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THE PASIFIKA YOUTH COURT: A DISCUSSION OF THE FEATURES AND WHETHER THEY CAN BE TRANSFERRED

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I Introduction

The Youth Court (YC) is a division of the District Court that is governed by specific principles contained in the Oranga Tamariki Act 1989 (the Act) and handles offending by young persons that are 14 years old but not yet 17 years of age. Since October 2010, the YC also has jurisdiction over certain 12 and 13-year-old children charged with specified serious offences.[1] The Family Court usually handles all cases involving children aged under 14 years old and all care and protection cases. YC judges although specialists in this area are also District Court judges handling general civil and criminal cases and their decisions are subject to appeal to the High Court and Court of Appeal.[2] Young persons may be charged with any criminal offence, but almost all charges are finalised in the Youth Court. [3] For purely indictable offences, the young person is transferred to the adult court unless the YC judge allows him to remain in the YC.[4]

At the heart of the YC is the Family Group Conferencing (FGC) model where informal meetings of the young offender, his or her extended family, the young offender's lawyer (or youth advocate), the victim with supporters, police, social workers and members of the community. FGC is the acknowledgment that a young person belongs to a family and community, who as stakeholders have vested interest in finding the best outcome that will help the youth offender take responsibility for the wrong done.[5] A further discussion of FGC is provided in the later part of this paper.

The focus of this paper is the Pasifika Youth Court (PYC). The PYC is just like any other YC applying the same laws and consequences but the similarities end there.[6]

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[1] Nessa Lynch *Youth Justice in New Zealand*, (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at 172.
[2] FWM McElrea "The New Zealand Model of Family Group Conferences" (paper prepared for the International Symposium 'Beyond Prisons' Best Practices Along the Criminal Justice Process, March 1998) at 2.
[3] Nessa Lynch *Youth Justice in New Zealand*, above n 1.
[4] Oranga Tamariki Act 1989, ss 275 and 276.
[5] PAC – Pacific Islands Broadcasting Association "Adoption of New Zealand Youth Court System" (12 Oct 2005) Gale CeFWMngage Learning <http://go.galegroup.com.helicon.vuw.ac.nz/ps/i.do?&id=GALE|A137416302&v=2.1&u=vuw&it=r&p=ITOF&sw=w&authCount=1>
[6] Lucy Hughes Jones "NT:NT inquiry reviews cultural NZ youth court" (10 February 2017) AAP General News Wire <https://search.proquest.com/docview/1866525924/fulltext/9F573C5085A64320PQ/1?accountid=14782>

This paper will first provide an overview of the PYC in the Youth justice system. Secondly it will provide a detailed account of the legal framework that empowers the operation of the youth justice system in New Zealand and subsequently, the PYC. This paper will then provide a detailed outline of the features that are unique to the PYC. These features will be dealt with in this order: involvement of elders and advocates; involvement of community; physical environment; and role of culture. This paper will then provide a brief account of where the PYC fits in with some of the comprehensive laws. Restorative justice and therapeutic jurisprudence are paid particular attention to with very brief accounts for problem solving courts and reintegrative shaming. This paper will then proceed to provide a very detailed analysis the PYC by answering some hard questions. Topics of analysis can be seen in Part 6 of this paper. This paper will towards the end provide a brief account of whether the features are transferable followed by a concluding remark.

II PYC in the Youth Justice System

The PYC was established as a judicial initiative supported by the Ministry of Justice. In response to the disproportionate over-representation of Pacific youth offenders in the youth justice system as set out in Appendices 1, 2 and 3,[7] the first of two PYCs opened in Mangere in 2010 to address youth offending in a specifically tailored cultural environment.[8] The second PYC is in Avondale. The Ministry of Justice conducted a study comparing the reoffending rate for young people aged between 14 to 16 who had appeared in either the Rangatahi or Pasifika Court with young people that appeared only in the mainstream YC. Only those who had their case finalised from 1 January 2010 to 31 December 2012 were included in the study. Of the 575 young people who had appeared in either the Rangatahi or Pasifika Court and has their case finalised in 2010 – 2012, 40.9% reoffended within 12 months, after risk-adjustment. This is 11% lower than the rate for the matched comparison group of youth offenders (46.0%).[9] Although these provisional results are positive, they must however be viewed with caution

[7] Ministry of Social Development *Report: The Fresh Start Reforms in Operation* (2011) at 13.
[8] Julia Ioane, Ian Lambie and Teuila Percival "A review of the literature on Pacific Island youth offending in New Zealand", above n 8, at 428.
[9] Briefing for Hon Amy Adam, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pasifika Courts" (15 December 2014) CJS-05-40-05 at 14 (Obtained under Official Information Act 1982 Request to the Reducing Crime Policy Group, Ministry of Justice).

because they have limitations as full apprehension history data for individual youth was not obtainable from Police on all youth in the studies.[10]

All youth offenders must first appear in the mainstream YC. If the youth offender does not deny the charge or if the charge is denied and subsequently proved, the court must order an FGC in every case. At an FGC, if the charge is admitted, a comprehensive plan is formulated. Part of the plan may include provision for regular and consistent monitoring of the plan's progress at the PYC. Successive hearings may be held at the PYC as directed by the PYC judge. After an FGC has been held, an YC judge is able to direct that the PYC monitors the FGC plan. The PYC monitors the completion of the FGC plan and sentences the youth offender at the conclusion of the plan. The role of monitoring the plan entails usually of court appearances every two weeks before the same Judge until the plan is completed. If the FGC plan breaks down, or new charges are laid because of fresh offending, the matter may be referred back to the YC.[11]

The aim of the PYC is to provide the best possible rehabilitative response to Pacific youth offenders by encouraging strong cultural links and meaningfully involving communities in the youth justice process.[12] The aim is to create a culturally supportive environment in which young people can accept fault for their actions, make reparation for the harm committed and make positive changes in their lives.[13] The PYC supports Pacific Island cultures but is not exclusively for Pacific Islander.[14] This means non-Pacific islander young offenders can select to have their plans monitored by the PYC.

The delivery of services and programmes to youth offenders in the PYC is effectively targeted and characterised by Pasifika cultural elements, tailoring proceedings to the language and culture of the young offender and their family. In a similar way to other YCs, the PYC is participatory and inclusive,[15] but instead of it simply assigning punishments as a deterrent for

[10] "Short Description: Rangatahi and Pasifika Courts" (Obtained under Official Information Act 1982 Request to the Reducing Crime Policy Group, Ministry of Justice).
[11] Te Koti Rangatahi: The Rangatahi Court" (Obtained under Official Information Act 1982 Request to the Reducing Crime Policy Group, Ministry of Justice).
[12] Briefing for Hon Amy Adams, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pasifika Courts", above n 9.
[13] Above n 9.
[14] Ministry of Justice "The District Court of New Zealand – Rangatahi and Pasifika Youth Courts" <http://districtcourts.govt.nz/youth-court/about-the-youth-courts/rangatahi-and-pasifika-youth-courts/>
[15] Ministry of Health *Youth Crime action plan 2013 – 2023* report (2013), at 29.

future offending, it functions in a way that addresses core issues and/or causes underlying the offences. The aim of the PYC is simply to reduce recidivism by young Pacific people and to provide the best possible rehabilitative response.[16]

III Legal Framework

There have been a number of legal instruments and events that have shaped New Zealand's youth justice system today. The following are some of these significant legal milestones:[17]

> The Neglected and Criminal Children Act was passed [in 1867]. This gave courts the power to commit to industrial schools. It also sought to keep industrial schools from reformatories, which were for 'criminal' children.
>
> The Industrial Schools Act was passed [in 1882], repealing the Neglected and Criminal Children Act 1867. This placed the guardianship of neglected or criminal children in the hands of the Managers of the Industrial Schools. The Act also increased the power of the Education Department, giving it considerable discretion over where a child was placed and for how long.
>
> The Justice of Peace Act was also passed [in 1882]. This distinguished children (aged under 12 years) and young persons (aged 12 and under 16 years). The Act states that non-homicide indictable offences committed by a youth could be dealt with summarily (with the parents' consent). Penalties available for both children and young persons were imprisonment, fine or whipping.
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> [In 1893], the Criminal Code Act was passed. Section 22 state that no person under the age of 7 could be convicted of an offence and those under the age of 12 were given the benefit of the *doli incapax* rule.
>
> [In 1906], the Juvenile Offenders Act was passed. The object of this Act was to save children from the degrading influences and notoriety inseparable from the administration of justice in Criminal Courts. The Act established private hearings for juveniles, stating that Magistrates should assign 'special hour' for hearing of charges against persons under 16 years.

[16] Ministry of Social Development *Report: The Fresh Start Reforms in Operation*, above n 7, at 13.
[17] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft* (Department for Courts, January 2003) at 7-10.

> [In 1908], the Industrial Schools Act was passed, consolidating the 1882 Act.
>
> [In 1917], the Statute Law Amendment Act was passed giving statutory recognition for the appointment of Juvenile Probation Officers. This represented an attempt to keep juveniles in natural home conditions and relegate an admission to an institution as a last resort.
>
> [In 1924], the Prevention of Crime (Borstal Institutions Establishment) Act passed. This recognised the measure used since 1909 of sending some male youths between 12 and 21 to prison.

In 1925, the Child Welfare Act was passed which formally established a Children's Courts "with the aim and on the principle, that [young persons] require protection and guidance rather than disciplinary punishment".[18] It was the first statute in New Zealand to embrace the positivist welfare approach with a focus on "re-defining the delinquent as a child in need".[19]

The District Courts Act 1947, enabled a Judge to hold "a particular sitting of a Court at any place he deems convenient".[20] Under this provision, the Judge had a broad discretion to direct that a YC sitting is to be held on a marae or Pasifika community hall for the purposes of monitoring an FGC plan.[21] Although this provision was subsequently repealed, it is believed that this is the provision which enabled the setting up of the PYC. Literature shows that this section and this Act remain the basis for reference to the setup of the PYC and the Te Kooti Rangatahi.

