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YOUTH FITNESS TO STAND TRIAL IN NEW ZEALAND: ARE WE FAILING OUR MOST VULNERABLE?

Submitted for the LLB (Honours) Degree

Faculty of Law

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2020

Abstract

New Zealand's current framework for evaluating fitness to stand trial is inappropriate for children and young people and fails to uphold their fundamental right to be fit to stand trial. The current test acknowledges 'mental disorder' and 'intellectual disability' as mental impairments which may support a finding of unfitness. However, the same deficits in court-related competencies exhibited by individuals with mental disorder or intellectual disability are exhibited by individuals presenting developmental immaturity alone. Allowing children and young people to undergo trial proceedings whilst lacking court-related competence contradicts the fundamental notion of the doctrine of fitness to stand trial and violates due process rights. A wide body of research confirms children and young people, particularly those 14 and under, exhibit significant trial-related deficits. Thus, reform is necessary to bring New Zealand into alignment with developmental evidence and international standards. Raising the age of criminal responsibility to 14 is necessary to ensure the vital protection of those most at risk of trial-related deficits. Whilst, the inclusion of developmental immaturity as an admissible predicate for 'mental impairment' provides the necessary flexibility and protection of those above 14. Implementation of these reforms protects New Zealand's most vulnerable, reinstates their due process rights and promotes a youth justice system based on fairness, empirical evidence and decarceration. Thus making New Zealand more deserving of its "world-renowned" status.

Key words: fitness to stand trial, children, young people, developmental immaturity, competency

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I Introduction

Alex is 13 years old.[1] New Zealand (NZ) laws consider him too young to vote, drink, smoke and have sexual relations.[2] However, he can be prosecuted for serious criminal offences.[3] Alex appeared in the Youth Court on aggravated robbery charges. Alex has an IQ of 73, low social/emotional abilities, and low verbal skills but was found fit to stand trial. In court[4], he appeared fidgety and evasive. He doesn't seem to be listening to what is explained, doesn't make eye contact and is inattentive. He swiftly responds "yeah, yeah" to questions, even though it is getting him into more trouble. He appears unwilling to cooperate, disinterested in proceedings and surly. Alex has admitted to a crime he did not commit just to get it over with.

Fitness to stand trial (FTS) is a fundamental doctrine within NZ's criminal justice system recognising it is inherently unfair to try an unfit accused.[5] The longstanding question of what constitutes unfitness remains contentious and has been met with some conflict in literature and case law. What is indisputable though, is individuals who inherently lack competency to meaningfully participate in the criminal trial process cannot be said to be fairly tried in accordance with their rights. An array of research depicts one consensus: youth have inherent vulnerabilities in trial-related competency when compared with adults. At present, an individual's developmental level on its own is insufficient to determine they are incompetent.[6] Thus, NZ's current approach to youth FTS, whereby children/young people (CYP) are treated in the same way as adults, does not adequately factor in an individual's age and associated developmental deficiencies. This is insufficient and inconsistent with national and international standards and a significant body of developmental research.

The current approach is harmful to CYP like Alex who are involved with it. Accordingly, the complex but defeatable issues present in the current approach must be met with comprehensive

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[1] Fictitious story modelled off *New Zealand Police v AZ* [2019] NZYC 88 and inspired by Francine Chye "When children kill: Age of criminal responsibility and criminal procedure in New Zealand" (2012) 2 NZLSJ 837 at 837.
[2] In New Zealand, the legal ages are 18 to vote, smoke and drink, and 16 to have sexual relations and drive.
[3] In New Zealand, a 12 or 13 year old can be prosecuted where charged with murder/manslaughter, a serious offence with a maximum penalty of jail for at least 14 years or if they have offended before, and the maximum penalty for their last offence was more than 10 years but less than 14 years in jail.
[4] Scenario modelled from Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, January 2020) at 1.
[5] Ian Freckelton "Assessment of Fitness to Stand Trial" (paper presented to Legal Research Foundation seminar, University of Auckland, March 1995) 13 at 14.
[6] Robert Ludbrook and others *Brookers Family Law: Child Law* (online looseleaf ed, Thomson Reuters) at [YJ2.6.01].

solutions acknowledging the specific characteristics youth display. It is "paradoxical" that CYP are tested like adults when law and society suggest they should not be judged as so.[7] Individuals like Alex should not enter the prison pipeline solely because NZ's current approach is fundamentally inappropriate for CYP. I argue reform is needed to provide fundamental protections to our most vulnerable via raising the age of criminal responsibility (ACR) to 14. Further, the influence of developmental immaturity (DI) on FTS must be acknowledged within our present framework via statutory reform.

II Young people who offend

2019 statistics illustrate key characteristics of young people who offend (YPWO). Māori young males are overrepresented as offenders within the youth justice (YJ) system.[8] 79 per cent of all YPWO were male.[9] 64 per cent involved 15/16 year olds.[10] 61 per cent were Māori, whilst 25 per cent were European.[11]

Young people are "characterised as impulsive, temperamental and immature, finding it difficult to consider others feelings or the consequences of their actions."[12] Brain development research confirms youth, due to the way the brain develops, are more likely to engage in risk-taking behaviour than younger or fully mature adults.[13] Additionally, they are especially vulnerable to peer/social influence and impulsive actions in response to distress.[14]

The notion of culpability recognises an individual who causes harm and is morally culpable merits criminalisation.[15] However, it is these characteristics paired with inexperience, less education and less intelligence which make CYP incapable of evaluating the consequences of their actions.[16] This is why CYP are "not trusted with the privileges and responsibilities of an adult" but also justifies regarding their irresponsible behaviour as less morally culpable than

[7] Chye, above n 1, at 837.
[8] Ministry of Justice *Children and young people in court: Data notes and trends for 2019* (December 2019) at 3.
[9] At 2.
[10] At 2.
[11] At 3.
[12] Professor Sir Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, June 2018) at 13.
[13] At 13.
[14] At 13.
[15] Dennis J Baker *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate Publishing Ltd, Surrey, 2011) at 1.
[16] *Thompson v Oklahoma* 487 US 815 (1988) at 835.

that of adults.[17] This rationale ought to be mirrored in a youth-specific fitness test recognising evidenced deficiencies CYP exhibit.

III New Zealand's Youth Justice Framework

A Background[18]

1 Oranga Tamariki Act 1989 (OTA)

First enacted in 1989, the Act represented a 'new paradigm', unparalleled worldwide in its aim to advance community-based alternatives to institutions, encourage and support family involvement in decision-making, and promote diversion and cultural flexibility.[19] The 2010 and 2019 amendments produced radical changes in terms of YJ and the principles underpinning it.[20] The 2010 amendment focused on the Youth Court, introducing new powers and orders.[21] Most significantly, the child offender provisions now permit prosecution of 12/13 year olds for certain serious or persistent offending.[22] Regarding children, this represents a marked theoretical shift from the premise youth offending "stems from difficulties in the home life of the child, and thus (apart from homicide cases) should be resolved through alternative action or the care and protection process."[23] Changes to the section 208 principles evidenced further theoretical shifts, bolstering victim's rights and interests and requiring action towards addressing causes of offending.[24]

The 2019 amendment extended the Youth Court jurisdiction to include 17 year olds.[25] Further, re-drafted principles clarified "the weight to be placed on the interests of the young person, the victim and public safety".[26] Section 4(A) presents the paramountcy requirement demanding a

[17] At 835.
[18] See above n 6, at [YJ1.1] for an overview of the history relevant to youth justice in New Zealand.
[19] Alison Morris and Gabrielle Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26(1) Australian and New Zealand Journal of Criminology 72 at 81. See also Gabrielle Maxwell and Allison Morris *Family, Victims, and Culture: Youth Justice in New Zealand* (Social Policy Agency and Institute of Criminology, Victoria University of Wellington, Wellington, 1993) at 165.
[20] Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010. See also Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, Family Violence Act 2018 and the Oranga Tamariki Legislation Act 2019.
[21] Nessa Lynch "Changes to Youth Justice" (2010) 8(3) NZLJ 129 at 1.
[22] At 1.
[23] At 1.
[24] At 1.
[25] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 7(4).
[26] Simon France (ed) *Adams on Criminal Law: Criminal Procedure* (online looseleaf ed, Thomson Reuters) at [CYIntro.01].

focus on CYP's wellbeing/best interests in respect of the new section 5 and amendments to section 13.[27] Section 5 contains general principles affording CYP rights, including seeing a defendant as a whole person which includes but is not limited to their developmental potential, education/health needs, whakapapa, cultural identity, disability and age.[28] Hence, this amendment focused on promoting CYP's wellbeing, which is "inextricably linked with their relationships with whānau, hapu and iwi."[29]

2 Age of criminal responsibility

The minimum age a child can be prosecuted and punished by law in NZ is 10.[30] Children between 10 and 13 can be prosecuted with murder/manslaughter provided they knew their act or omission was wrong or contrary to law.[31] Unless charged with a section 272(3) offence, any "child" (aged under 14) or "young person" (aged 14 to 18) falls under the Youth Court's jurisdiction.

