JUVENILE JUSTICE: A COMPARISON BETWEEN THE LAWS OF NEW ZEALAND AND GERMANY

A thesis submitted in fulfilment of the requirements for the Degree of Masters of Laws in the University of Canterbury by Katja Kristina Wiese

School of Law University of Canterbury

2007
DEDICATED TO MY GRANDMOTHERS,
GRETA WIESE (AMI DUMBO)
AND
SYBILLE HEGERMANN (AMI SYBILLE)
TABLE OF CONTENTS

TABLE OF CONTENTS ...........................................................................................................  I

ABSTRACT ......................................................................................................................... V

ACKNOWLEDGEMENTS ................................................................................................. VII

GLOSSARY OF GERMAN WORDS ........................................................................ X

CHAPTER ONE – INTRODUCTION ........................................................................... 1

CHAPTER TWO - THE RESEARCH PROCESS .................................................. 12

2.1 INTRODUCTION .......................................................................................... 12
2.2 RESEARCH METHODS .............................................................................. 13
2.3 SELECTING AND CONTACTING PARTICIPANTS ...................................... 18
2.4 THE INTERVIEWS .................................................................................... 21
2.5 ANALYSING THE RESEARCH MATERIAL ............................................. 26

CHAPTER THREE - JUVENILE JUSTICE MODELS ...................................... 32

3.1 INTRODUCTION ....................................................................................... 32
3.2 WELFARE MODEL .................................................................................. 35
3.3 JUSTICE MODEL ..................................................................................... 39
3.4 CRIME-CONTROL MODEL ...................................................................... 41
3.5 DIVERSION MODEL ................................................................................ 42
3.6 MEDIATION AND RESTORATIVE JUSTICE MODEL ............................. 47
CHAPTER FOUR - HISTORICAL, SOCIAL AND LEGAL CHARACTERISTICS OF NEW ZEALAND AND GERMANY

4.1 INTRODUCTION .................................................................................................................. 50
4.2 NEW ZEALAND .................................................................................................................... 51
   4.2.1 History and Profile ........................................................................................................ 51
   4.2.2 Legal System and Jurisdiction .................................................................................... 54
   4.2.3 Demographic Characteristics .................................................................................... 56
   4.2.4 Family Structure ........................................................................................................ 60
   4.2.5 Juvenile Delinquency .................................................................................................. 62
4.3 GERMANY .......................................................................................................................... 73
   4.3.1 Profile ........................................................................................................................ 73
   4.3.2 Legal System and Jurisdiction .................................................................................... 74
   4.3.3 Demographic Characteristics .................................................................................... 75
   4.3.4 Family Structure ........................................................................................................ 80
   4.3.5 Juvenile Delinquency .................................................................................................. 81
4.4 SUMMARY AND COMPARISON ......................................................................................... 90

CHAPTER FIVE - HISTORICAL DEVELOPMENT OF NEW ZEALAND’S AND GERMANY’S JUVENILE JUSTICE SYSTEMS

5.1 NEW ZEALAND .................................................................................................................... 92
   5.1.1 The Pre-Colonial Maori Practice of Dispute Settlement ............................................... 92
   5.1.2 Development at the End of the 19th and in the early 20th Century ............................ 97
   5.1.3 The Child Welfare Act 1925 and the Crimes Act 1961 ............................................. 106
   5.1.4 The Children and Young Persons Act 1974 ............................................................. 114
5.2 GERMANY .......................................................................................................................... 125
   5.2.1 The Penal Proceedings Regarding Children And Young Persons From the Roman Empire to the Early 20th Century ............................................................... 125
   5.2.2 The Jugendgerichtsgesetz of 1923 ............................................................................. 138
   5.2.3 The Jugendgerichtsgesetz (RJGG) of the Third Reich of 1943 ............................... 143
5.2.4 The *Jugendgerichtsgesetz* of 1953 and the Development of the Implementation of the 1st *JGG Änderungsgesetz* of 1990 ................. 146

5.3 **SUMMARY AND COMPARISON** ................................................................. 152

**CHAPTER SIX -THE CURRENT YOUTH JUSTICE SYSTEMS IN NEW ZEALAND AND GERMANY** ........................................ 159

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1</td>
<td><strong>INTRODUCTION</strong></td>
<td>159</td>
</tr>
<tr>
<td>6.2</td>
<td><strong>THE JUVENILE JUSTICE SYSTEM IN NEW ZEALAND</strong></td>
<td>161</td>
</tr>
<tr>
<td>6.2.1</td>
<td>Principles of the <em>CYPFA</em> Guiding Exercise of Power in Relation to Offending by Young People</td>
<td>165</td>
</tr>
<tr>
<td>6.2.2</td>
<td>Scope of the <em>CYPFA</em></td>
<td>168</td>
</tr>
<tr>
<td>6.2.2.1</td>
<td>Persons to Whom the Act Applies and Age of Criminal Responsibility</td>
<td>168</td>
</tr>
<tr>
<td>6.2.2.2</td>
<td>Relevant Scope</td>
<td>171</td>
</tr>
<tr>
<td>6.2.3</td>
<td>The Juvenile Justice Process and the Legal Consequences of an Offence Committed by a Young Person</td>
<td>172</td>
</tr>
<tr>
<td>6.2.3.1</td>
<td>Police Contact and Reaction</td>
<td>175</td>
</tr>
<tr>
<td>6.2.3.2</td>
<td>Youth Justice Coordinator</td>
<td>185</td>
</tr>
<tr>
<td>6.2.3.3</td>
<td>Family Group Conferences</td>
<td>187</td>
</tr>
<tr>
<td>6.2.3.4</td>
<td>Youth Court</td>
<td>218</td>
</tr>
<tr>
<td>6.2.4</td>
<td>Evaluation</td>
<td>242</td>
</tr>
<tr>
<td>6.2.4.1</td>
<td>Introduction</td>
<td>242</td>
</tr>
<tr>
<td>6.2.4.2</td>
<td>Diversion</td>
<td>243</td>
</tr>
<tr>
<td>6.2.4.3</td>
<td>Family Group Conferences</td>
<td>247</td>
</tr>
<tr>
<td>6.2.4.4</td>
<td>Evaluation of Measures and Court Orders</td>
<td>257</td>
</tr>
<tr>
<td>6.2.4.5</td>
<td>Further Strengths and Weaknesses of the System</td>
<td>267</td>
</tr>
<tr>
<td>6.2.4.6</td>
<td>Conclusion</td>
<td>268</td>
</tr>
</tbody>
</table>
6.3 THE JUVENILE JUSTICE SYSTEM IN GERMANY ........................................... 269
6.3.1 Principles of the Jugendgerichtsgesetz .................................................. 270
6.3.2 Scope of the JGG ............................................................................... 273
   6.3.2.1 Persons to Whom the Act Applies and Age of Criminal
           Responsibility .......................................................................... 273
   6.3.2.2 Relevant Scope ...................................................................... 281
6.3.3 Youth Justice Proceedings and Legal Consequences of an Offence
       Committed by a Young Person ..................................................... 282
   6.3.3.1 Police Contact and Reaction ................................................. 287
   6.3.3.2 Staatsanwaltschaft ................................................................. 291
   6.3.3.3 Jugendgerichtshilfe ................................................................. 296
   6.3.3.4 Youth Court ......................................................................... 298

CHAPTER SEVEN - COMPARISON, RECOMMENDATIONS AND
              CONCLUSION ........................................................................... 328

BIBLIOGRAPHY ............................................................................................... 355

APPENDICES ................................................................................................. 390

APPENDIX A – EXAMPLE OF A FAMILY GROUP CONFERENCE PLAN .......... 391
APPENDIX B – INTERVIEW GUIDES ............................................................. 393
APPENDIX C – JUVENILE JUSTICE ACT (ENGLISH TRANSLATION) .............. 412
The main objective of this thesis is to make a contribution to the controversial subject of how the German youth justice system could be reformed. In this context, this thesis aims to discover innovative strategies that might be implemented into German youth justice law. As New Zealand’s juvenile justice system, which was established under the Children, Young Persons, and Their Families Act 1989, has become the centre of extensive international attention and has already been adopted and adapted by other jurisdictions, this thesis focuses on the question whether parts of New Zealand’s legislation could be transplanted into German youth justice law. For these purposes, the method of Comparative Law is employed. Accordingly, New Zealand’s and Germany’s social, legal, historical and cultural background are briefly outlined and compared. This comparison reveals that an implementation of concepts of New Zealand law into German law would generally be possible. The historical development of distinct youth justice systems in both countries are presented and differences and similarities are compiled. Both countries’ current youth justice legislations are than critically examined. This thesis further provides an evaluation of the practical effectiveness of New Zealand’s youth justice system. In this regard, this research is exploratory and qualitative, drawing on semi-structured interviews with 10 practitioners working in the field of youth justice. The comparative and qualitative research identified many strengths as well as some weaknesses of the current youth justice system in New Zealand. Consequently, this thesis comes to the conclusion that an implementation of a youth justice forum comparable to New
Zealand’s Family Group Conference would be expedient and worthwhile from Germany’s perspective, but that some aspects of the New Zealand system, like police diversion and the formal court orders, cannot or should not be introduced in Germany. Regarding the latter topic, the comparison of both systems revealed that New Zealand might even be inspired by the German option of imposing youth prison sentences on recidivist offenders.
ACKNOWLEDGEMENTS

I would like to sincerely thank the various people who provided me with care, support, assistance and consideration while researching and writing this thesis.

First, I wish to express gratitude to my supervisors, Professor Jeremy Finn and Mr John Caldwell, for their committed assistance in the preparation of this thesis. Our meetings were always informative and fruitful and I really appreciate the time they spent helping me to contact the interviewees, commenting on my work, and providing guidance and advice from start to finish.

Special appreciation goes to the interview participants, Mrs Cathrene Brophy, Judge Patricia Costigan, Mrs Margaret Gifford, Mr Anthony Greig, Judge Jane McMeeken, Mrs Siobhan McNulty, Sergeant James Read, Judge John Strettell, Judge Noel Walsh, and Mr Malcolm Young, who took their time to talk to me and who willingly shared with me information about their professional experiences. Their familiarity with and knowledge about the youth justice system in New Zealand were exceedingly helpful in gaining an impression about the evolution of the Children, Young Persons, and Their Families Act 1989 in practice. Without their generosity in sharing aspects of their work, this research would not have been possible. I would really like to commend the outstanding cooperativeness, open-mindedness, and, above all, exceptional friendliness I experienced during the interviews. Further, I
want to express special gratitude to Judge Jane McMeeken for giving me the chance to participate in a Youth Court sitting.

I owe great thanks to the University of Canterbury for supporting my research through granting me the University of Canterbury Masters’ Scholarship 2006. I would also like to thank the School of Law for funding my participation in the 2006 International Conference on the Family Group Conference in Wellington.

Other persons have also had important roles. I am grateful to Mrs Carole Acheson and Mrs Frieda Looser of the University of Canterbury’s Academic Skills Centre for their patience, their unremitting support and their valuable input.

On a more personal note, I am indebted to a number of friends who have accompanied me during the research period and provided important support during the last year. In particular, I would like to thank Mr Devon Barrow, who has solved various computer problems; and Mr Kasim Husain, who has assisted with phrasing the questionnaire guideline.

To Katja Daske, I thank you so much for your valuable friendship and support over the last 12 months. Without you, I am not sure I would have reached the end. I am forever grateful for your intellectual and practical support as well as the much needed discussions – and for tolerating the occasional lapses into insanity that have accompanied the writing of this thesis.

I also thank my flatmates Karin Deglmann, Tessie Lambourne, Nils Langeloh, Stephanie Lumpp, Dichapong Pongpattrachai, Andrea Roth, Vilailuck Siriwongrungson, and Montira Watcharasukarn, who have provided amusement, encouragement, understanding and sympathy and listened when things were not going to plan.
Finally, I want to thank my partner, Götz von Grone, for always being there and encouraging me with positive affirmations about my work during the highs and lows of thesis writing; my parents, Ulla and Udo, for having supported me in more than one way over the last 29 years; my sister, Maja, for providing much needed chats as well as distractions from academic work; and the rest of my family as well as my closest friends back home for putting up with my year abroad, for believing in me, and for providing on-going support and assistance whenever it was needed.

Without all of you, this thesis would never have been completed.
<table>
<thead>
<tr>
<th><strong>Glossary of German Words</strong></th>
</tr>
</thead>
</table>

1. Änderungsgesetz zum JGG  | First Amendment Act to the Juvenile Justice Act |

Allgemeines Landrecht für die Preußischen Staaten (ALR)  | Common Country Laws of Prussian States |

Amtsgericht (AG)  | District Court |

Arbeiterwohlfahrt  | Labour Welfare, a labour union associated organisation |

Asylverfahrensgesetz  | Asylum Procedure Act |

Ausländergesetz  | Aliens Act |

Aussiedler  | Resettler |

Bedingt strafmündig  | Contingently criminally responsible |

Bestimmtheitsgrundsatz  | Principle of Determinacy |

Bundesgerichtshof (BGH)  | Federal Court of Justice |

Bundesländer  | Federal States |
<table>
<thead>
<tr>
<th>German Term</th>
<th>English Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bundesrepublik Deutschland (BRD)</td>
<td>Federal Republic of Germany</td>
</tr>
<tr>
<td>Bundestag</td>
<td>Federal Diet</td>
</tr>
<tr>
<td>Bundesverfassungsgericht (BVerfG)</td>
<td>Federal Constitutional Court</td>
</tr>
<tr>
<td>Bürgerliches Gesetzbuch (BGB)</td>
<td>Civil Code</td>
</tr>
<tr>
<td>Deutsche Demokratische Republik (DDR)</td>
<td>German Democratic Republic</td>
</tr>
<tr>
<td>Erziehung statt Strafe</td>
<td>Education instead of punishment</td>
</tr>
<tr>
<td>Erziehungsbedürftig</td>
<td>To be in need of education</td>
</tr>
<tr>
<td>Erziehungsfähig</td>
<td>To be amenable to education</td>
</tr>
<tr>
<td>Erziehungsgedanke</td>
<td>Principle of Education</td>
</tr>
<tr>
<td>Erziehungsmaßregeln</td>
<td>Educative Measures</td>
</tr>
<tr>
<td>Gerichtsverfassungsgesetz (GVG)</td>
<td>Constitution of the Courts Act</td>
</tr>
<tr>
<td>Germanische Volksrechte</td>
<td>Germanic Public Legal Rights</td>
</tr>
<tr>
<td>Gesetz über die Eingetragene Lebenspartnerschaft</td>
<td>Act Governing the Legal Rights of Unmarried Couples</td>
</tr>
<tr>
<td>Grundgesetz</td>
<td>German Constitution</td>
</tr>
<tr>
<td>Halbbüßigkeit</td>
<td>Half-liability</td>
</tr>
<tr>
<td>Term</td>
<td>Translation</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>-------------</td>
</tr>
<tr>
<td><em>Heranwachsende/r/n</em></td>
<td>Adolescents or young adults (persons between 18 and 21)</td>
</tr>
<tr>
<td><em>Jugendgericht</em></td>
<td>Youth Court</td>
</tr>
<tr>
<td><em>Jugendgerichtsbewegung</em></td>
<td>Juvenile Court Movement</td>
</tr>
<tr>
<td><em>Jugendgerichtshilfe</em></td>
<td>Youth Court Aide Service</td>
</tr>
<tr>
<td><em>Jugendliche</em></td>
<td>Young Persons</td>
</tr>
<tr>
<td><em>Jugendstrafe</em></td>
<td>Youth Penalty</td>
</tr>
<tr>
<td><em>Jugendwohlfahrtsgesetz (JWG)</em></td>
<td>Juvenile Welfare Act</td>
</tr>
<tr>
<td><em>Kinder- und Jugendhilfegesetz</em></td>
<td>Child and Youth Welfare Act</td>
</tr>
<tr>
<td><em>Landgericht</em></td>
<td>Regional Court</td>
</tr>
<tr>
<td><em>Legalitätsprinzip</em></td>
<td>Principle of Mandatory Prosecution, literally Principle of Legality</td>
</tr>
<tr>
<td><em>Moderne Strafrechtsschule</em></td>
<td>Modern Criminal Law Academe</td>
</tr>
<tr>
<td><em>Oberlandesgericht (OLG)</em></td>
<td>Supreme Higher Regional Court</td>
</tr>
<tr>
<td><em>Ordnungswidrigkeitengesetz (OWiG)</em></td>
<td>Summary Offences Act</td>
</tr>
<tr>
<td>German Term</td>
<td>English Translation</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td><em>Polizeiliche Kriminalstatistik der</em></td>
<td>Police Crime Statistics on Recorded Crime and Suspects of the Federal Republic of Germany</td>
</tr>
<tr>
<td>Bundesrepublik Deutschland (PKS)</td>
<td></td>
</tr>
<tr>
<td><em>Richtlinien zum JGG</em></td>
<td>Guidelines for the application of the JGG</td>
</tr>
<tr>
<td>Staatsanwaltschaft</td>
<td>Public Prosecution Authority</td>
</tr>
<tr>
<td>Stadtrechte des Mittelalters</td>
<td>Municipal laws of the Early Middle Ages</td>
</tr>
<tr>
<td>Strafgesetzbuch (StGB)</td>
<td>Criminal Code</td>
</tr>
<tr>
<td>Strafgesetzbuch für das Deutsche Reich (RStGB)</td>
<td>Criminal Code of the German Reich</td>
</tr>
<tr>
<td>Strafprozessordnung (StPO)</td>
<td>Criminal Procedure Code</td>
</tr>
<tr>
<td>Straßenverkehrsgesetz (StVG)</td>
<td>Road Traffic Act</td>
</tr>
<tr>
<td>Subsidiaritätsprinzip</td>
<td>Principle of Frugality or Principle of Minimum Intervention</td>
</tr>
<tr>
<td>Verhältnismäßigkeitprinzip</td>
<td>Principle of Proportionality</td>
</tr>
<tr>
<td>Verurteilenstatistik</td>
<td>Criminal Conviction Statistics</td>
</tr>
<tr>
<td>Zuchtmittel</td>
<td>Disciplinary measures – literally: ‘Means of Corrections’</td>
</tr>
</tbody>
</table>
CHAPTER ONE
INTRODUCTION

Few topics receive more public and media attention in the world’s Western nations than juvenile offending. The subject ‘youth and crime’ has been widely discussed in the media, politics, society and academia during the last few decades. The focus of discussion ranges between minimisation and dramatisation both in effect and trend. There is nothing new about extensive debate concerning juvenile delinquency and deviant behaviour, and commentaries on these issues can be found in the earliest human historical records. Thus, archaeologists working in a Mesopotamian valley found a clay tablet in a tomb some 6,000 years old. The inscription on the tablet read:

Our earth has degenerated in these latter days; there are signs that the world is coming to an end. Children no longer obey their parents. The end of the world is manifestly drawing near.²

This comment shows that ‘disobedient’ children and young persons have always evoked the public’s anxiety. Hence, politicians, the general

---


³ The term ‘delinquent’ was only invented around the 18th century.
public and academics have debated the ‘nonconforming, deviant, protesting, aggressive, rowdy and violent’ behaviour of young persons over and over again. There have always been efforts to explain those behaviours and ‘to cure’ those attitudes in different ways (for example with educational approaches, youth work or punishment). However, juvenile delinquency shows a worldwide trend of rising.

Today, nearly every Western legal system recognises that children and young persons ‘are different from adults and should not be held accountable for their violations of the criminal law in the same fashion as adults’. Nevertheless, there is still a worldwide discussion about the most appropriate way of dealing with juvenile delinquency, and there is much commentary and controversy about the most suitable legal responses. It is broadly acknowledged that children and young persons have special needs and limited competencies, receptivity and abilities, and for these reasons require distinct, or at least separate, treatment from adults. Nevertheless, there are very considerable discrepancies in how different nations respond to youth offending, not only in how they legally define such basic perceptions as ‘child’, ‘juvenile’, ‘adolescent’, and ‘adult’, but also in how they define offending behaviour and in how they deal with it. The different juvenile justice systems existing today have

7 Ibid, p. 3.
been developed on the bases of different - and sometimes contrary – theories, objectives and principles.

In many Western nations, the prime underlying principle for establishing a juvenile justice system discrete from the adult system was the belief that young persons are more vulnerable than adults and more amenable to rehabilitation. In some countries, long-term social protection was expected to be best attained by concentrating resources on young persons’ rehabilitation, reacting as soon as possible to an offence and applying supervisory measures to protect them from adverse influences. Thus, many children and young persons were removed from their families and put into state care. Furthermore, it was believed that young persons should be protected from the glare of public accountability. The juvenile justice systems that arose out of these ideas were based on the so-called welfare model.

The remainder of the Western nations established their juvenile justice systems on the basis of the oppositional theoretical approach called the justice model. Its fundamental idea is that human beings are able to control their actions and therefore can decide whether to offend or not. If they decide to offend, they must assume responsibility for their offence and are brought before the court where penalties are imposed after their guilt is proven. The justice model is therefore oriented towards accountability and punishment rather than welfare, and favours less intrusive reactions to juvenile offending than the quite invasive supervisory measures provided by the welfare model. The justice model recognises the significance of the young offender’s legal rights and, for

---

10 Ibid.
those convicted of a crime, concentrates on punishment for specific criminal offences through defined sentences.\textsuperscript{11}

Although other theories have evolved and some of their aspects were implemented over time, the juvenile justice systems existing in the different Western nations today are still mainly rooted either in the welfare model or in the justice model. However, as the present crime rates concerning youth offending are very high and are even increasing in some countries, systems either based on a welfare approach or a justice approach are both under increasing criticism. In countries operating a welfare-based model, many people are of the opinion that there is a need for a ‘get tough’ approach to juvenile delinquency, and that a more punitive response is needed to protect society and hold young offenders accountable. The countries operating a justice-approach-based model face criticism because intense punishment does not deter juvenile offenders from reoffending and often is not appropriate for rehabilitating and educating the young person. Obviously, the panacea for dealing with young delinquents does not (yet) exist. Discussion about the best way of dealing with young offenders continues, and most countries are in search of new approaches that might provide solutions for reducing the high crime rates of juveniles and deter young offenders from reoffending.

The current German juvenile justice system, which is based on the \textit{Jugendgerichtsgesetz}\textsuperscript{12} of 1923, can still be described as a justice model. Although the \textit{JGG} was repeatedly amended (lastly in 1990), the legislation is challenged and faces severe criticism. The disapproval is predominantly based on the high offending rates of young persons. The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{11} Ibid, p. 8.
\item \textsuperscript{12} ‘Juvenile Justice Act’, literally ‘Juvenile Court Act’, hereafter referred to as \textit{JGG}.
\end{itemize}
\end{footnotesize}
impact of crime by juveniles and *Heranwachsen*de*¹³* in Germany, calculated in relative figures, amounts to approximately three times as much as the impact of adult crime.*¹⁴* This proportion is fairly high in relation to young persons’ offending rates in the past. Accordingly, public concern about juvenile delinquency has increased in Germany over recent decades. However, not only the general public, politicians and the media, but also practitioners and academic experts consider the German youth justice system as being in need of reform. Nevertheless, the perceptions as to how this reform should proceed are ambivalent. While conservative parties demand the lowering of the age of criminal responsibility from 14 to 12 and support the application of adult criminal law to recidivist young offenders, criminologists and practitioners plead for the retention of current age limits and propose the extension of community-based responses and mediation.*¹⁵* These opposing notions demonstrate that youth justice is a matter of controversial debate in Germany. The objective of this thesis is to make a contribution to this debate. The author aspires to find fruitful ideas and innovative strategies that might be beneficial regarding the question as to how the German youth justice system could be reformed.

During the early stages of research, the author came across youth justice literature that dealt with New Zealand’s current juvenile justice system. It appeared that New Zealand had enacted the *Children, Young Persons and*...

---

*¹³* *Heranwachsen*de* translates into ‘young adults’ or ‘adolescents’. *Heranwachsen*de are persons between the age of 18 and 21. If certain conditions are satisfied, young adults may be adjudicated in accordance with youth criminal law, see below Chapter Six, 6.2.2.1.


Their Families Act\textsuperscript{16} in 1989, an Act which totally revamped the focus and process of juvenile justice in New Zealand by providing for an innovative and unique procedure for dealing with juvenile offending. This change in legislation was a response to various criticisms (similar to those in Germany and other Western nations) that were being made of the previous youth justice system under the Children and Young Persons Act of 1974.\textsuperscript{17} Under that previous, welfare-oriented youth justice system, New Zealand’s incarceration rate for young people was one of the highest in the world, but its crime rate nonetheless remained high.\textsuperscript{18} Many children and young persons, especially members of minority groups, were being removed from their families and placed in foster care or institutions.\textsuperscript{19}

The system under the CYPFA moved away from the former wholly welfare-oriented system by focusing on the idea of the young offender’s accountability and participation. It combines aspects of the welfare and of the justice approaches while preserving the rehabilitative ideal and acknowledging the importance of legal rights and the need to protect society.\textsuperscript{20} Additionally, New Zealand’s legal system became the first in the world to institutionalise a form of ‘restorative justice’, although it did not use this terminology until later.\textsuperscript{21} Family Group Conferences\textsuperscript{22} became the hub of New Zealand’s entire juvenile justice system. Morris

\textsuperscript{16} Hereafter referred to as CYPFA.


\textsuperscript{18} A MacRae and H Zehr, The Little Book of Family Group Conferences New Zealand Style (2004), p. 10.

\textsuperscript{19} Ibid.

\textsuperscript{20} N M C Bala and R J Bromwich, above n 6, p. 8.

\textsuperscript{21} A MacRae and H Zehr, above n 18, p. 11.

\textsuperscript{22} Hereafter referred to as FGC(s).
and Maxwell\textsuperscript{23} summarised the novel system brought about by the \textit{CYPFA} as reflecting a number of innovative strategies: ‘being culturally sensitive and appropriate; encouraging parents to be involved in all the decision-making processes regarding their children; giving young persons themselves the opportunity of participating in the decision of how their offending should be responded to; giving victims a voice in negotiations over possible penalties for juvenile offenders and encouraging decision making by agreement’. In New Zealand today, the office of the Police Youth Aid Section or an FGC, not a courtroom, are intended to be the normal site for making decisions about possible reactions to youth offending.\textsuperscript{24}

In 1990/91, FGCs were evaluated by Maxwell and Morris.\textsuperscript{25} At that time, they presented conferencing as being a more effective and participatory system for victims, young persons and their families. Maxwell and Morris pointed out that the new system led to relatively high levels of satisfaction among all parties involved in the process and to major reductions in the numbers appearing before court. A further consequence was that the use of court orders and custodial penalties decreased. Beyond that, Maxwell and Morris highlighted that high rates of agreement among all parties were recorded at conferences and that victims often received apologies and other forms of recompense. Furthermore, Maxwell and Morris stated that conferences that result in remorse and repair of harm can reduce reoffending, and they emphasised


\textsuperscript{24} A MacRae and H Zehr, above n 18, p. 10.

\textsuperscript{25} G Maxwell and A Morris, \textit{Family, Victims and Culture: Youth Justice in New Zealand} (Wellington 1993), Institute of Criminology, Victoria University of Wellington and Social Policy Agency.
that there was no evidence of net-widening\textsuperscript{26} or the widespread use of inordinately severe penalties.\textsuperscript{27}

The author became aware that, due to these positive experiences, New Zealand’s juvenile justice system has become the focus of extensive international interest among practitioners, academics, policy advisers and the media, and has already been adopted and adapted by other jurisdictions. Various versions of conferencing have been developed or been given a trial in countries as diverse as Ireland, England, Belgium, Sweden, South Africa, Singapore, Canada and the United States.\textsuperscript{28} Against this background, the author intended to explore whether New Zealand’s youth justice system is still – after having been implemented 18 years ago - regarded as being a best practice model. In this regard, this research is exploratory and qualitative, drawing on literature evaluation as well as on semi-structured interviews with 10 practitioners working in the field of youth justice. The evaluation of the interviewees’ perspectives was intended to reveal perceptions held by experts working ‘behind the scenes’ and to disclose possible weaknesses of the system. In the case that this research corroborated the success of New Zealand’s system, the author intended to investigate whether parts of New Zealand’s system could be adapted by Germany – or, in other words, whether Germany could ‘borrow’ some of New Zealand’s legal concepts regarding youth justice. As a consequence, the idea of writing a comparative thesis matured.

\textsuperscript{26} For an explanation and discussion of the ‘net widening’ effect of welfare and diversionary responses to youth offending see below page 38, 46 and 181.

\textsuperscript{27} G Maxwell and A Morris, above n 17, p. 215.

\textsuperscript{28} Ibid.
The method of ‘Comparative Law’ was chosen because ‘borrowing’ legal concepts can be ‘the most fruitful source of legal change’.\(^{29}\) Especially with regard to juvenile justice, comparative studies of the treatment of young offenders provide an opportunity for countries to learn from each other’s experiences and develop new or better approaches for dealing with the universal problem of juvenile delinquency.\(^{30}\) By studying the experiences of different countries, common problems and themes may be discerned and the strengths and weaknesses of the approaches in each country may be better understood.\(^{31}\) On that account, New Zealand’s and Germany’s current youth justice systems and their underlying legislations are examined and compared in this thesis.

However, ‘Comparative Law’ is more than the comparison of two existing legal branches. Different country-specific structures and variation between the legal cultures of different nations make direct comparisons difficult. Not only the language, and, resulting from that, different terminology, but also the legal heritage and the current legal system can differ greatly. Furthermore, with respect to criminology and youth justice, one has to be aware that there are different types of statistics and evaluation methods employed and available in each country, so that the facts and figures available on the extent of juvenile delinquency are hard to compare.

As these differences do not only make comparison difficult but some of them may further hinder successful transplantation of foreign legal concepts, Comparative Law is ‘closely allied to ethnological


\(^{30}\) N M C Bala and R J Bromwich, above n 6, p. 3.

\(^{31}\) Ibid.
jurisprudence, folklore, legal sociology and philosophy of law’ and is therefore ‘more than one discipline’. Hence, before current legal systems and concepts can be compared in an adequate way, historical, sociological, cultural, philosophical, and legal similarities and differences have to be discovered, compiled and understood. Thus, this thesis first of all explores the social, cultural and historical backgrounds of both countries before the history of youth justice and the current legislations are compiled.

This thesis is structured around seven chapters. Chapter One, the introduction, provides an overview of this study. Chapter Two details the methodology and research design. The theoretical models underlying today’s youth justice systems are presented and discussed in Chapter Three. These models are based on various philosophies that are concerned with the best way of responding to juvenile offenders. Chapter Four explores and compares the historical, social, and legal backgrounds of both New Zealand and Germany and provides an overview of juvenile delinquency and crime statistics in both countries. Chapter Five presents the historical development of discrete juvenile justice systems in New Zealand and in Germany and concludes with a comparison. Chapter Six is the main chapter of this thesis. It begins with setting out the salient provisions of New Zealand’s CYPFA before the semi-structured interviews are analysed and evaluated and the findings of this qualitative research are presented and discussed. Chapter Six further presents the salient provisions of the German JGG. Chapter Seven concludes with the comparison of New Zealand’s and Germany’s youth justice legislations. The author draws conclusions, formulates some recommendations and finally arrives at the decision that the implementation of a decision-

making forum similar to the FGC would seem to be expedient and worthwhile from the German perspective.
CHAPTER TWO

THE RESEARCH PROCESS

2.1 INTRODUCTION

This chapter provides a description of the research methods and processes used to carry out this study. Since this thesis is primarily a comparative study and therefore contains several descriptive parts, information is principally derived from the relevant literature. Literature reviews, however, risk of only covering theoretical, one-dimensional and academic perceptions. As this thesis considers the question of whether components of New Zealand’s youth justice law and system might be incorporated into Germany’s youth justice system, it was regarded as valuable to additionally ‘look behind the New Zealand scenes’ to evaluate the practical application of the CYPFA. To achieve this desired insight, the method of qualitative research was chosen as the most appropriate and efficient procedure, because it enables the researcher to collect and analyse personal views of people living or working in a specific area of research. The qualitative method is identified as being the most suitable for collecting data concerning people’s private thoughts and opinions\(^1\) – thus data that cannot be gathered from literature. Consequently, qualitative semi-structured interviews with 10 practitioners in the field of juvenile justice in New Zealand were

conducted. Furthermore, a Youth Court sitting was observed and an international conference on the Family Group Conference was attended.

This chapter explains the applied research methods, outlines the strategies used to select and contact the participants, describes the interview process, and discusses the programmes and strategies used to generate, interpret and analyse the interview data.

2.2 Research Methods

Predominantly, this thesis was informed by an evaluation of literature dealing with youth justice and the analysis of semi-structured in-depth interviews undertaken with youth justice professionals working in New Zealand. Furthermore, important background information was acquired from observing a Youth Court sitting in Christchurch and from attending the 2006 International Conference on the Family Group Conference ‘Te Hokinga Mai – Coming Home’, held over three days between 27 and 29 November 2006 in Wellington. The writer’s own study and internship experiences have also informed the thesis to some extent.

Concerning the German part, the primary method of gathering information was collecting and evaluating the relevant literature dealing with youth justice in general and the German youth justice system in particular. The German literature was already collected and evaluated before the writer arrived in New Zealand. Additional information concerning the German youth justice system was gained through studying law in Germany with the area of concentration being criminology and youth justice. During her university studies in Germany, the writer undertook a four-week internship in the German Youth Court and a nine-week internship at the public prosecution office’s youth justice division. These internships provided valuable insights into the German youth
justice practice and also aroused the writer’s interest in searching for input and ideas that may help to improve the German system.

Literature concerning the New Zealand part was collected during the research process for this thesis. The consulted literature informs discussion throughout the thesis, particularly concerning the historical background of New Zealand’s youth justice system, the prevailing youth justice theories, and the current substantive law. Additionally, this project is a qualitative study based on direct observation of an important site within the study field (a Youth Court sitting), and the testimonies generated by a sample of practitioners working in New Zealand’s youth justice field. The direct observation and the semi-structured face-to-face interviews with Youth Court Judges, Youth Advocates, a Youth Justice Coordinator, a Youth Aid Coordinator, a Youth Justice Supervisor and a solicitor working for the Ministry of Social Development were seen as vital sources of information concerning practical experiences in New Zealand’s youth justice arena.

While the literature dealing with youth justice was identified as representing the ‘academic’ point of view, it was anticipated that in-depth interviews would reveal some of the ‘personal’ and ‘private’ appraisals concerning New Zealand’s youth justice system, offered by those implementing the theoretical ideas and legal statutes during their everyday work. Further, it was hoped that the interviews might give more insight into how the youth justice system actually works ‘on the ground’ and how the professionals working in this field review and evaluate the CYPFA from the practical point of view. Additionally, there was an intention to examine what representatives of the different occupational groups in the field of youth justice perceive to be working well or what they assume could be improved. Finally, the interviews should help to reveal possible gaps in or disadvantages of the youth justice system.
The qualitative research method was chosen because it appeared to be the best method of collecting complex and personal information about areas of people’s (working-) lives. Qualitative research is one of the two major approaches to research methodology in the social sciences. ‘The word qualitative implies an emphasis on the qualities of entities and on processes and meanings that are not experimentally examined or measured (if measured at all) in terms of quantity, amount, intensity, or frequency.’ Qualitative research methods facilitate a more holistic, in-depth understanding of what is happening in a particular research setting because they are rather more open-ended and exploratory than quantitative methods. The socially constructed nature of reality, the intimate relationship between researcher and what is studied, and the situational constraints that shape the inquiry are emphasised by the qualitative researcher. By employing qualitative research, the researcher always expects to get a better understanding of the subject matter at hand. The term ‘qualitative research’ describes research focusing on how individuals and groups view and understand the world or a specific social system they live or work in, and how they construct meanings out of their experiences. Hence, qualitative research involves an interpretive, naturalistic approach to the world. Qualitative researchers attempt to make sense of, or to interpret, phenomena in terms of the meaning people bring to them and therefore study social systems in their natural settings.

---

5 Ibid.
6 N K Denzin and Y S Lincoln, above n 3, p. 5.
7 U Froschauer and M Lueger, Das qualitative Interview (2003), p. 16.
8 N K Denzin and Y S Lincoln, above n 3, p. 4.
and coherences. This means that ‘qualitative researchers study people doing things together in the places where these things are done’.

However, qualitative research is a dynamic process that cannot be reduced to particular techniques and set stages. It ‘involves the studied use and collection of a variety of empirical materials – case study; personal experience; introspection; life story; interview; artifacts; cultural texts and productions; observational, historical, interactional, and visual texts – that describe routine and problematic moments and meanings in individual lives.’ Nevertheless, qualitative research essentially is narrative-oriented and uses content-analysis methods on selected levels of communication content.

The method of direct observation was chosen to gain an insight into the proceedings of one of the most important institutions in the field of New Zealand’s youth justice system: the Youth Court. Being able to observe a Youth Court sitting was a very good opportunity to see how this part of the youth justice system actually works. The writer attended the Youth Court sitting after nine of the 10 interviews had already been undertaken and met four of the interviewees again. This provided for the interesting experience of seeing them actually perform in their field. The author had further intended to directly observe several FGCs. However, despite considerable efforts made by both the author as well as the supervisors of this thesis, this request was repeatedly declined by Child, Youth and Family Services.

---

9 Ibid.
11 N K Denzin and Y S Lincoln, above n 3, p. 5.
For the purposes of this thesis, other than the mentioned method of direct observation, the method of semi-structured in-depth interviews, probably the most popular technique used to collect qualitative data, was chosen. According to Fielding and Thomas,\(^{13}\) in-depth interviewing is frequently used by qualitative researchers aiming to explore people’s attitudes, beliefs and values. The writer of this thesis wanted to see ‘behind the curtain’ to gain a comprehensive, holistic, and deepened insight into the New Zealand youth justice system. It was hoped that talking to practitioners working in the particular field of study would be the best way to achieve this desired insight.

The semi-structured, in-depth interview technique sets up a situation (the interview) that allows a respondent the time and scope to talk about their opinions on a particular subject while the focus of the interview is decided by the researcher. The purpose is to understand the respondent’s point of view rather than make generalisations about the subject. The semi-structured interview uses open-ended questions whose order and wording are laid out in an interview guide.\(^{14}\) These questions are asked during the interview, whereas the response is intended to be open ended, and the interviewee is allowed to reply in his or her own words.\(^{15}\) Generally, some further questions will arise naturally during the interview and will be discussed as well. The questions to be asked during the interview do not necessarily have to be the same for all participants.\(^{16}\)

The interviewer tries to build a rapport with the interviewee so that the interview is like a conversation.\(^{17}\) This enables the interviewer to collect

\(^{13}\) N Fielding and H Thomas, above n 2, p. 137.
\(^{14}\) A-M Nohl, above n 12, p. 20.
\(^{15}\) Ibid, p. 19.
\(^{16}\) A-M Nohl, above n 12, p. 21.
data, such as feelings, emotions, and personal points of view, which cannot be easily observed or taken from literature. Further, the strength of semi-structured interviews is their high validity. The respondents are able to talk in detail and depth about their area of expertise. As the interviewees speak for themselves and with little direction from the interviewer, the meanings behind actions and the personal view of the interviewee may be better revealed than with any other research method. Another advantage of semi-structured interviews is that the interviewer can probe areas suggested by the respondent’s answers and pick up information that had either not occurred to the interviewer or of which the interviewer had no prior knowledge.

2.3 Selecting and Contacting Participants

The main criteria for selecting participants were that they worked in the field of youth justice and possessed reasonable experience in this field. As already mentioned above, it was seen to be most valuable to interview members of different occupational groups working in the field of youth justice, such as Youth Court Judges; Youth Advocates; Youth Aid Officers; Youth Justice Coordinators; and members of the Department of Child, Youth and Family Services. Further, it was intended to contact professionals working in Christchurch and Hamilton to be able to explore two different Youth Court circuits.

The first potential participants in Christchurch and Hamilton were contacted via introductory letters sent out by the supervisors of this thesis in May 2006. The selection process was ongoing and covered several weeks, overlapping with the development of the interview guide, because selected participants were not always available or willing to participate.

---

18 U Froschauer and M Lueger, above n 7, p. 59.
19 Hereafter referred to as CYF.
Whereas the practitioners working in Christchurch were very cooperative and willing to involve themselves, it proved difficult to find a comparable number of willing professionals in Hamilton. Thus, after having received several interview confirmations in Christchurch, it was decided not to conduct the interviews in Hamilton.

Hence, 10 professionals working in different occupational groups in the field of youth justice were finally selected from the range of Christchurch professionals who had indicated a willingness to take part. The aim was to talk to at least one representative of each occupational group. Further, an equal sample of male and female participants was chosen. More specific selection data were not applied. The selected participants were four Youth Court Judges, two female\(^\text{20}\) and two male\(^\text{21}\); two Youth Advocates, one female\(^\text{22}\) and one male\(^\text{23}\); one male Youth Justice Coordinator\(^\text{24}\), one male Police Youth Aid Sergeant\(^\text{25}\); one female solicitor employed by the Ministry of Social Development and servicing CYF\(^\text{26}\), and one female Youth Justice Supervisor working for CYF\(^\text{27}\). All participants were Pakeha.

The number of participants, the fact that they were all of the same ethnicity, and the concentration on only one New Zealand city – Christchurch – already indicates that this thesis does not aim at providing universally valid or generally accepted information. By presenting the collected data, the intention is to portray people’s experiences, which are

\(^{20}\) Judge Costigan and Judge McMeeken.

\(^{21}\) Judge Strettell and Judge Walsh.

\(^{22}\) Siobhan McNulty.

\(^{23}\) Anthony Greig.

\(^{24}\) Malcolm Young.

\(^{25}\) James Read.

\(^{26}\) Margaret Gifford.

\(^{27}\) Cathrene Brophy.
likely to be similar to the experiences of others working in the same positions. In some cases, the similarity is supported by evidence from other studies. However, writing about peoples’ narrative always involves interpretations and personal judgements, which may be contested.

Regarding the sample, no claims are made concerning its ‘representativeness’ in the statistical sense of the word. Instead, the thesis aims at collecting and interpreting personal appraisals and thoughts of the interviewed individuals. Like other qualitative researchers, who aim for ‘depth’ instead of ‘breadth’, the intention was to discover and reveal the variety of experiences of a number of people working in different occupational groups in youth justice, and to provide an in-depth analysis of these. Thus, it was decided to study a few cases intensively. Although the professionals were selected and accessed as representatives of their occupational group, and as such were speaking as named participants on behalf of their group, it is acknowledged that specific individuals cannot represent all members of the relevant group. Consequently, this thesis makes no claims about the generalisability of its findings to a particular population or group. Therefore, while reading this thesis, one has to be aware that the material is not intended to be generalised as ‘the views of New Zealand’s youth justice practitioners’, but instead grants an insight into what some individuals working in the current youth justice system personally think. These insights, however, are regarded as being very informative in terms of the way professionals (being ‘experts’ and ‘insiders’) actually see the system they work in.

After having contacted the 10 selected participants by telephone and having agreed on time and date for the interviews, the elaborated

---

interview guide was emailed to them in the first week of July 2006 for enabling them to prepare for the interviews.

2.4 The Interviews

The interviewing process began on 1 August 2006 and the final interview was undertaken on 31 August 2006. Each of the 10 face-to-face interviews was carried out in the respective office or workplace of the interviewee in Christchurch.

Before each interview commenced, the participant was asked whether he or she minded being tape-recorded. All interviewees were agreeable so all interviews were recorded digitally. This, on the one hand, ensured that the information collected was accurate and allowed the interviews to be transcribed verbatim; and on the other hand enabled the interviewer to fully concentrate on the conversation instead of needing to take handwritten notes throughout the interview. As the participants were all being interviewed in their professional capacity and some of them were officers, magistrates, or other public servants, it was considered necessary to offer anonymity. Because of that, each participant was asked before commencement of the interview whether he or she objected to being mentioned by name in the thesis or being cited or quoted. Although all participants agreed to be quoted and mentioned by name in the thesis, this request was repeated via email approximately two weeks after the final interview was undertaken. Shortly before the final draft was handed in, the author further provided each interviewee with a draft of the thesis with the request for confirmation or changes.

The interviews were expected to last approximately one hour. However, as the semi-structured in-depth approach was applied, the length of the interviews varied significantly and ranged from approximately 47 minutes to three hours. The three-hour-interview, undertaken with
Malcolm Young, was split into two parts because on the original interview day the participant had to keep another appointment after having talked to the interviewer for two hours. Fortunately, he kindly agreed to continue the interview one week later. The variation in length was dependent on the participants’ timetables and commitments as well as their personal and professional involvement in, and knowledge of, the different areas of the youth justice system. The Youth Court Judges, for instance, could not report about experiences with FGCs and police diversion so that those interviews were generally shorter than, for example, the ones with the Youth Justice Coordinator or the Youth Aid Coordinator.

The interviews were carried out as semi-structured in-depth interviews by using three slightly different types of interview guides, one for each occupational group, making allowance for the different institutional contexts and perspectives. The different groups were the Youth Court Judges; the Youth Advocates; and the Youth Aid Officer as well as the professionals working for CYF. Each type of interview guide contained 27 questions.

The interview guides were used to help keep the interview focused and to ensure that the relevant topics were addressed. However, the semi-structured, in-depth approach allowed the participants to engage with the topic and address issues they thought were important. All interviews were carried out like a conversation in which extra questions arose and were discussed during the course of the interview. Although conversational interaction was employed, the interviewer tried to limit her spoken involvement during the interviews to ensure that the participants were not interrupted or prevented from completing what they were saying. Nonetheless, it was sometimes difficult to maintain an involved presence.

See Appendix B for examples of the three different interview guides.
while at the same time attempting to remove any influential or disrupting elements. Some interviews were more informal than others and it was not always possible to sustain the strategy of limited interaction throughout. Moreover, it was sometimes regarded as essential to direct the discussion towards certain issues; to intercede for clarifying a point or asking a follow-up question; or to answer direct questions. In some interviews, the conversation was established more easily and the discussion was more active than in others. Particularly in two interviews, the participants tended to just answer the questions so that a narration of their own experiences and engagement with the topic needed to be prompted and direct follow-up questions needed to be asked, so that increased participation on the interviewer’s part was required.

Recapitulating, all the 10 interviewees were friendly, helpful, and responsive and talked frankly about their experiences. The assumption that the participants employed by the public authority might be influenced by their position within an ‘institutional context of hierarchy, loyalty and formal procedures’ did not eventuate. The interviewer could not ascertain any differences between the interviews with the lawyers on the one hand and the interviews with judges, police officers, or employees of the Ministry of Social Development or CYF on the other. All interviewees disclosed private appraisals and seemed to advance their own (sometimes critical) opinions by blending their personal and professional views. None of the participants, regardless of whatever occupational situation, appeared to be constrained or guarded in their views. The confidence and candour of the participants throughout all conducted interviews may be based on their overall positive appraisal towards New Zealand’s youth justice system and to some extent on the professional status of their position. All participants had several years of

---

experience in the field of youth justice and can be regarded as experts in this topic, so they might have felt free to reflect upon the system in a straightforward and critical way.

Two of the judges, Judge McMeeken and Judge Walsh, were appointed seven years ago and have worked in the Youth Court since then. Judge Costigan has been practising for 17 years and has been hearing youth justice cases since her first year as a judge. Judge Strettell has been a judge for 16 years and a Youth Court Judge since his first year. Siobhan McNulty has 20 years’ experience and has worked as a Youth Advocate for five years, while Anthony Greig has been working as a lawyer for five years and became a Youth Advocate seven months prior to the interview. James Read became a front-line police officer 31 years ago. He worked in front-line policing for 15 years before he became a Youth Aid Officer. After 12 years of practice as a Youth Aid Officer he became a Youth Aid Sergeant, working in the position of a Youth Aid Coordinator over the past three years. Malcolm Young has been working as a Youth Justice Coordinator for 10 years. Cathrene Brophy has been employed in various different fields of social work before she started working as a Youth Justice Supervisor seven months ago. Finally, Margaret Gifford has worked as a solicitor for the Ministry of Social Development for 18 years and six months.

The different periods of work practice and experience indicate that a direct comparison between the participants’ testimonies cannot be drawn for lack of comparability. Instead, the different periods of practice lead to different backgrounds and therefore may result in different perspectives and views. These factors had to be kept in mind while analysing the interview material. It was anticipated that those participants who have already been working in their current position for a long time might be somehow more pragmatic about their work, the system, and the CYPFA, or at least less enthusiastic, than participants who have not been working
in that field or in that position for such a long time. However, as it was intended to gain a wide variety of appraisals and viewpoints, it was regarded as very valuable for the purposes of this research project that the interviewees had diverse backgrounds and working experiences.

