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IS BEST INTERESTS BEST?

AN UNDERSTANDING OF 'BEST INTERESTS' IN LIGHT OF NEW ZEALAND'S RESERVATION TO ARTICLE 37(C) OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2020

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Abstract

Article 37(c) of the UNCRC holds that children deprived of liberty should be separated from adults unless it is in their *best interests* not to be. New Zealand has a formal reservation to this article that allows for the mixing of adults and juveniles due to a shortage of facilities. Because the article itself has a built in best interests consideration and best interests is one of the fundamental principles guiding decisions regarding children, this paper explores the meaning of best interests, its application in this context and what it means for New Zealand's reservation. The paper argues that it *can* be in a child's best interest to be kept in custody with adults (despite its negative impacts) because of the way best interests is conceptualised. However, there is more than one way to conceptualise best interests. Namely, the meta/specific divide which draws a distinction between what might be in a child's best interests in a particular situation given the available options and what would be in a child's best interests in an ideal world. The paper explains these different interpretations of best interests by using article 37(c) and New Zealand's reservation as a case study.

Key Words

best interests, youth justice, children's rights, article 37(c) of the United Nations Convention on the Rights of the Child, deprivation of liberty, custodial mixing

I Introduction

"A deprivation of liberty is a deprivation of childhood".[1] was the tagline of the UN's global study on the children's deprivation of liberty. Depriving a child of liberty is likely to have negative lasting impacts on that child's life. There are different contexts in which children can experience a deprivation of liberty, this paper will primarily focus on children who are deprived of liberty in criminal justice. The documented repercussions of a deprivation of liberty, especially within the context of an adolescent who is still in their 'formative years' sit behind one of the general principles in international children's rights, that detention ought to only be used as a last resort.[2] Despite the principle, children continue to be placed in custody. Further, due to population size and availability of resources, under 18s are being mixed with over 18s.[3] The mixing of young and adult offenders amplifies concerns about the impact of imprisonment on young offenders. This is because it is largely understood that housing children prisoners with adult prisoners impacts on their likelihood of reoffending and their ability to reintegrate back into society.[4]

This paper will focus on article 37(c) of the UN Convention on the Rights of the Child (CRC) which provides that children ought to be kept in custody separately from adults unless it is in their best interests. It will further explore New Zealand's approach to this provision within the context of the reservation to it that we maintain. The central focus of this paper will be whether it can ever be in a child's best interest to be kept in custody with adults. To explore this, the paper will outline the context for the paper, including studies on the impact of depriving children of liberty and the international and domestic legal frameworks in place; the concept of best interests and how it is defined and applied in the law, including a proposed distinction between two different understandings of best interests, one specific and one more general; examples of how best interests might apply in this context and how they illustrate said distinction. Overall, this paper will argue that there are circumstances in which it can be in a child's best interests to be kept in custody with adults because of the understanding that we

[1] United Nations General Assembly *Global Study on Children Deprived of Liberty* A/74/136 (11 July 2019) at 1.
[2] United Nations Convention on the Rights of the Child.
[3] Above n 1, at 1.
[4] United Nations Committee on the Rights of the Child *General Comment No.24 (2019) on children's rights in the child justice system* CRC/C/GC/24* (18 September 2019).

give to best interests and therefore it makes little sense for New Zealand to maintain its reservation to art 37(c) CRC.

II New Zealand

A Overview

Article 37(c) of the CRC is phrased as follows: [5]

> "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;"

Despite agreement on child focussed YJ systems and New Zealand receiving praise for having one of the best approaches to YJ in the world, we retain a reservation to article 37(c), expressed as follows: [6]

> "The Government of New Zealand reserves the right not to apply article 37 (c) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply article 37 (c) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned."

Given our retention of the right to mix children with adult prisoners, it is available and utilised in New Zealand. Children are able to go through the adult criminal justice system in 3 scenarios:

[5] United Nations Convention on the Rights of the Child.
[6] Ministry of Justice "Constitutional Issues and Human Rights UN Convention on the Rights of the Child" (accessed August 2020) < https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/crc/>.

(1) A 17-year-old who has committed a scheduled offence consisting of serious offences carrying a sentence of 14 or more years imprisonment.[7]
(2) 14-18 year olds at the discretion of the Youth Court based on seriousness of offence, risk, among other factors.[8]
(3) Those above minimum age of criminal responsibility (MACR) who have committed murder or manslaughter – automatically transferred to the HC.[9]

B International Obligations

In New Zealand's 2015 report under art 44 of the CRC it expressed that it was not yet ready to withdraw the reservation to art 37(c) due to facility shortages and it will not be ready to do so until such a time that they are able to undertake large renovations of youth justice facilities.[10] The Committee on the Rights of the Child's (the Committee) report back, indicated that New Zealand should take active steps toward removing the reservation.[11]

In the 2020 submission of the New Zealand Human Right Commission to the Committee, the Commission noted that the government delegation stated "it would consider removing existing reservations."[12] However, it has made no moves to do so and further noted it "cannot bypass [the] domestic process of considering the implications of international conventions. We are therefore unable to accept recommendations 'to ratify/sign' or to withdraw reservations."[13] This indicates that any change to the existing position is not imminent.

Although New Zealand is standing by its decision to maintain this reservation, there have been various law changes and policy shifts in the youth justice system over the past few years.

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[7] Youth Court of Aotearoa New Zealand "Youth Court Overview" (accessed August 2020) < https://youthcourt.govt.nz/about-youth-court/overview/>.
[8] The District Court of New Zealand "About the Youth Court" (accessed August 2020) < https://www.districtcourts.govt.nz/youth-court/about-the-youth-court/>.
[9] Above n 7.
[10] Ministry of Social Development "United Nations Convention on the Rights of the Child Fifth Periodic Report by the Government of New Zealand 2015" (2015) accessed at <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/monitoring/uncroc/nz-fifth-periodic-report-under-the-united-nations-convention-on-the-rights-of-the-child.pdf>.
[11] United Nations Committee on the Rights of the Child *Concluding Observations on the Firth Periodic report of New Zealand* CRC/C/NZL/CO/24* (30 September 2016).
[12] New Zealand Human Rights Commission "New Zealand's 6th Periodic Review under the UN Convention on the Rights of the Child Submission of the New Zealand Human Rights Commission to the Committee on the Rights of the Child" (March 2020) Human Rights Commission<https://www.hrc.co.nz/files/9215/8466/4444/HRC_submission_on_CRC_LOIPR_-_with_annexure.pdf>.
[13] at 14.

Notably, the inclusion of 17 year olds in the youth justice system in 2019.[14] As well as the inclusion of a direct mention of the CRC in the Oranga Tamariki Act 1989 (OTA) which states that a child's rights under the Convention must be respected in decisions made about them.[15] This serves to reaffirm New Zealand's commitment to the rights and principles of the CRC, although as a guiding principle, does elevate the rights of the convention to that which are directly enforceable.[16] The position of the Convention as a piece of international law in New Zealand's justice system will be discussed below. However, given that our focus is on a provision over which there is a direct reservation, it is unclear the extent to which art 37(c) would be included in this principle/consideration of OTA.[17]

Prior to its inclusion in the OTA it had been noted that the CRC, as an international instrument still had "strong persuasive effect in the interpretation of statute, and in the exercise of judicial and professional discretion."[18] The orthodox dualist approach that international law is not applicable unless it has been directly incorporated into domestic law has been challenged in key public law cases such as *Tavita,* which held that:[19]

> "a failure to give practical effect to international instruments to which New Zealand is party may attract criticism. Legitimate criticism should extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."

It is also understood per Keith J in *New Zealand Air Line Pilots Association Inc v Attorney General* that it is a presumption of interpretation that the international instrument consistent interpretation is preferred.[20] Further it has been clearly stated in *Martin v Police* that "[i]t is beyond doubt that sentencing Courts in New Zealand must have regard to the United Nations Convention on the Rights of the Child".[21]

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[14] Catherine Groenestein "Prison Teens: 'We've got with the game at last'' (September 15 2018) < https://www.stuff.co.nz/national/crime/106985783/law-changes-bring-youthfocus-for-17yearold-offenders>.
[15] New Zealand Human Rights Commission, above n 12, at
[16] Judge Andrew Becroft and Sam Bookman "CROCodile tears or provisions with a bite?" [2019] NZLJ 267.
[17] at 272.
[18] Nessa Lynch *Youth Justice in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 2.5.2.
[19] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.
[20] *New Zealand Air Line Pilots Association Inc v Attorney General* [1997] 3 NZLR 269 (CA) at 289.
[21] *Martin v Police* HC Wellington CRI-2206-485-163, 19 March 2007 at [10].

Keane J in *Powhare v R* on the place of the convention when a child has been transferred to the District Court noted that to the extent that it is consistent with the letter of the Sentencing Act – best interests is a primary consideration and that "Provisions of the CRC were used to justify a more child-centred approach, even though homicide cases require that the child's case is tried and sentenced in the adult system."[22]

Given that there is a pattern of judicial recognition of treaty obligations it is not clear that the inclusion in the OTA does much more than affirm the position as an interpretive principle that already existed given the CRC's position as an international Treaty that New Zealand has signed up to.[23] Further New Zealand maintains its reservation so it is not clear that provision would be determinative regardless.[24] It has also been noted that overall, that the CRC used less in the justice context than family and immigration law. Best interests and the convention is still of noted importance in the justice context, this will be discussed further in the best interests section below.[25]

C Domestic Law

Although it is unclear whether 37(c) ought to be taken into account under the new OTA principles, art 3(1) incorporates a broader best interests consideration.[26] There are also other domestic laws in New Zealand which make a point of a best interests consideration in the context of mixing children with adults in custody. The Corrections Regulations 2005 'special category prisoners: young persons', outlines the power of the Chief Executive (CE) to order children to be kept in custody with adults which reintroduces a best interest test.[27] Regulation 179 requires adults and young prisoners to be kept apart[28] which is followed by regulation 180 allows CE to approve of mixing "If the chief executive is satisfied that it is in the best interests of the prisoners concerned".[29]

[22] *Powhare v R* [2010] NZCA 286 at [82].
[23] Judge Andrew Becroft and Sam Bookman, above n 16, at 274.
[24] at 272.
[25] Nessa Lynch *Youth Justice in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2019) at 54.
[26] United Nations Convention on the Rights of the Child.
[27] Corrections Regulations 2005, reg 180.
[28] At reg 179.
[29] At reg 180.

