marchi, Lucertini and Tsoukiàs, above n 2, at 28.

[166] Annie Franco, Neil Malhotra and Gabor Simonovits "Publication bias in the social sciences: Unlocking the file drawer" (2014) 345 Science 1502 at 1502.

erroneous. For certain policy issues, appeals to rationality are unlikely to engender logical responses.[167] The area of competency undoubtedly falls within this category. For example, attempting to raise the alcohol purchase age to 20 failed, due to a clash in the evidence and key stakeholders. The evidence supported raising the age, but the influence of the liquor industry undoubtedly had a greater influence than was noted in policy documents. Additionally, this proposal engaged young people—a group typically apathetic to reform. The conflict between the evidence and their human rights meant that sufficient justification was required, a threshold not met here. These other factors, including the strong opinions voiced during the process, were fatal to an evidence-based reform.

The idea that young people should be capable of making considered, unpressured decisions for themselves at 16, even if they are life-changing, conflicts with our conceptions of childhood and adulthood. If *Gillick* was officially adopted in New Zealand law as applying to those under 16, there could potentially be young children making their own treatment decisions. However, it is these "big" decisions that society believes children need the most help with. Actors in the policy process are emotional, irrational beings and are unlikely to be swayed by research contrary to their beliefs, regardless of how valid the evidence is. In addition, evidence is presented as neutral facts. Yet, all evidence presented in the policy context is affected by spin—the selling of a political message involving management and manipulation of the media.[168] A model that disregards the influence of persons in the policy process is simply inadequate.

5 Ignoring underlying values and assumptions

The EBP model does not necessarily acknowledge the broader context that evidence occurs in. While it is premised on prioritising "'what works", foundational values of individuals, organisations and policy-makers underpin each decision that is made.[169] Related to this idea are the assumptions that underlie the policy process. They are rarely articulated, due to their nature—beliefs about the nature of social reality, the character of history, qualities of social reality or human condition.[170] Articulating these assumptions allows scope to understand how they may be challenged. The evidence set out in part V assumes that there is some element of universality to development—that all children will develop to have

[167] Arie Freiberg and WG Carson "The Limits to Evidence-Based Policy: Evidence, Emotion and Criminal Justice" (2010) 69 Australian Journal of Public Administration 152 at 156.

[168] Watts, above n 18, at 36.

[169] Carolyn Boyes-Watson and Kay Pranis "Science cannot fix this: the limitations of evidence-based practice" (2012) 15 Contemp Justice Rev 265 at 267.

[170] Marston and Watts, above n 148, at 152.

certain capacities by a certain time. More widely, it is assumed that inherent differences actually exist between children, adolescents and adults. Finally, participants involved in research are typically white, North American populations. There may also be some characteristics unique about the people involved in studies (or those who allow their children to participate)—but it is assumed that these findings generalise. While these assumptions may hold some truth, there will always be individual differences. Perhaps it is because society favours certainty in the law that the evidence becomes perceived in this way.

Assumptions are made about what credible knowledge is, the "best practice" for research methodologies and the position taken on that knowledge. Acknowledgement and understanding of how these values and assumptions operate to guide decision-making is required. Requiring researchers to reflect and note their own position in the research would provide greater clarity and transparency in the policy process.

6 Conclusions

EBP cannot be reduced to "technical calculation of effectiveness and costing of well-defined policy options".[171] The looming caveat is that use of EBP cannot assuredly result in good research or policy.[172] It is underpinned by a number of flawed assumptions while the model itself works in problematic ways for social issues. Whether or not EBP "works" will depend on its interaction with other ways of reform. Policy-makers are faced with the dilemma of reconciling a variety of viewpoints and coming up with workable policies. A comprehensive approach to policy-making must also consider these alternative perspectives and the role that societal context plays.

B Reconciling Evidence-Based Policy with Other Approaches

1 Conceptions of childhood

Perceptions of childhood vary depending on variety of factors, including culture, period and social values. Phillipe Ariés controversially claimed that "in medieval society the idea of childhood did not exist", based on the fact that children could enter the workforce from the age of seven.[173] Comparatively, early Roman and Anglo-Saxon laws relied on physical maturity (i.e. puberty) to determine competency of young persons.[174]

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[171] Perri Six "Can Policy Making be Evidence-Based?" (2002) 10 MCC: Building knowledge for integrated care 3 at 7.

