MANAAKITIA Ā TĀTOU TAMARIKI
Children's Commissioner

Children with Offending Behaviour

Supporting children, 10-13 year olds, who seriously offend and are referred under s14(1)(e) of the Oranga Tamariki Act 1989

Office of the Children's Commissioner

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CONTENTS

A STATEMENT FROM THE CHILDREN'S COMMISSIONER
Children who offend

Many New Zealanders probably don't know we have a specialised and separate 'child offender system'. This system is designed to respond to children aged 10 – 13 years who offend.[1] It is quite different from the youth justice system that mainly deals with 14 – 17-year olds.

The system for children who offend takes a primarily welfare approach not a criminal justice approach. The welfare approach views children's offending within a context of concern about inadequate care and protection. This is the right starting point.

Unfortunately, this system isn't working as well as it should. Too many of these children who offend are not getting the support and interventions that would stop their offending. Some go on to become serious youth offenders (as 14-17-year olds) who are dealt with in the separate 'youth justice system'; and some of them become adult criminals.

It doesn't have to be this way. We could do much better. I believe our system provides a critical window of opportunity to divert these children from a life of crime. Currently this golden opportunity is not being fully grasped.

This report concludes the system for children who offend is insufficiently resourced and requires greater leadership, especially from Oranga Tamariki and the Police.

None of the concerns this report raises is new. A 1995 report commissioned by the Office of the [then] Commissioner for Children reported:[2]

> *"Concerns have been expressed in the media, by Parliamentarians, by the Police, and in the Mason Report, about whether or not children aged 10-13 years who offend are being adequately dealt with under the Children, Young Persons, and Their Families Act 1989."*

That report stressed some important matters. Nearly four out of five children re-offended. In 72% of cases referred by the Police for a Family Group Conference (FGC), the resulting FGC plans broke down or were not fully implemented. The report also identified difficulties with referral procedures and cooperation between Police and the then Child, Youth and Family, as well as the inadequacy and unavailability of services and supports for children who offend and their families.[3]

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[1] See an Appendix to this Report which provides a detailed description of the system for children who offend.

[2] Maxwell, G and Robertson, *Child Offenders: A report to the Minister of Justice, Police and Social Welfare*, Wellington, Office of the Commissioner for Children, October 1995, cited in *Child Offenders Manual* (3rd edition), Wellington, Chief Judges Chambers, 2002 af pix.

[3] Social Services Select Committee *Inquiry into the identification, rehabilitation, and care and protection of child offenders: Report of the Social Services Select Committee* (Wellington, 2012). The Committee's recommendations are contained in an Appendix to this report..

We must conclude that in the intervening 25 years there has been insufficient change. To bring about that necessary change the solution is clear: simplify, better resource and prioritise the child offender system as the first and best opportunity to effect change in the lives of children who offend.

These improvements were exactly what was recommended by the 2012[4] Social Services Select Committee Inquiry into Child Offending.

The Committee made 31 recommendations mainly involving earlier intervention and better support services, together with a simplified Family Court process. Late in 2012 the Government endorsed the recommendations. Yet, frustratingly, eight years later, few of the 31 recommendations have been formally implemented.

Given all the public discourse and government commitments to reducing crime and prison numbers, it is ironic that a very effective long-term solution – a focus on reducing child offending – has not been prioritised. A critical opportunity for reform and improvement has been missed.

Not withstanding that, the present day presents an opportune moment. Despite the long-standing failings in the child offender system, the number of children who offend (as with youth offenders) is dropping. In 2010 there were a total of 5,012 children who offended. By 2018 the number had dropped to 2,330. The rate of children who offended per 10,000 fell from 208 to 93. And the number of children whose offending was very serious (warranting a Family Group Conference) dropped from 328 to 170.

These numbers are manageable. Most children who offend are well known to many government departments. Focussed interventions are possible and will pay dividends.

However, there is a deeper reason why improvements to the system are desperately needed. No child under 14 should ever be charged in the criminal justice system - either the youth justice system or the adult system. Instead of charging them we need an appropriate and effective system in place for under 14-year olds who offend seriously that holds them to account while avoiding locking them in to a criminal future.

Most children who offend come from backgrounds of trauma and disadvantage. Frequently they have violent and damaging backgrounds. They have complex needs. A criminal response simply does not work. It is wrong in principle and inappropriate for children so young.

Instead, all children who offend should be dealt with by the child offender system as described in this report. When that system functions at its best it will provide a more positive and constructive alternative to the criminal justice process.

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[4] Social Services Select Committee *Inquiry into the identification, rehabilitation, and care and protection of child offenders: Report of the Social Services Select Committee* (Wellington, 2012). The Committee's recommendations are contained in an Appendix to this report.

The current minimum age of criminal responsibility of 10 years old is far too low.[5] As it is, 10 and 11-year olds can only be charged with murder or manslaughter. There is no known example of a 10 or 11-year-old being charged in the last forty years. Immediately raising the age of criminal responsibility to 12 years old would be a formality and present no problems. But that is only a first step.

The minimum age of criminal responsibility should be at least 14 years old. Taking this child-centred approach would respond to consistent recommendations from the United Nations Committee on the Rights of the Child.

Indeed, (apart from murder or manslaughter) that always used to be the case until 2010. Only a relatively recent amendment taking effect from 1 October 2010 allowed a very small group of children, who allegedly committed certain very serious offences, to be charged directly in the Youth Court bypassing the system for child offenders.

This change was based on thin policy grounds and no evidence. Indeed, offending by children was already decreasing. In my view it was a backwards step. It was unnecessary and has done no good. All it achieved was to criminalise young children and risk enmeshing them in the wider criminal justice system.

An effective and well-resourced system to work with children who offend can do a much better job than the criminal justice system. It can provide many more options for dealing with children and ensure parents are subject to clear obligations. Further, its interventions are not time limited, as sentences must be in the criminal justice system.

We cannot afford to squander another opportunity to change the potential life path of children who offend. This report identifies long running deficiencies and makes plain where immediate improvements must take place.

These recommendations also offer a real opportunity for Oranga Tamariki to work with iwi and Maori organisations including iwi authorities in genuine partnership as envisaged by s7AA of the Oranga Tamariki Act.

My hope is that at long last these improvements will be promptly and properly implemented. As a consequence, we can raise the minimum age of criminal responsibility to14 years knowing that we have an effective, indeed the best possible, response for children under 14 who offend.

For the sake of our children this step cannot come fast enough. The current age of criminal responsibility should be consigned to history. Then we could lay claim, with all due kiwi modesty, to having not only a world leading youth justice system but also a world leading system for children who offend.

[5] Crimes Act 1961, s 21.

INTRODUCTION

This report considers the statutory response to children aged 10 to 13 years whose offending causes serious concern for their wellbeing.[6] This has led Police to refer them to an Oranga Tamariki Youth Justice Coordinator for a Family Group Conference (FGC) in accordance with section 14 (1) (e) of the Oranga Tamariki Act 1989 (the Act).

To gather the evidence to inform this thematic review, the Office of the Children's Commissioner (OCC) undertook 93 interviews with individuals or groups – in eight locations across Aotearoa/ New Zealand. The purpose of our interviews was to assess what was working well to support positive changes; and to understand what gets in the way.