Best interests also forms part of New Zealand's youth justice process through its inclusion in the OTA purposes section, as follows:[30]

S4(1)

(i)responding to alleged offending and offending by children and young persons in a way that—

(i) promotes their rights and **best interests** and acknowledges their needs; and

(ii) prevents or reduces offending or future offending; and

(iii) recognises the rights and interests of victims; and

(iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour[31]

The phrase "rights, best interests and needs" is not clearly defined, examples could include the rights in the CRC – needs could include mental health support, medical support and so forth.[32] It is also made clear with the incorporation of the other considerations that best interests is not the only factor in the justice context, this idea will be expanded on later in the paper.[33]

Best interests and wellbeing also has its entirely own provision, s 4A of the OTA:[34]

(1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

(2) In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—

(a) the well-being and **best interests** of the child or young person; and

(b) the public interest (which includes public safety); and

(c) the interests of any victim; and

[30] Oranga Tamariki Act 1989, s4(1).
[31] (Emphasis added)
[32] United Nations Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* CRC/C/GC/14 (29 May 2013).
[33] Oranga Tamariki Act 1989, s4(1).
[34] At s4A.

(d) the accountability of the child or young person for their behaviour.[35]

The design of these provisions clearly reflect what has been colloquially referred to as the 'need and deed' of the youth justice system.[36] That is to say, it attempts to recognise both a desire to make young offender face consequences of their actions (acknowledging the deed), while also acknowledging their unique position/vulnerability in a developmental stage and not full rights holders (the need).[37] This is an attempt at reconciling special status of children and the purpose of criminal justice.[38]

The New Zealand model of youth justice is a hybrid between welfare and justice models.[39] These have been the two dominant types of justice throughout international and historical models of youth justice. Welfare models are those that take a more 'needs' based approach and focus on the fact that often children who come into contact with the justice system are those that are in need of care and protection and or welfare type support.[40] The children are therefore to be dealt with accordingly, focussing on restorative and 'welfare' measures as opposed to punitive and retributive measures.[41] Contrastingly, 'justice' models are those that focus primarily on individualism and notions of crime control. These can be associated with 'tough on crime' rhetoric and a desire to treat children who offend as the 'criminals that they are'.[42] New Zealand's 'need and deed' concept can be seen as an attempt at implementing ideals from both models.[43]

The OTA is split in to two main parts, those provisions that deal with care and protection cases and those that deal with youth offending.[44] These are seen as two different classes given our shift toward a more 'justice' type approach.[45] Some jurisdictions draw no distinction.[46] Although they can be conceptualised as two different classes, the OTA recognises that there

[35] (Emphasis added).
[36] Nessa Lynch, above n 25, at 45.
[37] Nessa Lynch, above n 25, at 45.
[38] At 45.
[39] At 43.
[40] At 44.
[41] At 44.
[42] At Chapter 1.
[43] At 44.
[44] Oranga Tamariki Act 1989.
[45] Nessa Lynch, above n 25, at 45.
[46] Étienne F. Lacombe "PRIORITIZING CHILDREN'S BEST INTERESTS IN CANADIAN YOUTH JUSTICE: ARTICLE 3 OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND CHILDFRIENDLY ALTERNATIVES" (2017) 34 Windsor Y B Access Just 209.

can be overlap between the two and has incorporated some specific provisions accordingly. The OTA holds that children in need of care and protection cannot be dealt with using justice tools, that is to say that custodial or punitive measures cannot be used on a child who is need of care and protection simply as a means of 'helping' them.[47] These children instead should be dealt with using the care and protection framework.[48] Although children who are in need of care and protection should not be dealt with by the justice system, there is scope to refer children who have offended for care and protection type reasons to alternate processes.[49] This preserves some of the vestiges of a welfare type youth justice process by recognising that motives for offending can be complex and related to external factors. It further helps to contextualise the place of best interests in New Zealand's YJ system. This distinction will be discussed more later on in the paper, within the context of the discussion on alternate options within a best interests consideration.

Prima facie, the phrasing of New Zealand's reservation would allow mixing in scenarios other than best interests, namely, where there is a shortage of facilities, the Corrections regulations appear to have reincorporated a best interests test.[50] Therefore, we seem to be somewhere in a confused position regarding the exact status of a best interest consideration. Even though the reservation leaves open the possibility for justifications other than a best interests test alone, best interests maintains a strong place in this area of law, which will be explored in greater detail below. It is interesting to consider, therefore, why New Zealand maintains this reservation, the differences and overlaps between best interests and convenience, which will in turn, inform our understanding of best interests and the distinctions that can be drawn between a specific understanding of best interests and a more meta understanding, and how the best interests test is actually applied in this context.

D Current position

[47] Oranga Tamariki Act 1989.
[48] Judge Andrew Becroft and Sacha Norrie "It's All Relative: the Absolute Importance of the Family in Youth Justice (a New Zealand Perspective)" Paper to be delivered at the World Congress on Juvenile Justice Geneva, Switzerland: 26-30 January 2015 at 21-22.
[49] At 22.
[50] Corrections Regulations 2005, reg 180.

As at 17 July 2020 there were only two children in adult prisons in New Zealand, one 17, one 16, both male.[51] Prison populations are subject to fluctuations but this provides a snapshot. This relatively low figure may indicate that New Zealand's ability to mix children and adults in custody is not widely used. This could be reflective of the narrow scope pitched for mixing adults and children in custody, both by international standards and domestic law. Comparatively, there are four YJ residences throughout the country, two of which have 40 beds each, the others 30 each.[52] It is difficult to get exact figure on how many of these beds are filled at a given point in time, but it is nonetheless clear to see that YJ residences are used more for youth than adult prison facilities.

Further, in the case of *New Zealand Police v [MQ]*[2019] illustrates a reluctance to subject children to the adult justice system. In this case, MQ, who was 16 at the time of offending- was charged with wilful damage to an EM bracelet, assault with intent to rob, and aggravated wounding.[53] The prosecution argued that MQ should be transferred to the District Court because of the seriousness of the offending, the insufficient gravity of Youth Court measures to act as a deterrent for this kind of offending, and public interest in protecting the wider community.[54] Judge Fitzgerald of the Youth Court in Auckland, discussed the obligations under the CRC including article 37(c) but did not mention or have regard to New Zealand's reservation, proffering a convention compliant approach which would avoid placing children with adults. The prosecutions request to transfer MQ was ultimately refused.[55]

Judge Fitzgerald emphasised the importance of children's well-being when they are subject of the criminal justice process in the following: [56]

> "[35] Perhaps the strongest statement on the importance of wellbeing is in the general comment, number 10 of the Committee of the Rights of the Child adopted in 2007. It makes it clear that when balancing the young person's wellbeing on the one hand, and

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[51] Letter from Brydie Raethel (Principal Advisor Ministerial Services Department of Corrections) to Rebecca Tyler regarding The number of children and young people (18 and under) in custody at adult correctional facilities in New Zealand (14 August 2020) (Obtained under Official Information Act 1982 Request to the Department of Corrections).

[52] Above n 7.
[53] *New Zealand Police v [MQ]* [2019] NZYC 456 at [3].
[54] At [10].
[55] At [14].
[56] At [35].

> the need for public safety and sanctions on the other, the scales should tip in favour of wellbeing."

From this outline of the New Zealand positon on mixing children and adults in custody in the justice system and the place of best interests, we can see that best interests is expected to compete with alternate justice considerations such as those outlined in s 4A(2) of the OTA, but is still perhaps the most or one of the most important considerations.

Overall, although international law is not directly binding, it is highly persuasive and included in the OTA as a guiding principle.[57] 'Best interests' are included as a guiding principle in their own right under the OTA. Further, the corrections regulations require the CE to be satisfied of best interests before approving of mixing, despite the reservation. Best interests still forms part of an assessment on housing youth and adults together in custody and therefore lays the foundation for this analysis. Given that there are children in adult custody an assessment of whether it can ever be in a child's best interests will help understand whether this is the only consideration relied on or whether we are still falling back on the reservation. That is to say, mixing children in custody with adults for reasons other than their best interests.

III Context

The UN published its Global Study on children deprived of liberty in 2019. This multiple-year long study looked at the deprivation of the liberty of children around the world in its different forms. The study (and this paper) classify children as those below the age of 18.[58]

The study is prefaced by acknowledging that childhood is a period of development and gathering social skills, personality, emotions, and relationships with others. Consensus amongst international standards suggest that the family unit is the best place for this, provided that said family life is one of safety and support.[59] Removing children from an environment conducive to developing the social and interpersonal skills required to live a fulfilling life is likely to have negative consequences both in the immediate and longer term.[60] Overall, the

[57] Oranga Tamariki Act 1989, s 4.
[58] Global study, above n 1, at 2.
[59] At 2.
[60] At 3.

study recognises that 'deprivation of liberty is hard to reconcile with the guiding principles of the CRC'.[61]

The Study divides deprivation of liberty into different categories, outlined below for context:[62]

i. Detention in administration of justice (including prison and police cells)
ii. Children living in prisons with their primary caregivers
iii. Institutions (ostensibly for disability or health issues)
iv. Migration related detention
v. Armed conflict related detention
vi. National security related detention (specifically terrorism concerns).[63]

This paper focuses on the Study's first category– detention in administration of justice– but acknowledges the importance of the others and the children's rights issues they raise. Given the justice context it is important to acknowledge the concept of the minimum age of criminal responsibility (MACR), the age which children must attain before they can be held criminally responsible. This is set at different points in different jurisdictions. New Zealand's MACR is 10, therefore we are talking about children 10-17 years inclusive.