3 Youth Court

The Youth Court is responsible for offences involving CYP under 18 at the time of offending, subject to the age provisions.[32] This jurisdiction does not extend to murder/manslaughter, category 3/4 offences where trial by jury is elected, or where the individual is prosecuted jointly and elects a jury trial.[33] If the offence falls outside the Youth Court's jurisdiction, pre-trial processes occur in the Youth Court before a transfer for trial in the District or High Court.[34] Hence, the most serious offending is dealt with in the adult courts.[35]

The Youth Court constitutes a "paradigm shift" from the traditional court model.[36] Whilst the judge retains control, less formality, a more welcoming/inclusive layout and increased encouragement of whānau involvement are indicative of this shift.[37] The judge's role depicts a partnership: they are tasked with supporting the development and accomplishment of

[27] Justice Joe Williams (speech to the Tai Tokerau Family Law event, 15 April 2019).
[28] Oranga Tamariki Act 1989, s 5.
[29] Above n 27.
[30] Above n 6, at [YJ 2.1.01]. See also Crimes Act 1961, s 21(1).
[31] Above n 6, at [YJ 2.1.01]. See also Oranga Tamariki Act, s 272(1)(a) and s 272A(1)(d). See also Crimes Act, s 22.
[32] Above n 6, at [YJ 1.4.01A].
[33] Oranga Tamariki Act, s 273.
[34] Oranga Tamariki Act, s 275.
[35] Pip McNabb "Raising the Age of Youth Justice: Should 17 Year Olds Be Included Within New Zealand's Youth Justice System?" (LLB(Hons) Dissertation, University of Otago, 2016) at 10.
[36] Above n 6, at [YJ 1.4.02].
[37] Ministry of Justice "What to expect at Youth Court" Youth Court of New Zealand <https://www.youthcourt.govt.nz/about-youth-court/what-to-expect-at-youth-court/>.

solutions via the Family Group Conference (FGC) process in partner with multiple parties "towards a common end".[38]

IV Establishing fitness to stand trial

A Doctrine

FTS denotes the competence of a defendant throughout criminal proceedings to discern the course of those proceedings.[39] The underlying rationale is: an individual facing trial ought to be able to defend themselves, reflecting a fundamental notion of law.[40] The law governing fitness depicts a crossroads of criminal procedure, human rights law and psychological assessment.[41] The doctrine aims to detain or avert defendants until they are indeed fit. Unfitness does not equate to acquittal. The trial process is instead rescinded awaiting a defendant's recovery of trial competence.[42]

The requirement a defendant be fit is a pivotal tenet of NZ's criminal justice system, but a confused one at that.[43] The doctrine establishes the boundary limiting the extent society can prosecute defendants incapable of defending themselves.[44] Three key principles underpin the FTS requirements in the Criminal Procedure (Mentally Impaired) Persons Act 2003 (CPMIPA): fairness via protection of defendant's rights to a fair trial and to present a defence; integrity and legitimacy of the criminal justice system by only holding defendants accountable if they understand why they have been prosecuted; and enhancing society's interest in a reliable criminal justice system.[45] CYP are not excluded from this doctrine. The right of CYP to be competent in their own defence is recognised in the NZ Bill of Rights.[46]

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[38] BJ Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) at 5.
[39] See *Frith* (1790) 22 St Tr 307 and Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011).
[40] W Brookbanks and J Skipworth "Fitness to plead" in W Brookbanks and S Simpson (eds) *Psychiatry and the Law* (LexisNexis, Wellington, 2007) 157 at 157.
[41] At 158.
[42] Brookbanks, above n 39, at 21.
[43] *P v Police* [2007] 2 NZLR 528 at [2].
[44] *R v Duval* [1995] 3 NZLR 202 at 205.
[45] *Nonu v R* [2017] NZCA 170 at [26].
[46] New Zealand Bill of Rights Act 1990, s 25.

B Criminal Procedure (Mentally Impaired Persons) Act 2003

The CPMIPA governs FTS in NZ, though it was previously regulated by the Criminal Justice Act 1985. The Act's purpose is threefold:[47]

> (a) provide the courts with appropriate options for the detention, assessment, and care of defendants and offenders with an intellectual disability:
> (b) provide that a defendant may not be found unfit to stand trial for an offence unless the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence:
> (c) provide for a number of related matters.

The CPMIPA empowers criminal courts to make a finding of unfitness and contains the power to authorise detention via the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCRA).[48] The Act only applies to defendants charged with an imprisonable offence.[49]

Section 4 is key to the fitness assessment. The wording 'under disability' in the Criminal Justice Act is replaced by 'unfit to stand trial' as the new legal standard for FTS.[50] Section 4 defines 'unfit to stand trial' as "unable, due to mental impairment, to conduct a defence or to instruct counsel to do so".[51] This includes defendants who due to mental impairment are unable to plead, adequately understand the nature, purpose or possible consequences of proceedings or to communicate adequately with counsel.[52] The presence of these factors will necessitate a finding of unfitness but are not mandatory.[53]

Through the passage of the CPMIPA, Parliament intended to broaden the qualifying criteria for unfitness by encompassing those who are mentally impaired through intellectual disability, personality disorder or a neurological disorder for example.[54]

The meaning of "adequately" in section 4 requires expansion. Baragwanath J concluded a defendant's competence is not to be measured solely by their ability to perform straightforward

[47] Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIPA], s 3.
[48] CPMIPA, ss 5, 7 and 14.
[49] CPMIPA, s 5.
[50] Above n 26, at [CM14.04].
[51] CPMIPA, s 4 "unfit to stand trial".
[52] CPMIPA, s 4(b) "unfit to stand trial".
[53] Above n 26, at [CM4.17.01].
[54] Above n 45, at [25].

cognitive tasks (like understanding the role of the prosecutor) but further, involves assessing their ability to understand and choose amongst alternative courses of action.[55] In *P v Police*, the health assessors findings suggested the defendant had a marginal ability to understand charges against him, a rudimentary understanding of proceedings, and an ability to participate in a mechanistic rather than informed manner.[56] Those factors were sufficient for Baragwanath J to rule the defendant was unfit.

Fitzgerald J provided a useful list of incapacities to assist the unfitness assessment in *Police v UP*.[57] This includes whether the accused is capable of: understanding their charges; pleading and exercising their right of challenge; following proceedings; making a defence or answering the charge; deciding what defence to rely on; giving instruction to counsel, and; communicating their version of facts to the court and counsel.[58]

Drafters intentionally left 'mental impairment' undefined, authorising an interpretation consonant with procedural fairness and to prevent any unintentional legislative gaps.[59] However, its meaning is accepted to include impairments by way of a 'mental disorder' or 'intellectual disability', as defined in the Mental Health (Compulsory Assessment and Treatment Act 1992 (MHCATA) and the IDCCRA respectively.[60] Characteristics including cognitive impairment, impulsivity, difficulty processing information and poor communication skills have been said to go towards 'mental impairment'.[61] DI itself is excluded.

Section 2 of the MHCATA defines 'mental disorder' as an "abnormal state of mind" characterised by delusions, mood disorders, perception, volition or cognition, of such a degree that it poses a serious danger to the health or safety of that person or others or seriously diminishes the capacity of the person to take care of themselves.[62] Hence, this high threshold requirement for 'mental impairment' ignores DI as a proven and significant factor influencing an individual's FTS.

[55] Above n 43, at [26].
[56] Above n 43, at [43].
[57] *Police v UP* YC Auckland CRI-2010-204-314, 5 May 2011.
[58] At [42].
[59] (5 October 1999) 580 NZPD 19706.
[60] (21 October 2003) 612 NZPD 9511.
[61] *Police v HJ* [2016] NZYC 168 at [13].
[62] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

C Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

The IDCCRA provides for the compulsory care and rehabilitation of persons with an 'intellectual disability' who have been convicted of an imprisonable offence or found unfit to stand trial for an imprisonable offence.[63]

The CPMIPA and IDCCRA are interrelated. T CPMIPA Bill's third reading described them as "companions".[64] The CPMIPA directs the court to the IDCCRA when it is decided an assessment to determine if 'intellectual disability' has regarded a person unfit or insane must be undertaken.[65]

Section 7 defines 'intellectual disability' which hinges on psychometric testing to assess functioning relative to particular skills. An intellectual disability is established if the person has a permanent impairment that:[66]

> (a) results in significantly sub-average general intelligence; and
> (b) results in significant deficits in adaptive functioning, as measured by tests generally used by clinicians, in at least 2 of the skills listed in subsection (4); and
> (c) became apparent during the developmental period of the person.

The Select Committee recommended the threshold for subpart (1)(a) be an IQ of 75 but a Supplementary Order Paper lowered this to 70.[67] Importantly, the fact an individual has an 'intellectual disability' does not necessitate a finding of unfitness.[68]

Powers exercised under the IDCCRA are guided by principles requiring the balancing of individual autonomy and community protection. Where evenly balanced, Minister of Justice during the relevant period stated, "the Judge must give paramount consideration to the safety of the community".[69] The Court is responsible for deciding the need for and level of care, guided by Specialist Assessors evidence and recommendations.[70]

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[63] Above n 6, at [YJ2.7].
[64] (21 October 2003) 612 NZPD (Criminal Procedure (Mentally Impaired Persons) Bill – Third Reading, Phil Goff).
[65] CPMIPA, s 38.
[66] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCRA], s 7(1).
[67] (21 October 2003) 612 NZPD 9576 (Intellectual Disability (Compulsory Care and Rehabilitation) Bill – In committee).
[68] *Police v NJ* HC Auckland CRI-2010-404-309, 21 September 2010 at [12].
[69] Above n 64.
[70] CPMIPA, s 23.