In 1957, the Juvenile Crime Prevention section of the police was established followed by the Crimes Act being passed in 1961. This raised the age of criminal responsibility from seven to ten and formalised the *doli incapx* rule.[22] In 1968 the Guardianship Act was passed, which formally established the paramountcy principle, stating that the interests of the child or young

[18] John A Seymour *Dealing with Young Offenders in New Zealand – the System in Evolution* (Legal Research Foundation, Auckland, 1976).
[19] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft*, above n 17, at 11.
[20] Section 4(4).
[21] "Te Koti Rangatahi: The Rangatahi Court", above n 11.
[22] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft*, above n 17, at 8.

person shall be the first and paramount consideration (s 23(1)).[23] This was subsequently followed by the passing of the Children and Young Persons Act in 1974 (the 1974 Act) which was the crowning moment for the positivist welfare approach founded on the principle of "the interests of the child or young person as the first and paramount consideration".[24] The 1974 Act offered the following three innovations: "legally distinguished children and young persons, formalised diversionary strategies through the establishment of Children's Boards, and it took steps towards reforming the Children's Courts".[25] The latter was replaced with the Children's and Young Persons Court.[26] This 1974 Act though became the subject of extensive and professional commentary with the most relevant concern for this paper being the monocultural nature of the Bill.[27] It was also criticised for making:[28]

> …too many and inappropriate arrests of young people for minor offences and the subsequent stigmatising; the inherent injustice of open-ended sanctions; and the realisation that many young people who offend do not have any special family or social problems…

The 1974 Act was also condemned for its little impact on youth offending especially with the increase in street kids and with persistent young offenders.[29] There was an attempt to counter these denigrating views. The 1977 amendment of the 1974 Act allowed children to be tried for murder and in 1981 and 1982, police possessed greater powers to deal with street kids.[30] Nevertheless the 1974 Act was denounced for sheltering young people from the consequences of their actions and for misleading young people to think that they are victims of the system as opposed to being the root of all suffering and anxiety to the community.[31] The 1974 Act placed a great emphasis on diversion, an avenue away from court appearance which did not increase the likelihood of further offending.[32] Unfortunately, it came to light in a 1987 report that the police had no confidence in diversion and tended to bypass them altogether and proceeded to

[23] At 8.
[24] Ken Mason *Report of the Ministerial Review Team to the Minister of Social Welfare Hon. Jenny Shipley* (1992) at 8.
[25] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew* Beacroft, above n 17, at 11.
[26] John A Seymour *Dealing with Young Offenders in New Zealand – the System in Evolution,* above n 18, at 52.
[27] Department of Social Welfare *Review of the Children and Young Persons Bill* (December 1987) at 8.
[28] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew* Beacroft, above n 17, at 13.
[29] At 13.
[30] At 13.
[31] At 13.
[32] At 14.

make arrests if they believed prosecution was necessary.[33] The same diversionary system also faced other criticisms such as:[34]

> …lack of follow up; domination of the consultations by police who held exclusive control of information (and resulting disempowerment of the officer for the Social Welfare Department); a failure to involve communities and families…

As reported by Morris and Allison, the diversionary system set up by the 1974 Act failed because the Children's Boards were not as effective as intended.[35] For this paper and for further context, the 1974 Act also failed in fulfilling the following responsibility:[36]

> When any person, being a young person or a parent or guardian or a person having the care of the young person, appears before a Children and Young Persons Court, the Court shall satisfy itself that he understands the proceedings, and shall, if necessary, explain to him in simple language the nature of the proceedings and of any allegations against the young person or himself, including their legal implications, such as the existence of an intention on the part of the young person or himself to do an act that constitutes an offence or to bring about by his acts a certain result that constitutes an offence or both, but no particular form of words shall be necessary.

Morris and Young reported that young people and their families "felt neither able to participate in the proceedings nor even understood them properly".[37] Although it is arguable that the PYC like the Rangatahi court "developed on an organic basis rather than through statutory or policy prescription", the monocultural nature of the 1974 Act contributed to the setup of the PYC.[38] The system was based on the British system of laws and ignored existing cultural systems and left indigenous people confused and on the borders of the existing system.[39] In 1978, the Royal

[33] Allison Morris and Warren Young "Juvenile Justice in New Zealand: Policy and Practice" (1987) Study Series 1 Institute of Criminology at 124.
[34] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew* Beacroft, above n 17, at 14.
[35] Allison Morris and Warren Young "Juvenile Justice in New Zealand: Policy and Practice", above n 33, at 124 – 125.
[36] Section 40.
[37] Allison Morris and Warren Young "Juvenile Justice in New Zealand: Policy and Practice", above n 33, at 101.
[38] Nessa Lynch *Youth Justice in New Zealand*, above n 1, at 202.
[39] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew* Beacroft, above n 17, at 16.

Commission on the Courts' report was published recommending the establishment of a Family Court which includes the Children and Young Persons Act within its jurisdiction.[40]

In 1984, the Labour Government established a Working Party to review the existing Children and Young Persons legislation.[41] Piecemeal amendments could not remedy the criticisms faced by the 1974 Act thus a full renovation of the Act was necessary. Then the Criminal Justice Act was passed in 1985 barring imprisonment of a person under the age of 16 years except for purely indictable offence. Following the Working Party's recommendations, the 1986 Children and Young Persons Bill was introduced into the House. In 1988, the State Sector Act was passed and in 1989, New Zealand signed the United Nations Convention on the Rights of the Child, which states: [42]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> The child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or indirectly, or through representative a representative in a manner consistent with the procedural rules of national law.

In the same year, the Children Young Persons and their Families Act 1989 came into effect which was hailed as a new paradigm offering a completely new approach beyond the traditional philosophies of youth justice.[43] Notwithstanding the volatile and tumultuous political and social setting of the time, the Act codified statutory principles and objectives[44] and set up specific youth justice principles[45] distinguishable from the ones governing care and protection procedures. In summary, the principles are:[46]

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[40] At 8.
[41] At 9.
[42] Articles 3.1 and 12.2.
[43] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft*, above n 17, at 26.
[44] Sections 4 and 5.
[45] Section 208.
[46] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft*, above n 17, at 26.

- Criminal proceeding should not be used if there is an alternative means of dealing with the matters;
- Criminal proceeding should not be used for welfare purposes;
- Measures to deal with young offenders should strengthen family groups and foster their skills to deal with offending by their children and young people;
- Young people should be kept in the community as far as in consonant with public safety;
- Age is a mitigating factor when deciding on appropriate sanctions;
- Sanctions should promote the development of the young person and be the least restrictive possible;
- Due regards should be given to the interests of the victim; and
- The child or young person is entitled to special protection during any investigation or proceedings.

While the Act attempts to strike a balance between the dichotomies of the justice and welfare models, it also promotes the following contemporary principles and concerns: striking a balance between justice and welfare; diversion; victim and offender empowerment; strengthening families and indigenous concerns by offering appropriate and relevant services. For the purpose of this paper, strengthening of families is a significant change. One of the key objectives of the Act is to empower families and communities instead of professionals when addressing young offenders.

Following the enactment of the Act, an emphasis has been placed on the young offender's "membership of a family and community" and "it is the consequences for the wider family to which he relates that is under consideration".[47] It is implicit under the Act that youth offenders with stronger cultural ties and relationships will have more invested in good behaviour, and less to gain from criminal offenses that may be linked to alternative group affiliations where offending may be the norm.[48]

The Act sets out that wherever possible, a child's or young person's whanau, hapu, iwi and family group should participate in decision making and regard should be given to their views.[49]

[47] FWM McElrea "A New Model of Justice" in BJ Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, University of Auckland, 1993) 3 at 6.
[48] Camile Nahkid "The meaning of family and home for young Pasifika people involved in gangs in the suburbs of South Auckland" (2009) 35 Social Policy Journal of New Zealand 112.
[49] Section 5(a).

Furthermore, measures dealing with offending should be designed to strengthen the whanau, hapu, iwi and family groups of children and youth offenders, as well as designed to foster the ability of these groups to develop their own means of dealing with offending by the children and youth offenders.[50] This sees a move away from personal liability to a collective responsibility for the youth offenders and their families. The Act is a global trendsetter where new threads have been woven together to create a new model.

IV Features

A Involvement of Elders and Lay Advocates

The main difference in the way the PYC operates is the active involvement of the lay advocates and unique to the PYC, its elders.[51] The PYC comprises of lay advocates from each of the islands supporting the presiding judge and offering youth offenders and their families encouragement and guidance.[52] Lay advocates are assigned more frequently in the mainstream YC and are usually appointed by the Court under section 326 of the Act with their principal functions being:[53]

> a. to ensure that the court is made aware of all cultural matters that are relevant to the proceedings:
> b. to represent the interests of the child's or young person's whanau, hapu, and iwi (or equivalents (if any) in the culture of the child or young person) to the extent that those interests are not otherwise represented in the proceedings.

They "have sufficient standing in the relevant culture by reason of their personality, cultural background, knowledge and experience."[54] They can be classified as either cultural advocates, family advocates or community advocates.[55] As an example, they provide insightful advice as

[50] Oranga Tamariki Act 1989, s 208(c).
[51] Eleanor Boon, Ida Malosi and Elizabeth Purcell "The Pasifika Court" (paper presented to Youth Advocates Conference, July 2015) at 49.
[52] Lucy Hughes Jones "NT:NT inquiry reviews cultural NZ youth court", above n 6.
[53] Oranga Tamariki Act 1989, s 327.
[54] Ministry of Health *Youth Crime action plan 2013 – 2023* report, above n 15, at 30.
[55] Andrew Becroft "The Youth Courts of New Zealand in 10 years' time: crystal ball gazing or some realistic goals for the future?" (paper presented to Youth Advocates Conference, July 2015) at 13.

to cultural factors involved in the offending, or necessary as part of any subsequent intervention package.[56] The following are success measures for the lay advocate:[57]

> Acknowledging the four domains of the collective identity of the young person – spiritual, cultural, physical and emotional.
> Youth culture experience – "I do get it because I was one of you".
> Open minded and non-judgmental – "In order for me to help, I got to know you".
> Be resourceful "what have you got to offer".
> Family community approach – "you are family".

Elders are different to lay advocates. Unlike lay advocates, the Act offers no provision dealing directly with elders. During a hearing, an elder who is generally the same Pacific Island ethnicity as the young offender and his family, formally welcomes the young offender and his family and support persons. In a similar way to Maori understanding, there is no substitute for kin participation in decision-making about youth offenders. The state's role is to support families and communities by providing information that is timely and necessary and by providing access to resources to enable kin participation in the PYC.[58] Although elders are not direct kin of the young offenders, they are nevertheless comparable to other kin of the young offenders such as grandparents.

Young offenders often listen to their elders in court because respecting their elders is a fundamental and core value of their Pasifika heritage. Although the elders may be harsh and direct, their dialogue can affect the young person's mind and heart to change for the better.[59] The elders have a gift through their ability to recognise the soft spot of an offender, knowing the right words to use and knowing the penalties to be imposed.[60] The author recognises that through the lay advocates and elders, culturally responsive pedagogy is in place not only through the knowledge they impart but also through their influence toward equity and justice.[61]

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[56] At 11.
[57] Eleanor Boon, Ida Malosi and Elizabeth Purcell "The Pasifika Court", above n 51, at 50.
[58] Department of Social Welfare *Review of the Children and Young Persons Bill*, above n 27, at 10.
[59] Losirene Lacanivalu "Pasifika court backs CI methods" *Cook Islands News* (online ed, Cook Islands, 8 November 2016).
[60] Above n 59.
[61] Christine E Sleeter "An agenda to strengthen culturally responsive pedagogy" (2011) 10(2) English Teaching 7 at 19.

B Involvement of Community

Involving the community encourages a process of "responsible reconciliation".[62] Reconciliation here means strength is derived from the interaction of victim, offender and family in a supportive environment and responsible because offenders take responsibility for what has happened and for what is to happen.[63] Therefore: [64]

> "Partnering with communities is about working together to prevent offending and re-offending. It is not about duplicating efforts or adding more meetings – it's about building on what is already delivering results and outcomes, and strengthening coordination at every level within the community".