In New Zealand, children who have been deprived of liberty in the course of 'administration of justice' can be separated into two broad categories:

(1) Children in adult prisons or police cells.
(2) Children in YJ residences (these are mostly managed by Oranga Tamariki, not Corrections).[64]

Within the context of article 37(c), it is important to look at both of these categories. As can be summarised from the global study, depriving a child of liberty is something that is know to have detrimental effects. Given these detrimental effects it is difficult to see how a deprivation of liberty is something that could ever be considered to be in a child's best interests. Nonetheless, art 37(c) specifically references that the mixing of children and adults should only be done if it can be seen to be in the child's best interests. This therefore raises the question of

[61] At 2.
[62] At 2.
[63] Global study, above n 1, at 68.
[64] above n 7.

whether this can ever be the case. The answer to which depends on a number of factors including how we define and apply the notion of best interests. From here, this paper will explore more detail around the ways in which depriving children of liberty (with and without adults) can impact them as well as an exploration of what best interests means. The New Zealand specific context will also be explored. Ultimately building off these understandings of the effects of a deprivation of liberty and what best interests means, whether the two can be reconciled and what this means for the state of New Zealand's youth justice system and its rules surrounding mixed custody of adults and children.

IV The Problem

Being held in criminal custody either on sentence or remand is likely to have negative impacts on a person's health and wellbeing. A 2009 qualitative study on the impact of imprisonment on the health and wellbeing of inmates and their family in New Zealand found that in prison, primary health care is inconsistent, mental health care is inadequate and overall health is undermined by prison culture, which consists of both the relationship with other inmates and the relationship to authority which may include degrading and humiliating treatment.[65]

Despite youth justice and international children's rights principles that detention ought to be used as a last resort and only for the shortest possible time, children continue to be held in criminal custody, both in child specific residences and, in fewer instances, in mixed custody with over 18s. The mixing of young and adult offenders is understood to have negative impacts on their likelihood of reoffending and their ability to reintegrate back into society.[66] Further concerns raised about mixed custodial housing include a potential risk of sexual exploitation.[67] Violence is also endemic in these institutions.[68] Both partaking in and witnessing the culture and influences that are present in such institutions is widely understood to negatively impact the physical, mental and social health of individuals.[69] This is a particular problem for children who are in period of growth and development. In fact, the global study summarised that:[70]

[65] Dr Michael Roguski and Fleur Chauvel *The Effects of Imprisonment on Inmates' and their Families' Health and Wellbeing prepared for the National Health Committee* (November 2009) accessed at < https://www.moh.govt.nz/notebook/nbbooks.nsf/ea5ef2c0e4ab8ac485256caa0065e3eb/e0fe2f027c78bf00cc25776d000b8a96/$FILE/effects-of-imprisonment.pdf>.
[66] *General Comment No.24, above n 4.*
[67] Above n 1, at 102.
[68] At 47.
[69] At 26.
[70] At 40.

> "Evidence shows that institutions are often characterized by living arrangements that are inherently harmful to children. The characteristics include but are not limited to: separation and isolation from families and the wider community; forced co-habitation; depersonalization; lack of individual care and love; instability of caregiver relationships; lack of caregiver responsiveness; lack of self-determination; and fixed routines not tailored to the child's needs and preferences."

The use of harsh and punitive measures against children is generally opposed. This has been recognised globally in the need and adoption of specialist justice systems for youth which tend to focus on more restorative and community based approaches.[71] Despite shifts toward a more restorative approach, detention/punitive measures are still used. The global study found: "there are still at least 410,000 children held in detention every year in remand centres and prisons.", there is a further estimated 1 million held in police cells.[72]

New Zealand's two main categories of children deprived of liberty outlined above– those in YJ residences and children in adult prisons– are distinct. There is a likelihood of different forms or differing extent of harm.[73] There is undoubtedly some overlap of potential rights infringements and harms, but there are also some unique to the context of being housed with adults, hence article 37(c) of the CRC. Reoffending, reintegration and sexual exploitation have a potential to occur in each context, however, the power dynamics at play have slightly different implications for those children who are housed with adult offenders.[74] To understand the concept of best interests within article 37(c) we need to look at what the other options are, which is why we will be contrasting this with children in YJ residences.

IV International Standards (children's rights)

Human rights are always infringed to some extent when you have a depravation of liberty. This forms part of the overall context and aims of a punitive and 'protective' criminal justice system. These measures are intentional punishments for societal wrongs. However, further issues arise in the context of children. There are arguably higher or slightly different standards set out in

[71] Above n 1, at 40.
[72] At 40.
[73] At 64.
[74] At 64.

CRC that recognise the special status we afford to children given their developmental stage as well as, arguably, their position as non-full rights holders.[75] Below will consider some of the rights under the CRC concerned in the context of a deprivation of liberty. Including our focus provision, art 37(c).

From art 37(c), we can see a number of rights themes that the article is wanting to protect. These are;

(1) Treatment with humanity and respect
(2) Age appropriate treatment
(3) Separation from adults (with best interests proviso)
(4) Right to family contact

CRC's general comment No 24 (2019) clarifies that children deprived of liberty should not be placed with adults (in prisons or police cells) as there is "abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate".[76] It further clarifies that the permitted exception, where it is in a child's best interests, ought to be construed narrowly and state convenience should never be a factor that overrides best interests.[77] The Committee makes it clear that the housing of children with adults should be avoided at most costs except where necessary to satisfy best interests. States therefore should set up separate facilities to house detained children.[78] For clarification, the comment outlines that this does not mean children ought to be moved out of child specific detention centres as soon as they turn 18 in order to keep under 18s separate.[79] The comment therefore envisages that child specific detentions centres are appropriate forms of a deprivation of liberty, although, this is to be read in context of the other rights outlined by the CRC and emphasised in the same comment, namely, that detention ought to be a method of last resort and should only be imposed for the shortest applicable period of time.

The principles of a right not to be arbitrarily detained, detention as last resort (article 37(b)) and if detention is required, it should be for the shortest applicable time (article 37(b)). This is

[75] Kathyrn Hollingsworth "Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights" (2013) 76 MLR 1046.
[76] *General Comment No.24, above n 4,* at 92.
[77] At 92.
[78] At 92.
[79] At 93.

backed by the same overall philosophy that necessitates best interests considerations. That is, the general idea that detention can have negative impacts on children and should not be the preferred method of achieving 'justice'. These detention principles contextualise and help to narrow the scope of our focus group. Given that detention ought to be a measure of last resort (presumption against) there is more specificity to the best interests analysis. Article 37(a) also outlines a prohibition against cruel and inhumane treatment – including no capital punishment or life imprisonment (also emphasised in article 37(c)). The CRC also outlines that these provisions are not designed in a way that should take away from any human rights and due process rights afforded by an ordinary justice system.[80]

Given the above outlined impacts of depriving a child of liberty and mixing custody, it is important to consider the broader impacts on children's rights including a right to development and a right to health. Article 27 requires standards of living conducive to development. This has the potential to be infringed upon in deprivation of liberty contexts given the reported repercussions of deprivation on mental and physical health, which may limit potential for development. Article 24 outlines a right to the highest attainable standard of health. This again, is at issue due to the documented impacts of imprisonment.

The rights set out in the CRC are designed to be flexible enough to apply to different states while also providing minimum standards.[81] Therefore they will not be applied in an identical manner internationally, however, they provided a basis for understanding what children's rights should at the very least uphold.[82] Although parliamentary sovereignty and the position of the instrument discussed above dictates that the legislature can legislate inconsistently with with the CRC if they so wish, this does not mean they should. The rights that are infringed upon as part of a deprivation of liberty form a backdrop for an analysis of best interests. When considering if something is in a child's best interests, it is important to understand what those interests are, and rights under the CRC form one part of this equation.[83] Best interests is also a right itself under the convention.[84] Van Beuren notes "the rights in the Convention may be used as signposts by which the best interests of the child may be identified", indicating a

[80] United Nations Convention on the Rights of the Child, art 41.
[81] Nessa Lynch, above n 18, at 52.
[82] At 52.
[83] Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht 1998) at 48.
[84] *General comment No. 14,* above n 32.

presumption that CRC rights are in the best interests of the child.[85] There is no consensus on the nature of the relationship between CRC and best interests. This complicated position of the principle will be explained in more detail under 'best interests' below.