We spoke to children and their families and whānau. We also spoke to staff from Oranga Tamariki, Police, Health, Education, community organisations, Māori organisations and iwi social services. In addition, we reviewed a sample of Oranga Tamariki case records for children in this cohort.

Section 14(1)(e) of the Act states that a child needs care or protection if:

> *"In the case of a child of or over the age of 10 years and under the age of 14 years, the child has committed an offence or offences of sufficient number, nature, or magnitude to cause serious concern for the well-being of the child."*

This subsection of the Act is primarily a care and protection provision. However, it is intended to address both the offending behaviour and the underlying care and protection needs, for children who are exhibiting significant offending behaviour, without placing them under the jurisdiction of the Youth Court.

The criteria set out in s14(1)(e) constitute a high bar. The 'number, nature, or magnitude' of the offending behaviour must give rise to 'serious concern for the well-being of the child'. This justifies a Police referral to the local Oranga Tamariki youth justice FGC coordinator, under s18(3) of the Act, requesting that an FGC be convened.

Most children with offending behaviour do not reach the threshold required by s14(1)(e). Instead, they are dealt with by Police, through what are known as 'alternative action plans', rather than being referred under s18(3). In 2018, the number of children who met the criteria for s14(1)(e) was 118.

A child who offends is dealt with through both the youth justice and the care and protection provisions of the Act. In contrast, young people who offend (14-17 year olds) are only dealt with through the youth justice provisions of the Act. The Act clearly recognises the vulnerability and special circumstances of children who offend, by carefully balancing their care and protection needs with the interests of the victims of their offending. The Act also considers the importance

[6] This paper provides a summary drawn from the full report on this research. That document is not a public report. As part of our developmental mandate it was prepared for Oranga Tamariki to identify ways in which the system supporting children with offending behaviour can be improved. Oranga Tamariki provided feedback and this agreed summary has been released to the public to broaden understanding of the issues and remedies identified.

of holding them accountable, encouraging them to accept responsibility for their behaviour, and preventing or reducing future offending s4(1)(a)(i) of the Act. This formal intervention allows the youth justice FGC to fully address the child's needs while also ensuring that victims are an integral part of the process. The FGC can draw upon both the care and protection and youth justice sections of the Act to develop an inclusive and effective plan. Understanding how to apply care and protection provisions within a youth justice context is key to addressing these children's needs and the needs of their whānau to help prevent future offending, while also ensuring accountability for the offending and meeting the interests and expectations of victims.

Of the 118 children referred to a youth justice co-ordinator in 2018 under s18(3), 115 of these children had previously been the subject of a report of concern[7] about their care and protection. This indicates that potentially there were earlier opportunities to address underlying care and protection needs, which, if taken, may have prevented an escalating pattern of offending.

We also know from interviews with Police that there are many more children with offending behaviour that Police believe met the criteria for a s14(1)(e) referral. However, after consultation with Oranga Tamariki, these did not proceed to FGC. Police do not keep a record of the number of these consultations or the reasons for not proceeding to FGC, so the number of children affected by these decisions cannot be quantified.

The evidence gathered through our monitoring interviews with Oranga Tamariki staff, Police, Education, Health, community organisations, iwi, whānau and children indicate that the statutory system for children with offending behaviour is not working nearly as well as intended. This results in children having future and ongoing involvement with the criminal justice system, both as young people and then as adults.

[7] Ministry of Justice. (2009). *Youth justice indicators summary report August 2019*. Retrieved from https://www.justice.govt.nz/assets/Documents/Publications/E4NOUP-Youth-Justice-Indicators-Summary-Report-August-2019.pdf

SEVEN ISSUES RAISED BY OUR INTERVIEWS

This report identifies several key issues raised as a result of our interviews:

1. Police, Oranga Tamariki, Health, Education, community agencies and iwi told us the system is complex and often poorly understood;

2. There is a lack of consistent and effective collaboration and partnership within Oranga Tamariki between their Services for Children and Families, and their Youth Justice Service divisions.

3. Strong and effective collaboration is lacking between the government and community agencies involved;

4. Initial early intervention which takes into account the challenges faced by many of the families and whānau of children with offending behaviour, is too often missing;

5. Children with offending behaviour are frequently disengaged from education, and there can be significant difficulties in re-engaging them;

6. Most children in this cohort are Māori and many key stakeholders we interviewed, including whānau, told us that culturally focussed responses have been poor;

7. There is a need for strategic leadership that focuses on improving those parts of the child offender process that currently are not responding well to the needs of children and whānau.

1. A complex system

The legal process and system for responding to children with offending behaviour is unduly complex. All those interviewed noted that the process is difficult to understand and navigate. This is partly because the system provides a way of identifying and responding to care and protection needs while engaging youth justice processes such as convening the FGC; taking account of victims' interests; and holding a child accountable for their offending behaviour. However, it also requires a significant care and protection response to be included in the plan formulated by the youth justice FGC.

This combination of youth justice and care and protection elements in the plan can cause uncertainty as to how the plan is formulated and implemented. In our view, the complexity is also partly the result of poor legislative drafting in 1989. Efforts to address this complexity have included the publication of a 'Child Offender Manual', training seminars on the implementation of this section of the Act, and a Parliamentary Inquiry in 2012 which made 30 recommendations to address perceived shortcomings[8] (Appendix 3).

[8] Inquiry into the identification, rehabilitation, and care and protection of child offenders, Report of the Social Services Select Committee, New Zealand Parliament, June 2012

A 67-page Child Offender Manual was published in 1999, with a third edition in 2002. A one day training seminar was required to introduce practitioners to the complexities of the child offender system. While that manual could be usefully updated, legislative simplification is outside of OCC powers and responsibility. However, we suggest that this simplification is long overdue.

2. The need for careful partnership and collaboration within Oranga Tamariki

When the s14(1)(e) provisions were introduced into the Act in 1989, Services for Children and Families (previously known as Care and Protection) and Youth Justice Services were delivered from the same local Child, Youth and Family (CYF) site. They shared the same management structure within the same service delivery site and location and worked together in an integrated way. Today the two services have separate management structures, and some also have separate sites and locations. Oranga Tamariki believes these changes have contributed to positive outcomes that have benefitted children and families. However, a number of stakeholders told us this also poses some challenges and difficulties for s14(1)(e) referrals given they involve both services. For s14(1)(e) referrals to work effectively, staff across 'Services for Children and Families' and Youth Justice sites need to ensure they clearly understand the common mission of the organisation, and then work collaboratively across site boundaries to bring together their complementary roles and resources, while liaising closely with Police and other agencies.

Oranga Tamariki s14(1)(e) practice guidelines[9] advise on the relevant legislative principles.[10] Section 4A of the Act emphasises that the welfare and best interests of the child must be the 'first and paramount' consideration. The Act requires that these principles are also balanced with the views and interests of any victims.[11]

The guidelines recognise that the s4A principle has the potential to cause some tension for Youth Justice Coordinators. When they receive a referral from Police under s18(3) for a child with offending behaviour Youth Justice coordinators need to deal with the expectations of victims' as well as Police expectations for accountability – while at the same time placing the primary focus on addressing the child's care and protection needs. The challenge and difficulties in ensuring accountability for offending while also making the child's care and protection paramount, was a significant theme throughout our monitoring interviews.