Pasifika communities are actively involved in designing, developing and implementing responses to youth offenders who offend, resulting in more effective responses.[65] Power is vested in the community as opposed to previously being with the court.[66] The solutions they design aim to address the origins of youth crime because they know their young people and their circumstances best.

Judges make up members of the community. Judges for the PYC are specialists chosen due to their training, experience, personality and understanding of different cultural perspectives and values. Judge Ida Malosi in particular can be interpreted as occupying a number of roles during the process. These roles are as a judge, a mother, one of us and a member of the Pasifika community to which the young offenders also belong. With these roles, Judge Malosi is afforded respect from youth offenders because she is relatable and can be compared to biological kin of the young person. Judge Malosi can be seen to encourage the employment of solutions arrive at through the FGC and to "act as a back-stop if those solutions are not implemented".[67] Her Honour is on the same level as all parties involved and welcomes the presence of others in the courtroom. Family members are welcomed and thanked for their participation in the process and are encouraged to speak about their experiences with the system. What is important about this inquisitorial process is that the right to speak is not limited

[62] FWM McElrea "A New Model of Justice", above n 47, at 13.
[63] At 13.
[64] Ministry of Health *Youth Crime action plan 2013 – 2023 report*, above n 15, at 12.
[65] Ministry of Health *Youth Crime action plan 2013 – 2023 report*, above n 15, at 21.
[66] FWM McElrea "A New Model of Justice", above n 47, at 14.
[67] FWM McElrea "A New Model of Justice", above n 47, at 4.

to lawyers. Control is not exclusive but is a partnership and the court together with all the parties involved work together towards a common goal.[68]

The statutory basis for this can be found in the following principle:[69]

> …that any measures for dealing with offending by children or young persons should be designed –
>
> i. to strengthen the family, whanau, hapu, iwi and family group of the child or young person concerned; and
>
> ii. to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.

In the old model of justice, the judge was in control, representing the State and exercising authority given by the State either to impose punishment or to direct intervention in people's lives for "welfare" reasons.[70] The old model can be observed in the adversarial courtrooms of today. The judge has an elevated position with the benches up high. Around the judge are found the "trappings of power, ritual and mystique with which we are familiar" strengthened by the fact that virtually only prosecutors and lawyers talk to the judge.[71] This type of set up in the PYC today would further alienate the youth offender from the court process as they do not feel involved. This approach thus clearly lacks inclusivity. Fortunately, this is not the case in the PYC because the judge sits on an equal level with the young offender and all other members of the proceeding. The process is interactive as opposed to it being once-sided.

C Physical Environment

The PYC is located away from the general court environment and staff are dressed in Pacific Island attire.[72] The proceedings are conducted either in a Pasifika church or community

[68] FWM McElrea "A New Model of Justice", above n 47, at 5.
[69] Oranga Tamariki Act 1989, s 208(c).
[70] FWM McElrea "A New Model of Justice", above n 47, at 4.
[71] FWM McElrea "A New Model of Justice", above n 47, at 5.
[72] Julia Ioane, Ian Lambie and Teuila Percival "A review of the literature on Pacific Island youth offending in New Zealand", above n 8, at 428.

centres.[73] The room is decorated with island artworks, fine mats and floral cloth, the floor is covered with a 'tapa' - a traditional mat that now bears the signatures of children who have completed their plan successfully.[74] This setting is an attempt to create a different environment for young offenders by removing them and their cases away from the hostile environment that may be experienced in a traditional court setting and creating one where with the support of families and elders, they can take ownership of their offending.[75] The atmosphere is warm with a sense of reverence and respect when one enters the PYC and is faced with the smiling faces of Pacific Island elders.[76]

All the sessions open with a prayer and a formal Pacific Island greeting by the elder that is present towards the young offender, their families and support persons.[77] The Judge then conducts the hearing during which different participants are given the opportunity to contribute.[78] A decision is then made about way forward, a word of encouragement from specific elder is given, a closing prayer is said and Judge closes hearing.[79]

D Role of Culture

The PYC is based on traditional Pacific Island cultural practices,[80] such as the Pacific languages and protocols. These cultural protocols and practices of the Pacific Island world, direct accountability of a Pacific Island youth offender towards themselves and their families, their victims and their families, and their community.[81] It is thus a legal setting upholding Pacific values of community relationship and collective responsibility, serve and faith.[82] It is very likely that these cultural aspects of the PYC will be instrumental in youth offenders feeling a

[73] Losirene Lacanivalu "Pasifika court backs CI methods", above n 59.
[74] Lucy Hughes Jones "NT:NT inquiry reviews cultural NZ youth court", above n 6.
[75] Rod Vaughan "Criminal Justice and the community" (22 July 2016) ADLS <http://www.adls.org.nz/for-the-profession/news-and-opinion/2016/7/22/criminal-justice-and-the-community/>
[76] Julia Ioane, Ian Lambie and Teuila Percival "A review of the literature on Pacific Island youth offending in New Zealand", above n 8, at 428.
[77] At 428.
[78] Eleanor Boon, Ida Malosi and Elizabeth Purcell "The Pasifika Court", above n 51, at 51.
[79] At 51.
[80] Lucy Hughes Jones "NT:NT inquiry reviews cultural NZ youth court", above n 6.
[81] Julia Ioane, Ian Lambie and Teuila Percival "A review of the literature on Pacific Island youth offending in New Zealand", above n 8, at 428.
[82] Eleanor Boon, Ida Malosi and Elizabeth Purcell "The Pasifika Court", above n 51, at 51.

sense of belonging as opposed to a criminal if in the mainstream system. This shows that in a cultural context, optimal well-being can be easily achieved.[83]

What can be said is that those appearing before indigenous courts are more likely to respect the process, to engage positively in it and to respect the involvement of their elders and the recognition of their culture.[84] The notion of legal consciousness is at play because it is a series of underlying dimensions that structure the process of reaching and imposing formal decisions. Penological philosophy and ensnarement are two dimensions pertinent to the legal consciousness of courtroom professionals. The former refers to whether imposed legal outcomes will focus on rehabilitating or punishing/incapacitating an offender. The latter refers to whether a legal outcome will lead to prolonged entanglement with the criminal justice system or disentangle an offender.[85] Arguably, the aims of the PYC with the backing of the Act is to avoid the latter and achieve the former.

Reintegrative shaming sees the criminal as making choices, to commit crime in this instance against a background of societal pressures mediated by shaming.[86] Moralizing social control is more likely to secure compliance with the law than repressive social control.[87] A culture impregnated with high moral expectations of its citizens, publicly expressed, will deliver superior crime control compared with a culture which sees control as achievable by inflicting pain on its bad apples.[88] Shaming in this theory is a means of making youth offenders actively responsible and a route to freely chosen compliance.[89] Shame is about self and occurs when we fail to achieve some goal. [90] Shaming is part of the Pasifika culture in that it guarantees response from youth offenders.

[83] Bruce Winick "The Jurisprudence of Therapeutic Jurisprudence" (1997) 3(1) Psychology, Public Policy and Law 184.
[84] Rod Vaughan "Criminal Justice and the community", above n 75.
[85] Ronald Kramer "Neoliberal states and 'flexible penality': Punitive practices in district courts" 2015 30(2) New Zealand Sociology 44 at 50.
[86] John Braithwaite *Crime, shame and reintegration* (Cambridge University Press, New York, 1989) at 9.
[87] At 10.
[88] At 10.
[89] At 10.
[90] Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis NZ Ltd, Wellington, 2014) at 154.

V Pasifika Youth Court and Comprehensive Law

There are four components of comprehensive law that are most pertinent to the PYC. This paper will pay particular attention to restorative justice and therapeutic jurisprudence.

A Restorative Justice

Restorative Justice (RJ) is the idea that crime is:[91]

> …a violation of a person by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused to get them to understand and meet their liability to repair such harm, and to ensure that further offences are prevented; that the form and amount of reparation from the offender to the victim and the measures to be taken to prevent reoffending should be decided collectively by offenders, victims and members of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between the offender and victim and to reintegrate the offender into the law-abiding community.

It is not the adoption of one form or another but instead it is the adoption of any form that reflects restorative values and aims to achieve restorative process, outcome and objectives.[92] The process is restorative because it's primary concern is with "restoring, insofar as is possible, the dignity and well-being of those harmed by the incident".[93] It seeks to address the causes and aftermath of offending while restoring relationship between community members.[94] In New Zealand, the application of RJ principles began with the introduction of FGCs for young offenders through the Act.[95] FGC is not the sole avenue for RJ to demonstrate itself. Other formats include victim-offender dialogue, sentencing circles, community panels and so on.[96] Thus if values unique to RJ are observed and honoured, there is always room for "a diversity

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[91] Gerry Johnstone *Restorative Justice: Ideas, value, debates* (2nd ed, Routledge, Abingdon, 2011) at preface to the first edition.
[92] Allison Morris "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42 British Journal of Criminology 596 at 600.
[93] Ministry of Justice *Restorative Justice: Best Practice in New Zealand* (2004) at 30.
[94] Harry Mika and Howard Zehr "A Restorative Framework for Community Justice Practice" in Kieran McEvoy and Tim Newburn (eds) *Criminology, Conflict Resolution and Restorative Justice* (Palgrave MacMillan, New York, 2003) 135 – 152.
[95] Above n 93, at 7.
[96] At 30.

of processes and a flexibility of practice".[97] This form of diversity and flexibility can be seen in the way different cultural and ethnic communities use varied processes to "actualise common restorative values and achieve similar restorative outcomes".[98]

An FGC is convened by a Youth Justice coordinator who is an employee of the Ministry for Vulnerable Children.[99] No summons can be made without first referring the matter to the coordinator. The FGC is attended by the young offender, members of his or her family, the victim (with supporters if desired), a youth advocate (if requested by the youth offender), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to have present.[100]

If the young person has not been arrested, the FGC recommends whether the young person be prosecuted and if not so recommended, how the matter should be dealt with,[101] with a presumption in favour of diversion.[102] All members of the FGC (including the young person) must consensually agree to the proposed diversionary program and its implementation.[103] Where the young person has been arrested the court must refer all matters not denied by the young person to a FGC. Occasionally a FGC recommends a sanction to be imposed by the court, but it usually presents a plan of action, e.g. apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders.[104] The YC more likely than not accepts FGC plans however this may not be the case with serious offences. The plan nominates persons to supervise - which can be anybody, including a family member - with the court usually being asked to adjourn proceedings, for three to four months, to allow the plan to be implemented.[105] For this paper, the PYC is another 'person' that supervises compliance with the plan. If the FGC plan is complied with as agreed between all parties, then the proceedings are withdrawn but failure to fulfil the terms of the plan can see the court imposing its own sanctions.[106] The values unique to RJ which can be

[97] At 30.
[98] At 30.
[99] Oranga Tamariki Act 1989, s 245.
[100] FWM McElrea "The New Zealand Model of Family Group Conferences", above n 2, at 3; Oranga Tamariki Act 1989, s 251.
[101] Oranga Tamariki Act 1989, s 258(b).
[102] Section 208(a).
[103] FWM McElrea "The New Zealand Model of Family Group Conferences", above n 2, at 3.
[104] At 3.
[105] At 3.
[106] At 3.

observed in FGCs held for youth offenders are participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope.[107] Failing to adhere to these values can result in unsatisfactory recommendations or a break down of the FGC plan.