V Youth Justice Principles and framework

The CRC is not the only guidance on how youth justice should be executed in New Zealand. Nessa Lynch's 'Youth Justice in New Zealand' clearly frames out some of the principles underpinning the youth justice system in New Zealand, besides 'best interests'. These include, 'family involvement', which can be seen in the implementation of procedures such as Family Group Conferences (FGCs) and Rangatahi and Pasifika courts.[86] These methods differ from traditional court processes by including input from family and the wider community and undergoing a more restorative process. 'Restorative justice' is also one of the principles outlined, this is a broad term that encompasses any approach that works at including those impacted by the offending to reach some kind of balance or restoration instead of punishment goals. The FGC is a clear example of this, where a group comes together to decide on a plan to deal with the offending (can involve victim, state actors for example; police, family whānau).[87]

A Further principle outlined is that of 'decarceration & diversion'. Decarceration indicates a prioritisation of non-custodial sentences. Diversion has various meanings, in this context it refers to alternate methods used to divert children away from the court and restrict use of residential or penal resolutions.[88] This includes methods such as police diversions and FGCs. Statistics show that these principles have been embodied by the New Zealand YJ system, as there is a clear trend in a reduction of custodial measures.[89]

These principles contextualise that best interests is not the only consideration in the YJ context but it is an important one. However, these principles have a complicated relationship with best interests in that they can be seen as having been informed by best interests- but also informing

[85] Geraldine Van Bueren, above n 83.
[86] Nessa Lynch, above n 25, at 46.
[87] At 46.
[88] At 45.
[89] At 45.

best interests.[90] This is because they are normative ideals that the New Zealand youth justice system prioritises and are used to inform the overall process but can also be used to inform the approach in a specific situation.[91]

VI Best Interests

In order to assess and apply 'best interests' it is important to first understand what it means. Best interests is recognised as one of the four overall guiding principles of the CRC through article 3(1), as follows:[92]

> "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."

This concept is intended to have broad application, and is therefore necessarily non-specific and flexible. Because of the supposed universality of the convention, and its near universal implementation, flexible concepts such as best interests are important for allowing scope for cultural difference.[93] The Committee on the Rights of the Child has described it as a 'dynamic' concept that requires context specific assessments. [94]"The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child".[95] In their General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee explained that 'best interests' is not only a principle of interpretation, it is also a substantive right and a rule of procedure.[96] It is therefore clearly a broad and complex concept that has different meanings, implications and application depending on the context. But it also has specific reference in article 37(c) regarding detention of children in the criminal context, specifically, when considering whether said children might be placed into mixed custody with adult offenders.

[90] General comment No. 14, above n 32, at 4.
[91] Jeanne Snelling "Minors and Contested Medical Surgical Treatment Where are we at with Best Interests?" Cambridge Quarterly of Healthcare Ethics (2016) 25, 50-62 at 50.
[92] United Nations Convention on the Rights of the Child.
[93] Philip Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (1994) 8 International Journal of Law and the Family 1.
[94] General comment No. 14, above n 32, at 1.
[95] At 4.
[96] At I.A.

Best interests is perhaps the most important, recognised and discussed principles in children's rights but it is not without criticism. Its flexibility has led to confusion and sometimes misunderstanding about its application. The Global study suggested that "Some children end up in institutions owing to the incorrect application of the best interests principle."[97] That is, a misunderstanding that placing for example, high needs children in places that units because that as seen as preferable for the family as a whole, rather than conducive to development of and in the best interests in the child themselves.[98] Further they also found that the deprivation of liberty in the migration context could never reach the threshold of best interests and thus could never be justified and therefore should never be used.[99] Considering the place of best interests as an overall guiding principle of the convention and its specific reference in article 37(c), the best interests of the child has a clear place in youth justice and child detention.

Therefore, before undergoing an assessment of best interests, it is important to understand what is meant by the phrase (even if its definition is necessarily flexible) and how one might conduct an assessment of best interests. The Committee's General Comment No 14 provides useful guidance to states regarding understanding and applying best interests.

A Best interests and children's rights

As mentioned, best interests have a strong place in children's rights frameworks including the CRC. It is not entirely clear, however, the exact relationship between best interests and the other rights provided for by the convention. The Committee expressed that there is no hierarchy of rights within the convention and that all of the rights are therefore to be regarded as being in the child's best interest.[100] Further, this means that no interpretation of the rights provided for that could be perceived to be contrary to a child's interest is sustainable.[101] Despite the Committee's statement against the notion of a hierarchy of rights, the article itself makes it clear that best interests ought to be 'a primary' consideration. So while there may not be express rankings, it is clear that the notion of best interests is in someway 'special' and to be weighted accordingly.[102]

[97] Global Study, above n 1, at 63.
[98] General comment No. 14, above n 32, at 63.
[99] At 20.
[100] At 4.
[101] At 4.
[102] At 4.

Earlier iterations which propounded for the best interests to be 'the primary' or 'the paramount' consideration were ultimately rejected due to state opposition.[103] The current position is understood as giving best interests "first importance among other considerations, but they do not have absolute priority above other considerations".[104] However, in some jurisdictions in some contexts paramountcy is granted for example, the Scottish position, and the paramountcy principle under NZ's COCA.[105] Despite only being 'a primary' consideration, the Committee still emphasises and seeks to justify a special place for best interests.[106] They suggest that such an emphasis is justified by the nature of children as dependents and their relative levels of maturity, legal status and often voicelessness.[107] That is to say, because of children's developing nature they are more likely to be in a position where they cannot advocate for their own interests and if there is no one to advocate for their interests they are in danger of being overlooked in the process.[108]

Despite clear indication of its importance, there is still no clear indication of its exact meaning. Although the Committee and other commentators have highlighted that the principle is necessarily flexible, it is still something that needs to be applied and therefore some semblance of understanding is required. What does best interests actually mean? Are we looking at process or outcome? The General Comment seems to suggest it is both.[109] We are still somewhat left with the question – what do we actually mean when we say a decision was or was not compliant with the best interests of the child? "This was said to be especially so because the Convention contained no prior stipulation that the 'best interests of the child' included his or her physical, mental, spiritual, moral and social development (as the first Polish draft had done)."[110] Which aspects do we consider to be best interests? Physical well being? Mental? Social development? Upholding convention rights? All of the above? If so, what might be their relative weightings?

The Committee made it clear that it is a procedural and substantive right so when making decisions best interests must have regards paid to them and the outcome of the decision should

[103] Philip Alston, above n 93, at 10.
[104] Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht, 1999) at 91.
[105] Care of Children Act 2004.
[106] Above n 32.
[107] At 37.
[108] At 37.
[109] At I.A.
[110] Philip Alston, above n 93, at 11.

be the one that is in the child's best interests.[111] But, is the one that is in the child's best interests the one that allows them to maintain healthy social and familial relationships? Or the one that prioritises their physical health? From what can be ascertained from the committee's continued vagueness and academic scholarship in the area, it is both or all of the above. The best interest compliant outcome is the one that puts them in a situation where the greatest number of positive implications for them can be realised.[112] Which may necessitate different levels of balancing. This is because we want to secure a child's social development, mental health, physical wellbeing, cultural ties and all number of positive outcomes for them, ideally not at expense of other outcomes. What is in a child's best interests is not a one-dimensional analysis. It is not a single and clear cut question – as many factors that go into the analysis as the outcome, ie we look at inter alia their situation, family life, risks, opportunities, when assessing best interests, but we also have to look at a number of outcomes – physical, mental, cultural, social, developmental wellbeing.[113]

Further, how we understand best interests also depends on our view of the child (Michael Freeman) parental rights vs children's rights – this divide comes up more for best interests in the family law realm than the youth justice realm.[114] The root of best interests is in family law, specifically custody arrangements.[115] After the CRC there has been a shift to centring the child instead of viewing children as their parents' property, therefore considering the rights of the parents or wider family (when the emphasis rests with the child) does not make a lot of sense in the individualised criminal justice system we have in New Zealand.[116] However, there is undoubtedly a cultural dimension to the understanding of best interests. Philip Alston points out that:[117]

> "In more traditional societies, the links to family and the local community might be considered to be of paramount importance and the principle that 'the best interests of the child' shall prevail will therefore be interpreted as requiring the sublimation of the individual child's preferences to the interest of the family or even the extended family."

[111] Above n 32, at IV.A.3.
[112] At 32-35.
[113] Above n 32, at 32.
[114] Nessa Lynch, above n 25, at 55.
[115] Philip Alston, above n 93, at 10.
[116] At 5.
[117] At 5.

The differences between cultural understandings of what is best for a child can be seen throughout New Zealand's legal history. Compliance with tikanga and a recognition of a more community based model have been behind a lot of New Zealand's development in youth justice and family law.[118] This is where we see things such as Family Group Conferences, Rangatahi Courts and the obligations of the Chief Executive of Oranga Tamariki to consider the Treaty when making decisions.[119] These examples show both how the best interests principle can sit behind policy and reform, as well as how it can be influenced by different cultural understandings.

Overall, the concept is necessarily flexible but not without flaw – we can look to guidance for how to apply but will unlikely be able to ever have a clear cut set of rules.[120] Although flexibility is inevitable and allows us to tailor to specific situations, on top of disagreement, this flexibility can also cause further issues. The Committee warned in their general comment that flexibility:[121]

> "may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant."

We see therefore, that although best interests is accorded with substantial weight and considered one of the fundamental principles of children's rights, its difficulty in defining and potential for manipulation mean that it is not without flaw.

B Best interests and criminal justice

Best interests has its routes in family law and custody battles. However, as article 3(1) suggests, the concept is to be used in all decisions concerning children. This includes the youth justice system. This area further highlights the tension between whether best interests ought to be 'a primary' or 'the primary' consideration. In the youth justice context, the concept of the best interests of the child can find itself in conflict with the traditional goals of the criminal justice

[118] Judge Andrew Becroft and Sacha Norrie, above n 48, at 21.
[119] At 22.
[120] Above n 32, at 34.
[121] At 34.

system. In their General Comment on best interests, the Committee suggested that such conflict should be treated in the following manner:[122]

> "protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders."