> *"I worry about s14(1)(e) cases the most. Youth justice is black and white. Care and protection is grey."* **Oranga Tamariki**

The Oranga Tamariki practice guidelines require Services for Children and Families, and Youth Justice site staff, to work collaboratively, sharing information and consulting together on Police

[9] https://practice.orangatamariki.govt.nz/previous-practice-centre/policy/youth-court-processes/key-information/guidance-for-working-with-children-who-have-offended/

[10] s.5, 6, 13, 208 Oranga Tamariki 1989

[11] s.208 (2) (g)

referrals for children with offending behaviour. Their joint role is to assess the nature of care and protection needs and address them, and to ensure accountability for offending with the intention of assisting the child and their family to engage with change in ways that will resolve both sets of issues.

During interviews with our team, Services for Children and Families, as well as Youth Justice staff, recognised this does not consistently happen. Some stakeholders we interviewed including Police, Education, Health and community, and iwi providers commented on the (at times) awkward relationship breakdowns between Services for Children and Families and Youth Justice staff. We frequently heard that this affects their confidence in the Oranga Tamariki system.

Through our interviews we found that many Oranga Tamariki Youth Justice and Services for Children and Families staff do not seem to be familiar with the s14(1)(e) practice guidelines.

There is one issue for Oranga Tamariki that we believe requires urgent resolution. That is, which division within Oranga Tamariki, Youth Justice or Services for Children and Families (care and protection), has the responsibility to implement and monitor FGC plans for children who offend?

Ideally, the offending responses addressed by the plan would be dealt with promptly and, at the same time, the support and monitoring of the plan would be passed from Youth Justice to Services for Children and Families so that relevant care and protection resources can be put in place. In our view this is what the legislation requires. However, it has long been the subject of distracting debate and inconsistent practice within Oranga Tamariki.

Our view is based on s261 of the Act. That provision applies to an FGC convened, in respect of a child who offends, by a Youth Justice Co-ordinator, under s18(3). If that conference considers the child is in need of care and protection (within the meaning of s14 of the Act) the conference (if it has received information on care and protection matters pursuant to s255 of the Act) may make decisions, recommendations, and plans for the care and protection of the child under s261(1) of the Act. Crucially, s261(2) provides, in effect, that every such decision, recommendation or plan is deemed to be a care and protection plan and s29A – 38 of the Act apply.

- These sections include the important obligation on the Chief Executive to provide resources and services to give effect to the plan.

- Even more explicitly, s261(3) provides that every such FGC is deemed to be an FGC convened under Part 2 of the Act – the care and protection part of the Act.

That is why we think that the law is clear- responsibility for providing resources and services for FGCs which deal with children who offend, lies with what is now known as the Services for Children and Families division of Oranga Tamariki. In our view clear national guidance is urgently required on this issue.

We think our view is also consistent with the clear philosophy of the Act which is that responses to offending should be proportionate, prompt and time limited and that underlying, long term care and protection needs should be the responsibility of Services for Children and Families.

3. The need for strong and effective interagency collaboration and partnership

To be effective, the child offender system requires:

- clear leadership;
- collaborative and informed engagement by Services for Children and Families and Youth Justice staff;
- easily available and clearly understood practice guidance for the Police and Oranga Tamariki;
- a coordinated response from all agencies involved.

All these responses should demonstrate a child and whānau centred approach.

The role and participation of other agencies in the process is pivotal. However, it presents further challenges and complexities. When Police make a s14(1)(e) referral to Oranga Tamariki, other government, community, iwi and Māori agencies also have parts to play. Schools, the Ministry of Education and local health services in particular, are responsible for assessing the children's education, health and specialist needs in order to inform FGC planning and decisions.

Our review found this resulted in a set of complex interfaces between multiple players, all with different levels of understanding. This complexity and lack of understanding leads to relationship challenges both within and between agencies. These challenges affect the timeliness and quality of the services delivered to children, their families and whānau.

> *"Sometimes it takes a catalyst (e.g. suicide) in area to reignite ability for agencies to work together."* **Community Agency**

We found most of the community agencies involved with these children and their families had little knowledge of the s14(1)(e) legislation or its practical implementation, let alone Oranga Tamariki internal practice guidelines. Some stakeholders told us they felt excluded from a system they perceived to be owned and controlled by Oranga Tamariki and the Police. Even where they were familiar with them, Oranga Tamariki, Police and other stakeholders told us the guidelines are often inconsistently applied because of systemic barriers to collaborative practice, for example poor relationships between agencies; a lack of capacity or willingness to attend meetings; and an unwillingness to share information.

Overall, there was little evidence of the well-informed, collaborative and joined-up systemic response envisioned by either the legislation or Oranga Tamariki practice guidelines.

Our review found the starting point for joined-up cross-agency Oranga Tamariki and Police practice needs to be based on a shared philosophy which matches that set out in the Oranga Tamariki practice guidelines. It is particularly vital that Police and Oranga Tamariki have a shared understanding about the inter-relatedness of the offending behaviour and the care and protection needs. Children and families need staff across these two agencies to be 'on the same

page' so the two agencies can communicate with each other effectively and focus their efforts in a coordinated way.

This shared understanding must be translated into a well-coordinated approach to s14(1)(e) practice with children and families. It should demonstrate consistent child and family centred coordination between all the agencies and services that inform and enable FGC decisions and plans.

We did not see the principles behind the Oranga Tamariki practice guidelines consistently evidenced. Many stakeholders told us about substantial differences in philosophy and understanding between the Police and Oranga Tamariki, for example, a desire by some Police to address the care and protection and offending concerns by removing the child from their home, while the Oranga Tamariki focus was to maintain the child within their family or whānau. Stakeholders told us they witnessed these differences playing out in case meetings. They were frustrated to see the extent to which this led to delays in Police making a referral under s14(1)(e) while the child continued to offend.

> *"The response times from agencies is too long. It leaves the child feeling like people don't care."* **Police**

This lack of collaboration could initially be addressed by agencies meeting regularly to build professional relationships. Where we did see effective coordination, it clearly encouraged greater information sharing and more effective cross agency practice. This had positive impacts for children, families and whānau, in that they dealt with fewer agencies; didn't need to repeat their story multiple times; and had a clearer sense of what was expected of them, and what they could expect from others. Community stakeholders told us that currently there is limited capacity across most government and community agencies to do this. Community and iwi told us this problem is further compounded by a reluctance by some staff in government agencies, such as Oranga Tamariki, Police, Health and Education, to share information.

4. Whānau-focussed early intervention is vital

Those we interviewed told us about the complex challenges faced by most whānau when a s14(1)(e) referral is made. They emphasised how important it is for the child always to be seen within the context of their wider family, whānau, hapū, iwi and community.

> *"We are looking, from a care and protection perspective, about what we can put in place for this family."* **Oranga Tamariki**

A review of case files and conversations with key stakeholders showed that while nearly all children with a s14(1)(e) referral had previous reports of concern to Oranga Tamariki, many of these reports had resulted in no further action. This may be because Services for Children and Families social workers have large, often complex caseloads, meaning they may prioritise more urgent cases. Early signs of offending behaviour may be categorised as 'behavioural issues' that

do not meet the threshold of s14(1)(d) of the Act,[12] rather than being indicators of trauma or ongoing neglect. It seems clear from our review that Oranga Tamariki are missing opportunities for earlier and effective intervention. Recent amendments to the Oranga Tamariki Act under s13(2) now place an even greater onus on Oranga Tamariki to provide early support and services that improve the safety and wellbeing of the child and reduce the risk of further reoffending.