Although this paper has just discussed why RJ through FGC has many benefits, an arguable flaw of the approach as can be seen in the PYC is the issue of culture. RJ philosophy derives from relatively closed and homogenous tribal societies which one would usually attribute to Pacific islanders, consumers of the PYC. However, the term Pasifika has become a label of convenience and a new administrative stereotype enabling different Pasifika cultures to be lumped within one tickable box.[108] It has become an umbrella term for all living in New Zealand with traceable Pacific island heritage. This fails to give true recognition to the individual islands that make up the Pacific. Each individual island has its own culture and culture affects "language, behaviours, and preferred conflict resolution styles" and thus plays a significant role in RJ practices.[109] Failing therefore to understand the different cultures within the individual islands can result in the works carried out in FGC and in the PYC becoming redundant. Another flaw of RJ is that it is feared by victims for being motivated mainly by a need to work with offenders even though it claims itself to be victim oriented.[110] If this is how the victims see the PYC, then evidently the PYC is not ensuring that victim involvement is a priority which is should be.

B Therapeutic jurisprudence

Therapeutic jurisprudence (TJ) is the study of the role of the law as a therapeutic agent by focusing on the law's impact on emotional life and psychological well-being.[111] TJ applies laws in a more therapeutic way while upholding values such as justice and due process. It is by no means substantively restricted to the realm of mental health law which is where it originates

[107] Above n 93, at 32 – 33.
[108] Alan Perrott "Pasifika – identity or illusion" (4 August 2007) NZHerald.co.nz <http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10455473>
[109] Berit Albrecht "Multicultural Challenges for Restorative Justice: Mediators' Experiences from Norway and Finland" (2010) 11(1) Journal of Scandinavian Studies in Criminology and Crime Prevention 3 at 6.
[110] Howard Zehr *The Little Book of Restorative Justice: Revised and Updated (Justice and Peacebuilding)* (Skyhorse Publishing Inc, New York, 2014).
[111] David Wexler "Therapeutic Jurisprudence: An Overview" (2000) 17(1) Thomas M. Cooley Law Review 125 at 125.

from.[112] Laws discussed here can be divided into three categories: (1) legal rules, (2) legal procedures such as hearings and trials and (3) the roles of legal actors and the behaviour of judges, lawyers, and other actors in the legal context.[113] The latter category is particularly important for this paper because for example, the way the judge behaves in a sentencing hearing can affect how the young offender comply with the conditions of the order. If a judge is not entirely clear in formulating conditions, the young offender may not comply with them because they never understood the conditions correctly.

In the context of the PYC, TJ can be seen as operating through the way the specialised Judge and/or the elders address the young offender. The responsibilities possessed by these actors are very crucial in ensuring the young offender continues to comply with his or her plan. Through interactions, the actors in the PYC must promote in the young offender a sense of cognitive self-change as part and parcel of the court process.[114] This encourages the young offender to take some responsibility as opposed to the judge imposing something on him or her.[115] What must be observed at all times though is that the notion of separation of powers is not compromised. Judges have been critiqued for becoming too proactive or too paternalist and an element of coercion has been observed as present.[116] These are features that TJ does not support. Consequentially, TJ and PYC are conflicting because the specialist judges do want to present themselves almost like the young offenders' parents while the elders as the grandparents. Therefore, they will be paternalist and coercive in the directions they give the young offenders. These are attributes inherent in a Pacific islander. Contemporaneously, the same judges and actors use the law as a "social force that produces behaviours and [therapeutic and antitherapeutic] consequences".[117] This is an interesting issue but one that deserves its own paper.

C Problem solving courts

[112] David Wexler "Therapeutic Jurisprudence and the Culture of Critique" (1999) 10 Journal of Contemporary Legal Issues 263 at 267.
[113] David Wexler "Therapeutic Jurisprudence: An Overview", above n 111, at 126.
[114] At 134.
[115] At 134.
[116] LAWNEWS "Therapeutic jurisprudence – not just for specialist courts?" (13 November 2015) ADLS Connecting New Zealand Lawyers < http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/11/13/therapeutic-jurisprudence-%E2%80%93-not-just-for-specialist-courts/>
[117] David Wexler "Therapeutic Jurisprudence: An Overview", above n 111, at 125.

This is where the Judge is a facilitator and leader in the process. He or she takes into account offenders' perceptions of fairness, motivations, and emotions in addressing offenders' psychological and social issues. Elements of this can be observed in the PYC but these elements have been discussed in other parts of this paper.

D Reintegrative shaming

Reintegrative shaming is a strategy that utilises community disapproval to respond to offending whilst sustaining the community's relationship with the offender (as opposed to ostracising the offender). In the PYC, the elders being present and the judge being paternalist, show the young offender that their behaviour is unacceptable.

VI Analysis

A discussion of the features unique to the PYC have been addressed already in this paper. However certain elements that influence the PYC will be analysed to assess other operating factors that may be contributing either in isolation or alongside the features previously discussed, to the success of the PYC.

A PYC compared to the Koori court

While many claim that the Illinois founded the first juvenile court in 1899, the State Children's Act in South Australia established one in 1895.[118] Other jurisdictions followed swiftly; England and Canada in 1908, France and Belgium in 1912, Hungary in 1913, Austria and Argentina in 1919, and Germany and Brazil in 1923.[119] New Zealand established a separate youth court in 1925 with the first PYC launched in 2010. The PYC is judicially driven particularly by Judge Ida Malosi who uses the concept of a village type community for the young people and their families to drive the existence of this court.[120] It is important to note that the PYC is based off

[118] Arie Freiberg, Richard Fox and Michael Hogan *Sentencing young offenders* (Australian Law Reform Commission, Sydney, 1988) at 2.
[119] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew* Beacroft, above n 17, at 2.
[120] Tariana Turia "Launch of the Mangere Pasifika Youth Court" (press release, 23 June 2010).

the same idea as the Te Kooti Rangatahi(TKR) or the Rangatahi Court. Thus, to make a comparison with Australian Koori courts, this paper will give a brief discussion of the TKR.

TKR is a marae-based court that uses traditional values of tikanga Maori to ameliorate the lives of young Maori offenders. It is the brainchild of Judge Heemi Taumaunu who sits at Waitakere and Te Poho Rawiri Marae in Gisborne where the first TKR opened. Like the PYC, TKR is a judicially-led initiative primarily established to provide a more culturally responsive and appropriate process with the overall vision being to promote better engagement with, confidence in, and respect for the youth justice process.[121]It provides an opportunity to draw on local marae resources while operating consistently with the objects and principles of the Act. The process integrates the use of Maori language, rituals and protocols. It encourages respected Maori elders to become involved by sitting alongside the presiding judge and provide valuable insights and advice from a traditional Maori perspective to the young offender and his or her whanau (extended family).[122]

The Children's Koori Court (CKC) of Adelaide, Australia was the first legislated[123] effort in Australia to involve the indigenous community in the sentencing of young people. The CKC began operating in October 2005 and was followed later by three new Koori Courts – two in the adult jurisdiction of the Magistrates Court and a third in the Children's Court jurisdiction at Mildura.[124] The latter was launched in late 2007. The CKC came about after the Royal Commission into Aboriginal Deaths in custody in 1991 which reported that indigenous youth were significantly over-represented in the youth justice system. The Royal Commission found that indigenous Australians faced a much greater risk than the general Australian population of becoming the victims of violence, up to 10 times greater in the case of homicide. Following the delivery of the Royal Commission's findings, the Victorian Government entered into the Victorian Aboriginal Justice Agreement in 2000 and established Koori Courts in various jurisdictions.[125] The responsible Minister when introducing the Children and Young Persons (Koori Court) Bill 2004, described the CKC as:[126]

[121] Te Koti Rangatahi: Background and Operating Protocols (1 July 2015) at [4] (Operating under Official Information act 1982 Request to the Reducing Crime Policy Group, Ministry of Justice).
[122] Above n 121.
[123] The Children and Young Persons (Koori Court) Act 2004 (Australia).
[124] Allan Borowski "Indigenous Participation in Sentencing Young Offenders: Finding From an Evaluation of the Children's Koori Court of Victoria" (2010) 43(3) The Australian and New Zealand Journal of Criminology 465 at 468.
[125] Judicial College of Victoria *Chidlren's Court Bench Book* at [33].
[126] At [33].

> …an alternative way of administering sentences so that court processes are more culturally accessible as well as acceptable and comprehensible to the indigenous (Koori) community. The key emphasis is on creating an informal atmosphere which allows for greater participation by the Koori community through the Aboriginal elder or respected person, the Koori court officer, indigenous (Koori) defendants and their families in the court and sentencing process. It aims to reduce perceptions of intimidation and cultural alienation experienced by indigenous (Koori) defendants.

The CKC employs senior Aboriginal people to assist the Magistrate by advising about local social and cultural issues and matters personal to the defendant which is all done in open court. The Aborigine elder or respected person assists the court by providing information on the background of the defendant and possible reasons for the offending behaviour.[127] They play a vital role in enhancing connection to culture and community for both the court and the child. Their attendance at the court is regulated by a court generated roster. Although the legislation provides for one elder to sit with the court in any given hearing, two elders or respected persons attend the court on each list to avoid the need for adjournments in the events of any conflicts, or to resolve any culturally determined gender issues. [128] Like the PYC and TKR, the following persons are involved in cases at CKC: the judicial officer; Aboriginal elders or respected persons, with one sitting on either side of the judicial officers; the Koori child; a family member of the child or support person; the police prosecutor, the child's legal representative; a youth justice representative and the children's koori court officer.[129]CKC has sentencing powers as opposed to PYC which acts as a supervisor for a young offender's FGC plan. The CKC implements specific and culturally appropriate sentencing procedure in proceedings and as distinct from the mainstream court, the judicial officer can consider statements from other persons during the sentencing process.[130]

What is obvious from the discussion is that while the PYC is a judicially driven initiative, CKC is on the other hand, an executive initiative driven by the Victorian Aborigine Justice

[127] At [33.2].
[128] Michael King and Kate Auty "Therapeutic Jurisprudence: An emerging trend in courts of summary jurisdiction" (2005) 30(2) Alternative Law Journal 69 at 69.
[129] Above n 125, at [33.2].
[130] Above n 125, at [33.2].