This clearly emphasises that even though criminal justice has certain ideals, the status and position of children still needs to be recognised and afforded sufficient weight. It further suggests that any potential conflicts with external considerations ought to be considered on a case by case basis and balanced carefully to find suitable compromise.[123] Keeping in mind, where there is the need for compromise, the weighting of best interests with its designation as "a primary consideration".[124]

On top of being a consideration in all decisions effecting children, best interests has specific mention in article 37(c) which holds that children should not be kept in custody with adults *unless* it is in their best interests to do so. With the principles of detention as a matter of last resort and when used, only for the shortest applicable period, as well as the rights impacts of deprivation of liberty and custodial mixing, the convention suggests that not being deprived and not being in custody will be in best interests unless it can be shown otherwise. It appears, therefore that one ought to prove that going against these default presumptions is the appropriate course. Other more rehabilitative measures should be prioritised when children are in conflict with the law.[125] (See consideration of youth justice principles above).

Best interests is present at two stages of our analysis- sitting behind and informing the rights denouncing the use of punitive measures on children and mixing with adults, but then also at a later stage suggesting a practical assessment if mixing is desired. Further illustrating its multifaceted design. In the following section, we are focussing more directly on the second stage of best interests, its practical analysis when determining potential mixing of adults and children.

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[122] At 28.
[123] Above n 32, At 39.
[124] At 39.
[125] See Nessa Lynch Youth Justice in New Zealand "Chapter 2: Principles Underpinning the Youth Justice System".

Because of its flexibility and the different ways of determining best interests we face this problem, in the criminal context, are external factors such as the goals of the criminal justice system (retribution, public safety, and so forth), something to be weighed against best interests or something that should be incorporated into it. For example, it is assumedly in a child's best interests not to reoffend.[126] In theory, it can be conceptualised as either but it is an important distinction to make because it could change the outcome of a decision. Something could be not in the child's best interests but still be the desired outcome for alternate reasons, such as public safety, yet not be able to be displaced by the relative weighting of the best interests principle. Whereas, if these other considerations form part of best interests we can justify giving them more of a consideration or maintain that their use is not in conflict with the best interests. Therefore, not having to engage in further determination of whether to prioritise best interests or another consideration. Instead of 'this is what is best for the child being weighed against other objectives', it becomes 'this is what is best for the child including a consideration of these objectives and how they specifically relate to that child'. The way the legislation and general scholarship seems to conceptualise this idea, is that these factors are something that is in competition with the welfare and best interests and is therefore understood and applied accordingly.[127] Therefore, this paper will adopt this understanding.

C Practical application

In order to establish whether it can ever be in a child's best interest to be kept in custody with adults, we need to establish how best interests is actually applied in practice. In terms of practically assessing best interests in a specific decision, the Committee proposed following these steps in their general comment:[128]

> "(a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;
>
> (b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right."

[126] Above n 32, at 32.
[127] See for example, the Oranga Tamariki Act 1989.
[128] Above n 32, at 46.

This assessment is said to consist of evaluation and balancing all the relevant elements needed to make a decision about a specific child or group of children in a specific situation.[129] The decision is taken by the relevant decision maker but should include, where possible, input from a multi-disciplinary team and participation of the child.[130] The Committee outlined an extensive but non-exclusive list of factors that form part of a best interests assessment, including:[131]

> "inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc."

This indicates that the test is a highly practical and fact specific analysis which essentially involves a holistic look at any and all factors that are and could be relevant to determining what is in the child's best interests. These factors include things that relate to process as well as outcome.[132] Different factors may include the types of people that should participate in decision making such as extended family or relevant professionals where applicable. As well as a results based focus on what could or should feasibly be given the situation. For example, living arrangements, such as suggesting that a child should live with their extended family (when they are unable to be with their immediate family) would not work in a situation where the extended family is unwilling or unable to take them.

The Committee further suggests a safeguard on the concept by recommending that in order to prove best interests has been a primary consideration, that "any decision concerning the child or children must be motivated, justified and explained."[133] This should state all factual circumstances, all elements that have been considered and how they have been found to be in the child's best interests, including their relative weightings.[134] Further, if the decision is

[129] At 47.
[130] At 47.
[131] At 48.
[132] Above n 32, at 52 ff.
[133] At 97.
[134] At 97.

different from the views of the child, reasons should be given clearly.[135] Best interests, therefore, is clearly not an exact science. However, it is something that should be taken seriously and considered broadly.[136] Further, given its importance, analyses should be clearly outlined, explained and justified.[137]

In New Zealand, best interests is held in higher regard in the family law context. This is seen through its positioning as 'the paramount' consideration under the Care of Children Act.[138] Compared with its positioning under the OTA outlined earlier in this paper. The Family Courts are experienced in making best interests assessments, which they do by taking a holistic assessment of various factors, essentially following the same approach as outlined by the Committee (above).[139] Whereas in the the YJ context best interests and wellbeing can be used as a sentencing consideration in a similar way, something that ought to be balanced.[140] As well as an underlying justification for the YJ system.[141] As seen in *MQ* example where 'wellbeing' was used as a means of proffering child specific instruments and not referring the case to the District Court.[142]

D Best interests, paternalism, autonomy and capacity

Despite best interests' importance, there are further concerns and criticisms of the concept. Some argue that the consideration is paternalistic and that "Best interests has variously been alleged to be indeterminate as well as susceptible to majoritarian ideology and inherent bias."[143] By requiring an external decision maker, influence by societal structures, to decide what they think is best in a given situation as opposed to a more autonomous approach.[144] The Committee has emphasised, however, that an adult's understanding of a child's best interests should never be used to override the obligations and rights affirmed by the CRC.[145] However, it can still potentially be seen as conflicting with children's rights approaches that advocate for evolving capacities, greater autonomy and participation rights. These rights are expressed in

[135] At 97.
[136] At 34.
[137] At 97.
[138] Care of Children Act 2014, s 4.
[139] See: Mark Henaghan and Bill Atkin (editors) *Family Law Policy in New Zealand* (Lexis Nexis, Wellington 2020).
[140] *New Zealand Police v [MQ],* above n 53.
[141] Above n 53.
[142] Above n 53.
[143] Jeanne Snelling, above n 91, at 50.
[144] At 55.
[145] United Nations Convention on the Rights of the Child.

art 5 (evolving capacities) and art 12 (participation/right to be heard) and the resulting scholarship.[146] As well as the oft used standard of *Gillick* competence.[147] Representing an overall trend in giving children autonomy.

Can we reconcile a desire to protect them in this context (where arguably they could be held to the same standards as adults, measures to make them address their actions) with a shift toward giving children more rights, for example, calls to lower the voting age and empowerment to make medical decisions? Arguably both contexts that can have lasting impacts and therefore should be treated alike.[148] However, the very purpose of the CRC, which has near universal assent, is to recognise the unique status of children.[149] While maintaining their position as members of humanity.[150] They are capable of existing in more than one dimension. We can give them more autonomy in some areas while wanting to protect them in others.[151]

This criticism has more traction in best interests' other contexts. Children's rights scholarship is running in two streams, those who pioneer best interests and those who look at evolving capacities and autonomy. They are not necessarily incompatible, they have different uses and implications depending on the area of law.[152] In the YJ detention context, best interests is probably no more paternalistic than a custodial sentences. We are concerned with an area of law where there is an element of control and rights constraints because they have breached the law. Having a paternalistic consideration is not as problematic in a justice context as it might be in a family law or rights enforcement context. They are already in a situation where they are 'subjects' of the justice system, compared to when they are members of civil society (albeit without full enjoyment of democratic rights).[153]

Further, it can be true that we have capacity in some instances but not others- capacity is not all or nothing- you can gain and lose capacity at different points in your life. There is arguably a difference between when we make reasoned decisions and when we make 'decisions' that lead to committing crimes. There are numerous factors that go into a person's likelihood of

[146] Michael Freeman "The Best Interests of the Child? Is *the Best Interests of the Child* in the Best Interests of Children?" (1997) 11 International Journal of Law, Policy and the Family 360 at 369.
[147] At 369.
[148] Michael Freeman, above n 146, at 380.
[149] Philip Alston, Above n 93, at 1.
[150] Michael Freeman, above n 146, at 383.
[151] Kathryn Hollingsworth, above n 75, at 1061.
[152] At 1057.
[153] At 1061.

offending, including their socio-economic position, family life and other external influences – and internal influences, a lot of young offenders suffer from conditions such as Traumatic Brain Injuries and Foetal Alcohol Syndrome Disorder.[154] Some may argue that lessened capacity in this context justifies use of best interests but this is problematic.[155] It could lead to different treatment for those we see as having capacity compared to those we do not in a discriminatory as opposed to rights affirming way. Overall, despite trends in assessing adults to be more 'adult like' in a rights context, best interests is still a dominant concept despite any potential conflict with autonomy.[156]

It is important to see children as both becomings and beings as it may help justify different treatment in different contexts.[157] A trend in children's rights scholarship has been to discuss the line between viewing children as becomings or beings.[158] That is to say whether we enforce more specialised approaches to children's rights due to their special developmental status or whether we grant them treatment more akin to adults and participatory rights based on the idea that they are individuals themselves. Michael Freeman outlines the importance of seeing them as both as it is true that children are both existing and developing.[159]

In this context, if we see children as becomings it is easier to justify a best interests, restorative and protective rights based approach. If we see them as beings, their rights are still important but the emphasis on potential and development is lessened, making punitive or detention based sentences more justifiable as the child is seen as an individual who should be able to face the consequences of their actions in accordance with the criminal justice system applicable to adults.

Given the structure of the CRC and its mechanisms of acknowledging children as both and providing for different rights in different contexts. For example, provisions of best interests as well as participation. It is unlikely that an acknowledgment of children as beings would greatly

[154] Ministry of Justice "Traumatic Brain Injury affects many people in the criminal justice system" Ministry of Justice (accessed September 2020) <https://www.justice.govt.nz/assets/Documents/Publications/Traumatic-Brain-Injury-A3.pdf>.
[155] Kathryn Hollingsworth, above n 75, at 1057.
[156] At 1061.
[157] At 1060.
[158] At 1061.
[159] At 1061.

infringe upon the general consensus amongst states that youth justice is unique and should be dealt with by different and specialised mechanisms to the adult criminal justice system.