In the absence of a fully established and well-resourced early intervention service, many families and whānau have been left to cope with these challenges alone. The Child and Youth Wellbeing Strategy 2019 has a focus on developing intensive and early intervention models to prevent children and young people entering state care,[13] and Oranga Tamariki is currently in the beginning of designing its early intervention service. We are interested to see how these developments may impact on children referred under s14(1)(d).

> *"Care and Protection see offending happening and don't know what to do. They wait until it's bad enough for Youth Justice to get involved."* **Oranga Tamariki**

Stakeholders told us about the pressing need for child and family centred intervention services early in the life of the child and/or the problem behaviour. Intensive wrap-around intervention should support children and families for success, as soon as a s14(1)(e) FGC has been held and a plan is in place to address first the offending issues but also, and importantly, the care and protection issues. Stakeholders were also aware of the unresolved issue within Oranga Tamariki (discussed earlier) as to which division of the organisation has responsibility to implement and monitor the FGC plan for children who offend.

> *"There is not enough support at the front end to make sure they don't come through to the other (YJ) phases."* **Oranga Tamariki**

Families, whānau and key stakeholders, both government and community, had a perception that families and whānau known to Oranga Tamariki often find it easier to engage with Youth Justice than Services for Children and Families. For many this was because of their unhappiness with previous interactions with Child Youth and Family (CYF) or more recently Oranga Tamariki, Services for Children and Families, including removal of children from their care. While engagement can be easier when working with youth justice, the primary focus needs to continue to be the addressing of complex family issues to prevent reoffending rather than a predominant focus on offending behaviours.

Stakeholders told us that many families and whānau are facing multiple, often intergenerational challenges that mean support needs to be provided in ways the family or whānau can trust and readily accept. Necessary intensive, on-going and solution-focused support must be delivered by appropriate cultural and community services.

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[12] S.14 (1) (d) states that the child or young person has behaved, or is behaving, in a manner that is or is likely to be harmful to the physical or mental or emotional well-being of the child or young person or to others and which the child's parents or guardians are unable or unwilling to control

[13] Child and Youth Wellbeing Strategy: Section C: The outcomes- children and young people are loved, safe and nurtured

"The relationships with whānau is key. Success is how well we have developed relationships from the beginning. The quality of the relationship is everything." **Oranga Tamariki**

5. Children with offending behaviour are frequently disengaged from education

Oranga Tamariki recognises the critical role education plays in children's futures. Its policy guidelines require a comprehensive health and education assessment for each child who offends. The consent of the child's parent/s or guardians is necessary to access the required assessment service. Assessments should be completed before an FGC is held. Oranga Tamariki told us that health assessments are consistently available as they contract these privately, however education assessments provided by the Ministry of Education are frequently not available before the FGC. This was identified as a serious problem. The guidelines suggest that "every effort should be made to have a school representative, as an information giver, at the conference" where possible.

However, we found schools often lack the resources, skills or willingness to support the complex needs of these children. Key stakeholders we spoke with said nearly all children with s14(1)(e) referrals have moved schools, been stood down or excluded, because schools have been unable to cope with the complex behaviours the children are presenting.

"If kids are getting stood down early in school, a whole lot more systemic patterns start to occur that lead to disadvantages for that child." **Education**

We were told that a lack of capacity, within attendance services, to monitor and track truancy, coupled with a lack of resources for schools, such as insufficient teacher's aide hours, mean many of these children are cut off from the school system. These children and their families have few opportunities to access the support they need.

This lack of accessible and sustained support means those children who are successfully re-enrolled in school are likely to experience the same difficulties all over again and be removed from school once more. The child who is out of school with nothing to do, and whose parents have little ability to provide the necessary supervision, is in danger of becoming involved in escalating offending behaviour, often with peers who are also not attending school.

"Often we are working with families where there is no structure. The kids are free to roam and there is drugs, alcohol and family violence at home." **Attendance Services**

Families and whānau also find it difficult to navigate the complexity of school stand down, suspension and exclusion processes. They told us they also find it difficult to navigate the school system, lack support and advocacy, and /or choose not to engage because of their own negative past experiences of school. However, some families and whānau told us that their child's school had been very helpful and they got to understand what strategies helped their child in class and with other children, so they could stay in school.

"Many of the whānau are disconnected from education themselves because of their own

bad memories, experiences, fear, intimidation, and get labelled as not caring." **Education**

6. Insufficient access to specialist health services is also a factor in school attendance

School attendance is also affected by a lack of specialist programmes and services tailored to the mental health and developmental needs of these children and their families. This is especially noticeable in regional New Zealand where access to specialist health services can be challenging.

Stakeholders told us there is only one Foetal Alcohol Spectrum Disorder (FASD) specialist in the South Island, there are waiting list delays for child adolescent mental health services; and there are difficulties recruiting specialist staff to fill vacancies, especially in smaller towns and cities. Neuro-developmental disorders, if not identified and responded to, can be a major driver of offending by children.

7. A culturally focussed response is required

Māori stakeholders alerted us to what they saw as a lack of cultural capability and capacity within statutory services to work effectively with Māori. They perceive that there are only small numbers of Māori staff and there is a lack of support for these staff. We were told by both Māori and non-Māori that government agencies are overwhelmingly 'Pakeha-centric', which can result in mistrust and poor engagement. This acts as a barrier to whānau accessing the help they need. They emphasised the need for workers to have the cultural competence and confidence to create a culturally safe environment where tamariki and whānau can engage and build trust.

"Getting through the day stuff has been more important than engaging with the cultural stuff." **Oranga Tamariki**

"I worked with a Māori mental health worker. She is gold. She needs to be cloned by about ten. With her it's no problem getting in to Māori families." **Health**

Māori stakeholders told us that while initially whānau may feel whakamā about asking for help, many whānau are less fearful about connecting with Māori community agencies than with Oranga Tamariki and Police. The implementation of s7AA of the Act requires Oranga Tamariki to ensure their staff have the cultural competence and confidence to work effectively with tamariki Māori, whānau, hapū and iwi. It also requires Oranga Tamariki to consult with iwi and Māori organisations about the delivery of services for whānau within their rohe. At the time of our interviews, which took place prior to the 1 July 2019 implementation of s7AA, iwi and Māori stakeholders had high expectations for the changes s7AA would bring.

Oranga Tamariki practice standard, 'Whakamana Te Tamaiti', introduced in November 2017, and foreshadowing s7AA of the Act, requires practice that empowers tamariki Māori in their identity and culture, 'connecting them with whānau and whakapapa and wider support networks that support their wellbeing'. At the time this monitoring review took place, our finding was that this practice standard was not being consistently applied for children and whānau referred

under s 14(1)(e). We found in FGCs and support plans there was an absence of proactive engagement with wider whānau, hapū and iwi for these children and their whānau.

> *"Our kids are lost. They know they are Māori, but they're not. They need a community who loves and cares."* **Iwi**

CONCLUSION

A focused and strategic cross-agency approach is required to reform the way the system responds to, and supports children aged 10-13 years with offending behaviour – and their families and whānau. This support is needed as soon as concerns are raised for the child, preferably through early intervention before coming to the notice of either Oranga Tamariki or the Police. Mobilising this change will require dedicated national and regional leadership across agencies, with a clear vision, direction and action plan, including measures evidencing improvement in the outcomes achieved. When this happens, we will start to see a successful statutory response.