Agreement (the Agreement). The Agreement provides a dynamic framework for justice agencies and the Aboriginal community to work together to address issues underpinning overrepresentation.[131] The motivation for both courts is arguably the same: to reduce recidivism and imprisonment rates. Both courts also have similar features particularly the involvement of elders. As CKC is a government action, this resulted in The Children and Young Persons (Koori Court) Act 2004 plus the Agreement and the involvement of the Department of Justice and its agencies. Although the PYC is not regulated by its own statute, it still has the support of the Ministry of Justice and other agencies and maintains its flexibility to develop in any form or way it wants. Furthermore, the PYC observes the principles set out in the Act.[132] The PYC is also not limited to Pacific islanders while to have a case dealt with in the CKC, one of the essential requirements is that the young offender must be Aboriginal or Torres Strait Islander.[133]

To have The Children and Young Persons (Koori Court) Act 2004 means the rule of law is upheld, democratically elected members have been mandated to pass the legislation and there is consultation with the public. Rule of law implies that the creation of laws, their enforcement and the relationships among legal rules are themselves legally regulated so that no one is above the law.[134] The independence of the judiciary is problematic to the rule of law if the independence is misused to foster sectoral privileges of judicial personnel or to allow unchallenged interpretations of the law.[135] It is thus arguable that to have a legislation, is to have certainty as in the case of CKC whereas the initiation of the PYC could be seen as a sectoral privilege of judicial personnel with no clear legislation as its foundation. If the TKR and PYC were to go through the legislative process, this would have resulted in a delay as the process is time consuming. Legislations are not always guaranteed to have the necessary form of clarity. With Maori and Pasifika numbers of youth offenders increasing, it was sufficient for the judiciary to initiate the setup of the courts. What must be emphasized is that the PYC only monitors the youth offender's plan while CKC has sentencing jurisdictions. Therefore, it is justifiable for CKC to have a legislative basis and for PYC to maintain its flexibility without a particular statutory prescription.

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[131] Victorian Department of Justice *Victorian Aboriginal Justice Agreement* (2000) at 8.
[132] Section 208.
[133] The Children and Young Persons (Koori Court) Act 2004, section 16C(1a).
[134] Naomi Choi "Rule of Law" (2017) Encyclopaefia Britannica Inc. <http://tewaharoa.victoria.ac.nz>
[135] Larry Diamond and Leonardo Morlino (eds) *Assessing the Quality of Democracy* (The John Hopkins University Press, Baltimore, 2005) at 6.

B Who are the elders?

The earlier parts of this paper provided a discussion of the elders in the PYC. What is clear in that discussion is that unlike the lay advocates, there is no provision in the Act that specifically addresses the elders. Instead, their existence can be justified under the principles of the Act especially in involving the community.[136] The author believes that as the PYC is based off the TKR model, it is important to also give a brief discussion of the elders in the TKR for more context. In the TKR, the elders are known as the kaumātua and kuia (male and female respected elders of the Marae). They commence each case by performing a brief traditional greeting in the Maori language to the young person and his or her whanau present.[137] The kaumātua and kuia are present throughout each hearing, and will speak to the young person during their hearing. They do not play a legal role, but they will often give the young person valuable personal advice, or will be able to tell the young person about their whānau and connections to the marae.[138]

The elders are randomly appointed. They are selected based on a positive referral from a current elder on the PYC or from a person with standing in the Pacific community. This raises a question for the author as to why these elders do not go through a police vetting process. The police vetting requests is required as part of a Chidlren's Worker Safety Check under the Vulnerable Children Act 2014. This enhances the safety and competency of professionals who work with children. What is interesting is that under the Vulnerable Children Act 2014, child is defined as a person who is under the age of 18 years and is not married or in a civil union.[139]Therefore, the young people under the jurisdiction of the PYC can be classified as 'child' under this provision. Consequentially, the elders by not undergoing the police vetting process, are likely to be in breach of the Vulnerable Children Act 2014 which in part three has a purpose of reducing "the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked".[140] The definition of 'regular' will determine whether the elders are in breach of this Act or not. What

[136] Section 208.
[137] Heemi Taumaunu "Rangatahi Courts of Aotearoa New Zealand – an update" (paper for the Maori Law Review, November 2014).
[138] Above n 137.
[139] Section 5(1).
[140] Section 21.

has been clearly established is that young people in the PYC are classified as children under the Vulnerable Children Act 2014 and the elders are engaged in work that involves contact with the young people.

Based on several observations the author undertook of the PYC, there wasn't a single case where the elders knew of the young offenders directly. The elders are not given any information about the young offenders in advance until minutes before the hearing. Minutes before the hearing, the presiding judge reads out a summary of the offence and details about the young person to the elders. At this point, the ethnicity of the young person is identified through either the facts or the young person's name and two elders of the same ethnicity are selected. One elder will welcome the young offender with his or her family with a prayer and the other will end the hearing with words of inspiration and encouragement followed by a closing prayer. At the completion of this, the young offender and his or her family shake hands with the two elders involved and immediately leave the court. It is clear therefore that there is no time for the elders to get to know the young offenders or to establish whether there are any connections between the parties because the court must be ready to proceed to the next matter almost immediately. As an observer of the court and author of this paper, the elders performed their duties with respect both for the youth offenders but also for the PYC. In performing their duties, it can be assumed that through the information sharing process minutes before the hearing, elders can identify any conflict of interests. The issue here though is that if a conflict does arise, must the elder be removed from the court room (community hall for the PYC) altogether for that particular hearing or is it sufficient that they are not one of the two elders that greet and farewell the young offender.

C Is the PYC personality driven?

The judge in the PYC is supported by a group of elders from each of the islands who offer young people and their family encouragement and guidance. How the judge presides over the matters in the PYC is not legislated for and thus, there is no structure for the judge to follow when monitoring the plan. In this situation, it is arguable that the PYC sitting is driven by the personality of the judge and the actors involved. In order to provide an analysis of these personalities, McAdams argued that "to truly understand a person, we must understand his/her contingent, context-specific patterns of thoughts, feelings, and behaviour (and ultimately, their

life narrative".[141]Most of us use skills that we observed growing up, unless we have made a conscious decision to change our management style.[142]Alongside these observations are our value systems which further influence how we react to and deal with issues with other people.[143]

In the PYC, Judge Malosi as outlined in the earlier part of the paper is of Samoan heritage. Her style of interaction and dialogue with the youth offenders before her can be likened to the loving yet strict parents of those youth offenders. The style can be described as tough love as set out in the book of Proverbs chapter 13 verse 24 "he who spares the rod hates his son, but he who loves him is careful to discipline him". Arguably, as Judge Malosi grew up observing her parents' disciplinary styles, she has used just that plus the values unique to all Pacific islanders to get very clear messages across to the young offenders. She is stern with the youth offenders but with the intention of helping them in the long run. Her style of judging can be classified as collaborative in that she tries to meet the needs of all the parties involved. Being collaborative means that she is assertive, she cooperates effectively, and she acknowledges that everyone in the process is important.[144]

What is evident is that Judge Malosi is and has not always been a judge. Being a judge is part of her professional life while she also maintains a personal life. She is a mother, sister, aunty, role model and more to others. The question for this part of the analysis is whether her role as the judge in the PYC a real part of her personality and if it is, how should it be understood and included in the systemic analysis of personality structure.[145] William James labelled this as having many social selves due to the different social situations Judge Malosi finds herself in.[146] What this requires is a distinguishing between status and role. Status refers to the position of a person in a social structure without regard to how high the position is and may include her position in a family group, age group or occupational group.[147] Associated with each of these statuses are certain expected patterns of behaviour or social norms with these patterns known as status personality.[148]Therefore, it is arguable that Judge Malosi being a judge requires that

[141] D. P. McAdams "A psychology of the stranger" (1994) 5 Psychological Inquiry 145.
[142] CRANA Plus "Personality Differences and Conflict Handling Styles" (October 2011) <https://crana.org.au/uploads/pdfs/Other_44.pdf>
[143] Above n 142.
[144] Above n 142.
[145] David C McClelland *Personality* (William Sloane Association, United Sates, 1951) at 289.
[146] At 290.
[147] At 290.
[148] David C McClelland *Personality* (William Sloane Association, United Sates, 1951) at 290.

she adheres to expected status personality of the position. She must be assertive not because she is of Pacific island descent but because that is expected of any judge in their interactions with all offenders regardless of their making. With this in mind, it is still likely that she may display certain status personality of a Samoan mother while acting in her professional capacity. Therefore, although one may argue that Judge Malosi is attempting to act like the mother of the youth offenders, it is important to remember that her status as a judge in the specialised PYC comes with its own set of status personality that is very similar to the status personality of her position as the mother of her own children in her family.

D Are the young people coming through the PYC motivated anyways?

The average uptake rates by year for the PYC have varied between 30 and 39 percent since 2010.[149] As outlined earlier, young people who participate in the PYC and Rangatahi Court do so on their own volition. This is merely an option available to the youth offenders. The question therefore for this analysis is whether the young offenders that complete their plans and don't recidivate are young people that are motivated to right their wrongs and never return to the justice system or whether the PYC has contributed to their recidivism and successful completion.

Research on motivation for change has often centred itself around behavioural changes associated with addictions. Individuals with intrinsic motivation to stop smoking are more likely to achieve abstinence as opposed to those motivated by extrinsic means which gets its motivation from reinforcement contingencies and social influence.[150] The theory of self-determination is at play here which suggests that autonomy is associated with intrinsic motivation and greater persistence of behaviour change.[151] Self-determination is characterised by "internalization, assimilating an external value and accepting it as one's own".[152] Based on the self-regulation of behaviour, research suggests that there are three contextual factors facilitating self-determination: "providing a meaningful rational for the belief, acknowledging

[149] "Uptake of Rangatahi Courts – Briefing for meeting with the District Courts Kaupapa Maori Advisory Group on 10 November 2014" (Obtained under Official Information Act 1982 Request to the Reducing Crime Policy Group, Ministry of Justice).
[150] Leah Monique Fraser "An exploration of factors contributing to desistance from offending in a sample of moderate to high-risk young offenders" (Masters of Arts, Dissertation, Lakehead Unviersity, 1997) at 11.
[151] At 11.
[152] At 11.

the individual's feelings, and conveying a choice".[153] The individual is more likely to internalize a prescribed value if he/she perceives a rational reason for the belief and if the reason has meaning for that individual. Finally, providing the individual with choices offers him or her the opportunity to experience self-determination.

In the PYC, young offenders that do come out of the PYC and do not recidivate can be described as having self-determination. What this means is that it is not necessarily the PYC and its processes that have led to the successfully completion of the plan but instead the intrinsic motivation to redeem themselves and get out of the justice system are the justifications for persistence in positive behavioural change. Getting out and making something better of themselves is a reason with meaning which therefore means some young offenders never get in trouble with the law again. The young offender recognises that he or she has a choice and exercising this choice appropriately is an opportunity for them to experience self-determination. It may therefore be that these young people exercising self-determination are markedly different from other youth with comparable risk profiles because they were motivated to change their offending behaviour, and would be less likely to reoffend irrespective of whether they attended a Rangatahi or PYC.[154]

The following are variables that are identified as risk factors for delinquency onset, recidivism and desistance. Amongst the strongest single correlate of delinquency, recidivism, and disposition is the number of prior and current offenses.[155] Therefore, if the young offender in the PYC is one that has no prior offenses, it is most likely that they won't return to the court. This is opposed to a youth offender with multiple prior and current offenses who is very much a regular in the youth justice system and can be seen as continuing this behaviour onto the adult criminal system. Therefore, the PYC and self-determination or motivation under this variable are irrelevant because recidivism and desistance depends on history of offending. It is likely therefore that the earlier the age of onset can result in poorer prognosis in re-offending.