D Statutory process

The fitness question can be raised in any proceedings where CYP are charged with an imprisonable offence.[71] Section 7(1) of the CPMIPA enables a finding of unfitness "at any stage after the commencement of proceedings and until all evidence is concluded".[72] The statutory process is triggered upon raising of the fitness issue.[73]

The first step is an assessment of whether the defendant is fit.[74] A court must receive evidence of two health assessors as to whether the defendant is mentally impaired.[75] Health assessors must be either a practising psychiatrist who is a registered medical practitioner, a psychologist registered with the Psychologist's Board or a specialist assessor under the IDCCRA.[76] If the court is satisfied the defendant is mentally impaired, it must allow each party an opportunity to be heard and present evidence on the issue.[77] Following this, the court will rule on the fitness issue.[78] For a finding of unfitness, the standard of proof is the balance of probabilities.[79]

If the defendant is found fit, the court continues with proceedings as normal.[80] If unfit, the court must assess the defendant's involvement in the offence and determine whether they caused the act/omission under section 10, 11 or 12 depending on when the finding of unfitness occurred during trial proceedings.[81] If the court is not satisfied of the defendant's involvement, charges are dismissed and the finding of unfitness is deemed quashed.[82] Where the court is satisfied, it must look to subpart 3.[83] Section 23 requires the court to order inquiries regarding the most appropriate disposition option under sections 24 and 25.[84] Where the defendant has an 'intellectual disability', they must be assessed under Part 3 of the IDCCRA during this period of inquiries.[85]

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[71] Above n 6, at [YJ2.6.01].
[72] CPMIPA, s 7(1).
[73] *R v McKay* [2009] NZCA 378 at [34].
[74] CPMIPA, s 8A.
[75] CPMIPA, s 8A.
[76] CPMIPA, s 4(1) "health assessor".
[77] CPMIPA, s 8A(2)(a).
[78] CPMIPA, s 8A(2)(b).
[79] CPMIPA, s 8A(3).
[80] CPMIPA, s 8A(4).
[81] CPMIPA, s 8A(5).
[82] CPMIPA, s 13(2).
[83] CPMIPA, s 13(4).
[84] CPMIPA, s 23.
[85] CPMIPA, s 23(5).

Two disposition routes exist under the CPMIPA. Section 24(2) enables the court to order the defendant be securely detained as a special patient (under the MHCATA) or a special care recipient (under the IDCCRA).[86] Alternatively, section 25(1) allows the court to order a defendant be treated as a patient (under the MHCATA), a care patient (under the IDCCRA) or immediately released.[87] Where a defendant is liable to be detained under a sentence of imprisonment, the court can choose not to make an order.[88]

E Youth

The statutory process applies to adults and CYP alike. A mental impairment is required for a finding of unfitness – usually as a result of mental disorder or intellectual disability.[89] Yet, importantly, CYP's developmental level on its own is insufficient to determine they are incompetent.[90] In *Police v UP,* health assessors noted no youth-specific screening tool for competence exists, emphasising complications in identifying vulnerable CYP whose competence is in question.[91] Commentators state it is "axiomatic" CYP lack the maturity adults are presumed to have, which is clearly detrimental to their ability to make decisions on complex legal issues and in conducting a defence, disadvantaging them.[92] This distinction between adults and CYP should be reflected in the fitness test.

However, some consideration of CYP is made. Section 12 of the IDCCRA specifies a distinct set of principles overseeing decisions affecting CYP.[93] Yet, the MHCATA provides no CYP-specific rights and does not restrict CYP from being held in an adult mental health facility.[94] The current approach is inadequate and fails to recognise proven incompetency's CYP display.

V Youth Justice principles

A International principles

[86] CPMIPA, s 24(2).
[87] CPMIPA, s 25(1).
[88] CPMIPA, s 25(1)(c).
[89] Above n 6, at [YJ2.6.01].
[90] Above n 6, at [YJ2.6.01].
[91] Above n 57, at [68].
[92] Sophie Klinger "Youth Competence on Trial" (2007) NZ Law Rev 235 at 252.
[93] IDCCRA, s 12.
[94] Above n 6, at [YJ2.5.01A].

The UN Convention on the Rights of the Child (CRC) is the primary instrument in the YJ field, and was ratified by NZ in 1993.[95] NZ has also ratified the UN Convention on the Rights of Persons with Disabilities (RPD).[96] These instruments emphasise the importance for CYP to be treated considering their age and the desirability of promoting their reintegration and constructive role in society.[97] OTA requirements regarding the obligation to uphold and respect rights in these conventions significantly increased their status.[98] However, their provisions are unable to override domestic legislation by virtue of NZ's dualist system, though may be subject to judicial criticism.[99]

Whilst not binding, NZ is party to the Beijing Rules and Riyadh Guidelines which provide useful direction on minimum standards expected in YJ systems.[100] Rule 5.1 of the Beijing Rules stipulates sanctions and outcomes must emphasise CYP's wellbeing and ensure any reaction to young offenders is always in proportion to the circumstances of the offender and the offence.[101]

Fitzgerald DCJ believes the "strongest statement of the importance of wellbeing" derives from general comment No.10 of the UN Committee on the Rights of the Child (CORC), which was reiterated in general comment No.24.[102] This clarifies "when balancing the young person's wellbeing… the need for public safety and sanctions, the scales should tip in favour of wellbeing."[103]

B Age consideration

The age-appropriate treatment of CYP is required by both Article 14.4 of the International Covenant on Civil and Political Rights and Article 40.1 of the CRC.[104] Domestic legislation recognises this via section 208(2)(e) of the OTA where age acts as a mitigating factor in

[95] Above n 6, at [YJ1.3.01].
[96] Human Rights Commission "Convention on the Rights of Persons with Disabilities" <https://www.hrc.co.nz/our-work/international-reporting/rights-disabled-people/crpd/>.
[97] *Police v KM* [2019] NZYC 436 at [12].
[98] At [14]. See also Oranga Tamariki Act, s 5(1)(b)(i).
[99] Above n 6, at [YJ1.3.01]. See also *Police v FG* YC Auckland CRI-2019-204-192, 29 June 2020 at [145]-[149].
[100] *Police v MQ* [2019] NZYC 456 at [33]. See also above n 97, at [15].
[101] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* GA Res 40/33 (1985), Rule 5.1. See also *Police v MQ,* above n 100, at [34].
[102] *Police v MQ,* above n 100, at [35]. See also Committee on the Rights of the Child *General comment No.24* UN Doc CRC/C/GC/24 (18 September 2019) at [76].
[103] *Police v MQ,* above n 100, at [35].
[104] *International Covenant on Civil and Political Rights* GA Res 2200A (1976), art 14.4. See also *Convention on the Rights of the Child* GA Res 44/25 (1990), art 40.1.

deciding whether to impose any sanctions/the nature of those sanctions.[105] Furthermore, section 284(1)(b) requires the Youth Court to consider a young person's history, social circumstances and personal characteristics.[106] Protection is further afforded to CYP who appear in adult courts via the Sentencing Act 2004. Section 9(2)(a) records age as a mitigating factor.[107]

C Children's participation

The OTA's scheme demonstrates a shift from the traditional criminal justice approach - punishment by judicial officer.[108] Instead, children's involvement in decision-making is emphasised via the FGC process where CYP are viewed not only as the problem but key to the solution.[109] The involvement of CYP features in many provisions.[110] Specifically, sections 10 and 11 ensure the individual's understanding of proceedings and encourages their participation.[111]

VI Issues in New Zealand Approach

Despite the "world-class" status afforded to NZ's YJ system, emerging local research commands scrutiny of the current approach to youth FTS. The adult test is simply transposed in the Youth Court with adult-appropriate tools used on CYP. The current test is under-protective of CYP, acknowledging 'mental disorder' and 'intellectual disability' as mental impairments which may support a finding of unfitness but not DI. Yet, the same deficits in court-related competencies exhibited by individuals with mental disorder or intellectual disability are exhibited by individuals presenting DI alone.