As a result of their long-time work experience, the interviewed persons had plenty of accumulated knowledge about youth justice in general and about their special field in particular. In addition, some of the participants had interdisciplinary knowledge, for instance Anthony Greig had worked as a police officer and specialised in Youth Aid before he became a lawyer, and three of the four interviewed Youth Court Judges had also been working in the field of youth justice when they were practising as lawyers before they were appointed as judges. Thus, they could talk about their experiences in the different occupational groups. Judge Walsh had worked as a judge in another South Island city for six and a half years before he came to Christchurch six months ago, so he could give interesting insight into the youth justice work in another region and draw comparisons while reporting about different issues. Judge McMeeken runs the only Youth Drug Court in New Zealand, a court set up by statute which arose from a Ministerial Taskforce on youth crime. The young persons who come before the Drug Court have to be alcohol or drug dependent, which means they have usually been assessed by a psychiatrist, a specialist in the field of addiction, who has confirmed that they are addicts. Further, the young persons coming before the Drug Court have to be serious offenders, meaning that they have committed a serious offence or are repeat offenders. The Drug Court sits every two weeks, so the Drug Court Judge sees the young persons fortnightly and is able to monitor their plans very closely. This differs from the ordinary Youth Court, where the young persons either only appear once or again after six months. Judge McMeeken gave an insight into her special field as well as drew comparison between the ordinary Youth Court and the Drug Court.
Finally, all the participants agreed to further contact if the transcription and analysis process brought up any further questions or highlighted any other issues that needed discussion or clarification. Additionally, most participants asked to be kept informed about the development of the thesis. After having conducted the final interview, emails to thank the participants for their contribution to the project were sent out and they were told that they would receive a digital copy of the thesis once it is completed.

2.5 Analyzing the Research Material

Following qualitative fieldwork, a researcher needs to analyse the data before being able to present them in a narrative form. Thus, after having created a field text consisting of the interview contents, a researcher moves from this text to a research text. During this process, the researcher becomes a ‘writer-as-interpreter’ who re-creates the text as a working interpretive document that contains the writer’s initial attempts to make sense of what he or she has learned. Finally, the writer produces the public text that contains empirical assertions supported by direct quotations from interviews and evidence from behaviours collected in the fieldwork.\(^3\) Furthermore, the qualitative writer needs to provide some interpretive commentary framing the key findings in the study, and the theoretical discussion should be traceable in the final text.\(^3\)

Qualitative analysis is done in almost constant interaction with the data.\(^3\) The first point where this interaction started to take place was during the process of interviewing and hearing the recorded material while transcribing the interviews verbatim. However, only the first interviews

\(^3\) V J Janesick, above n 17, p. 54.
\(^3\) Ibid.
\(^3\) R Tesch, *Qualitative Research: Analysis Types and Software Tools*, (1990), p. 113.
were transcribed word for word, including pauses and interruptions. As the transcription process developed, certain shortcuts and ellipsis were employed to speed up the process. Eventually, non-relevant data were excluded and a note was made in the transcription to indicate that.

Through the ongoing interaction with the data while transcribing the interviews and reducing the data, certain major categories were identified. This procedure is called de-contextualising the data or segmenting the whole interview text into meaning units or analysing units.\(^{34}\) While reading through each transcript, major categories emerging in each were listed under a respective heading. Similar topics were put together while new categories were developed when data appeared not to ‘fit’ into existing ones. However, the nature of the research topic meant that material often ‘fitted’ into multiple categories, which called for a later decision about where in the thesis it could be included to greatest effect. This procedure provided a good sense of the whole, which is important when developing an organising system, particularly for the analysis of unstructured qualitative data.\(^{35}\)

Following that, the different categories that had emerged from the different interviews were compared to develop a sense of commonalities and diversities that existed. After having ascertained what contradictions existed between the different categories, the gaps, marginalisations, and different perceptions were noted.


\(^{35}\) R Tesch, above n 30, p. 142.
The identified categories included: pathways through the system; ethnicity and cultural appropriateness; the different levels of diversion as a response to youth offending; re-offending and serious offenders; FGCs; plans and outcomes; ‘dysfunctional’ families and their attitude towards participating in an FGC; problems with resources; and the occurrence and appliance of alternative actions. Certainly, many of these were pre-determined in the sense that they reflected the central categories from the interview guide, which themselves had emerged from the writer’s previous knowledge on the topic and the questions that seemed to be interesting from the German point of view. However, some unanticipated themes evolved additionally from the interview material.

After having de-contextualised the data of each interview, reports containing the variety of responses to a particular question or theme were produced. In other words, the statements relating to a specific category were extracted from each interview transcript and put together in one report. These reports formed major themes that were subsequently interpreted and used to structure, inform and formulate the chapter on the current juvenile justice system in New Zealand.

After having assembled all the data relating to one particular question or theme in one report, the data were ready for interpretation. However, as Tesch\(^{36}\) notes, in qualitative data analysis (unlike quantitative data analysis), organisation and interpretation of data do not always take place as two isolated processes; rather they are intellectually interwoven and thus often happen at the same time. Hence, linking the major themes to the literature and the youth justice theories that might be used to explain them had already happened to some extent during the interviewing-and/or transcription process or the re-examination of the transcripts.

\(^{36}\) Ibid, p. 114.
Nevertheless, most of the interpretation proceeded from examining the interview material once it was assembled in each report. Firstly, the different reports were inspected in order to divide the major themes into several sub-themes, trying to get a sense of the variety of peoples’ experiences, responses to questions and their different attitudes to particular aspects of their specific field of work. Many of these sub-themes formed the basis of separate sub-titled parts of the chapter on New Zealand’s current youth justice system. As part of this process, an interviewee’s conversation was scrutinised for the use of any conflicting or contradictory discourses, to tease out the complexities and ambiguities in participants working lives. Additionally, each participant’s narrative was compared with other participants’ responses to the same questions or themes to determine similarities and differences. This procedure is called comparative analysis.  

At this point it has to be emphasised that the responses of all 10 participants were to a large extent very congruent. Further, the information provided by the interviewees mostly aligned with the information represented in the relevant literature. Because of that, much information provided by the participants could be used to inform the chapter on the current youth justice system. Sometimes, portions of interviews were included in the thesis and participants’ comments were cited to illustrate a certain aspect or to emphasise an important fact. Although these portions of the interviews were edited as necessary, the meaning was not changed. Only characteristics of spoken narratives, expletives, or words such as ‘um’ or ‘er’ were omitted from quotations. Where a word needed to be changed or inserted to clarify what a participant was talking about, brackets have been used to indicate this.

37 A-M Nohl, above n 12, p. 50.
In addition to the comparative analysis, participants’ talk was analysed textually and contextually, with the emphasis on the contextual analysis. While the textual analysis focuses on the structure of interviewees’ conversation by evaluating syntax, grammar, the use of rhetorical devices, and specific linguistic features, the contextual analysis links structural descriptions to their cultural, social and political context. Furthermore, the symbolic and latent meanings of texts or verbal communications were analysed.

The contextual analysis that was carried out when interpreting the data for this study was concerned with revealing the routine in which certain types of talk occur, and how these are connected with particular circumstances and social interaction. Accordingly, assigning the different statements to the various themes needed to be exercised cautiously in order to maintain the original context in which the comment was made or discourses were drawn on. If the context seemed to be unclear, it was referred back to the participant’s whole transcript to ‘re-contextualise’ the statement.

A participant’s responses were not only interpreted to establish connections between discourse, particular circumstances and social interaction, but also to determine the way discourse reproduces ideology. Close attention was paid to the specific words the interviewees used when describing certain incidents, institutions or the persons they deal with. When referring to young persons who offended repeatedly, for instance, it was interesting to see whether the young person was referred to as an ‘unfortunate kid’ or as a ‘resistant hard-core offender’. While comparing different expressions used, it was considered whether different

---

meanings attached to these words could be explained with understandings resulting from different social contexts, and how these unlike meanings are inherent in peoples’ attitudes and actions.

In conclusion, this chapter has outlined an apparent linear progression activity, from formulating the research topic, reviewing the relevant literature and setting out the historical and theoretical background of youth justice to observing youth justice institutions, interviewing practitioners and analysing and presenting the interview material.
CHAPTER THREE
JUVENILE JUSTICE MODELS

3.1 INTRODUCTION

The legal implementation of criminal proceedings against juvenile offenders varies greatly across the international spectrum. Commonly held perceptions about the causes of juvenile offending are increasingly challenged, as are practices and procedures employed for dealing with both young offenders and juveniles in need of care, protection and control.\(^1\) As a consequence of the different theories concerning the causes of juvenile offending, there is much commentary and controversy about appropriate legal responses to juvenile crime, how to deter juvenile offenders from reoffending, and how to reduce the increasing number of young delinquents. Accordingly, there is considerable divergence in the juridical bases and the structure of organisations dealing with juvenile offenders in different jurisdictions. These different systems are based on diverse theoretical approaches which have been developed over the years by legal practitioners and criminologists.

Until the 18\(^{th}\) century, Western justice systems were characterised by a classical crime-control approach. Crime was seen as a rational act of free will and children and young persons were convicted and punished as adults in adult courts. Corporate punishment and execution were common

penalties for violating the law. However, in the late 18th, early 19th century it was acknowledged children were uniquely vulnerable. Consequently, discrete youth justice systems were developed. While the first European youth justice models could still be characterised by the classical crime-control approach, the first American youth justice legislation was based on a philosophy that is now commonly referred to as a welfare model. The welfare approach was soon adopted by several European countries, such as England and Wales, Ireland and Scotland.

While the youth justice systems set up under the welfare approach were a significant improvement over former treatment of young offenders, they were not without criticism. As a ‘rights’ culture developed in various countries around the 1950s, the welfare model was criticised for its paternalism and violation of rights. Consequently, youth justice systems based upon a justice approach were established, emphasising due process and legal rights. Nevertheless, some countries retained the welfare approach up to the present.

The welfare and the justice models can be regarded as the ancestors of the various juvenile justice systems existing nowadays in different countries all over the world. However, both models can be characterised by their apparent lack of success either in preventing or reducing youth

---


3 Also called 'social welfare model', 'treatment model', 'medical model', 'paternalistic rehabilitative ideal' or 'red model'.

4 In England and Wales, for instance, the concept of welfare provision was introduced into the youth justice system in 1933, placing a duty on magistrates to have regard for the welfare of the child in making an appropriate disposition., see, e.g., J Graham, ‘Juvenile Crime in England and Wales’ (Chapter 4) in N M C Bala, J P Hornick, H N Snyder and J J Paetsch (eds), *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (2002), p. 81.

5 Also called 'due process model', 'blue model' or 'equity model'.
offending, or in rehabilitating those who offend. Thus, alternative philosophies have been developed and applied to the original two models.

Although the welfare and justice models replaced the earlier philosophy which emphasised crime-control and punishment, the crime-control approach has never completely disappeared and has recently regained attention in the discussion concerning appropriate responses to youth offending behaviour. In contrast to the crime-control model, another approach was recently established that emphasised diversion from formal responses to youth offending and decarceration. Last but not least, the idea of mediation has lately entered the juvenile justice area, accentuating the importance of involving victims and their needs in the justice process. This approach is often referred to as the ‘restorative justice model’.

These different, and sometimes contrasting, models have basically developed in response to historical and legal-cultural factors. The welfare model, which is rooted in the North American tradition, can be seen as the counterpart of the justice model, which evolved in Europe. The crime-control model is often employed by conservative parties in electoral campaigns, promising a ‘get-tough’ approach towards the increasing crime rates, while the diversion and restorative justice models are more often promoted by the social democratic and liberal lobbies.

---

10 Prior to the 1970s elections in England; prior to the 1987 election in New Zealand (J Pratt, 1987); prior to the 1998 and 2002 elections in Germany (F Dünkel 2002).
Although these different approaches are labelled as ‘models’ in the following text, it needs to be emphasised that they are in fact theoretical or philosophical rationales which have been stereotyped and idealised as such. In reality, their outlines are blurred and the approaches are mingled. A pure form of either of these ‘models’ does not exist in practice; instead, most current youth justice systems are an amalgam of these different theories.\textsuperscript{11} The diversion approach and the restorative justice approach in particular are not independent youth justice models from the doctrinaire point of view, because neither of them has ever been operated ‘purely’ as a discrete justice model. Instead, their principles can be applied comfortably alongside each of the ‘real’ youth justice models.\textsuperscript{12} However, it makes sense to describe their main principles and critics at this point because it facilitates understanding the development of the New Zealand and Germany youth justice systems.

\section*{3.2 Welfare Model}

The welfare model has a long history. As long ago as 1790 the ‘Philantropic Society’ [sic] was founded in the USA. This association was established to prevent needy children from committing criminal offences and to protect them from supposedly malicious influences. These self-named ‘child-savers’\textsuperscript{13} disapproved of the imprisonment of juvenile delinquents in adult prisons because they were convinced that the conditions prevailing there were not appropriate for the rehabilitation of young offenders. As a consequence of the Society, for the first time the deviant behaviour of young persons and ‘youth’ as a specific group and life phase was recognised as a social issue. This development led to the

\begin{flushleft}
\footnotesize
\textsuperscript{11} G Maxwell and A Morris, above n 7, p. 165.
\textsuperscript{12} Ibid, p. 169.
\end{flushleft}
enactment of the first juvenile justice acts and the establishment of the first (integrative) youth- and tutelage- court in Illinois in 1899. The American Children Act 1908 was intended to abandon the crime-control model and lead to a more welfare-oriented jurisdiction that considered the child’s needs. To achieve this goal, special magistrates were appointed who were expected to administer justice relating to young persons and their needs.

The welfare model follows a determinist explanation which argues that criminal behaviour is a symptom of underlying disorder that follows from individual pathology, family breakdown, community disruption, or social or economic disadvantages. Accordingly, it is believed that young offenders are not responsible for their behaviour and therefore act without individual guilt. Their offending is a consequence of external adverse influences; the offender has no choice over whether or not to become delinquent. Thus, the focus of responding to youth offending is on finding out what ‘went wrong’ and ‘putting it right’. This argument leads to the belief that each state should endeavour to reduce the disadvantages which are responsible for causing criminal behaviour instead of punishing the individual. It is further believed that the causes of delinquent behaviour can be discovered and that discovery makes possible the treatment and control of such (basically remediable) behaviour.

Since the offender is not personally guilty but just ‘a victim of society’, the adherents of the welfare model favour an integrative reaction system for children and juveniles who come to official notice. It is argued that there should be no distinction between children and young persons who

offend, and those who are in need of care and protection. This idea results from the conviction that all children and young persons have the same basic needs, and criminal behaviour is just an expression of social or family problems. The focus of juvenile justice is on the offender rather than on the offence, and on the welfare of the young persons rather than on their punishment or accountability for an offence.\textsuperscript{16} Therefore, the best ‘treatment’ for criminal behaviour is seen as individual casework, family therapy, and group and community work leading to the rehabilitation of the young offender.\textsuperscript{17} Interventions should be judged on their effectiveness in meeting the individual’s (or family’s) ‘best interests’ and ‘welfare needs’.\textsuperscript{18} Additionally, the adherents of the welfare model state that ‘the earlier the intervention, the more effective treatment will be’.\textsuperscript{19}

The welfare approach maintains that intervention and treatment do not have harmful side effects.\textsuperscript{20} Furthermore, many adherents believe that treatment does not necessarily have to be voluntary and that involuntary treatment is not punishment.\textsuperscript{21} Effective responses to offending behaviour require broad discretion by authorities, and any information concerning the young persons and their social background may be ‘relevant’ in determining their needs and best interests.\textsuperscript{22} Thus, while trying to achieve the best treatment for young offenders, procedural


\textsuperscript{17} Bradford Juvenile Justice Unit, cited in: M P Doolan, above n 1, p. 1.

\textsuperscript{18} M P Doolan, above n 1, p. 2.

\textsuperscript{19} Ibid, p. 8.

\textsuperscript{20} Bradford Juvenile Justice Unit, cited in: M P Doolan, above n 1, p. 1.

\textsuperscript{21} M P Doolan, above n 1, p. 2; M P Doolan, above n 15, p. 8.

\textsuperscript{22} G Maxwell and A Morris, above n 7, p. 165.
safeguards and legal rights are regarded as obstructive and are therefore secondary to welfare-oriented intervention. Furthermore, tariff considerations are seen as a hindrance to achieving the most effective intervention which needs to be provided for as early as possible and as long as necessary.  

The welfare model faces enormous criticism. Opponents argue that a range of abuses is concealed under the guise of the term ‘welfare’. First of all, critics disapprove of the limited recognition of due process and the young person’s legal rights. Second, the broad discretion exercised by the authorities may lead to disparities through subjective, and possibly discriminatory, decision-making and can have a net-widening effect. Furthermore, it is acknowledged today that state intervention is always harmful. Research shows that children who were taken away from their families and placed in an institution for welfare purposes were more likely to offend than children who were reared in their own families. Despite these criticisms, few jurisdictions have abandoned welfare-oriented ideas completely, and endeavours to address the young offender’s well-being and to provide measures and responses that meet their individual needs are found in many youth justice systems.

23 Ibid, p. 166.
24 N M C Bala and R J Bromwich, above n 16, p. 6.
25 G Maxwell and A Morris, above n 7, p. 166.
3.3 Justice Model

The welfare and the justice model are often described as ‘two polarities on a theoretical continuum of possible models of regimes of juvenile justice’. Indeed, the justice approach was responsive to critics about ‘welfare’ and some of its principles are the exact opposite of those underlying the welfare approach.

Adherents of the justice model follow an indeterminist approach and explain criminal behaviour as an act of free will. They believe that each person is an individual and is able to consider and control their own actions which are not dependent on social or environmental factors. As a consequence, criminal behaviour is optional for the individual, even if they do have social or personal problems.

The justice approach is based on a liberal interpretation of criminal law represented by the absolute criminal justice theories and is, in other words, based on an ‘equitable theorem’, meaning that dispositions should be equated with the gravity of the offence. Both juveniles and adults are expected to act in accordance with the law and dispositions need to be determinate. Proof that an offence has been committed requires judicial intervention and is the basis for punishment after personal guilt is proven. The committed offence is the main focus of decision-making, while treatment is secondary or optional. The authority to adjudicate belongs to the criminal courts and judges. Criminal proceedings against offenders (juvenile or adult) must be formal, and judges are obliged to observe due

27 N M C Bala and R J Bromwich, above n 16, p. 6.
28 G Maxwell and A Morris, above n 7, p. 167.
30 G Kaiser, above n 9, p. 450.
31 G Maxwell and A Morris, above n 7, p. 167.
process as well as the offender’s legal rights and procedural safeguards. Consequently, responding to criminal behaviour is no concern of social welfare departments.

The adherents of the justice approach are convinced that criminal behaviour is a normal part of growing up and stops automatically as individuals leave school, find work, are less influenced by their peer group, and have children of their own. Only a few individuals become serious offenders. Consequently, intervention should be delayed for as long as possible, because it will introduce the individual to associations which are likely to exacerbate delinquency, not ameliorate it. Furthermore, social work intervention may help with some problems, but its influence on criminal behaviour is likely to be limited. Social work or welfare help, if needed, should be provided by the appropriate field of law. It should not be given under the guise of a supervision order imposed for a criminal offence.

Today, elements of a justice model are found in many constitutional law systems where penalties have to be determinate, legal representation is common, and custodial sentences are limited, while the use of ‘least restrictive alternatives’ are promoted.

However, the justice model also has its critics. Opponents state that it fails to address the causes of offending behaviour and ignores social disadvantages and deprivation. Additionally, the critics disapprove of the equality of penalties which do not allow for adequate responses to

32 M P Doolan, above n 1, p. 9.
35 M P Doolan, above n 1, p. 2.
36 G Maxwell and A Morris, above n 7, p. 167.
individual needs and therefore lead to inflexibility and sometimes injustice.\textsuperscript{37} Furthermore, lack of discretion and formal proceedings prevent moves to novel decision-making arenas.\textsuperscript{38}

\subsection*{3.4 Crime-Control Model}

Fear of crime and violence has recently increased in many countries. The reasons are increased crime rates as well as populist press coverage and pre-electoral cheap propaganda by the right wing ‘law and order’ lobby. However, this fear recently led to a return to crime-control aspects in the area of youth justice. The main principle of the crime-control approach focuses on general prevention of crime through deterrence and incapacitation.\textsuperscript{39} Thus, the adherents of a crime-control model emphasise the importance of protecting the general public by punishing offenders as hard as possible, preferably with custodial sentences. Comparable to the justice approach, it is believed that the offender is an individual with free will who can choose whether to offend or not. If the offender chose to offend, he or she must be held accountable for his or her wrongdoing, regardless of his or her age. The primary aim is the protection of society. The adherents of the crime-control model favour a ‘no mercy’ strategy towards offending as opposed to the other approaches, which they accuse of excusing crime and being sympathetic towards offenders.\textsuperscript{40}

The implementation of crime-control principles is reflected by the ability, in some jurisdictions, to refer young offenders to adult courts for a ‘harder’ punishment; a more extreme example is that in some American

\begin{itemize}
\item[\textsuperscript{37}] Ibid.
\item[\textsuperscript{38}] Ibid.
\item[\textsuperscript{39}] Ibid, p. 168.
\item[\textsuperscript{40}] Ibid.
\end{itemize}
states juvenile and adult offenders can be sentenced to death.\footnote{Ibid.} Further aims recently formulated by crime-control adherents are lowering the age of criminal responsibility, or abolishing youth justice as a whole and instead applying general criminal law to young offenders.\footnote{These ideas are often brought forward by the conservative parties, for example in Germany by the CSU-party.}

The main criticism of the crime-control approach is that it favours harsh and custodial sentences. This response to juvenile offending ignores not only social deprivation and disadvantages but also the adverse influences that custodial sentences have, especially on young persons. Further, research has proven that custodial sentences lead to higher reoffending rates so that the crime-control model is likely to increase crime rather than lower it.\footnote{F Schaffstein and W Beulke, \textit{Jugendstrafrecht} (14\textsuperscript{th} ed 2002), § 44, p. 278.} Additionally, an increased application of custodial sentences results in high incarceration rates which result in higher costs. Last but not least, individual responses or alternative sanctions do not exist and due process as well as legal rights may be overlooked under the guise of public protection.

### 3.5 Diversion Model

Concurrently with the support for crime-control, a strong move against conservative policies in general could be observed. Democratic and liberal lobbies argued for the establishment of equal treatment and equal chances across social classes, including equal opportunities in education and training for deprived young persons. They accused the formal youth justice practices of discriminating against members of the working class or minority groups. Further, they stated that the formal youth justice process leads to stigmatisation and thus is likely to increase
reoffending. This belief led to the establishment of the ‘labelling theory’ that first - in the 1960s - gained importance in sociology and later emerged as a leading theoretical framework for youth justice practitioners.

Labelling theory deals with the reaction others have to those labelled (or stigmatised) as criminals. Generally, the term stigma is used to ‘refer to an attribute that is deeply discrediting’. Inherent in this definition is the idea that this attribute is something which deviates from what society has deemed ‘normal’; society therefore responds to this attribute with ‘[...] interpersonal or collective reactions that serve to ‘isolate’ ‘treat’, ‘correct,’ or ‘punish’ individuals engaged in such behaviour’. As such, the response to stigma is social control.

The focus of any discussion concerning labelling and stigmatisation through criminal justice proceedings is their great influence on a person’s personality. Labels are theorised to cause a change in role for those labelled, such that those labelled as deviant may internalise that they are indeed deviant and criminal and therefore may actually become criminals. The adherents of the labelling approach distinguished between ‘primary’ and ‘secondary’ deviance. Primary deviance is the initial behaviour which violates the prevailing norms of society. This may or may not result in the individual receiving an official stigmatising label. When it does, however, the process of secondary deviation begins. Secondary deviance involves the assumption of certain ‘roles’ which then

48 E M Schur, above n 45, p. 12.
become the central way through which the labelled person and society views and judges him or her. The adherents of the labelling approach further argue that the labelled persons become, by virtue of the label, isolated from non-stigmatised groups in society. This can severely limit the individual’s ability to fully participate in everyday life, such as finding and holding a job, having a home, getting access to any needed services and enjoying mutually supportive relationships with family and friends. As a result, the labelled individual who is denied legitimate social roles adopts ‘a deviant social role’. This has profound implications for the individual’s view of his or her self. Thus, someone who has committed an offence, and therefore is labelled as an offender through criminal proceedings and formal conviction, is very likely to reoffend because everyone (including him or her self) believes anyway that he or she is a criminal.

To avoid young persons being labelled as criminals, the logical consequence was to bypass formal court proceedings and incarceration wherever possible. Thus, the approach evolving out of labelling theory was called the ‘diversion approach’, because diversion literally means ‘to bypass’. Consequently, the only ‘real’ form of diversion in this sense of the word is police diversion, because police informal actions apply before formal criminal proceedings have been initiated and the young offender therefore really ‘bypasses’ formal court proceedings. However, in many jurisdictions today, the term ‘diversion’ is often also used for responses to youth offending which are applied after formal proceedings have been initiated and therefore after the young person has already entered the youth justice system. These responses (like dismissal or termination of

50 Ibid.
52 E M Schur, above n 45, p. 69.
53 E M Lemert, above n 47.
proceedings) are – although this is literally not correct - called ‘diversion’ because they prevent the young person from being criminally convicted.

Furthermore, diverting young offenders from formal criminal proceedings is justified by the fact that basically every young person commits minor offences during his or her adolescence. Offences like shoplifting, minor traffic offences, minor property damage, defamation and minor physical injuries nowadays are widespread behaviour patterns among juveniles. The commission of petty offences is viewed as being ubiquitous; the growing-up process ‘is a phase which many of us – boys and girls, black and white, middle class and working class – both go and grow through’.\(^{54}\) In agreement with the principle of the justice approach, the adherents of the diversion model are convinced that criminal behaviour appears episodically and generally stops automatically as individuals leave school, find work, are less influenced by their peer group, and start a family. Thus, formal proceedings are hardly ever needed because the average young person ceases offending after growing up.

However, young offenders who are diverted from formal proceedings generally receive responses to their offending behaviour. Today, most statutory diversion provisions provide for informal measures, such as warnings or community service, which are usually imposed concurrently with the diversionary action and are regarded as more successful than formal court orders. These measures are, depending on the underlying youth justice system, applied by police, public prosecution authorities, or judges.

Diversion is probably the leading trend in youth justice today. It is applied in order to reduce stigmatisation and to protect young persons from the consequences of formal court appearances. Further, the

---

\(^{54}\) G Maxwell and A Morris, above n 7, p. 169.
adherents of the diversion model point out that diversion, as a response to youth offending, not only protects the young offender from the adverse effects of criminal proceedings and incarceration, but also from the intrusive influences of ‘welfare treatments’. Additionally, diversion can be a gateway to earlier and better responses to youth offending.\(^\text{55}\)

However, the diversion model also faces criticism. The alternative measures applied adjacent to diversion are accused of expanding the net of social control. As already mentioned, alternative sanctions imposed concurrently with diversion provide for an earlier opportunity of working with young offenders. Consequently, young persons who have committed only a petty offence and would neither have entered the justice system nor received any formal response under either of the other justice models, now receive alternative diversionary sanctions. Critics of the diversion approach argue that young offenders who are dealt with by means of diversion do in fact enter the system of social control, which would not have happened without the diversionary practice and the existence of alternative measures. The diversionary practice can indeed be seen as net-widening, although these criticisms apply rather to jurisdictions that employ the principle of discretionary prosecution than to those applying the principle of mandatory prosecution, because in the former system, every case that causes a reasonable suspicion has to be prosecuted anyway.\(^\text{56}\)

Additionally, diversion is accused of having potential for discriminatory decision-making. It is feared that those operating diversionary processes might employ discriminatory selection criteria which cannot be completely controlled.\(^\text{57}\)

\(^{55}\) Ibid.

\(^{56}\) F Schaffstein and W Beulke, above n 43, § 37, p. 239.

\(^{57}\) G Maxwell and A Morris, above n 7, p. 170.
Last but not least, there is concern about due process protection when diversion is applied. Alternative sanctions, which are applied concurrently with diversion, are often based on broad discretionary decisions.\textsuperscript{58} Particularly when the alternative sanctions do not have a statutory basis, it is difficult for external authorities to observe their application and enforcement. Furthermore, in some youth justice systems the imposition of alternative sanctions may be based on the mere allegation that a young person has committed an offence, and the young person often does not receive any legal advice before being questioned on the facts on which the sanctions will be based.\textsuperscript{59}

3.6 Mediation and Restorative Justice Model

In recent years, there has been a move towards a greater involvement of victims in criminal proceedings and an attempt to pay more attention to their needs. Mediation and restorative justice approaches differ from all criminal justice models presented so far in one basic respect: they emphasise reparation and reconciliation through mediation involving victims.\textsuperscript{60} All the models discussed hitherto primarily dealt with the offender and the response to the offence committed, while almost completely ignoring the victims’ needs.\textsuperscript{61} This emphasis on the offender is based on the underlying philosophy of criminal law today, that is, that the offence harms society, meaning the corporate whole. Thus, the state and its governmental bodies are in charge of criminal prosecution in the public interest. This philosophy, however, predominantly ignores the fact that it is usually individuals who are the actual victims and who suffer personally from the offence and its

\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid, p. 171.
consequences. The impersonality of the criminal justice process today tends to dehumanise both the criminal act and its consequences. The offender appears before the court, is indicted by the public prosecution authority and adjudicated by the judge. The victim of the offence, however, is often not even present at the trial. Thus, the offender generally does not realise the real impact of what he or she has done, while the victim remains an invisible person beyond the criminal proceedings, knowing only that the offender, somewhere out of his or her sight or reach, serves whatever sentence the authorities deemed to be adequate.  

The concept of mediation and restorative justice sees criminal offences as a violation of individuals and their relationships. When an offence is committed, the relationship between two individuals is generally at least as much affected and harmed as society as a whole. Thus, the main idea of restorative justice models is creating obligations to put things right. For this reason, the victims, the offender, and the community must be involved in searching for solutions that enable reconciliation, the repair of relationships, and reassurance. Summing up, restorative justice models redefine crime by seeing it as an injury to another person rather than as a violation of society, the state and the law. Consequently, the restorative justice model favours a move from punishment through the state to agreement and reconciliation between the affected parties, from vengeance against offenders to healing for victims, and from alienation and harshness to community and wholeness.

62 Ibid.
64 Ibid.
The adherents of mediation in youth justice proceedings point out that
this method is particularly valuable from the educative point of view: it
improves understanding between the parties; holds the young offender
accountable for his or her actions; makes him or her realise that he or she
has harmed an individual person who suffers from the offence; and leads
to a link between the ‘punishment’ (in the form of direct apologies and
actions to compensate the damage caused) and the underlying offence.
Furthermore, mediation in youth justice may avoid a court appearance,
criminal records and custodial sentences, and their harmful effects.66

Mediation and restorative justice models face criticisms as well. Mainly it
is feared that mediation in criminal proceedings can lead to a lack of due
process and to the infringement of the rights of the weaker party.67
Additionally, mediation always carries the risk of further victimising the
victim. By and large, the effectiveness of mediation depends to an
enormous extent on the ability of the mediators, who might manipulate or
coerce the mediation and thus affect the outcomes.68 Furthermore,
outcomes and agreements can be biased or might be disproportional to
the offence, and there is no external control of the mediation process.

66 G Maxwell and A Morris, above n 7, p. 171.
67 Ibid.
68 Ibid.
CHAPTER FOUR

HISTORICAL, SOCIAL AND LEGAL CHARACTERISTICS OF NEW ZEALAND AND GERMANY

4.1 INTRODUCTION

The international comparison of juvenile justice systems involves problems that are more complex than the comparison of general criminal law. Due to the different orientation of the respective systems, a direct comparison between national-specific conditions and institutions is not possible.\(^1\) This chapter will therefore briefly introduce the historical background, the social structure, and the current demographic and socio-economic characteristics of New Zealand and Germany.\(^2\) Only by considering the current social structures of both countries will it be possible to find out whether parts of the justice system of one society may be successfully introduced into another society’s legal system.

---


4.2 NEW ZEALAND

4.2.1 HISTORY AND PROFILE

New Zealand is a country of two large islands (called the North Island and the South Island), and many small islands in the South-Western Pacific Ocean and is also known as Aotearoa3 in the Maori language. The population of New Zealand is mostly of European descent, with Maori being the largest minority. Non-Maori Polynesian and Asian peoples are also significant minorities, especially in the nation’s cities.

New Zealand is one of the most recently settled major land masses. Polynesian settlers arrived in their waka4 some time between 800 and 600 years ago to set up the indigenous Maori culture. The first Europeans reaching New Zealand were led by Abel Janszoon Tasman, who sailed up the west coast of the South and North Islands in 1642. On 9 October 1769, Captain James Cook reached the islands and claimed the country for the British Crown. Cook soon after began extensive surveys of the islands which finally led to significant European colonisation. By the end of the 18th century the settlement by the Europeans began. These first colonists mainly came from Britain; however, there also came many Dutch as well as smaller groups from all parts of Europe.

The British annexed New Zealand by Royal Proclamation in January 1840 because they were concerned about the exploitation of Maori by Europeans, Church Missionary Society lobbying, and French interest in the region. Lieutenant Governor William Hobson was delegated to legitimise the British annexation in 1839, and on his arrival he hurriedly negotiated the Treaty of Waitangi with Northern Maori chiefs. Two versions of the Treaty were created, an English version and a version

---

3 Aotearoa means ‘the Land of the Long White Cloud’.
4 Waka are Maori watercraft, usually canoes.
translated into Maori by the missionary Henry Williams. The Treaty was signed on 6 February 1840, and in recent years it has come to be seen as the founding document of New Zealand.\(^5\) None the less, the Treaty of Waitangi is still regarded as controversial and dispute over the true meaning and intent of either party remains an issue to this day. Historians have often debated the differences between the Maori and English translations. The original dilemma was a discrepancy between British and Maori understandings of the Treaty.\(^6\) The English version promised that Maori should achieve full equality as British subjects in return for complete rights of government. The Maori version also promised that Maori would maintain their chieftainship, which included local rights of government. Maori recognised that the Treaty gave the Crown rights of governance. However, historians debate whether this extended to their own affairs (rather than those of the settlers) or whether Maori understood the yielding of sovereignty contained in the English version of the Treaty.\(^7\) Certainly, Maori society valued the spoken word, and Hobson’s explanations were probably as important as the document. Hobson and others stressed the Treaty’s benefits while playing down the effects of British sovereignty on rangatiratanga.\(^8\) Reassured that their mana\(^9\) and authority would be strengthened, many rangatira\(^10\) supported the agreement and cooperated deliberately. However, some Maori tribes


\(^7\) Ibid.

\(^8\) ‘Rangatiratanga’ is often translated as chieftainship or authority, which was promised to the chiefs in Article II of the Maori Treaty text.

\(^9\) ‘Mana’ translates into dignity, pride, power, identity, prestige, worth and sovereignty.

\(^10\) ‘Rangatira’ translates into ‘chiefs’.
and the Moriori\textsuperscript{11} refused to sign the Treaty, or had no chance to sign while some chiefs signed while remaining uncertain.\textsuperscript{12}

The problems with the different understandings were not great at first, because the Maori version applied outside the small European settlements. But as those settlements grew, conflicts brewed. The Colonial Office declared that the Treaty applied even to communities that had not signed. But how British sovereignty and Maori authority would work together remained to be worked out in practice. Disagreements over land sales and sovereignty caused the New Zealand land wars that took place between 1845 and 1872. In 1975, the \textit{Treaty of Waitangi Act} institutionalised the Waitangi Tribunal, charged with hearing claims of Crown violations of the Treaty of Waitangi dating back to 1840.

Although New Zealand was initially administered as a part of the colony of New South Wales, it became a separate colony in 1841. In 1852, self-government was granted to the settler population. Already a majority of the population by 1859, the settlers multiplied to reach a million by 1911. On 26 September 1907, New Zealand became an independent dominion by royal proclamation, and full independence was conceded with the Statute of Westminster passed by the United Kingdom Parliament in 1931. The New Zealand Parliament adopted the Statute in 1947, making New Zealand a sovereign constitutional monarchy with a parliamentary democracy within the Commonwealth of Nations. Under the \textit{New Zealand Royal Titles Act} of 1953, Queen Elizabeth II is Queen of New Zealand and is represented as head of state by the Governor-General. However, the Queen ‘reigns but does not rule’, so the Queen has no real

\textsuperscript{11} The Moriori form an outlier, ethnically and culturally, to the Polynesians of the Pacific Ocean.

political influence. Political power is held by the Prime Minister who is leader of the Government.

4.2.2 Legal System and Jurisdiction

The New Zealand court structure is based on a four-tier hierarchy. In the first tier there is the District Court, followed by the High Court, which deals with serious criminal offences and civil matters. On the third tier there is the Court of Appeal. The highest court is the Supreme Court of New Zealand. The Supreme Court was established in 2004, following the passage of the Supreme Court Act in 2003. The Act abolished the possibility of appealing Court of Appeal rulings to the Privy Council in London. The current Chief Justice is Dame Sian Elias.

The major criminal court is the District Court. This is not only the court of summary jurisdiction, but it also handles the majority of cases that proceed to jury trial. Above the District Court is the High Court, which presides over the most serious criminal cases and hears appeals from the District Court against summary conviction and sentence. Above the High Court is the Court of Appeal, which hears appeals against convictions and sentences in cases laid on indictment in both the District Court and the High Court. Nevertheless, criminal offences may emerge in the context of proceedings before other specialist tribunals, such as the Family Court, the Employment Court, the Disputes Tribunal or the Equal Opportunities Tribunal. Although these tribunals have a variety of civil remedies to deal with unlawful behaviour, they cannot impose criminal sentences.13

The only special criminal court is the Youth Court,\textsuperscript{14} a division of the District Court, responsible for handling cases involving children and young persons under the age of 17 years. Procedure in the Youth Court is designed to be informal and consensual rather than adversarial in nature.\textsuperscript{15} Under the current youth justice system established under the \textit{CYPFA 1989}, the great majority of young offenders are dealt with outside the formal court system by way of diversion or an informal justice process involving extensive participation by the family, the community and the victim.\textsuperscript{16} The Youth Court cannot make a court order or come to a decision unless an FGC has been held and must take account of the plan and recommendations formulated by the conference in relation to the young offender.\textsuperscript{17}

On account of its history, New Zealand’s justice system in its basic structures is based on the law of Britain. Hence, New Zealand, like Great Britain, has no written constitution and many legal areas are still based to a large degree on Common Law. ‘Common Law’ denotes the principles deduced from judgements of courts as developed in England, brought to New Zealand and modified by further judicial decisions and to some extent by legislation. In New Zealand, the Common Law has lost much of its importance in criminal matters since the legislature specifically enacted that no person may be convicted of any offence at Common Law or any offence against any Act of the Parliament of England or of Great Britain or of the United Kingdom.\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{14} See below Chapter Six, 6.3.3.4.
  \item \textsuperscript{16} W Young, above n 13, at 9 December 2006.
  \item \textsuperscript{17} See below Chapter Six, 6.2.3.3.
  \item \textsuperscript{18} \textit{Crimes Act 1961}, section 9.
\end{itemize}
4.2.3 DEMOGRAPHIC CHARACTERISTICS

New Zealand has a population of about 4.1 million. Children (0-14 years) made up about 21.8% of New Zealand’s population in 2006 (455,100 male and 430,550 female) while 66.2% of the population (1,324,850 male and 1,358,870 female) were aged between 15 and 64 years. The age group of 65 years and over made up 12.0% (214,270 male and 270,570 female) in 2006.

About 70% of the population of New Zealand live in major urban areas with a population of at least 30,000. Another 16% live in secondary cities with a population of at least 1,000, and only 15% of New Zealand’s population live in rural areas.

About 75% of the population are of European descent. Europeans who are born in New Zealand are collectively known as Pakeha; however, this term is used variously and some Maori use it to refer to all non-Maori New Zealanders. Maori people are the second largest ethnic group. The percentage of the population who identify as being of full- or part-Maori ancestry is 14.7%; those who define themselves as only Maori are

---

21 Ibid, see also G Maxwell and A Morris, above n 15, p. 191.
22 Ibid, see also G Maxwell and A Morris, above n 15, p. 191.
23 In the 2001 census.
7.9%.\(^{24}\) Between the 1996 and 2001 censuses, the number of people of Asian origin (6.6%) overtook the number of people of Pacific Island origin (6.5%).\(^{25}\) New Zealand is positive about immigration and is committed to increasing its population by about 1% per annum.\(^{26}\) At present, migrants from the UK constitute the largest single group (30%) but new migrants are drawn from many nations, increasingly from East Asia.

The age and gender structure of New Zealand’s population is comparable to the population of most of the other industrialised countries in the world: the birth rate is relatively low and the life expectancy is relatively high. Therefore, a considerable proportion is aged over 60 years, and children or young persons aged between 5 and 19 years make up a comparatively small proportion.\(^{27}\) Between 1901 and 1951, the number of New Zealanders aged 65 years and over increased almost six-fold, from 31,000 to 177,000. Over the next 48 years, it grew by another 151% to reach 446,000 in 1999. By contrast, the number of children under 15 years and those in the working ages (15-64 years), increased by only 54 and 109% respectively. Reduction in mortality, especially in childhood mortality, and an improvement of almost 20 years in life expectancy at

\(^{24}\) It has to be mentioned that these Maori identify themselves as only Maori although this may be technically inaccurate because almost all Maori in New Zealand have European or non-Maori Pacific Island ancestors.

\(^{25}\) Note that the census allowed multiple ethnic affiliations.


birth during the 20th century were important elements in the growth. A newborn male can these days expect to live on average 74 years and a newborn female about 80 years. In addition, more people are now surviving beyond 65 years of age. Summing up, the proportion of elderly people in New Zealand’s population has trebled from 4% in 1901 to over 12% in 1999. However, this is predominantly valid regarding the European population. In contrast, the populations of Maori and Pacific Island peoples are for the most part composed of young people.

New Zealand has traditionally had a relatively equitable income distribution across the population and enjoyed full employment. Although this situation has slightly changed over the past 10 to 15 years, overall only 3.7% of the adult population was classified as unemployed and seeking work in 2005. In fact, official unemployment has only recently dropped this low; it generally ran at nearly 10% from 1991 to March 1993 and has gradually declined since then. New Zealand’s unemployment rate of 3.7% in 2005 was below the OECD average of 6.6%. New Zealand’s rate was the lowest – equal with South Korea – among 27 OECD nations, where rates ranged from 3.7% in Korea and New Zealand to 17.7% in Poland, while the German unemployment rate was 9.5%.

33 Ibid.
Nevertheless, the unemployment rates for young persons aged 15 to 19 is much higher in New Zealand: throughout the period from 1990 to March 1994, they came to 20% or even more, and up to March 2000 were still over 18%. In 2004, 9.3% (44%)\(^{35}\) of New Zealand’s 15 to 24 year olds in the labour force were unemployed, compared with an OECD average of 13.4%.\(^{36}\) Therefore, youth unemployment in New Zealand was slightly below the OECD average. New Zealand’s youth unemployment rate was the seventh-lowest among OECD nations, where rates ranged from 6.4% in Mexico to 40.8% in Poland.\(^{37}\) In Germany, 11.7% of the 15 to 24 year olds in the labour force were unemployed in 2004.\(^{38}\) Maori unemployment has been consistently at least double the rate for people of European descent.\(^{39}\)

In New Zealand, a considerable number of people receive state benefits such as Unemployment Benefits, Sickness Benefits, Invalid Benefits or Domestic Purposes Benefits. The figures relating to the year 2005 show that overall the total number of people receiving any kind of benefit decreased by 6% in the 12 months to December. Since December 1999, the total drop in the number of people receiving any kind of benefit has been 25% (from 401,415 people to 302,083 people). This in turn has meant that there are 48,400 fewer children living in households


\(^{37}\) Ibid.


dependent on benefits.\textsuperscript{40} The statistics show that the number of people receiving an Unemployment Benefit fell by 22\% over the year to December 2005. While the number of Sickness Benefit recipients increased by just 1,214 in 2005, and the number of Invalid’s Benefit recipients increased by 1,957 (which is a 3\% rise for each respectively), the statistics show that in 2005 the number of people receiving the Domestic Purposes Benefit\textsuperscript{41} decreased by 3,037, or 3\%.\textsuperscript{42}

\subsection{4.2.4 Family Structure}

There is great diversity in the structure of families in New Zealand today, including couples with children, sole parents, same sex couples (some with children), parents who do not live with their children but are still involved, and many family members who have ties of support across households and generations.\textsuperscript{43} Although living in families is still

\begin{itemize}
\item \textsuperscript{40} Scoop Independent News, 1\textsuperscript{st} February 2006, \url{http://www.scoop.co.nz/stories/-PA0602/S00015.htm} at 8 August 2006.
\item \textsuperscript{41} The Domestic Purposes Benefit may be paid to a parent over 18 years of age who is caring for a child without the support of a partner. By the 1996 Census, there were 19,000 women aged between 15 and 24 years who had received the Domestic Purposes Benefit in the previous 12 months, equalling 7\% of the 266,000 women in this group. Around 2,700 or 15\% of these young women were also registered quarterly as job seekers with the Department of Work and Income. Maori women are over-represented among women in the 15 to 24 age group who received the Domestic Purposes Benefit. In the 1996 Census, young people who identified themselves as having Maori ethnicity made up 19\% of the 15 to 24 age group, but formed 47\% of women between 18 and 24 years who had received the Domestic Purposes Benefit. (Source: Statistics New Zealand, \url{http://www.stats.govt.nz/-analytical-reports/school-leavers/domestic-purposes-beneficiaries.htm} at 8 August 2006.)
\item \textsuperscript{42} Scoop Independent News, 1\textsuperscript{st} February 2006, \url{http://www.scoop.co.nz/-stories/PA0602/S00015.htm} at 8 August 2006.
\end{itemize}
the preferred form of cohabitation among New Zealanders, the divorce rates in New Zealand, as in other Western nations of the world, have been increasing in recent years. The stability and nature of intimate partnerships in New Zealand have also been shifting. There are quite a few people who are moving both into and out of intimate relationships. Accordingly, many children experience a change in the people who are involved in parenting them, and sometimes find themselves leaving one of their attachment figures and possibly also their siblings and entering a new family with other children belonging to the new partner of their own parent.  

As a group, Maori families differ considerably from European families. Maori are more likely to have children at younger ages and to have more children. There are also a greater proportion of sole-parent-families among Maori (although many of them live with other family members). In addition, the child’s grandparents and other whanau tend to be more closely involved in children’s upbringing. Maori are more likely to live in extended family households than non-Maori. In 1996, one in five Maori (19%) lived in extended family households, the majority of which were households containing three or more generations of the same family (57%). A further 41% of extended family households consisted of two generations and 2% contained just one generation. In contrast, only 7%
of the non-Maori population lived in households containing extended families. There are different and specific patterns again for Pacific and Asian families.\textsuperscript{48}

\section*{4.2.5 Juvenile Delinquency}

To consider the extent of juvenile delinquency in New Zealand, the existing data dealing with offences committed by juveniles have to be examined and evaluated. There are two main sources of data regarding the amount and type of juvenile offending in New Zealand. Police offences are the number of cases that the police have attributed to offenders. This data is available by age, sex and ethnicity.\textsuperscript{49} The other source of data is information on Youth Court appearances.\textsuperscript{50}

From the police data it can be determined that, although there was a significant increase in youth offending statistics in the first half of the 1990s, most categories have been relatively stable since about 1997. In 2004, there was an increase in police apprehensions of young persons aged 14 to 16.\textsuperscript{51} The rates of Youth Court appearances dropped appreciably with the introduction of the \textit{CYPFA} in 1989, but increased somewhat over the following 10 years.\textsuperscript{52} Nonetheless, these rises are

\textsuperscript{48} Ministry of Social Development, above n 43, p. 10.
\textsuperscript{50} Ibid.
\textsuperscript{52} G Maxwell and E Poppelwell, above n 49, p. 3.
consistent with increases in the number and seriousness of all offending in New Zealand.\textsuperscript{53}

Offending by under 17 year olds has not increased at any greater rate than adult offending but has remained at about 22\% of the total number of apprehended offenders for the last 10 years.\textsuperscript{54} The great majority of juvenile delinquency is perpetrated by a small group of serious offenders, who make up about 5\% of total youth offenders and tend to reoffend.\textsuperscript{55} These 5\% of ‘hard core’ offenders have a tendency to share the following characteristics:\textsuperscript{56} 85\% of them are male and about 50\% of them are Maori; in some Youth Courts the Maori appearance rate comes to about 90\%. 70-80\% of these young serious offenders report having a drug and/or alcohol addiction (usually cannabis). Most of them come from backgrounds of disadvantage and lack positive male role models; furthermore, many of them have a history of abuse and neglect, and a considerable number admit having had or having psychological or psychiatric difficulties. Because of this background, some display little remorse, let alone victim empathy. About 70\% of the so-called hard-core offenders are not at school and many are not even enrolled at a secondary school.