[153] At 11.
[154] Briefing for Hon Amy Adams, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pasifika Courts", above n 9.
[155] Leah Monique Fraser "An exploration of factors contributing to desistance from offending in a sample of moderate to high-risk young offenders", above n 150, at 12.

The second variable is associated with parental supervision and discipline on top of the quality of the parent-child relationship.[156] Issues important to this variable are low levels of supervision; inconsistent or inappropriate discipline, including neglect or abuse; low levels of parental warmth, affection and support; criminality in the family of origin; and general parenting skill deficits.[157] Delinquents, relative to nondelinquents, often have poorer indications on scales of family interaction.[158] What this means is that the success of the young offender in the PYC can come down to the family environment that they come from and then will return to. It has nothing to do with the work of the PYC or the intrinsic motivation of the young person. If the young person comes from a family with a history of ongoing violence, returning to the exact same environment following completion of their plan will guarantee recidivism because there is no continuity of good practices learnt while under the supervision of the PYC. Family interaction and parenting variables for the purposes of improving family settings and eliminating recidivism have the potential for improvement and thus improvement in these areas may contribute to a positive change in delinquent behaviour.[159] The concern with this variable is that it is an external factor which is something the young offender has very little control over. Alternatively, if the young offender is liberated from the dysfunctional family home to a more structured, less chaotic environment that has the necessary supervision and support, the young offender is less likely to recidivate than if they retuned their dysfunctional family.[160]

The next influential variable is low ratings in academic achievement, school failure and employment. Study shows that a poorer attitude toward school, such as a lack of interest or below average effort, are important in distinguishing delinquents from non-delinquents.[161] This includes low commitment to school and dropping out. This variable is an internal one and therefore the young offender has the potential to ameliorate his or her habits. If the young person develops good habits and becomes interested in learning while under the supervision of the PYC, continuation of this attitude post-PYC can result in lack of recidivism. However, if the young offender never changes his or her attitude towards learning, then it is very likely that delinquent behaviours will resurface. It has been reported that obtaining employment provides a sense of worth and purpose to young offenders attempting to amend their delinquent ways.[162] A young offender returning to his community and subsequently obtains employment has a much better chance of not reoffending than a person that has nothing to return to.

[156] At 12.
[157] At 12.
[158] At 13.
[159] At 13.
[160] At 14.
[161] At 14.
[162] At 15.

Peer relations is another variable with significant consequences. Peers can either be potential barriers to delinquency or potential instigators of delinquency. Reduction in antisocial peer associations and increases in identification and association with anti-criminal role models has been suggested to reduce delinquent behaviour.[163] If a young offender is one with good peer relations, the young offender is likely to complete their plan effectively while under the PYC's supervision because they are surrounded by positive friends who are supportive, compassionate and providing positive directions. Lay advocates and mentors for young offenders while under the supervision of the PYC can be seen as positive acquaintances. Therefore, if the young offender has good peer relations and has good relations with his case officers, they are less likely to return to the court because they already have good support systems in place to continue their progress.

Another key variable for this analysis relates to the temperament of the young person's activity level, impulsivity and tendency toward aggressions.[164] Young offenders that come to the PYC with short attention span and restless energy are linked very closely to delinquency. Poor frustration tolerance and behavioural problems associated with aggression have also been major predictors of recidivism.[165] These sort of behaviours although they may be internal require treatment. The success of the treatment depends on how well the young person complies with the treatment. Therefore, if the young offender is able to successfully achieve their plan while managing their temperament or getting treatments for it, their recidivism level will be very low.

Internal or interpersonal variable are characteristics of an individual which he or she can control. This means that the individual has the ability to change these factors given the requisite desire, motivation and assistance is necessary. Adolescence is characterised by struggling with the process of individuation and identity formation. Blos' theory of individuation states that adolescence involves a process by which the individual is involved with the development of relative independence from family relationships and with an increased capacity to assume a functioning role as an adult member of society.[166] High risk young offenders often exhibit a lack of direction or concern about their future which may be explained by a lack of ego identity.[167]

[163] At 15.
[164] At 18.
[165] At 19.
[166] At 9.
[167] At 9.

Young offenders that have stopped offending have reported a novel awareness and concern regarding their future. It is assumed that moderate to high risk young offenders are less likely to spontaneously mature out of delinquency because the greater number of risk factors increases their vulnerability to offend and recidivate.[168] Based on the social-control theory, an individual can control his or her behaviour based on external influences (e.g. attachment to parents, commitment to education etc.) to prevent damaging relationships with these social groups. Young offenders that are low in social control are more likely to engage in law breaking behaviour because they are free to satisfy their needs in the most expedient manner. This approach emanates from the failure of others to satisfy the individual's needs and through social learning from delinquent peers.[169] Therefore, what can be seen from this discussion is that the young offender in the PYC will always have a number of competing factors influencing their decisions and their behaviours away from the PYC. There are internal factors which are capable of being changed by the young offender and external factors where the young offender has very little control. Therefore, preventing delinquent behaviour cannot be attributed to the young person's motivated ways or the PYC's perfect monitoring ways. Recidivism will occur where the young offender has no control of internal and or external variables but with the right support and networks, the young person can desist from recidivism.

E Is it really a community justice process?

Community justice is distinguishable from restorative justice[170] in that community justice may or may not follow restorative values and principles. It broadly looks to "all variants of crime prevention and justice activities that explicitly include the community in their processes and set the enhancement of community quality of life as a goal".[171] Restorative justice arguably is one of the four central dimensions of community justice, but both reject punishment as a sanctioning philosophy. The difference between the two is that:[172]

[168] At 9.
[169] At 10.
[170] Kay Pranis "Promising Practices in Community Justice: Restorative Justice" in American Probation and Parole Association *Community Justice: Concepts and Strategies* (American Probation and Parole Association, Lexington, 1998).
[171]David Karp and Todd Clear "Community Justice: A Conceptual Framework" (2000) 2 Boundary Changes in Criminal Justice Organizations 323 at 323.
[172] At 325.

> Restorative requirements are viewed not as punishment but as obligations assumed through membership in a community. Community justice, however, is more broadly conceived of than restorative justice, attending to crime prevention as well as offender sanctioning. In addition, community justice focuses explicitly on the location of justice activities at the local level and concentrates on community outcomes.

Community justice is not simply concerned with individual criminal offenders but also the communities they live in. [173] The question is not 'what kind of person are you', instead the question is 'what kind of place is this'. Through this, community justice tunes in on neighbourhoods and seeks to develop comprehensive strategies for improving the social environment in which residents live.[174]It embraces a number of criminal justice approaches, including the aforementioned crime prevention, community policing, community defense, community prosecution, community courts and restorative justice sanctioning systems.[175]

Community justice has several goals including but are not limited to:[176]

- changing the relationship between law enforcement and citizens
- changing citizens' perception of law enforcement
- shifting the focus to the common good of all involved
- demonstrating genuine concern for crime victims
- repairing the harm done by crime
- preventing crime

Its five core elements are: (1) community justice operates at the neighbourhood level; (2) community justice is problem solving; (3) community justice decentralizes authority and accountability; (4) Community justice gives priority to a community's quality of life and (5) community justice involves citizens in the justice process.[177]

Community justice can be seen as a challenge to traditional criminal justice practices which has distinct boundaries between the role of the state and the role of communities in the justice

[173] At 2.
[174] At 2.
[175] At 324.
[176] Millicent Kelly "Community Justice: Definition & Services" <http://study.com/academy/lesson/community-justice-definition-services.html>
[177] David Karp and Todd Clear "Community Justice: A Conceptual Framework", above n 171, at 327 – 330.

process.[178] Priority is given to the community, which enhances its responsibility from social control while contemporaneously, building its capacity to achieve this and other outcomes relevant to the quality of community life.[179] The community justice ideal is for the agents of criminal justice to tailor their work so that its main purpose is to enhance community living, especially by reducing the inequalities of ghetto life, the indignities of disorder, the agony of criminal victimization, and the paralysis of fear.[180]

Community justice is governed by democratic and egalitarian principles. Norm affirmation, restoration and public safety are democratic principles which refer to community justice responses to criminal incidents. Norm affirmation refers to:[181]

> When a community responds to a criminal incident, it seeks not merely to restore credibility to the community's conception of the moral order by reaffirming that individuals are accountable for their violations of community life, but also to symbolically affirm community norms for others who have not disobeyed them. A fundamental principle of democratic community justice is the reaffirmation of standards that have been brought into dispute by the criminal incident. Norm affirmation is more than an intuitive recognition of right from wrong; it is a conscious process that articulates behavioural standards and provides justification for them…By removing the sanctioning process from the courtroom to the informal problem-solving setting of the community boardroom, offenders are forced to confront their community peers directly.

Restoration as a principle of sanctioning takes:[182]

> exception to retributive sanctioning that punishes offenders without holding them accountable for making amends to victims and the community at large. The idea underlying the pursuit of restoration is that crime has wrought harm and this needs rectification, preferably through restoration rather than reciprocal imposition of more harm. The goal of restorative justice is repairing the damage done by the offense rather than inflicting proportionate harm on the offender.

[178] At 324.
[179] At 324.
[180] At 325 – 326.
[181] At 331.
[182] At 332.

In New Zealand, restoration can be seen in practice in the FGC models outlined in this paper. The third democratic principle of community justice is public safety which is the guarantee that offenders will not inflict further or additional harm on any member of the community. Upholding this enhances the processes of victim healing and reducing community fear in crime being committed in their neighbourhoods.[183] Public safety is questioned as soon as an offender is convicted therefore the quality of community life after knowledge of this offence is partly "predicated on the confidence its members have in crossing public spaces and safely engaging other community members".[184]

There are four egalitarian principles "that frame a community justice approach to criminogenic neighbourhood conditions".[185] The four are intended to direct community justice approaches toward egalitarian concerns for equality, inclusion, mutuality and stewardship. The first principle in social equality which as can be observed as unevenly distributed across society. Community justice approaches this inequality by firstly "considering a community's capacity for responding to crime and the institutional resources it has available to provide directly for the community welfare".[186] The aim is to increase the community's capacity to leverage extra local resources on its own behalf so that the capacity of indigenous resources can be enhanced.