[172] Marston and Watts, above n 148, at 159.

[173] Philippe Ariés *Centuries of Childhood* (Jonathan Cape Ltd, Edinburgh, 1962) at 128.

[174] Cipriani, above n 27, at 73.

In New Zealand, by age 18, young people have obtained many of the rights and responsibilities attached with adulthood. However, Western cultures also embrace the concept of "extended adolescence" as a result of compulsory schooling, greater uptake of tertiary education, smaller families and greater societal wealth.[175] Under this concept, both society and young people do not consider themselves adults even in their mid-twenties.[176] Conversely, the "traditional" markers of adulthood—marriage and parenthood, are being postponed in lieu of other pursuits. These features are most commonly found in Western, industrialised nations, although this concept of adolescence and emerging adulthood is spreading with greater globalisation.[177]

Comparatively, in some non-Western "traditional" societies, marriage marks the culmination of the transition to adulthood. This typically occurs at age 16-18 for women, and 18-20 for men. In such cultures, the marriage age and participants are decided by parents.[178] Some ideas about adulthood transcend cultural boundaries, as features such as age, being capable to provide or care for children, and changes in character also indicate maturity.[179]

Differing conceptions of childhood are likely to change the age at which "children" become "adults" in the eyes of the law. In a modern society, physical maturity is no longer sufficient. Rather, cognitive capacity to reason and understand is determinative. Under a purely 'conceptual' approach, young people in Western nations may therefore not be deemed fully competent until their mid-twenties. In other cultures, it may be significantly earlier. Scientific evidence may demonstrate otherwise. These conceptions influence the way young people are perceived, and form the foundations for many objections as to why an age limit ought/ought not to be changed. Comparatively, a human rights approach may advocate for children to have the power to exercise rights from the moment they are born.

2 The human rights approach

Whether competency is required for rights to attach is a controversial topic. Some believe that rights are "only thought appropriate for those who possess the capacity for rational

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[175] Arnett, above n 33, at 471.

[176] At 472.

[177] Lene Arnett Jensen and Jeffrey Jensen Arnett "Going Global: New Pathways for Adolescents and Emerging Adults in a Changing World" (2012) 68 J Soc Issues 473.

[178] Jeffrey Jensen Arnett "Learning to stand alone: The contemporary American transition to adulthood in cultural and historical context" (1998) 41 Hum Dev 295 at 297.

[179] At 299.

choice: a criterion commonly held to exclude children."[180] On the contrary, international law and other writers are of the belief that children have rights, even if they lack the capacity to exercise them.[181]

The United Nations Declaration of Human Rights affirmed that "*everyone* is entitled to the rights and freedoms set forth", and recognises the *dignity and equal rights of all members of the family*.[182] Therefore, children should not be seen as a separate category to whom rights apply differently. Nevertheless, it distinguishes between adults and young people by noting that childhood merits special assistance.[183]

Additionally, arts 3, 5 and 12 of the United Nations Convention on the Rights of the Child allow for paternalistic decision-making in the name of "best interests" of the child.[184] For example, states are to "respect the responsibilities, rights and duties of parents…. to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance".[185] This concept recognizes that children acquire enhanced competencies over time, requiring less direction from parents or other caregivers. However, recognition of the parental role in children's lives conflicts with the idea that children ought to be afforded all the same rights (and the power to exercise them) as adults.

Children (defined as anyone under 18) are perceived as a vulnerable group requiring extra protection .[186] One of the underlying themes of rights jurisprudence is that everyone has human rights by nature of being human. Although children (as members of the family) are entitled to human rights, their "vulnerability" allows some human rights to be taken away from them. Following this reasoning, young people may be seen not yet as "humans", but

[180] Lee E Teitelbaum "Children's Rights and the Problem of Equal Respect" (1998) 27 Hofstra L Rev 799 at 803.

[181] Claire Breen *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Koninklijke Brill NV, Leiden, 2006) at xi.

[182] Universal Declaration of Human Rights, GA Res 217 A (III), A/Res/217 A (III) (signed 1948), art 2; preamble (emphasis added).

[183] Universal Declaration of Human Rights, art 25.

[184] Breen, above n 181, at 28.

[185] United Nations Convention on the Rights of The Child, 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990), art 5 (emphasis added).