Apart from the (more serious) offences committed by this small group, it has to be emphasised that the ‘average’ juvenile offending is ‘more harmless’ than adult offending. In a 2000/2001 study, the police described almost half of youth offences as ‘of minimum seriousness’.\textsuperscript{57}

\textsuperscript{53} Principal Youth Court Judge A Becroft, above n 51.
\textsuperscript{54} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Principal Youth Court Judge A Becroft, above n 51, at 30 May 2006.
The majority of offences are petty dishonesty (in 2003 just over 50% of the offences attributed to young people) or property offences (in 2003, for instance, 20% of all offences attributed to young people were shoplifting). The average seriousness of proved cases involving young offenders has fluctuated over the last decade with no clear pattern.\(^{58}\)

Due to the special provisions of the \textit{CYPFA}, the Police Youth Aid Section deals with most young people in New Zealand who are apprehended. Today, police deal with 76% of young offenders through diversion, written warnings or a range of creative, community-based approaches.\(^{59}\) It has to be emphasised that New Zealand’s diversion rate leads the world.\(^{60}\) Only the minority of young people apprehended are referred to an FGC or are prosecuted in the Youth Court.\(^{61}\)

An important feature of the Youth Court process is the FGC. In the resolution of a young person’s offending, an FGC places emphasis on accountability as well as on family involvement. The number of FGCs held has stayed stable over most of the last decade but rose by more than a thousand to 7,552 between 2002/2003 and 2003/2004.\(^{62}\) 8% of youth offenders are dealt with by Intention to Charge FGCs. Only a small number of these offenders end up being charged in the Youth Court. Thus, only 16% of New Zealand’s young offenders are directly referred to the Youth Court.\(^{63}\) Despite an increase in the population, the number of cases completed in the Youth Court has declined over recent years.

\(^{58}\) Ibid.
\(^{59}\) Ibid.
\(^{60}\) Ibid.
\(^{62}\) Principal Youth Court Judge A Becroft, above n 51, at 30 May 2006.
\(^{63}\) Principal Youth Court Judge A Becroft, above n 51, at 30 May 2006.
Well over half of those young offenders appearing in the Youth Court either receive an absolute discharge after the completion of an FGC plan, or the case against them is not proved.\textsuperscript{64}

Therefore, before discussing statistics on the young offenders who have had at least one appearance in the Youth Court, the number of 14 to 16 year olds apprehended by the police has to be examined. These figures give an indication of trends in offending by young people.\textsuperscript{65}

Table 1\textsuperscript{66} shows the number of 14 to 16 year olds apprehended by the police since 1994 for each offence type. (Data for 1992 and 1993 were not available.) The definitions used are Ministry of Justice offence classifications, rather than the police classification, for consistency with the rest of the data provided by the courts.

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
**Table 1: Number of 14 to 16 year olds apprehended by the police from 1994-2001**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Subtotal Violent</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>2389</td>
<td>2690</td>
<td>2741</td>
<td>2630</td>
<td>2658</td>
<td>2708</td>
<td>2829</td>
<td>2885</td>
<td>+21%</td>
</tr>
<tr>
<td><strong>Other against persons</strong></td>
<td>382</td>
<td>409</td>
<td>459</td>
<td>448</td>
<td>495</td>
<td>477</td>
<td>578</td>
<td>571</td>
<td>+49%</td>
</tr>
<tr>
<td><strong>Subtotal Property</strong>&lt;sup&gt;2&lt;/sup&gt;</td>
<td>19893</td>
<td>20740</td>
<td>21006</td>
<td>19663</td>
<td>18550</td>
<td>18965</td>
<td>19687</td>
<td>18901</td>
<td>-5%</td>
</tr>
<tr>
<td><strong>Drug</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>1132</td>
<td>1184</td>
<td>1492</td>
<td>1950</td>
<td>1851</td>
<td>1910</td>
<td>1977</td>
<td>1917</td>
<td>+69%</td>
</tr>
<tr>
<td><strong>Against justice</strong>&lt;sup&gt;3&lt;/sup&gt;</td>
<td>361</td>
<td>467</td>
<td>586</td>
<td>759</td>
<td>952</td>
<td>1018</td>
<td>1331</td>
<td>1308</td>
<td>+262%</td>
</tr>
<tr>
<td><strong>Good order</strong></td>
<td>3188</td>
<td>3412</td>
<td>3354</td>
<td>3839</td>
<td>3501</td>
<td>3720</td>
<td>3712</td>
<td>4127</td>
<td>+29%</td>
</tr>
<tr>
<td><strong>Miscellaneous</strong></td>
<td>1334</td>
<td>1487</td>
<td>1633</td>
<td>1738</td>
<td>1992</td>
<td>1867</td>
<td>1210</td>
<td>1082</td>
<td>-19%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>28679</td>
<td>30389</td>
<td>31271</td>
<td>31027</td>
<td>29999</td>
<td>30665</td>
<td>31324</td>
<td>30791</td>
<td>+7%</td>
</tr>
</tbody>
</table>

*Notes concerning Table 1:*

The data used to produce this table was sourced from New Zealand Police.

1: The different sub-categories of the violent offences are homicide (murder, manslaughter, and attempted murder), violent sexual (sexual violation, attempted sexual violation, and indecent assault), aggravated robbery, robbery, g/s assault (‘grievous’ and ‘serious’ assaults, including assaults by males on females, and assaults on children), minor assault (mainly common assault under the *Summary Offences Act 1981*), and other violent. The data for these individual categories is available at [http://www.justice.govt.nz/pubs/reports/2003/conviction-sentencing-2002/chapter-7.html](http://www.justice.govt.nz/pubs/reports/2003/conviction-sentencing-2002/chapter-7.html).


3: Under the *Bail Act 2000*, failure to comply with bail conditions became an offence (which it had not previously been). Accordingly, the data on offending for the years 2000 and 2001 show a great increase. Therefore, a direct comparison with the previous years is misleading.
Cases involving traffic offences that are not punishable by imprisonment are usually not dealt with under the provisions of the *CYPFA*, and for this reason such cases have been excluded from the statistics provided.

The table shows that the total number of apprehensions of 14 to 16 year olds by the police fluctuated between 30,000 and 31,000 each year from 1995 with no clear trend emerging. The 2001 figure for 14 to 16 year olds was 7% greater than the figure in 1994. By way of comparison, apprehensions of adult offenders (which means those aged at least 17 years) have fluctuated between 150,000 and 153,000 annually since 1996, with no clear trend appearing. The 2001 figure for adults was 4% greater than the figure in 1994.\(^{67}\)

The number of 14 to 16 year olds apprehended for violent offences has increased by 21% since 1994, with the 2001 figure (2,885) being the highest recorded in the period under examination. The majority of apprehensions involving 14 to 16 year olds were for property offences. In 2001, 61% of apprehensions of 14 to 16 year olds were for property offences, a lower proportion than in previous years. Apprehensions of 14 to 16 year olds for drug offences increased significantly between 1994 and 1997, and have remained fairly stable at this higher level since then. The 2001 figure was 69% greater than the figure in 1994.

One has to be aware, however, that apprehension statistics do not represent the total extent of youth offending rates. First of all, statistics always contain only the so-called ‘bright field’\(^{68}\) of criminal offences known to the police. The so-called ‘dark field’ – which means the criminal offences that have remained undetected – naturally does not


appear in the statistics and therefore cannot be counted. Because of that, the whole extent of juvenile crime is not exactly known. Second, when surveying police statistics, it has to be remembered that the data have not been able to be related to general population numbers.\(^6^9\)

Further, regarding police statistics, one has to be aware of the (country-) specific sources of error that occur while collecting data relating to youth offending. In comparison to other jurisdictions, the New Zealand statistics might in some respects be inflated. For instance, all offences that are reported to the police are recorded, even if it is determined that no offence has happened or the assumed offence cannot be proved. Furthermore, one has to appreciate that an apprehension is not the same thing as a charge. There may be an apprehension without a charge being laid, e.g. for breach of bail conditions.\(^7^0\) Additionally, it should be noted that people who are apprehended for more than one offence are counted once for each offence.\(^7^1\) That means that police apprehension statistics do not represent a count of individual offenders but only the number of offences. Additionally, there is no verification of whether or not the offences were committed by the particular young person to whom they were attributed, or whether the level and details of charging were appropriate.\(^7^2\) Further, the number of apprehensions is heavily influenced by factors such as police resources and changes to police strategies and charging practices. In addition, society’s decreased tolerance of violent behaviour and youth offending can also impact upon the numbers of offences reported. Thus, an increase in police apprehension rates does not necessarily show that offending has actually increased. Accordingly, a

\(^{69}\) G Maxwell and E Poppelwell, above n 49, p. 5.

\(^{70}\) W Young, above n 13.

\(^{71}\) Ibid.

\(^{72}\) G Maxwell and E Poppelwell, above n 49, p. 5.
better indicator for youth offending rates is the number and nature of cases proven in the Youth Court.

Table 2\textsuperscript{73} shows the number of proved cases against young people that involved offences of various types over the period 1992 to 2001. The term ‘proved cases’ refers here to cases that resulted in a conviction in the District or High Court, or which had a final outcome recorded as proved in the Youth Court.\textsuperscript{74}


Table 2: Number of proved cases against young persons from 1992-2001*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Subtotal Violent¹</td>
<td>239</td>
<td>274</td>
<td>308</td>
<td>376</td>
<td>427</td>
<td>468</td>
<td>400</td>
<td>402</td>
<td>438</td>
<td>+83%</td>
<td></td>
</tr>
<tr>
<td>Other against persons</td>
<td>9</td>
<td>13</td>
<td>12</td>
<td>10</td>
<td>16</td>
<td>20</td>
<td>18</td>
<td>15</td>
<td>10</td>
<td>+11%</td>
<td></td>
</tr>
<tr>
<td>Subtotal Property²</td>
<td>617</td>
<td>674</td>
<td>649</td>
<td>770</td>
<td>776</td>
<td>900</td>
<td>787</td>
<td>945</td>
<td>905</td>
<td>814</td>
<td>+32%</td>
</tr>
<tr>
<td>Drug</td>
<td>15</td>
<td>15</td>
<td>21</td>
<td>15</td>
<td>15</td>
<td>23</td>
<td>24</td>
<td>36</td>
<td>29</td>
<td>23</td>
<td>+53%</td>
</tr>
<tr>
<td>Against justice³</td>
<td>24</td>
<td>27</td>
<td>50</td>
<td>45</td>
<td>78</td>
<td>84</td>
<td>58</td>
<td>74</td>
<td>61</td>
<td>+154%</td>
<td></td>
</tr>
<tr>
<td>Good order</td>
<td>28</td>
<td>21</td>
<td>28</td>
<td>33</td>
<td>45</td>
<td>43</td>
<td>54</td>
<td>39</td>
<td>49</td>
<td>+75%</td>
<td></td>
</tr>
<tr>
<td>Subtotal Traffic⁴</td>
<td>117</td>
<td>121</td>
<td>119</td>
<td>131</td>
<td>119</td>
<td>189</td>
<td>161</td>
<td>155</td>
<td>139</td>
<td>166</td>
<td>+42%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>12</td>
<td>34</td>
<td>33</td>
<td>27</td>
<td>24</td>
<td>37</td>
<td>51</td>
<td>49</td>
<td>22</td>
<td>47</td>
<td>+292%</td>
</tr>
<tr>
<td>Total</td>
<td>1061</td>
<td>1179</td>
<td>1220</td>
<td>1397</td>
<td>1432</td>
<td>1713</td>
<td>1638</td>
<td>1715</td>
<td>1625</td>
<td>1608</td>
<td>+52%</td>
</tr>
</tbody>
</table>

*Notes concerning Table 2:
The numbers in this table cannot be compared directly with the first table because of different counting rules, and the fact that the year a case is finalised is not necessarily the same year as the offender was apprehended.


2: The different sub-categories of property offences are burglary, theft, motor vehicle conversion, arson, wilful damage, and other property. The data for these individual categories is available at http://www.justice.govt.nz/pubs/reports/2003/conviction-sentencing-2002/chapter-7.html.

3: Under the Bail Act 2000, failure to comply with bail conditions became an offence (which it had not previously been). Accordingly, the data on offending for the years 2000 and 2001 show a great increase. Therefore, a direct comparison with the previous years is misleading.

4: The different sub-categories of traffic offences are Drive with an excess blood or breath alcohol level, or refuse to supply a blood specimen, drive while disqualified, reckless or dangerous driving, and other imprisonable traffic offences. The data for these individual categories is available at http://www.justice.govt.nz/pubs/reports/2003/conviction-sentencing-2002/chapter-7.html.
The data show ups and downs among the proved cases of youth offending. While some categories have more or less been stable over the period, others show increases and some have slightly decreased. However, almost every category shows a higher number in 2001 than in 1992. Interestingly, most categories show specific increases around 1996/1997, while having stayed quite stable since then. This is mirrored by the total number of proved cases that amounted to 1061 in 1992 and increased to 1713 in 1997. In 2001, the number was 1608.

The number of cases proved against young offenders and involving a violent offence almost doubled between 1992 and 1998 (from 239 to 468), before decreasing in 1999 to 401. In the next two years, the number increased again to 439 in 2001 - the second highest figure recorded in the period covered by the table. Altogether, violent offences have accounted for about a quarter of the proved cases involving young people each year from 1992-2001.  

The number of aggravated robbery cases proved against young offenders also doubled between 1992 and 1998 (from 76 to 153), but the number was lower from 1999 to 2001. The 2001 figure (127) is the lowest recorded since 1996.  

The number of (non-aggravated) robberies has fluctuated around an average of 53 convictions annually since 1994, with no clear pattern.

The number of ‘grievous’ or ‘serious’ assaults proved against young offenders increased significantly between 1992 and 1996 (from 59 to 142), and has generally remained at this higher level since then. The 2001

---


76 Ibid.
figure (148) was the highest recorded in the period covered by the table.\footnote{77}

Throughout the period covered by the table, the majority of proved cases against young offenders involved property offences. Burglaries have accounted for over half of these.

The majority of proved cases involving young offenders in 2001, 82\%, were finalised in the Youth Court while the remaining 18\% were almost all finalised in the District Court. Only 12 of the 1,608 proved cases in 2001 have been finalised in the High Court.\footnote{78}

Altogether it can be said that youth offending in New Zealand is not rising alarmingly. Instead, the rates stabilised since 1997.


\footnote{78} Ibid.
4.3 Germany

4.3.1 Profile

The Bundesrepublik Deutschland\(^79\) is located in Central Europe. It is the most populous country in Europe, being flanked by nine neighbouring states since the unification of the two German states in 1990, and is today bordered to the north by the North Sea, Denmark, and the Baltic Sea, to the east by Poland and the Czech Republic, to the south by Austria and Switzerland, and to the west by France, Luxembourg, Belgium and the Netherlands.

Germany is a democratic parliamentary federal republic, made up of 16 Bundesländer\(^80\), which in certain spheres act independently of the federation. Historically consisting of several sovereign nations, which had their own history, culture and religion, the state now known as Germany was unified as a modern nation-state only during the Franco-Prussian War in 1871, when the German Empire, dominated by the Kingdom of Prussia, was forged. This was the ‘new’ German Reich, usually translated as ‘empire’, but also meaning ‘kingdom’, ‘domain’ or ‘realm’.

After the end of World War II, Germany had been divided into four occupation zones. The former capital of Berlin, as the seat of the Allied Control Council, was itself subdivided into four occupation zones. Although the intent was for the occupying powers to govern Germany together in the borders from 1937, the advent of Cold War tension caused the French, British and American zones to be formed into the BRD (and West Berlin) in 1949, excluding the Soviet zone which then formed the

\(^79\) ‘Federal Republic of Germany’, hereafter referred to as BRD.

\(^80\) ‘Federal States’.
Deutsche Demokratische Republik\textsuperscript{81} (including East Berlin) the same year. On 3 October 1990, Germany was officially reunified when the five reestablished Federal States of East Germany (Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt, and Thuringia) formally joined the BRD.

### 4.3.2 Legal System and Jurisdiction

Germany’s legal system is based on its own constitution and has its own body of law, but it is also influenced by the law of the European Union and by international law. The body of federal laws now includes approximately 1,900 acts and 3,000 statutory instruments. In Germany, the power of legislation belongs to the Bundestag\textsuperscript{82}, which passes laws. Decrees on the basis of laws are enacted by the Federal Government. Germany has a statute law system based on Roman Law. Legislative power is divided between the Federation and the individual Federal States. While criminal law and private law are codified on the national level (in the Strafgesetzbuch\textsuperscript{83} and the Bürgerliches Gesetzbuch\textsuperscript{84} respectively), no such unifying codification exists in administrative law, where much remains under the jurisdiction of the individual federated states.

In Germany, the courtroom style is inquisitorial. The court structure is based on a four-tier-hierarchy. In the first tier there is the Amtsgericht,\textsuperscript{85} followed by the Landgericht\textsuperscript{86} and the Oberlandesgericht\textsuperscript{87}. These hear

\textsuperscript{81} ‘German Democratic Republic’, hereafter referred to as DDR.
\textsuperscript{82} ‘Federal Diet’.
\textsuperscript{83} ‘Criminal Code’, hereafter referred to as StGB.
\textsuperscript{84} ‘Civil Code’, hereafter referred to as BGB.
\textsuperscript{85} ‘District Court’, hereafter referred to as ‘District Court’.
\textsuperscript{86} ‘Regional Court’, hereafter referred to as ‘Regional Court’.
criminal law and civil law cases. Further, there is a series of specialist supreme courts. The *Bundesgerichtshof*[^88], located in Karlsruhe, is the highest court of appeal for civil and criminal cases. The *Bundesverfassungsgericht*[^89], also located in Karlsruhe, is the German Supreme Court responsible for constitutional matters, with the power of judicial review. It acts as the highest legal authority and ensures that legislative and judicial practice accords with the Constitution. The *Bundesverfassungsgericht* acts independently of the other state bodies but cannot act on its own behalf.

In Germany, the Youth Court is not an independent court distinct from the jurisdiction of the general Criminal Court, but is a branch of the District Court or a division of the Regional Court, depending on the jurisdiction.[^90]

### 4.3.3 DEMOGRAPHIC CHARACTERS

There are some 82.5 million people living in Germany,[^91] which is one of the most densely populated countries in Europe. However, there are considerable differences between the former West Germany and the former German Democratic Republic. In the new Federal States and East Berlin, the population density is 140 persons per square kilometre and in the old Western part of Germany about 267 per square kilometre. Additionally, the population in Germany is very unequally dispersed. About one third of inhabitants, around 25 million people, live in 82 large

[^88]: ‘Supreme Higher Regional Court’, hereafter referred to as ‘Supreme Higher Regional Court’.
[^89]: ‘Federal Court of Justice’.
[^90]: See below Chapter Six, 6.3.3.4.
towns. Some 50.5 million people live in communities and towns with between 2,000 and 100,000 inhabitants, and approximately 6.4 million have their homes in villages with up to 2,000 inhabitants. Having experienced a rapid enlargement since the German unification, the catchment area in and around Berlin currently has more than 4.3 million inhabitants, more than the total New Zealand population. The industrialised region on the Rhine and Ruhr rivers, where the settlements merge into one another without clear boundaries, is home to more than 11 million people. These populous regions contrast with very thinly populated areas such as large sections of the March of Brandenburg and Mecklenburg-Western Pomerania.

As of 2004, about 7.5 million foreign citizen residents were living in Germany.\(^92\) This means 8.9% of the total population is not ethnically German. Many foreign employees came to Germany between the mid-1950s and the end of 1973. In need of additional manpower for its nascent economy, Germany focused its recruiting activities on the littoral states of the Mediterranean region, initially in Italy, and subsequently in Spain, Portugal, the former Yugoslavia, and Turkey, as well as Tunisia and Morocco. Many of these foreign workers stayed in Germany, and later sent for other members of their family. Since 1970, around 3.2 million foreigners have attained German nationality.\(^93\) By far the largest number came from Turkey, followed by Italy, Greece, Croatia, Bosnia and Herzegovina, the Netherlands, Albania, Serbia and Montenegro, Spain, Austria, Portugal, Vietnam, Morocco, Poland, Macedonia, Lebanon and France.\(^94\) Thanks to a reform of the German nationality law,


\(^93\) Tatsachen über Deutschland, [http://www.tatsachen-ueber-deutschland.de/-804.0.html](http://www.tatsachen-ueber-deutschland.de/-804.0.html) at 20 March 2006.

\(^94\) Statistisches Bundesamt Deutschland, [http://www.destatis.de/basis/e/bevoe/bevoetab10.htm](http://www.destatis.de/basis/e/bevoe/bevoetab10.htm) at 20 March 2006.
many of these immigrants are eligible for naturalisation.\textsuperscript{95} Since 2000, children born in Germany to foreign parents are entitled - provided they meet certain conditions – to acquire German nationality. Furthermore, Germany is still a primary destination for political and economic refugees from many less industrialised countries, especially Turkey and Southern/South-Eastern Europe, but the number of annual asylum seekers has been declining in recent years, with about 50,000 in 2003.\textsuperscript{96} There are a large number of ethnic German immigrants from the former Soviet Union area (1.7 million), Poland (0.7 million) and Romania (0.3 million), who are automatically granted German citizenship, and thus do not show up in foreign resident statistics; unlike non-ethnic German immigrants, they have been settled by the government in an almost even spread throughout Germany.\textsuperscript{97}

At the end of 2003, one third of foreigners had been living in Germany longer than 20 years, and about two-thirds had been living there for more than eight years. More than two-thirds of the foreign children living in Germany were born in the country.\textsuperscript{98} The majority of foreigners living in Germany have become integrated into German society; indeed, many of them have attained top positions or started up their own business. Marriages between foreigners and Germans are on the increase and are becoming a common occurrence. However, although many foreigners are integrating well, a large number does not. Some foreigners tend to live in areas where many other foreigners from their home country already live.

\textsuperscript{95} Ibid.

\textsuperscript{96} Staatistisches Bundesamt Deutschland, \url{http://www.destatis.de/basis/e/bevoe/-bevoetab10.htm} at 20 March 2006.


\textsuperscript{98} Ibid, p. 35.
As a result, they do not learn the German language properly and so they have huge problems with assimilating; the children especially have difficulties in school. These circumstances lead to a high percentage of foreigners in Germany who do not have a school-leaving certificate and for this reason do not find a job. The high unemployment rate among foreigners is regarded as one of the reasons why they have a very high crime rate in Germany.

With nine births per 1,000 inhabitants per year, Germany has one of the world’s lowest birth rates. Too few children are being born too late. Most women do not have their first child until they are in their early thirties, and on average each woman has only 1.3 children. However, in recent years, Germany’s population has remained at a stable level. The deficit in births was compensated for by some three million immigrants. Nonetheless, this low birth rate is coupled with an increasing life expectancy – currently 74.4 years for a newborn boy and 80.6 years for a newborn girl – which certainly affects the age distribution of the population. Currently, there are 22 million people under the age of 25; about 25% of the population belongs to this age group. 76% of them have siblings and 81% live with their natural parents.

As in the rest of the world, the number of older people in Germany is on the rise. Around 25% of the country’s population is aged 60 or over. It is projected that in 2030 the percentage of over-60-year-olds will have grown from today’s figure of 23% to around 30%. The ratio between the proportion of the population in active employment and the percentage of

pensioners is shifting towards those who have retired from the labour market.\textsuperscript{101}

One of the greatest problems in Germany over the last few years is the high unemployment rate. In December 2005, 11.1\% of the German adult population was unemployed and seeking work.\textsuperscript{102} Foreigners especially are affected by unemployment to an extremely high degree. From 1990 to 1998, the number of foreign citizens seeking a job in West Germany doubled from 203,000 to 505,158 and in 1998 the unemployment rate of foreigners was 20.3\%.\textsuperscript{103} Since 1998, the unemployment rate of foreigners has continued to increase. At the beginning of 2005, for example, unemployment in general was about 12\%, while it was about 31\% among the Turks.\textsuperscript{104} The position of these minority population groups having much higher unemployment rates than the rest of German society can be compared to the situation of the Maori population in New Zealand.

As in New Zealand, young people in Germany (which means those between 15 and 24) are also more affected by unemployment than other population groups. In 2005, 10.6\% of the German juveniles were unemployed; the difference from the general unemployed person’s rate in Germany amounts merely to 1.3\%.\textsuperscript{105} Compared to most of the other Western nations, this is a relatively low rate.\textsuperscript{106} But nevertheless, the

\textsuperscript{101} Ibid.
\textsuperscript{102} Statistisches Bundesamt Deutschland, \url{http://www.destatis.de/indicators/d/-arb210ad.htm} at 20 March 2006.
\textsuperscript{103} Ibid.
\textsuperscript{104} Statistisches Bundesamt Deutschland, \url{http://www.destatis.de/indicators/-d/arb210ad.htm} at 22 March 2006.
\textsuperscript{105} J Schormann, \textit{Jugendarbeitslosigkeit in Deutschland verfestigt sich} (2005), \url{http://idw-online.de/pages/de/news109547} at 22 March 2006.
\textsuperscript{106} Ibid.
development still gives occasion for concern: currently there are more than half a million young persons without employment, which means that the ‘army of the jobless juveniles’ is almost twice as big as the armed forces of Germany.\textsuperscript{107}

4.3.4 FAMILY STRUCTURE

For all the changes in society, the family is still the preferred form of cohabitation in Germany. Four out of every five people in Germany (81\%) live in a family. Almost every second person (47\%) lives in a traditional family consisting of a married couple with children. Great importance continues to be placed on a steady relationship with a partner – in Germany 21.6 million couples live together, 89\% of them with a traditional marriage certificate.\textsuperscript{108} For most couples, children make up a complete family. According to a representative poll (a mini-census) in April 2002, just 12\% of 35- to 40- year old married women had no children.\textsuperscript{109} In the same poll, around 2.4 million people, mostly women, stated they were living as single parents. Of the total population in Germany, 17\% live alone, significantly more women than men.\textsuperscript{110} As in many other Western countries, the divorce rate in Germany has also been increasing in recent years.

Even if most people still favour the traditional form of marriage, living together without being married has become more pronounced over the past few years. Since 1996, the number of unmarried couples living together in the Western German states rose by 25\% to 1.7 million and in

\textsuperscript{107} Ibid.
\textsuperscript{108} Statistisches Bundesamt Deutschland, \texttt{http://www.destatis.de/themen/d/-thm_bevoelk.php} at 18 March 2006.
\textsuperscript{109} Ibid.
\textsuperscript{110} Tatsachen über Deutschland, \texttt{http://www.tatsachen-ueber-deutschland.de/} at 22 March 2006.
the Eastern German states by 24% to 543,000. There are no reliable comparable figures for same-sex households, but the Federal Statistics Office puts the number in the region of 53,000 to 148,000. The Gesetz über die Eingetragene Lebenspartnerschaft\textsuperscript{111} of 2001\textsuperscript{112} accords partners of different or the same gender the same legal status as that applicable to members of a family.\textsuperscript{113}

### 4.3.5 Juvenile Delinquency

To gain a general idea about the extent of juvenile delinquency in Germany, the existing data dealing with offences committed by juveniles have to be evaluated. As in New Zealand, the main sources are police data and court-based data.

However, as already mentioned with regard to New Zealand statistics, it is very difficult and sometimes misleading to compare and contrast police and court-based data. This is partly because the data is collected at different dates. Further, different methods of assembling the data are used. For example, unlike the Verurteiltenstatistik\textsuperscript{114}, the Polizeiliche Kriminalstatistik der Bundesrepublik Deutschland (PKS)\textsuperscript{115} places the offences in categories not only in line with statutory requirements, but also with the criminological needs of the police. Additionally, police data register the offence as described by or to the police. Thus, in the course of the law enforcement process, a police registered homicide may turn out to be an accident, or a case of bodily injury to be attempted murder.

\textsuperscript{111} ‘Act Governing the Legal Rights of Unmarried Couples’.

\textsuperscript{112} BGBl. I 2001, p. 266.

\textsuperscript{113} Tatsachen über Deutschland, \url{http://www.tatsachen-ueber-deutschland.de/} at 22 March 2006.

\textsuperscript{114} ‘Criminal Convictions Statistics’.

Another reason is that statistics represent only the detected offences while the undetected offences cannot be counted. Finally, the statistics are subject to fluctuation, which result, for example, from variations regarding the prosecution activity, in the clear-up rate and in criminal legislation by the creation or abolition of criminal offences. Therefore, the German statistics grant only a cursory and general overview about the development of juvenile delinquency and do not represent the actual level of crime.\footnote{F Schaffstein and W Beulke, \textit{Jugendstrafrecht} (14\textsuperscript{th} ed 2002) § 2, p. 13.}

The \textit{PKS} annually list the number of suspects apprehended by the police. The data are presented not only in absolute terms, but also in frequency numbers,\footnote{\textit{Tatverdächtigenbelastungsziffer} = \textit{TVBZ} – literally: ‘calculated suspect’s impact figure’.
PKS 2004, p. 17.} calculated on 100,000 inhabitants of the corresponding residential population, in each case without children of less than 8 years). The \textit{Verurteiltenstatistik} annually list the number of convicted offenders calculated on 100,000 Germans from the corresponding age group.

According to the \textit{PKS} of 2004,\footnote{PKS 2004, p. 17.} the number of \textit{Jugendliche}\footnote{‘Young persons’ (14, 15, 16 and 17 years old), hereafter referred to as young persons.
Young persons without German citizenship. Note: The PKS includes cases involving tourists, visitors, illegal immigrants and members of foreign armed forces while the population statistics do not include these people. Furthermore, there exist some crimes which only foreigners can commit (for example illegal immigration or offences against the Asylum Proceedings Act) and, last but not least, the willingness among the general public to report foreigners to the police is higher. These facts are some reasons for the high number of foreigners in the crime statistics and have to be remembered while interpreting the data.} amounted to 297,087, which was 1.1% more than in 2003, where the number was 293,907. The proportion of foreign young persons
amongst them was 17% in 2004 (and 16.9% in 2003). In 2004, the German young persons made up 12.5% of all apprehended suspects apprehended by the police.

The number of *Hieranwachsende*\(^{121}\) was 250,534 in 2004, which is 1.2% more than in 2003, when the number was 247,456.\(^{122}\) The proportion of foreigners amongst them was 20.9% in 2004 (and 21.5% in 2003). In 2004, the number of *Hieranwachsende* amounted to 10.5% of all Germans apprehended.

The number of apprehended adults (from age 21 onwards) amounted to 1,720,877 in 2004 (and 1,687,440 in 2003).\(^{123}\) The proportion of foreign adult offenders was 24.6% in 2004 (and 25.4% in 2003). Thus, in 2004, 72.2% of all apprehended offenders were adults. Children (young persons under the age of 14 years) made up 4.9% of all apprehended suspects in 2004.\(^{124}\) That means that young persons and young adults committed 23% of all apprehended offences the police dealt with in the year 2003\(^{125}\) (and about the same in 2004).

Beyond these absolute figures, one has to look at the frequency figures, which are more significant because they are related to general population numbers and therefore give a better overview of the actual proportion of young persons among the apprehended suspects in Germany. According

---

\(^{121}\) Literally ‘adolescents’ (young adults who are 18, 19 and 20 years old); see below Chapter Six, 6.3.2.1.


\(^{123}\) Ibid, p. 21.

\(^{124}\) Ibid, p. 22.

\(^{125}\) Ibid, p. 74.
to the *PKS* for the year 2003,\textsuperscript{126} German young persons had a *TVBZ* of 7102 and German young adults had a *TVBZ* of 7717. In comparison, German adults (from 21 years upwards) had a *TVBZ* of 2584 in the same year. These figures show that the crime load of juveniles and young adults, calculated in frequency figures, amounts to approximately three times as much as the crime load of adults.\textsuperscript{127}

Indepth studies of the relationship between undetected and detected crime has revealed, however, that the commission of petty or trivial offences is ubiquitous and 70% of young offenders are one-time offenders,\textsuperscript{128} while commission of serious and repeated criminal offences is restricted to a small group of about 5% of total youth offenders.\textsuperscript{129} These serious offenders tend to reoffend repeatedly and are responsible for about 30% of all offences attributed to young offenders.\textsuperscript{130} As in New Zealand, most of these 5% of serious offenders are male, belong to an ethnic minority group,\textsuperscript{131} and come from backgrounds of disadvantage. Apart from the (more serious) offences committed by the 5% of serious juvenile

\begin{itemize}
  \item \textsuperscript{127} F Streng, *Jugendstrafrecht* (1\textsuperscript{st} ed 2003), p. 14.
  \item \textsuperscript{128} V Grundies, ‘Polizeiliche Registrierungen von 7- bis 23jährigen. Befunde der Freiburger Kohortenuntersuchung’ in H-J Albrecht (ed) *Forschungen zu Kriminalität und Kriminalitätskontrolle am Max-Planck-Institut für Ausländisches und Internationales Strafrecht in Freiburg i. Br.* (Freiburg 1999).
  \item \textsuperscript{130} W Heinz, *Jugendkriminalität in Deutschland, kriminalstatistische und kriminologische Befunde* (2003) University of Konstanz, p. 77, \url{http://www.uni-konstanz.de/rtf/kik/Jugendkriminalitaet-2003-7-e.pdf} at 12 December 2006.
  \item \textsuperscript{131} V Grundies, above n 128.
\end{itemize}
offenders, the ‘average’ juvenile offending is ‘more harmless’ than adult offending and most young people give up offending once they have grown up.\textsuperscript{132}

Summing up, about 23\% of all apprehended suspects in 2003 and 2004 were young persons and \textit{Heranwachsende}. Although this figure is comparable with youth offending rates of other Western countries, the situation concerning juvenile delinquency in Germany is regarded as unsatisfactory. The offending rates of young persons and \textit{Heranwachsende} are rather high in comparison with rates through much of the 20\textsuperscript{th} century. However, it has to be said that no longitudinal studies of delinquency on the basis of representative surveys exist in Germany. The \textit{PKS} and the \textit{Verurteiltenstatistik} are unsuitable for gaining a long-term overview about the extent of juvenile delinquency as the counting methods were changed in the 1970s and 1980s. Accordingly, more or less comparable data is available only from 1984 onwards.\textsuperscript{133}

These data show that juvenile delinquency has decreased slightly in the 1980s before rising again at the beginning of the 1990s.\textsuperscript{134} While young persons accounted for approximately 15\% of all police apprehended suspects in 1980, their share dropped to 9.5\% in 1991, and the proportion of \textit{Heranwachsende} suspects decreased from 13.5\% to 10.2\% during the same period.\textsuperscript{135} However, during the 1990s, the proportions of juvenile and \textit{Heranwachsende} suspects increased continuously. In 1995, the share

\begin{footnotesize}
\begin{enumerate}
\item[132] W Heinz, above n 130, at 12 December 2006.
\item[134] Ibid.
\end{enumerate}
\end{footnotesize}
of juvenile suspects had increased to 12% and the one of Heranwachsende to 9.8%. In 2000, 12.9% of all suspects apprehended by the police were young persons and 10.8% were Heranwachsende. Nevertheless, since the increase in the early 1990s, the numbers of apprehended young suspects have remained fairly stable, even though on a high level.

Many explanations are offered for the increase of juvenile offending rates since 1989. One cause of the increase in – especially violent – juvenile offending is the social change which appeared concomitant with the German reunification and which caused or intensified many social problems. These problems include the economic difficulties and the economic situation in general; changes in family structures; changes in social-ethical views; the trend to a consumption oriented society; the poverty from which more and more young people are suffering; the influence of the media; and last but not least the increase of youth unemployment, which sometimes leads to frustration, disorientation, increasing drug consumption, aggressive and violent behaviour and the foundations of criminal gangs.¹³⁶

After German reunification, a particular increase of apprehended suspects could be observed in the five new states of former East Germany.¹³⁷ In those five states, the rates for certain offences, particularly violent offences, surmounted the rates of the Western Federal States. In the last few years, however, the crime rates for violent and other offences committed by young persons have grown closer together in West and East Germany due to another increase in West Germany and a

¹³⁷ Brandenburg, Mecklenburg-Western-Pomerania, Thuringia, Saxony and Saxony-Anhalt.
stabilisation or even reduction in East Germany.\textsuperscript{138} This development has been interpreted as a kind of normalisation after a problematic period of social transition in East Germany caused by the reunification.\textsuperscript{139}

Furthermore, young migrants and members of ethnic minorities have become a key problem for the German juvenile justice system. They are over-represented, especially with regard to violent offences.\textsuperscript{140} Thus, during the period 1984 to 1997, 83\% of the increase in the \textit{PKS} concerning young persons and young adults was ascribed to foreign citizens.\textsuperscript{141} Most of these foreign young people were born in Germany. The Turkish minority especially plays a significant role in this problem.\textsuperscript{142} Self-report studies reveal that the rate of violent young offenders is twice as high among the Turkish population group compared to the same German age group.\textsuperscript{143} Another specific problem has emerged with the so-called \textit{Aussiedler}\textsuperscript{144}, basically people from the former Soviet Union who have a German passport.\textsuperscript{145} These people have profound problems with integration into German society because of language deficiencies and a different cultural background.\textsuperscript{146} The \textit{Aussiedler} tend to be condemned for serious violent crimes and often build a rather

\textsuperscript{138} F Dünkel, above n 133, p. 7.
\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid.
\textsuperscript{143} F Dünkel, above n 133, p. 7.
\textsuperscript{144} Literally ‘resettler’.
\textsuperscript{145} F Dünkel, above n 133, p. 7.
\textsuperscript{146} Ibid.
explosive prison subculture. On the other hand, these ethnic minority groups are also over-represented as victims of violent crimes, particularly committed by xenophobic or right wing extremists. However, right wing extremist and xenophobic attitudes have also decreased in East Germany since 1998.

The over-representation of ethnic minority groups is ascribed to various factors, such as specific social problems young foreigners have to face, special offences only non-Germans can commit, a different pattern of crime reporting in the population, and a possible affection of police apprehension practices by the apparent foreign origin of the offender. The high proportion of minority ethnic groups in crime statistics, however, is comparable with New Zealand’s position, where Maori and Pacific Islanders are very significantly over-represented in apprehension, prosecution and conviction statistics.

Different from the police statistics, a considerable decline in the conviction figures could be observed regarding cases against young persons and young adults since the 1980s.

147 Ibid.
148 Ibid.
149 Ibid.
150 Some of these offences are breaches of the Ausländergesetz (Aliens Act) and the Asylverfahrensgesetz (Asylum Procedure Act).
151 F Schaffstein and W Beulke, above n 116, p. 21.
Table 3: Number of convicted young persons and *Heranwachsende* from 1980-2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Young persons</th>
<th><em>Heranwachsende</em></th>
<th>Total population of convicted people</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>80 424</td>
<td>98 849</td>
<td>732 481</td>
</tr>
<tr>
<td>1985</td>
<td>62 645</td>
<td>90 667</td>
<td>719 924</td>
</tr>
<tr>
<td>1990</td>
<td>34 684</td>
<td>66 972</td>
<td>692 363</td>
</tr>
<tr>
<td>1995</td>
<td>37 668</td>
<td>64 887</td>
<td>759 989</td>
</tr>
<tr>
<td>2000</td>
<td>49 510</td>
<td>73 487</td>
<td>732 733</td>
</tr>
<tr>
<td>2003</td>
<td>52 905</td>
<td>75 468</td>
<td>736 297</td>
</tr>
</tbody>
</table>

These figures seem to draw a rather favourable picture concerning the development of youth delinquency. The decrease of the conviction figures, however, was not based on the decline of juvenile delinquency. Instead, it resulted from the annually increasing practice of the prosecution authorities and the youth courts to deal with smaller and even intermediate criminal offences not by conviction, but informally by diversion. Thus, it can be concluded that the PKS is more suitable for

---


obtaining an idea about the development and extent of juvenile delinquency.

4.4 Summary and Comparison

Despite a different historical background, discrete legal and governmental systems and a huge discrepancy in population figures, the comparison of New Zealand’s and Germany’s social structure and current demographic and socio-economic characteristics revealed that there are several communalities. Both countries are well developed Western Nations whose societies are composed of a main ethnic group and several minority ethnic groups.

Concerning the family structure, the preferred form of cohabitation in both countries is the family. This counts especially with regard to the ethnic minorities. However, divorce rates are increasing and there are significant numbers of single-parent-households in both New Zealand and Germany.

Regarding the population structure, both countries experience low birth rates and quite high life expectancy, so that the proportion of older people is on the rise while the proportion of children and young persons is decreasing. This fact needs to be kept in mind especially when interpreting crime statistics.

With regard to crime rates, it has to be emphasised that a direct comparability between both countries is not possible due to dissimilar population numbers, discrete collection methods, different crime provisions, unlike prosecution methods and a different scope of youth justice legislation. Nevertheless, the statistics display almost the same figures: in New Zealand, young persons make up about 22% of all apprehended persons in the country while in Germany, 23% of all police-
apprehended suspects are young persons and *Heranwachsende*. However, as there is no useful separate data available on the age group of 17 to 20 in New Zealand, a direct comparison between the two countries cannot be drawn. As *Heranwachsende* are included in the 23%-figure, the German youth offending rate seems to be lower in comparison to New Zealand, where ‘young persons’ in respect of the criminal law are people of a much smaller age group (aged 14 up to and including 16), who also make up about 22% of all apprehended persons in the country.

Interestingly, both countries’ statistics display a figure of 5% for young ‘hard-core offenders’. Furthermore, a decrease in court appearances and conviction figures could recently be observed in both countries. This resulted from both countries’ recently increased diversion practices.

It can additionally be ascertained that both societies’ ethnic minority groups are over-represented in the statistics although they make up only a small proportion of the whole society. While this makes cautious comparison possible, it has to be borne in mind that New Zealand’s largest minority group consists of Maori, who are the indigenous people in the country, and Germany’s largest minority group is made up of Turks, who are immigrants. This factor leads to different attitudes and approaches concerning the attempts to solve problems these minority groups face.

The review of New Zealand’s and Germany’s social structure, the current demographic and socio-economic characteristics, and the situation regarding juvenile delinquency revealed that both countries’ moral, societal and economic situations and values do not differ significantly. It can therefore be assumed that efficient methods employed in one country might most likely be effectively introduced into the other country’s legislation.
CHAPTER FIVE
HISTORICAL DEVELOPMENT OF
NEW ZEALAND’S AND GERMANY’S
JUVENILE JUSTICE SYSTEMS

5.1 NEW ZEALAND

5.1.1 THE PRE-COLONIAL MAORI PRACTICE OF DISPUTE SETTLEMENT

When the first Polynesian peoples arrived in New Zealand almost 800 years ago, they started to set up their own cultural strategies for dispute resolution in Aotearoa. Although there were some variations between the different tribes, there was a distinct set of conventionally approved instruments of ensuring acceptable behaviour. Actions that

---

1 While reading this chapter, it has to be borne in mind that there are only a few sources of evidence concerning Maori life before the colonisation which are largely the written observations of early European visitors and settlers and the Maori oral traditions they have recorded. It is therefore impossible to expose the actual situation that time. Thus, the following generalisations should be read with that caveat in mind.


were unacceptable, known as hara, were well understood.\textsuperscript{4} Tikanga o nga hara could be translated broadly into ‘the law of wrongdoing’ in which there were clear concepts of right or wrong, even though there were no written ‘legal rules’.\textsuperscript{5} A way of dealing with offenders existed and those who committed hara or crimes were subject to punishment. However, Maori customary dispute resolution did not distinguish between criminal and civil offences, because in the absence of a state, all conflicts were adjusted between the parties themselves.\textsuperscript{6} The emphasis of any dispute resolution was on reconciliation and the settlement had to be acceptable to all people involved in the dispute.\textsuperscript{7} Penalties should constrain possible offenders, but crucial aim of responding to an offence was to maintain social stability and harmony as well as order and security.\textsuperscript{8}

The tribal bases, constructs, and methods of application of this pre-European institution were quite different from the state centred models of Western jurisprudence.\textsuperscript{9} The method of social control and dispute resolution was based on social responsibilities which connected people to their wider community.\textsuperscript{10} The recognition that every member of a tribe had a responsibility to the wider community was as important as the belief that all people had a tapu\textsuperscript{11} that was not to be abused by others.\textsuperscript{12}

\begin{footnotes}
\item[4] Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 2.
\item[7] Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 2.
\item[8] Ibid.
\item[9] Ibid.
\item[10] A Ward, above n 6, p. 6.
\item[11] It is difficult to give a single English expression for the word ‘tapu’. There are many meanings and attendant conditions of ‘tapu’, which are difficult to understand,
Responsibility was shared rather than individual, and relief was due not just to the victim but also to the victim’s family. This idea resulted from the understanding that society could function only if all physical and spiritual elements stayed in balance. If the balance was disturbed through an offence, this imbalance had to be addressed in a collective way and, in particular, the imbalance between the offender and the victim’s family had to be restored. Property offences and acts of bodily harm to another were seen to be a failure to recognise one’s responsibility to others and would damage that person’s tapu as well as endanger the function of the kinship and menace the stability of the social order. Thus, a wrong had to be put right, but how this was done could vary greatly. In some cases, this was achieved through mediation between the conflicting parties. However, reparation sometimes also resulted in the confiscation of all the possessions of the offender’s family, bloody retribution, or even the taking of slaves or life. Accordingly, pre-colonial Maori dispute settlement also involved violent responses to offending behaviour and mediation was only one aspect of pre-colonial Maori dispute settlement.

particularly for non-Maori. ‘Tapu’ primarily represents the power of the creator, but other gods endow things and people with ‘tapu’ as well. Its chief meaning was ‘being with potential for power’, but this is to leave out the most important element of the word, the faith element, which is the link with the spiritual powers. In the understanding of ‘tapu’ presented on http://homepages.ihug.co.nz/~dominic/tapu.html at 30 June 2006, every part of creation has its ‘tapu’, because every part of creation has its link with one or other of the spiritual powers, and ultimately with Io, Io matua kore, the parentless one, Io taketake, the source of all. For many people today ‘tapu’ means ‘forbidden’ or ‘restricted’.

12 Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 2.
13 Ibid.
14 T Olsen and G M Maxwell and A Morris, above n 5, p. 46.
15 A Ward, above n 6, p. 6.
16 Ibid, p. 8.
17 A Ward, above n 6, p. 7; T Olsen, G M Maxwell and A Morris, above n 5, p. 46.
Prior to colonisation, a kind of court or council of law (runanga o nga tura), led by experts of law and also containing elders, a representative from the offender’s family, and a representative from the victim’s family, was established.\(^\text{18}\) The trial was conducted by iwi\(^\text{19}\) and hapu\(^\text{20}\) who sorted out the wrongdoing and afterwards tried to restore society’s balance.\(^\text{21}\) The offender could defend himself and call witnesses.\(^\text{22}\) These trials could be lengthy but the punishment was carried out swiftly and with no right of appeal. Murder, rape and witchcraft were offences punishable by death, but sometimes, in the event of mitigating circumstances, utu\(^\text{23}\) or payment for the hara could take the form of muru.\(^\text{24}\) In the case of theft, utu and muru applied.\(^\text{25}\) After the trial, the shame felt by offenders through being confronted with the effects of their wrongdoing led to remorse, which was followed by reintegration into the whanau.\(^\text{26}\)

\(^{18}\) T Olsen, G M Maxwell and A Morris, above n 5, p. 46.  
\(^{19}\) ‘Tribal group’.  
\(^{20}\) ‘Kin group’.  
\(^{21}\) T Olsen, G M Maxwell and A Morris, above n 5, p. 46.  
\(^{22}\) Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 3.  
\(^{23}\) Although often defined as ‘revenge’ or ‘compensation’, utu has a broader meaning. It essentially aims to maintain balance and harmony within society. Almost every activity, ceremonial or otherwise, was connected to the maintenance and enhancement of mana and tapu. Crucial to this was the concept of utu. Utu through gift exchange established and maintained social bonds and obligations. If social relations were disturbed, utu would be a means of restoring balance, employing several different methods.  
\(^{24}\) One form of utu was muru, which involved the taking of personal property as compensation for an offence against an individual, community or society. Once muru was performed, the matter was considered to be ended. The nature of muru would be determined by various factors, including the mana of the victim or offender, the degree of the offence and the intent of the offending party.  
\(^{25}\) Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 3.  
\(^{26}\) T Olsen, G M Maxwell and A Morris, above n 5, p. 46.
In Maori thinking, children were not the exclusive possession of their parents. Instead, all decisions made in pre-colonial times were customarily made by the whanau, hapu or iwi.\(^{27}\) The whanau was important in child-raising. Not only the parents, but also every member of the whanau could and should be involved in the children’s upbringing and could contribute to the children’s development. It was quite usual for Maori children to live from time to time with different relatives within their whanau, hapu and iwi.\(^{28}\) As the upbringing of children, the dealing with their misbehaviour and delinquencies was a communal responsibility.\(^{29}\) However, since there is very little literature on this topic, it is not assured whether young offenders were treated in a different way than adult offenders.