Due process necessitates the competence of a defendant to ensure a fair trial. Hence, all individuals must display certain competencies to ensure meaningful participation in court proceedings.[112] Yet, research confirms many CYP like Alex display serious court competence-

[105] Oranga Tamariki Act, s 208.
[106] Oranga Tamariki Act, s 284.
[107] Sentencing Act 2004, s 9(2)(a).
[108] Above n 6, at [YJ1.3.05].
[109] Above n 6, at [YJ1.3.05].
[110] Oranga Tamariki Act, ss 215(1)(f), 221(2)(c), 251(1)(a), 251(1)(g), 263, 265(1)(a), 329(1)(b), 330(1)(a), 323(1), 326(1), 284(1)(c) and 351(1).
[111] Oranga Tamariki Act, ss 10 and 11.
[112] Laurence Steinberg "Adolescent development and juvenile justice" (2009) 5 Annu Rev Clin Psychol 459 at 464.

related deficits, pertaining to an inability to understand charges/basic elements of the court system, appreciate their position as a defendant in criminal proceedings, and communicate material information/facts to counsel.[113] The current approach ignores this, allowing proceedings to continue with CYP who lack the capability to meaningfully participate in their trial according to their rights. Consequently, this approach violates due process rights and encourages early entry into the justice system, the first step in a potential cycle of life-course persistent offending, of which Māori who are already overrepresented within the system, are at heightened risk of.[114]

A Developmental Immaturity

The role of DI in fitness assessments is the subject of growing international literature. Growing concerns underlining youth's still developing social/emotional competencies and their influence on decision-making abilities have provoked increasing claims DI deserves attention in youth fitness evaluations.[115] Conventionally, the FTS criteria concentrates on mental disorder/intellectual disability. Yet, in a youth context, more complexities arise given these issues often surface by reason of age and developmental variation, as opposed to an independent mental/intellectual disorder.[116] International literature must be considered with caution given legal contexts differ between jurisdictions.[117] A paucity of NZ-specific research hindered previous analysis, but emerging NZ research warrants current attention.

DI immaturity is an "umbrella term encompassing the incomplete neurological, social, emotional and cognitive systems development of young people, relative to adults".[118] Adolescents' foresight, autonomy for reasoning/understanding, self-control, consideration of future consequences and resistance to peer influence are all factors informed by the "developmental timetables" of these systems.[119] The notion a defendant's competence decides whether court proceedings will continue is viewed as critical to ethical foundations of criminal

[113] Richard Bonnie and Thomas Grisso "Adjudicative competence and youthful offenders" in Thomas Grisso and Robert Schwartz (eds) *Youth on Trial: A developmental perspective on juvenile justice* (University of Chicago Press, Illinois, 2000) 73 at 77.
[114] Above n 12, at 24.
[115] Thomas Grisso and others "Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants" (2003) 27 Law and Human Behaviour 333 at 334.
[116] Bath, Sidhu and Stepanyan "Juvenile competency to stand trial" (2016) 25(1) Child Adolesc Psychiatr Clin N Am 49 at 57.
[117] Caleb Armstrong and Susan Hatters Friedman "Fitness to Stand Trial in the New Zealand Youth Court: Characterising Court-Ordered Competence Assessments" (2016) 23(4) Psychiatry, Psychology and Law 538 at 539.
[118] Pip Dean "Young people's knowledge and understanding of the youth justice system in New Zealand: A community sample" (M.Sc. Thesis, Victoria University of Wellington, 2019) at 8.
[119] At 58.

justice provision.[120] Hence, it is intrinsically unethical to require incompetent defendants to partake in legal proceedings, given this would "compromise a fair and unbiased assessment of both culpability and accountability".[121] This is insufficiently catered for via the graduated system for criminal responsibility under the OTA. Whilst this delays the earliest involvement with the system, 12/13 year olds who commit serious crimes and YPWO alike, exhibit marked deficiencies detrimental to their competency at rates which suggest this is insufficient to account for DI. In general comment No.24, the CORC showed recognition of documented evidence indicating at age 12/13, the frontal cortex is still developing, meaning so is their maturity and capacity for abstract reasoning.[122] Thus, decreasing their ability to understand the effects of their actions and court proceedings.[123] Hence, subjecting an alleged defendant to trial proceedings who lacks rational understanding and ability to effectively participate would therefore offend "the moral dignity of the process because it treats the defendant not as an accountable person, but as an object of the state's effort to carry out its promises."[124]

Research supports the notion DI impairs court-related competence and ought to be acknowledged within fitness evaluations. Youth are distinct from adult populations in terms of competency. Sanborn suggests youth tend to be less competent to stand trial compared with adults, indicative of the need for a cautious approach to youth fitness compared to adults.[125] Youth FTS was first investigated in a 1984 study, analysing differences between youth and adult populations evaluation scores which were found to be significantly correlated to age.[126] Successive studies have not deviated from the notion youth lack the cognitive ability, developmental maturity nor level of judgment required for meeting competency standards.[127] Grisso et al. and Bath et al. are international studies supporting the argument DI impairs court-related competence similarly to mental disorders/cognitive deficits.[128] Grisso et al. found approximately one-third of 11 to 13 year olds and one-fifth of 14 to 15 year olds exhibited pronounced deficiencies in court-related competencies.[129] These findings are reinforced in

[120] Richard Bonnie "The competence of criminal defendants: A theoretical reformulation" (1992) 10(3) Behavioural Science & the Law 291 at 306.
[121] Above n 118, at 13.
[122] Committee on the Rights of the Child, above n 102, at [22].
[123] Committee on the Rights of the Child, above n 102, at [22].
[124] Above n 120, at 295.
[125] Joseph Sanborn "Juveniles' competency to stand trial: Wading through the rhetoric and the evidence" (2009) 99(1) Journal of Criminal Law & Criminology 135.
[126] Above n 118, at 16.
[127] David Farrington, Rolf Loeber and James Howell "Young adult offenders: the need for more effective legislation options and justice processing" (2012) 11(4) Criminology & Public Policy 729 at 732.
[128] Above n 115, at 358. See also Eraka Bath and others "Correlates of competency to stand trial among youths admitted to a Mental Health Court" (2015) 43(3) Journal of the American Academy of Psychiatry and the Law 329.
[129] Above n 115, at 356.

later studies concluding legal and court-related capabilities are positively correlated with age.[130] Additional studies using adult samples are necessary to draw direct comparisons but research confirms adults do not exhibit significant court-related deficits and, if present, they are due to mental/intellectual disorder which is recognised within the current test.[131] Thus, youth are distinguishable from adults necessitating recognition of this distinction within the FTS test.

Other early studies further corroborate the impact of age and DI on legally relevant abilities. Studies using samples of detained youth found approximately 35 per cent of 11 to 13 year olds and 22 per cent of 14 to 15 year olds demonstrated impaired abilities to reason and understand trial-related issues.[132] Additionally, 11 to 13 year olds exhibited considerably impaired ability to think about the long-term consequences of trial-related decisions.[133] A 2015 study involving youths in mental health court reinforced prior findings through analysis of the correlation between age, mental health diagnoses and treatment. Results suggested a finding of unfitness was markedly more probable in those below 15 compared with older youth because of developmental limitations, irrespective of diagnosis/treatment for mental illness.[134] A 2008 study further substantiated the argument for DI to be considered in fitness assessments, with overall findings that youth showed "less responsibility and perspective" relative to older groups regarding decision-making.[135] Thus, supporting both the need for acknowledgement of DI within the fitness test and a higher ACR.

Recent NZ research further supports this proposition. A 2016 study aimed to delineate characteristics of youth remitted for forensic assessment in Auckland.[136] One-fifth of youth regarded incompetent by experts were not formally diagnosed with any mental disorder. Instead, they were considered unfit due to deficits in court-related competencies stemming from a mix of cognitive limitations and DI, thus signalling some current acknowledgement by

[130] Above n 127. See also above n 112.
[131] Above n 115, at 334.
[132] Susan Ficke, Kathleen Hart and Paul Deardorff "The performance of incarcerated juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)" (2006) 34(3) Journal of the American Academy of Psychiatry and the Law 360 at 365, as cited in above n 118, at 17.
[133] Kimberly Larson and Thomas Grisso "Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A guide for lawmakers" (paper prepared for the National Youth Screening & Assessment Project, University of Massachusetts, 2011) at 18, as cited in above n 118, at 17.
[134] Bath, above n 128, at 330.
[135] Kathryn Modecki "Addressing gaps in the maturity of judgment literature: Age differences and delinquency" (2008) 32(1) Law and Human Behaviour 78 at 89.
[136] See above n 117.

experts of links between youth developmental levels and FTS.[137] Hence, statutory amendment is not unwarranted.

A 2017 study found in the alternative – DI had an insignificant influence on evaluator opinions/court fitness findings and was noted as a vulnerability factor in two of 79 cases.[138] Moreover, only nine per cent of the 29 per cent of youth flagged as likely to be classed unfit ended up being found unfit. Thus, highlighting the need for change in NZ's approach. Still absent though is the NZ establishment of base rates of DI that significantly influence youth competence and research assessing DI independent to pre-existing mental/intellectual disorders.[139] The most recent NZ study addressed these absences by investigating youth fitness in a community sample of NZ youth to establish base rates of competence in the general NZ youth population.[140] Dean's findings support the "existence and impact of DI on trial-related capacities" as her study demonstrated that "developmental maturity level impacted young people's knowledge, understanding, reasoning and decision-making" regarding the YJ system in NZ.[141]

Importantly, criticism of DI exists. Sanborn raised concerns many studies in actuality found most youth exhibit adult-like capabilities.[142] He insists against an umbrella affirmation of youth incompetence, but his findings do suggest youth below 14 years suffer deficits in court-related abilities.[143] Whilst this finding is supported in other studies, Dean refutes Sanborn's assertion DI is irrelevant above 14, arguing "the presence of DI and significant deficits in legal knowledge and understanding extends beyond those 14 years and younger".[144] This was supported by her study which found in its reasoning and decision-making sections, age was not predictive of how individuals scored, whilst IQ and gender were.[145] This demonstrates that "whilst age acts as an indicator of legal capabilities, complex developmental timetables make it unwise to assume all young people are at the expected level of competence, or fitness, for their age."[146]

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[137] Above n 117, at 543.
[138] David Tan and others "New Zealand Youth Fitness to Stand Trial: the impact of age, immaturity and diagnosis on evaluator opinions and court determinations" (2018) 25(3) Psychiatry, Psychology and Law 374 at 379.
[139] Above n 118, at 23.
[140] Above n 118, at 24.
[141] Above n 118, at 58.
[142] Above n 118, at 59.
[143] Above n 125, at 187.
[144] Above n 118, at 59.
[145] Above n 118, at 57.
[146] Above n 118, at 59.