E Best interests and justification

Considering the phrasing of New Zealand's reservation, it is important to note that there are differences between best interests and justification or convenience. That is to say there may be alternate reasons why mixed custody is the 'best available option', while still not being in the child's best interests.[160] It is not the same thing to say that something is in a child's best interests and that something is justified. There may be other reasons why we ought to do something that do not necessarily result in the most favourable outcome for the child.

For example, the above discussed conflict with ideals of the justice system or the competing public interest. Or that there is no other *feasible* alternative even though doing something different would undoubtedly be better. Although, this is why best interests is understood to take account of the context. There is overlap here with the idea of context specific best interests, explored below. In the practical application of a best interests assessment the outcome of the decision needs to be something that can actually be implemented. Therefore, if the option does not actually exist, for example, there is no available residence, placement there cannot be the outcome of the best interests assessment, because it does not exist. Mixed housing may therefore be the outcome. However, if we look to best interests in a meta-sense, it could be said that not mixing would be the better option and the only reason it is not done is because it is impractical or unfeasible, not because it is the best outcome for that child.

F A proposed understanding

As has been outlined so far, best interests is a concept that is difficult to define yet necessarily flexible.[161] There are also different uses and contexts in which 'best interests' can be conceptualised, as was pointed out by the Committee where they outlined that it is a substantive right as well as a rule of procedure and an interpretive principle.[162] This paper further proposes that on top of this, there is another layer of meaning which can be applied to the concept depending in the context. These can be expressed in the following terms:

- Meta-best interests (MBI)

[160] See New Zealand's 6th Periodic Review under the UNCRC, above n 12.
[161] Above n 32, at 32.
[162] At 1.

    - An understanding of best interests that looks *beyond* the specific context.[163]
- Best interests-specific (BIS)
    - An understanding or assessment of best interests applied to get a result in a particular situation.[164]

MBI can inform the practical analysis but would not always lead to the same result because of the need to include the context. It asks, what, in an ideal world, would satisfy best interests? MBI creates a presumption against rights infringing outcomes.[165] For example, in our case, a deprivation of liberty or being in mixed custody. But it is a rebuttable presumption, it can be rebutted by BIS. This means, it presumed that best interests meta will be the preferred approach but there may be something in the circumstances (BIS) from preventing that result. For example, insufficient housing when a community based sentence is likely to be the best result. MBI does have room for some context, otherwise, what would we be applying it to? However, BIS, as in the name, requires a more specific assessment of what is actually available in the circumstances. There will always be context but that context will not always be inconsistent with a MBI result. This idea can also be understood as further clarifying the context specific nature of a practical best interests and application assessment, contrasted with a broader and more academic understanding of best interests on a larger scale. The distinction between these concepts will be further explored in the examples below.

It is also important to keep in mind the differences between best interests in the criminal justice system and best interests in family or immigration law contexts. While best interests is considered important in all these areas, less emphasis is often afforded to it in the criminal context, which is where we are focussing this analysis.[166]

Below is a proposed four-part test, synthesising, clarifying and summarising authority the discussion of best interests above. This test provides an application for the BIS consideration but it sits on the foreground of and is informed by MBI.[167]

[163] At 50.
[164] At 1.
[165] Geraldine Van Bueren, above n 83.
[166] Nessa Lynch, above n 25, at 59.
[167] Above n 32.

1. Consider all the factors relevant to the individual.[168]
2. Consider all the possible options.[169]
    a. This requires looking at what could actually occur, ie if there is no home for them to go to, a home based sentence would not work.
    b. But one should avoid merely putting things in the 'too hard basket'. For example, suggesting "they do not have a home so we have to put them in prison". Decision makers should consider seriously other options, for example, placement with extended family, fostering arrangements, care and protection arrangements, welfare approaches.[170]
3. Consider the possible outcomes/impacts of these options. Which of these will have the outcome that preserves the wellbeing of the child the most?
    a. Best interests includes: mental, physical, spiritual and cultural wellbeing and rights compliance. It is an overall holistic understanding that will likely take different emphasis depending on the context.[171]
4. Consider other factors of the justice system paying due regard to the weighting of the best interests principle.[172]

VII Can Best Interests Be Satisfied?

Whether it can ever be in a child's best interests to be placed in adult custody ought to be considered in the New Zealand context for two main reasons 1) The proviso in the convention 2) the Chief Executive's consideration under the Corrections Regulations. Both of which suggest that mixing ought only to be done if it is in the best interests of those concerned.[173] If being in custody with adults cannot be in a child's best interest, we must question why it is still done, albeit in limited numbers. New Zealand's reservation implies there may be situations where one would want to use a mixed custody arrangement for reasons contrary to best interests, such as resourcing issues. However, as I have suggested and will explore further below, this may not be contrary to all understandings of best interests. Despite the reservation

[168] At 1.
[169] At 32.
[170] Above n 32, at 34.
[171] At fn 1.
[172] At 28.
[173] United Nations Convention on the Rights of the Child, art 37(c) and Corrections Regulations 2005, reg 180.

best interests still appears to form part of the benchmark we have for custodial mixing.[174] This is seen through the domestic regulations and influence of the CRC in decision making.

Analysing whether it can ever be in a child's best interests to be placed in custody with adults speaks to the purpose of having the reservation. If it can be in a child's best interests; then the proviso within art 37(c) itself, should be sufficient to explain and justify why some children are kept in custody with adults. However, if it *cannot* be seen to be in a child's best interest, it would suggest that those children who are placed in adult custody are there for other reasons, and that the reservation has therefore been relied on. The answer to this central question depends in large part, on the exact interpretation of best interests we take from the discourse above.

A Points of Comparison

An analysis of whether it can ever be in a child's best interests to be kept in custody with adults necessitates an examination of what the other options are. The background to this has been outlined already in this paper, however, for easier reference, these are broadly speaking, as follows:

1 a more restorative approach

As is common place in the youth justice context, alternative justice measures that take a more restorative justice approach are often seen as more appropriate measures for youth offending.[175] This can include community service type sentences, diversion, and family group conferences.[176] These are staples of the New Zealand youth justice system. The majority of youth offenders in New Zealand do not make it to formal court processes.[177] In practice, the method by which each offender is dealt with, is fact specific, depending on the severity of offending among other factors.[178]

2 youth justice residences

[174] At reg 180.
[175] Global Study, above n 1.
[176] Above n 1.
[177] Above n 7.
[178] Above n 7.

When youth offenders have made it through to the formal processes of the youth justice system one of the key available sentencing options is child specific youth justice residences.[179] These residences still constitute a deprivation of liberty (per the discussion above) and as such are subject to many of the same impacts on the child. These residences are, however, regarded on a whole as being more appropriate than mixing adults and children in custody but they are not without flaw.[180] On top of the general overlapping concerns for children's rights that we see from depriving them of liberty, there are also documented concerns of placing youth in these types of environments. This has been described as the pipeline effect, 'from state care to state prison'.[181] During the Royal Commission into Abuse in State Care, Arthur Taylor, perhaps New Zealand's most well known repeat offenders, stated that he believed he would have never ended up in prison if he had not been sent to the Epuni Boys' Home when he was a youth.[182] There are many other documented occurrences that imitate this story.[183] A best interests consideration can include a consideration of potential recidivism, although studies have shown likelihoods are higher in mixed custody, some alternate options are not without risk.[184]

3 Welfare

An alternate option for dealing with youth offending would be to look to international precedent for example, Scotland, and shift toward a more welfare based model. Treating children who have come into conflict with the law and children who are in need of care and protection in the same way (not treating young offenders as 'baby criminals').[185] Scotland's youth justice system is largely a result of what is known as the Kilbrandon Report. This report can be summarised in the following quote:[186]

> "At the core of the Report's recommendations was an understanding that differences between juvenile offenders and youth requiring protection or care were of little

[179] Above n 7.
[180] Global Study, above n 1.
[181] See Elizabeth Stanley "Why a radical approach is needed to fix our broken justice system" (September 14 2020) The Spinoff <https://thespinoff.co.nz/society/14-09-2020/why-a-radical-approach-is-needed-to-fix-our-broken-justice-system/>.
[182] Katie Scotcher "Boys in state care ruled by fear 'you just didn't know what they could do to you'" (30 October 2019) RNZ <https://www.rnz.co.nz/news/national/402079/boys-in-state-care-ruled-by-fear-you-just-didn-t-know-what-they-could-do-to-you>.
[183] See <https://www.abuseincare.org.nz/>.
[184] Global study, above n 1.
[185] Lord Fraser of Carmyllie Introduction by Professor Fred H. Stone Series Editor: Stewart Asquith "THE KILBRANDON REPORT CHILDREN AND YOUNG PERSONS SCOTLAND" accessed: <https://www.gov.scot/publications/kilbrandon-report/pages/4/>.
[186] Étienne F. Lacombe, above n46, at 221.

> significance. No distinction could be drawn so as to justify discrete modes of treatment."