\(^{27}\) Ibid.
\(^{29}\) Ibid.
5.1.2 Development at the End of the 19\textsuperscript{th} and in the Early 20\textsuperscript{th} Century

The traditional Maori method of dispute resolution persisted into the colonial period. However, the current New Zealand legal system, and consequently also the (youth) criminal law, was based on English law following the British colonisation of New Zealand. The signing of the Treaty of Waitangi between the Crown and many of the indigenous Maori chiefs in 1840 had the effect of transplanting the English legal system, including its criminal law, to the new imperial settlement. Although a parallel indigenous justice system remained in place for a short while, the marginalisation of the Maori during the second half of the 19\textsuperscript{th} century practically erased their own concepts of law and justice.\textsuperscript{30}

At the beginning of New Zealand’s colonisation, the laws of England officially applied to the new colony, but there was no conflict with the law the Pakeha settlers imported as long as Maori were numerically dominant and their traditional system was functional.\textsuperscript{31} At the time of European settlement, most Maori lived in the North and East where they remained concentrated and nearly isolated in rural areas until after World War II, while the European colonists at first disproportionately settled in rural areas in the South Island.\textsuperscript{32}

Although tikanga o nga hara shared with the British a clear code of right and wrong behaviour, its philosophical emphasis was different as the

\begin{flushright} 
\textsuperscript{31} Ibid.
\end{flushright}
system was rooted in religion and tradition. Many early settlers did not understand these traditions and started to depreciate Maori law as the ‘barbarous custom of the native race’. The increasing numbers of settlers in the 1830s led to the call for ‘good government’ and ‘law and order’ along Pakeha lines. At first, Maori did not want to submit to British law and order. Instead, they considered that social order could be maintained by retaining their customs with a possible sharing between the Maori and British legal systems. After two decades of intensified feuding between the various Maori tribes, however, some Maori communities sought European settlements not only for the protection they could afford, but also because they were seen as a source of strength and trade. As a consequence of this notion, the missionaries claimed that ‘the natives are not only willing to submit to British laws, but wish for them to be enacted’. Consequently, tikanga o nga hara was replaced by the British legal system and the values and procedures of the European settlers became the only valid ones.

This development led to a breakdown of the traditional Maori system of dispute resolution. Although most Maori chiefs accepted the Treaty of Waitangi as a guarantor of justice, order and protection, many of them never completely approved of the Pakeha way of dealing with offenders and still consider that the British criminal justice system is culturally

35 Ibid.
37 Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 3-4.
insensitive, monocultural and is not aligned to Maori ideals and practices.\(^{39}\)

Because the traditional Maori method of dispute resolution fell into disuse in the 19\(^{th}\) century, it was under Pakeha law that a specific criminal justice system for juveniles developed. In 1858, the General Assembly passed the *English Laws Act*, which officially confirmed the application of English law in New Zealand as existing on 14 January 1840. In 1840, the laws of England contained only minor specific provisions regarding young offenders.\(^{40}\) The English Common Law introduced the *doli incapax* rule (inability to do wrong) to formalise the existing court practice of granting pardons to young offenders.\(^{41}\) Under the common law, children under seven were conclusively presumed to be incapable of possessing the *mens rea* - which was a precondition for criminal liability - and because of that were given immunity. Children between the ages of seven and 14 were presumed incapable of doing wrong (*doli incapax*) unless there was evidence to the contrary.\(^{42}\) The onus was placed on the prosecution to prove that the young person appreciated the wrongfulness of its behaviour.\(^{43}\) Children over the age of 14 were treated like adults. All children were tried in the same courts and liable to the same penalties as adults. That legal situation did not change until 1847, when an Act for the more speedy trial and punishment of juvenile offenders was adopted.

---

\(^{39}\) Joint Methodist/Presbyterian Public Questions Committee (N.Z.), above n 2, p. 4.


which gave justices the power to deal summarily with children under 14 years who were charged with petty theft.\textsuperscript{44}

In the early stages of New Zealand’s settlement, the social conditions were not conducive to good childcare. The cities suffered from increasing pauperism, many men had been discharged from employment because of a ‘great depression in trade’ and had deserted their families.\textsuperscript{45} Accordingly, many abandoned children lived in the streets. To help these destitute children, the churches and some private organisations established institutions that combined the role of schools and orphanages.\textsuperscript{46} In the 1860s the first free schools were opened in Dunedin, aiming to reclaim, educate, and train neglected youth.\textsuperscript{47} These schools were day schools, and some police commissioners regarded them as inappropriate to educate vagrant and neglected children properly, believing that they should be totally isolated from their relatives and other adverse influences. Accordingly, the police commissioners recommended the creation of industrial schools to assure the proper training of neglected children. Consequently, the \textit{Neglected and Criminal Children Act} was adopted in 1867. Although its name implied that it should also deal with young offenders, the emphasis of the Act lay on neglected, needy children. The Act gave justices the power to commit uncared-for children (pursuant to section 12 of the Act, a child was a boy or girl under the age of 15) to industrial schools. The industrial schools, however, were not designed with the young offender in mind. ‘Criminal’ or ‘convicted’ children were to be sent to reformatories instead to keep them distinct from ‘good and unfortunate’ children.\textsuperscript{48} Clearly people at

\textsuperscript{44} J A Seymour, above n 40, p. 5.
\textsuperscript{45} Ibid, p. 6.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} \textit{The Neglected and Criminal Children Act 1867}, sections 3 and 4.
that time believed that a fundamental difference between ‘criminal’ (= bad) and ‘unfortunate’ (= good) children existed. At the same time, the Act shows that the imprisonment of young offenders was already regarded with disquiet. The need for a different approach had already been recognised, although destitute children were considered a much more pressing problem than juvenile crime.

Although the Act attempted to initiate a policy of dealing separately with the two groups of children by providing both for industrial schools and reformatory schools, only the former were built, and it was cheaper to use the already existing industrial schools for criminal children as well instead of creating new reformatories. This procedure quickly led to criticism from various sides. People were afraid that the criminal children might ‘infect’ the ‘unfortunate’ children with their criminal behaviour while living together in the same institution.

Regardless of the critics, the Industrial Schools Act repealed the Neglected and Criminal Children Act in 1882 and transferred the guardianship of neglected or criminal children to the managers of industrial schools, who were then to separate internally the neglected children from those who belonged to the ‘criminal class’. Reformatories were no longer mentioned. The explanation for this legal change was that the law had, in fact, made a distinction between ‘neglected’ and ‘criminal’ children before, but the law had always been broken by sending the two different classes of children to the same schools. Thus, the new Act legalised the already existing practice by mentioning only one type of school, but kept alive the once intended

49 J A Seymour, above n 40, p. 7.
51 E Watt, above n 41; J A Seymour, above n 40, p. 12.
52 J A Seymour, above n 40, p. 21.
distinction between the two classes of children by giving the managers of the industrial schools the power to separate the two groups. Furthermore, the 1882 Act gave the Education Department a considerable amount of discretionary power. The administrators were now empowered to decide where a child was placed and for how long they should remain in the chosen institution.\(^{53}\)

In the same year, the *Justices of the Peace Act 1882* was passed. It was the first New Zealand Act to distinguish between children (those under the age of 12) and young persons (those aged 12 to under 16 years). There were several penalties available for the court to deal summarily with a child charged with an indictable offence other than homicide. The court could impose a term of imprisonment not exceeding one month or a fine not exceeding 40 shillings. Further, the court could, in addition to or instead of the two other punishments, impose the whipping of a boy.\(^{54}\) For dealing with the child’s offence summarily, the parents’ consent was needed pursuant to section 176 of the Act. Regarding young persons, section 177 of the Act provided that a young person charged with certain specified indictable offences could be dealt with summarily if he or she consented. The types of penalty were the same as for children, although the period of imprisonment was longer and the fine limit was higher.\(^{55}\)

In 1893, the *Criminal Code Act* was enacted. It stated that no person under the age of seven could be convicted of an offence and that a person under the age of 12 was given the benefit of the *doli incapax* rule.\(^{56}\)

\(^{53}\) Ibid.

\(^{54}\) *The Justices of Peace Act 1882*, section 176.

\(^{55}\) J A Seymour, above n 40, p. 28.

\(^{56}\) J A Seymour, above n 40, p. 29.
The like treatment of neglected and criminal children lasted until 1900. Only then were legal modifications made which attempted to implement a policy based on the idea of separating the industrial school inmates into two groups. Although reformatories had already been legislated for in the 1867 Act, the first institutions were actually established in 1900 (Burnham Industrial School was transferred into a reformatory for boys and Te Oranga Home became a reformatory for girls). The distinction was quite similar to that drawn already in the 1867 Act: the children convicted of an indictable offence were committed to a reformatory and the children in need of care and protection were still placed in an industrial school. Children under the age of 12 who had committed an offence were committed to an industrial school as well unless they had not become habitual criminal offenders so far.\(^{57}\) The age limit for committal to an industrial school was raised from 15 to 16 years.\(^{58}\)

In 1906 the *Juvenile Offenders Act* was adopted. After the *Justices of the Peace Act 1882* had successfully introduced dealing with children and young persons summarily in court, the next step in the development of a juvenile justice system was to provide for discrete court proceedings regarding juvenile offenders. Thus, the main object of the 1906 Act was ‘to save children from the degrading influences and notoriety inseparable from the administration of justice in Criminal Courts.’\(^ {59}\) To achieve this aim, the Act established private hearings for young offenders and stated that magistrates should assign a ‘special hour’ for hearings of charges against persons under 16 years.\(^ {60}\) Furthermore, the Act stated that the court did not necessarily have to record a conviction against a young person; in lieu the child or juvenile could also be admonished or

\(^{57}\) Ibid, p. 13.

\(^{58}\) E Watt, above n 41.

\(^{59}\) E Watt, above n 41; J A Seymour, above n 40, p. 29.

\(^{60}\) *The Juvenile Offenders Act 1906*, section 3 (2).
This provision was in fact an early occurrence of a diversionary approach.

Although the 1906 Act succeeded in establishing some important principles for dealing with young offenders in court, there were some provisions that did not correspond with the aim of protecting children from the adverse effects of a criminal court process. For instance, persons concerned in the case and representatives of the press were allowed to sit in and watch the lawsuit and the publication of the children’s names in the newspaper was not restricted.

In 1908, The Juvenile Offenders Act was incorporated into The Justices of the Peace Act 1908, and the Industrial Schools Act 1908 (which remained in force until repealed by the Child Welfare Act 1925) consolidated the 1882 Act and its amendments.

In 1912, the Department of Education assumed that the number of industrial school committals could be reduced if magistrates were able to put children under the ‘friendly and helpful oversight’ of an experienced officer. As a consequence, the Department appointed such an officer in Auckland in the following year. His duty was to prepare court reports on juvenile offenders and to keep an eye on those young persons who were convicted and ordered to come up for sentence when called upon or who were committed to probation. Following this management, the use of informal probation continued to expand. Consequently, in 1917 the Statute Law Amendment Act was passed, giving statutory recognition for

---

61 The Juvenile Offenders Act 1906, section 5.
62 E Watt, above n 41.
63 AJHR 1912, E4, 3.
64 J A Seymour, above n 40, p. 23.
the appointment of Juvenile Probation Officers\textsuperscript{65} (who in fact were the forerunners of Child Welfare Officers). Furthermore, the 1917 Amendment Act provided for the creation of Probation Homes, attempting to keep young offenders in their natural home conditions and making a committal to an institution a last resort.\textsuperscript{66} The Probation Homes were intended for cases requiring short periods of detention or separation from parents and to offer shelter and safety for juveniles before trial, either on arrest or on remand from the courts.\textsuperscript{67}

Summing up, the range of responses available to the courts for dealing with juvenile offenders was significantly extended in the early 20\textsuperscript{th} century. From 1910 to 1912, for instance, the measures used by magistrates in the four main centres of New Zealand were: admonition and discharge; conviction and discharge; conviction and order to come up for sentence if called upon; fine; whipping (which was little used except by the Wellington magistrate); committal to an industrial school; and committal to the Supreme Court for trial or sentence.\textsuperscript{68} By 1919, probation had been added to the list. Children guilty of very serious crimes were still dealt with in the same way as adults.\textsuperscript{69}

\textsuperscript{65} Statute Law Amendment Act 1917, section 10.
\textsuperscript{66} Statute Law Amendment Act 1917, section 10.
\textsuperscript{67} J A Seymour, above n 40, p. 24.
\textsuperscript{68} AJHR 1913, H20B, 1-6.
\textsuperscript{69} J A Seymour, above n 40, p. 25.
5.1.3 The Child Welfare Act 1925 and the Crimes Act 1961

In 1925, the Child Welfare Act \(^{70}\) was enacted, implementing the ideas of a welfare model into New Zealand’s youth justice system. The Act was effective until 1974 and is therefore a very significant statute regarding the history of juvenile justice in New Zealand.

The 1925 Act resulted from much criticism and controversy concerning the way children in trouble were being dealt with. By 1920, the main features of the future Act had already been outlined in a report. \(^{71}\) The current procedure of dealing with young delinquents was therein referred to as ‘almost obsolete’, and the comment was made that ‘at present every detail of the criminal law is worked out against the child. Like the adult, he is a law-breaker, and as such must be punished’. \(^{72}\) The Minister of Education, Sir Christopher Parr, commented that

\[
[…] up to the present, there has been no special provision in New Zealand for dealing with children who commit breaches of the law. At present they are dealt with in the same way as adults. They get into the hands of the police. The police take charge of them and bring them before the Magistrates in the ordinary way. \(^{73}\)
\]

This procedure was held to be inappropriate for young offenders, and it was argued that it should be changed by the establishment of discrete children’s courts and by the appointment of special magistrates and

\(^{70}\) Any further referrals to legislation will be to this statute unless otherwise stated.

\(^{71}\) AJHR 1920, E4, 13.

\(^{72}\) AJHR 1920, E4, 13.

\(^{73}\) Sir Christopher Parr, Minister of Education, 1925, cited in J A Seymour, above n 40, p. 31.
special child welfare officers.\textsuperscript{74} The debate regarding juvenile justice philosophy in New Zealand at that time focused on re-defining the delinquent as a child in need\textsuperscript{75} and so followed an international trend. In many countries across the world, the classical justice approach gave way to the positivist welfare approach at the beginning of the 20\textsuperscript{th} century.\textsuperscript{76} Although British law heavily influenced the early legislation in New Zealand, the 1925 Act adopted the more liberal, welfare-based philosophies of American policy-makers.\textsuperscript{77} New Zealand’s first Child Welfare Superintendent, John Beck, who was profoundly involved in drafting the bill, had visited the United States to learn about their juvenile justice practice.\textsuperscript{78} After his return, he proposed that ‘special Magistrates’ should sit in the Children’s Court.\textsuperscript{79} The appointment to the bench of people ‘selected not on account of their knowledge of legal procedure alone, but mainly on account of their knowledge and experience of child life and nature’\textsuperscript{80} was intended to be another feature of the new Children’s Court system.\textsuperscript{81} Further, a ‘woman referee’ should sit with the magistrate ‘as an adviser and colleague’.\textsuperscript{82} Another of John Beck’s proposals was that child offenders should be held in receiving or probation homes. John Beck thought that it was ‘quite wrong’ for them to

\textsuperscript{74} Sir Christopher Parr, Minister of Education, 1925, cited in J A Seymour, above n 40, p. 31.
\textsuperscript{76} E Watt, above n 41.
\textsuperscript{77} J A Seymour, above n 40, p. 32.
\textsuperscript{78} Ibid.
\textsuperscript{79} In accordance with Sir Christopher Parr, who also wanted to appoint special Magistrates, see above n 73.
\textsuperscript{80} AJHR 1920, E4, 13.
\textsuperscript{81} J A Seymour, above n 40, p. 32.
\textsuperscript{82} NZPD, Vol. 206, 1925, p. 585.
be held in an ordinary lock-up.\textsuperscript{83} To protect children from the atmosphere of an ordinary criminal court, Beck pleaded for the Children’s Court being held in a probation home instead of in a courtroom.\textsuperscript{84}

These ideas were quite revolutionary. Unfortunately, the statute which was enacted later, and the way it was implemented, did not totally meet the expectation of John Beck, Sir Christopher Parr and other experts who had been working on the draft of the Bill.

Like its predecessors, the 1925 Act applied to two broad categories of children,\textsuperscript{85} namely the ones in need and those who broke the law. According to section 2 of the Act, a ‘child’ was a boy or a girl under the age of 16 years. The age of criminal responsibility was still seven years. However, two years later, the age of 16 was substituted by the age of 17 by section 27(1) of the \textit{Child Welfare Amendment Act 1927}.

The new Act did not fundamentally alter the range of measures available to the court. The only new orders were Child Welfare supervision and committal to care.\textsuperscript{86} Under section 13 of the Act, a child who was taken away from home was committed to the care of the Child Welfare Superintendent\textsuperscript{87} who became the legal guardian of the child.\textsuperscript{88} In

\begin{itemize}
\item[\textsuperscript{83}] NZPD, Vol. 206, 1925, p. 676.
\item[\textsuperscript{84}] J A Seymour, above n 40, p. 32.
\item[\textsuperscript{85}] According to section 2 of the Act a ‘child’ was a boy or a girl under the age of 16 years.
\item[\textsuperscript{86}] The already existing dispositions available to the Children’s Court were: admonition and discharge, conviction and discharge, conviction and whipping (the Children’s Court’s power to order a whipping was abolished by section 17 \textit{Statutes Amendment Act 1936}), conviction and fine, conviction and an order to come up for sentence if called upon, borstal, committal to the Supreme Court, and conviction and probation (AJHR 1927 E4, 5).
\item[\textsuperscript{87}] J A Seymour, above n 40, p. 42.
\end{itemize}
addition, the new Act arranged that children could also be placed under the supervision of a Child Welfare Officer.\textsuperscript{89}

The two most important aspects of the 1925 Act were firstly the formation of the Child Welfare Branch, a new branch of the Education Department, which was formed to replace the Special School Branch, and secondly, the creation of Children’s Courts.

Regarding the needy children, section 13 of the new Act replaced the \textit{Industrial Schools Act}’s lists of harmful situations with a very general definition. Under the new Act, according to section 13(1), a complaint could be laid in respect of a child which was ‘neglected, indigent or delinquent’, ‘not under proper control’, or ‘living in an environment detrimental to its physical or moral well-being’.\textsuperscript{90} This list of grounds contained both justice model and welfare model characteristics through blurring ‘delinquency’ and ‘environment’ criteria.

\textsuperscript{88} \textit{Child Welfare Act}, section 16(1). Under the 1882 Act, the rights of guardianship had vested to the Manager of the industrial school the child had been sent to (see above).

\textsuperscript{89} \textit{Child Welfare Act}, section 13(4).

\textsuperscript{90} J A Seymour, above n 40, p. 41.
Regarding the young offenders, the new regulations concerning the Children’s Court’s jurisdiction were not very precise. Section 29 of the Child Welfare Act stated that

[...] all proceedings within the jurisdiction of a Stipendiary Magistrate or of Justices and relating to the committal of children to the care of the Superintendent under this Act, or to offences committed by ... children ... shall be heard and determined in a Children’s Court [...]’.

This provision was already modified by section 22 of the Child Welfare Amendment Act 1927, which stated that charges of murder and manslaughter could not be dealt with in the Children’s Court. Concerning the other indictable offences not triable summarily, section 19(2)(b) of the same amending Act pointed out that they could be dealt with in a Children’s Court, but when a Children’s Court Magistrate was dealing with such matters he was limited to the measures available to him under section 31 of the Child Welfare Act.91

To guard children from the stigma of delinquency and having been dealt with in court, section 31 of the 1925 Act gave the court the power to make an order against a child without the requirement to hear and determine the charge. A child charged with an offence could be brought before the court and committed to the Child Welfare Division without the charge being heard or discussed in any way.92 In combination with the introduction of non-specific complaint proceedings, this provision seems to be the foundation for removing the young delinquent from the arena of a criminal court.93 Section 31 of the 1925 Act was not amended94 until 1948, but then the court lost its power to ignore the offence. Instead,

91 J A Seymour, above n 40, p. 42.
92 Ibid, p. 38.
93 Ibid.
94 Child Welfare Amendment Act 1948, section 16(1).
under the *Amendment Act* of 1948, the court had to hear and determine the charge and could only commit the child following a decision.

In the debate on the Act, the foundation of the Children’s Courts was described as the Act’s ‘main provision’. The establishment of discrete Children’s Courts was based on the ‘aim and on the principle that [young persons] require protection and guidance rather than disciplinary punishment’. Children and young persons should be kept out of the normal criminal courts to be protected from their disadvantageous atmosphere and should be dealt with in an adequate, youth-specific way. To support this aim, several provisions were made.

For instance, the new Act opened up the possibility of ending police participation in court proceedings against juveniles as section 13 of the 1925 Act empowered both Child Welfare Officers and Constables to lay complaints under that section. The idea of banning police officers from Courts and replacing them by a Child Welfare Officer was taken from the juvenile justice practice in some parts of the United States, where young offenders were handed over by the police to Juvenile Probation Officers, who then conducted the case in court. Child Welfare Superintendent, John Beck, now hoped that ‘the need for the police to attend Children’s Courts would be practically eliminated’.

Many of the new provisions show that there was a huge desire to introduce radical change to the youth criminal jurisdiction. Unfortunately, this aim was not completely achieved. The police

---

95 Sir Christopher Parr, Minister of Education, 1925, cited in J A Seymour, above n 40, p. 31.
96 Sir Christopher Parr, Minister of Education, 1925, cited in J A Seymour, above n 40, p. 32.
97 J A Seymour, above n 40, p. 32.
98 AJHR 1927, E, 4, 9-10.
continued to play an important role in Children’s Court proceedings, and the Act did not resolve the problem of the detention of children prior to the charge being heard. Although section 28 of the Child Welfare Act 1925 provided that Children’s Courts should ‘so far as practicable, be separate from the premises in which any other Court usually exercises jurisdiction’, hearings of accused children were not invariably held in premises separate from adults’ courts. As a consequence, this section was repealed in 1927.\\(^99\) Only very few specially qualified magistrates had been appointed, nor did the presence of specialised associates become a permanent feature of the Court. It was assumed that the Government’s desire to reform the juvenile justice system was not strong enough, and moreover that judicial conservatism was responsible for that situation.\\(^100\)

Thus, there was a sharp contrast between the experts’ progressive ideas in 1925 and the legal statute after the enactment of the Amendment Act in 1927. For instance, Sir Christopher Parr, the Minister of Education in 1925, stated that year that he did not want convictions recorded against children, at least in respect of their first offence.\\(^101\) The new Minister of Education’s statement on this topic in 1927 was that an amendment was being introduced to dispense with recording a conviction ‘if such a course is deemed advisable’.\\(^102\) Thus, the Children’s Court did not develop the distinctive identity which those who drafted and introduced the 1925 Act had envisaged.

---

99 J A Seymour, above n 40, p. 34.
100 Ibid p. 33.
101 NZPD, Vol 206, 1925, p. 682.
This was clearly recognised by J A Seymour: 103

What emerged was not a special tribunal for children, but an adult court which had been clumsily modified, a court whose powers and procedures were contained in a confusing collection of statutes, rather than in a coherent code reflecting clearly defined aims.

Although the Children’s Court did not develop fully in the way it was expected, there were at least some magistrates who caught the spirit of the *Child Welfare Act 1925* and acted accordingly. 104

Nevertheless, despite shortcomings concerning the implementation of discrete Children’s Courts, the 1925 Act was a revolutionary piece of legislation which contained matters discussed in most Western nations at that time. Since the enactment of the *Child Welfare Act*, New Zealand’s law in relation to young people who offend has been firmly rooted in the welfare model. Offending was to be viewed as a cry for help, a symptom of family disorganisation or even pathology, and the proper response was considered to be welfare intervention. 105 Most of the contents of the 1925 Act were effective until 1974, when the *Children and Young Persons Act 1974* was enacted. Prior to that, the Juvenile Crime Prevention section of the police was established in 1957, and in 1961 the *Crimes Act* was passed, raising the age of criminal responsibility from seven to 10 years. 106 Furthermore, the *Crimes Act* formalised the *doli incapax* rule, stating that ‘no child shall be convicted of any offence […] when over the age of 10 years but under the age of 14 years, unless the child knew

---

103 J A Seymour, above n 40, p. 37.
104 Ibid.
106 E Watt, above n 41.
either that the act or omission was wrong or that it was contrary to the law. “

5.1.4 The Children and Young Persons Act 1974

With the introduction of the Children and Young Persons Act in 1974, aspects of a diversion approach entered New Zealand’s predominantly welfare-oriented youth justice legislation. The Act represented the end of the 50-year era of the 1925 Child Welfare Act. As with the previous legislation, the development process beforehand was lengthy. Like its predecessor, the new Act resulted from dissatisfaction and criticisms - especially by the members of the Department of Social Welfare, who urged the replacement of the Child Welfare Act. When the 1974 Act became effective, it was regarded with enthusiasm. During the second reading debate on the Bill the Minister of Social Welfare commented that

it would be quite wrong to regard this Bill as merely an updating of the existing child welfare legislation […] it is a completely new approach […] one of the major social welfare Bills introduced in New Zealand during this century.

Contrary to this statement, J A Seymour argued that it was little more than clarification and assimilation of existing practices.

However, the 1974 Act introduced three notable key areas of innovation. Firstly, it distinguished legally between children and young persons;

107 Crimes Act 1961, sections 21 and 22.
108 Any further referrals to legislation will be to this statute unless otherwise stated.
111 J A Seymour, above n 40, p. 51.
secondly, it formalised diversionary strategies through the establishment of Children’s Boards; and thirdly, it tried to reform the Children’s Courts.\footnote{112}

The legal distinction between children and young persons was in line with the legislation of other countries all over the world.\footnote{113} According to section 2 of the \textit{Children and Young Persons Act}, a child is a boy or girl aged under 14 years and a young person was a boy or girl over the age of 14 but under the age of 17 years. The distinction between the two categories of young law-breakers was designed to reflect the view that older juveniles should accept a fair measure of responsibility for their own actions.\footnote{114} Accordingly, the new Act prescribed a different approach to deal with offenders from either category.

Concerning children, the age of criminal responsibility and the \textit{doli incapax} rule have been retained. Section 27(2)(f) made the age of 10 the minimum age for offence-oriented complaint proceedings, maintaining the rule embodied in section 21 of the \textit{Crimes Act 1961}. Section 29(2)(b) states that offence–oriented proceedings shall not happen unless the child knew that their behaviour was wrong or contrary to law.\footnote{115} Furthermore, children under 14 years should not undergo criminal proceedings unless under charges of murder and manslaughter.\footnote{116} The aim of these rules was to divert young persons from court proceedings wherever possible. Child offenders had to attend court only when proceedings were brought

\footnote{113}{For example, the English \textit{Children and Young Persons Act 1969} also distinguished between children and young persons.}
\footnote{114}{J A Seymour, above n 40, p. 51.}
\footnote{115}{Ibid.}
against their parents because the child was ‘in need of protection’. \(^{117}\)

Instead of being dealt with in court, offences committed by children became the duty of the newly created Children’s Boards. Their purpose was to change the centre of gravity in the way New Zealand was dealing with child offenders by reducing the role of the court and bringing most of the young lawbreakers before a much less formal body. \(^{118}\)

Underlying the creation of Boards, however, was the desire to make informal action the primary means of dealing with child offenders, as the Boards were put forward as a preferred alternative to court proceedings. \(^{119}\)

The Boards seem to have been regarded as an agency particularly well suited to the delivery of preventive services. \(^{120}\)

A Government member of that time described the Board’s preventive role as follows: ‘a fence at the top of a cliff rather than the ambulance at the bottom’. \(^{121}\)

The Children’s Boards were informal agencies consisting of a member of the Police Department, a Social Welfare Officer, an officer of the State Services who was appointed by the Secretary for Maori and Island Affairs, and a local resident. \(^{122}\)

Each Social Welfare District had its own Board or several Boards. \(^{123}\)

Pursuant to section 15, the Police or the Department of Social Welfare had to report every child offender to a Children’s Board. The Board would then decide whether complaint proceedings should be undertaken or whether informal action would suffice. \(^{124}\)

What was envisaged for the Boards was that each should be a relaxed forum in which family problems could be discussed with understanding.

\(^{117}\) E Watt, above n 41.

\(^{118}\) J A Seymour, above n 40, p. 45.

\(^{119}\) Ibid, p. 49.

\(^{120}\) Ibid, p. 47.

\(^{121}\) Mr C. R. Marshall, 1974, cited in J A Seymour, above n 40, p. 47.

\(^{122}\) Children and Young Persons Act, section 13(2).

\(^{123}\) J A Seymour, above n 40, p. 45.

\(^{124}\) E Watt, above n 41.
and sympathy.\textsuperscript{125} According to section 19(2), the child and their parents or guardians must be given the opportunity of attending a Board’s deliberations, the outcome of which might be a decision to take no action at all, the administration of a warning or the counselling of child or parents. Section 15(7) provided for a referral to another agency for counselling or assistance. Such a referral could be made only with the consent of the parties involved.\textsuperscript{126} These provisions were to encourage children and their parents to discuss the problem, face it and collaborate in a search for a solution.\textsuperscript{127} It was only if this co-operation was not provided or, for some reason, the matter could not be handled informally, that the Board could recommend court action.\textsuperscript{128}

The positive consequence of the Boards was that the chosen measures for dealing with the offence were voluntarily accepted by the child and its parents and were therefore more likely to be carried out. J A Seymour stated that ‘the Act’s introduction of Children’s Boards is a reform which can with some justification be regarded as a genuine innovation’.\textsuperscript{129}

Another innovation of the new Act is worth mentioning. Pursuant to section 27(2)(f), a child over the age of 10, whose offences warranted court action, could be made the subject of a complaint that they were in need of care, protection or control. Obviously, section 27 was a direct descendent of section 13 of the \textit{Child Welfare Act}. Like its predecessor, it was an expression of the welfare approach. Although the new section contained broad definitions and therefore was not very precise, it

\textsuperscript{125} J A Seymour, above n 40, p. 49.
\textsuperscript{126} J A Seymour, above n 40, p. 46.
\textsuperscript{127} Ibid.
\textsuperscript{128} \textit{Children and Young Persons Act}, section 15(7)(d).
\textsuperscript{129} J A Seymour, above n 40, p. 45.
constituted a non-criminal form of action and a means of re-defining the young offender as a child in need.\textsuperscript{130}

Regarding the young persons, the new legislation adopted a more ambivalent position.\textsuperscript{131} In opposition to children, young persons could be taken to court for prosecution as well as for complaints against their parents.\textsuperscript{132} The significant reform of dealing with young offenders applied only to those under 14 years; young persons could still be charged with an offence. Thus, when a person aged between 14 and 17 years committed an offence, two choices were open to the authorities: action by way of complaint under section 27, or prosecution.\textsuperscript{133} However, also for the young persons, the new Act established informal and formal diversionary procedures. Police officers could, for example, give a formal warning to the offender instead of making an arrest if they considered it the better way of responding to the offence. If they found that further action was necessary, they could refer the young person to the Youth Aid Section of the police who must then consult with an officer from the Department of Social Welfare before prosecuting.\textsuperscript{134} Furthermore, the new Act formalised the existing practice of police consultations with Child Welfare and the Maori community, which had been in operation since the 1930s.\textsuperscript{135}

The 1974 Act also replaced the Children’s Court with the Children’s and Young Persons’ Court.\textsuperscript{136} The Children’s and Young Persons’ Court

\begin{itemize}
\item \textsuperscript{130} Ibid, p. 50.
\item \textsuperscript{131} A Morris and W Young, above n 116, p. 6.
\item \textsuperscript{132} E Watt, above n 41.
\item \textsuperscript{133} J A Seymour, above n 40, p. 50.
\item \textsuperscript{134} Ibid.
\item \textsuperscript{135} A Morris and W Young, above n 116, p. 35.
\item \textsuperscript{136} J A Seymour (above n 40) argues that it was little more than an “exercise in name-changing”, see p. 51.
\end{itemize}
dealt with both offending and care and protection cases. Underlying this exercise was the welfare-oriented belief that all these problems of juveniles are symptoms of family difficulties which can be treated by social work assistance and therapy. Because of this belief, the court used the same welfare-based orders for all juveniles coming to official notice. The court was regarded as the last resort, dealing with all matters beyond the capacity of the Children’s Boards. The courts were presided over by special magistrates from the District Court who could place young offenders under the guardianship of the Director General of Social Welfare but had no custodial powers on their own. Pursuant to section 36(1)(j), young people over the age of 15 years could, however, be referred to the District Court for adult sentencing if those measures were considered appropriate. This regulation, a manifestation of the crime-control approach, was intended to provide a solution to the problem of the older juvenile offender. However, it was a retreat from the principle that a special court should deal with persons below a certain age and older juvenile offenders were therefore likely to be denied the benefits the jurisdiction of a specialist court offered.

The Children and Young Persons Act mainly adopted the measures which had already been employed under the Child Welfare Act. As mentioned previously, the Children’s Boards could arrange appropriate counselling or assistance for parents and guardians of a child, instead of the child being punished as it was exercised under the former Act. The new provision for the proceedings of the Children’s and Young Persons

137 Department of Social Welfare, cited by E Watt, above n 41.
138 E Watt, above n 41.
139 Ibid.
140 Ibid.
141 J A Seymour, above n 40, p. 53.
142 Ibid p. 52.
143 Children and Young Persons Act, sections 15(b) and (c).
Court concerning this matter was comparable. Pursuant to section 31(1)(h), the magistrate could, when a complaint had been proved, order the Director-General of Social Welfare to arrange counselling for parents and guardians. Another innovation was the possibility that semi-custodial measures were developed for young persons. This development resulted from section 47(1)(g) which permitted the Court, as a provision of a supervision order, to direct that a young person should attend a centre ‘for such weekday, evening, and weekend hours each week and for such numbers of months’ as the magistrate thought would be adequate. Further, the new Act provided for the performance of community work.

Comparable to its predecessor, the 1974 Act and its implementation soon became the subject of criticism similar to that of welfare models all over the world. Since 1925 in New Zealand, the ultimate response to persistent offending behaviour has been the indeterminate Guardianship Order. Concerns were expressed about how the welfare of children and young persons who offended was being used ‘as a reason’ in criminal proceedings for placing them in institutions for an indeterminate period (in practice, this was for any time up until the age of 16) ‘for their own good’. This most intrusive intervention was used also in circumstances of relatively minor transgressions – not because the offences warranted such action, but because the young person was considered to be in need of help and control. The value of the ‘training’ delivered in these institutions was disputed. The practice had completely adopted the

---

144 J A Seymour, above n 40, p. 52.
145 Ibid p. 52.
146 Ibid.
welfare approach, and accordingly, no distinction was made between those young people who offended and those who needed care, protection or control. One court jurisdiction and one welfare service managed all the proceedings for all children and young persons coming to official notice.\textsuperscript{149} Penalties for juvenile offending were being determined by welfare factors rather than the circumstances of the offence.\textsuperscript{150}

Regarding this practice, the public’s faith in the effectiveness of the welfare-oriented youth justice system declined because it seemed to have little impact on the levels of youth offending and was regarded as being unable to deal with persistent juvenile offenders.\textsuperscript{151} Particularly the fact that some persistent young offenders seemed not to have any special social problems made the welfare responses provided by the new Act seem inappropriate.\textsuperscript{152} Another reason for the public’s disapproval of the welfare approach was that the new diversionary procedures did not work as they were expected to and the court’s role still was far too active; the consequence was too many and inappropriate arrests of juvenile offenders for minor offences and the consequent stigmatisation.\textsuperscript{153}

According to some previous studies in New Zealand, the stigma of court appearance increases the likelihood of further offending.\textsuperscript{154} Young people diverted from prosecution and custody were marginally less likely to reoffend. It has therefore - in accordance with the findings of the diversion approach - been concluded that diversion from prosecution has

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{149}] Ibid.
  \item[\textsuperscript{152}] E Watt, above n 41.
  \item[\textsuperscript{153}] Ibid.
  \item[\textsuperscript{154}] Ibid.
\end{itemize}
\end{footnotesize}
some potential to decrease reoffending.\textsuperscript{155} As a consequence, the proceedings provided for by the new legislation were designed to avoid the stigma of court appearance. To achieve that, the 1974 Act encouraged the use of diversion and tried to ensure that formal court proceedings were used as sparingly as possible.\textsuperscript{156} Unfortunately, this intention was not realised.\textsuperscript{157} The police seemed to have no confidence in the diversionary measures and tended to bypass them altogether by making an arrest if they themselves believed that prosecution was necessary, regardless of whether the arrest was appropriate or not.\textsuperscript{158} The police referred to the Children’s Boards and to Youth Aid only those cases which they themselves had decided were not suitable for prosecution.

Furthermore, the open-ended sanctions of the new Act ran the risk of injustice and unequal treatment.\textsuperscript{159} The diversionary procedures were also held to be ‘net-widening’ because they unnecessarily formalised the procedures dealing with petty offenders who had been dealt with informally before the new procedures were established,\textsuperscript{160} and because they used offending behaviour in young people as a route to tackling the problems of whole family systems.\textsuperscript{161}

Like almost everywhere else in the world where a welfare-based juvenile justice system operated, the public started to demand control and punishment of juveniles rather than benevolence.\textsuperscript{162} People believed that juvenile offenders should not be cushioned from their wrongdoing. They

\begin{footnotesize}
\begin{enumerate}
\item[155] M P Doolan, above n 74, p. 4.
\item[156] A Morris and W Young, above n 116, p. 124.
\item[157] E Watt, above n 41.
\item[158] A Morris and W Young, above n 116, p. 125.
\item[159] Ibid.
\item[160] E Watt, above n 41.
\item[161] M P Doolan, above n 74, p. 4.
\item[162] E Watt, above n 41.
\end{enumerate}
\end{footnotesize}
should learn to assume responsibility for what they did and be accountable for their misbehaviour. To achieve this aim, the families and communities of the young offender should be involved, and the procedures for dealing with young offenders should not be dominated by professionals.\textsuperscript{163}

On top of the general criticism regarding the welfare orientation, New Zealand was confronted with increasing concern that its youth justice system was unable to meet the needs of young Maori.\textsuperscript{164} Between 1981 and 1985, the rates for young Maori (male and female) coming to official notice were nearly seven times higher than for non-Maori, and disproportionate numbers of young Maori received custodial sentences compared with non-Maori juveniles.\textsuperscript{165} The new efforts by Maori for self-determination and autonomy in the 1980s led to dissatisfaction with the monocultural nature of the 1974 Act.\textsuperscript{166} The system did not meet Maori philosophy and ignored the important role that whanau, hapu and iwi play in a child’s life.\textsuperscript{167} Consequently, another reform of New Zealand’s juvenile justice system was considered.

In 1984, the newly elected Labour Government realised that the problems with care and protection aspects of the \textit{Children and Young Persons Act 1974} could not be remedied by amendment. Accordingly, the Government authorised a full review of the children and young persons legislation.\textsuperscript{168} After the selection of a government-appointed working party (without Maori representation) in 1984, a public discussion

\begin{footnotes}
\item 163 Ibid.
\item 164 Ibid.
\item 165 M Norris and R Lovell, above n 112, p. 8-10 and 33.
\item 166 E Watt, above n 41.
\item 168 M P Doolan, above n 150, p. 20.
\end{footnotes}
document was issued in December 1984 and submissions were invited.\textsuperscript{169} In 1985, the Minister of Social Welfare charged a Ministerial Advisory Committee with investigating and reporting from the Maori perspective to provide a framework for a bicultural approach in the Department of Social Welfare.\textsuperscript{170} The report of the Advisory Committee, Puao-Te-Ata-Tu (Daybreak), was released in 1986 and stated that Maori taonga\textsuperscript{171} to the Pakeha had been buried by the system and with it the mana of Maori people.\textsuperscript{172} The report identified ways in which this could be redressed.

In 1986, new legislation was drafted and the Minister of Social Welfare presented the \textit{Children and Young Persons Bill} in December 1986.\textsuperscript{173} This Bill was in line with most of the working party’s recommendations but without making reference to the proposal of Puao-Te-Ata-Tu. Consequently, it aroused widespread public dissatisfaction; Maori people especially were concerned about its complexity, its bureaucratic nature and its perpetration of a monocultural system of law.\textsuperscript{174} The new Minister of Social Welfare, who was appointed after the re-election of the Labour-Government in 1987, therefore commissioned a second working party to

\textsuperscript{169} E Watt, above n 41; M P Doolan, above n 150, p. 20-21.


\textsuperscript{171} ‘Taonga’ is the Maori word for treasured thing. The word \textit{taonga} has constitutional significance in New Zealand, as Article two of the Treaty of Waitangi guaranteed that the Māori signatories would retain the possession and enjoyment of their taonga under British rule.

\textsuperscript{172} E Watt, above n 41.

\textsuperscript{173} Ibid.

\textsuperscript{174} Ibid.
review the Bill. This working party presented its report in December 1987. The report was then referred to the Select Committee which travelled round New Zealand for two months to visit Maori and Pacific Island centres to hear submissions on how to recast the bill. Over the following two years, the Select Committee and officials worked together on a draft intended to answer Maori and Pacific Island concerns, and which was supposed to be less bureaucratic and complex. Finally, in April 1989, the result of this work was returned to the House of Representatives for its second reading, and the CYPFA became effective on 1 November 1989. This new piece of legislation had a favourable response from Maori and Pacific Island institutions and achieved almost total political unanimity.

5.2 GERMANY

5.2.1 THE PENAL PROCEEDINGS REGARDING CHILDREN AND YOUNG PERSONS FROM THE ROMAN EMPIRE TO THE EARLY 20TH CENTURY

When the Germanic tribes entered the lands of the Western Roman Empire in the 4th century, they brought with them customs and traditions that comprised their system of justice. The bases of these customs among the various tribes appear to have been much the same. The operative unit of society was kindred, the clan or extended family. When the member of one clan harmed a member of another in either their person or their property, the aggrieved person’s relatives sought retribution in what is now termed a vendetta or feud. Given the collective manner in which people operated, it is not surprising to find that

175 E Watt, above n 41.
176 Ibid.
177 M P Doolan, above n 150, p. 21.
retribution was not sought specifically from the person at fault, but from any member of his kindred. A process of ‘tit for tat’ could go on for years with men being killed long after the original basis of complaint had been forgotten.\(^{178}\)

During the Roman Empire\(^{179}\) and in the Middle Ages,\(^{180}\) characteristics of an age-specific period of development from childhood to adulthood was not identified and did not play an important role.\(^{181}\) Children were seen as ‘small adults’ that time and did not have separate areas of life from adults. The prevailing opinion is that the transition period between childhood and adulthood, which we call ‘youth’ today, was not recognised.\(^{182}\) Accordingly, there was no special treatment for young offenders. Children (which mainly meant persons under the age of seven) who had committed an offence were treated and punished like adults. Only occasionally, when the child was very young, was the punishment mitigated.


\(^{179}\) 6th century BC to 5th century AD.

\(^{180}\) About 5th to 15th century AD.


\(^{182}\) H J Schneider, ‘Wesen und Erscheinungsform der Kinder- und Jugenddelinquenz’ [1999] *Jura*, p. 343; different view: B A Hanawald, *Medieval Children*, [http://historymedren.about.com/library/weekly/aa100500c.htm](http://historymedren.about.com/library/weekly/aa100500c.htm), where it is stated that there is some evidence to refute this assumption. ‘Inheritance laws set the age of majority at 21, expecting a certain level of maturity before entrusting a young individual with financial responsibility. And there was concern expressed for the “wild youth” of teenage apprentices and students; the mischief that youth can cause was frequently seen as a stage that people pass through on the way to becoming “sad and wise”.’
The *Germanischen Volksrechte*\(^{183}\) and the *Stadtrechte des Mittelalters*\(^{184}\) of the Early Middle Ages were affected by the social structure of those days. As during the era of the Roman Empire, the population was composed of extended families. Clans mainly lived together in ordered, manageable, rural communities. Children lived among extended families where they experienced security as well as hard work.\(^{185}\) From earliest childhood they had to contribute to the homesteads or work on the family farm. Education was limited to a few wealthy children of townspeople and noblemen, and was primarily a matter for the home or monastery until the beginning of the High Middle Ages, when the first schools appeared in more populous areas. Peasants had no incentive to teach their children to read and could rarely read much themselves.\(^{186}\) As a result, most children did not have a period dedicated to their education and started helping their parents when they were strong enough. From that point onwards, they led the same life their parents did.\(^{187}\)

The Early Middle Ages were characterised by the urban control of bishops and the territorial control exercised by dukes and counts. There were court days on which all citizens could bring forward their disputes, which were arbitrated by an alderman and jury. Further, there were arbitration boards where the opposing parties could choose a referee who tried to find a solution for the dispute. Because the population lived together, however, mainly in clans, they continued to deal with most of their problems within the community. Criminality was one of the issues that was generally solved within the clan and for which no court day or arbitration board was needed. Beyond that, the feud system still played a

\(^{183}\) ‘The Germanic Public Legal Rights’.

\(^{184}\) ‘The municipal law of the Early Middle Ages’.


more important role in the punishment of criminal offences than the official court days. These feuds were a problem for the ruling councils of the towns, because possessions were destroyed and numerous people killed. Attempts to restrict the feud system by legal means failed over and over again.\footnote{188}

In the small communities of the Early Middle Ages, child delinquency did not appear excessively. A child’s offence was regarded as the child’s custodian’s carelessness. Public punishment for children did not exist - the young delinquent was returned to his clan for further education and supervision. The predominant response of the clan was castigation of the child by either his custodian or by the victim of the offence. The death penalty or corporal punishments were rare for children. If a child offended a member of another clan, both clans met and worked out reconciliation. Owing to the age of the young offender, the clans often agreed upon penal mitigation or exclusion.\footnote{189}

The rise of urban communes marked the beginning of the High Middle Ages. Outside the cities, the power of central government was greatly reduced. Consequently, government authority, and responsibility for military organisation, taxation and law and order, was delegated to provincial and local lords, who supported themselves directly from the proceeds of the territories over which they held military, political and judicial power. This was the establishment of the feudal system. The High Middle Ages saw the growth of centralised power and new ‘national’ identities, as strong rulers sought to eliminate competition (and potential threat to their rule) from powerful feudal nobles.\footnote{190}

\footnote{188} B A Hanawald, above n 178.  
\footnote{189} F Streng, \textit{Jugendstrafrecht} (1\textsuperscript{st} ed 2003), p. 15.  
During the High Middle Ages it was recognised that children do not turn directly into adults. The Germanic Legal Rights of the High Middle Ages already included exemption from punishment for young children and a *Halbbüßigkeit*\(^1\) for minors, which basically meant that the young offender had to pay a reduced monetary fine to the victim or the clan he had offended, or to the authority.\(^2\) The age of 12 became an average age threshold of full criminal liability,\(^3\) whereas the various legal statutes of the High Middle Ages\(^4\) did not have standard regulations. Generally, criminal liability began somewhere between the ages of seven to 14 years. The *infantes*\(^5\) were usually not punished at all or only caned ‘lightly’. The *impuberes puberta*\(^6\) were punished according to their level of development. The *minores*,\(^7\) however, were tried similar to adults.\(^8\) This age threshold seems to be quite low at first sight, but it has to be taken into consideration that life expectancy at that time was essentially lower in comparison to the present. Therefore, 18- to 25-year-old young persons contributed the majority of adults in the Middle Ages.\(^9\)

\(^1\) Literally ‘half-liability’.