This action plan needs to include a review of the ways s14(1)(e) provisions and policies are communicated to staff within Oranga Tamariki, the Police and all other agencies involved in its implementation. Each agency needs to be clearer about its distinctive and shared roles and responsibilities. Agencies also need to act more consistently and collaboratively in the culturally appropriate delivery of effective intervention services.

This will allow agencies to be better placed to help these children, their whānau and families address the complex challenges they face and achieve the lifelong wellbeing they deserve.

RECOMMENDATIONS

1. Leadership and direction

That the Chair of the Youth Crime Action Plan (YCAP) with the oversight of the Justice Sector DCE Group:

(a) develops a strategic vision and action plan that addresses the identified needs of children aged 10-13 years with offending behaviour, referred under s14(1)(e), and their whānau, and ensures that recommendations made in this report are implemented in a timely fashion;

(b) oversees the implementation of this plan and to drive improvements in the system.

2. Addressing complexity

That Oranga Tamariki:

(a) works with the Ministry of Justice and Police to develop an updated version of the existing 2007 Child Offender Manual to ensure a current and shared understanding of the purpose of s14(1)(e) of the Oranga Tamariki Act 1989. As well as clarifying the purpose of this section of the Act, it should also provide clarity regarding the policy, principles, processes and respective roles and responsibilities of the Police and Oranga Tamariki.

(b) works with Police and the Ministry of Education to create an exemplar process that is easily available to all agencies involved in the s14(1)(e) process, so they have a readily accessible reference tool that supports a shared understanding of best practice with children referred for an FGC under s18(3).

3. Enabling collaboration and information sharing

That Oranga Tamariki:

(a) works with community and government agencies to ensure they have a clear understanding of the information sharing guidelines introduced to the Oranga Tamariki Act 1989 from 1 July 2019. This will enable them to confidently share and request information that supports effective interventions with this cohort of children.

(b) addresses the current capacity, capability and system barriers identified in this report to ensure Youth Justice and Services for Children and Families provide consistent, timely, high-quality, and collaborative practice for these children.

That Police:

(c) develop a recording system that identifies when Police have approached Oranga Tamariki to make a s14(1)(e) referral and the outcome of that referral, including where no FGC is held. This will provide a fuller understanding of the total number of children considered for a s14(1)(e) referral, the reasons these did not progress to FGC and alternative actions taken to address the identified concerns.

4. Improving education outcomes

That the Ministry of Education:

(a) ensures that education assessment requests are made early to ensure they are consistently completed for FGCs convened in response to s14(1)(e) referrals and, that relevant Education staff attend FGCs and present this information in ways that support the development of responsive FGC plans, tailored to meet the complex education needs of these children. This aligns with the Child and Youth Wellbeing Strategy and ensures that children are positively engaged with and progressing and achieving in education.

(b) ensures that schools and attendance services have consistent access to the level of support and training required to help them maintain this group of children successfully in school.

(c) ensures that the families and whānau of children subject to a 14(1)(e) referral who are stood down, suspended, excluded or expelled have ready access to advocates who can support them to engage with school principals and Boards of Trustees to enable their child/ren to remain in school.

5. Access to specialist services

Oranga Tamariki:

(a) engages with Ministries of Health and Education to develop a co-ordinated approach to identifying and addressing the shortfall of specialist services for this cohort of children, their families and whānau, as per the Child and Youth Wellbeing Strategy .

6. Addressing complex family issues

Oranga Tamariki:

(a) pays specific attention to the needs of families and whānau of children aged 10-13 years, subject to s14(1)(e) referrals, as the agency implements its new intensive intervention service, ensuring they receive the level of wrap-around support they require to resolve the often-complex care and protection needs underpinning their child's offending.

7. Working successfully with Māori

Oranga Tamariki consistent with s7AA and the Treaty of Waitangi:

(a) continues to strengthen its focus on the cultural makeup of its workforce and the development of cultural confidence and capability for all staff, to ensure that tamariki Māori and their whānau receive services that are informed by and delivered from a Māori world view and build the trust necessary to support tamariki and whānau effectively.

(b) continues to focus on ensuring that there are sufficient opportunities for iwi and Māori social services to build the capability and capacity they need, to meet the needs of this cohort of tamariki and their whānau. The Child and Youth Wellbeing Strategy expects that all children will be connected to their culture, language, beliefs and identity.

APPENDIX ONE:
System for Children who Offend - Summary

APPENDIX ONE: SYSTEM FOR CHILDREN WHO OFFEND - SUMMARY

A detailed description of the system for children who offend can be found in the legal texts, for instance Youth Justice in New Zealand.[14] Although now out-of-date, the Child Offenders Manual may also be of assistance. However, for the purposes of this report, and the recommendations made, the summary below will be of assistance.

Background

1. The minimum age of criminal responsibility is 10 years.[15]
2. The Oranga Tamariki Act 1989 makes a clear distinction between "children" – aged 10 to 13 inclusive and "young people" – aged 14 to 17 inclusive. There are separate, but not quite self-contained systems for each age group who offend. This report only focusses on the system for 'children'.
3. Until 2010 children could not be prosecuted at all except for homicide (that is murder or manslaughter). In these cases, they are dealt with in the High Court, effectively as adults – with none of the protections or special youth specific processes ordinarily available for children.
4. As from 1 October 2010, while children could still be prosecuted for homicide, in two additional situations children aged 12 and 13 could also be charged in the Youth Court.

    - First, when the alleged offence was a very serious one carrying life imprisonment or at least 14 years imprisonment.
    - Second, where the child is alleged to have committed an offence carrying 10 years imprisonment or more but under 14 years imprisonment and has been previously declared to need care and protection by the Family Court due to committing a very serious offence.

NB: Each year, less than thirty children have been prosecuted in this way.

About the system for children who offend

The system for dealing with children who offend takes a 'welfare' approach and not a criminal justice approach. It was introduced in 1989.

This system assumes children under 14 are too young to stand in a dock and take personal responsibility, as autonomous individuals, for their alleged offending (except in the limited situations described above).

Instead, their offending is seen as raising concerns about the child's lack of adequate care and protection, for which a care and protection response, if necessary in the Family Court, is taken.

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[14] *Youth Justice in New Zealand*, (2nd Edit), Nessa Lynch, 2016, Thomson Reuters NZ Ltd, pp55-80.

[15] Crimes Act 1961, s 21.

1. Dealing with serious and persistent offending: Police referral

For serious and/or persistent offending by a child, the police may report matters to a youth justice Family Group Conference co-ordinator and commence a consultation as to whether an FGC should take place.[16]

A police officer may only make such a report if the officer believes, after inquiry, that a child needs care and protection because:

> *"...the child has committed an offence or offences of sufficient number, nature or magnitude to cause serious concern for the wellbeing of the child."*[17]

If, after consultation, the police officer believes that the making of an application for a care or protection order is required in the public interest, then the youth justice co-ordinator must convene an FGC.[18] The ultimate power in these circumstances as to whether an FGC proceeds rests entirely with the police officer, not the FGC co-ordinator.

At this stage the FGC, although initiated under the care and protection provisions, becomes a youth justice FGC subject to the youth justice rules for FGCs in sections 247 to 271 of the Act.