Furthermore, this research potentially implicates NZ's approach as contrary to the CRC. Article 37 affords CYP the right to participate in their own criminal proceedings, and all CYP must be able to formulate opinions and express them as a crucial part of participating in proceedings.[147] Article 40.2 affords CYP due process rights with regard to their views, and in respect of their age and maturity.[148] As Dean's study demonstrates the relationship between age, IQ and competence, this introduces the possibility current legislation fails to adequately uphold primary components of the CRC in practice i.e. youth's due process rights are violated.[149] The CORC has acknowledged CYP lack the ability to understand criminal proceedings given brain development persists into the early twenties and encourage States to recognise this in their approach.[150] Yet, section 4 of the CPMIPA establishes the standard for FTS but fails to impart legal acknowledgement of youth's DI and its impact on court-related competence.[151]

Extensive research solidifies the importance of acknowledging the relationship between DI and youth FTS. Current practice in NZ fails to account for this and hinders youth's due process rights. Whilst current Youth Court procedures such as the provision of Youth and Lay advocates support youth's understanding of court procedures, this is insufficient to recognise and protect vulnerable youth displaying severe deficits.[152] Hence, the test should be clarified via statutory reform as recommended below to better account for DI, not just mental and intellectual disorders. The source of incompetency, whether mental illness or immaturity, should make no difference.[153] The same due process constraints which forbid trial of mentally ill or intellectually disabled defendants unable to meaningfully participate ought to apply equivalently to those incompetent by reason of immaturity.[154]

VII Recommendations

Research evidences YPWO differ from first-time adult offenders.[155] Furthermore, the large body of evidence mentioned solidifies the notion DI must be acknowledged somehow within the YJ field. Whilst developmental research presents an uncomfortable reality for

[147] *Convention on the Rights of the Child*, above n 104, art 37.
[148] *Convention on the Rights of the Child*, above n 104, art 40.2
[149] Above n 118, at 64.
[150] Committee on the Rights of the Child, above n 102, at [22].
[151] CPMIPA, s 4.
[152] Above n 37.
[153] Above n 115, at 358.
[154] Above n 115, at 358.
[155] C Johnson "Are we failing them? An analysis of the New Zealand Criminal Youth Justice System: How can we further prevent youth offending and youth recidivism?" (M.A. Thesis, Massey University, 2015) at 4.

policymakers, clear and achievable solutions will be mooted to remove current prejudices disadvantaging youth. The current approach must be reformed to recognise age-associated deficiencies to align with international and national obligations.

No specific age is identified as developmentally significant in terms of when criminal responsibility should begin. However, research strongly supports the notion under 14 year olds across the board exhibit significant court-related competency deficits. For this reason, it is recommended the ACR be raised to 14 to align with strong neuroscientific research and international standards. Additionally, amendment of the current FTS test to acknowledge the influence of DI will ensure the rights of YPWO are upheld. Together, these changes more adequately protect CYP who lack capacity to meaningfully participate in proceedings.

A Age of criminal responsibility

Raising the ACR is a necessary and warranted solution. The current age of 10 sits below the worldwide median of 12, violates international standards and is inconsistent with other domestic legal minimum ages.[156] Given no murder/manslaughter charges have been placed against 10 or 11 year olds for over 40 years, and under 30 12/13 year olds are prosecuted in the Youth Court each year, an immediate increase "would be a formality and present no problems".[157] The current government has agreed to consider whether the current minimum age should be raised but this may be a case of political hot potato.[158] The current age is too low and should be raised to 14 to align with national and international imperatives and developmental research. This however, is subject to the exception of 12 and 13 year olds, who should be prosecuted where homicide is committed. This exception will operate to adequately balance the right of society to be protected from harm and the competing objective of recognising a child's immaturity and their right to be treated fairly under the law, whilst acknowledging homicide as the most serious crime warranting punishment.[159]

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[156] Penal Reform International "Justice for Children Briefing No.4: The minimum age of criminal responsibility" (2013) <https://www.penalreform.org/resource/justice-children-briefing-no4-minimum-age-criminal-responsibility/>.
[157] Office of the Children's Commissioner *Children with Offending Behaviour: supporting children, 10-13 year olds, who seriously offend and are referred under s 14(1)(e) of the Oranga Tamariki Act 1989* (August 2020) at 6 and 22.
[158] Georgia Forrester "As countries look to raise the age of criminal responsibility, should NZ too? (1 November 2019) Stuff New Zealand <https://www.stuff.co.nz/national/crime/116585038/as-countries-look-to-raise-the-age-of-criminal-responsibility-should-nz-too>.
[159] Raymond Arthur *Young Offenders and the Law* (Taylor & Francis, Hoboken, 2010) at 43.

Worldwide disparities exist whereby minimum ages range from as six to 18.[160] Inherent in any legal age threshold is artificiality but although reaching a particular age does not come with instant developmental maturity, the age of 14 can be justified by the extensive developmental research discussed.[161] This evidences that individuals aged under 14 exhibit the most severe trial-related incompetence, such that the literature base regards this cohort nearly always unfit due to DI.[162]

Raising the minimum ACR to 14 is necessary for NZ to adhere to international standards it has committed to. Article 1 of the CRC defines "child" as every human being below 18.[163] Article 40(3)(a) requires states to set a minimum ACR.[164] Rule 4.1 of the Beijing Rules states the ACR shall not be fixed at too low an age level, bearing in mind facts of emotional, mental and intellectual maturity.[165] No minimum age is provided by either the CRC or Beijing Rules, however, in 2007 the CORC considered 12 years the absolute minimum but later considered even this too low, encouraging states to increase their minimum age to at least 14, if not 15 or 16.[166] NZ's lack of adherence to the CRC definition of "child" has been the subject of multiple CORC reports between 1997 and 2016, as well as a 2010 Human Rights Commission report.[167] Most recently, the CORC advised states must "not set the minimum ACR at an age less than 14, placing emphasis on brain development evidence".[168] Thus, a minimum ACR of 14 years better accords with such research and expected standards. Anything less is unjustifiable.

A higher ACR is also necessary to mend legislative failures to safeguard YPWO's meaningful participation in proceedings, in accordance with their due process rights. The law's capacity to hold 10 year olds legally accountable for serious crimes explicitly contradicts developmental research proving this cohort of youth, who require the most help in presenting a meaningful

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[160] Above n 156.
[161] Sarah Kuper "An Immature Step Backward for New Zealand's Youth Justice System? A Discussion of the Age of Criminal Responsibility" (LLB (Hons) Dissertation, University of Otago, 2010) at 4, as cited in Chye, above n 1, at 843.
[162] Above n 115. See also Bath, above n 128. See also above n 133.
[163] *Convention on the Rights of the Child*, above n 104, art 1.
[164] *Convention on the Rights of the Child*, above n 104, art 40(3)(a).
[165] Above n 101, Rule 4.1.
[166] Committee on the Rights of the Child, above n 102, at 6.
[167] Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/15/Add.71 (24 January 1997) at [10] and [23]. See also Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/15/Add.216 (27 October 2003) at [4], [5] and [9]. See also Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/NZL/CO/3-4 (11 April 2011) at [56(a)]. See also Committee on the Rights of the Child *Concluding observations on the fifth periodic report of New Zealand* CRC/C/NZL/CO/5 (21 October 2016) at [4]. See also Human Rights Commission *Human Rights in New Zealand* (2010).
[168] Above n 6, at [YJ 2.1.14]. See also Committee on the Rights of the Child, above n 102.

defence, are least adept to do so.[169] This represents an infringement on due process rights afforded in the CRC and OTA.[170] The OTA's protective foundation is arguably unfulfilled, as the rights of children under 14 who undertake court proceedings are violated. International support for this argument has been given by the European Court of Human Rights (ECHR) which has concluded in multiple judgments the State failed to assure the meaningful participation of children throughout trial proceedings which resulted in rights and due process breaches.[171] For example, in *T v UK*, the ECHR stated a fair trial "constituted the capacity to participate and engage within the trial arena", and held the defendants (10 years old) were not given a fair trial citing inadequate measures taken to ensure they could properly understand and participate in proceedings.[172] NZ's OTA - legislation drafted to afford protection to CYP - is failing to do so, necessitating a higher ACR.