\(^2\) Payment towards the victim or clan was called ‘wergild’ or ‘bot’, payment towards the authority was called ‘wite’, see K Holzschuh, *Geschichte des Jugendstrafrechts bis zum Ende des 19. Jahrhunderts*, (1957), p. 25; F Streng, above n 189, p. 15.


\(^4\) For example the *Sachsenspiegel*, literally ‘Mirror of the Saxons’, which was a legal code, written in Middle Low German in ca. 1220.

\(^5\) Children up to seven years.

\(^6\) Immature young persons, from age seven up to about 13 to 14 years.

\(^7\) Young persons of 14 to 25 years.

\(^8\) K Holzschuh, above n 193, p. 58-62.

\(^9\) H J Schneider, above n 185, p. 343.
To sum up, the High Middle Ages already recognised a stage of development called ‘youth’. Regarding criminal law, this recognition did not lead to special treatment of children or juveniles who have committed offences, but children and young persons were not punished as hard as adults, even when committing the same offence.

The partial break-up of the self-educating and self-controlling social communities at the end of the High Middle Ages led to an increase of child and juvenile delinquency. Public concern about this matter therefore increased as well, and public intervention and sanctions were demanded. Criminal law became more and more an issue for the authorities, and consequently, offences and conflicts were to a lesser extent solved by the clans themselves. Public sanctions for young offenders, such as ‘caning on skin and hair’, ‘whipping with birches’, clipping, and also executions were introduced. These sanctions were intended as a deterrent and differed only marginally from those imposed against adults. From that time onwards, young offenders in Germany have been dealt with by formal criminal proceedings, being prosecuted and convicted in criminal courts and receiving criminal sanctions. This notion can be seen as the ancestor of the justice model in which the German juvenile justice system is rooted.

A more marked differentiation between the phases of childhood, youth and adulthood began in the early Renaissance. In 1532 the *Constitutio Criminalis Carolina* (named after Charles V) became effective. The *CCC* was intended to curb the arbitrary and country-specific differences

---

200 K Holzschuh, above n 193, p. 80.
201 Hereinafter referred to as *CCC*.
202 It was also called *Peinliche Halsgerichtsordnung Karls des V.*, whereas *peinlich* came from the word ‘pain’ (or *Pein* in German) which has its roots in the Latin word *poena*, which means pain or punishment, and in which the *Hals* (neck) of the culprit was at stake.
of the various local penal jurisdictions existing in the Holy Roman Empire. Although it was only imperial subsidiary law - local law remained in effect – the *CCC* became the model for numerous state codes and remained valid in outline in some states even after the end of the Holy Roman Empire in 1806. The *CCC* was the first statute dealing with the culprit’s guiltiness and made it a requirement for determining someone liable. Further, it was the first statute providing for special rules regarding young persons. Article 179, for instance, linked youth and guiltiness while stating that ‘*jemandt, der jugent oder anderer gebrechlichkeyt halben, wissentlich seiner synn nit hett […]*’\(^{203}\) should only be tried or convicted after an expert’s opinion was heard. This provision led to youthful offenders being - till the end of the 18\(^{th}\) century - predominantly dealt with by legal ‘experts’, thus by the upper courts and under the advice of legal faculties.\(^ {204}\)

Further, the *CCC* contained a single special regulation exclusively for young persons, being theft committed by youthful offenders (Article 164). This article stated that a culprit of less than 14 years might be punished only by a corporal punishment instead of the death penalty.

As the Renaissance continued, awareness of a special life phase between childhood and adulthood started to increase, and consequently, the treatment of young persons changed fundamentally. It was recognised that children and young persons are vulnerable and, because of that, malleable through education during their development. Thus, education and pedagogy became very important issues.

\(^{203}\) Roughly: ‘If it is known that somebody is a young person or has got another affliction and might not be criminally responsible he […]’.

In the 18th century, during the age of the Enlightenment, criminal law was increasingly included in the area of philosophy. From this followed the implementation of important principles, which could be attributed to the justice approach, into substantive criminal law in Germany. One of those innovations was that judges had to confine themselves to the law and could no longer consider customary law, ancient customs, traditions or religious approaches anymore. Another innovation was that punishment should be proportionate to the offence.\(^{205}\)

The Enlightenment period, however, did not entail the implementation of discrete youth justice provisions. In the *Allgemeines Landrecht für die Preußischen Staaten*\(^{206}\) of 1794, the age of criminal responsibility was fixed at 14 years, and the attributability was defined in only one general rule (section 17 *ALR*):\(^{207}\)

\begin{quote}
Unmündige und schwachsinnige Personen können zwar zur Verhütung fernerner Vergehen gezüchtigt; niemals aber nach der Strenge des Gesetzes bestraft werden.\(^{208}\)
\end{quote}

For persons younger than 14 years, only (corporal) punishments were available which were later also carried out for mitigating prison sentences.\(^{209}\) Special criminal rules for young persons older than 14 years did not exist.

\(^{205}\) K Holzschuh, above n 193, p. 126.

\(^{206}\) `Common Country Laws of Prussian States`, hereafter referred to as *ALR*.

\(^{207}\) K Holzschuh, above n 193, p. 128.

\(^{208}\) That means ‘Minors or amential persons might be caned to prevent them from committing other crimes, but they can never be punished after the full strength of the law’.

In the early 19th century, efforts in Germany to grasp the special situation of children and young persons increased. In 1851, the German legislation implemented section 42 of the Prussian StGB, under which the capacity to understand wrongdoing was essential for the punishment of a person under 16 years. If the young persons possessed this capability, they were punished like adults. If they lacked this capability, they were to be exonerated or sent to a reformatory.

As a consequence of industrialisation, modernity and urbanisation, an acknowledgement of a ‘youth phase’, which was completely dedicated to the education of young persons and therefore contrasted clearly to childhood and adulthood, developed at the end of the 18th and during the 19th centuries. Much employment during the Industrial Revolution required school education and professional training. A special system of youth policy and social control was set up, including youth-specific institutions of education and socialisation such as different types of schools, a Youth Welfare Department, and Youth Aid. Soon after the establishment of this youth-related system, new concepts of dealing with young persons who offended or were in need of care and protection were demanded. The rise of the social work professions and their motivation to support former convicts and young persons at risk resulted in a more welfare-oriented approach concerning the treatment of young offenders. Pedagogues and criminologists criticised the previously existing, mostly repressive sentences of the justice system which they mistrusted and regarded as old-fashioned. Thus, a new way of dealing with young persons in trouble was sought which provided for appropriate

---

210 Ibid, p. 56.
212 H J Schneider, above n 185, p. 343.
213 F Schaffstein and W Beulke, above n 204, p. 38.
intervention possibilities if problems with the education and socialisation of young persons should arise.

The prevailing liberalism led to the foundation of private ‘saving homes’. The task of these institutions was to help neglected children and young persons and to give them a home. Juveniles who had committed a criminal offence were meanwhile not accepted because of the disapproval of the founder of the institutions. Thus, regarding young offenders, the justice-model-orientation remained in force so that they were still dealt with in adult courts and committed to adult prisons.

With the introduction of the *Strafgesetzbuch für das Deutsche Reich* in 1871, the age of criminal responsibility became 12 years and milder ranges of punishments applied to those persons between the ages of 12 and 18. However, apart from penal mitigation on account of youthful age, juveniles were still convicted like adults. The age of criminal responsibility at 12, however, was criticised because offenders younger than 12 were thereby excluded from the application of criminal law. The critics were extremely strong in Prussia, where it was bemoaned that young children under the age of 12 sometimes were ‘abused and obliged to steal’ by their parents or other adults and it was impossible under the

214 ‘Rettungshäuser’ – the first saving homes have been founded by Zeller in Beuggen/Baden in 1816 and Graf v. d. Recke in Düsseldorf in 1819.
216 Except in Berlin; see J H Wichern, above n 215, p. 317.
217 ‘Criminal Code of the German Reich’, hereafter referred to as *RStGB*. 
218 *RGBl* 1871, 127.
219 Section 55 *RStGB*.
new Act to punish them. Accordingly, section 55 RStGB was amended on 26 February 1876 by inserting a second clause under which welfare and supervision measures could be imposed against children under 12. This amendment led to several enactments of Acts in various German states which adjusted supervision and guardianship orders for criminal children under the age of 12. The Prussian Act, for instance, stated that young offenders between the ages of six and 12 years could be committed to live in a reformatory or in a foster family if the Guardianship Court decided so. Other German states allowed similar intrusive interventions if the child showed signs of neglect or destitution.

This development formed part of the general political movement promoting the creation of a welfare state, social security, a new balance between labour unions and employers, and a movement towards a more welfare-oriented approach concerning young offenders. The welfare-oriented measures that were consequently implemented, however, applied only to children. Juvenile offenders, aged 12 and older, were still treated in accordance with the justice approach. Thus, they were still prosecuted and convicted in court and received formal, punitive sentences, although criminologists and pedagogues claimed that deterrence and retribution were inappropriate responses to criminal behaviour of juveniles. They believed that educational and rehabilitative aspects should be given more emphasis when dealing with young offenders. Accordingly, attempts to create a special criminal law for juveniles were made at the end of the

---

223 Ibid, p. 144.
224 For instance the Hamburg Act of the 06 April 1887; the Lübeck Act of the 17 March 1884; the Hesse Act of the 11 June 1887; the Baden Act of the 04 May 1886.
19th century. The moderne Strafrechtsschule\textsuperscript{226} and the Jugendgerichtsbewegung\textsuperscript{227} contributed to the creation of an independent youth criminal law, emphasising individual prevention and rehabilitation instead of deterrence and retribution.\textsuperscript{228} Their leading figure, Franz von Liszt, introduced diversionary ideas to the German youth justice discussion.\textsuperscript{229} He held the view, for that time radical and revolutionary, that in case of a non-response to the first criminal action of a young person the likelihood of reoffending would be lower than in the case of a hard punishment.\textsuperscript{230}

Another intensely criticised issue at that time was the practice of dealing with juveniles in the ‘adults’ courts’ and imprisoning adults and juveniles in the same prisons. Experts demanded that proceedings against juveniles should be held in special juvenile courts, and that young persons should be placed in probation homes, reformatories, or at least in special juvenile prisons. The first achievement in this respect at the beginning of the 20th century was the establishment of the first separate youth criminal court chambers in Frankfurt, Cologne and Berlin in 1908,\textsuperscript{231} which specialised

\textsuperscript{226} Literally ‘Modern Criminal Law Academe’, represented, for instance, in the Marburger Programm developed by Franz von Liszt, professor for criminal law in Vienna, in 1882.

\textsuperscript{227} Literally ‘juvenile court movement’, a sister-movement to the child-saving charitable organisations established in North America and Great Britain that time.


\textsuperscript{231} Those youth court chambers remained in the normal criminal court buildings and were only appointed by the assignment of actions.
in dealing with young delinquents. In 1912, the first separate prison for juvenile delinquents\(^{232}\) was built.\(^{233}\) Furthermore, police administrators advised the police officers to be more sensitive and careful when interviewing a child or young person who was charged with an offence.\(^{234}\)

With the enactment of the *BGB*\(^{235}\) in 1900, section 1666 was introduced. It provided for welfare, education and supervision, and directed that the Guardianship Court could impose the required measures when the mental or physical well-being of a child or young person was endangered due to neglect or because of the culpable moral conduct of their legal guardian. The Guardianship Court could withdraw the right of custody if the parents misused their legal guardianship or if the child or young person committed a criminal offence.

It can be concluded that the treatment of young offenders in Germany was based on a pure justice-model-orientation till the early 20\(^{th}\) century. Young offenders were tried in criminal courts and received formal sentences. Welfare-oriented and diversionary ideas, introduced by criminologists or practitioners, were not implemented into substantive law.

---

\(^{232}\) This was situated in Wittlich in Rhineland-Palatinate. Juvenile inmates were strictly separated from adult inmates and were put under a so-called ‘educational enforcement of sentences’.

\(^{233}\) H J Schneider, above n 185, p. 343; F Schaffstein and W Beulke, above n 204, p. 37.

\(^{234}\) A Roth, above n 230, p. 36.

\(^{235}\) See above Chapter Four, n 84.
5.2.2 The Jugendgerichtsgesetz\textsuperscript{236} of 1923

The progressive development of a special treatment for young offenders was disrupted by World War I. Only after World War I was the idea of specific legislation successfully pursued by opting for the ‘dualistic’ approach of welfare and justice.\textsuperscript{237} This dualistic approach,\textsuperscript{238} which distinguishes between criminal sentences on the one hand and welfare measures on the other, remained in force until today.\textsuperscript{239}

In 1922, the Jugendwohlfahrtsge\textsuperscript{240} was passed, dealing with children and young persons who were in need of care and protection. The JWG was a classic legal statute providing intervention along the lines of the parens patriae doctrine.\textsuperscript{241} Under this new Act, the state was able to replace parents who were considered unable or unwilling to fulfil their educational duties.\textsuperscript{242} The educative measures available under this new Act were for example: supervisory directives, care orders to improve the educational abilities of parents, and placement in foster families or in residential care.\textsuperscript{243}

\textsuperscript{236} ‘Juvenile Justice Act’, literally translated as ‘Juvenile Courts Act’, RGBl 1923 I, 135, hereafter referred to as JGG.


\textsuperscript{238} The dualistic approach was finally established by the Gewohnheitsverbrechergesetz (‘Habitual criminal Act’) in 1933.

\textsuperscript{239} H Jung, ‘Sanktionensystem’ (2005), University of Saarbrücken, jung.jura.unisb.de/Ab\%202005/SanktionensystemSS05.Internet.pdf at 14 May 2006, p. 15.

\textsuperscript{240} ‘Juvenile Welfare Act’, hereafter referred to as JWG.

\textsuperscript{241} F Dünkel, above n 237, p. 3.

\textsuperscript{242} Ibid.

\textsuperscript{243} Ibid.
In 1923, one year after the enactment of the *JWG*, the *JGG* was enacted. This was the first Act dealing only with young criminal offenders who had committed a delinquent act as defined by the German general penal code *StGB*. As the legislators had been pressed for time, the *JGG* was not as revolutionary as it was intended to be. A totally welfare-oriented model of juvenile justice did not fit the German ‘mentality’, which remained intent upon keeping the penal option to deal with young offenders. Thus, the new Act was more a compromise, a ‘mixed’ system of juvenile justice, combining elements of educative measures with legal guarantees and a procedural approach.  

This, in fact, reflected the characteristics of the justice model. The punishments and ranges of punishment of the *StGB*, however, remained applicable. Because of that, the Minister of Justice of that time, Gustav Radbruch, stated:

> [...] *ein hocharfreulicher Fortschritt, aber seit langem nicht mehr ein kühner Wurf.*

By enacting the *JGG*, the legislator did not create a distinctive ‘juvenile penal law’. Punishable crimes were – and still are - the same ones as defined for adults in the *StGB*. What are known as ‘status offences’ did not form an element of the *JGG*. Instead, the *JGG* consisted of a specific system of responses and sanctions applicable only to young offenders, and of some specific procedural rules for the juvenile court and its proceedings.

---

244 Ibid, p. 2.


247 ‘[...] a most impressive progress but not an audacious action anymore.’

248 F Dünkel, above n 237, p. 2.
The emphasis of the 1923 Act lay on the education and rehabilitation of the young offender instead of punishment.249 The corresponding slogan at that time was *Erziehung statt Strafe*250, which is still the main idea of juvenile justice in Germany. In contrast to the retributive criminal law which had been enforced before, the new legislation focussed on the idea of individual prevention. The selection and assessment of sanctions should be made according to their suitability to prevent the young offender from reoffending.251

The essential regulations of the *JGG* and the changes resulting from it, in contrast to the preceding legal situation, can be described as follows: under section 2 *JGG*, the age of criminal responsibility was increased from 12 to the age of 14. A young person was now described as a boy or girl from the age of 14 but under the age of 18. Thus, the threshold of unlimited criminal responsibility at the age of 18 remained untouched.

The preceding regulation concerning acquittal of a young person under the age of 18, who lacked the capacity to understand, was modified by the new Act. Thus, pursuant to section 3 *JGG*, not only intellectual and mental, but also moral maturity was now a condition for being able to impose a punishment against young persons. In addition, besides the condition of capacity to understand the wrongfulness of an action, it had to be proved that young people possessed the ability to affect and control their own actions.

---

249 W Heinz, above n 220, p. 896.
250 ‘Education instead of punishment’.
251 W Heinz, above n 220, p. 896.
At the beginning of the 20th century, prison sentences began to be regarded as unsuitable to meet educational needs and to rehabilitate young offenders. Criminologists emphasised that incarceration has damaging effects when applied to young offenders.\textsuperscript{252} Thus, in 1923, for the first time in German criminal law history, judges were given the option to suspend a prison sentence and replace it with probation. This regulation, however, only applied to juveniles.\textsuperscript{253} Moreover was the prison sentence for juveniles limited to a maximum of 10 years instead of life imprisonment in jail, which had been applicable until 1923. Furthermore, the range of criminal sentences was expanded. Alongside the prison sentence, a new form of sentences called \textit{Erziehungsmaßregeln}\textsuperscript{254}, which did not have a punitive nature, was created.\textsuperscript{255} Sentencing rules were adjusted to the goal of education, introducing the dogma that the prison sentence is a course of last resort to implement education within the youth justice system and therefore was to be used only if educative measures were assessed to be insufficient to respond to the young offender’s needs.

Section 32 \textit{JGG} implemented the possibility of abandoning the \textit{Legalitätsprinzip}\textsuperscript{256}, which is part of the \textit{Grundgesetz}\textsuperscript{257} and accordingly a strictly applied principle in adult criminal law. Under certain circumstances, the public prosecutor could now terminate criminal proceedings if the judge agreed. The aim was to avoid stigmatisation and social discrimination, as well as the burden of a criminal proceeding.

\textsuperscript{252} F v Liszt, above n 230, p. 347.
\textsuperscript{253} F Schaffstein and W Beulke, above n 204, p. 37.
\textsuperscript{254} ‘Educative Measures’, sections 5 \textit{JGG} et seqq.
\textsuperscript{255} J Schady, above n 221, p. 25-32.
\textsuperscript{256} ‘Principle of Mandatory Prosecution’, literally ‘Principle of Legality’.
\textsuperscript{257} ‘German Constitution’.
unnecessary for prevention of reoffending. In this respect, the JGG of 1923 was a forerunner of the notion of giving the public prosecutor discretion whether (and how) to prosecute, or whether to terminate a case because of the petty nature of the offence or because other measures have already been carried out by other institutions or persons.

Another important and revolutionary innovation was the possibility for the youth court to refrain from punishment even if the young offender was pronounced guilty. According to section 6 JGG, the court should act in this way when convinced that the imposition of Erziehungsmaßregeln was sufficient. Additionally, pursuant to section 9(4) JGG, the judges could also refrain from punishment without imposing a sentence at all if the case was just a petty offence. This provision expressed the legislator’s new aim regarding juvenile justice: the reform of the offender instead of the traditional compensation of guilt through punishment.

Summing up, the JGG 1923 implemented rules which were more than ever geared towards the protection and education of the young offender instead of towards punishment. Nevertheless, the JGG of 1923 did not become a welfare model or a completely education-oriented Act. Instead, it remained a part of criminal law. This situation was reflected by the new sharp partition of juvenile welfare legislation on the one hand and juvenile criminal justice on the other. Under the new legislation, young offenders were clearly separated from otherwise endangered children and young persons.

---


259 F Dünkel, above n 237, p. 2.
5.2.3 The Jugendgerichtsgesetz (RJGG) of the Third Reich of 1943

Academics still differ when interpreting the development of the juvenile justice system during the Third Reich. Some authors believe that the juvenile justice system ‘developed continuously’ between 1933 and 1945, or that it was ‘merely good fortune’ that the Nazis did not destroy the work and the achievements of many years. Other authors, however, argue that the juvenile justice system and its provisions were exploited for national socialist ideals. These different points of view result from different perspectives. Adherents of the first theory consider only the new measures and sanctions introduced under the RJGG, whereas adherents of the other theory look also at the social political background and the intentions behind the new provisions.

In fact, the reforms of the national socialist system were ambivalent insofar as they introduced innovative educational ideas that had already been previously discussed in the Weimar Republic, but at the same time established a totally different meaning and use of the educational principle by defining ‘education’ as education by (not instead of) punishment. Consequently, the educational principle of the former JGG of 1923 was undermined by its racist interpretation and use. Indeed, the Nazis kept most of the provisions of the JGG of 1923, but at the same

260 F Schaffstein and W Beulke, above n 204, p. 39.
263 F Dünkel, above n 237, p. 2.
time they implemented special regulations which ensured that mitigation and educational provisions did not apply to Jewish and foreign juveniles anymore.\textsuperscript{264}

In accordance with the adherents who stated that the progressive development of the juvenile justice system continued during the Third Reich, it has to be emphasised that the RJGG introduced some of the former ideas of the Jugendgerichtsbewegung, such as renaming the term ‘imprisonment’ as ‘youth penalty’ and therewith making it independent from the range of prison penalties provided for adults; and establishing a separate and uniform set of minimum and maximum youth prison sentences. Another positive innovation was the introduction of the \textit{Beseitigung des Strafmakels durch Richterspruch}.\textsuperscript{265} Additionally, the RJGG established the requirement of appointing judges and prosecutors specially qualified in education.

Another improvement of the 1943 Act was the partition of the JGG measures and sanctions into three parts. Alongside the \textit{Erziehungsmaßregeln} and the youth penalty, the Zuchtmittel\textsuperscript{266} were established. With the introduction of youth detention as one of the Zuchtmittel, the former short-term imprisonment for juveniles was abolished. Short-term youth detention allowed the imposition of up to four weeks’ detention, which was intended to be a ‘short sharp shock’ for the young offender. This amendment can be seen as a demonstration of the repressive \textit{Zeitgeist} of the Nazi regime.\textsuperscript{267} As youth detention could be imposed for four weeks, the minimum period of a youth penalty became three months.


\textsuperscript{265} ‘Removal of the taint of a previous conviction by judge sentence’.

\textsuperscript{266} ‘Disciplinary measures’ – literally ‘means of corrections’.

\textsuperscript{267} F Dünkel, above n 237, p. 3.
However, besides the distinction between Jewish or foreign and German young offenders, the RJGG introduced some more iniquitous aspects. The complete removal of the suspension of sentence on probation was regarded as being a step backwards, as was the break-up of the age brackets, which, pursuant to section 3(2) RJGG, allowed punishment of children from the age of 12 onwards if they had committed a serious offence. Further, a special decree dealing with the treatment of ‘dangerous juvenile criminals’ was implemented which allowed the possibility of applying adult criminal law sanctions (which also included the death penalty) to juvenile felons over the age of 16 years.

Additionally, the power of the executive authority, especially of the police, increased more and more. Preventive and repressive methods became more extreme. The police were able to impose measures without even referring to the court. This procedure led to enormous injustice and many persons – including children and juveniles – were taken to concentration camps.


5.2.4 The Jugendgerichtsgesetz of 1953 and the Development of the Implementation of the 1st JGG Änderungsgesetz of 1990

The general situation in Germany after the German surrender in 1945 was characterised by a breakdown of law and order. Germany was partitioned into four zones of occupation and an Allied Control Council was created to co-ordinate the zones. The original division of Germany was between America, the Soviet Union and Britain. Stalin agreed to give France a zone, but it had to come from the American or British zones and not the Soviet zone. The American, British, and French zones joined in 1949 as the BRD and the Soviet zone, situated in the Eastern part of Germany, became the DDR. As a result of this political development, the juvenile justice system developed differently in both German Republics.

Straight after founding the DDR, a youth justice system was established which was quite similar to that existing under the JGG of 1923. This system remained effective until 1968. After its abolition, the adult criminal law of the DDR with its regular sentences and ranges of punishment became applicable - except for some penal mitigation - for juvenile offenders (young persons between 14 and 18 years). The Heranwachsenden were treated like adults and did not receive any mitigation at all.

In the BRD, the Allied Control Council abolished all national socialist elements in juvenile justice legislation. Apart from that, the RJGG initially remained in force because it was not regarded as being a ‘typical national-socialistic body of thought’.

271 D Rössner and B Bannenberg above n 264, p. 52.
On 4 August 1953, the BRD enacted a new JGG. From the extensive number of innovations only some will be discussed. The 1953 Act reintroduced the suspension of the imposition of the youth penalty (section 27 JGG) on probation because it was acknowledged that imprisonment generally entails many adverse influences and does not advance the young offenders rehabilitation. In connection with this development, probation services and probation supervision were established. Additionally, the minimum period of the youth penalty was raised to six months.

The JGG of 1953 was the first Act broaden its application area, to some extent, for Heranwachsende. Under the JGG of 1953, all young people up to the age of 21 were transferred to the jurisdiction of the youth court. This provision introduced a flexible system to deal with young adult offenders and allowed the judge to choose an appropriate sentence from either the JGG or the StGB after having considered the personality and maturity of the offender. The broadening of the JGG’s scope was based on the belief that young adults still differ from adults psychologically, physiologically, and in their social status due to stress and conflicts arising during the transitional developmental period from childhood to adulthood. This period is often not completely concluded when a young person turns 18. Instead, transitional periods have been extended and entrance into adult world has been made more difficult. Failure to recognise the mentioned differences between Heranwachsende and adults might lead to failure of adequate justice for Heranwachsende offenders.

272 F Schaffstein and W Beulke, above n 204, p. 40.
273 See above Chapter One, n 13.
Summing up, by enacting the *JGG* of 1953, the legislators had finally implemented nearly all the ideas of the *Jugendgerichtsbewegung* which had been only revolutionary visions at the beginning of the century.

During the 1960s and 1970s, the juvenile justice system once more became the focus of criticism and discussion, followed by several proposals for reform. The most popular proposal was the suggestion of an enlarged and unified youth welfare act and an abolition of the discrete youth justice legislation. This proposal was introduced by the *Arbeiterwohlfahrt*\(^{274}\) in 1970.\(^{275}\) In 1973, an expert committee of the Federal Ministry of Youth, Family, and Health presented a discussion paper\(^{276}\) dealing with the idea of restricting punitive sentences to those young persons aged 16 and 17 while imposing welfare measures for offenders aged 15 and 15.\(^{277}\) Additionally, the fundamental and axiomatic question of how to balance the proportion of education and punishment in the *JGG* evoked controversy, especially in the context of how to reduce reoffending. It was during this period that Germany came closest to abolishing youth criminal law and replacing it with an integrative and unique welfare model, applicable to delinquent juveniles as well as to all children and young persons who were in need of care, education, and protection.\(^{278}\) The idea of eliminating the dualism of youth criminal law and youth welfare law, however, faded out without leaving

\(^{274}\) ‘Labour Welfare’, a labour union associated organisation.

\(^{275}\) Vorschläge für ein erweitertes Jugendhilferecht, 1970, Schriften der Arbeiterwohlfahrt 22.


significant traces and an overall reform of the system did not take place.279

As a consequence, the *JWG* of 1922 remained in force alongside the *JGG* and provided measures for dealing with children and young persons in need of care and protection. Those measures were similar to, or even the same as, the educative measures stipulated in the *JGG*, including supervisory directives, care orders, orders to improve the educational abilities of parents, and placement in a foster family or in residential care.280 In 1990, the *JWG* was replaced by a modern law of social welfare which established juvenile welfare boards to help young persons and their families and offer assistance instead of being ‘agents of intervention’.281

The juvenile justice legislation has remained unchanged for almost 40 years, but the juvenile justice system has experienced major changes since the 1970s. This happened without any legislative amendment and was therefore called ‘reform through practice’.282 The slogan of the 1980s was ‘internal reform’ of the juvenile justice system.283 This label signalled two things. On the one hand, the reform should not touch the basic structures of the *JGG*; and on the other hand, the term indicated that the 1980s reform of youth criminal law was planned and implemented essentially through its practice, meaning that innovative projects have

280 F Dünkel, above n 237, p. 3.
281 Ibid.
282 ‘Jugendstrafrechtsreform durch die Praxis’.
been developed and carried out by social workers, juvenile court prosecutors and judges. Since 1953, the practitioners working in the field of juvenile justice have adjusted to the social and political conditions relating to young persons and their lives. They have gained experience and insight from several years of work in this specific area, from the results of criminological research projects and from the increasing influence of educational and psychological findings. Accordingly, the administration of juvenile justice has changed decidedly since the early 1980s and, to a considerable extent, has turned away from repressive and institutional sanctions and more and more towards helping and supporting non-institutional measures as well as informal sanctions.

Finally, following the developments initiated by practice, a ‘partial reform’ proceeded in 1990 when the legislator enacted the 1. Änderungsgesetz zum JGG. Its purpose was to implement the educational approach of the JGG to a greater extent. Furthermore, longitudinal research had proved that as many as 70% of young offenders are one-time-offenders. This suggested that prevention efforts should rely heavily on non-prosecution and diversion rather than on youth

---

287 ‘First Amendment Act to the Juvenile Justice Act’; passed by BGBl I 1990, 1853, hereafter referred to as 1st JGG:ÄndG.
penalty and other punitive orders. An implementation of diversion and community-based orders, such as community service, social trainings courses, restitution, conflict mediation, and reconciliation was therefore aspired.

In fact, the 1st JGGÄndG brought fewer changes than many expected. These included some consolidation of diversion, decarceration, and depenalisation policies that had been changing youth court practice since the late 1970s. Although the 1st JGGÄndG extended a paradigm shift away from prison and towards new, community-based sentences and social-work-based measures, the basic and highly disputed issues – such as the change of age limits and the provisions concerning Heranwachsende in section 105 JGG – were admittedly not changed by the legislators. Furthermore, in spite of considerable criticism concerning youth detention and the youth penalty imposed because of 'harmful inclinations' (section 17 JGG), the 1st JGGÄndG reformed these topics very cautiously.

Indeed, the debate concerning these topics was taken into consideration as the German Bundestag, parallel to the enactment of the 1st JGGÄndG, adopted a resolution290 in which the Federal Government was invoked to present a draft of a second Amendment Act of the JGG no later than 1 October 1992. This second Amendment Act was supposed to contain solutions291 to 11 defined problems that were still outstanding.292 However, this second draft still does not exist today.293

290 BT- Dr 11/7421.
292 The draft should provide solutions for following subjects and questions: the relation between Erziehungsmaßregeln and Zuchtmittel; the solution of how to respond to adolescents with respect to juvenile justice; a new practice for the imposition of youth penalty; an increasing involvement of lawyers; the limitation of the
5.3 Summary and Comparison

Summing up, it can be concluded that the existence of a separate youth criminal law, which is independent from adult criminal law, is relatively recent in both New Zealand and Germany. The youth criminal law existing nowadays is a specialist area in theory and practice and as such a creation of the 20th century.294 Juvenile delinquency is a social problem in both countries, but was only recognised as such in the late 18th, early 19th century.295 The knowledge that children and young persons do not have the analytical ability of an adult by birth, and therefore it is argued that they should not be punished at all or at least differently for criminal offences, has been implemented into positive law only very recently.

The historical development of the juvenile justice systems in both countries over the past centuries reflects ideological shifts in the perceptions of needs, rights and capacities of children and young persons.296 Today, it is acknowledged in both New Zealand and Germany that only children of a certain age are sufficiently psychologically developed to understand the wrongfulness of an action and to act

---

293 F Schaffstein and W Beulke, above n 204, p. 43.
294 H Shore (with P Cox), above n 211, p. 8; F Schaffstein and W Beulke, above n 204, p. 32.
295 H J Schneider, above n 185, p. 343.
according to this knowledge. While there is significant variation between the two countries in terms of legal regimes, both recognise a stage of life when there is no criminal accountability for wrongful acts. This can be viewed from the criminal law perspective as recognition of childhood.\textsuperscript{297} In Germany, this recognition has led to the criminal incapacity of children under 14 years. In New Zealand, children under the age of 10 years are not criminally liable.\textsuperscript{298} In addition, the law in both countries recognises adolescence while holding young persons accountable under criminal law, but not to the same extent nor in the same manner as adults.\textsuperscript{299} Instead, today there exist discrete measures for dealing with youthful offenders.

The implementation of those general principles concerning the treatment of child and youthful offenders was achieved after a long process of development and is now fundamental in both legal systems. In New Zealand, the development of a discrete juvenile justice system was linked to the development in England, because English law was applicable to the colony during the 19\textsuperscript{th} century. However, New Zealand’s legislators were also inspired by American philosophies. Before the arrival of Pakeha, it appears that Maori did not distinguish between young persons and adults and it can therefore be assumed that they did not treat juvenile offenders different from adult offenders. People lived together in iwi and hapu, and the focus of responses to criminal offences was not on punishing the individual offender, but on keeping or restoring the public peace. The situation in Germany during the Roman Empire and the Early Middle Ages was interestingly very similar. It is acknowledged that children were regarded as ‘small adults’ in Germany at that time and therefore did not receive special judicial treatment. As in Aoteaora,

\textsuperscript{297} Ibid.
\textsuperscript{298} \textit{Crimes Act 1961}, section 21(1).
\textsuperscript{299} N M C Bala and R J Bromwich, above n 296, p. 3.
people lived in clans and extended families, and the solutions to disputes were found within the clan or the victim’s extended family. The responses to criminal behaviour were informal. The main objective of those ancient criminal law systems was perpetuating the community’s functionality by healing the breach of social harmony and making reparation rather than concentrating on punishment. The offender had to make up for the offence and reconciliation was one of the most important features of criminal justice. State responses – insofar as they existed – were regarded as secondary.

This idea of dealing with criminal behaviour has recently regained importance in the international youth justice discussion as the ‘restorative justice approach’. In this context, Judge F W M McElrea stated: ‘Those medieval systems may have something to teach us which the intervening central power of the State has obscured’.  

In New Zealand as well as in Germany, juvenile offenders were convicted and punished as adults in adult courts until the beginning of the 20th century. One reason for the equal treatment of adults and juveniles at that time is that childhood and youth are social categories which have not always existed and began to be recognised only in the 18th century. Hand in hand with the recognition of those categories began the consideration of how to respond to young offenders in the right way. Subsequently, children and juveniles were held to be uniquely vulnerable, and as a result, in the 19th century a movement towards child-centred treatment began.

---

301 Regarding Germany: see, e.g., F Schaffstein and W Beulke, above n 204, p. 15 et seqq; regarding New Zealand, see, e.g., J Finn and C Wilson, above n 42 p. 279.
302 E Watt, above n 41.
In New Zealand, the first discrete legal provisions for dealing with young offenders were introduced by establishing the ‘industrial schools’ in the late 19th century. Already then, the welfare-orientation could be clearly observed. The young offenders were sent to the same schools as the needy children, and later received exactly the same treatment and underwent the same measures as the children who were considered to be in need of care and protection. By contrast, until the beginning of the 20th century, the whole German justice system was characterised by the classical crime-control approach. Crime was seen as a rational act of free will and as a result, punishment (which was applied equally to adults, children and juveniles) focused on deterrence rather than on the education or reform of the offender. Attempts to create a special criminal law for juveniles were then made at the beginning of the 20th century because it was believed that responses to offences of juveniles should include more educational aspects.

In both countries, the first legal statutes dealing with young offenders were enacted almost at the same time: in Germany, the first JGG was passed in 1923, and in New Zealand the Child Welfare Act was enacted in 1925. These acts, for the first time, established a clear distinction from adult delinquency by adopting the ‘new’ term ‘juvenile delinquency’. A stronger linguistic delineation of juvenile delinquency thus aided the move from a more informal system to a more formal system of regulation, in which, for the first time, state responses dominated.  

From a comparative viewpoint it is interesting to observe the differences in approach taken between New Zealand and Germany. The greatest difference between those first youth justice statutes is that New Zealand’s juvenile justice system was clearly rooted in the welfare model and the legislation did not distinguish between the treatment of young offenders

303 H Shore (with P Cox), above n 211, p. 8.
on the one hand and children in need of care and protection on the other. Meanwhile, the German legislation adopted a justice approach. Although the *JGG* focused on educational and rehabilitative needs of young offenders and policies of decarceration and diversion were successfully implemented, it was never dominated by a welfare approach. Welfare-oriented measures or education did not replace punitiveness, which was only made less severe. Although voices were repeatedly raised in favour of a unified welfare approach, a strict separation of young offenders and young people in need of care and protection could be observed throughout the history. German youth justice never deviated far from general criminal law and always remained a matter for criminal courts. Thus, the German youth justice system only became a subsystem in the general criminal justice system.

The two countries’ different orientations led to the implementation of different court orders which again reflected the underlying youth justice models. While the *Child Welfare Act 1925* introduced welfare-oriented measures like supervision orders and committal to care, the *JGG 1923* kept prison sentences and established the *Erziehungsmaßregeln*, which aimed at the education of the young offender, but which were still criminal sentences.

Another great difference was the age threshold of criminal responsibility. When the *Child Welfare Act* was enacted, the age of criminal responsibility in New Zealand was still seven years and was raised to 10 years not before the *Crimes Act* was passed in 1961, while the *JGG of 1923* increased the age of criminal responsibility from 12 to 14 years. Furthermore, the *Child Welfare Act* was applicable to children under the age of 16, while the *JGG 1923* applied to young persons under the age of 18. Thus, German youth justice legislation has been more progressive and liberal in terms of age brackets than its New Zealand counterpart.
With regard to the idea of establishing special youth courts, where specialised and experienced prosecutors and judges deal with young offenders, however, the development in both countries showed clear parallels. Furthermore, the introduction of the first prisons for juveniles proceeded in a similar time frame.

While the development of the New Zealand juvenile justice system somehow stagnated for about 50 years between 1925 until the enactment of the *Children and Young Persons Act* in 1974, the German legislation experienced two amendments in the meantime: one in 1943 and one in 1953. While a partial setback regarding the youth justice development could be observed under the influence of German fascism, the *JGG 1953* led to the remarkable innovation of being applicable to *Heranwachsende* if certain conditions were met. The German youth justice legislation, apart from some amendments, however, was still firmly rooted in the justice-model-tradition and the basic ideas and main structure of the 1923 Act were remained in force throughout both amendments.

With the introduction of the *Children and Young Persons Act 1974*, New Zealand legislation distinguished between children and young persons. However, the age of criminal responsibility remained 10 years and youth justice provisions were applicable only to persons under the age of 17. An innovative implementation of the 1974 Act was the introduction of Children’s Boards, which were designed to deal with young offenders rather than judges in courts. These Children’s Boards were the first attempts to introduce diversionary responses and to divert young offenders from court proceedings. By contrast, in Germany there does not until today exist an alternative forum other than the courtroom for dealing with young offenders.

The last modification in youth justice legislation again took place at almost the same time. New Zealand enacted the *CYPFA* in 1989, while
the German 1st JGGÄndG became effective in 1990. While the CYPFA was celebrated as a new and revolutionary piece of legislation, the German Act was seen as a poor compromise and was characterised as a temporary regulation right from the beginning.

In conclusion, it is evident that in spite of some similar developments, such as the implementation of distinct youth justice legislation, discrete youth courts and youth prisons, the youth justice systems in New Zealand and Germany developed quite dissimilar. The reasons for that are the different initial positions and political situations as well as strongly varying statutory sources.
CHAPTER SIX
THE CURRENT YOUTH JUSTICE SYSTEMS
IN NEW ZEALAND AND GERMANY

6.1 INTRODUCTION

The juvenile justice systems in New Zealand and Germany are based on legislation dedicated to youth criminal law. As shown above, the differences in the legal statutory bases derive from their specific historical development in both countries and are therefore determined by different juridical traditions.

New Zealand’s law applying to children and young persons did not distinguish between offending and needy children for a long time. Thus, New Zealand did not have any legal provisions applying solely to young offenders before the CYPFA was passed in 1989. Today, this Act is New Zealand’s major statute relating to juvenile justice, regulating, inter alia, proceedings against young offenders before the Youth Court and containing various legal consequences for dealing with young persons who have offended against the law. Alongside the statutory regulation, the law relating to young offenders is to some extent shaped by case law.

The legal situation in Germany concerning the area of juvenile justice is slightly different. As the law relating to young offenders has always been geared to the justice approach, there have been independent legal statutes for solely dealing with young offenders since the first JGG was enacted in 1923. Accordingly, the JGG, being almost ninety years old, already
belongs to the traditional legal inventory. The JGG regulates by law the
court proceedings against young persons as well as the legal
consequences for criminal offences committed by young persons.

This chapter begins with setting out the salient provisions dealing with
youth offending of New Zealand’s CYPFA before the semi-structured
interviews are analysed and evaluated and the findings of this qualitative
research are presented. Subsequently, the salient provisions of the
German JGG are described.
6.2 THE JUVENILE JUSTICE SYSTEM IN NEW ZEALAND

The CYPFA\(^1\) was passed to reform the law relating to children and young persons who are in need of care or protection or who offend against the law. Accordingly, the new legislation set up some unique objectives and put ‘a comprehensive set of general principles that govern both state intervention in the lives of children and young people and the management of the youth justice system’ into statutory form.\(^2\) The Act’s objectives are: to promote the well-being of children, young persons, their families, whanau and family groups by providing accessible services and processes that try to address cultural needs and assist families in caring for their young people; to assist families when the relationship between family members is disrupted; to assist children and young people in order to prevent harm, ill-treatment, abuse, neglect or deprivation; to hold juvenile offenders accountable for their wrong-doing; to deal with young offenders by addressing and acknowledging their needs and enhancing their development; and to promote cooperation between organisations that provide services for children, young persons, families and family groups.\(^3\)

A significant innovation was the provision for jurisdictional separation between children and young persons in need of care and protection and those who offend.\(^4\) Concerning youth justice issues, the CYPFA can be

---

1. Any further referrals to legislation will be to this statute unless otherwise stated.
4. See Part IV, (sections 208-320) and Part V (sections 321–340) for provisions regarding offending by children and young persons and Youth Court Procedure. Provisions concerning care and protection are contained in Part II (sections 13–149) and Part III (ss 150–207). See also the *Children and Young Persons (Residential*
seen ‘as an Act within an Act without the blurring of principles and processes between care and protection and youth justice’,\(^5\) and was called ‘a new paradigm’\(^6\) which ‘turned the old [model] on its head’.\(^7\) Although both care and protection issues and youth justice issues are still regulated within the same Act, the two areas are now clearly divided.

While Part I of the \textit{CYPFA} contains general objects, principles, and duties relating to both areas, the care and protection issues of children and young persons are dealt with under Part II. Part III contains the provisions relating to care and protection proceedings. Part IV contains the provisions regarding youth justice and Part V contains the provisions relating to procedure in the Youth Court. Part VI contains the provisions regarding appeals from decisions of the Youth Court and the Family Court while Part VII contains the provisions dealing with children and young persons in care of the Chief Executive\(^8\) or other persons and bodies. Part VIII includes provisions relating to iwi social services, cultural social services, child and family support services, and community services. Part IX was repealed, and Part X contains miscellaneous provisions regarding both courts, such as provisions dealing with Care and Protection Coordinators and Youth Justice Care) Regulations 1986 (SR 1986/306); the Children, Young Persons and Their Families Rules 1989 (SR 1989/295); and the Children, Young Persons, and Their Families (Forms) Regulations 1989 (SR 1989/296).


8 The Chief Executive, being Mr Peter Hughes since 2001, means the Chief Executive of the Ministry of Social Development.
Finally, Part XI contains amendments to other enactments, repeals, savings, and transitional provisions.

In this thesis, Parts IV and V (which deal with youth justice issues) are of prior interest and are therefore examined more closely in the following.

The process for dealing with young offenders regulated in these parts of the CYPFA is designed to eliminate the vagueness of principles and processes which occurred between care and protection and youth justice and which characterised the earlier legislation. In accordance with the jurisdictional separation between both areas, the exercise of power under the CYPFA regarding youth offending is subject to principles separate from those guiding the exercise of power in care and protection cases. To realise these new principles in practice, police and court work had to be revised and a new decision-making forum, the FGC, had to be established. This forum aims to enable victims and offenders to meet together with members of the families and the enforcement agencies to decide on an appropriate outcome. The CYPFA further provides for a new diversion process, involving the FGC; a variety of orders and other options available to the Youth Court for the disposal of proceedings; and a requirement that a Youth Court may not make any order in relation to a young person unless an FGC has considered how the court might

9 Section 446.
11 Section 208.
12 G Maxwell et al, above n 2, p. 8.
13 Ibid.
14 Sections 245–271.
15 Sections 281–295.
deal with the matter.\textsuperscript{16} Furthermore, Youth Courts for the hearing of proceedings relating to offending\textsuperscript{17} were established while care and protection matters are heard in Family Courts.\textsuperscript{18} The Children and Young Persons Court, which under the previous legislation dealt with all matters relating to care, protection and control of children and young persons, was abolished.\textsuperscript{19} Additionally, the \textit{CYPFA} imposes limitations on powers of arrest and provides procedural safeguards for investigations.\textsuperscript{20}

\textsuperscript{16} Section 281(1).
\textsuperscript{17} Section 433.
\textsuperscript{18} Section 150.
\textsuperscript{19} Section 456 and Third Schedule. Children and Young Persons Courts were established under the \textit{Children and Young Persons Act 1974}, (see above).
\textsuperscript{20} Sections 209–271.
6.2.1 Principles of the CYPFA Guiding Exercise of Power in Relation to Offending by Young People

When the CYPFA was drafted, the legislature attempted to address seven foundation concepts of youth justice - responsibility, specificity, frugality, equality, determinacy, diversion and proportionality - which reflect contemporary beliefs, trends and concerns regarding youth justice issues. Those concepts represented disillusionment with aspects of the welfare approach\(^{21}\) and instead placed emphasis on responsibility by holding young persons accountable for offending behaviour.\(^{22}\) This notion typified the separation of welfare and justice processes.

Based upon the widespread assumption that the criminal justice system, for both adults and young persons, does not and cannot stop offending behaviour, it was emphasised that intervention, in the form of prosecution, should be delayed or avoided if possible, and criminal proceedings should not be instituted if alternative means are available. It was believed that contact with the criminal justice system is likely to increase the likelihood of reoffending through factors such as labelling or aggregating with other offenders, whereas diversion from prosecution does not increase reoffending rates and has the potential to reduce them. Thus, diversionary responses should be addressed very clearly by the new legislation. Furthermore, the importance of family participation in decisions affecting the child or young person and the importance of maintaining and strengthening the family relationship was recognised. It was acknowledged that families have a vested interest in the well-being of their children and most of them are able and willing to help their children work through the effects of their offending behaviour. Another

\(^{21}\) G Maxwell et al, above n 2, p. 8.

emphasis was on empowering victims and offering a culturally appropriate law. Direct involvement of the victim should help a focus on ‘putting right’ than on ‘punishing’ and it was believed that community based sanctions can be planned and are better able to focus on the offending behaviour than custodial sentences. The foundation concepts furthermore aimed to establish the entitlement of young people to special protection in the course of criminal investigations and focused on the protection of children’s and young persons’ rights.

Most of these foundation concepts are in accord with the spirit of the United Nations Convention of the Rights of the Child, the most widely adopted human rights instrument ever written, and have been implemented into the CYPFA’s principles for governing the juvenile justice aspects. Any court or person exercising any powers under the provisions of the CYPFA relating to offending by children or young persons must be guided by these principles which apply to criminal investigations, the diversionary process established by the law, and the Youth Court itself.


26 *Tavita v Ministry of Immigration* [1994] 2 NZLR 257, 266.

27 Section 208, which also specifies that it applies to the exercise of power under Part IV (Sections 208-320), which relates to offending by children and young persons; under Part V (Sections 321-340), which relates to Youth Court Procedure; and under sections 351-360, which relates to appeals from Youth Court decisions.
The youth justice principles are listed in section 208 as follows:  

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


29 Section 208(a).

30 Section 208(b).

31 Section 208(c)(i).

32 Section 208(c)(ii).

33 Section 208(h).

34 Section 208(f)(i).

35 Section 208(f)(ii).

36 Section 208(d).

37 Section 208(e).

38 Section 208(g).
It can be concluded that these principles constitute the first legislative base for diversionary measures and can be seen as an example of moving towards a restorative justice approach to offending. They include a number of innovative and revolutionary strategies, such as involving families in decision-making processes, taking into account the rights and needs of indigenous people, giving young offenders the opportunity to be involved in deciding how their offending behaviour should be responded to, and giving victims a say and a vote in negotiating possible penalties for the offender.\(^{39}\) Consequently, the emphasis of the new system does not lie on decision-making by officials anymore, but on reaching a consensus between several persons who are involved in the offending, either directly as offender or victim, or indirectly, as family members and police officers. The system focuses on repairing and compensating the caused harm, reintegrating the young offender into society, and restoring the balance within the community that was affected by the offence.\(^{40}\)

### 6.2.2 Scope of the CYPFA

#### 6.2.2.1 Persons to Whom the Act Applies and Age of Criminal Responsibility

Parts IV and V of the *CYPFA* apply to ‘children’ and ‘young persons’ who offend against the law. Pursuant to section 2(1) of the *CYPFA*, which contains the interpretation of the *CYPFA*, a *child* is a boy or girl under the age of 14 years.