Strict time limits apply: 21 days to convene (organise) the FGC and then a month after convening to complete the FGC.

2. Establishing that a child has committed an offence

Every FGC must ascertain whether the child admits the offence alleged to have been committed.

If the child does not admit the offence, and the Police wish to continue with the process for child offenders, the Police must file an application for a care and protection order in the Family Court.

Although the Family Court is a civil court, where ordinarily the standard of proof is the balance of probabilities, in these circumstances the court cannot make a care and protection order unless the offence is established to the criminal standard of beyond reasonable doubt.[19]

Also, the Family Court must be satisfied that the child knew either that the act or omission constituting the offence was wrong or that it was contrary to law.[20]

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[16] Oranga Tamariki Act 1989, s 18(3).

[17] Oranga Tamariki Act 1989, s 14(1)(e).

[18] Oranga Tamariki Act 1989, s 18(3).

[19] Oranga Tamariki Act 1989, s198(1)(a).

[20] Oranga Tamariki Act 1989, s198(1)(b).

This gives effect to the "doli incapax" presumption – which means literally that a child is incapable of evil.

3. A FGC considers the child's need for care and protection

If the offence is proved in the Family Court or is admitted at the FGC then an FGC must, under s 258(a) of the Act, consider such matters relating to the care and protection of that child as the conference considers appropriate.

Where the FGC agrees that the child is in need of care and protection, the conference can make such recommendations and plans as the FGC considers desirable and necessary having regard to the principles in s4A(1), s5 and s13 of the Act.[21]

The FGC plan will also usually include what might be called "justice" responses to the offending, to consider the interests of the victim and to hold the child accountable. These may include reparation, return of property, recommended community work etc. Ideally, the victim will be present at the FGC and will actively participate in it.

4. Oranga Tamariki manages components of the FGC plan

Oranga Tamariki social workers are responsible for managing and resourcing each component of the plan.

In our view, the "justice" components of the plan (which are usually time limited and specific) are the responsibility of the youth justice division of Oranga Tamariki.

All other components of the plan that relate to the care and protection of the child (providing information and advice on care and protection issues have been received by the FGC under s255(1) of the Act) are deemed to have been formulated under s 29 of the Act. This is a care and protection provision. Sections 29A to 38 of the Act apply, including the resource provisions – which are purely care and protection provisions. Therefore, we believe it the law is clear the care services division of Oranga Tamariki should take full responsibility for these components of the plan.

5. Formal care and protection order referred to the Family Court

If the FGC recommends an application for a formal care and protection order should be made, the matter is referred to the Family Court.

If necessary, several specific orders can then be made by the Family Court to support the child and his or her family/guardians. Some additional orders can be made in the case of a child in need of care and protection because of offending, including reparation orders, forfeiture or return of property.

[21] Oranga Tamariki Act 1989, s258(a).

6. An immediate application under s78

If the police have serious concerns as to the living arrangements of the child, where for instance there is a risk of continuing offending, an immediate application under s78 of the Act (usually with an accompanying application for a care of protection order) can be made directly to the Family Court for the custody of the child pending determination of the proceedings without the necessity of a prior FGC.

This option can be considered as providing the Police, in the public interest, with options for alleged child offending very roughly akin to remand in custody or to bail in the criminal courts. If a custody order is made, an FGC must be convened and the child is then dealt with as previously described.

Additional notes:

1. Police diversion for minor offending

This aspect of the system is not directly addressed in this report. It applies when the threshold of serious offending specified in s14(1)(e) is not reached. Although it is used for 80-90 percent of the offending by children, it is a discretionary, informal system, largely dependent on professional and appropriate intervention by the police.

In such cases, for instance alleged shoplifting, theft or minor assault the police can put in place diversionary plans if the offending is admitted and the family agrees.

These plans can be very creative and are limited only by the imagination of the those involved. The police can enlist the support of Health and Education services as well as community-based NGO services.

Alternatively, the police can refer the child and the family to Oranga Tamariki for intervention or support if there are legitimate care and protection concerns separate to the offending.

2. Police intervention for children under 10 years old who offend

The police can also act in situations of alleged offending by children aged under 10 years old. There is no minimum age of arrest, although for children of that age, the power is necessarily exercised sparingly.

Where the offending is admitted, the police have the generally the same opportunities described in the preceding paragraph.

Evidence shows most children who offend between the ages of 10-13 years have already come to the notice of the police before the age of 10. Effective police intervention at this even earlier age, if necessary, in consultation with Oranga Tamariki, is therefore of crucial importance.

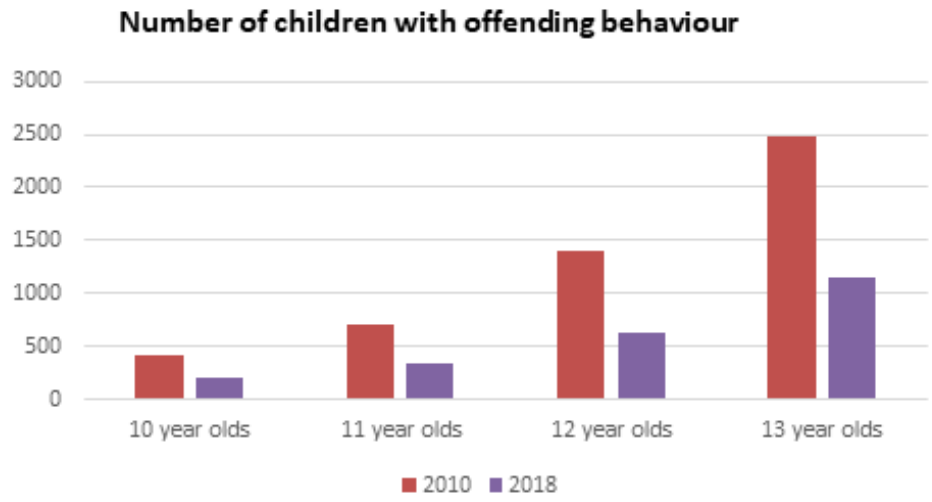
APPENDIX TWO:
Key Statistics

APPENDIX TWO: KEY STATISTICS

The 2019 Ministry of Justice Youth Justice Indicators Summary Report[22] offers some useful statistics about 10-13-year olds with offending behaviour.