[186] United Nations Convention on the Rights of The Child, art 1.

rather "human becomings" who are not entitled to exercise rights in and of themselves. [187] The Children's Commissioner noted that:[188]

> Their interests tend to be subsumed into those of the adult leaders…Their identity tends to be collapsed into being dependents...or pupils...This relative invisibility is reinforced by some longstanding beliefs and attitudes about children that tend to devalue them as citizens.

Therefore, while all children have rights, perhaps what they lack is the ability to exercise them on their own behalf. "Liberty rights" are the rights to act with freedom—such as freedom of speech, or freedom of religion. This loosely aligns with the concept of negative liberty, which concerns the sphere in which an individual can do things free from interference by the state.[189] Conversely, "protection rights" are the rights to have interests protected by some other person—such as the right to safety or education.[190] Protection rights by their nature require someone else to hold the duty to uphold them. The analogous concept is positive liberty. This concerns the ability to take control and autonomy over one's actions. It focuses on the ability of the individual.[191] As children may lack the presence of control and autonomy required for positive freedom, they must have limits imposed on them. Their sphere of action is impinged upon by the state, and hence both their positive and negative freedoms are impacted. Therefore, children enjoy protection rights, but their capacity will determine whether they can exercise liberty rights in a certain context.

On a universal human rights perspectives, everyone would be entitled to rights through their status as a human being. In particular, children should not lack capacity based on their likelihood of making imprudent decisions.[192] Straightforward application of this concept would result in the abolishment of age limits, and substitute individual assessments for

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[187] *Report of the New Zealand Children's Commissioner to the United Nations Committee on the Rights of the Child* (2010) at 3; Sophie Debski, Sue Buckley and Marie Russell "Just who do we Think Children are? New Zealanders' Attitudes about Children, Childhood and Parenting: An Analysis of Submissions on the Bill To Repeal Section 59 of the Crimes Act 1961" (2009) 34 Social Policy Journal of New Zealand 100 at 101.

[188] "Report of the New Zealand Children's Commissioner to the United Nations Committee on the Rights of the Child", above n 187, at 3.

[189] Kai Möller "Negative and Positive Freedom" in *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) at 29.

[190] Cipriani, above n 27, at 2.

[191] Möller, above n 189, at 29.

[192] Breen, above n 181, at 38.

capacity. Clearly this would run counter to typical notions of childhood and adolescence, particularly when contrasted with an evidence-based approach. Human rights would allow young people to make "bad" decisions, or encounter some harm. Conversely, an evidence-based approach would be premised on the fact that preventing harm to young people is the goal. Arguably in some of the areas discussed in chapter IV (particularly liquor laws), the "human rights" approach actually prevents the evidence base from taking hold in policy making. Freeman balances the principle of equal respect for persons against the idea of legitimising interventions directed at "irrational" conduct by a neutral theory of the good. He concludes that the balance weighs in favour of 'supplying' young people with their missing rationality through mechanisms other than arbitrary age limits.[193] This approach can be balanced against the New Zealand human rights framework for age discrimination.

3 New Zealand human rights approach

The New Zealand Bill of Rights Act 1990 (BORA) prohibits discrimination on the basis of age, using grounds set out in the Human Rights Act 1993.[194] Notably, this only protects people aged over 16. The original Human Rights Bill contained both an upper and lower age limit for age discrimination. After recommendation by the Justice and Electoral Committee, the upper age limit was removed as "age per se does not determine a person's ability or productivity…reliance should instead be placed on…ability to perform the task required."[195] While this reasoning could be applied to both ends of the age spectrum, the lower age limit was retained. There was little justification for this except to note that the "circumstances in which young people would be adversely affected if it were removed could not be fully identified".[196]

Other members did not believe in this differential treatment – the removal of the upper age limit should also have necessitated the removal of a lower age limit. Ms Dalziel (then an MP for the Labour party) noted the opportunity for discrimination against young people in employment and the provision of goods and services. There was some truth in these fears—for a long period the adult wage was only available for 20 year olds, then 18 year olds respectively.[197] Amendments in 2013 most significantly changed the outlook for young people's minimum wages. However, while the adult minimum wage can be "earned" by meeting certain criteria, there is no entitlement to the adult wage until age 20. Experience

[193] Freeman, above n 36, at 59.

[194] New Zealand Bill of Rights Act 1990, s 19(1); Human Rights Act 1993, s 20(1)(i).

[195] Human Rights Bill 1992 (214–1) (select committee report), at [2.5].