The second principle is inclusion. This asserts that:[187]

> that communal membership is not cheaply bought or sold. Much of the pressure for longer prison sentences is predicated on a "kinds of people" perspective on crime: The world can be cleanly divided into good people and bad people, and the sooner the bad people are removed from the public domain, the better. A community justice approach favours public safety but rejects the simplistic claim that removal of the "bad guys" is the core strategy for solving community safety problems. Residents existing on the margins of community life are potential resources for community development. The challenge is not to isolate as many dubious residents as possible but to find ways to include as many community members as possible in efforts to improve community quality of life.

[183] At 333.
[184] At 333.
[185] At 334.
[186] At 334.
[187] At 335.

An example of this principle in practice is the drug courts where there is a shift in perspective that accepts drug users and abusers as "troubled members of the community in need of help" instead of ostracizing them from society and deeming them in need of "exile through incarceration".[188] The third principle is mutuality. Community justice is a proud advocate of "peaceful coexistence of self-interested actors and…cooperation in the pursuit of mutually beneficial ends".[189] What this means is that:[190]

> On the one hand, this entails incentives for prosocial behaviour: performing community service, joining a community crime prevention campaign, socializing and supervising youths, and so on. On the other hand, the mutuality principle endorses disincentives for antisocial behaviour: holding offenders accountable for the damage they have caused, increasing the risks of criminal detection, making criminal targets less vulnerable, or reducing the rewards of criminal behaviour.

The fourth and final principle is stewardship which requires all citizens to see themselves as responsible for the welfare of the wider community "not merely in response to their own immediate interests but also to the needs and interests of others, particularly those who are disadvantaged or vulnerable".[191] Stewardship simply promotes democratic citizenship. The first youth courts as outlined earlier in this paper were founded on the principle that youth offenders were victims of their environment and in need of help as opposed to punishment. The welfare model was born out of this positivist approach. [192] The welfare model is based on the idea that criminal behaviour in youth offenders emanates from their upbringing and surrounding environment. Therefore, these young people need care and protection as oppose to placing emphasis on accountability and punishment as in the adult courts. The focus in on the youth offenders' needs not deeds.

Is the PYC a community justice process? Section 208 of the Act sets out principles that shall guide the exercise of certain powers also conferred under the Act. Of particular importance for the purpose of this discussion are the following principles:[193]

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[188] At 336.
[189] At 336.
[190] At 336.
[191] At 337.
[192] Emily Watt *A History of Youth Justice in New Zealand – a paper commissioned by the Principal Youth Court Judge Andrew Beacroft*, above n 17, at 2.
[193] Section 208.

(c) the principle that any measures for dealing with offending by children or young persons should be designed—

(i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and

(ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

….

(f) the principle that any sanctions imposed on a child or young person who commits an offence should—

(i) take the form most likely to maintain and promote the development of the child or young person within their family, whanau, hapu, and family group; and

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

These principles speak to the need to as far as practicable keep the young person in the community so long as the public safety is guaranteed. These principles are significant because the PYC strives to achieve these while monitoring a young offender's plan. The PYC ensures that the young offender comes from a background that can guarantee that the conditions of the plan will be met satisfactorily. The PYC is not concerned simply with the completion of the plan but it is also concerned with the environment in which the young offender is attempting to repair the harm done in. By keeping the young offender in the community, the young offender is granted a second chance to do everything right by its community and its victims and to improve its surrounding conditions. Whether this approach is a community justice one is up for discussion.

The PYC is a model that completely removes the young person from an adult court's form of punishment; imprisonment. There is a form of accountability in that the young person pays reparation, provides an oral and or written apology and fulfils other terms of the plan. The PYC would not be monitoring these plans if it did not value public safety and everyone's equal membership in society. What this does is that it shows those in the process of committing similar offences, the process they will go through. It is not an easy way out but is a process that encapsulates many elements to guarantee that there is remorse from the young offender and the

community continues to operate as it should. The author cannot conclude on whether the PYC is a community justice process, but the seven principles outlined above can be said to be somewhat present in the PYC. An issue that arises though is whether community includes only parties indirectly affected by the offence. This issue arises because one hypothesis regarding the definition of community is that community justice is likely to be most successful if the parties involved in the justice process are directly related to the incident.[194] If this question is answered in the positive, then PYC is not a community justice process because the PYC has elders and lay advocates who will never be direct parties to the incidents.

Another significant question for the purpose of this analysis is whether PYC can ever be a community justice process because PYC are closed courts. They are not open to the public and is only open to the media where consent has been given. The information heard and discussed are confidential information which may never become known to the public. The issue here then is how is the community to know about the crime if the offender is dealt with in close courts. Public safety is clearly undermined here.

On the positive side, PYC hearings are conducted in community halls as opposed to a normal courtroom. This is a practice preferred by the community justice approach because authority and accountability are decentralised, and the community is responsible for the process. The PYC also restores crime victims as one of its sole goals. This is by identifying the harm and then identifying how the harm can be compensated. The plan as agreed in the FGC, would set out how the victims will be compensated for by the young offender and the PYC ensures these conditions are consistently carried out and meeting the deadlines. This restoration is in line with the community justice model.

F Cross Cultural Issues

Developing a sense of place and of identity are essential to the wellbeing of every youth offender whether Pakeha, Maori or Pasifika.[195] Failing to establish this can lead to the reality for some youth offenders that being of a mixed cultural ethnicity may be associated with an

[194] David Karp and Todd Clear "Community Justice: A Conceptual Framework", above n 171, at 342.
[195] Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*, above n 90, at 266.

increased risk of criminal and antisocial behaviour.[196] The concern here is that youth offenders with mixed ethnicities may not completely reap the benefits of the PYC. What can happen in this instance is the operation of competing theories. On one hand, the moral educative normative theory aspires to put the offender in a position where he must argue for his innocence, admit guilt and express remorse, or contest the legitimacy of the norms he is accused of infringing.[197] On the other hand, the deterrence theory raises no problems with the silencing of critics, the suffocation of moralising on both sides, by locking away the offender from community contact.[198] The former can be argued as operating in the PYC while the latter should be the last resort when all other options have failed. However, cross cultural issues can lead youth offenders accepting the latter without considering the former as a viable option.

For a young person with an upbringing that is deeply rooted in the Pacific ways, reintegrative shaming is an integral part of growing up. This though may be counterproductive and dangerous for someone who identifies himself equally as a Pacific Islander and as a non-Pacific Islander for example. It could be misunderstood as an oppressive means for thought control and stultification of human diversity.[199]

G Measure of Success

It has been reported that between 2010 and 2014, 254 Pasifika youth attended the PYC.[200] The author is uncertain as to the reduction of recidivism for these youth offenders. The concern then is are the features reducing recidivism. Perhaps the answer does not lie in statistics or figures, instead success can be measured in the way youth offenders' response to the holistic support available and opportunities created. This is the same conclusion reached by the YC judges who initiated the Rangatahi and PYC. Other indicators of the successful implementation of the courts are:[201]

[196] Julia Ioane, Ian Lambie and Teuila Percival "A Comparison of Pacific, Maori, and European Violent Youth Offenders in New Zealand" (2016) 60(6) International Journal of Offender Therapy and Comparative Criminology 657 at 658.
[197] John Braithwaite *Crime, shame and reintegration*, above n 86, at 11.
[198] At 11.
[199] At 12.
[200] District Court of New Zealand *Annual Report 2014*.
[201] Briefing for Hon Amy Adams, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pasifika Courts", above n 9.

> Successful in engaging and facilitating positive behaviour by young people.
> Recognised to have facilitated young people to connect with their cultural identity, […] and positive role models.
> Viewed positively by both Rangatahi and their whanau.

Other factors to consider in judging the success of the PYC and the Rangatahi Court are:[202]

a) Willingness of the young person to accept fault, make reparation for the harm they have caused and make positive changes in their life.
b) Effectiveness of the process from the point of view of the victim (which will usually be closely linked to the willingness of the young person to accept fault and make reparation).
c) Positive impact of the Rangatahi and Pasifika Courts on the wider Maori and Pasifika communities. As local marae and Pacific community centres hosting the courts become more positively engaged in the justice system, this may have a range of positive spin-offs on others within those communities. For example, tikanga programmes (and the Pasifika equivalent) developed for the purpose of supporting the courts may also benefit others.
d) Any increased perception of 'procedural fairness' by those using the Rangatahi and Pasifika Courts. Evidence indicates that people who believe they have received procedural justice are more likely to be willing to accept the decisions of legal authorities and to abide by those decisions over time.

H Public Interest

The case of *Police v S and M* (1993) although not considered in the PYC, raised competing issues of public interest and cultural resolution.[203] Counsel for the defendants relied on the Act to support their submission that the YC was the most appropriate jurisdiction for resolving this matter due to its emphasis on empowering families, reintegration and healing.[204] What this case

[202] Briefing for Hon Amy Adams, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pasifika Courts", above n 9.
[203] *Police v S and M* (1993) 11 FRNZ 322.
[204] At 326.

raises is whether justice is really achieved even with the involvement of community and family members.

VII Are features transferrable?

Local communities and professionals are often best placed to decide how to deal with youth crime in their local areas, and respond to offending in ways that help children and youth offenders to develop in positive ways. With the right information and the right connections to other related initiatives, communities can respond to the issues particular to their own area. One size does not fit all, and government agencies must be careful to not hamper creativity, but rather allow for flexible local forms to address youth crime.[205] Therefore, the PYC is one approach to responding to Pasifika youth offenders only and its unique features are particular to Pasifika communities only. Transferring the distinct features of the PYC to the mainstream youth justice system is not the answer to solving all youth offending. Communities for non-Pacific youth offenders should respond in ways that are in line with the beliefs and values of their youth offenders. As confirmed in the Youth Crime Action Plan consultation process, youth offenders need early intervention, engagement with family and communities, communication and collaboration between agencies and better information in the youth justice system.[206] By intervening early, tools specific to those young offenders can be employed.

Instead of transferring features of the unique PYC, non-Pacific families and communities should be encouraged and supported to build foundations for their youth offenders, provide programmes and services that are responsive and allow their youth offenders to realise their potential.[207] Imposing what is culturally specific on others will result in incompatible views such as state intervention versus family autonomy, the application of welfare versus justice models for dealing with young offenders, the priorities given to prevention versus intervention and the role of professionals versus that of lay members of the community in dealing with matters affecting youth offenders.[208]

[205] Ministry of Health *Youth Crime action plan 2013 – 2023 report*, above n 15, at 5.
[206] At 11.
[207] At 18.
[208] Department of Social Welfare *Review of the Children and Young Persons Bill*, above n 27, at 6.