Beneficially, raising the ACR reduces the harmful implications of early criminalisation. Research confirms early contact with the YJ system can lengthen children's offending careers.[173] Potential reasons include labelling and decreased likelihood of completing education/securing employment.[174] However, downfalls also exist given alternatives to criminalisation may lack the same provision of due process, transparency and protection of legal rights the justice system provides.[175]

The more complex issue involves appropriate treatment of under 14 year olds who now fall outside the YJ system. Removing 12/13 year olds from the Youth Court jurisdiction, with the exception of homicide, accords with research confirming youth offending responses based on punishment, deterrence and supervision are generally inefficient.[176] Where criminalisation is no longer possible, a welfare-based approach should underpin policy targeted at under 14s. This is supported by the efficacy of welfare-based approaches in European nations such as the Netherlands.[177] NZ's current gap in preventative measures is problematic.[178] I recommend a

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[169] Above n 118, at 67.
[170] *Convention on the Rights of the Child,* above n 104, art 40. See also Oranga Tamariki Act, s 5.
[171] Louise Forde "Realising the right of the child to participate in the criminal process" (2018) 18(3) Youth Justice 265 at 272.
[172] *T v United Kingdom* (2000) 30 EHRR 121 (ECHR) as cited in Chye, above n 1, at 853.
[173] Lesley McAra "Child-friendly Youth Justice?" in Bateman and others (eds) *Child-friendly youth justice?: A compendium of papers given at a conference at the University of Cambridge in September 2017* (National Association of Youth Justice, 2018) 5 at 9.
[174] Dr Harriet Pierpoint "Age of Criminal Responsibility: A provocation paper" (5 February 2020) Medium <https://medium.com/reframing-childhood-past-and-present/age-of-criminal-responsibility-1e7714db9c1c>.
[175] Above n 176.
[176] Principal Youth Court Judge Andrew Becroft "10 suggested characteristics of a good youth justice system" (paper for The Pacific Justices' Conference, Auckland, March 2014) at 11.
[177] Josine Junger-Tas "Youth Justice in the Netherlands" (2004) 31 Crime and Justice 293 at 293.
[178] Above n 155, at 2.

developmental crime prevention focus. This policy requires collaboration between families, communities and across education, health, cultural and social services.[179] Improved programmes addressing youth-specific characteristics/needs such as mental health are required and more effective and less costly than prison or harsh punishments.[180] In particular, two key focus areas are family and education.

It is widely recognised that a child's individual upbringing and community play a significant role in their development and the "needs" principle assumes CYP offend due to factors outside their control.[181] Hence, in accordance with the OTA's objective of supporting children's "needs", policy should be directed towards supporting families, who have a pronounced impact on children's offending potential, to promote children's positive development. Crucially, where the family environment is causative and care and protection concerns arise, section 83 of the OTA remains available. Beyond this, more widely accessible and low-cost parental support is necessary to assist parents. Parent management training programmes like "Triple P" are most effective when taken before the child reaches 10 and are successful in enhancing positive interactions between parents and their children, and emotional communication/behaviour management skills.[182] However, many parents have various needs based on the diverse characteristics/issues CYP exhibit.[183] Hence, these programmes should be low-cost, accessible, and divided based on age group to better cover specific needs relevant to different children.[184] Fortifying parental capabilities is key to improving youth outcomes and lessen the burden on the State.[185]

Education is the bedrock of healthy child development.[186] Austria's preventative education programme suggests early intervention provides positive outcomes.[187] Austria's approach begins at pre-school level with a curriculum involving weekly courses covering "peaceful conflict resolution, prevention of violence, integration and addiction awareness as well as the recognition of right and wrong".[188] Courses are taken by trained social workers and teachers and have produced positive outcomes by enhancing children's coping mechanisms and skills

[179] Above n 12, at 6.
[180] Above n 12, at 28.
[181] Nicholas Bala *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing, Toronto, 2002) at 6.
[182] Above n 12, at 19.
[183] Above n 155, at 122.
[184] Above n 155, at 122.
[185] Above n 155, at 122.
[186] Above n 12, at 20.
[187] Above n 155, at 98.
[188] Bruckmuller "Austria: A protection model" in Junger-Tus and Decker (eds) *An international handbook of juvenile justice* (Springer, New York, 2008) 263 at 271.

such as communication, compromise and conflict resolution.[189] This provides a model to guide NZ's approach. Addition of 'life skills' to the curriculum brings NZ in line with international norms and provides a cost-effective option to improve children's crisis response skills. Teaching could cover communication skills, managing/resolving conflict, how to compromise and cultural diversity, "with the objective to prevent 'bad' responses to conflict or troubling situations for youth".[190]

Where police identify particularly high-risk children, direction to evidence-based rehabilitation programmes within the community can be utilised.[191] Such programmes follow a risk, needs, responsivity model to provide the most appropriate rehabilitation depending on the individual's risk.[192]

Continued ignorance of neuroscience necessitating change is promoting harm, whereby more CYP experience a breach of their fundamental rights in accordance with the CRC, of which NZ has committed to upholding. The "tough on crime" stance cannot override the serious inequities the present ACR allows. A higher ACR eliminates a significant portion of the issues arising out of establishing youth FTS trial, allowing a stronger focus on establishing more adequate procedures suitable for youth suffering severe deficits. Furthermore, a higher ACR allows a focus on children's wellbeing, care and protection as the "most effective and enduring mechanism through which to tackle their harmful behaviour," and hence key to reducing recidivism.[193]

B Fitness to stand trial test

1 Developmental immaturity

Raising the ACR is necessary to bring NZ law into alignment with developmental research. However, literature recognises the issue of having protections founded wholly on an arbitrary age range.[194] Hence, flexibility is necessary to recognise development continues through

[189] At 271.
[190] Above n 155, at 120.
[191] Above n 12, at 27.
[192] Above n 12, at 27.
[193] Office of the Children's Commissioner *It's time to stop criminalising children under 14* (September 2019) at 1.
[194] Kate Fitz-Gibbon "Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales" (2016) 16(4) Criminology & Criminal Justice 391 at 406.

adolescence into the 20s.[195] Such flexibility can be provided via an amended fitness test. Society distinguishes between youth and adults in many ways including voting and drinking ages. It seems illogical the fitness test would not be separate to adults or have significant consideration of age, especially given expectations set out in the CRC. Research confirms DI is still relevant above 14 and hence must be acknowledged in the fitness test.[196]

I recommend DI be included among the admissible predicates as a 'mental impairment', requiring a fitness assessment, alongside 'intellectual disability' and 'mental disorder'. The CPMIPA should provide formalised legal recognition of this and define DI to provide courts/assessors with guidance given it is a novel addition. This should be drafted with reference to the most current research. A definition should not be too narrow so as to risk future obsoletion as law/research evolves. An additional provision within the CPMIPA could be as follows:

> **Meaning of developmental immaturity**
>
> (1) A person exhibits **developmental immaturity** where the person is impaired by an abnormality of mental functioning arising from incomplete development of neurological, social, emotional or cognitive systems that results in significant deficits in trial-related cognitive or functional abilities.
>
> (2) The trial-related cognitive or functional abilities referred to in subsection (1) include the capacity to –
>
> (a) understand and appreciate the charges alleged:
>
> (b) appreciate the range and nature of potential dispositions that may be imposed:
>
> (c) have a rational and factual understanding of the proceedings against them:
>
> (d) consult with counsel with a reasonable degree of rational understanding:
>
> (c) disclose to counsel facts and information pertinent to proceedings and understand their applicability to their own case:
>
> (d) testify relevantly; and
>
> (e) any other factors the qualified health assessor deems relevant.

The question should be raised in the same way it currently is with mental/intellectual disorders. The need for an automatic inquiry age is diminished via the higher ACR. However, judges, lawyers, and prosecutors must be alert to the potential presence of DI in adolescents.[197] The fact DI is included as a legal predicate for unfitness will not necessitate a finding all youth who

[195] Above n 112, at 468.
[196] Above n 118. See also above n 113. See also above n 115.
[197] Above n 115, at 334.

are developmentally immature will be unfit. The question will be whether that immaturity, actually has the effect of rendering the person deficient in court-related competencies i.e. understanding the implications of a plea and the sentencing process, conducting a defence or instructing a lawyer.[198] For the purposes of assessment, a "health assessor" should be a licensed psychologist or psychiatrist with expertise in child development. I recommend DI should be applied at the court's discretion. Raising the ACR already provides improved protection of those most at risk of court-related incompetency's. Above this age, a case-by-case assessment as is done now should be undertaken.

The statutory recognition of DI as a factor influencing FTS is heavily warranted by the need to align NZ law with current research and fulfil due process obligations. The need for acknowledgement of DI is evident in research and is beginning amongst clinicians and legal professionals.[199] Prior discussion provided an outline of the extensive research which supports this recommendation. The current reliance on discretion of professionals which is guided by inconsistent views necessitates clear guidelines around this and a suitable assessment tool to assess youth adequately.