[196] (27 July 1993) 537 NZPD 16911.

[197] Employment New Zealand "Minimum wage" <www.employment.govt.nz>.

may be a valid distinction between workers and their "value", but age does not necessarily indicate lack of experience. In the situation of employment, the most likely area of age discrimination, the legislation imposes a higher standard upon young people than someone who is 20 years of age. This indicates a presumption that people under 16 are incompetent, and those aged 16-20 are presumed incompetent unless they can prove otherwise (here through training or holding the position for six months).[198] Evidence would support young people at 16 having the same wage rate as an "adult" employee—as being committed to work is unlikely to require the rash, impulsive decision-making that impairs young people. However, the current framework represents the idea that children are inherently immature. There does not appear to be a justifiable limit of this right to people aged over 16. Hence, it is an arbitrary restriction, undoubtedly impacted by fiscal considerations.

4 The political approach: populism and tradition

Populism has three core elements:[199]

- justifies actions by appealing to and identifying with "the people",
- rooted in anti-elite feelings, and
- "the people" are a homogenous group.

"Penal populism" exemplifies this concept—where politicians encourage punitive sentences and harsher treatments as responses to public sentiments.[200] This idea was evident in 2010 reforms of the youth justice system.[201] These reforms had the effect imposing greater liability on younger children, based on spiels that youth crime was on the rise. Pratt and Clark argue that politicians are not necessarily led by the public, but rather select, vocal groups who claim to represent the people at large.[202]Although in fact the youth crime rate was not increasing, it garnered the appeal of the "public" as "cracking down" on crime was seen as a desirable trait in an incoming government.

Populism demonstrates a "close relationship between the electorate and the elected", with a charismatic leader upholding the ideology of the people.[203] In New Zealand, the Rt Hon.

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[198] Employment New Zealand, above n 197.

[199] Barbara Wejnert and Dwayne Woods *Many Faces of Populism* (Emerald Group Publishing Limited, Bradford, 2014) at 3.

[200] John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 Punishment & Society 303 at 304.

[201] Lynch, above n 58, at 18–20.

[202] Pratt and Clark, above n 200, at 304.

[203] Wejnert and Woods, above n 199, at 14.

John Key is systematically associated with making policy decisions on the basis of polls and focus groups.[204] In his 2015 state of the nation speech, Mr Key noted that:[205]

> If we're to succeed in solving some of New Zealand's longstanding social challenges, the Government needs to be open to working with community groups, non-government agencies and the private sector.

This embodies an all-encompassing approach—creating the sense of relatability and inciting feelings that the government is "for the people". For example, in liquor law reforms, certain stakeholders appear to sway the government to their wishes, even in the face of evidence.[206]

Policies are also often founded upon tradition, or "the way things have always been done". This is undoubtedly influenced by New Zealand's roots as an English colony. Arguably this is the predominant approach that has been taken in regards to law reform in this area. This could be characterised as "the policy problem in the law reform process." An evidence-based approach is simply unlikely to eventuate—perhaps the most that could be hoped for is an "evidence-informed" process. This offers its own benefits in that it is not filled with the naïveté of assuming evidence is rational and neutral. An alternative model of EBP must recognise the position of politics and societal views in order for evidence to be used, and recognise that evidence may not, or even should not, be a foundation for decision-making.

C What would a comprehensive reform look like?

1 Alternative model of EBP

An alternative model proposes that there are continuous interactions between knowledge creation, validation, dissemination and adoption. Both experts and users can participate in all parts of this process. Under this conceptualisation, knowledge flows in both directions (from experts to users and vice versa), whereas under the traditional model, knowledge is centralised in experts and flows out to users. Essentially, the alternative model utilises the three types of knowledge mentioned above: scientific, political and practitioner knowledge.

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[204] Pete George "Poll driven Government" (17 April 2016) Your NZ <www.yournz.org>; Bryce Edwards "Political round-up: The house that a focus group built" *New Zealand Herald* (1 February 2013) <www.nzherald.co.nz>; Michael Cummings "Editorial: An uneasy juxtaposition" *Stuff.co.nz* (6 September 2012) <www.stuff.co.nz>.

[205] "John Key's state of the nation speech" *Radio New Zealand* (28 January 2015) <www.radionz.co.nz>.

[206] See Part IV.G.