Bohannan's position in the Gluckman-Bohannan debate is relevant in here because indigenous local terminology should be used to convey meanings of that indigenous local system only. Failing to do this, can result in the rich detail of what the indigenous local are doing to become lost as their reality is ill-fitted into Western local categories.[209] This is a preferable view because western legal categories should not be used to interpret or categorise non-western systems. Therefore, it would be wrong to transfer features of a specific system because it would not have the same impact on non-Pacific youth offenders as it would on Pasifika youth offenders. If anything is transferrable, as can be seen from Judge Malosi's visit to the Cook Islands, features are only transferable across Pacific Island nations as opposed to non-Pacific island communities because the values and ideas remain the same, with setting being the distinction.[210]

Like the PYC, there are also other problem-solving courts such as the Ngā Kōti Rangatahi, Auckland Intensive Monitoring Group Court, Family Violence Courts, the Court of New Beginning, Matariki Court, Alcohol and Other Drug Treatment Court or the Christchurch Youth Drug Court.[211] Perhaps creating problem-solving courts for non-Pacific youth offenders is an option but this can only lead to more issues.

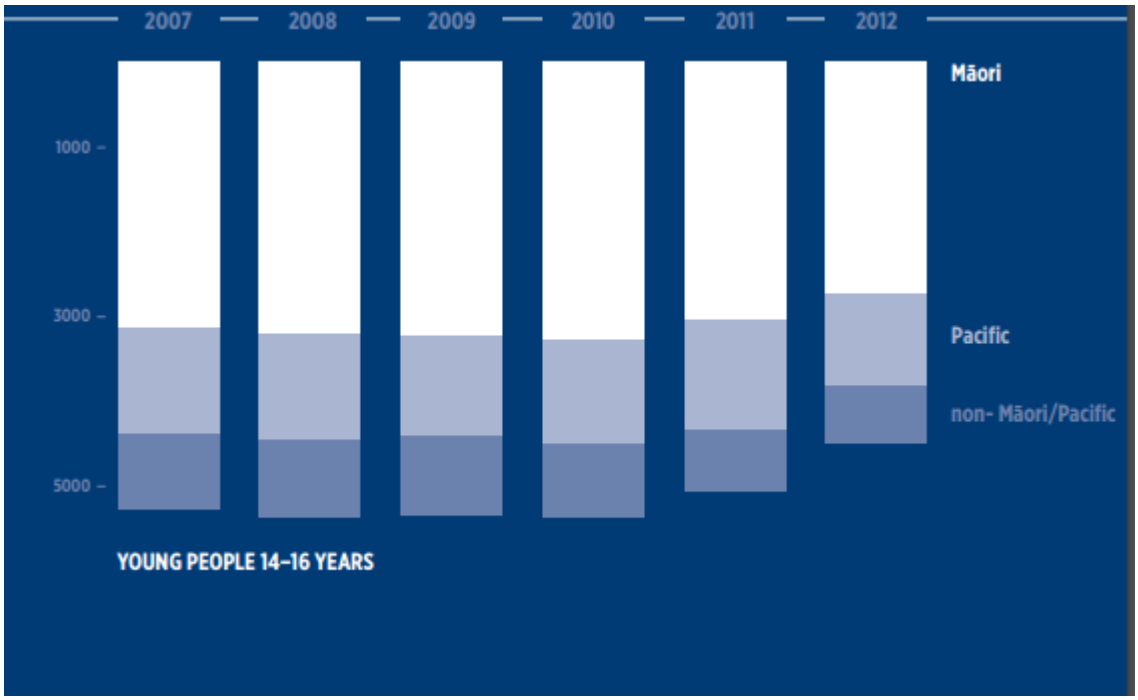
VIII Conclusion

As can be seen, the PYC is evolving "to recognise the call from Pasifika peoples, to restore the rights of the village to take care of its own".[212] The features are specific and unique and their transferability is questionable. The analysis provided shines light to some of the issues surrounding the success or lack of success of the PYC and as the youth justice continues to evolve, so will the features of the PYC and their survivability.

[209] James Donovan *Legal Anthropology: An Introduction* (Rowman & Littlefield Publishers Inc, Plymouth, UK 2008) at 165.
[210] Losirene Lacanivalu "Pasifika court backs CI methods", above n 59.
[211] Ministry of Health *Youth Crime action plan 2013 – 2023 report* (2013), above n 15, at 29; District Courts of New Zealand *Annual Report 2016* at 54.
[212] Above n 120.

IX Appendix 1[213]

Apprehension rates (per 10,000) for imprisonable offences



[213] Ministry of Health *Youth Crime action plan 2013 – 2023 report*, above n 15, at 9.

X Appendix 2[214]

Trends in Child and Youth Prosecutions

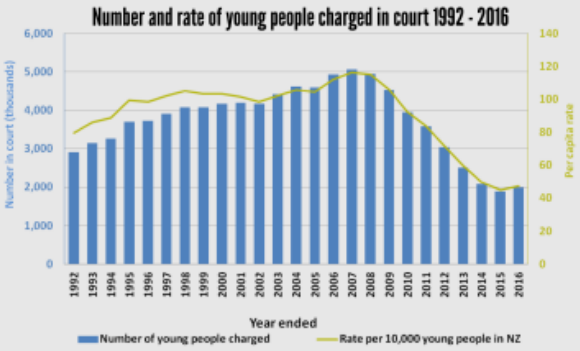
MINISTRY OF JUSTICE
Tāhū o te Ture

Court statistics for 10-16 year olds in the year ended December 2016

The number of children (10-13) and youth (14-16) charged in court has increased over the last year

The number of children and youth in court:

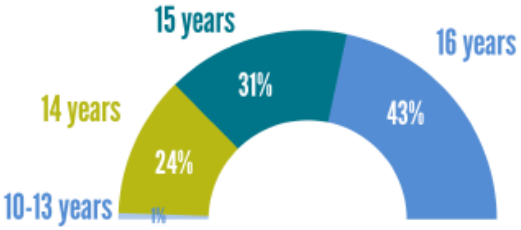
- Increased by 6% since 2015
- Decreased by 45% since 2011
- Account for less than 3% of all people charged in court in 2016



The number of young people charged in court has decreased for all gender, age and ethnic groups over the past 5 years

79% are male

The majority of young people in court are aged 15 or 16



	2015		2016	Change
Māori	1,164	→	1,272	+9%
European	438	→	432	-1%
Pacific People	204	→	207	+1%

Proportion who are Māori has increased in the last 10 years

Most charges are proved, and plans agreed at Family Group Conferences are followed

Instead of undertaking a Family Group Conference plan, a small number of children and young people with proved charges received one of these as their most serious order:

- 126 monetary, confiscation, or disqualifications
- 99 community work order or supervision order
- 54 compulsory community programme which may be followed by supervision
- 90 supervision with residence

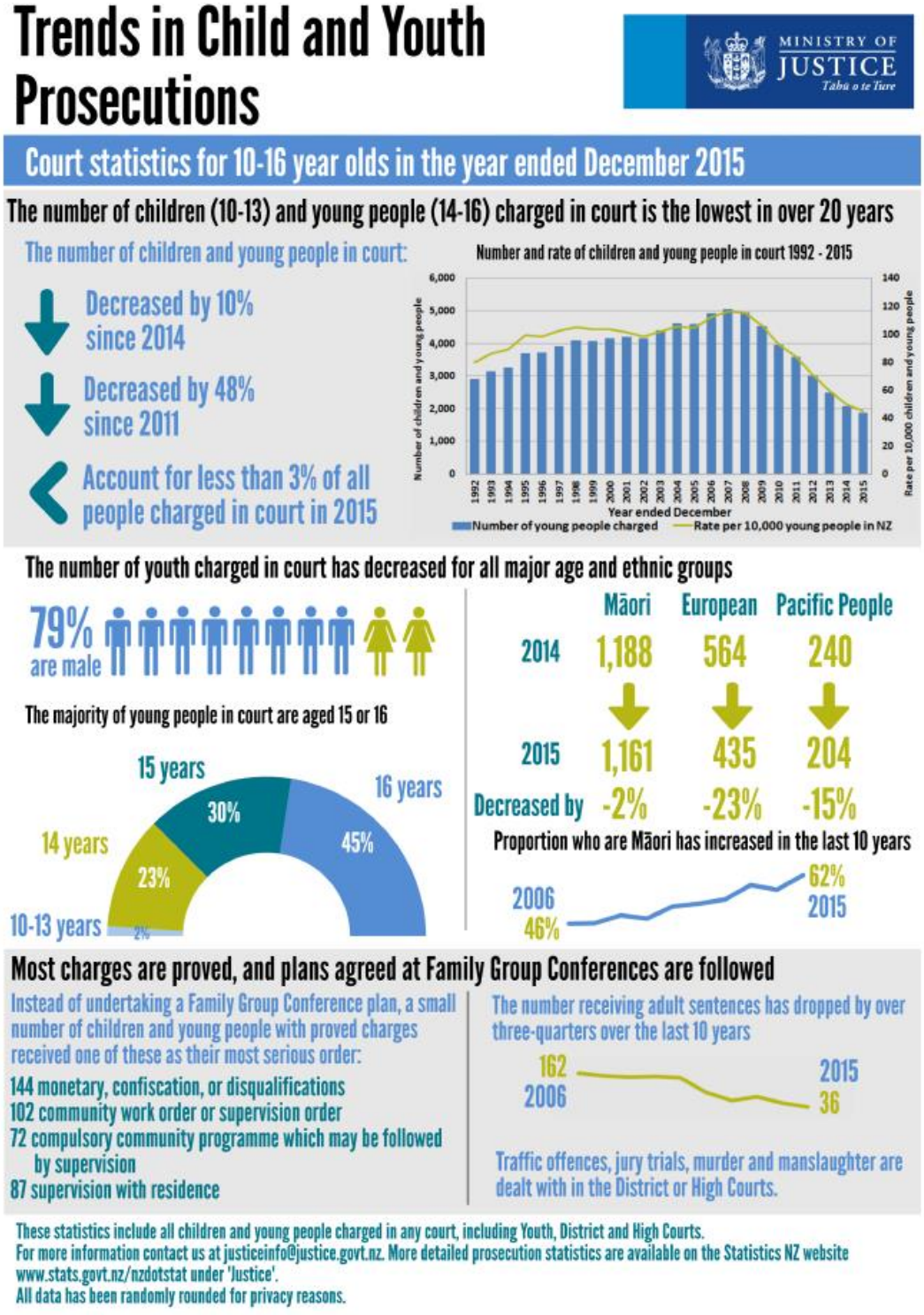
The number of youth receiving adult sentences is less than a quarter of what it was 10 years ago

Non-imprisonable traffic offences, jury trials, murder and manslaughter are dealt with in the District or High Courts.

These statistics include all children and young people charged in any court, including Youth, District and High Courts.
For more information contact us at justiceinfo@justice.govt.nz. More detailed prosecution statistics are available on the StatsNZ website www.stats.govt.nz/nzdotstat under 'Justice'.
All data has been randomly rounded for privacy reasons.

[214] Ministry of Justice "Trends in Child and Youth Prosecutions" <https://www.justice.govt.nz/assets/Documents/Publications/Trends-in-child-and-youth-prosecution-Dec-2016.pdf>

XI Appendix 3[215]



[215] Ministry of Justice "Trends in Child and Youth Prosecutions" <https://www.justice.govt.nz/assets/Documents/Publications/trends-in-child-and-youth-prosecutions-december-2015.pdf>

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