\(^{39}\) G Maxwell et al, above n 2, p. 8.

\(^{40}\) Ibid.
The age brackets for criminal responsibility are regulated in the *Crimes Act 1961*. Under section 21(1) of the *Crimes Act*, the age of criminal responsibility is 10 years,\(^{41}\) which means that no person under the age of 10 years may be convicted of an offence. This, however, does not affect the liability of any other person alleged to be a party to that offence.\(^{42}\)

The relevant date to determine the age of the young offender is the day on which the offence in question is said to have been committed. Thus, a child offender is a person who was 10, 11, 12 or 13 years old when he or she committed the offence. However, by virtue of the *Crimes Act 1961* and the *CYPFA*, a child between the ages of 10 and 14 years cannot be prosecuted for any offence other than murder or manslaughter, and cannot be convicted for murder or manslaughter unless he or she knew either that the act or omission was morally wrong or that it was contrary to law.\(^{43}\) The onus is on the prosecution to prove that the accused knew that the act or omission was wrong or was contrary to law.\(^{44}\) Consequently, prosecutions of children under the age of 14 are very rare.\(^{45}\) When a child is charged with either murder or manslaughter, the preliminary hearing of the charge must take place before a Youth Court.\(^{46}\) In such cases, the provisions of the *CYPFA*, with certain exceptions, apply as if that child were a young person.\(^{47}\)

---

\(^{41}\) The time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of their birth; *Age of Majority Act 1970*, section 5.

\(^{42}\) *Crimes Act 1961*, section 22(2).

\(^{43}\) *Crimes Act 1961*, section 22(1); *CYPFA 1989*, section 272(1).

\(^{44}\) *R v Brooks* [1945] NZLR 584; [1945] GLR 278 (CA).


\(^{46}\) Section 272(2).

\(^{47}\) Section 272(2).
When a child aged 10 to 13 commits any type of offence other than murder or manslaughter, the offending will be dealt with under the care and protection provisions of the CYPFA if the number, nature, or magnitude of the offence(s) give serious concern for the well-being of the child. In those cases, the offence of a 10 to 13 year old child can be dealt with in the Family Court or a youth justice FGC. A Youth Justice Coordinator is required to convene an FGC upon receiving a report from an enforcement officer regarding a child whose offending is such as to cause serious concern for the child’s well-being. This applies where the officer believes that the public interest requires an application to be made for a declaration that the child is in need of care and protection.

Pursuant to section 2(1) of the CYPFA, a young person is a boy or girl over the age of 14 but under the age of 17 years. Relevant to this is how old someone was at the time he or she committed an offence; someone who was 16 when committing an offence will still be treated as a young person and appear in the Youth Court, even when he or she is 17 at the time of prosecution. However, once someone is 18 years, he or she cannot be a ‘young person’ under the CYPFA, however old they were when they were said to have committed the offence. They will be treated as an adult and dealt with in the District Court, not the Youth Court. Furthermore, the CYPFA is not applicable to any young person who is or has been married. A juvenile who commits offences at the age of 17 or older is dealt with in the same manner as an adult, that is, in the District Court, or, if the offence is serious, in the High Court.

---

48 Ministry of Justice, http://www.justice.govt.nz/youth/media/rates1204.html at 30 May 2006; note: pursuant to section 17(1) of the Marriage Act of 1955, young persons aged 16 and older are allowed to marry.

49 Sections 247(a) and 18(3).

50 Sections 247(a) and 18(3).


52 G Maxwell et al, above n 2, p. 15.
6.2.2.2 Relevant Scope

Parts IV and V of the CYPFA apply to children and young persons who ‘offend against the law’. The CYPFA does not define the term ‘offence against the law’. Instead, offences are specifically created by a statutory criminal law provision which defines them.\textsuperscript{53} Thus, an offence against the law is any act or omission punishable under the Crimes Act 1961 or any other enactment, whether on conviction on indictment, or on summary conviction.\textsuperscript{54} If the maximum penalty for an offence is three months’ imprisonment or less, the offence has to be tried summarily in the District Court by judge alone. In cases of summary offences that have a maximum penalty of more than three months, the defendant may elect trial by jury.\textsuperscript{55}

Indictable offences are those created by the Crimes Act 1961, by other statutory enactments if so described, or if they are punishable ‘on conviction on indictment’.\textsuperscript{56} Unless an accused applies for, or a judge orders, trial without a jury, every person accused by indictment must be

\textsuperscript{53} TG Maxwell and D L Bates, Luxford’s Police Law in New Zealand (1991), Ch 1, p. 4.

\textsuperscript{54} Crimes Act 1961, section 2. Note: New Zealand’s criminal law itself has been codified since the Criminal Code Act 1893, so that all substantive offences are contained in legislation. The main statute governing the more serious crimes is the Crimes Act 1961, while the Summary Offences Act 1981 now contains a variety of lesser offences. A number of serious offences are to be found in the Misuse of Drugs Act 1975, the Transport Act 1962, and the subsequent Arms Act 1983. However, notwithstanding the codification of the substantive criminal law, many procedural and evidential rules, general principles of criminal liability and criminal defences are still derived from common law and developed through judicial precedent.

\textsuperscript{55} Summary Proceedings Act 1957, section 66.

\textsuperscript{56} TG Maxwell and D L Bates, above n 53, p. 4.
tried before a judge with a jury. Only a few serious crimes have to be tried in the High Court.

As the offences are defined by general criminal statutory provisions, the specific features of the CYPFA therefore mainly contain the special procedure for dealing with an offence committed by a child or young person, whatever the Act or regulation creating the offence. Furthermore, the CYPFA contains specific measures or orders (distinct from those applicable to adult offenders under the provisions of the general criminal law) available to the police or the court to respond to an offence committed by a child or young person.

6.2.3 The Juvenile Justice Process and the Legal Consequences of an Offence Committed by a Young Person

An important element of New Zealand’s youth justice system is diversionary processes carried out on various levels. The new system under the CYPFA emphasises diversion from courts and custody, and, while holding young persons accountable, facilitates the construction of responses that aim to provide for the rehabilitation and reintegration of young people, support for their families, and that take into account the needs of victims. Minor and first-time youth offending can be dealt with by enforcement officers while more severe or recidivist offending

57 Crimes Act 1961, sections 361A, 361B, 361C
58 These are more serious offences such as treason, piracy, rape, kidnapping, murder, manslaughter and dealing in Class A drugs, see W C Hodge et al., Doyle and Hodge Criminal Procedure in New Zealand (1991), p. 3.
has to be brought before a Youth Court Judge. The following figure provides a diagrammatic description of the possible pathways through New Zealand’s youth justice system. Evidence suggests that about 44% of New Zealand’s young offenders are dealt with by police warnings (by either front line or Youth Aid police officers), about 32% by police Youth Aid diversion, about 8% by direct referral to an FGC, and about 16% by charges in the Youth Court followed by an FGC. Each of these different stages in the youth justice process is consecutively explained in detail in the text following.

**Offence committed**

Young person detected for alleged offending by front line police

- **No action**
- **Warning or other informal police action**
  - Referral to Youth Aid Section

- **Arrest**
  - **No charge**
    - Charge
      - **No denial**
      - **Denial**

  - Intention to Charge FGC
    - **No denial**
    - **Denial**
      - FGC makes recommendations and prepares plans
      - Refer back to Youth Aid Section

  - Implementation of FGC decision
  - Summons to Youth Court

**Youth Court**

- **Charge denied**
  - Released at large or on bail
  - Custody FGC recommends to court regarding placement
    - Defended Hearing
      - Acquittal
      - Charge Proved FGC
        - FGCs make recommendations and prepare plans
          - Youth Court Disposition
            - ‘Section 282 discharge’
            - Withdrawal of charge
            - Imposition of one or more court orders under s 283

- **Charge not denied**
  - Remanded in Custody
  - Custody FGC recommends to court regarding placement
    - Defended Hearing
      - Acquittal
      - Charge Proved FGC
        - FGCs make recommendations and prepare plans
          - Youth Court Disposition
            - ‘Section 282 discharge’
            - Withdrawal of charge
            - Imposition of one or more court orders under s 283
6.2.3.1 Police Contact and Reaction

A young person’s involvement with the justice system usually begins with police contact. By far the largest proportion of juvenile offending is dealt with and settled directly by the police themselves in various ways. As already discussed, one of the intentions underlying the *CYPFA* is to encourage the police to adopt restrained responses to juvenile offending except where the nature and circumstances of the offending indicate that stronger measures are required to protect the safety of the public. The diversionary measures adopted by New Zealand’s police in responding to juvenile offending are often referred to as alternative actions or informal sanctions. These alternative actions are carried out either by front line police or by specialist police Youth Aid officers. The Youth Aid section of the New Zealand police force was established in 1957 and is a specialist branch dedicated to working and dealing with juvenile offenders. The Youth Aid officers work at prevention and law enforcement, but also serve as the prosecution, deciding what charges to file or to “lay”.

When a child or young person is apprehended after having committed an offence, the New Zealand police have four principal response options: the issue of an immediate warning not to reoffend by the front line police officer involved in the incident; arranging a diversionary plan which contains informal actions and/or a written warning; referring young

---

63 G Maxwell, J Robertson and T Anderson, above n 60, p. 1.
64 Ibid.
65 K Akester, above n 61, p. 27.
offenders for an FGC; or, last but not least, charging the young offender in the Youth Court.\textsuperscript{67}

**Front Line Police Action**

Normally, a young offender is apprehended by a front line police officer. Thus, the choice of which of the four response options to take lies within that police officer’s discretion. Hence, before initiating any of the responses listed above, the front line police officers have to consider different factors. They have to take into account the nature of the offence, the attitude and perception of the young person towards the offence, and their previous experiences with the young person or their family.\textsuperscript{68}

Additionally, they have to gather any information available to the police about the young offender (for example if there is a care and protection background or a drug problem). In examining those factors and weighing up the different aspects, the police officers have to follow the police general instructions as well as the key principles set up in section 208 of the *CYPFA*,\textsuperscript{69} which state that ‘alternatives to criminal proceedings should be used wherever possible’ and ‘sanctions should be the least restrictive possible’.\textsuperscript{70}

Accordingly, comparable to several other jurisdictions today, it is expected that minor and first-time offenders will be diverted from prosecution by using an immediate ‘street’ warning by the front line

\textsuperscript{67} Information based on the interview with Youth Aid Coordinator Sergeant James Read, Christchurch Police; see also G Maxwell, J Robertson and T Anderson, above n 60, p. 40.

\textsuperscript{68} G Maxwell, J Robertson and T Anderson, above n 60 p. 1.

\textsuperscript{69} Information based on the interview with Youth Aid Coordinator Sergeant James Read, Christchurch Police.

\textsuperscript{70} K Akester, above n 61, p. 27.
officer in charge with the case.\textsuperscript{71} Police warnings are regulated under sections 209–213 of the \textit{CYPFA}. Section 209 states that where a child or young person has admitted committing an offence, or where an offence has been alleged, any enforcement officer\textsuperscript{72} considering whether to institute criminal proceedings shall consider if it would be sufficient to issue a warning to the young offender. This does not apply, however, if a warning would be clearly inappropriate with regard to the seriousness of the offence and the nature or number of previous offences committed by that child or young person. Section 210 empowers enforcement officers to warn or arrange for any other person to warn a child or young person who is alleged to have committed, or has admitted committing, an offence. These warnings do not require an FGC as a prerequisite.\textsuperscript{73}

Pursuant to section 212(1), any person who gives a warning under section 210 shall, as soon as possible, give written notice specifying the offence in respect of which the warning was given and recording the fact that it was given to the child or young person and a parent or guardian or other person having the care of the child or young person. Section 212(2) emphasises that the notice shall, if practicable, be given in a language the child or young person, as well as the parent or guardian, understands. Subsequently, the different incidents and the actions taken by front line police officers are recorded on standard forms and sent through to the Youth Aid section of the police for their records.\textsuperscript{74}

\textsuperscript{71} G Maxwell, J Robertson and T Anderson, above n 60, p. 1.

\textsuperscript{72} Pursuant to section 2(1), an enforcement officer is any member of the police, an enforcement officer as defined under section 2(1) of the \textit{Land Transport Act 1998}, any person acting in the course of his or her official duties (being duties that consist of or include detection, investigation, or prosecution of offences) as an officer or employee of the Public Service (as defined in section 2(1) of the \textit{State Sector Act 1988}) or a local authority.

\textsuperscript{73} \textit{Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP210.3 Comment.}

\textsuperscript{74} G Maxwell, J Robertson and T Anderson above n 60, p. 1.
Section 213 limits to the defence the right of disclosure of the warning (or a caution pursuant to section 211) given to a child or young person. That means that in any subsequent criminal proceedings against the child or young person no information relating to the warning or caution shall be disclosed except on behalf of the defence. Further, no evidence of the underlying offence shall be admissible on behalf of the prosecution. The intention of this section is to protect the child or young person against the potential net-widening effect of warnings and cautions given by the police. 75 Such a net-widening effect was observed in England, where an increased use of formal police cautions led to the fact that young persons appearing in the court for the first time had an increasing tendency to have previous cautions, therefore tended not to be treated as first-time offenders, and therefore were less likely to be discharged. 76

By giving effect to the principle stated in section 208(a), section 209 clearly expresses the principle of frugality that should be exercised for criminal proceedings under the CYPFA. This provision is in effect a formal recognition of the diversionary approach. Additionally, this section is an expression of the principle of discretionary prosecution. Its purpose is to enable the law enforcement and prosecution agencies to take into consideration criminal policy in deciding whether or not to take action against or whether or not to prosecute a specific suspect. In contrast, under the principle of mandatory prosecution (which is effective in Germany), the law enforcement and prosecution agencies are obligated to take action or to prosecute once they have a probable cause that an offence has been committed.

75 Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP213.3 Comment, which contains further references.

A critical issue concerning section 209 is its wording which implies that an enforcement officer may warn a child or young person for an offence ‘alleged to have been committed’, even where there has been no admission or proof of commission of the offence.\textsuperscript{77} It is debatable whether it is proper statutorily or otherwise to approve warnings issued by police officers for mere allegations.\textsuperscript{78} With regard to the child’s or young person’s rights, it seems to be essential that there should first have been proof or at least an admission by the child or young person that they committed the alleged offence. Otherwise, it might happen that a child or young person receives a police warning without even having committed an offence; this would be a material breach of due process.

**Youth Aid**

More serious offences or repeat offenders will be reported by the front line police officer to Youth Aid for action. These reports may already include a recommendation for action from the front line officer in charge of the case.\textsuperscript{79} The Youth Aid officer will then decide what, if any, further response is appropriate.\textsuperscript{80} The decision about which action is appropriate lies within the discretion of the Youth Aid officer. Although there are no statutory rules or binding norms, the Youth Aid officers have to follow the youth justice principles of the CYPFA as well as the police general instructions set up by the Commissioner of New Zealand Police under section 30 of the Police Act 1958 when deciding how to respond to the offending.\textsuperscript{81}

\textsuperscript{77} *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP209.3 Comment.*

\textsuperscript{78} Ibid.

\textsuperscript{79} G Maxwell, J Robertson and T Anderson, above n 60, p. 1.

\textsuperscript{80} K Akester, above n 61, p. 28.

\textsuperscript{81} Information based on the interview with Youth Advocate Anthony Greig, former police officer.
Research carried out by Maxwell and Morris in 1990-91\(^\text{82}\) showed that Youth Aid officers took into account before responding to the offence the seriousness of the incident, whether or not the young person or their family had a previous history with Youth Aid, the perceptions of the young offender and their family towards the offence, other known risk factors, and whether or not there are other issues outstanding.\(^\text{83}\) Furthermore, the determination of actions was based on file information or on impressions received after visits by the Youth Aid officer to the young person, their family and/or the victim.\(^\text{84}\)

After taking into account these various factors and following the youth justice principle that as far as possible least restrictive responses should be imposed, the Youth Aid officer may consider that no further action is necessary.\(^\text{85}\) If the officers are of the opinion that the young person requires a more severe response regarding their offence, they may arrange for diversionary alternatives which will be agreed upon in a plan developed by informal methods, such as home visits, telephone calls or consultations with the offender’s school and/or the victims of the offence.\(^\text{86}\) Regarding the alternative actions, the officers have broad discretion and can be quite creative in devising alternative diversionary actions, such as arranging for apologies to the victim, making the young person pay financial reparation, or imposing other minor penalties by agreement with the respective victims and families,\(^\text{87}\) because there are no standard or definite alternative actions written down in any legal

---

82 See G Maxwell and A Morris, above n 22.
84 Ibid.
85 Ibid.
86 Ibid.
statute. However, in issuing alternative actions, the officers have to follow the police general instructions set up in accordance with section 30 of the *Police Act 1958*. These general instructions relating to youth offending contain guidelines about what sort of alternative action can be demanded from the young offender.\(^8\) Thus, the alternative action could be, for example, any kind of reasonable labour. The Youth Aid officers have wide discretion in considering what kind of labour the young offender should do, but the guidelines contained in the police general instructions state that the labour demanded should be something that benefits the community and cannot be anything that benefits the officer in question.\(^9\) Accordingly, the Youth Aid officers generally arrange for community work or work for the victim.\(^9\) Furthermore, the officers can demand an apology to the victim, make the young person pay reparation or a donation, give the young person a curfew or impose other restrictions or requirements.\(^9\) When the Youth Aid officers have considered what kind of alternative action should be taken, they enter into a ‘diversionary contract’ with the young offender about what to do and when the demanded alternative action must be completed. If the contract is kept and the young person completes in time what is demanded from him, the case is settled and no further action will be taken. If the contract is not kept, the officer will either refer the young

---

\(^8\) Information based on the interview with Youth Advocate Anthony Greig, former police officer; and the interview with Youth Aid Coordinator Sergeant James Read, Police Christchurch.

\(^9\) Information based on the interview with Youth Advocate Anthony Greig, former police officer.


\(^9\) G Maxwell, J Robertson and T Anderson, above n 60, p. 2.
person to a Youth Justice Coordinator,\textsuperscript{92} who will then convene an FGC,\textsuperscript{93} or lay information in the Youth Court.

If, after having considered all the factors mentioned above, the Youth Aid officer is either of the opinion that police diversionary actions are not sufficient for responding to the offending, or knows that such alternative actions have not been successful in the past, and thus might intend to charge the young person, an FGC may directly be ordered. In this case, the Youth Aid officer passes the incident to CYF where a Youth Justice Coordinator will prepare an FGC and has to convene it within 21 days.\textsuperscript{94} These kind of FGCs are called ‘Intention to Charge Conferences’,\textsuperscript{95} which means that the young person is not arrested but is referred directly to a Youth Justice Coordinator for a conference. This FGC will then decide if the young offender should be prosecuted, or how the matter can be dealt with in another way,\textsuperscript{96} for example by drawing up a plan consisting of similar alternative actions as listed above.

One of these alternative actions agreed upon by the conference can be that the Youth Aid officer issues a formal police caution. Formal police cautions are regulated by law under section 211 of the \textit{CYPFA}. Section 211(1) empowers a member of the police to give a formal police caution to a child or young person in respect of any offence which has been admitted or proved to have been committed. In contrast to the warning regulated under section 210, the formal police caution thus cannot be imposed if the commission of an offence is only alleged. A formal police caution...
caution does require an FGC as a prerequisite\textsuperscript{97} and therefore can only be issued if the FGC has recommended doing so.

According to section 211(2), the caution shall, if practicable, be given at a police station in the presence of a parent or guardian\textsuperscript{98} by a member of the police who is of or above the rank of sergeant or, if no such member is available, by the highest ranked member available.

The most serious cases will be dealt with by charges in the Youth Court which are followed by an FGC and a return to court for a final decision.\textsuperscript{99} This normally happens after the young person has been arrested. Young offenders can only be arrested if certain narrowly specified criteria are met.

The conditions for arresting a child or young person without warrant are regulated by law under section 214 of the \textit{CYPFA}. Section 214(1) states that, where any enforcement officer has a power of arrest without warrant under any enactment, that officer is not entitled to arrest a child or young person unless satisfied, on reasonable grounds, of certain matters. First, it must be necessary to arrest the child or young person without warrant for the purpose of ensuring the appearance of the child or young person before a Youth Court; or second, the arrest must be necessary in order to prevent the child or young person from committing further offences; or third, it must be necessary to prevent the loss or destruction of evidence relating to an offence; or fourth, the arrest must be necessary in order to prevent interference with any witness in respect of any such offence.\textsuperscript{100} If proceeding by summons would also achieve the intended purpose, the

\textsuperscript{97} Section 211(1).
\textsuperscript{98} Or other persons having the care of the child or young person or an adult person nominated by the child or young person.
\textsuperscript{99} G Maxwell, J Robertson and T Anderson, above n 60, p. 2.
\textsuperscript{100} Section 214(1)(a)(i)-(iii).
officer shall not arrest a child or young person without warrant but issue a summons instead.\textsuperscript{101}

Section 214(2) contains exceptions for this general administration by stating that, notwithstanding the provisions in section 214(1), any member of the police is permitted to arrest a child or young person without warrant on a charge of any offence where two conditions are satisfied: first, the member of the police must have reasonable cause to suspect the child or young person of having committed a purely indictable offence,\textsuperscript{102} and second, that member of the police must believe that the public interest requires the arrest of the offender.\textsuperscript{103}

Subject to section 214(3), an enforcement officer who has arrested a child or young person without warrant shall furnish a written report to their superior officer within three days of making the arrest. Every report furnished pursuant to that subsection shall state the reason why the child or young person was arrested without warrant.\textsuperscript{104}

Summing up, it can be concluded that New Zealand Police play one of the most important roles relating to youth justice under the \textit{CYPFA}, since the vast majority (about 76%)\textsuperscript{105} of cases known to the police and attributed to juvenile offenders are handled directly by either front line or Youth Aid police.

\textsuperscript{101} Section 214(1)(b).
\textsuperscript{102} Section 214(2)(a).
\textsuperscript{103} Section 214 (2)(b).
\textsuperscript{104} Section 214(4).
\textsuperscript{105} Breakdown of data for the period August 2000 to May 2001, gathered and evaluated by G Maxwell, J Robertson and T Anderson, above n 60, p. 42.
6.2.3.2 Youth Justice Coordinator

A very important person in connection with the youth justice system is the Youth Justice Coordinator, who is a social service professional employed by CYF. Under the State Sector Act 1988, the Chief Executive from time to time appoints a sufficient number of YJC for the purposes of the CYPFA. To be appointed as an YJC, a person needs to be suitably qualified by reason of his or her personality, training, and experience to exercise or perform the functions, duties, and powers conferred or imposed on an YJC under the CYPFA. Accordingly, the coordinators come from a range of backgrounds, such as social services, or the probation, residence or prison systems.

The YJC is involved on two different levels in the youth justice system. Firstly, the YJC operates as the system’s ‘gatekeeper’. Where a child or young person is alleged to have committed an offence and the police intend to charge the young person in court, the police has to consult an YJC who reviews information on the case and explores the possibility of dealing with the matter by means other than the institution of criminal proceedings. Concerning this consultation, Malcolm Young says:

[…] When they [Youth Aid officers] get to the point where they believe alternative action is not appropriate or not working, they are making a referral to me. […] We meet face to face. […] We often have discussions and for example a Youth Aid Officer or policeman may believe that it needs to come to a conference. Following the discussion with me, I perhaps may give him a couple of more ideas that they are prepared to try with the family and the YP. […]

---

106 Hereafter referred to as YJC.
107 See above n 8.
108 Section 425(1).
109 Section 425(2).
110 G Maxwell and A Morris, above n 22, p. 10.
111 Section 426(b).
Thus, the coordinator’s ‘gatekeeper’-role is ensuring that young offenders who can be adequately dealt with by police diversion do not enter the justice system.\textsuperscript{112} Although this is a very important task, the YJC cannot refuse a referral from a Youth Aid officer if the officer is clear that he or she wishes the YJC to pick up the case.\textsuperscript{113} This provision bears the risk that the ‘gatekeeper’-role might be undermined in some cases and it should be considered to alter it \textit{de lege ferenda}\textsuperscript{114}. Another task of the YJC functioning as a gatekeeper is that they have to ensure that the process is kept. Malcolm Young says:

[…] The YJC\’s are meant to be a gatekeeper of the act in terms of youth justice. We see all practice. We see how families operate, how lawyers operate, how judges operate, how social workers operate; and you know, at the end of the day, the whole idea around where we are positioned is in order to get feedback so that the system stays robust. […] We are independent from everyone, from social workers, from judges. We are there to ensure that the process is kept. And the process is the most important thing. If you actually provide that process in the way it was meant to be provided, it is the most impressive piece of work you can be involved in.

Secondly, once it is decided that an FGC is to be held (either through court or police referral) the YJC\’s task is to convene and facilitate the FGC, and, when necessary, further meetings of any such conference.\textsuperscript{115} Prior to a conference, the YJC meets with the young persons, their families, and the victims to inform them about the course of the FGC and to consult with them about the arrangements for it, including who will be invited and when and where it will be held. If the family of the young person does not have extended family or adequate resources to meet the

\textsuperscript{112} Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.

\textsuperscript{113} Sections 247(b) and 245(1)(b).

\textsuperscript{114} The Latin term \textit{\textipa{də leʒ fərəndə}} means, in a legal context: \textquoteleft what the law ought to be (as opposed to what the law is).\textquoteright

\textsuperscript{115} Section 426(c).
obligations of an FGC, or the young offender lives with a single parent,\textsuperscript{116} the coordinator has to assist the family in developing the required support by trying to create working relationships with community organisations or other resources. For this purposes, the coordinator needs to be well connected in the community.\textsuperscript{117} He or she has to know the existing services and organisations and should be able to contact them. Those organisations (for example migrant or refugee organisations if the young offender does not have an extended family in New Zealand because of his migration background) can offer venues and support for families and can also be contracted to monitor the young person’s outcomes.\textsuperscript{118}

During the conference, the YJC conducts and observes the process, records the details of any decision, recommendation, or plan made or formulated by the FGC,\textsuperscript{119} notifies its results to certain persons listed in section 265 of the \textit{CYPFA},\textsuperscript{120} and performs such other duties as may be prescribed by or under the \textit{CYPFA} or any other Act.\textsuperscript{121} Some of these other duties will be described later in the relevant context.

\subsection*{6.2.3.3 Family Group Conferences}

FGCs are the primary forum in New Zealand for dealing with more serious juvenile offending. Today, FGCs are regarded as being one of the most promising models of restorative justice and are a means of both avoiding prosecution and also enabling offenders, their families, and the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{116}]
\item A McRae and H Zehr, above n 66, p. 37.
\item Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.
\item A McRae and H Zehr, above n 66, p. 37.
\item Section 426(d).
\item Section 426(e).
\item Section 426(f).
\end{enumerate}
\end{footnotesize}
victims of the offence to come to some agreement which offers reparation as well as assisting in the offender’s reintegration. Since their introduction in New Zealand in 1989, FGCs have been used as decision-making processes in various fields, including child welfare, school discipline and criminal justice relating to both juveniles and adults. In the following, solely FGCs emerging from the youth justice arena are discussed.

In the field of youth justice it is mandatory to hold an FGC to consider the case whenever criminal proceedings are contemplated (non-arrest cases) or brought (arrest cases). An FGC convened under provisions of the CYPFA relating to youth offending may make decisions and recommendations or formulate plans in relation to the child or young person in question as it is considered necessary or desirable. The conference may recommend that any proceedings commenced against a child or young person for any offence should proceed or be discontinued, that a formal police caution should be given, that the young offender make reparation to any victim of the offence in question, or that appropriate penalties are to be imposed on the young offender. Further, an FGC may recommend that an application for a care and protection declaration should be made when, on the ground of the offending, a child is believed to be in need of care or protection.

---

122 K Akester, above n 61, p. 28.
123 A MacRae and H Zehr, above n 66, p. 12.
124 G Maxwell and M Morris, above n 22, p. 10.
125 Section 260(1).
126 Section 260(3)(a).
127 Section 260(3)(b).
128 Section 260(3)(e).
129 Section 260(3)(d).
130 Section 260(3)(c).
principles contained in the *CYPFA* for guiding the exercise of power in relation to youth offending.\(^{131}\)

The *CYPFA* defines an FGC in relation to juvenile offending as ‘a meeting convened or reconvened by an YJC in accordance with section 247 or section 270 or section 281 of the Act’. These three sections state the circumstances when an FGC has to be convened. On closer examination of these sections, four different types of juvenile justice FGCs can be identified under New Zealand law. These four different types of conferences are described in the following section.

**Intention to Charge Conference**\(^{132}\)

The first type of FGC is the ‘Intention to Charge Conference’, which, as already mentioned, has to be convened when the police intend to charge the young person in court without having arrested them and no prosecution has commenced.\(^{133}\) Where a young offender has not been arrested but is alleged to have committed an offence, and the offence is such that the young person will be required to be brought before a Youth Court if charged, no information in respect of that offence may be laid unless three conditions are satisfied:\(^{134}\) first, the Youth Aid officer in charge of the case must believe that the institution of criminal proceedings against the young person for that offence is required in the public’s interest;\(^{135}\) second, consultation in relation to the matter must have taken place between the Youth Aid officer and a YJC;\(^{136}\) and third, the matter must have been considered by an FGC convened under the

---

\(^{131}\) Section 260(2); see above 6.2.1.

\(^{132}\) Terminology taken from A MacRae and H Zehr, above n 66, p. 15.

\(^{133}\) Section 258(b).

\(^{134}\) Section 245(1).

\(^{135}\) Section 245(1)(a).

\(^{136}\) Section 245(1)(b).
provisions of the *CYPFA* relating to youth offending.\(^{137}\) Regarding the question in which case the institution of criminal proceedings is required in the public’s interest, the Youth Aid officer can exercise his or her discretion. James Read says:

> Even some indictable matters can be diverted. It depends on the perspective. We [the police officers] follow the principles of the act. There is no black and white saying that shall be referred. The only ones is murder and manslaughter. Well, if you have a decent assault, you wouldn’t generally divert them.

Malcolm Young adds:

> […] The basic rule is that young people shall only come to conference referred by police if they intend to take it to court. In other words: if they have enough evidence, say to a court prosecution level; and they have tried reasonable alternative action; and it is a certain offence. It is depending on the situation. There is no, and I like the fact that there is no, sort of box where they are throwing it into. In saying that, however, in some cases police will believe that, because of the nature of the offence, they have no choice but to bring it to FGC.

The YJC has to convene the ‘Intention to Charge Conference’ within 21 days\(^{138}\) after having been notified about the police’s intention to charge. According to Smellie J in *H v Police*,\(^ {139}\) the compliance with this time limit is mandatory to ensure that the conducting of FGCs are not drawn out to unacceptable lengths. Thus, according to Smellie J, the failure to convene within 21 days invalidates the conference and therefore removes the jurisdiction of the Court.\(^ {140}\)

---

\(^{137}\) Section 245(c).

\(^{138}\) Section 249(2).

\(^{139}\) *H v Police* [1999] NZFLR 966; 18 FRNZ 593.

\(^{140}\) See also: *Police v N* [2004] NZFLR 1009.
In contrast to Smellie J’s view, Hansen J stated in \textit{Police v VL}^{141} that section 249(2) time limits are not mandatory. However, the effect of non-compliance described by Smellie \textit{J in H v Police} is upheld. Accordingly, non-compliance invalidates the FGC and removes the jurisdiction of the court to consider the information.

The ‘Intention to Charge Conference’ decides if the young offender shall be prosecuted or how the matter can be dealt with in another way.\textsuperscript{142} If the FGC recommends that the matter can be dealt with in another way than by prosecution, a plan for the young offender is formulated and the conference has to make recommendations to the police or the relevant enforcement agency accordingly.\textsuperscript{143}

\textbf{Custody Conference}

The second type of FGC is the ‘Custody Conference’. In the case of an FGC convened in respect of a young person detained in the custody of the Chief Executive\textsuperscript{144} or the police pending the determination of the charge,\textsuperscript{145} the conference has to make a recommendation to the court in relation to the custody of the young person pending that determination.\textsuperscript{146} In this case, the FGC must be convened within seven days\textsuperscript{147} and solely determines where the young person will be placed in custody.\textsuperscript{148}

\begin{flushright}
\footnotesize
142 Section 258(b).
143 Section 258(b).
144 See above n 8.
145 Section 247(c).
146 Section 258(c).
147 Section 249(3).
148 G Maxwell and A Morris, above n 22, p. 11.
\end{flushright}
Charge Not Denied Conference

The third type of FGC is a ‘Charge Not Denied Conference’. This conference is either to be held when a young person is arrested or there has been a decision that the charge is going to be laid in court and the young person has been issued with a summons. Once the young person appears before court and he or she does not deny the charge, the court must adjourn the matter and direct an YJC to convene an FGC. These provisions do not apply, however, where the offence is murder, manslaughter or a traffic offence not punishable by imprisonment.

The conference must consider whether the alleged offence should be dealt with by the Youth Court or the matter could be dealt with in some other way. This means the conference can recommend to the court whether the charge should be prosecuted, whether it should be removed from court, whether a plan addressing the charges should be implemented, whether the charge should be amended, or how the court should dispose the matter. When the case comes back before court, the court must give regard to the plan or the recommendations decided upon by the FGC.

---

149 Terminology taken from: A MacRae and H Zehr, above n 66, p. 15.
150 Section 246(b)(ii).
151 Section 246(b)(i).
152 Section 246.
153 Section 258(d).
154 Section 258(d).
155 A MacRae and H Zehr, above n 66, p. 15.
**Charge Proved Conference**\(^{156}\)

The Youth Court calls for the fourth type of FGC, a ‘Charge Proved Conference’, if the young person had denied guilt but is then found guilty in court.\(^{157}\) In this case, the conference must be convened no later than 14 days after the date on which the court finds that the charge against the young person is proved.\(^{158}\) The question whether this time limit is mandatory or not was decided in *Police v VL*,\(^{159}\) where Hansen J ruled:

> The time limits in section 249 *CYPFA* are not mandatory. If there has been non-compliance with statutory time limits the status of the proceeding should be determined on the facts of each case and by reference to the following principles:

  a) The extent of the delay;
  b) Reasons for failure to convene FGC within time;
  c) Consequences of non-compliance – [e.g.] seriousness of offending and personal circumstances of offender of relevance.

In each case a judgment must be made which seeks to give effect to the objects of the legislation while achieving an appropriate balance between the interests of the offender, victims and those of the wider community. If the cause and consequences of non-compliance involve an unacceptable intrusion into the rights of the offender, it will be appropriate to dismiss the charge.

The function of a ‘Charge Proved Conference’ is to consider how the young person should be dealt with for that offence.\(^{160}\) The conference is then to recommend to the court accordingly.\(^{161}\)

---

\(^{156}\) Terminology taken from: A MacRae and H Zehr, above n 66, p. 15.

\(^{157}\) Section 247(e).

\(^{158}\) Section 249(5).

\(^{159}\) *Police v VL*, 1 August 2006, HC, Auckland, CRI 2006-404-95/96, Hansen J.

\(^{160}\) Section 258(e).

\(^{161}\) Section 258(e).
Regardless of the type of FGC, the basic shape of its process is generally the same. There is only one exception: the ‘Intention to Charge Conference’ is held without a Youth Advocate representing the young person, whereas in the court-directed FGCs, the young persons are allocated a Youth Advocate.\footnote{162}

In general, FGCs convened under the provisions of the \textit{CYPFA} relating to youth offending must seek to ascertain whether the young person in question admits any offence which he or she is alleged to have committed.\footnote{163} Where there is no admission, the conference may not make any decision, recommendation, or plan if it cannot do so without assuming guilt.\footnote{164} This provision also applies where the conference is unable to ascertain whether or not the young person admits the offence.\footnote{165}

**Mandatory Participants and Entitled Members of an FGC**

The \textit{CYPFA} makes provision for several potential contributors in an FGC.\footnote{166} Attendance, however, is only mandatory for the ‘participants’, being the offenders, their family members, the YJC,\footnote{167} the police representative,\footnote{168} (normally a Youth Aid officer) and, when the FGC is not an ‘Intention to Charge Conference’, the Youth Advocate. Victims and their supporters as well as lay advocates, social workers, and care- or information-givers are entitled to come but must not be present. In the

\footnotetext[162]{Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.}  
\footnotetext[163]{Section 259(1).}  
\footnotetext[164]{Section 259(2).}  
\footnotetext[165]{Section 259(2).}  
\footnotetext[166]{Section 251(1).}  
\footnotetext[167]{Section 251(1)(c).}  
\footnotetext[168]{Section 251(e).}
following section, the mandatory participants and their roles are discussed before the entitled members are introduced.

The offenders themselves must attend their FGC.\textsuperscript{169} They can invite any support person they want,\textsuperscript{170} apart from other young persons who were involved in the offence.\textsuperscript{171}

If the young person does not attend a court-ordered conference, the FGC must be adjourned and the young person has to reappear before court. The judge can then make it a condition of bail that the young person must attend the conference and will tell him or her that they will be arrested for breaching their bail conditions if they do not go.\textsuperscript{172} This procedure generally helps to make the young person attend the next FGC.\textsuperscript{173}

If a young person does not attend an ‘Intention to Charge Conference’ however, the YJC and the Youth Aid police officer are able to make valid decisions even in the absence of the young person (or any family members). In \textit{H v Police},\textsuperscript{174} Smellie J stated that this is

\[
[...]
\text{because it could not have been the intention of Parliament that a young person and his family could avoid the laying of an information in respect of alleged offending simply by staying away from a conference.}
\]

Apart from the offender, the parents, any guardian, any person having care of the young person, and any member of their family, whanau or

\begin{footnotes}
\item[169] Section 251(1)(a)
\item[170] Section 251(1)(o).
\item[171] Information based on interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.
\item[172] Information based on the interview with Judge Costigan, Christchurch.
\item[173] Information based on interview with Judge Costigan, Christchurch.
\item[174] \textit{H v Police} [1999] NZFLR 966; 18 FRNZ 593.
\end{footnotes}
family group are entitled to attend the FGC. The role of the family is crucial in the FGC process. As the *CYPFA* was drawn up after lengthy consultation with Maori representatives, it states as a general principle that ‘wherever possible, a child’s or young person’s family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group’. This principle recognises the social structure of indigenous people, where children belong to kin groups beyond their immediate families. For Pakeha families, who do not necessarily exercise the idea of living in extended families, grandparents, aunts, uncles, or family supporters, such as school counsellors, church colleagues or close family friends are potential resources who may contribute to and accept responsibility for monitoring plans set up for the young person. Thus, the involvement of as many family members as possible is very meaningful, also because the participation of may people demonstrates to young persons how many people care about them and might assist them developing a sense of accountability and responsibility to their social circle and consequently to society.

Because of the importance of family participation, the YJC needs to consider the provision of financial support to enable family members who live at a distance to take part in the conference, particularly if they are significant members in the family circle or are likely to be supportive to the outcome. Even though the family members should attend, there

---

175 Section 251(1)(b)(i) and (ii).
176 Section 5(a).
177 T Stewart, above n 87, p. 67.
178 Ibid.
179 Ibid.
180 Ibid.
is no legal provision for forcing them to do so. Unlike in other jurisdictions, it is not possible in New Zealand to arrest or summon the parents of the young offender in order to make them participate in the FGC. Thus, it is often a question of the YJC’s skills if family members are willing to attend. Concerning this topic, Malcolm Young says:

[…] they [the family] can be influenced, and really the only way you can do that is by trying to form a relationship with them, talk to them about their young people, remind them about the dreams they had for them […] when they were born […], and try to make a linkage with them so that they are a little motivated themselves to do something around their own behaviour.

Other than the offenders and their families, a YJC and a representative of the police are compulsory participants of each FGC. A Youth Aid officer generally represents the police. His or her role is usually limited to reading the official ‘Summary of Facts’ of the offending, possibly altering details in it following consultation with the offender and victim, and describing the offence and possibly the impact of it on the victim(s) and the community. In the absence of the victims, the Youth Aid officer has to represent their interests during the conference. As the Youth Aid officers often know the young offender and his or her family from previous dealings with them, they may convey to the family their concerns or emphasise certain parts of the young person’s behaviour that they think need to be focused on, such as drug or alcohol abuse or

181 Information based on interviews with Judge Costigan, Christchurch, Judge McMeeken, Christchurch, Malcolm Young, Youth Justice Coordinator, Christchurch, Anthony Greig, Youth Advocate, Christchurch.

182 Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.

183 T Stewart, above n 87, p. 70.
undesirable associates. The police may further voice their concerns if the proposals of the family seem either inadequate or excessive.

The YJC plays probably one of the most important roles in connection with FGCs. As described above, in certain cases an YJC is required to convene an FGC. He or she is the person who organises, conducts and observes the whole FGC process and has to ensure that all issues that should be canvassed are and that emotions are managed as constructively as possible.

A Youth Advocate is a barrister or solicitor who has specialised in youth justice issues. As there are only a restricted number of Youth Advocates in each court circuit, lawyers have to apply to be selected and appointed as a Youth Advocate by the court. If there is a vacancy, the court organises interviews with experienced lawyers and must, so far as practicable, appoint lawyers who are, by reason of personality, cultural background, and training suitably qualified to represent a young person. Although there is no special qualification needed, lawyers applying for appointment as a Youth Advocate have to demonstrate a good knowledge of the CYPFA and must have several years of experience as a lawyer. Generally, the lawyers who apply have been

---

184 Ibid.
186 Section 247. The requirement that an YJC convenes a conference under this provision is subject to section 248, which specifies certain circumstances in which conferences are not required; to section 249, which provides for time limits for the convening of such conferences; and to section 250, which provides for consultation with certain persons before a conference is convened.
187 G Maxwell and A Morris, above n 185, p. 209.
188 Section 323(2).
working as family lawyers in the Family Court beforehand so it can be taken for granted that have some experience in dealing with young people.\textsuperscript{189} If a lawyer is selected, he or she has to attend a training seminar, and afterwards, his or her work will be observed for several weeks.\textsuperscript{190}

A Youth Advocate\textsuperscript{191} will be appointed by the Youth Court to represent and assist the young person before court\textsuperscript{192} as well as at a court-directed FGC.\textsuperscript{193} This does not apply, however, where the young person is already represented by a lawyer, or where the court is satisfied that legal representation has been, or will be, arranged.\textsuperscript{194} However, although a family may engage a barrister or solicitor privately, this is very rare in practice.\textsuperscript{195}

Youth Advocates generally receive a telephone call and will be asked by the court if they are going to take on a certain case.\textsuperscript{196} The role of a Youth Advocate is to represent the young person in the proceedings, to give legal advice, to safeguard the rights of the young person, and to ensure that the legal rights of the alleged offender are protected during

\textsuperscript{189} Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.
\textsuperscript{190} Information based on the interview with Anthony Greig, Youth Advocate, Christchurch.
\textsuperscript{191} Section 251(1)(g).
\textsuperscript{192} Section 323(1).
\textsuperscript{193} Section 324(3)(a).
\textsuperscript{194} Section 323(1)(a) and (b).
\textsuperscript{195} T Stewart, above n 87, p. 71.
\textsuperscript{196} In Christchurch there is a list of about 12-15 Youth Advocates; information based on the interview with Siobhan McNulty and Anthony Greig, both Youth Advocates in Christchurch.
the justice process. Further, a Youth Advocate may also express an opinion about the proposed penalties if these seem to be too excessive. Relating to this topic, Siobhan McNulty says:

[…] Sometimes the families are very hard on them [the young persons] and want them to do 140 [hours of community work] and there is no point in doing that, that is just too harsh for the young person [in relation to the committed offence], so sometimes the Youth Advocates really have to pull the family back.

Apart from the mandatory participants, other persons are entitled to be present at a conference. The victim(s) or their representative(s) are entitled to attend the FGC and they can bring any reasonable number of support persons they want, although a support person must not be a member of the FGC. If victims do not wish to attend the conference in person, they must be informed that they may participate by telephone, by sending in letters, or may be represented by an authorised representative. It is crucial that the YJC ascertains the victims’ views and presents them – verbally or by way of a videotape or audiotape - to the FGC. If an YJC fails to ascertain the views of the victims beforehand, the FGC is not properly co-ordinated and the views of the victims have to be obtained before any decision can be made on FGC recommendations.

---

197 Information based on interviews with Siobhan McNulty and Anthony Greig, both Youth Advocates in Christchurch.
198 Section 251(1)(f).
199 Section 251(2).
200 Section 251(3).
201 Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch, see also: A McRae and H Zehr, above n 66, p. 28.
At times, a lay advocate, a social worker, a care-giver or an information-giver may be present at an FGC. A lay advocate is appointed to advise the FGC on cultural matters and to make sure that the process is culturally appropriate for those involved. A social worker can attend the FGC either if the young person or the family wishes him or her to (in cases where the agency has legal custody, guardianship or supervision of the young person) or if it is required to give support to the young person. The social worker then will normally only provide background information on the young person and participate in supporting the plans of the family and the young person for the future. Care-givers are persons currently having care of the young offender, and information-givers are persons having a special relationship with the young person or special information (such as community members, school teachers, sports trainers, youth group leaders or church representatives). Sometimes, a young person has someone he or she looks up to. If so, it would be very useful to have that person present at the conference, because the young offender can be greatly encouraged by having someone he or she respects helping to put things right. Inviting such a support person is especially important if a family member is the victim of the offence, so the offence has put a strain on the young offender’s relationship with the family. Then the support person can act as an advocate for the young

---

203 Section 251(1)(g).
204 Section 251(1)(h).
205 Section 326.
206 Section 251.
207 G Maxwell and A Morris, above n 22, p. 10; A McRae and H Zehr, above n 66, p. 30.
208 G Maxwell and A Morris, above n 185, p. 209.
209 A McRae and H Zehr, above n 66, p. 30.
person during the FGC. The information-givers may attend only for the relevant part of the conference.\textsuperscript{211}

Summing up, it is evident that the professionals are expected to play a low-key role in an FGC and should try to arrange for the conference to be flexible, family centred and responsive to victims.\textsuperscript{212} To achieve this, it is crucial that the professionals understand and accept their roles. Otherwise, the values of the FGC are at risk of being breached.\textsuperscript{213}

**Preparation of an FGC**

The FGC process starts with notice to the YJC to convene an FGC in respect of a young person’s offending. The YJC first contacts the parties to explain the process to them. This requires the coordinator to consult with the offender and his or her family, whanau, or family group\textsuperscript{214} to inform them of the FGC process and to ask them who should be invited and whether they might need additional support.\textsuperscript{215} The coordinator must also discuss with the victim his or her possible attendance.\textsuperscript{216} If the victim wants to take part, the coordinator explains the FGC process and the victim’s rights during the conference.