However, it is not necessarily devoid of a hierarchy of evidence—it may be naïve or even disingenuous to presume that scientific knowledge will not be prioritised.[207] While centralised and decentralised models offer different benefits, the adoption of a decentralised model is likely to result in less public or practitioner scepticism and more widespread adoption.[208] Having more parties involved in the policy process will engender wider public engagement and give a more accurate representation of the knowledge base. In this area, scientific evidence clearly offers some benefit. However, there is also significant practitioner knowledge that is consistently ignored, particularly if it does not align with the position parliament has decided to take on a particular issue.

Using EBP involves a three step cycle: sourcing, using, and implementing evidence. But presenting strong evidence for a policy is insufficient. Each stage in this process is underpinned by a variety of values on differing levels within the system.[209] Hence, adoption of a policy measure requires other favourable conditions.

2 Factors affecting adoption of a policy

(a) Policy context

As evidenced in the law set out above, changes to law do not occur in a neutral setting. Historical, cultural, ideological, political and economic systems all have a role to play in the formation and implementation of policy. In addition, the way that evidence is used will depend on the beliefs and values of individual policymakers, and their prioritisation of goals to be achieved. Even if there is compelling evidence for a certain cause or policy position, the ultimate implementation rests in the hands of government. New Zealand is a small country. Therefore, the separation between elected officials and policymakers, the public, and the media is likely to be blurred. An Englightenment model of EBP places research distant from policy. It is used to address the context of decisions, such as helping policymakers to understand the conditions under which interventions will be more or less effective.[210] Under this model, policymakers are not necessarily directed to a single study or body of research, but rather research has founded their backdrop of ideas and

[207] Shaun Young "Evidence of democracy? The relationship between evidence-based policy and democratic government" (2011) 3 J Public Adm Policy Res 19 at 22.

[208] Sandra M Nutley and Huw TO Davies "Making a reality of evidence-based practice" in *What Works? Evidence-based policy and practice in public services* (The Policy Press, Bristol, 2000) at 328.

[209] Shelley Bowen and Anthony B Zwi "Pathways to 'Evidence-Informed' Policy and Practice: A Framework for Action" (2005) 2 PLOS Med e166 at 601.

[210] Carol H Weiss "The Many Meanings of Research Utilization" (1979) 39 Public Administration Review 426 at 429; Ken Young and others "Social Science and the Evidence-based Policy Movement" (2002) 1 Social Policy and Society 215 at 17.

orientations towards certain policy problems. This model is typically favoured by the United States government—as its politically decentralised economy means social science researchers have little influence over policy. Nutley and Webb note that in more "corporatist" systems such as Europe, or Australia, there is greater dialogue between researchers and politicians.[211] New Zealand shares features with both sides of this debate. As New Zealand is a small country, we produce little of our own research, relying on the knowledge bases of other nations to inform policy—making those researchers distant and uninfluential over policy development. However, the same feature also means that there are close links between the researchers that do operate in New Zealand and politicians—who in all likelihood have funded or requested that research. This is similar to political and tactical models, which see research agendas as politically driven. Projects are commissioned and used to support the position of a particular government or minister, or research may be used as a scapegoat to justify an unpopular policy.[212] This would seem the most apt model for the current New Zealand policy-making climate. Although it is unlikely that governments confine themselves to a single typology, the way evidence is used will affect whether EBP (and the policy itself) is seen as successful.

Another factor relevant to New Zealand is that the short electoral cycle means there is greater risk that evidence is ignored.[213] Some argue that there is a tension between democracy and EBP. One of the core features of democracy is political equality—that every citizen should have an equal right and opportunity to affect a decision.[214] EBP potentially threatens this, or alternatively, good democracy could prevent the full implementation of EBP. If EBP is presumed to privilege the knowledge of experts (i.e. scientific knowledge), then the public is not given the opportunity to have some say in a public policy outcome—as policy-makers would be bound by what science says (the "knowledge-driven" model).[215] However, these threats have not materialised, and are unlikely to do so. Science provides enlightenment, rather than a form of social engineering.[216] It is fallacious to assume that researchers or experts could be the sole voice

[211] Sandra M Nutley and Jeff Webb "Evidence and the Policy Process" in *What Works? Evidence-based policy and practice in public services* (The Policy Press, Bristol, 2000) at 31–32; Lisel O'Dwyer *A critical review of evidence-based policy-making* (Australian Housing and Urban Research Institute, May 2004) at 85.