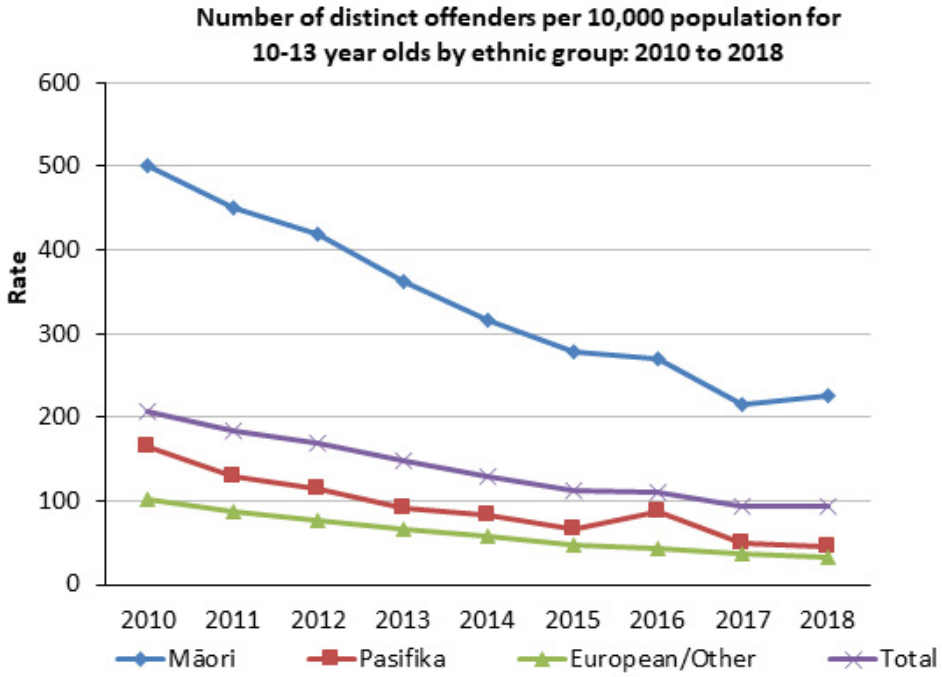
1. Number of children with offending behaviour

In 2018 there were 2,330 children who offended, down 55% from 5,012 in 2010.



2. Reduction in offending rates

This reduction in the offending rate has been higher for European/Other (68%) than for Māori (52%).



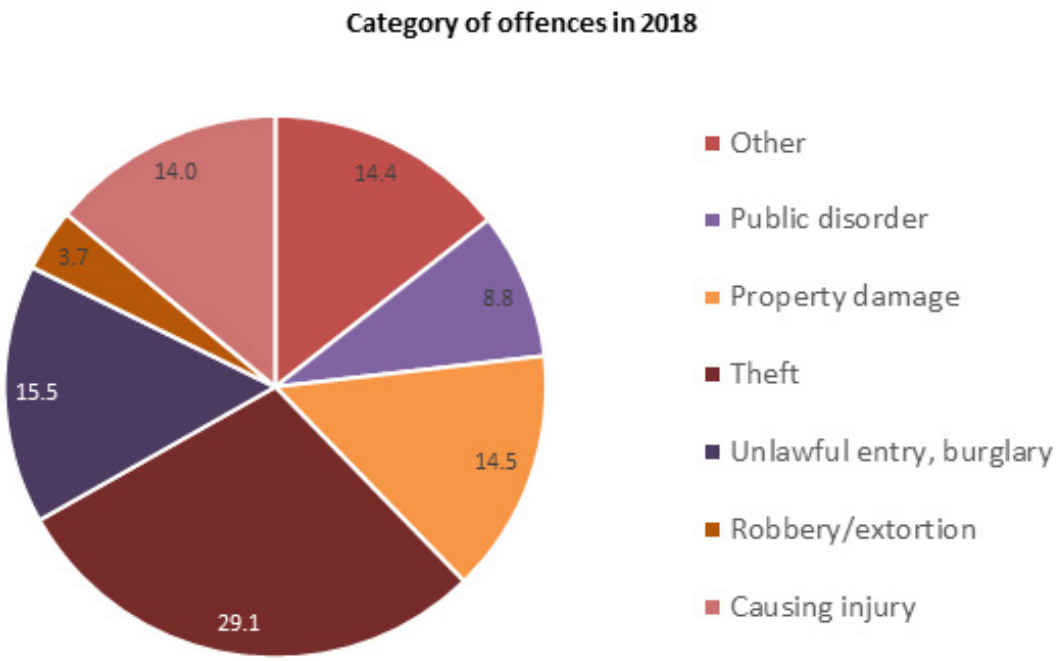
[22] https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/youth-justice-indicators/

3. Disparity between Māori and non-Māori children

The ratio of Māori to non-Māori children who have offended (by rate per 10,000 population) has increased from 4.6 in 2010 to 6.6 in 2018. This shows an increased disparity between Māori and non-Māori children.

4. Category of offences

In 2018, theft was the most common category of offence, representing over a quarter of offences by each child who had offended.

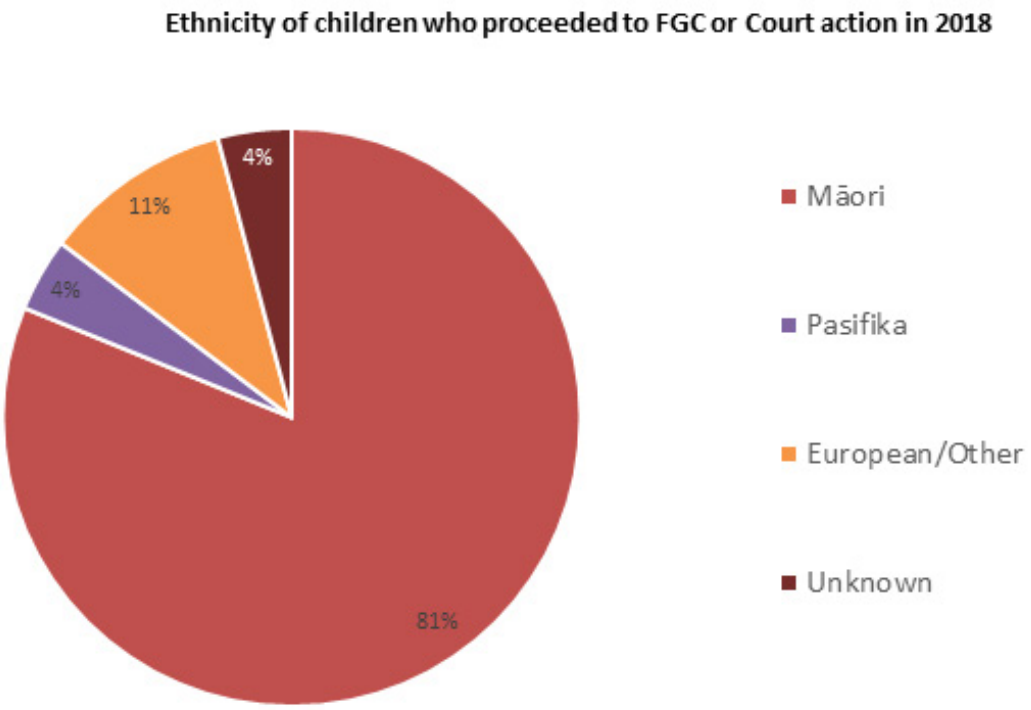


5. Alternative actions

In 2018, the majority of children with offending behaviour (69%), were the subject of alternative action plans. A much smaller number (2%), proceeded to Court.