As victims often fear confrontation with the offender and/or are afraid of being re-victimised, the coordinator must behave sensitively to provide reassurance and must explain that the FGC process is designed to safeguard against this happening. The YJC may help the victim decide the value of giving time to attend an FGC by sharing information about

\textsuperscript{211} Ibid, p. 30.
\textsuperscript{212} G Maxwell and A Morris, above n 185, p. 209.
\textsuperscript{213} Ibid.
\textsuperscript{214} Section 250.
\textsuperscript{215} Section 250(1)(a),(b), and (c); see also: A McRae and H Zehr, above n 66, p. 27.
\textsuperscript{216} Section 250(2).
the successes that are being achieved through FGC processes. If the
victim signals that he or she would want to attend but would require
assistance, such as babysitters, travel support or compensation for the
loss of income, the coordinator may try to provide support. If the victim
has to work, the coordinator offers the opportunity to hold the FCG in the
evenings to accommodate work schedules.\textsuperscript{217}

After having talked to the parties, prepared them for the FGC and agreed
on time, date and venue with them,\textsuperscript{218} the YJC has to take all reasonable
steps to give notification of the FGC (including time, date and venue) to
all those persons who are entitled to attend.\textsuperscript{219} Notice is not required to be
given, however, to any person whose whereabouts cannot, after
reasonable enquiries, be ascertained.\textsuperscript{220} If one of the entitled persons is
unable to attend the FGC, the coordinator has to find out that person’s
views\textsuperscript{221} and must ensure that they are made known at the conference.\textsuperscript{222}
The coordinator further has to ensure that relevant information and advice
will be given and made available to the FGC by services and networks in
the community so that the process may be carried out successfully.\textsuperscript{223}
The YJC therefore needs to have a well-functioning network within the
community and with other professionals working with young persons.\textsuperscript{224}

\begin{footnotesize}
\textsuperscript{217} T Stewart, above n 87, p. 33.
\textsuperscript{218} Section 247 states that the YJC must fix the date, time and place at which an FGC is
to be held.
\textsuperscript{219} Section 253(1).
\textsuperscript{220} Section 253(2).
\textsuperscript{221} Section 254(1).
\textsuperscript{222} Section 254(2).
\textsuperscript{223} Section 255(1).
\textsuperscript{224} T Stewart, above n 87, p. 33.
\end{footnotesize}
Procedure at FGC

Subject to section 256(1), an FGC may regulate its procedure in the manner it thinks fit. Nevertheless, coordinators seem to follow a common (and well-tried) procedure rather than letting families set up their own procedure. Thus, an FGC is regularly divided into three sections. It starts with the opening and information sharing section, which is then followed by the family caucus. In the third section, the participants try to reach an agreement on a plan for the young offender before the FGC is finally closed. These three sections will now be described in detail.

Opening and Information Sharing

The FGC is normally held in a room provided by the CYF, but it can also be held in any other room, for example at the marae or in another community venue, as long as the room has adequate resources for the conference. For victimless offences, such as possessing drugs, FGCs can be held in the young offender’s home, but in cases where victims are

---

225 Impression gained through interviews with Malcolm Young, Youth Justice Coordinator; Catherine Brophy, Youth Justice Supervisor; Siobhan McNulty, Youth Advocate; and Sergeant James Read, Youth Aid Coordinator. They all described the FGC process in similar terms. However, due to the fact that interviews have only been undertaken in Christchurch, the scope of the apparent similarity may be limited to conferences in Christchurch.

226 Information based on the interviews with Malcolm Young, Siobhan McNulty, and James Read; see also: G Maxwell and A Morris, ‘The New Zealand Model of Family Group Conferences’, in C Alder and J Wundersitz, Family Conferencing and Juvenile Justice, The Way Forward or Misplaced Optimism? (1994), p. 22 (note: the authors refer to ‘an office of the DSW’. DSW means Department of Social Welfare and was the forerunner of the CYF).

227 Tribal meeting centre, focal point.

228 According to Malcolm Young, Siobhan McNulty, and James Read, families are given a choice but mostly opt for the FGC to be held in a Department building. Catherine Brophy states, however, that ‘hopefully most of them [are held] out in the community, normally it is.’
involved, a neutral venue is sought to ensure the victims are not intimidated.\textsuperscript{229} The venue should include access to a second room where private deliberations can be held.\textsuperscript{230}

The conference room is usually arranged in a circle or horseshoe shape because this is most appropriate both culturally and to enhance communication,\textsuperscript{231} and should provide for more seating and space than may be required to allow for more flexibility of choice among the participants.

After the participants have arrived and have chosen to sit where they feel comfortable, the FGC may, depending on the customs of those involved, start with a blessing, prayer or karakia.\textsuperscript{232} Following the prayer (or as the first step of the conference if there is none), the YJC welcomes the participants and either introduces the participants or lets them introduce themselves (where the latter seems to be preferable because it may help to start the participants’ active involvement in the process).\textsuperscript{233} The introduction of the parties must include the reasons for being part of the conference.\textsuperscript{234} The YJC will then describe what is going to happen in the next hours, what the purpose of the meeting is, and that the principles of the \textit{CYPFA} will be followed strictly regarding the process of the FGC as

\textsuperscript{229} T Stewart, above n 87, p. 75.
\textsuperscript{230} Information based on the interview with Malcolm Young, Youth Justice Coordinator Sydenham, Christchurch.
\textsuperscript{231} Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch; see also: A MacRae and H Zehr, above n 66, p. 40.
\textsuperscript{232} ‘Karakia’ is the Maori word for prayer or blessing. The prayer or karakia is normally said in the family’s first language and in a cultural appropriate way by a family member, by a support person or, on rare occasions, by the YJC and, if necessary, can be translated to the other participants.
\textsuperscript{233} A MacRae and H Zehr, above n 66, p. 41.
\textsuperscript{234} Ibid.
well as the outcomes.\textsuperscript{235} It needs to be clear that each FGC is flexible and that members can have private time or a break whenever they need one.

What happens next varies depending on the type of FGC. Typically, the focus now shifts to the offending behaviour, and the police representative reads out the Summary of Facts of the offence.\textsuperscript{236} This summary contains all the facts on which the (intended) charges (or the custody) are based. When the young person does not agree with the facts, variations in the circumstances of the offence are noted and the summary of facts is amended.

 Afterwards it has to be determined if the charges are denied or not denied because the jurisdiction of an FGC is limited to the disposition of cases where the young offender has not denied the alleged offences or has already been found guilty.\textsuperscript{237} Thus, when the young person denies at an ‘Intention to Charge Conference’, ‘the YJC issues a certificate to the police so the police representative can lay an information to court for that charge’,\textsuperscript{238} and in case of a ‘Charge Not Denied Conference’ the case will automatically be returned to court. In both cases, a defended hearing will take place before the Youth Court.

After having ensured that the charges are not denied, the victims are asked to explain the impact the offences have had on them. Once more, the skills and abilities of the YJC are demanded. Whether the victim dares to tell his or her story and feels comfortable enough to show emotions depends to an extremely high degree on the skills of the coordinator. He or she has to ask the right questions to bring out the story

\begin{itemize}
\item \textsuperscript{235} Ibid.
\item \textsuperscript{236} T Steward, above n 87, p. 78; G Maxwell and A Morris, above n 185, p. 209.
\item \textsuperscript{237} Section 259.
\item \textsuperscript{238} Information based on the interview with Sergeant James Read, Youth Aid Coordinator, Christchurch Police.
\end{itemize}
and needs to be able to create a suitable atmosphere during the conference. If there is no victim present, the coordinator or a victim’s representative present the victim’s information.

Following the victim’s story, the young person is encouraged to tell why he or she committed the offence and how he or she feels after having heard the victim’s information. If necessary, the YJC has to help the young person formulate his or her information and sometimes needs to guide them with pointed questions. Malcolm Young says: ‘you get them to tell the story of their offending in their own way.’

Following the young person’s story, victims, representatives or other participants may start asking questions. The coordinator must try to establish and enhance a natural flow of communication between the participants that may lead to a general discussion of the offence and the underlying circumstances. The offender’s family can be asked how the offence has impacted on them and want to provide any other information relating to their young person or the circumstances of the offence. At this point, the young person or their family sometimes express their remorse for what has happened or apologise to the victim, although this might also happen later (or sometimes does not happen at all).

**Family Caucus**

The offender’s family is entitled to have private deliberations, called ‘family caucus’, which must be offered to them by the YJC. The family, however, may choose not to take the time.

239 A MacRae and H Zehr, above n 66, p. 43.
240 G Maxwell and A Morris above n 185, p 209.
241 Section 251(4).
242 A MacRae and H Zehr, above n 66, p. 44.
When the general discussion has come to an end and everyone has had the opportunity to say or ask what he or she wants, it is time for the family caucus. The professionals and the victim(s) leave the family and the young person alone to let them discuss privately what recommendations they wish to make and what the plan for the young person could look like. During the family caucus, the other members of the FGC are not entitled to be present unless the family wishes a participant to attend and answer questions. Families often take this option to check whether they are moving towards an acceptable plan before they invest more time in it.

If a Youth Advocate has been allocated, however, it is his or her duty to provide information and advice to the young person and the family before leaving them to themselves. Malcolm Young says:

> If they [the young persons] have a lawyer appointed by the court, the lawyer will stay for the first little bit to give them some advice, and then, they should come out.

Thus, the allocated Youth Advocate informs the young offender and his or her family about what is expected from them, what a plan could look like, and what different points they should try to address before he or she leaves the family alone.

---

243 Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.

244 Information based on the interviews with Siobhan McNulty, Youth Advocate, and Malcolm Young, Youth Justice Coordinator, Christchurch.

245 Section 251(4).

246 A MacRae and H Zehr, above n 66, p. 45.
Siobhan McNulty describes the way she informs the family and the young person at the beginning of the family caucus as follows:

[...] When it comes to family time, my role is to provide them [the family] with some options about the plan and then I go and leave them to it. [...] I always explain to the family that the conference plan has three parts: one of them is addressing the victim, the second is what kind of punishment should be imposed and the third is what kind of support is needed to be put in place to stop this young person from offending again. So I always write down these three parts of the plan they need to look at. [...] I talk to them about the options and give them an idea of how many community service hours can be done and are probably realistic, and I give them some of the agencies that might be available for support (like alcohol and drug assistance) [...]..

The role a Youth Advocate plays in connection with FGC is non-adversarial. So the lawyer needs to act on behalf of the young person and must be as supportive as he or she can be. Siobhan McNulty states:

[...] What I do, and I think most lawyers do the same, [...] is to make sure that the young person is getting a fair go, because sometimes they can be very challenging, and sometimes the victims can be pretty hard on young people. It is important for victims that they have the right to have a say and the family has the right, too, but sometimes they give the young person a hard time and the young person is not to be victimised or bullied, so you [the Youth Advocate] have a bit of a role in that regard.

In conclusion, the family caucus is an important and crucial part of the FGC process for various reasons. It is the family’s first opportunity to talk in private since the beginning of the conference. They may now discuss and reflect on what has happened so far, what they have heard from the victim(s), what kind of options and resources they have within the family, and what recommendations they wish to make to repair the damage and to prevent re-offending.247 While discussing privately, the family can address and investigate more personal issues, like financial

247 G Maxwell and A Morris, above n 185, p. 209; A MacRae and H Zehr, above n 66, p. 45.
commitments, or personal requests for support from the extended family to cover diverse needs, including time commitments that may be required for monitoring parts of a more complex plan.\footnote{248}

\textbf{Reaching an Agreement, Formulating a Plan and Closing of FGC}

When the offender’s family returns from their caucus, the conference is reconvened. If it has not happened before, the young offender often apologises to the victim at this stage of the conference. Preferably, the young offender himself then presents the recommendations, because this ensures that he or she really understands the content and agrees with. Malcolm Young says: ‘It is not a family plan, it needs to be their [the young persons] plan by the end of the day.’\footnote{249} Further, it helps to shift the conversation back between the offender and the victim as the main parties of the conflict.\footnote{250} However, a spokesperson of the family may also present the family’s proposals for a plan which will subsequently be discussed by all conference participants.

The families might come back with quite varied recommendations.\footnote{251} While some of the families may return and present a complete plan, others may just have had a brainstorming and following that may have developed a list of initial ideas, whereas some families have addressed only personal issues during the caucus and wish to put the plan together with the help of all participants.\footnote{252}

\footnote{248}{A MacRae and H Zehr, above n 66, p. 45.}
\footnote{249}{Emphasis is that of the interviewee.}
\footnote{250}{Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.}
\footnote{251}{A MacRae and H Zehr, above n 66, p. 46.}
\footnote{252}{Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.}
Regarding this topic, Anthony Greig states that

[…] [the recommendations] can be very worthwhile, [and they] can be hopeless. […] Where the family is the problem, you don’t get much out of it, don’t achieve much. When the wider family gets involved and they embrace the spirit of it, you can get good recommendations out of it – both in terms of punishment and rehabilitation.

What can be recognised, however, is that families do not seem to try to protect their young people by opting for restrained responses. Instead, they are often harder on the young offenders than the professionals.\textsuperscript{253} Judge Strettell also observed this fact and said:

[…] It surprises me – often the family are harder on their young people than the professionals and I have actually imposed lesser penalties […] because I think it has been too tough.

After the suggestions have been presented, the YJC asks the victim what he or she would consider necessary to be added or removed from the plan.\textsuperscript{254} Once the victim’s wishes have been expressed and the details have been worked out with the young offender and the family, the professionals (the police representative and the Youth Advocate) will be involved again. The police representative will now be asked if he or she thinks that the recommendations need to be amended in any way.\textsuperscript{255} However, the police generally agree to a plan that meets the victim’s needs, because the police representative would normally not ask for an amendment that will remove from the plan a victim’s wish or something that has been offered to the victim.\textsuperscript{256} If the police want an amendment to

\textsuperscript{253} Information based on the interviews with Siobhan McNulty, Youth Advocate, and Malcolm Young, Youth Justice Coordinator, Christchurch.

\textsuperscript{254} Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.

\textsuperscript{255} Section 263(1)(a).

\textsuperscript{256} A MacRae and H Zehr, above n 66, p. 47.
be made, they normally focus on the public interest. In case of a contradiction between the public’s and the victim’s interests, the police representative has to weigh up the different needs, but if the victim’s interests are known, the police are in a better position to weigh them alongside the community’s interests.  

Once everyone was offered the opportunity but there are no more issues to discuss, the plan is going to be outlined. It is normally made up of four core elements: the first element is putting things right for the victim, the second is returning something to the community, the third is addressing the underlying causes of the offending and the fourth is ensuring that the young offender gets the support he or she needs to meet the obligations under the plan. These elements can be put into effect in various ways and the exact details are limited only by the imagination of the parties, but each of the four elements needs to be addressed somehow. Some of the most common options include an apology to the victim(s), reparation, work for the victim or the community, donations to charity, restrictions on liberty such as a curfew or programmes of counselling or training.

The first element, putting things right for the victim, is usually addressed by requiring the young offender to write a letter of apology, or, if there is a human victim, encouraging the young person to apologise to the victim in person as well. Further, there might be reparation for a victim, and although many young persons do not have any income, the family may

---

257 Ibid.
258 Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.
259 A MacRae and H Zehr, above n 66, p. 448. For an example of how the described four elements might be addressed in a plan, see Appendix A.
260 Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.
come up with some part of the money, or the young person may get a part
time job and for example may agree to pay $100 at $five a week to the
victim. Additionally, young persons can be creative in their plan.
Regarding this topic, Siobhan McNulty says:

I have had kids who have baked cakes for their victim or have
done artwork or taken flowers, so I encourage them to come up
with something they might want to do [for the victim].

For addressing the second element, returning something to the
community, the FGC plan usually contains community work hours, a
minimum of 20 hours for minor offences and a maximum of 200 hours
for more serious offences or repeat-offenders. Again, this element can
also be addressed in a more creative way, for example, requiring the
young person do a project about drunk driving or bullying, write an
essay, or do some artwork relating to their offence (in the Christchurch
Youth Court there are many framed posters at the wall which young
persons have done as part of their FGC plans). However, these options
should only be considered if the young person seems to be capable of
managing tasks like that. If the offence was a traffic offence, the young
person may also receive driving disqualifications.

While the second element is often addressed rather similarly in different
cases (for example with community work), the implementation of the
third element, addressing the underlying causes of the offending, depends
very much on each case and young person. If, for example, alcohol or
drugs are involved in the offending and if the conference thinks that the
offender needs assistance in this regard, the plan may include that they

\footnote{Ibid.}
\footnote{Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.}
\footnote{Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.}
have to attend a drug withdrawal programme or drug counselling. If the offence was committed during school hours and if the young person is not in education, the plan may say that they have to go to school every day. If the young person damaged property or rampaged, the plan may say that he or she has to attend an anger-management course.\(^{264}\)

The fourth element, ensuring that the young person will get the support he or she needs to meet his or her obligations under the plan, is regularly addressed by writing down who is going to support and monitor the young person in which of the obligations under the plan, to whom the supervisor has to report, and what deadlines exist for each obligation under the plan. The supervision and support can be done by family members, social workers, truancy officers, sports coaches, or even by the victim, depending on what the obligation in question is like.\(^{265}\) The monitoring of the outcomes of the FGC plan is as important as any other part of the FGC process. Where a plan fails, mostly the supervising adult did not have the tenacity to carry the plan through to its conclusion.\(^{266}\)

Once the participants believe that they have addressed all these elements, they have to check whether the contents of the plan are realistic, measurable and able to be monitored. Each decision fixed in the plan needs to describe clearly what and how much the young person shall do, include a date by when it should be completed, and who will monitor and ensure that it is carried out.\(^{267}\)

\(^{264}\) Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.

\(^{265}\) Information based on the interviews with Anthony Greig, Youth Advocate, Christchurch; and with Siobhan McNulty, Youth Advocate, Christchurch.

\(^{266}\) A MacRae and H Zehr, above n 66, p. 53.

\(^{267}\) Ibid, p. 48.
Further, the plan must include what will happen legally if the young person completes the plan in the way he or she is expected to. In this spirit, the plan needs to specify what the FGC is requesting of the agency having jurisdiction. Thus, the plan could, for instance, state that the police have agreed not to take any further action if the plan is completed, or that the conference has agreed that the case is to be brought before court. If the case is, or is to be, before court, the plan may recommend how the matter is to be monitored by the court.\textsuperscript{268} For example, the plan may say that the FGC wants the court to adjourn the matter until the young person has completed his or her obligations under the plan, and if the plan is successfully completed, the charges should be withdrawn or discharged without any formal record.\textsuperscript{269} If the court directed the FGC, the participants can recommend an overall sentence in which they would like to see the plan included.\textsuperscript{270}

Once the outcomes have been drawn up in this way, the participants may once again express objections. Further, under section 263(1), the YJC who convened the conference must communicate the FGC plan to certain persons. Where the conference was convened as an ‘Intention to Charge Conference’, the YJC must communicate the plan to the Youth Aid officer and to those other persons who will be directly involved in its implementation.\textsuperscript{271} Where a ‘Charge Denied Conference’ was convened, the plan must be communicated to the court.\textsuperscript{272} In the case of all other FGCs, the plan must be communicated to the informant or intended informant, and to others who will be directly involved in its

\textsuperscript{268} Ibid, p. 52.
\textsuperscript{269} This reaction is generally referred to as ‘282-discharge’.
\textsuperscript{270} A MacRae and H Zehr, above n 66, p. 52.
\textsuperscript{271} Section 263(1)(a).
\textsuperscript{272} Section 263(1)(c).
implementation.  After having communicated the plan to those persons, the YJC must seek their agreement, except where the YJC is required to communicate the relevant information to the Youth Court for its endorsement.

In 95% of all FGCs, full agreement on the plan is reached. The young person then needs to be told that he or she has to contact the police or the social worker if something beyond their control is preventing them from completing the plan.

If the FGC can only agree to some specific points of the plan, these points are recorded without mentioning why the other points could not be agreed upon. Then the YJC, for example, records: ‘The FGC agreed that community work should be done but could not agree on the amount’, so the court knows where some negotiation might be required. Where the YJC is unable to secure agreement at all, he or she must adjourn the proceedings of the conference and must then report the matter to the appropriate enforcement agency or to the court, depending on the circumstances under which the conference was convened.

Once all details have been formally recorded by the YJC, the FGC will be closed. Most youth justice FGCs require only one session and last one

---

273 Section 263(1)(b).
274 Section 263(1)(a)(ii) and (b)(ii).
275 A MacRae and H Zehr, above n 66, p. 49.
276 Ibid.
277 Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.
278 Ibid.
279 Section 264 (1)(c).
280 Section 264 (1)(d) and (e).
to two hours (although sometimes they can take much longer).\textsuperscript{281} If the conference started with a blessing, prayer or karakia, it will generally be closed with one as well.

The plan decisions made by the FGC are binding once all participants have agreed to them (or, where it is relevant, the court has accepted them). Generally, a plan is set up to be completed in three months (if it has been a minor offence or the first offence of a young person) or in six months (if the offence was more serious or the offender is a repeat offender).\textsuperscript{282} A plan that is longer than three months will be put into review normally, which means that the young person has to come back to court or see a social worker every two months or at the half-way-point to make sure that he or she is on track with the plan. If they have not started doing their community work then, for instance, it is not too late to get them back on track.\textsuperscript{283} If the young person then still fails to complete the obligations under the plan, an FGC can be reconvened to review the decisions.\textsuperscript{284} This can either be initiated by the YJC or requested by two members of the FGC.\textsuperscript{285} If the conference is subsequently reconvened, a new plan will be formulated which can also include a recommendation for prosecution in court.\textsuperscript{286}

Where the young person is doing well and the interim reports show that the obligations seem to be completed in time, the court may decide that

\begin{itemize}
\item \textsuperscript{281} Information based on the interview with Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch.
\item \textsuperscript{282} Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.
\item \textsuperscript{283} Information based on the interview with Siobhan McNulty, Youth Advocate, Christchurch.
\item \textsuperscript{284} Section 270(1).
\item \textsuperscript{285} G Maxwell and A Morris above n 22, p. 11.
\item \textsuperscript{286} Ibid.
\end{itemize}
the young person does not have to come back before the court on the final day, whereas it is often quite encouraging for them to do so when they have completed their plan. Siobhan McNulty says:

It is good for kids to come back and get a pat on the back and [the judge] says: “well done”; so unless they have employment or school or something they cannot get off, I think it is good for them to come back. If they have got a good report it is good for them to come and hear.

Summing up, since the introduction of the CYPFA, FGCs are the primary forum for dealing with more serious youth offending in New Zealand. They can be seen as the lynchpin of the juvenile justice system, making the FGC the normal site for making decisions about youth justice outcomes in place of the courtroom.

6.2.3.4 YOUTH COURT

The Youth Court process in New Zealand is reserved for a minority of juvenile offenders because most cases are dealt with by diversionary schemes beforehand.\(^\text{287}\) Today, every District Court must have a division known as a Youth Court.\(^\text{288}\) The Youth Court was established for dealing with juvenile justice cases only. This reflects one of the principles of the CYPFA which states that offending behaviour of young persons should be premised on criminal justice, including the ideas of ‘accountability and responsibility for actions, due process, legal representation, requiring

\(^{287}\) G Maxwell et al, above n 2, p. 19.

\(^{288}\) Section 433. In addition to the ordinary Youth Courts, a Drug Court pilot was established in Christchurch in 2002. It is based on an initiative developed by Youth Court Judge Walker who identified a need for addressing the linkage between alcohol and other drug use and offending and facilitating better service delivery to this group (http://www.justice.govt.nz/pubs/reports/2004/process-evaluation-chch-youth-drug-court-pilot/chapter-1.html). For further information see above Chapter Two 2.4.
judges to give reasons for certain decisions, and imposing sanctions which are proportionate to the gravity of the offence', and not welfare principles.\(^{289}\)

**Youth Court Judges**

A sufficient number of District Court Judges are, on the recommendation of the Principal Youth Court Judge, to be designated as Youth Court Judges by the Chief District Court Judge.\(^{290}\) In doing so, the Chief District Court Judge may designate Family Court Judges as Youth Court Judges,\(^{291}\) although he must not do this without the concurrence of the Principal Family Court Judge.\(^{292}\) A person to be designated a Youth Court Judge needs to be a suitable person to deal with matters within the jurisdiction of a Youth Court by virtue of that person’s training, experience, and personality and understanding of the significance and importance of different cultural perspectives and values.\(^{293}\)

**Procedure and Jurisdiction**

With certain exceptions, the procedure in a Youth Court follows the provisions of the *District Courts Act 1947* and the *Summary Proceedings Act 1957*.\(^{294}\) The Youth Court is closed to the public\(^{295}\) to preserve the confidentiality of its proceedings. The only people entitled to be present during the hearing are officers of the court; the child or young person; the person representing the prosecution agency (usually someone from the

\(^{289}\) G Maxwell et al, above n 2, p. 19.

\(^{290}\) Section 434(1).

\(^{291}\) Section 434(2).

\(^{292}\) Section 434(4).

\(^{293}\) Section 434(3).

\(^{294}\) Section 321(1) and (2).

\(^{295}\) Section 329(1).
police); the young person’s parents, guardians, or caregivers; someone from the FGC (if one has been held); a lawyer or Youth Advocate who speaks for the young person; a lawyer who speaks for the young person’s parents or guardian; a YJC; a social worker; a lay advocate who supports the child or young person, or their parent, guardian or caregiver; witnesses; reporters who have permission to be there; and anyone else the judge allows to take part.\(^{296}\)

Contrary to the FGC process, where parents or guardians cannot be forced to participate, a summons may be issued to any parent, guardian or other person responsible for the young person’s care, if it is required that this person appears before a Youth Court at a specified time.\(^{297}\) At the hearing, this person may be examined in respect of any matter relating to those proceedings.\(^{298}\) Where the person fails to appear, a Youth Court Judge may direct that an arrest warrant be issued.\(^{299}\)

The Youth Court is supposed to operate an appointment system to on the one hand reduce the amount of time offenders and families are kept waiting,\(^{300}\) and on the other prevent the young offenders from associating with each other at court.\(^{301}\) Nevertheless, in some larger cities, this is not practicable because the Youth Court sometimes deals with more than 50 young offenders per day.\(^{302}\)

---

\(^{296}\) Section 329(1)(a)-(m).

\(^{297}\) Section 278(1).

\(^{298}\) Section 278(2).

\(^{299}\) Section 278(4).

\(^{300}\) Section 332(1).

\(^{301}\) Sections 331(a) and (b); see also: G Maxwell et al, above n 2, p. 20.

\(^{302}\) Information based on the interview with Judge McMeeken, Judge, Christchurch.
Generally, every young person charged with an offence must be brought before a Youth Court. Nonetheless, the Youth Court can transfer cases involving serious offences to the High Court, and there is provision in other cases for the Youth Court to transfer matters to the District Court, depending on the seriousness of the case and the previous offending history of the young person. Furthermore, in some cases the Youth Court does never – or only by way of exception - have jurisdiction. Examples for these cases are given in the following.

Where the offence is murder or manslaughter, only the preliminary hearing of the charge is to take place before a Youth Court, which then transfers the matter to the High Court.

When a young person is charged with a traffic offence not punishable by imprisonment, the Youth Court generally does not have jurisdiction. It will only hear and determine the information if the young person was charged with another offence requiring proceedings to be held in a Youth Court, both offences arose out of the same event or series of events, and the Youth Court believes that either it is desirable that the charges are heard together or that the charges can conveniently be heard together.

Where a young person is charged with a summary offence or an indictable offence other than a purely indictable offence, a Youth Court must hear and determine the information unless the offence is

303 Section 272(3).
304 G Maxwell et al, above n 2, p. 15.
305 Section 272(3)(a) and (b).
306 Section 272(4).
307 Section 272(5)(a).
308 Section 272(5)(b).
309 Section 272(5)(c)(i) and (ii).
310 Section 273.
punishable by imprisonment for a term exceeding three months, the young person elects trial by jury under section 66 of the *Summary Proceedings Act 1957*,\(^{311}\) or the court discharges the information under section 282 of the *CYPFA*.\(^{312}\)

Where a young person is charged with a purely indictable offence, or has elected trial by jury under section 66 of the *Summary Proceedings Act 1957*, the preliminary hearing must take place in accordance with the relevant provisions of the *Summary Proceedings Act 1957*.\(^{313}\) The hearing itself, however, must take place before the Youth Court,\(^{314}\) which, for that purpose, has all the powers of a District Court\(^{315}\) and is presided over by a Youth Court Judge or, if none is available, by a District Court Judge or by two or more Justices of the Peace.\(^{316}\) Where the Youth Court is of the opinion that the evidence is sufficient to put the young person on trial for a purely indictable offence other than murder or manslaughter, it may give the young offender the opportunity to forego the right to trial by jury and elect to be dealt with by a Youth Court.\(^{317}\) This provision also applies if at any time during the preliminary hearing the young person indicates that he or she wishes to plead guilty.\(^{318}\) If the young person elects to be dealt with by a Youth Court, the court has the jurisdiction to deal with the young person in accordance with the *CYPFA*.\(^{319}\)

\(^{311}\) Section 273(a).

\(^{312}\) Section 273(b).

\(^{313}\) Section 274(1) and (2).

\(^{314}\) Section 274(2) (a).

\(^{315}\) Section 274(2) (a).

\(^{316}\) Section 274(2) (a).

\(^{317}\) Sections 275(1) and 276(1).

\(^{318}\) Sections 276(1) and 274(1).

\(^{319}\) Sections 275(2) and 276(2).
Apart from matters referred to in sections 274 and 283(o), the CYPFA does not authorise the Youth Court to enter a conviction on the court record.

**Legal Consequences**

Different things might happen after a child or young person has appeared in the Youth Court, and the charge against them has been proved or the child or young person has admitted the charge. Where a charge against a young person is proved before Youth Court, the court may not make certain orders disposing of the proceedings unless an FGC has had an opportunity to consider ways in which the court might deal with the young offender in relation to the charge. If the young person admits the charge, the Court shall not enter a plea to the charge but instead is required to direct a YJC to convene an FGC in relation to the matter, to adjourn the proceedings against a young person until that FGC has been held, and to consider any decision, recommendation, or plan made or formulated by the FGC in relation to that offence before hearing.

---

320 Which regulates the manner of dealing with purely indictable offences or where the young person elects trial by jury.

321 Which states: ‘In the case of a young person who is of or over the age of 15 years, enter a conviction and order that the young person be brought before a District Court for sentence or decision, and in any such case the provisions of [the Sentencing Act 2002] shall apply accordingly.’

322 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP 283.5 Comment.*

323 As to the question when a charge is deemed to be proved see below n 337-349 and accompanying text.

324 Section 281(1). This provision applies to orders made under sections 282 or 283 of the CYPFA, Section 281(1) is subject to section 248, which provides for certain circumstances in which FGCs are not required to be held.

325 Section 246(b)(i).

326 Section 246(b)(ii).
the information. Concerning the recommendations formulated by the FGC, Judge Costigan stated:

Some [of the FGC plans] are quite involved, some are not as good as they should be, but mostly they come up with what they think should happen. […] So generally, you [a judge] try to implement the outcomes but sometimes they haven’t addressed the combination of problems the young person has got […]

If the judge disagrees with the recommendations of the FGC, he or she can override these. However, this does not happen very often. Judge Walsh emphasises that the recommendations are predominantly reasonable. He says:

[…] You know sometimes you say: “oh gosh, that’s not going to work!” but with 90% [of the recommendations] I agree.

‘282-Discharge’ and Withdrawal of Information

Where information is laid charging a young person with an offence (other than a purely indictable offence), a Youth Court may, after enquiring into the circumstances of the case, discharge the information. The judge may exercise discretionary power and will generally take into account the circumstances of the case, especially the seriousness of the offence, and any failure to observe time limits, while considering whether to discharge the information. Thus, a young offender who appeared before court for the first, or at the most a second time will normally receive a ‘282-discharge’ after having completed his or her obligations

---

327 Section 279.
328 Section 282(1); According to Siobhan McNulty, Youth Advocate, Christchurch, and Malcolm Young, Youth Justice Coordinator, Sydenham, Christchurch, this possibility is called a ‘282-discharge’ in practice.
329 See Police v C (Youth Court, Wellington, CRNO285015569, Carruthers DCJ).
330 Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP 282.6 Comment.
under the FGC plan in time. The judge, discharging any information with a ‘282-discharge’, may, if satisfied that the charge against the young person is proved, make an order under any of the provisions of paragraphs (e) to (j) of section 283 of the *CYPFA*331 (these orders are discussed below).

If a young person complies with the recommendations of the FGC and the FGC participants have unanimously agreed upon this, information can (with the leave of the court) be withdrawn.332

A ‘282-discharge’333 or a withdrawal of information has the effect, in law, of an information having never been laid. That means that no official Justice Department record of the offending thereafter exits.334 From this follows that, upon subsequent prosecution and conviction for another crime, the young person will have to be regarded as a first offender which can affect the sentencing method adopted by the court in a significant way.335

**Court Orders**

Where a charge against a young person is proved before a Youth Court, and the charge is not discharged or withdrawn, the judge has a number of courses of action open to it and may impose one or more of these.336

---

331 Section 282(3).
332 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP282.5 Comment.*
333 Section 282(2).
334 Ibid.
335 See *Police v P and T* (1991) 8 FRNZ 642.
336 Section 283. Section 283 is subject to sections 284-290 of the *CYPFA*. See section 285 for certain restrictions placed on the making of orders under section 283.
According to the wording of section 283, the charge against the young person must be ‘proved’ before a Youth Court Judge may make an order under section 283. The term ‘proved’ is not defined in the CYPFA. Nevertheless, it is clear that a charge is proved if, following a defended hearing, the Youth Court was satisfied beyond reasonable doubt of the guilt of the young person and found accordingly.\textsuperscript{337}

However, as already shown above, a young person who, after having been arrested, does not deny the charge before court,\textsuperscript{338} becomes subject to a ‘Charge Not Denied Conference’ procedure and afterwards has to appear before court again for disposition. In this case, there was no defended hearing and the young person has never formally pleaded guilty. The CYPFA does nowhere specify that a young person must at some stage formally plead guilty. The question arising in this context is: when can an offence be said to have been ‘proved’, even though the young person did not plead guilty and there has not been a defended hearing where the young offender was found guilty? Several courts have already considered this question.\textsuperscript{339} In \textit{C v Police}\textsuperscript{340} Hammond J specifically repudiated the perception that the term ‘not denied’ could ever equate to proof and stated that

A criminal charge is “proved” in one of two ways. Either it is proved by evidence led by the prosecution, which, in the view of the trier of fact comes up to the criminal law standard of proof. Or, the person charged “acknowledges” the crime. I have used the word “acknowledges” at this point, advisedly, as a

\textsuperscript{337} Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP283.4 Comment.

\textsuperscript{338} See section 246.


neutral term. The use of the term "not denied" could not support the entry of a conviction.

In *Police v M*[^341] Harding DCJ ruled that a charge against a young person is ‘proved’

… either by a finding by the Youth Court that the charge has been proved after a defended hearing, or by the positive acceptance in Court of the admission of the charge reported as the result from the family group conference, usually as PAFGC ("proved by admission at family group conference").

In *Police v Baker*,[^342] McElrea DCJ, relating to the requirement that a charge must be ‘proved’, adopted the reasoning of Harding DCJ in *Police v M*[^343] by stating:

> A matter is proved sufficiently if it is noted as having been proved by admission at an FGC, provided the Youth Court Judge has affirmatively turned his mind to the question of whether that proof is available.  

Thus, where the young offender was not arrested but summoned to appear before the Youth Court after he or she had admitted the offence at an FGC held pursuant to sections 247 and 258(b) and (e), it is submitted that at the first appearance before court the ‘charge’ could be ‘admitted’ rather than ‘not denied’.[^345] The judge could then, based on the admission, note the court file accordingly and at that point, the ‘charge’ would be ‘proved’.[^346] Otherwise, if the charge was ‘not denied’, the Youth Court could be required to adjourn the proceedings for further consideration by


[^345]: *Abbott and Thompson District Courts Practice (Criminal) (NZ)*, *Children, Young Persons, and Their Families Act*, CYP283.4 Comment.

[^346]: Ibid.
an FGC as to whether the ‘charge’ has been admitted at the FGC.\textsuperscript{347} This understanding would circumvent the possibility that advice to the court that the charge was not denied would require an adjournment for further consideration by an FGC as to whether the ‘charge’ (as distinct from the offence originally considered) has been admitted at an FGC.\textsuperscript{348} The proceedings should be adjourned, however, if there has been no legal counsel involved as the youth’s advocate prior to and at the FGC.\textsuperscript{349}

Summing up, it can be said that a charge against a young person can be regarded as being ‘proved’ in the sense of section 283 either if it has been proved beyond reasonable doubt during a defended hearing, or, if the young person admits the offence at the FGC rather than just ‘not denies’ it and the court file is noted accordingly.

Before making any of certain orders, the Youth Court Judge is required to consider several issues.\textsuperscript{350} First, the nature and circumstances of the offence must be taken into consideration.\textsuperscript{351} Second, regard must be given to the attitude of the young person towards the offence\textsuperscript{352} and the young person’s involvement in it.\textsuperscript{353} Additionally, the personal history, social circumstances, and personal characteristics of the offender, so far as those matters are relevant to the offence and any order that the court is empowered to make in respect of it,\textsuperscript{354} need to be taken into account and the court must ascertain the response of the offender’s family, whanau, or family group both to the offending and to the young person as a result of

\textsuperscript{347} Ibid.
\textsuperscript{348} Ibid.
\textsuperscript{349} See Police v M, [2001] DCR 385, 288.
\textsuperscript{350} Section 284.
\textsuperscript{351} Section 284(1)(a).
\textsuperscript{352} Section 284(1)(c).
\textsuperscript{353} Section 284(1)(a).
\textsuperscript{354} Section 284(1)(b).
that offending.\textsuperscript{355} The effect of the offence on any victim, and the need for reparation to be made to that person, should be considered\textsuperscript{356} and regard should be paid to any measures taken or proposed by the young person, or by his or her family, whanau, or family group, to make reparation or apologise to any victim of the offence.\textsuperscript{357} Regard must moreover be given to any previous offence proved to have been committed by the young person (not being an offence where the information for that offence was discharged under the \textit{CYPFA} or under the \textit{Children and Young Persons Act 1974}), any penalty imposed or order made in relation to that offence, and the effect on the offender of that penalty or order.\textsuperscript{358} Finally, the court should take into consideration any decision, recommendation, or plan made by the FGC.\textsuperscript{359}

In addition to these regulations under section 284, it is generally a clear principle in sentencing that weight should be given to the personal circumstances and rehabilitative potential of the offender. Therefore, the age of an offender is a factor of considerable importance in determining sentence.\textsuperscript{360} Nevertheless, consideration of the possible reform of a young offender can be overridden in some cases by the inevitability to impose an appropriate sentence designed to deter others, predominantly in where the offence is more serious.\textsuperscript{361}

After having observed these issues, there are several courses of action available to the judge. Section 283 is, in effect, a sentencing code with

\begin{itemize}
\item Section 284(1)(d).
\item Section 284(1)(f).
\item Section 284(1)(e).
\item Section 284(1)(g).
\item Section 284(1)(h).
\item See, e.g., \textit{R v Autagavia} [1985] 1 NZLR 398 (CA).
\item See, e.g., \textit{R v Knowles} [1984] 1 NZLR 257 (CA), and \textit{R v Walker} [1973] 1 NZLR 99 (CA).
\end{itemize}
respect to young persons. However, the Youth Court Judge does not impose a ‘sentence’ but, rather, makes ‘orders’. The term ‘sentencing’ is only used in section 283(o), which provides for young persons of over 15 years of age to be convicted and ‘[…] brought before a District Court for sentence or decision.’ In this case, not the Youth Court Judge, but the District Court Judge may ‘sentence’ a young person.

Pursuant to section 283, the Youth Court Judge has the opportunity to do one or more of the following: he or she can discharge the young person from the proceedings without further penalty; admonish the young person; order the young person to come before court if called upon; order the disqualification of a young person from holding or obtaining a driver’s licence for a motor vehicle; impose a fine; order the young person to pay a sum towards the cost of the prosecution; order the young person to make restitution; order the payment of reparation; make an order for the forfeiture of property; impose a community work order, make a supervision, supervision with activity, or supervision with residence order, or transfer the charge to the District Court. These orders are described more closely in the following.

**Discharge**

The Youth Court Judge can discharge the young person from the proceedings without further penalty. If the court discharges a young person under section 283(a), ‘no further order or penalty’ may be imposed in contrary to section 282(3) where, if the young person is discharged under that section, the court may make orders under section 283(e)–(j).

---

362 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP283.3 Explanation.*

363 Section 283(a).
As to the question which type of discharge should be entered in respect of serious offending, a 282-discharge or o 283(a) discharge, Becroft DCJ noted in *Police v HGBH*\(^{364}\) that section 282 is not confined to less serious offending.\(^{365}\) Instead, the law requires a consideration of section 284, the youth justice principles in section 208, and the general principles set out in sections 4 and 5 and ‘in recognition of the particular facts of an individual case and an offender’s positive response, it is sometimes appropriate to absolutely discharge an offender where there has been serious offending’.

**Admonition**

The Youth Court Judge has the opportunity to admonish, which means to formally warn, the young person.\(^{366}\) However, the effect of the FGC process and other responses given to a young person as part of the whole youth justice process may largely have displaced admonition as a purposeful disposition option.\(^{367}\) Generally, a judge will informally caution a young person as an adjunct to some other formal order.\(^{368}\)

---

364 *Police v HGBH* [2006] DCR 958.


366 Section 283(b).

367 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act*, CYP283.5 comment.

368 Ibid.
Come before court if called upon

Furthermore, an order may be made for the young person to come before court if called upon within 12 months after the making of the order, so that the court may take further action.\(^{369}\) This order is in fact a type of conditional discharge and will generally be issued where the young person has already (similarly) offended before and the judge wishes to exercise some control associated with encouraging rehabilitation.\(^{370}\) If the court orders the young person to come before the court if called upon, the court may at any time during the duration of the order direct the young person to be recalled on the application of a social worker or member of the police.\(^{371}\) If the young person is recalled, the court may exercise any of its sentencing powers. However, if at the time the original order was made the court has already fined, made an order for payment towards costs, or made an order for reparation or restitution or forfeiture of property, that power may not be exercised a second time.

Disqualification from holding or obtaining a driver’s licence

The court may order the disqualification of a young person from holding or obtaining a driver’s licence for a motor vehicle if he or she was involved in a traffic offence.\(^{372}\) Such order may also be made for the confiscation of a motor vehicle as could have been made by a court other than a Youth Court under the *Criminal Justice Act 1985* if the young

---

\(^{369}\) Section 283(c). This order, unless it expires before that time, expires six months after the young person has turned 17 years, see section 296.

\(^{370}\) *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP283.5* comment; see also: *Police v T* (Unreported, YC, Wellington, CRN 0285006796; CRN 0285006292-5, Brown DCJ, 4 July 1990).

\(^{371}\) Section 295(1).

\(^{372}\) Section 283(i); see also section 293 A.
offender were an adult and had been convicted of the offence in a court other than a Youth Court.  

**Fine or payment of a sum towards the cost of the prosecution**

The judge can impose a fine, or may order the young person (or, in the case of a young person under the age of 16 years, any parent or guardian) to pay a sum towards the cost of the prosecution. The Youth Court can order immediate payment of the fine pursuant to section 83 of the *Summary Proceedings Act 1957*, but section 283(d) prohibits that the court may issue a warrant of commitment for default. Any bona fide cost arising from the prosecution might be the subject of an order.

**Restitution**

Moreover, the judge may order the young person (or, in the case of a young person under the age of 16 years, any parent or guardian) to make restitution in accordance with provisions of the *Crimes Act 1961*. Regarding the restitution order, section 404 of the *Crimes Act 1961* applies, stating that the court may order any person who is convicted of an offence to deliver any property found in his or her possession to the

---

373 Section 283(j). See section 84 of the *Criminal Justice Act 1985*. As to where a charge is proved against a young person in the Youth Court, and the offence is such that if convicted in a District Court he or she would have had incurred demerit points and the *Transport Act 1962*, see section 294 of the CYPFA.

374 Section 283(d). Section 292 provides for the whole or part of a fine to be awarded to a victim of an offence that suffers physical or emotional harm.

375 Section 283(e). As to the effect of such an order, section 293.

376 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act*, CYP283.5 comment.

377 Section 283(g). As to the effect of such an order, section 293.

378 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act*, CYP283.5 comment.
person who appears to the court to be entitled thereto. Where such an order is made, and it appears to the Court that a purchaser has bought the property in good faith and without knowledge that it was dishonestly obtained, the Court may order that on the restitution of the property the offender shall pay to the purchaser a sum not exceeding the amount paid by him. This, however, shall not affect the right of any person to recover by civil proceedings any sum in excess of the amount recovered under the order. Where anyone is convicted of having stolen or dishonestly obtained any property, and it appears to the Court that the property has been pawned to a pawnbroker, the Court may order the pawnbroker to deliver it to the person appearing to the Court to be entitled to it either on payment or without payment to the pawnbroker of the amount of the loan or any part thereof, as the Court in all the circumstances of the case deems just.

Section 404 Crimes Act 1961 leaves unaffected the title to property obtained by crime. With one exception, the section affects possession only. If an order for restitution is made, no one claiming the property in the goods will be prejudiced. The exception arises under subsection(4), if the true owner complies with a condition in the order that money be

379 Crimes Act 1961, section 404(1). As to the relevant principles applicable in respect of orders that may be made see R v Pedersen [1995] 2 NZLR 386, (1994) 12 CRNZ 224 (CA); Brough [1995] 1 NZLR 419. The matters which need to be identified by the Crown in support of an application were referred to in Carter v Solicitor-General of New Zealand [1999] 1 NZLR 541, (1998) 16 CRNZ 192 (CA).

380 Crimes Act 1961, section 404(2)

381 Crimes Act 1961, section 404(2C)

382 Crimes Act 1961, section 404(3)

383 Crimes Act 1961, section 404(4) states that if the person in whose favour any order under subsection (3) of this section is made thereby obtains the property, he shall not afterwards question the validity of the pawn.
paid to a pawnbroker. In such event he cannot subsequently challenge the validity of the pawn.³⁸⁴

Reparation

Where the court is satisfied that, as a result of the offence, any person other than the offender suffered any emotional harm, or any loss of or damage to property, the judge may order the offender (or, in the case of a young person under the age of 16 years, any parent or guardian) to pay to the person concerned such reparation as is thought fit.³⁸⁵ Regarding the harm or loss that has been suffered, it has to be ‘through or by means of an offence of which the offender has been convicted’.³⁸⁶ The reparation is limited to direct loss.³⁸⁷ If the reparation order was issued against a parent or guardian, he or she must be given the opportunity to be heard.³⁸⁸

Forfeiture of Property

The court may also impose an order for property to be forfeited to the Crown in certain cases.³⁸⁹ That applies where the forfeiture would have been obligatory or could have been ordered under any applicable enactment if the young person were an adult and had been convicted by a

³⁸⁴ Garrow and Turkington’s Criminal Law in New Zealand, Crimes Act 1961, section 404, CRI404.2 Explanation.
³⁸⁵ Section 283(f). As to the effect of such an order, section 293.
³⁸⁶ Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP283.5 comment.
³⁸⁷ Section 287.
³⁸⁸ Section 288.
³⁸⁹ Section 283(h).
District Court. The court can exercise broad discretionary power as to forfeiture of property.

**Community work order**

Furthermore, a Youth Court Judge has the power to make a community work order to which the young person must consent. The powers of the court to make such orders are restricted by section 285(5) and (6). The judge shall not make a community work order unless the court first obtains a report from a social worker. Such a report must be accompanied by a plan of implementation, and a written statement containing the terms of the order must be given to the young person. A community work order, unless it expires before that time, expires six months after the young person attains the age of 17 years. The maximum number of hours that may be imposed is 200 and the minimum is 20.