Overall, an approach was implemented that removed children under 16 from criminal procedures (except for very severe offending).[187] A more restorative and educative approach, including informal settings and child participation was to be taken.[188] Overall, the "treatment authority" would no longer be "a small and specialised part of the criminal jurisdiction, but instead ... a small but important part of the system of social service".[189] The Children's Hearings (Scotland) Act 2011 provides that decision makers "regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration."[190] This goes further than the requirements set out in art 3(1) of the CRC which only requires that best interests is to be "a primary" consideration.[191] Further, given no distinction is drawn for offending and care and protection, there is clearly a stronger emphasis placed on best interests in the justice context when compared to New Zealand, which clearly outlines the interests that are to be balanced against best interests in the OTA.[192]

FGCs are something implemented in New Zealand and only a small number of youth offending actually ends up in formal processes.[193] However, this cannot be seen as a 'welfare based approach'.[194] Further steps could be taken. The overall theme of considering youth offending as part of the welfare system instead of the justice system could potentially have great impacts. New Zealand used to have a more welfare based approach.[195] This has eroded and then been built back up somewhat over time.[196] It is often hard to argue for something like this because of the way the electorate sees crime, tough on crime rhetoric is a formidable opponent against restorative youth justice and best interests.[197]

[187] Above n 185, at x.
[188] At x.
[189] Étienne F. Lacombe, above n46, at 221.
[190] Étienne F. Lacombe, above n46, at 221.
[191] At 221.
[192] Oranga Tamaraki Act 1989, s 4.
[193] Above n 7.
[194] Nessa Lynch, above n 25, at 45.
[195] See at Chapter 2.
[196] At 46.
[197] Étienne F. Lacombe, above n 46, at 221.

The implementation of a welfare based approach relates more to the meta understanding of best interests than the specific, as something calling for reform. New Zealand has incorporated some of these ideas to varying extents.[198] This paper is not necessarily saying that to fix the positon we are in we need to copy Scotland. It is instead providing context and different ways of conceptualising youth offending which relate back to the best interests principle.

The first two are options within the current framework. New Zealand has undoubtedly taken steps towards decarceration and a community focussed youth justice system.[199] The goal of this section is to outline what alternate options for dealing with young offenders look like in order to inform our analysis of whether being deprived of liberty and specifically mixed with adults can ever be in a child's best interests. These are important factors to keep in mind when looking at the following fictitious examples.

B Example one

Suppose Lucy, a 16-year-old, has been found guilty of the manslaughter of a 90-year-old woman during a home invasion and robbery.[200] Lucy has committed a homicide, which is one of the most serious forms of offending. Assume Lucy does not have a suitable home to undertake a community based sentence Assume Lucy shows a tendency or potential for reoffending and committing further violent crimes, showing a lack of remorse – essentially potentially posing an ongoing threat to the community. Lucy is 16, however, due to brain injuries suffered as a younger child she has been assessed as functioning at approximately the mental level of someone around 12 years of age.

Lucy is a female. It is hard to find specific figures on New Zealand's youth justice residences but they all seem to exclusively cater to males (it is assumed that the mixing of males and females is prohibited) so if she were to go to a YJ residence she would need to be separated from all others in the facilities.[201]

[198] Nessa Lynch, above n 25, at 46.
[199] See at chapter 2.
[200] Based on a current case in Levin (they have applied for a restorative sentence, 2 of them are out on bail), not the exact facts, see: <https://www.stuff.co.nz/national/crime/300102381/teenage-girls-admit-manslaughter-of-90yearold-woman-after-murder-charges-withdrawn>.
[201] Above n 7.

Applying the best interests test outlined above: what are the factors relevant to Lucy? What are their relative weightings? What are the possible outcomes?

Lucy is young, presenting younger than her chronological age, rough home life. She also shows a lack of remorse. Possible options or outcomes for Lucy include:

a. To be housed with adults. However, per the factors outlined in this paper, this can negative impacts on the child. There is also a presumption against in the convention.[202]
b. To be housed alone. Assuming that there are no other young female offenders in YJ residences. However, being housed alone is akin to solitary confinement. The impacts of which are severe.[203] "Many children deprived of liberty experience post-traumatic stress disorders, in particular when in solitary confinement."[204] Further, the Global Study noted "The most egregious and direct forms of deprivation of liberty include solitary confinement, physical restraints and forced medication."[205] And that "Children should never be subjected to solitary confinement."[206]
c. A community type sentence is not available in this situation because the facts indicate that Lucy does not have suitable housing or a sufficiently stable home life.
d. Other options that may be available due to a discretion to refer to care and protection type procedures are unlikely to be available in this situation due to the severity of the offending.[207] Homicide cases are always referred to mainstream courts.[208]

So what will ultimately be best for Lucy given these circumstances and options? The Committee says that children should never be in solitary confinement but they also say children should never be kept in custody with adults. What are the effects of each? Which one would be worse? Does it depend on the child?

[202] United Nations Convention on the Rights of the Child, art 37.
[203] Global study, above n 1, at 29.
[204] Global study, above n 1, at 29.
[205] At 64.
[206] At 112.
[207] Above n 8.
[208] Above n 8.

Both options are shown to have negative impacts on the mental wellbeing of the individual. However, this risk seems to be somewhat heightened in solitary confinement situations. The UN Global Study also considered this as one of the more egregious forms of deprivation.[209] Potential for reoffending is a possibility in either situation, even if it is more likely if housed with adults, this is the kind of consideration (at this stage) that should carry less weight than mental impacts. Between these two different kinds of deprivation of liberty, being housed with adults seems to be there better option because of the increased negative impacts on mental health of those in solitary confinement.

In terms of other factors of the justice system, Lucy shows a potential for reoffending, does not and does not appear to show remorse for her actions. As we have established above that only different forms of deprivation of liberty are available, this consideration does not necessarily weigh against best interests above, therefore, the result remains the same. It is in Lucy's best interests to be housed in custody with adults.

C Example two

Suppose Jax a 16-year-old from Invercargill, has committed relatively serious offending. He poses an ongoing risk to the community, and has been given a short custodial sentence to be carried out at a youth justice facility – closest YJ residence/the only one in the South Island does not have any available space.[210] Therefore, he would need to be transported up to the North Island and would be removed from his locality and family.

The possible options available to Jax include:

a. A short stint at adult prison closer to home.
b. Transport and logistics of moving him to the next available YJ facility.
c. Being left at home has been ruled out due to insufficient arrangements and the severity of the offending.

Would the documented repercussions and risks of being housed with adult prisoners be worse than engaging in the process to remove Jax from his family and surrounding in order to keep him with other youth? It is possible that the risks of being in mixed custody are less tangible because of the short period of time. However, given the severity of the impacts of mixed

[209] Global study, above n 1, at 64.
[210] Above n 7.

custody, transport is likely to be the better option (even though youth specific residences are not without risk).

This example raises the issue of considerations other than best interests (and step 4) that may impact the assessment. Is this a case of: it could potentially be in his best interests to be housed with adults, or is this a case of holding too literally to the idea of not mixing unless it is in 'best interests' leading to inconvenience/being unrealistic? If it is the latter, we can see a place for wanting to rely on the reservation. However, this raises the question of whether the practicality concern should ever be able to trump best interests? Given the emphasis placed on best interests in international and domestic precedent, best interests is likely the preferred consideration.

Overall, it will be in Jax's best interests if the upheaval will have relatively severe impacts. If it would not, it may be a case where best interests is not satisfied but practicality suggests we should do something different. We are potentially being too principled by transporting Jax to the nearest YJ facility instead of just dealing with him where he is given that it is only for a short period. The assessment then becomes, what is more important– best interests or practicality? The CRC would suggest best interests.[211]

D Example three

Suppose Ariana a 17-year-old, comes from family situation that is not conducive to being fed, happy, healthy and homed. She has no stable family, nor any reliable extended family. She has committed persistent offending including robbery and aggravated wounding. She has stated that her reasons for offending are to do with putting food on the table and surviving. Ariana does not have stable housing and has a troublesome home life. She is young and has nowhere to live. Possible options for Ariana include:

a. A Youth Justice Residence. This is not really set up for females, and Ariana would be alone. Per the discussion on solitary confinement above.
b. Housed with adults. This carries all the issues we have talked about.
c. Care or protection arrangements made.

Where it appears as though a youth offender may be in need of 'care or protection', the Youth Court has discretion under s 280 of the OTA to refer the case to a care and protection

[211] Above n 32.

coordinator to determine whether the case ought to be dealt with by part 2 of the Act.[212] There is also scope under s 261 for 'care or protection' arrangements to be formulated within an FGC.[213] However, for the purposes of this analysis, assume that Ariana's offending was sufficiently serious that the court was deemed the appropriate forum. Keeping in mind the high standard emphasised in *MQ* for referral to the District Court.[214]

It has been documented that there are people who find being in prison takes the pressure off having to get a job and a house and food.[215] If this were the case for Ariana, being placed in custody could be good for her wellbeing, removing the pressure. Compared to already bad situations a deprivation of liberty may look like the better option. However, one must keep in mind the principle that justice measures should not be used to target care and protection cases.[216] This raises the question of whether providing this kind of support is the role of the criminal justice system? Should the justice system be the way in which we deliver social housing and welfare?[217] This drives home the justice and welfare divide discussed earlier and the Kilbrandon report in Scotland. A 'vulnerable' child such as one in Ariana's position is the kind of situation where we clearly want to take a more welfare based approach. Although no longer being on the streets may be in Ariana's interests, it is arguably not the place of the justice system. The underlying causes of the offending may need to be addressed. Given that the best interests side of the scale here includes welfare based concerns, the assessment becomes somewhat more difficult. The context seemingly tips the scales in favour of a protective approach. This idea is reflected in discretion to refer to care and protection procedures in these situations.