6. FGC or Court proceedings

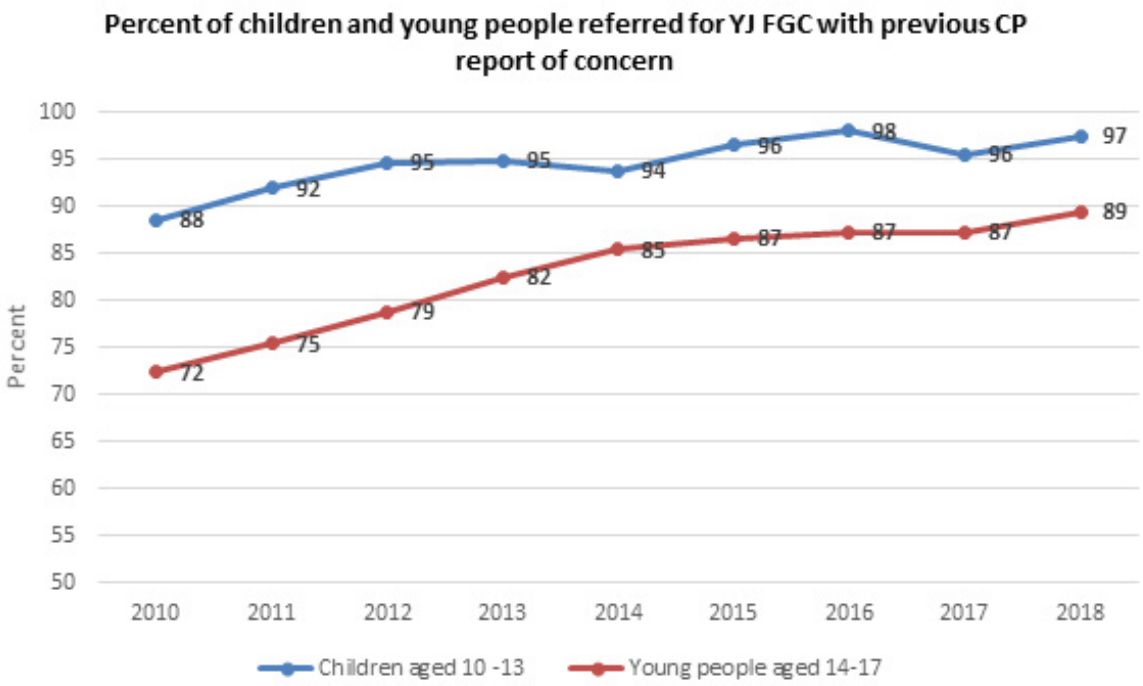
In 2018, 81% of those who proceeded to FGC or Court action were Māori.



7. Previous care and protection reports of concern

Almost all of the children referred for an FGC between 2010 and 2018 had previously been the subject of a care and protection report of concern. This trend was similar to that of older young people over the same time period. The data does not show what age the children or young people were when the report of concern was made.

97%
of children referred for a youth justice FGC in 2018 had previously been the subject of a report of concern about their care and protection.


Percent of children and young people referred for YJ FGC with previous CP report of concern
Percent
100
95
90
85
80
75
70
65
60
55
50
2010
2011
2012
2013
2014
2015
2016
2017
2018
88
92
95
95
94
96
98
96
97
72
75
79
82
85
87
87
87
89
Children aged 10 -13
Young people aged 14-17

APPENDIX THREE:
2012 Social Services Select Committee Inquiry into children who offend: Summary of Recommendations

Social Enquiry into the identification, rehabilitation, and care and protection of child offenders, Report of the Social Services Select Committee, New Zealand Parliament, June 2012 : Summary of Recommendations

Inquiry into the identification, rehabilitation, and care and protection of child offenders

Summary of recommendations

The Social Services Committee recommends to the Government

1 requiring government agencies to focus on the risk and protective factors identified in this report, the importance of effective early intervention, and the need for cross-agency collaboration (p. 19)

2 requiring child offending intervention and identification programmes to operate to consistent performance standards throughout the country (p. 19)

3 giving youth offending teams a clear mandate to work on individual cases, while retaining their strategic role (p. 19)

4 developing protocols to allow the Ministry of Social Development to share information about at-risk children with relevant agencies and organisations (p. 19)

5 clarifying where the accountability of government agencies for child offenders lies (p. 19)

6 considering lower thresholds for intervention, so that at-risk children can receive support and intervention before they begin to offend (p. 19)

7 considering expanding the eligibility criteria for Social Workers in Schools to make it available to more schools with potential child offenders on their rolls (p. 20)

8 ensuring that intervention for child offenders responds to any care and protection issues as well as the offending (p. 28)

9 speeding up the process of referral to rehabilitation programmes so that child offenders can benefit from these programmes sooner and more effectively (p. 28)

10 establishing and maintaining a national database of the rehabilitative programmes available for child offenders, to provide judges with a comprehensive overview of treatment options for child offenders (p. 28)

11 requiring all rehabilitation programmes receiving state funding to provide an evaluation of the programme's effectiveness (including cultural perspectives). Taking into account the size of the contracts or programmes may require the support of the relevant funding agency to conduct a robust evaluation (p. 28)

12 conducting a review to gauge the recidivism rates of child offenders who have taken part in rehabilitation programmes, to assess the effectiveness of the various schemes (p. 28)

13 making intervention proportionate to the risk a child's environment presents to his or her development and the seriousness of his or her situation, which may or may not be indicated by the seriousness of his or her offending; and examining the risk in a comprehensive assessment (p. 28)

14 that Child, Youth and Family review the offending history of a selected group of offending young people and track their outcomes to get an indication of the success of the interventions they have received and of Child, Youth and Family's case management, and to determine areas for a responsible review of practice and policy (p. 28)

15 ensuring progress is made as soon as possible on sharing information between Child, Youth and Family, the New Zealand Police, the Ministry of Justice, the Ministry of Health, and the Ministry of Education to track the outcomes of those in Child, Youth and Family care (p. 28)

16 considering simplifying the legislation governing child offenders to make it easier for practitioners to apply (p. 33)

17 requiring all children referred into the care and protection system to undergo health and education assessments automatically (p. 34)

18 ensuring child offenders identified as having mental health issues or drug and alcohol problems are given a high priority for care (p. 34)

19 considering ways of improving the Family Court process to prioritise child offending cases (p. 34)

20 streamlining all aspects of the current care and protection system and referral process to ensure child offenders are dealt with soon after the offending (p. 34)

21 requiring departments involved in care and protection proceedings to ensure that delays are never caused by administrative shortcomings or operational contingencies, but only to facilitate best practice and to promote the best outcome for the young person at the centre of proceedings (p. 34)

22 requiring that case files be reviewed on completion to determine whether deadlines were met and resolutions of family group conferences and Court hearings were realised; the reasons and justifications for any delay; and how the process could be improved to minimise delays in comparable circumstances (p. 34)

23 taking steps to ensure that changes of case officer are rare and reasonable, and that due consideration is given to a case officer retaining responsibility for any child or young person who is the subject of proceedings, regardless of a change in position, if continuity of responsibility is in the best interest of that child or young person and retaining the file would not impinge unduly on the efficiency of the department (p. 34)

24 that delays in proceedings and processes be a reportable measure in the annual report of Child, Youth and Family (p. 34)

25 that in cases involving children, the timeframes for action be required to reflect a child's concept of time (p. 34)

26 considering allowing cases before the Family Court to be transferred to the Youth Court if the child becomes old enough during the proceedings to be dealt with by the Youth Court, or if the child commits subsequent offences which fall into the Youth Court's jurisdiction (p. 39)

27 considering requiring more responsibility from agencies involved in Family Court proceedings (p. 39)

28 considering giving the Family Court greater powers to compel parents to attend court hearings involving their children (p. 39)

29 giving the Family Court similar powers to make supervision orders to those of the Youth Court (p. 39)

30 undertaking a more thorough, detailed review of the care and protection model to ensure intervention is early and effective (p. 40)

31 considering introducing a new oversight and accountability order in the Family Court (p. 40).

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MANAAKITIA Ā TĀTOU TAMARIKI

Children's Commissioner