[212] Weiss, above n 210, at 429; Young and others, above n 210, at 17.

[213] Gluckman, above n 147, at 9.

[214] Young, above n 207, at 22.

[215] Weiss, above n 210, at 427; Young and others, above n 210, at 216.

[216] Nutley and Webb, above n 211, at 34.

in the policy process.[217] Rather, at best evidence can frame and facilitate decisions, but cannot be determinative.

The roots and maintained connections with the British government are a foundational feature of New Zealand's legal system. Much of our law in this area has been adopted from English law and/or followed subsequent changes and schools of thought. New Zealand tends to uphold neo-liberal ideals, and has a unique policy consideration in the Treaty of Waitangi. There is also an increasingly diverse blend of cultures existing within New Zealand society that may all have different perspectives on maturity and competency. This is problematic for science as it has been demonstrated consistently that research findings vary depending on culture. Therefore, age limits are unlikely to be applicable or palatable equally to all groups. Finally, although New Zealand's centred political system means the governments are not as polarised as in the United States, whether a National or Labour government is in power and the unique blend of personalities within the wider Government will have an effect on policy-making.

(c) Usefulness

Whether a policy is adopted will depend on relative advantage to previous or current approaches, its complexity, and compatibility with values and past experiences.[218] Compatibility is one of the most important factors in evidence adoption. Other relevant considerations will be cost, flexibility, and whether the option has the possibility of being reversed and revised.[219] Comprehensively changing the law around competency and capacity would require an overhaul of many pieces of legislation, involving high time and monetary costs. The government is likely to be way of removing rights from groups which previously had them, as policies that have this effect are likely to be politically unpopular. Further, the government risks being seen as being "wishy-washy" if the position is continually updated and revised. Hence, this is an issue that policymakers would want to get right. Such a policy is likely to be surmounted by other, more pertinent issues such as the "wicked problems" of policy. These problems are unique, undefinable, entwined with other problems, and unsolvable.[220] Rhetoric is likely to encapsulate sentiments such as "why address the age of majority or age limits when child poverty still exists?" The

[217] At 33–34.

[218] Bowen and Zwi, above n 209, at 602.

[219] At 602.

[220] Richard H Beinecke "Introduction: Leadership for Wicked Problems" (2009) 14 Innovation Journal 1 at 2.

perceived utility of reforming age limits is likely to be minimal. This is particularly so given that there is not dramatic differences between the science and the current law.

(d) Adopter characteristics

Individuals or organisations choose whether to adopt or reject the knowledge they have been presented with. Their decisions rest on a variety of characteristics, such as values, policies, competencies, resources, organisational composition and links/networks.[221] Furthermore, change is less likely to occur when the current systems are seen as "working", a hurdle for this area.[222] Although the age limits in the law are disparate, they are still bright-line tests that the majority of the population can easily determine. In addition, the people most affected (young people), are likely to be one of the least active groups in advocating for change. The knowledge, experience and expertise of those involved in making decisions is also relevant.[223] Sir Peter Gluckman has noted the lack of movement between the public and private/academic sectors. There are few scientifically experienced staff in the public service, yet these few are disconnected from the scientific community.[224] The "adopters" of knowledge should ideally have expertise on both sides. "Good" decisions and evaluation of options is likely to be achieved if those involved have some knowledge about evidence and how it ought to be used.

(e) Who is promoting the policy or evidence

Factors such as whether the person presenting the evidence or policy is seen as credible, high-ranking or authoritative will also be relevant.[225] For example, a proposal put forward by the Prime Minister will have more weight behind it than a list MP from one of a less prominent political party. Jacinda Ardern noted the inconsistencies in the law in debate on the Limitations Bill in 2009. While the Age of Majority (Attainment at 18 Years) Amendment Bill has been proposed, it awaits its chances in the ballot box and has not gained any real traction. This indicates that instigation from a non-governing party has little effect. The most debate around this area of law has recently arisen as part of the Ministry of Social Development's "Investing in New Zealand's Children and Their Families" project. This aims to increase the age for state care and the upper bounds of the youth justice system. As of yet, no discussion of a more comprehensive reform has surfaced.

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[221] Bowen and Zwi, above n 209, at 603.

[222] Nutley and Davies, above n 208, at 330.

[223] Davies, above n 1, at 4.