Overall, in the context, best interests might be satisfied by placing Ariana in custody in order to provide her with security and improve her mental stability. However, we are faced with the question over whether this ought to be the place of the criminal justice system. This highlights our distinction drawn between MBI and BIS. In this particular situation, options that may be

[212] Judge Andrew Becroft and Sacha Norrie, above n 48, at 22.
[213] At 21-22.
[214] At 21-22.
[215] Mark Abadi "Some people get arrested on purpose so they can go to jail and their reasons range from sad, to nefarious, to political" (13 March 2018) Business Insider <https://www.businessinsider.com.au/jail-getting-arrested-deliberately-2018-3?r=US&IR=T>.
[216] Judge Andrew Becroft and Sacha Norrie, above n 48, at 22.
[217] Ti Lamusse and Vanessa Cole "The Biggest housing investment in the 'wellbeing budget'? prison cells" (5 June 2019) The Spinoff <https://thespinoff.co.nz/politics/05-06-2019/the-biggest-housing-investment-in-the-wellbeing-budget-prison-cells/>.

in the better interests of Ariana such as a welfare type package are not properly available (this would be the outcome of MBI). Therefore, BIS would dictate a custodial/deprivation of liberty approach. Because it is the best option in the circumstances.

E Discussion

Our examples above illustrate several points while also raising further questions. Are we mostly talking about homicide situations? What other serious offending would qualify – note the *MQ* decision, which involved arguably quite serious offending, yet referral to the District Court was not seen as displacing best interests. Do homicide cases automatically justify some kind of custodial sentence? For these serious offences can the weighting of best interests be displaced? These questions speak to the issue of displacing best interests, as opposed to whether it can be satisfied in the first place. For now, we will focus on the latter.

Our examples above have shown us that best interests can be satisfied in limited situations – bearing in mind best interests and justification are not necessarily the same thing – because best interests is necessarily flexible, if we take a more meta-analysis of it, we may not get the same result. The question is raised; how can something be considered in best interests when it has all these negative impacts?

There are instances where something can be justified but not in the best interests, such as resourcing shortages. Or it may be considered in best interests. Depending on the understanding of best interests that we use. For example, a resourcing shortage issue may satisfy a BIS analysis as it is the best of the available options, but not MBI, in that there are other outcomes that would be preferred. This may indicate a need for reform. That is to say that in order to satisfy MBI we ought to improve resourcing.

Therefore, the answer to the question "Can it ever be in a child's best interests to be kept in adult custody?" Is "yes", but largely because of the way we conceptualise best interests. There are, however, multiple ways of looking at it, specifically the meta vs specific divide. BIS is an important tool because it allows us to work within what we have to find what is the best approach that can actually happen for a specific child. However, it can be dangerous to only rely only on this understanding of best interests. This is because it can prevent us from looking to implement better alternatives. If we focus too closely on the specific we can justify away suboptimal treatment on the understanding that it is the best that can be done in the

circumstances, when in actuality, the more appropriate approach would be to change or reform the circumstances. In this context, this can be explained by the example of New Zealand's shortage of facilities. Such as in our cases above, BIS would be satisfied in taking an approach that may include mixed custody because it is the 'best available option in the circumstances', whereas, MBI would require stepping back and looking at what is *actually* in the child's best interest, in a meta sense, which could mean increasing or improving facilities. Of course, there are other factors (political and economic) that go into whether or not facilities will be developed but this does not preclude an argument being made for what might be in the best interests of the children, generally speaking.

Best interests is a useful and important concept, but best interests may not always "best interests" in a meta-sense because of its context specific nature. The concept is necessarily flexible; a one size fits all approach would be inappropriate. But its flexibility should not be used to justify an argument of "we are doing the best we can", when things perhaps ought to be changed.

VIII Best Interests and New Zealand

The place of the convention in New Zealand law was discussed earlier in this paper. Best interests is incorporated in both art 3(1) and art 37(c) and best interests is a test set out for the CE when approving of mixing facilities. Yet New Zealand retains a reservation to 37(c) reserving mixing where: "shortage of suitable facilities makes the mixing of juveniles and adults unavoidable" and "where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned."[218]

Given the discussion above on how one might understand best interests, it it important to consider what this means for New Zealand's maintenance of this reservation. Why do we have the reservation if: the convention has an in-built best interests consideration? And Best interests can be satisfied, per the discussion above? Is it because there is a distinction to be drawn between best interests vs convenience/resourcing? Does the fact that there are situations where factors other than best interests dictate the preferred approach mean we should retain the

[218] Ministry of Justice "Constitutional Issues and Human Rights UN Convention on the Rights of the Child" (accessed August 2020) < https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/crc/>.

reservation so that we can use it when we need to but best interests might not be satisfied? Or is best interests sufficiently flexible to cover this situation? Because of the BIS understanding incorporating context. What is the line between what the reservation preserves and a BIS consideration? These are somewhat blurred and overlapping concepts. Best interests could, in theory, be sufficiently flexible to incorporate what the reservation is designed to preserve, that is, a shortage of facilities. This is due to its ability to be context specific. However, by removing the reservation, may increase a focus on 'best interests' as a whole, by not providing for an 'easy out' via the reservation, but preserving the option to mix custody. This in turn may force analysis between the BIS and MBI by making best interests the core consideration. This may be the best we can do in the circumstances, but are the circumstances the best we can do? That is to say, to satisfy 'best interests', ought we consider changing the circumstances?

Further, best interests is already understood as competing with other factors in the justice context, although the Committee states that those factors ought to give way to best interests, this is not always how the application occurs.[219] It is considered "a primary" rather than "the primary" consideration. Given the importance of children and their development, best interests carries a necessary weight to it.[220] Convenience or ease should never be the sort of thing that could outweigh a best interests consideration.[221] Therefore, by shifting the emphasis onto an overall conception of 'best interests' we are able to preserve ability to work within the context and balance with other factors per the understanding of best interests in the youth justice context without providing for an easier alternative (the reservation) that does not place any emphasis on New Zealand to consider whether change ought to be the more appropriate response.

The outcome of a best interests consideration is not always actually what is in the child's best interests. It is sometimes all that can be done at the time short of a justice and welfare system overhaul (which would probably be a good thing). What would truly be in the 'best interest' would be to make change on a grander scale, but the way best interest is conceptualised, designed and applied revolves around applying best interests in the particular situation, within the existing framework.[222] When we ask whether it can be in a child's best interest to be put

[219] Above n 32, at 34.
[220] At 1.
[221] Global study, above n 1.
[222] Above n 32, at 32.

in mixed custody with adults, we are already operating on the assumption that this is one of the few actually plausible options. An individualised best interests assessment does not readily lend itself to an argument for total reform. However, as the Committee has pointed out about best interests; it is not *only* a principle and it does not *only* apply to individual children in individual circumstances. It applies to children as a whole or groups of children as well.[223] Further, best interests are to be considered in all decisions effecting children including the legislative process –this highlights a difference between best interests as we use it in 3(1) and 37(c) and the meta/specific divide. That is to say that best interests has multiple meanings and that it should apply both in the specific and individual situation at hand, as well as in a broader academic sense, informing arguments for reform. Both should apply in the situation of children deprived of liberty in the administration of justice and the conditions those children are to be placed in.

The Corrections Regulations also appear to add back in BI when the CE is considering approving the mixing of juveniles and adults.[224] It is not clear, therefore, how much the reservation is actually relied on to justify the mixing of adults and juveniles. It is also interesting to consider the place of the reservation considering its limited application, as seen in the small numbers of children in adult prisons mentioned, and approaches taken toward a more restorative YJ system.[225] However, for this small number, the impacts can be significant. Per the discussion on the impacts of these arrangements above.[226]

An appropriate course of action would be to remove the reservation as a matter of principle even though it may not make much of a practical difference, given its limited application and overlap between BIS and justification/convenience. This could have the benefit of placing emphasis and prioritisation to best interests in the mixed custody context. By removing it, we are making a statement about its priority. Shifting this emphasis, can encourage appreciation of MBI and its implications. This, in turn, could lead to a broad scale reform and taking a more welfare based approach and prioritising what may be seen in the MBI for children in the youth justice context. Such as taking continued steps away from measures involving deprivation of

[223] Corrections Regulations 2005, at reg 180.
[224] Above n 32, at 6.
[225] Nessa Lynch, above n 25, at 45.
[226] See the Global Study, above n 1, for more detail.

liberty and custodial mixing.[227] This would place more pressure on the state considering its reluctance to remove the reservation until such time as it can undergo YJ facility improvements.

IX Conclusion

As seen from the CRC and the UN Global study, it is understood that depriving a child of liberty is a grave infringement on children's rights and should only be done as a matter of last resort, for the shortest applicable period of time.[228] Further that mixing children in custody with adults ought only to be done when it can be shown to be in the best interests of the child/children concerned.[229] Through the analysis of the concept of best interests above we see that it can sometimes be in a child's best interest to be kept in custody with adults (despite its negative impacts) because of the way we conceptualise best interests. However, there is more than one way to conceptualise best interests. Namely, the meta/specific divide which draws a distinction between what might be in a child's best interests in a particular situation given the available options and what would be in a child's best interests in an ideal world. Both of these understandings of best interests are important and have their uses in decision making and analysing the state of the law.[230]

In the New Zealand context, this means we ought to revisit the reservation maintained to art 37(c) of the CRC. The Convention maintains a necessarily broad and flexible understanding of best interests which it is unlikely to change or limit.[231] Because of this flexibility, the reservation is not entirely necessary because there is scope within a best interests consideration to incorporate context specific resourcing considerations.[232] The main differences lies within the emphasis placed. Relying on best interests (while allowing specific considerations) sets a standard for respecting the interests of the child and considering a meta conception of best interests at the same time. Whereas, the reservation represents an 'opt out' of taking a child's best interests seriously when resourcing presents an issue.

[227] *Concluding Observations on the Firth Periodic report of New Zealand,* above n 11.
[228] United Nations Convention on the Rights of the Child.
[229] At art 37(c).
[230] Above n 32, at 99.
[231] At 32.
[232] At 32.

X Word Count

The text of this paper (excluding title, table of contents, footnotes, and bibliography) comprises approximately 14,751 words.

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