Research regarding factors influencing court process and decision-making has demonstrated formal laws shape court process, inform due process requirements to protect youth and laws which guide appropriate practice raise the likelihood professionals will use that practice.[200] It is however important to note the likely difficulty faced in recommending change to the current ambiguous definition of 'mental impairment' in the CPMIPA. Drafters intended to implement a vague definition to provide flexibility and cater to a nuanced understanding and assessment of impairment.[201] The impact of case law is strong in NZ, evidenced by the fact the courts have largely been responsible for defining the boundaries of 'mental impairment'. In *Roberts (No 2),* which was later approved by the Court of Appeal,[202] the court suggested:[203]

> "The judgment has to be made in the context. It is not satisfied by the accused demonstrating some fundamentals of rationality. So, the question is whether or not [the defendant] is 'unable, due to mental impairment, to conduct a [rational] defence or to instruct counsel to do so'."

[198] *R v Komene* [2013] NZHC 1347 at [18]. See also *R v Cunningham* HC Gisborne CRI-2011-016-0000048, 10 November 2011 at [26].
[199] Above n 118, at 53.
[200] Above n 118, at 68.
[201] Warren Brookbanks "The Development of Unfitness to Stand Trial in New Zealand" in Ronnie Mackay and Warren Brookbanks (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, Oxford, 2018) 129 at 133.
[202] *Solicitor General v Dougherty* [2012] 3 NZLR 586.
[203] *R v Roberts (No 2)* HC Auckland CRI-2005-092-14492, 22 November 2006 at [57].

This implicates case law as a potential alternative route to increase recognition of DI. It is evident the categories may be regarded as a 'mental impairment' are not closed.[204] Hence, case law decisively supporting DI as evidence of unfitness will encourage "a more inclusive practise of fitness evaluations" to encompass DI and give clinical professionals confidence to follow this precedent and undertake fitness assessments based on developmental level.[205] *R v Slade* provides encouraging signs of the courts' willingness to do so. The Court of Appeal expressed "it is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults."[206]

Even so, reliance on years of development in case law to give vulnerable youth the support they need and ought to be afforded in accordance with the CRC is undesirable. Formal recognition via statute will better guarantee their rights to due process. Currently, youth are afforded a Youth advocate who is responsible for supporting the individual in the legal aspects of their case. This is arguably insufficient. Another alternative which would have the effect of improving a youth's potential competence for trial is via 'teaching'. A recent study using the FST-SSIT showed the re-testing of youth following teaching resulted in "significant improvement in the amount of information retained" for all nine target questions, indicating there is "scope to improve young people's general knowledge through teaching".[207] Therefore, it may be beneficial to place more focus on the teaching of youth regarding general knowledge of court process and court-related information to improve their ability to meaningfully participate in court and be given their right to a fair trial.

Acknowledgement of DI in the fitness context is not unprecedented internationally. Over 18 American states have youth-specific statutory guidance for the issue of FTS.[208] In particular, a number of American courts have recognised individuals exhibiting DI as equivalent to those incompetent by reason of mental or intellectual disorder.[209] For example, The Iowa Court of Appeal concluded "limiting determinations of incompetency in juvenile cases to those cases in which the ability to appreciate, understand and assist is based on a 'mental disorder' would offend rights to due process."[210] Further, the Code of Virginia states:[211]

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[204] Above n 203, at 135.
[205] Above n 118, at 69.
[206] *R v Slade* [2005] 2 NZLR 526 at 533.
[207] Above n 118, at 52.
[208] Above n 125, at 142.
[209] Above n 133, at 24.
[210] *In the Interest of A.B* 2006 Iowa App. LEXIS 189 (Iowa Ct App 2006).
[211] Va. Code § 16.1-356.

> "If the juvenile is otherwise able to understand the charges against him and assist in his defence, a finding of incompetency shall not be made based solely on... the juvenile's age or developmental factors..."

Thus, recognition of DI in NZ is evidently feasible and can be guided by overseas experience.

The England and Wales Law Commission's 2005 proposal for a DI defence provides useful lessons, despite the differing 'defence' context. In terms of when DI should apply, it was argued where DI "is merely the result of social and/or environmental influences, then it seems unlikely the defendant would satisfy the requirements…".[212] Such arguments would be useful to consider when drafting, however, in the interests of flexibility, boundaries ought to be left to the courts. The proposal yielded apprehension that "an over-reliance on expert evidence would complicate the criminal justice process".[213] However, this reliance already exists in terms of current assessments in NZ so will not pose extraordinary additional burden. Further, NZ can reduce complications by providing sufficient guidance similar to the Law Commission's template guiding how the nature/degree of DI should be assessed by experts, including guidance on how cognitive functioning, mental state, behavioural problems, intellectual level and psychological development should be assessed.[214] Moreover, research following England/Wales' proposed defence of DI, provides encouraging signs of willingness within the legal profession to acknowledge DI. Of practitioners and policy stakeholders interviewed, more than two-thirds demonstrated support for acknowledging DI.[215] Findings also suggested practitioners viewed the flexibility afforded by the case-by-case assessment of maturity, which provides greater legal protection, as advantageous.[216] This flexibility was also appealing from a judicial viewpoint.[217] Hence, the flexibility provided by a case-by-case analysis as recommended here is warranted and likely to be beneficial in conjunction with raising the ACR.

One main argument in opposition of including DI within fitness tests is to say immaturity is already compensated for via the principles guiding the Youth Court. Further, some argue the "very existence of a juvenile court presumes all youth are less mature than adults, and… [is]

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[212] Above n 196, at 404.
[213] Above n 196, at 404.
[214] Law Commission (England and Wales) *Criminal Liability: Insanity and Automatism* (Discussion paper, 2013) at 185-191.
[215] Above n 196, at 405.
[216] Above n 196, at 405.
[217] Above n 196, at 405.

designed to take account of that immaturity."[218] I argue, whilst Youth Court procedure attempts to account for age, this insufficiently protects youth with severe deficits. Extensive research and youth's right to due process override, necessitating change.

2 Mental health system still harmful?

It is crucial to acknowledge the remaining potential for harm even after the implementation of these recommendations. Such amendments will have a net widening effect in terms of CYP found unfit. Arguably, the current disposition options result in these CYP being worse off in the mental health system than the criminal system. Due to the nature of DI which is distinct from curable disorders, disposition options have limited potential for such individuals. Any remediation of incompetence due to DI could be lengthened given competence-related cognitive functions are still developing and can continue into the 20s.[219] Hence, this would extend the trial process which is detrimental for youth's wellbeing.

As current disposition options under the CPMIPA and IDCCRA are inappropriate for youth displaying DI, additional options are necessary under the CPMIPA, guided by research and best practise, to adequately support this cohort. Design of this alternative should not deprive youth of crucial social/educational resources as these are necessary to promote development and deprivation is known to have a detrimental effect.[220]

VIII Conclusion

NZ's current framework fails to uphold youth's fundamental right to be fit to stand trial.
The current test acknowledges 'mental disorder' and 'intellectual disability' as mental impairments which may support a finding of unfitness. However, the same deficits in court-related competencies exhibited by individuals with mental disorder or intellectual disability are exhibited by individuals presenting developmental immaturity alone. Despite clear efforts to protect youth in domestic legislation, allowing youth to undergo trial proceedings whilst lacking court-related competence is inherently unfair, contradicts the fundamental notion of the doctrine of fitness to stand trial and violates due process rights. The abundance of emerging developmental research and increasing international recognition suggests NZ is failing its most

[218] Above n 133, at 25.
[219] Above n 133, at 24.
[220] Above n 133, at 24.

vulnerable – youth. Consequently, reform is needed to bring NZ into alignment with developmental evidence and international standards.

Both raising the ACR and reform of the FTS test are necessary. Raising the ACR ensures the vital protection of those most at risk of trial-related deficits. Whilst the inclusion of DI as an admissible predicate for 'mental impairment' provides the necessary flexibility and protection of those above 14. Remember Alex's case. He lacked understanding of court proceedings and the effect of his decisions, such that he took responsibility for something he did not do. Yet as he did not have a 'mental impairment' under the current framework, he was found fit. For NZ's CYP like Alex, these recommendations ensure they are adequately protected in a system which currently allows their incompetence to become their own source of defeat, reinstating their due process rights.

IX Bibliography

A Cases

1 New Zealand

New Zealand Police v AZ [2019] NZYC 88.

Nonu v R [2017] NZCA 170.

Police v FG YC Auckland CRI-2019-204-192, 29 June 2020.

Police v HJ [2016] NZYC 168.

Police v KM [2019] NZYC 436.

Police v MQ [2019] NZYC 456.

Police v NJ HC Auckland CRI-2010-404-309, 21 September 2010.

P v Police [2007] 2 NZLR 528.

Police v UP YC Auckland CRI-2010-204-314, 5 May 2011.

R v Brooks [1945] NZLR 584 (CA).

R v Cunningham HC Gisborne CRI-2011-016-0000048, 10 November 2011.

R v Duval [1995] 3 NZLR 202 (HC).

R v Komene [2013] NZHC 1347.

R v McKay [2009] NZCA 378.

R v Roberts (No 2) HC Auckland CRI-2005-092-14492, 22 November 2006.

R v Slade [2005] 2 NZLR 526.

Solicitor General v Dougherty [2012] 3 NZLR 586.

2 United Kingdom and Europe

Frith (1790) 22 St Tr 307.

T v United Kingdom (2000) 30 EHRR 121 (ECHR).

3 United States

In the Interest of A.B 2006 Iowa App. LEXIS 189 (Iowa Ct App 2006).