[224] Peter Gluckman *Towards better use of evidence in policy formation: a discussion paper* (Office of the Prime Minister's Science Advisory Committee, April 2011) at 12.

[225] Nutley and Davies, above n 208, at 330.

However, the law is receiving some spotlight under this project, arguably as a result of it being adopted by members of the current government.

The "majority rule" feature of democracy may also be detrimental to implementing EBP. This is the idea that parliament, or society, may reject the idea of using evidence in policy-making.[226] Rejection is not necessarily an active decision—but the result is that those who are democratically elected produce outcomes that are inconsistent with the "best evidence". While this may be what happens in practice, this too may be an overstated concern. EBP as a complete process would be inherently difficult to implement. However, the use of evidence, in some form, remains a constant desire. Given the public thirst for transparency and accountability in policy-making, it is unlikely that politicians would disregard evidence if they wish to seek re-election.[227]

These factors all interact to determine whether a policy will be adopted. While the existence of an evidence base is useful, no volume of research can create a policy without interacting with the political system.

VII Lessons learned

A comprehensive reform in this area therefore requires fertile policy conditions and an integration between the elements of EBP with other approaches to law reform. Additionally, a new model must also take into account alternative kinds of knowledge. Professional knowledge in this area from doctors, social workers, lawyers, and other professions that deal with children regularly hold valuable insight into children's capacities. This is particularly so as it is an area where robust, wide-ranging research is unlikely to eventuate.[228] While it is not debated that the use of evidence is beneficial for policy-making, it cannot be isolated from the differing perspectives that come forth from alternative approaches. Essentially, the future of reform will depend on choosing a "winning" approach to determine the direction of the law. Currently, the political/traditional and human rights approaches predominate, while evidence remains at the margins.

It is impossible to have a policy system fuelled by objective research findings. [229] In fact, it may be undesirable to do so. Even if EBP was implemented, there can be no assurance

[226] Young, above n 207, at 25.

[227] At 25.

[228] Head, above n 21, at 80.

[229] At 80.

that a resulting policy would have improved outcomes from those that are decided based on hunches or intuition.[230] Interestingly, Steinberg noted that the conclusions reached about age for competency (18 as a midpoint) were the same as those reached by policy-makers and the international community, long before the era of brain scans.[231] The law around competency and capacity of children tends to linger around granting rights between the ages of 16-18. While there are neurological and cognitive developments that occur in this period, the differences in practice may be minimal. Much of this discussion has arisen from the United States, and the research context is considering capital punishment for adolescents and the right to seek an abortion without parental consent. As New Zealand does not have the death penalty, and a girl may have an abortion at any age without parental consent, arguably this conversation is not as topical.

There is also a lack of a strong evidence base for the New Zealand context about competency and capacity, and more broadly, whether age limits actually achieve their aim of protecting young people. In addition, policy-makers are motivated by things other than evidence—such as their external perceptions in the media, public and with key stakeholders.[232] This is clear in the 2010 reforms of the youth justice system, and the instigation of the lowering of the voting age.

In this area of law, evidence may not have a large role to play. It is useful for framing thinking around these issues, but it cannot be determinative. Simply put, the law is not currently in crisis whereby the science and law are completely adjunct. The starkest difference from the research is that the age for criminal liability should be higher. However, such suggestions are likely to be politically unpalatable, given New Zealanders' relatively punitive attitudes to crime. Hence, EBP may be of little use—as there is nothing that would warrant a fresh approach in the eyes of policymakers. Any debates in this area are therefore likely to rest on differences in opinion, and social setting rather than "hard" evidence. The issues surrounding competency and capacity are turbulent, and subject to change. The result is that evidence becomes politicised, and can easily lead to accusations that the research is biased.[233] In other words, the two conditions are not met: the current policy climate is not favourable to evidence-based law reform in this area, and there is no easy way of reconciling an evidence-based approach with other approaches.

[230] Marston and Watts, above n 148, at 159.

[231] Steinberg, above n 134, at 76.

[232] Head, above n 21, at 80.

[233] At 81.

Whether EBP is desirable for law reform more generally is another question. The use of evidence in formulating policies for other issues is undoubtedly helpful, although the limits of evidence must also be acknowledged. EBP in its broader form (sometimes called "evidence-informed" policy-making) that acknowledges the role of context, and encourages or requires reflexivity and reflection on the part of the actors involved, could result in EBP meeting its objectives—effective, efficient solutions to social problems.

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