Thompson v Oklahoma 487 US 815 (1988).

B Legislation

1 New Zealand

Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010.

Crimes Act 1961.

Criminal Procedure (Mentally Impaired Persons) Act 2003.

Family Violence Act 2018.

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

Mental Health (Compulsory Assessment and Treatment) Act 1992.

New Zealand Bill of Rights Act 1990.

Oranga Tamariki Act 1989.

Oranga Tamariki Legislation Act 2019.

2 United States

Va. Code § 16.1-356.

C Books, chapters in books and loose-leaf texts

Raymond Arthur *Young Offenders and the Law* (Taylor & Francis, Hoboken, 2010).

Dennis J Baker *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate Publishing Ltd, Surrey, 2011).

Nicholas Bala *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing, Toronto, 2002).

Richard Bonnie and Thomas Grisso "Adjudicative competence and youthful offenders" in Thomas Grisso and Robert Schwartz (eds) *Youth on Trial: A developmental perspective on juvenile justice* (University of Chicago Press, Illinois, 2000) 73.

W Brookbanks and J Skipworth "Fitness to plead" in W Brookbanks and S Simpson (eds) *Psychiatry and the Law* (LexisNexis, Wellington, 2007) 157.

Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011).

Warren Brookbanks "The Development of Unfitness to Stand Trial in New Zealand" in Ronnie Mackay and Warren Brookbanks (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, Oxford, 2018) 129.

BJ Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993).

Bruckmuller "Austria: A protection model" in Junger-Tus and Decker (eds) *An international handbook of juvenile justice* (Springer, New York, 2008) 263.

Simon France (ed) *Adams on Criminal Law: Criminal Procedure* (online looseleaf ed, Thomson Reuters).

Robert Ludbrook and others *Brookers Family Law: Child Law* (online looseleaf ed, Thomson Reuters).

Gabrielle Maxwell and Allison Morris *Family, Victims, and Culture: Youth Justice in New Zealand* (Social Policy Agency and Institute of Criminology, Victoria University of Wellington, Wellington, 1993).

Lesley McAra "Child-friendly Youth Justice?" in Bateman and others (eds) *Child-friendly youth justice?: A compendium of papers given at a conference at the University of Cambridge in September 2017* (National Association of Youth Justice, 2018) 5.

D Journal Articles

Caleb Armstrong and Susan Hatters Friedman "Fitness to Stand Trial in the New Zealand Youth Court: Characterising Court-Ordered Competence Assessments" (2016) 23(4) Psychiatry, Psychology and Law 538.

Eraka Bath and others "Correlates of competency to stand trial among youths admitted to a Mental Health Court" (2015) 43(3) Journal of the American Academy of Psychiatry and the Law 329.

Bath, Sidhu and Stepanyan "Juvenile competency to stand trial" (2016) 25(1) Child Adolesc Psychiatr Clin N Am. 49.

Richard Bonnie "The competence of criminal defendants: A theoretical reformulation" (1992) 10(3) Behavioural Science & the Law 291.

Francine Chye "When children kill: Age of criminal responsibility and criminal procedure in New Zealand" (2012) 2 NZLSJ 837.

David Farrington, Rolf Loeber and James Howell "Young adult offenders: the need for more effective legislation options and justice processing" (2012) 11(4) Criminology & Public Policy 729.

Susan Ficke, Kathleen Hart and Paul Deardorff "The performance of incarcerated juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)" (2006) 34(3) Journal of the American Academy of Psychiatry and the Law 360.

Kate Fitz-Gibbon "Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales" (2016) 16(4) Criminology & Criminal Justice 391.

Louise Forde "Realising the right of the child to participate in the criminal process" (2018) 18(3) Youth Justice 265.

Thomas Grisso and others "Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants" (2003) 27 Law and Human Behaviour 333.

Josine Junger-Tas "Youth Justice in the Netherlands" (2004) 31 Crime and Justice 293.

Sophie Klinger "Youth Competence on Trial" (2007) NZ Law Rev 235.

Nessa Lynch "Changes to Youth Justice" (2010) 8(3) NZLJ 129.

Kathryn Modecki "Addressing gaps in the maturity of judgment literature: Age differences and delinquency" (2008) 32(1) Law and Human Behaviour 78.

Alison Morris and Gabrielle Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26(1) Australian and New Zealand Journal of Criminology 72.

Joseph Sanborn "Juveniles' competency to stand trial: Wading through the rhetoric and the evidence" (2009) 99(1) Journal of Criminal Law & Criminology 135.

Laurence Steinberg "Adolescent development and juvenile justice" (2009) 5 Annu Rev Clin Psychol 459.

David Tan and others "New Zealand Youth Fitness to Stand Trial: the impact of age, immaturity and diagnosis on evaluator opinions and court determinations" (2018) 25(3) Psychiatry, Psychology and Law 374.

E Parliamentary and government materials

1 New Zealand

(5 October 1999) 580 NZPD 19706.

(21 October 2003) 612 NZPD 9511.

(21 October 2003) 612 NZPD (Criminal Procedure (Mentally Impaired Persons) Bill – Third Reading, Phil Goff).

(21 October 2003) 612 NZPD 9576 (Intellectual Disability (Compulsory Care and Rehabilitation) Bill – In committee).

2 England and Wales

Law Commission (England and Wales) *Criminal Liability: Insanity and Automatism* (Discussion paper, 2013).

F Reports

Professor Sir Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, June 2018).

Human Rights Commission *Human Rights in New Zealand* (2010).

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

Ministry of Justice *Children and young people in court: Data notes and trends for 2019* (December 2019).

Office of the Children's Commissioner *It's time to stop criminalising children under 14* (September 2019).

Office of the Children's Commissioner *Children with Offending Behaviour: supporting children, 10-13 year olds, who seriously offend and are referred under s 14(1)(e) of the Oranga Tamariki Act 1989* (August 2020).

G United Nations Materials

Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/15/Add.71 (24 January 1997).

Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/15/Add.216 (27 October 2003).

Committee on the Rights of the Child *Concluding observations: New Zealand* CRC/C/NZL/CO/3-4 (11 April 2011).

Committee on the Rights of the Child *Concluding observations on the fifth periodic report of New Zealand* CRC/C/NZL/CO/5 (21 October 2016).

Committee on the Rights of the Child *General comment No.24* UN Doc CRC/C/GC/24 (18 September 2019).

Convention on the Rights of the Child GA Res 44/25 (1990).

International Covenant on Civil and Political Rights GA Res 2200A (1976).

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") GA Res 40/33 (1985).

H Dissertations

Pip Dean "Young people's knowledge and understanding of the youth justice system in New Zealand: A community sample" (M.Sc. Thesis, Victoria University of Wellington, 2019).

C Johnson "Are we failing them? An analysis of the New Zealand Criminal Youth Justice System: How can we further prevent youth offending and youth recidivism?" (M.A. Thesis, Massey University, 2015).

Sarah Kuper "An Immature Step Backward for New Zealand's Youth Justice System? A Discussion of the Age of Criminal Responsibility" (LLB (Hons) Dissertation, University of Otago, 2010).

Pip McNabb "Raising the Age of Youth Justice: Should 17 Year Olds Be Included Within New Zealand's Youth Justice System?" (LLB(Hons) Dissertation, University of Otago, 2016).

Rhonda Thompson "Old Enough to Know Better: The Doli Incapax Presumption in New Zealand Law" (LLM Dissertation, Victoria University of Wellington, 2009).

I Internet materials

Georgia Forrester "As countries look to raise the age of criminal responsibility, should NZ too? (1 November 2019) Stuff New Zealand <https://www.stuff.co.nz/national/crime/116585038/as-countries-look-to-raise-the-age-of-criminal-responsibility-should-nz-too>.

Human Rights Commission "Convention on the Rights of Persons with Disabilities" <https://www.hrc.co.nz/our-work/international-reporting/rights-disabled-people/crpd/>.

Ministry of Justice "What to expect at Youth Court" Youth Court of New Zealand <https://www.youthcourt.govt.nz/about-youth-court/what-to-expect-at-youth-court/>.

Penal Reform International "Justice for Children Briefing No.4: The minimum age of criminal responsibility" (2013) <https://www.penalreform.org/resource/justice-children-briefing-no4-minimum-age-criminal-responsibility/>.

Dr Harriet Pierpoint "Age of Criminal Responsibility: A provocation paper" (5 February 2020) Medium <https://medium.com/reframing-childhood-past-and-present/age-of-criminal-responsibility-1e7714db9c1c>.

J Other resources

Principal Youth Court Judge Andrew Becroft "10 suggested characteristics of a good youth justice system" (paper for The Pacific Justices' Conference, Auckland, March 2014).

Ian Freckelton "Assessment of Fitness to Stand Trial" (paper presented to Legal Research Foundation seminar, University of Auckland, March 1995) 13 at 14.

Kimberly Larson and Thomas Grisso "Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A guide for lawmakers" (paper prepared for the National Youth Screening & Assessment Project, University of Massachusetts, 2011).

Justice Joe Williams (speech to the Tai Tokerau Family Law event, 15 April 2019).

Word count

The text of this paper (excluding cover pages, footnotes, and bibliography) comprises 8,156 words.