---

390 Section 283(h).
391 *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP283.5 comment.*
392 Section 283(l). As to the meaning of ‘work’, see *Police v K* [1992] DCR 100, where Callander DCJ had to decide whether a community work order and a supervision with activity order could be imposed concurrently (as the FGC had recommended) and held that a Court can impose activity or work; one or the other, but not both; underlying concern that swamping youth with too many responsibilities could be counter-productive. According to Callander DCJ, ‘work’ is a wide concept involving most purposeful human endeavour; used in contradistinction to ‘activity’.
393 Section 298(1); see generally the provisions of sections 298-303.
394 Section 334(2).
395 Section 335.
396 Section 340.
397 Section 296.
398 Section 298(1).
Supervision

The Youth Court Judge may also make an order placing the young person under the supervision of the Chief Executive or a specified person or organisation for a period of not more than six months.399 Such order, unless it expires before that time, expires six months after the young person attains the age of 17 years.400 Before a supervision order may be made, a report and a plan must be prepared401 and a written statement containing the terms of the order has to be given to the young person and their legal counsel or Youth Advocate.402 Where a young person shall be placed under supervision, the consent of the person (other than the Chief Executive) or organisation to such supervision must be sought.403 Further, the parent or guardian of the young person must be given an opportunity to make representations to the court before an order under section 283 can be made.404

Supervision with activity order

A Youth Court Judge has the opportunity to impose a supervision with activity order.405 In Police v K,406 (supra) Callander DCJ stated: ‘activity

399 Section 283(k). As to conditions relating to such an order, see sections 305 and 306. As to where the young person fails to comply with conditions, see section 309. As to the suspension, cancellation, and variation of a supervision order, see section 310.
400 Section 296.
401 Sections 334(2) and 335.
402 Section 340.
403 Section 286.
404 Section 288.
405 Section 283(m). As to where the young person fails to comply with conditions, see section 309. As to the suspension, cancellation, or variation of a supervision order, see section 310.
must be something more than and different from community work order’. He further declared that ‘activity’ intends to include human action other than work. Thus, supervision with activity orders have their own distinct character and purpose.\(^{407}\) Where a supervision with activity order is imposed, the young person generally has to go to weekday, evening, or weekend activities, or a programme set by a supervisor. Similar to the supervision order, the young person has to consent.\(^{408}\) Furthermore, it is necessary to obtain the consent of that person (other than the Chief Executive) or organisation to such supervision.\(^{409}\) A supervision with activity order shall not be imposed unless the nature and circumstances of the offence are such that, but for the availability of that order, the court would have considered making a supervision with residence order.\(^{410}\) A supervision with activity order, unless it expires before that time, expires six months after the young person attains the age of 17 years.\(^{411}\)

**Supervision with residence order\(^{412}\)**

Finally, the Youth Court has the power to make a SWR-order.\(^{413}\) This order can be regarded as the most severe order available to a Youth Court Judge under the *CYPFA*. Subject to section 290, no such order shall be made unless the offence is a purely indictable offence,\(^{414}\) or the nature or circumstances of the offence are such that if the young person were an

---

\(^{407}\) *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act*, CYP 283.5 comment.  
\(^{408}\) Section 307(1).  
\(^{409}\) Section 286.  
\(^{410}\) Section 289.  
\(^{411}\) Section 296.  
\(^{412}\) Hereafter referred to as ‘SWR-order’.  
\(^{413}\) Section 283(n). As to the restrictions on the making of such order, see section 290(1).  
\(^{414}\) Section 290(1)(a).
adult and had been convicted for that offence in a court other than the Youth Court, a sentence of imprisonment would be required to be imposed on the young person, or the court is satisfied that any order of a non-custodial nature would be clearly inadequate because of the special circumstances of the offence or the offender. When an SWR-order is made, reasons must be given and these shall be recorded in writing by the judge making the order.

As defined in section 2, ‘residence’ means any residential centre, family home, foster home, family resource centre or other premises, approved or recognised for the time being by the Chief Executive as a place of care or treatment for the purposes of the CYPFA and does not include a penal institution or a psychiatric hospital. However, regardless of the original intention of the CYPFA and as opposed to section 2, residences often are CYF homes and do seldom satisfy rehabilitative or care purposes. In practice, young persons often spend their first days of an SWR-order in police cells, which is clearly not rehabilitative.

The duration of an SWR-order is three months in the custody of the Chief Executive. However, the Chief Executive can reduce the duration to two months if the young person does not abscond or commit further offences during the custodial placement. An SWR-order must be made

---

415 Section 290(1)(b). ‘Sentence of imprisonment’ is meant within the meaning of section 4 (1) of the Sentencing Act 2002.

416 Section 290(1)(c).

417 Section 340(1)(b); see also Gordon v Police (1990) 6 FRNZ 523.

418 See Police v CMT (Unreported, YC, Wanganui, CRI 2004-283-44, Callinicos DCJ, 6 May 2005), where Callinicos DCJ stated that if a supervision with residence order was made, CMT would probably spend the first few days of that in Police cells which would not be rehabilitative.

419 Section 311(1).

420 Section 314.
in conjunction with a supervision order (section 283(k)).\textsuperscript{421} The supervision order comes into force after the expiry of the SWR-order, or when the Chief Executive releases the young person from custody.\textsuperscript{422} Concluding, under section 311, the maximum period a young person could remain under the supervision of the Chief Executive is nine months (three months under section 311(1) and six months under section 283(k). An SWR-order, unless it expires before that time, expires six months after the young person attains the age of 17 years.\textsuperscript{423}

**Transfer to the District Court**

Where a young person is over 15 years old, the court may enter a conviction and order that the young person be brought before a District Court for sentence or decision.\textsuperscript{424} Pursuant to section 285(4), the Youth Court Judge may not exercise any of its powers under sections 283(a) and (c)-(n) when making an order under section 283(o). A transfer to the District Court can take place when two conditions are satisfied.\textsuperscript{425} First, the court must have considered all other alternatives available to it under the provisions of the *CYPFA* relating to youth offending, and must be satisfied that none of them is appropriate in the circumstances of the particular case.\textsuperscript{426} Second, the offence must be a purely indictable offence,\textsuperscript{427} and/or the nature and the circumstances of the offence are such that, if the young person were an adult and had been convicted of the offence in a court other than a Youth Court, a full-time custodial

\begin{itemize}
  \item \textsuperscript{421} Section 311(2).
  \item \textsuperscript{422} Section 311(3).
  \item \textsuperscript{423} Section 296.
  \item \textsuperscript{424} Section 283(o).
  \item \textsuperscript{425} Section 290(1) and (2).
  \item \textsuperscript{426} Section 290(2).
  \item \textsuperscript{427} Section 290(1)(a).
\end{itemize}
sentence would have to be imposed,\textsuperscript{428} and/or the Youth Court is satisfied that, because of the special circumstances of the offence or of the offender, any order of a non-custodial sentence would be clearly inadequate.\textsuperscript{429} Given that at least one of these conditions need to be existent before a transfer to the District Court can be made, the order seems clearly intended to be a course of last resort\textsuperscript{430} and is not used very often. Concerning that, Judge Strettell stated:

\[\ldots\] That [a transferral to the District Court] doesn’t happen a lot, it does usually where you have repeat offenders or very serious offending.

The Youth Court Judge may not transfer the young person to the District Court without giving the parent or guardian of the young person an opportunity to be heard.\textsuperscript{431}

\textsuperscript{428} Section 290(1)(b).
\textsuperscript{429} Section 290(1)(c).
\textsuperscript{430} Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act, CYP 283.5 comment.
\textsuperscript{431} Section 288.
6.2.4 Evaluation

6.2.4.1 Introduction

In the light of this review of the salient provisions of the CYPFA dealing with youth offending, New Zealand’s youth justice system appears to be a promising legal basis for a best practice youth justice model. The principles and strategies embraced by the Act reflect international youth justice trends and many ideas have been adapted and adopted by different jurisdictions all over the world. However, this does not necessarily mean that the legislation really works well in practice. One purpose of this research is, therefore, to examine how the principles and provisions of the CYPFA have been put into practice and how people who work with the legislation evaluate its effectiveness.

Generally speaking, the New Zealand practitioners working in the field of youth justice who have been interviewed during the research for this thesis all looked favourably upon the CYPFA. While eight of 10 interviewees explicitly stated that the Act is ‘good’, ‘great’, ‘wonderful’ or ‘a vast improvement of what was available before’, two participants did not use expressions like that but indicated that there are more strengths than weaknesses under the new legislation. However, the practitioners also spoke out on some weak points and criticised a number of aspects.

432 All statements quoted are from interviews conducted in August 2006 as described in Chapter Two.
6.2.4.2 Diversion

General Evaluation of Diversion as a Response to Juvenile Offending

One of the strengths that was emphasised by all 10 participants was that the system promotes diversion from court appearances and formal criminal convictions. All participants stated that diversion, which is operated on various levels in the New Zealand youth justice system (either as police diversion schemes, FGCs, or discharge or withdrawal of information in the Youth Court), is a valuable way to respond to juvenile offending because most children and young people commit petty offences during their adolescence but generally stop offending when they grow up. Regarding this topic, James Read stated: ‘Generally, it [diversion] is a good idea because the majority of kids you never see again.’ Judge Walsh supported this view by saying: ‘[…] It is just part of life that kids are going to experiment, push boundaries, and some get caught, but the majority never re-offend.’

Further, all participants were convinced that diversionary responses to first-time and minor juvenile offending are necessary because keeping young persons out of formal criminal proceedings, state institutions, and custody helps to avoid stigmatisation and labelling, as well as preventing the exposure of the young person to associations and practices which may prove unhelpful. Judge Strettell stated:

I think it [diversion] is good, there is no magic answer to have people appearing in court and convicting them, […] and yet it can have a significant impact on their later life if they were having convictions […], so in this way, where they are returning something to those who are affected by their actions and hopefully by improving themselves as people, that’s certainly a much more positive outcome than a penalty that might be imposed otherwise.
Additionally, the diversionary schemes operated under the *CYPFA* were approved because they provide the opportunity to hold young offenders accountable but at the same time prevent the young person from having a formal criminal conviction. Judge McMeeken emphasised:

> It [diversion] is good. There has got to be some consequences and there always is with diversion. [...] It is a very sensible approach. You don’t want to criminalize young people; you want to show them that they did something wrong but you don’t want to criminalize them.

Malcolm Young supported this view and further urged that diversionary schemes should be better resourced.

> I think it [diversion] is wonderful! I think that [...] resources for diversion should be our first priority. The research clearly shows that putting young offenders into a justice system, especially one that is slightly overloaded, is not effective.

One participant further emphasised that diversionary schemes also help to unburden the overloaded court system. Another participant estimated that about 90% of young offenders would be diverted at present and stated that diversionary schemes should be used even more often.

**Police Diversion**

Concerning police diversion, all participants agreed that Youth Aid officers are doing a great job and that police diversion schemes are generally working well in New Zealand. It was said that Youth Aid officers know the people they work with and the areas they work in very well. Concerning this, Judge Costigan stated:

> I think they [the police] are constantly improving their responses. [...] They know the local areas they work in quite well, and what is available, and they know the people to contact more than we do.
Judge Walsh affirmed this view in saying: ‘they [the Youth Aid officers] are special people. If they don’t have the right energy then they don’t stay in that team. […] I have got confidence in them.’ He further recalled that he had had very good experiences with Youth Aid officers while working in Invercargill.

[…] I know from my 6-½ years in Invercargill that the two police officers who dealt with youth offending were brilliant. They knew the city, they knew the people they were dealing with, they knew if they were dealing with children from career criminal families because they have dealt with these families before, […] and they knew that this kid is going to be a potential time bomb. […] So I can recall that some of these police officers were really going the extra mile to try and find jobs for some potential time bombs.

However, about one third of all participants believed that a number of police officers other than Youth Aid officers do not entirely understand the aims and principles of the CYPFA, therefore do not approve of the Act, and consequently do not always act in the way that they should. Judge Strettell stated:

I think Youth Aid officers are very good. They understand the process, they are very reasonable in their approach and they understand what’s happening. I think sometimes the general police don’t understand and become frustrated with the process and respond in a different way from how the Youth Court or a Youth Aid officer would have responded. […]

Judge Walsh suspected that

[…] they [the Youth Aid officers] are regarded by some of their colleagues as soft touchers. […] There are some other police officers that would like all young people locked up and crucified […].
Anthony Greig supported these statements by saying:

They [the police officers] follow the law somewhat reluctantly. The police officers don’t like the Act; they think it is too lenient. When I was a police officer when the Act came into force, my colleagues did not like the new Act which restricted their competency and their possibility to arrest.

With regard to police diversion, further concerns were expressed about resources. As to the opportunities police officers have to respond to juvenile offending, James Read stated:

I think that is depending on what resources are available. Especially for the minor matters they [the police officers] have good opportunities and if they are doing it in a productive way it can have a big impact.

Cathrene Brophy said:

I think probably they [the police] are under resourced. There are not enough Youth Aid officers to cover the amount of offending that they have.

Malcolm Young agreed by saying that

[…]

they [the police] should be resourced far more. I think the police are absolutely wonderful in the fact that they do approach youth offending with specialist teams like Youth Aid officers, I just truly believe that they need more Youth Aid officers in order to link in with the community, in order to look at other resources and not burn the community out. […] I believe we should really, really be working hard to support police in terms of the alternative action. And I think it is a really wonderful system in New Zealand that Youth Aid officers are able to do a lot of diversion work. I would like to see some of that diversion work far more robust. For example, far more abilities for families or young people to get into what we call family counselling, far more abilities to get into a father and son counselling and some work around that, and a lot more done in the areas of - if a young person first offends - having in there someone really skilled who can walk them through that pathway, talk about consequences, talk about some of the impact, and talk about the effect it has on them.
Regarding alternative diversionary actions carried out by police officers, Margaret Gifford emphasised that the CYPFA only legislates for police warnings while the other informal actions often imposed by police officers in order to divert young people from formal proceedings, like community work, are not legislated for. She urged that the CYPFA should be amended to legally recognize other alternative actions.

[...] It is very strange that the CYPFA does not legislate for something like that. It is very weird. The warning is quite formal [...], but there is no talk of anything else. [...] It is an easy thing for the CYPFA [to] be amended to put things in and to formally recognize these actions as diversion other than the warning. But it has never been done.

6.2.4.3 Family Group Conferences

The FGC concept, which was a wholly new diversionary concept for dealing with juvenile offenders outside the courtroom when introduced by the CYPFA in 1989, was praised by all participants. They endorsed the opportunity to include families and victims in decision-making and the fact that the young offenders themselves have a say in the FGC process. Further, around half of all participants stated that the system under the CYPFA works much better than the previous system. Cathrene Brophy said:

[...] The FGC process is the major, the star, the jewel in the crown of what you ever think to resolve. Decision making power is shared. [...] It is a way of involving victims in a process. So while it is not perfect, it is a whole lot better than what we had. And I would hate to go back to the old way.
Judge Walsh supported this point of view:

Strengths I think are that victim, family and offender sit around a table and sort out the penalty or sort out how to respond to the young people’s problems.

Judge Strettell agreed by saying:

It [the system] empowers the family to be involved in the decision making process, and it enables all those who may have been part of the offence, from the victim to the offender to the family and the professionals, so it is not simply the victim represented by the court, imposing a sentence upon the young person, so the solution should be so much better because there is so much more involvement of all parts […].

FGC Impact on Young Offenders

While one participant stated that she could not tell, the other nine interviewees were of the opinion that an FGC is a valuable experience for most young offenders, especially for those who appear for the first or second time, because being confronted by the whole family is generally ‘uncomfortable’, ‘difficult’ and ‘challenging’ for a young person and normally has some impact. It was emphasised that an FGC is not ‘a soft option’ but can be very demanding for the young person. As Margaret Gifford said:

[…] It is the family you need to front up with and sometimes it is much easier for young kids to front up with someone they don’t know and they are never going to see again, like a judge, as opposed to mum, dad, auntie and uncle and people at school they have to face every day. So from that point of view I think it is brilliant […].

Seven participants emphasised, however, that an FGC ‘means nothing’ for recidivist offenders who are ‘on their eighth, ninth, or tenth’ FGC. It was stated that recidivist offenders regard the FGC ‘as a soft option to be laughed at’.
FGC Acceptance Among Victims

The participants were asked how they evaluate the acceptance of the FGC process among the victims. Five interviewees stated that the victims generally ‘feel empowered’ and ‘believe that it is a wonderful process’ where they get ‘satisfaction through the way they face people, the letters of apology, tears [and] emotions’. It was further said that ‘some victims really like the opportunity of seeing the young person because ‘victims want to know “why did you do this to me?” and [therefore] find it a really good process to go through.’

The other five participants were of the opinion that the acceptance among the victims varies. It was generally believed that those victims who ‘engage in this process gain a lot from it […], because a criminal is always much less of a demon when you meet that person face to face’; but it was also believed that those who do not take part do not approve of the FGC process and/or the outcomes. Further, it was said that ‘sometimes we [the judges] get a very angry letter from a victim’ subsequent to an FGC. Additionally, it was emphasised that victims generally want ‘their wrong put right’, and when ‘there is no sense of satisfaction’ the victims do not appreciate the FGC process.

Concerning victim participation it was stated that ‘many don’t go’ and that the willingness to participate in an FGC had been great when the CYPFA came in but has drastically diminished since then.

FGC-Acceptance Among Families

The majority of participants believed that families appreciate being involved in the process and having a say. It was said that most families ‘want the young person to be held accountable’ and ‘to take responsibility for what they have done’. However, it was also emphasised
that ‘for bad families it’s just a joke’ and that non-supportive families generally ‘remain unhelpful and don’t accept it [the FGC process]’.

**Family Participation in FGCs**

In this context the question arises whether and how those ‘bad’ families can actually and practically be included in decision-making. It was assumed by the author that ‘difficult’ families often do not care much about their young persons and therefore might not be cooperative in participating in an FGC. Interestingly, this presumption was proven wrong. Most interviewees could tell from their experiences that even ‘difficult’ families only on rare occasions refuse to participate in an FGC. Malcolm Young emphasised:

> […] There is not as much resistance as perhaps people think.  
> […] So I personally don’t find a lot resistance to come into conference and I truly do believe that parents want their young people most times to be okay.

However, it was conceded that occasionally no family member turns up at conference. Anthony Greig stated: ‘you can’t force the family to take part. It happens that a parent is not coming. […] These are very sad little affairs.’ Nevertheless, the participants agreed upon the fact that this does not happen very often. Siobhan McNulty said: ‘it is rare that there would be no one there. She emphasised that ‘there would usually be one member of the family there,’ even if the young person comes from a ‘difficult’ family.

However, all participants were at one that any family’s willingness to participate in an FGC diminishes the more FGCs are held in respect of a young person. Consequently, families of recidivist offenders who have already been to several FGCs tend to not turn up anymore after a certain stage. Malcolm Young stated:
[...] However, although you have a lot of family participation at the first time, it decreases with the number of conferences you have, you know. They [the family] draw a line. And we say: “no, no, stay in there, these are young people”. But they say: “I know it is my kid and I should go there, but somehow I have to get the message to them that I am not going to go to conferences every month”.

Cathrene Brophy acceded:

That [families do not attend an FGC] doesn’t normally happen with first-timers. I have been to cases where they [the family] are not coming anymore; they think it is a waste of time because they [the FGC] don’t fix them.

As to the question what may happen if not enough family members had turned up at FGC, it was stated that a judge could order the FGC to be reconvened. However, this provision is of little practical use because those families who refused to participate before would usually still not turn up. Judge McMeeken said:

The judge can say that the FGC can be reconvened when too few family members attended and the coordinator can tell the families: “that is what the judge said”, but these are families who don’t give a toss about what a judge said. But then it is not the system which fails - the system shouldn’t be blamed – it is the family. [...] When the family is there and want to get involved and want to help the young person, then it will work, but if they don’t, then it won’t. You can’t make the people care about their young person. You can’t legislate making people better people; you can’t legislate making parents better parents.

As already mentioned, even if no family member appears at the conference, the coordinator and the Youth Aid officer may still make valid decisions.\(^{433}\) Nonetheless, the philosophy of family-decision-making may easily be undermined in such cases and the young person would rather be unbacked. To nevertheless achieve just outcomes and to assure support for the young person, the practitioners generally try to find

\(^{433}\) See \textit{H v Police} [1999] NZFLR 966; 18 FRNZ 593.
another adult, or even the peer group of the young offender, to provide support during the FGC process. The fact that families do not appear at conference shows the practitioners that the young person lacks support in his or her everyday life and that therefore persons other than the unwilling family need to be found who might provide some stability and assistance in the young person’s future life. Siobhan McNulty said:

For some kids we have unsupportive family but for some kids we have supportive other people in their lives, for example they might be on the YMCA course and some of these tutors are really good and might be supportive for that young person […]

Malcolm Young added:

[When no family member attends the FGC], it shows certain things, […] for me as a practitioner, it tells me something. […] What it does tell me is that I need to hook a lot more agencies in in terms of support. […] And it also tells me that that young person needs role models around them, perhaps. […] Part of my role is to make sure that there are a couple [of support persons]. And I always find someone, because we actually have some good agencies. And I’ll invite for example someone from youth culture development who run a series of programmes and do mentoring and everything. So I’ll find someone. […] I have never run a conference without an adult. […] I would adjourn it [the FGC]. It is also about making the young person to acknowledge who are the players in their lives. I had some cases, and I need to say that some people are uncomfortable with that, where I have had the peer group in, because there was nobody else. Of course the young person cannot have somebody around who committed the offences with him, but outside that, however, if that’s the only support group you can see, I am not against bringing in that peer group and try to work with the young person and the peer group in order to get some change.

In relation to family participation during the FGC it was indicated that good outcomes could not only be achieved if a whole extended family is involved. Malcolm Young emphasised that good outcomes could also be attained if only one or two family members participate. Concerning this, he stated:
The best conferences are where the young person has full support, where the victims are present and everybody does their role well. As a matter of fact the best conferences are where I, the coordinator, say and do very little. [But] I don’t make a judgment call about mum being the only one there; as a matter of fact that conference outcome may be more robust than if I had 30 bad members. […] I had conferences that I ran where I had mum, dad and the young boy. I had conferences that I have run where I had mum, dad, 15 family members and the young boy. The common denominator: they didn’t come back. So who is to say that one [FGC] was better than the other? At the end one must say that both were effective.

Although the interviewees experienced a rather high willingness to take part, about one third of them still urged that the CYPFA should be amended so it would be able to force parents to participate and to hold them accountable. Three participants mentioned that several overseas’ jurisdictions have implemented FGCs and have put into practice legal provisions for being able to force family members to attend FGCs. Malcolm Young stated:

There are places overseas where they have taken pieces of our Act and they made the accountability around families a little more robust. […] I think we would need the overseas’ approach.

**FGC Participation of ‘Criminal Career Families’**

While examining ‘difficult’ families, another issue regarding FGC participation comes into mind. As already discussed, some young offenders come from difficult family backgrounds. Often, these families have criminal careers themselves. In this context, the question arises of whether it seems to be valuable that ‘criminal career families’ participate in an FGC. It can be assumed that those families might refuse to participate in an FGC because they disapprove of society’s norms and values anyway. However, if those family members notwithstanding agree to take part, they may not be able to give good advice or to support the young person in carrying out the plan. Instead, criminal family members might be adverse role models if the young person approves of their way
of life. Thus, there is probably no clear answer to the question of whether ‘criminal career family’ members should take part in FGCs or not and of whether their participation is valuable or not. It really depends on the individual case. Participation might have some impact on the young offender if those family members honestly tell the young person that they want him or her to have a better life than they have. It might be disadvantageous, however, if the criminal family member actually reinforces the offending behaviour and the young person adopts the values of a criminal lifestyle. Concerning this topic, Malcolm Young said:

There might be young persons who have two or even three generations of criminal activity in their family. So their parents were criminals and still are, and their parents also were criminals and still are. So setting up that conference, you might think that they would not agree to participate, but actually they do agree to participate. And often the messages they give are very clearly: “Look, I don’t want my son or daughter going down the same road as I am.” […] So yes, they do turn up at conference, yes they say the right things to the young person, and often in terms of the male in that family, he will read the riot act about how ridiculous it is for the young person to be out offending, but when they have a huge history themselves, young people, although they really, really seldom will back their parents, often sit there and think: “you gotta be joking man, you are giving me a moral lecture? […] You have got no morals!” One day I got uncles and the father of one boy out of prison, although it is unusual to get a father out of prison, [but] in this case two of the uncles and the father were in prison at the same time and they came out to the FGC. So every one of those men – I believe – spoke honestly about how they wanted the young person having a different life, but at the same time they were in a lock up, you know. So the young person’s response to that was: he smiled and grinned a little bit as if to say: “Oh my God, […] you can see what I have got.”
Cultural Appropriateness of the FGC process

The youth justice system set up under the CYPFA was intended to be culturally sensitive and appropriate. The FGC, as a restorative and family-decision-making forum, was created with the indigenous Maori way of dispute resolution in mind and was supposed to better address Maori and Pacific Island people. Regarding the question of whether the FGC procedure actually has the potential to better cope with New Zealand’s cultural diversity and actually addresses Maori and Pacific Island people in a better way, nine participants were at one that it does. Only one participant stated that she was not entirely sure whether or not the new system was a vast improvement in this regard.

Furthermore, the majority of the participants assumed that the FGC system works best when victim and offender are of the same cultural background, even though most participants found that the system generally works well regardless of whether victim and offender have the same or a different cultural background. Concerning this topic, Judge Strettell stated:

It is an individual thing. I don’t think you can say that an ethnic background is more successful or not. I think it depends on the family of the offender – how responsible they are.

And Malcolm Young added: ‘I am not sure it [the cultural background] has any relevance at all.’

It was said, however, that the atmosphere could be a little tense if victim and offender have different cultural backgrounds and that the victim might sometimes not feel comfortable when the offender wishes the conference to be held at his or her place or at a cultural institution. The participants agreed, however, that these difficulties would generally be overcome by the coordinator using his or her skills. Judge McMeeken
said: ‘[… The FGC] can be a little difficult [where victim and offender have a different cultural background], but that is the point where the experience of the coordinator comes in.’ Margaret Gifford added:

[...] When you have a huge Maori family and the victim is Pakeha and the Maori family want it [the conference] on the marae, a coordinator has to be very mindful in the fact that you cannot have it in a place that would intimidate anybody in that conference.

Anthony Greig emphasised:

There was a lot of reservation about that [whether the system would work when victim and offender do not have the same cultural background], but my experience is that both parties come away having learnt something. You will never have a little old lady come to any harm at the hands of a large Maori family. I would send my own mother into that situation. She would be treated with respect and compassion.

As to the question of whether the FGC system also addresses the needs of ethnic groups other than Maori and Pacific Island people, most participants said that they could not tell because they did not have enough background experience concerning this topic since Christchurch is not such a culturally diverse city. However, some of the interviewees stated that the system works well for any ethnic group because it is based on shared decision-making and family support. Judge Strettell said:

It [the FGC process] can accommodate any ethnic diversity because you can invite whom you want as support people to your conference, […] there can be support provided, [and] the family can be involved in the process. […] The process is flexible enough to involve other groups. […]

Two participants emphasised that Christchurch has a growing Somali refugee population and they experienced that the FGC system works well for them, too. They stated that because of the refugee background there are not many family members around generally, so support would normally be provided by agencies, ensuring that someone is there to help
monitoring the FGC plan and maybe give the family other assistance that is required.

6.2.4.4 Evaluation of Measures and Court Orders

The participants were further asked how they evaluate the measures and court orders available under the current youth justice system and if they think that those measures and orders help to prevent young people from reoffending. In answering this question, all 10 participants were interestingly largely in accordance with each other. They all agreed that the system provides for a great range of different measures, starting with police diversionary schemes and ending with the supervision-with-residence order. The interviewees were of the opinion that, concerning the large majority of young offenders, the responses available are adequate and help to prevent reoffending. While most young offenders stop their criminal activity after they have received an informal police action, others are ‘slow learners’ who reoffend a couple of times but give up offending after having been subject to an FGC or having received formal court orders. Judge Strettell commented: ‘for the large percentage of the young people, what we have available is adequate, is quite capable of controlling their behaviours.’

However, although the responses to youth offending available under the current system were generally regarded to be sufficient, all participants had two objections: first, they agreed that the measures are not sufficiently resourced, and second, they held that the responses available do not serve recidivist offenders.
Resources

Regarding the resources, all participants agreed that the CYPFA provides for great ideas and opportunities in theory, but that there are not enough resources in order to put them into practice. Most participants claimed that there are huge waiting lists for beds in residences, that there are not enough detox-, drug withdrawal-, and therapeutic programmes available, that more counselling and mentoring would be needed, and that there are not enough social workers to monitor plans and cope with the huge number of supervision orders. Judge McMeeken said:

The problem is resourcing. We don’t have good facilities for treating young persons with alcohol- and drug addiction, we don’t have facilities for treating young persons who have been really damaged because of their upbringings. […] We don’t have decent residences, we don’t have programmes, good rehabilitation programmes, long-term rehabilitation programmes for young persons; so it might be that the orders under the Act may be okay but they are not sufficiently resourced. […] There is an order called supervision with activity, where young people are supposed to do something and be strictly supervised by social workers. The programmes do not exist so the order ‘supervision with activity’ is hardly ever used now. So there have to be programmes. It is expensive but if it turns the young people around it is worth it. […] When I was a young lawyer and the Act was very new, there was much more money allocated for each FGC so the […] coordinator could really look and find some family and could finance flying an uncle and an aunt from Auckland here and flying another distant cousin from Wellington – they had lots more money for the FGC. And as times have been going on, the resources have been withdrawn. […] If you are going to have this [FGC-] system, you have to have the best people there because otherwise it won’t work. […] And the whole thing with monitoring the plan, you know, they are not adequately monitored because there aren’t enough social workers and that all comes back to resourcing. […] I don’t know how to get around it but if you are going to have legislation that on paper looks really good, you can’t not fund it properly.
Siobhan McNulty added:

[...] It is all very well to put all these things into place but if the resources are not there to deal with it; the social worker who has been appointed to try and address these things and never sees the young person because they are too busy? Then it is hopeless. If there is no funding to pay for a young person to have a drug- and alcohol assessment or to have counselling or all those sorts of things; if there are not enough alternative education courses then what will you do. So the resourcing is a huge issue really and particularly in the area of drug and alcohol. The young people who are going to the Drug Court are desperately in need of residential drug and alcohol treatment, and for young females at present the only option is Auckland, so they are away from their family and there is a waiting list. [...] So it’s great to be able to do all these things and to stop young people from reoffending but you have got to have the facilities and the resources.

Judge Strettell commented:

I think its [the system’s] weakness is that it needs more financial support, more social workers, more options for providing support to young people in the longer-term measures. If you ask people who are involved [in the process] they would all say they need more time and they would like to have the options.

Recidivist Offenders

All participants stated that the measures available do not serve recidivist offenders. As to the question what kind of sentence the participants thought would be sufficient to respond to recidivist offenders, the majority of participants argued that the duration of the ‘top of the tariff order’, supervision with residence, should be extended so that this order could be imposed for a longer period of up to 12 months. Malcolm Young stated:

For the top end 5% it is not working well at all. [...] [We would need] longer supervision with residence periods, a longer supervision with activity plan – 12 months I am looking at. Sometimes young people get in such a cycle of violence and offending that the only way to actually break that cycle is a lock
up with a real structure and hopefully some real consistency in the way they are approached. […] Do I like that fact that we end up locking up under 17-year-olds? No. I’d prefer that we don’t have to go there. […] But if it needs an intervention like residence […] to take them off the drugs, to do some good work with them, then I think it is better for sure. The only other option, that you leave them in the community, you may turn them into offenders and they may end up in adult lock ups then.

The participants agreed that there are some great programmes available for young offenders in the residences, but that those programmes have just started to work when the young person leaves the institution again after two or three months and goes back into his or her unsupportive family and peer group again. Judge McMeeken called attention to that problem in stating:

[…] Our penalties for the top-end young offenders in Youth Court are inadequate because we can only impose two months. […] At the top end, the most you can do to someone in the Youth Court is to impose a sentence called supervision with residence and if the young person behaves then they will be locked up for two months. […] Many judges don’t believe that is long enough. You can’t achieve a change to a seriously damaged young person within two months.

Margaret Gifford added:

[…] There are extraordinary residences, and the programmes that are going on out there are amazing. But what I have to ask […]: what can one do for an entrenched kid and their family dynamics, what can you actually do in two months to actually break it, break the cycle for good? I often feel that the top of the tariff order, let’s face it, two months in a residence with the most skilled programmes - and there are phenomenal programmes - but they have just started and then they go probably back to the family and they [the family] haven’t changed, so how can you expect the young person to change when their family hasn’t changed?

Siobhan McNulty was also of the opinion that the duration of the supervision with residence order should be extended because programmes can only avail if they can be imposed for a reasonably long period.
Further, she believed that

[…] the time in residence is sometimes the most stable time in a young person’s life – they have got a warm bed, they have got food on the table, they go to school, they have got programmes that they are doing that address their behaviours, and there they are not using drugs and alcohol. […]

Some participants were of the opinion that harder sentences need to be imposed earlier or that adult sentences should be imposed on recidivist offenders. Cathrene Brophy stated:

The measures are fine, and the court orders are fine, there’s only one, well two things really. One is, that the sentences are not long enough. […] Two months in an institution or a residence where they are looking at turning around the young person’s behaviour – two months is not long enough. They can’t do anything except incarcerate them and hold them and give them three good meals a day. They need a longer term of therapeutic programmes and I think sometimes it is back to front; we need the sentences to be harder, sooner. Children and young persons continue with behaviour because they can. And there is very little people can do to stop the behaviour. And our system intends to go up the tariff rather than […] – these are not the right terms – but if […] the system] hit[s] them right, hit[s] them fast and hit[s] them first time, […] they come up and say: “wow, what did I do, I didn’t like that feeling, I am not going to go there again and I won’t do that again” and they learn from that. We don’t do that. We have a very soft system that graduates to a tough one. […]

Anthony Greig agreed with Cathrene Brophy’s view and further argued that recidivist offenders should be selected out early and should be put through different processes with harsher or adult penalties right from the beginning. He said:

There should be a system of labelling those hard-core offenders as that. […] And really putting them through a different process altogether. […] I think the range of penalties should be more serious. They should face adult penalties. That would protect society. And after a while protecting the young person. […] Where the young person thinks that they can offend with impunity, without suffering a penalty, then they need to learn very early on. I do see a lot of 17 and 18 year olds who have
been through the youth court system, who have been treated leniently; they are committing adult crimes and have still been treated leniently. As soon as they turn 17 and commit an adult crime they are dealt with it as an adult. Wouldn’t it be better if they had learnt the consequences younger? Suddenly they end up with prison sentences of five, seven, 10 years and that might have been avoided had they been treated tougher to begin with.

This view was partly disputed by Malcolm Young, who indeed was also of the opinion that in some cases longer sentencing is needed to ‘break the cycle’, but who stressed that at the same time ‘we have to keep all the other interventions open’. He said he does not ‘want to chop off every other option’ when a young person continues to reoffend because sometimes young persons respond to the options available rather late – but at least they do respond. Earlier sentencing with harsher penalties or in the adult system would restrict the possibility of rehabilitating them. Therefore he stated that

[…] you gotta be very clear to keep all the options open all the time, because we don’t know when young people are in the looking zone. And suddenly, you get 16 ½ year old who has been offending all over the place and meets the right girl, […] or they suddenly decide they just wanna buy a good car instead of stealing one, and these things can happen overnight with young people. […] There are a lot of young men […] who have had a lot of interventions early, some people would then say they are recidivist offenders, they have had counselling, they have had social workers working alongside them, […], they had stopping violence courses and everything like that […] and they got to a point when they were 16 where we manage to get them into some employment and they never offend again in their lives.

Although most participants agreed that ‘locking young persons up’ in prison is generally not the right answer and that the ‘boot camps’ once operated in New Zealand were a complete failure, some were still of the opinion that there should be more ‘teeth’ and more serious sentences available in responding to recidivist offenders. It was stated that most recidivist offenders ‘regard it [the system] as a soft option to be laughed at’ and think the orders available are a ‘big joke’. It was suggested that
legislation should provide a wider possibility to sentence certain young persons to youth prison not only for indictable offences. Further, it was stipulated that more specialised youth prisons would be needed. Judge Walsh stated:

I sometimes think that we don’t have enough teeth, enough sufficient penalties for that 4% [of recidivist offenders]. For the other it is enough. There is a certain amount in society […] who says: “bring back the boot camp”. We used to have boot camps, […] but they were a complete failure, so a boot camp is a bit like a harsh army camp […]. The public loved it. But all statistics said it was a complete failure. And the people who ran the boots camps were bullies anyway. We need specialist youth prisons with special schools. We don’t have enough beds in youth prisons. But locking them up in an institution were they have to go to school – not ordinary schools, but schools where they might learn other skills, you know a whole range of skills that cater for their place in society. […] What I am saying is: I think there should be a lot more money spent on specialist prisons with specialist courses, in-house schools, to look at a range of skills like forestry, farming, engineering to keep young minds occupied.

Siobhan McNulty supported this evaluation by saying:

[…] And those committing serious offences – unless they are purely indictable then they can also go to prison – and I am not necessarily saying that prison is the right answer - but for some young persons there is not enough teeth really unless they have committed something like an aggravated robbery or something purely indictable then they can go to prison, otherwise, all they can do is two months residence. […] Those kids who don’t turn up to FGC, those that don’t do their plans, those who are breaching everything – what can you do? […]

By contrast, Judge Strettell was of the opinion that imposing harsher penalties or prison sentences is not the right way of responding to recidivist offenders. He stated that most recidivist offenders do not have sufficient family support and therefore providing more support and replacing ‘dysfunctional’ families should be considered. He said:

I don’t think harsher penalties is the answer at this age. […] There is sufficient ability to hold people accountable within our
system and if it is necessary to put young people into prison. We could do it if they commit sufficiently serious offences. But the issues of repeat offenders who haven’t got family support are best addressed not by simply putting them into prison – because that’s just hiding the problem. It is by treating the problem, and the problem is best treated by more support. So I suppose what I am saying is: you need to replace the family in an appropriate way. And that might be by giving the individual – if it can be done – the tools to see a better way for themselves or it might be done by simply counselling and social work support, […] If the family is not there, unless there is a very supportive alternative environment, there is a difficulty. […] Possibly you could argue that for some of our repeat offenders some type of long custodial detention (which is not prison) of the young people might be an option.

The opinion that sometimes families – especially those of recidivist offenders - cannot provide answers and/or are not a good place for children was shared by many interviewees. They argued that children therefore occasionally do need to be removed from their families, although this view was rather frowned upon after the current system had displaced the previous paternalistic model. Judge McMeeken said:

The Act is based on the premise that families are the best place for children and that families know and that families can help. Sadly, for many of the young persons, especially the serious young offenders, their families are not a good place. Their families have taught them crime and encouraged them in crime and don’t respect the system and don’t know anything else about the young person.

Judge Strettell added:

[...] If you look at the reasons behind the most serious of our young people’s offending it will be either very difficult family backgrounds or no family support. And if you could cure that, you would cure a large percentage of our serious offending, because a lot of our most serious offenders come from deprived backgrounds, or where there is simply no family. So it is a difficult social issue to which the answer really comes back to providing more support to these young people.
Malcolm Young added:

[...] For example Maori themselves in New Zealand at the moment, for themselves speaking; say that there is too much of an emphasis on placing back into families. That that should not be done - at the end of the day there needs to be a believe that the family still deserves the young person coming back. I think the interpretation of the Act throughout the time I worked in it has perhaps led some people to believe that young people should be placed back in their families no matter what. And that is not okay, and I think things like that are being challenged now [...].

Judge McMeeken agreed:

Perhaps one of the [system’s] weaknesses is that there is such reliance on the families to provide answers and some families that are generations of being crime families can’t provide the answers. [...] You would have to remove some young people from their families but we don’t have those institutions.

Margaret Gifford also acceded that sometimes there is a need to remove children from their ‘dysfunctional’ families because those families do not set boundaries. She argued:

A lot of these kids don’t need fancy programmes that the department and the world put together; they need family to give proper standards and morals and what matters to kids. That’s the weakness, I guess, because these kids are by and large products of their environment. And just as we see in care and protection, children respond to boundaries and if these kids had had proper boundaries to start with they would probably never have gone down this track. And now they go back to the same families that don’t have the boundaries. And they are too young, they haven’t got the old head on their shoulders to say no.

Further, she stated that it would be best to be able to control births in the way that ‘we need to turn around that kids become parents’.
However, all participants agreed that the magic answer to the question of how to most effectively respond to recidivist offenders probably does not exist. Concerning the question how recidivist offenders could still be better responded to, Judge McMeeken emphasised that the Drug Court provides a valuable approach:

If you want to make our youth court system better you would need monitoring and consistency because these kids come to court and every time they come to court they see a different judge and different social workers. Within drug court, we have the same people, same judge, same social worker, one coordinator, one police prosecutor; so these people see the same people every time and that is one thing that works, but we don’t have that in ordinary youth court. The drug court is one response, because if you are dealing with a young hard-core offender who is an alcoholic you have to deal with the alcoholism, otherwise he keeps offending. […] That’s what the drug court is trying to do but that is only in Christchurch, it is a pilot programme and it is the only drug court in the country.

---

434 See above n 288 and Chapter Two 2.4.
6.2.4.5 FURTHER STRENGTHS AND WEAKNESSES OF THE SYSTEM

Apart from lack of resources and the problem with responding to recidivist offenders, the participants pointed out some more weaknesses. Anthony Greig said:

It [the system] has good and bad points. The bad are, that it treats all young persons alike. That was also the problem of the old system. The old system treated all too harsh, the new system can be too lenient. There needs to be a balance stroke but it is very difficult to legislate for that in a broader way.

Judge Strettell once more emphasised that the system only works if the young offender receives enough family support:

The weaknesses: It is dependent on people to make it work, because a lot of them have to agree voluntarily about. It needs good family support. If you get good family support it works well. [But] children from good families sometimes offend, as well as children from other families.

Margaret Gifford claimed that the CYPFA should legislate for a youth advocate to also be appointed if an ‘Intention to Charge Conference’ is held. She said:

[…] It is probably fiscally unable to happen but […] it seems a shame, and it seems odd, that these vulnerable kids are at FGC in the legal process and they are not legally represented. It seems nonsense that you only get a youth advocate when you actually hit the court system.

Apart from these criticisms, however, all participants agreed that the CYPFA indeed is a new paradigm that turned the old model on its head. Anthony Greig stated: ‘The system in general […] works very well, especially for those who might have been swept up into the system under the old system.’ Cathrene Brophy said: ‘it certainly did turn the old model on its head. It changed our entire way of working. Kids tended to drift into the system before; they don’t do it now.’
6.2.4.6 Conclusion

In conclusion, it can be said that the interviewees generally approve of the current system set out under the CYPFA. They praised the police diversion schemes, the FGC process and the diversity of court orders available and emphasised that for the majority of young offenders the system works well. They were further of the opinion that families generally appreciate being involved in decision-making and that those victims who engage in the process gain a lot from it. Nevertheless, the participants expressed two major objections: resources and recidivist offenders. As to the first point, it has to be kept in mind that lack of resources is not a matter of poor legislation and that the best legislation cannot be put into practice without sufficient funding. Therefore, the legislation’s cardinal weakness seems to be that it does not provide the right responses to recidivist offenders. This problem – and the question of how to possibly resolve it - has to be kept in mind while considering whether the New Zealand youth justice system can be adopted as a best practice model overseas.
6.3 The Juvenile Justice System in Germany

As a result of the historical development of the German laws relating to juveniles, today there is a strict separation between the laws dealing with young offenders on the one hand, and children and young persons being in need of care and protection on the other. Thus, in Germany there is a distinct Act dealing only with young offenders, the JGG, whereas children and young persons in need of care and protection are dealt with under provisions of another discrete Act, the Jugendwohlfahrtsgesetz. In the following section, only the provisions of the JGG are of interest and are described more closely.

The legal base of the juvenile justice system is the JGG of 4 August 1953 as amended on 11 December 1974 and partially reformed in 1990. Comparable to New Zealand’s legislation relating to juvenile offenders, the JGG is not a discrete criminal law statute for criminal offences committed by juveniles. Instead, criminal offences (whether committed by juveniles or adults) are specifically defined in the StGB, whereas the JGG contains the substantive law and the special procedural provisions for the Jugendgericht and its jurisdiction. In 1955, Richtlinien zum JGG were enacted to facilitate the application of the provisions contained in the JGG. These guidelines, however, do not constitute

---

435 ‘Juvenile Welfare Act’, hereafter referred to as JWG.
436 BGBl I, p. 3427; for an English translation of the Jugendgerichtsgesetz see Appendix C.
437 ‘Youth Court’, hereafter referred to as Youth Court.
438 ‘Guidelines for the application of the JGG’; these have been amended regularly, last in 1994.
binding provisions but rather give instructions and recommendations for the application of the JGG.  

6.3.1 **PRINCIPLES OF THE JUGENDGERICHTSGESETZ**

The juvenile justice system in Germany aims to address the diverse causes of youth crime. To achieve this goal, the JGG follows several principles which are distinct from those underlying the adult criminal law.

Today it is acknowledged that young persons are in a special biological, psychological and sociological transition period and therefore in need of special treatment. Although a young person is held legally responsible for a criminal offence, the primary goals of responding to the offending behaviour are education and rehabilitation. The emphasis is not on the offence or its seriousness but on the offender and his or her needs. While the adult criminal law focuses on the offence itself and sentencing ought to reflect three aspects, namely the seriousness of the offence; personal guilt; and general and individual prevention of crime, youth criminal law adopts individual prevention as the sole sentencing goal by focusing only on the offender. Individual prevention can be divided into a positive and a negative aspect. While positive individual prevention aims at rehabilitation and reform of the offender through reinforcement of

---


440 General prevention of crime means that the imposed sentence does not only address the individual (in contrast to individual prevention) but is intended to, first, affirm the general public in their non-offending behaviour (positive general prevention of crime), and, second, deter the general public from committing a similar offence (negative general prevention of crime). General preventive aspects must not be taken into consideration while imposing sentences on juveniles.
society’s norm and values, negative individual prevention is targeted at deterring the offender from reoffending and protecting the general public from the offender.

Because young persons generally are vulnerable and educable, it is believed they should be educated rather than punished. Accordingly, the main principle of German juvenile justice is the *Erziehungsgedanke*[^441]. Thus, the *JGG* focuses on the educational and rehabilitative needs of juvenile offenders by providing for education-orientated interventions and disciplinary measures[^442].

Further, German juvenile justice is characterised by the *Subsidiaritätsprinzip*[^443]. Comparable to New Zealand’s legislation, the *JGG* emphasises restrained responses to juvenile offending. This means that penal action should only be taken, and court orders should only be imposed, if absolutely necessary and must be limited by the *Verhältnismäßigkeitsprinzip*[^444]. The *Verhältnismäßigkeitsprinzip* is derived from the German Constitution and sets an upper limit to legal intervention in juvenile criminal cases. Hence, the particular response chosen must be sufficient to achieve the goal that is sought, be the least severe measure among several equally suited to attain that goal, and be proportional to its goal. Further, while any response to a young person’s offending behaviour must be proportional to the offence, it must also be guided by the goal of education and rehabilitation.

As a result, the most important response to first time offenders or less serious offences committed by young persons is diversion from court

[^441]: ‘Principle of Education’.
[^443]: ‘Principle of Frugality’ or ‘principle of minimum intervention’.
[^444]: ‘Principle of Proportionality’.
appearances and criminal convictions. It needs to be emphasised, however, that police diversion is not allowed in Germany. The reason for this is the misemployment of police powers that occurred in the Third Reich under the Nazi regime.\textsuperscript{445} Since then, Germany exercises a strict separation of the powers of the legislature, judiciary, and the executive branch. Consequently, imposing sentences or even alternative actions are tasks belonging to the judiciary, being the only power in charge of administering justice. From this can be concluded that the police, being part of the executive branch, do not have the power to take action against a criminal suspect. Instead, the police have only investigative and executive powers but may not decide which legal response shall be issued.

Germany operates the principle of mandatory prosecution which means that the police, once they have reasonable grounds for suspicion, must refer every case to the \textit{Staatsanwaltschaft}\textsuperscript{446}. Thus, once an apprehended person is reasonably suspected of having committed an offence, the German police do not have the power of diverting or settling this case on their own. Instead, after the mandatory referral to the \textit{Staatsanwaltschaft}, the public prosecutor must prosecute the case in court. As a result, all forms of diversion provided for in Germany can only be exercised by the judiciary, which means by the public prosecutors or judges.

\textsuperscript{445} F Schaffstein and W Beulke, \textit{Jugendstrafrecht} (14\textsuperscript{th} ed 2002), p. 240.

\textsuperscript{446} ‘District Public Prosecution Authority’, see below 6.3.3.2. Contrary to common law systems, in Germany public prosecutors graduate in law and have to qualify as a judge. Indeed, they do not dispense justice but primarily have investigative powers. However, under certain circumstances, they may divert criminal suspects without referring back to a judge and thus occasionally perform tasks of the judiciary. Although this is not strictly consistent with the separation of powers, it is considered that malpractice of powers is prevented because public prosecutors were educated as judges. Regarding diversion, public prosecutors are therefore considered to be part of the judiciary rather than the executive branch.
6.3.2 SCOPE OF THE JGG

6.3.2.1 PERSONS TO WHOM THE ACT APPLIES AND AGE OF CRIMINAL RESPONSIBILITY

In Germany, the age brackets for criminal responsibility are regulated in the StGB. Pursuant to section 19 StGB, the age of criminal responsibility is 14 years, which means that criminal proceedings against children are prohibited and no person under the age of 14 years may be prosecuted or convicted of an offence. As children, in respect of criminal law, always act without guilt, the Staatsanwaltschaft does not have the authority to prosecute. Thus, criminal incapacity and therefore lack of criminal responsibility is a bar of trial, which needs to be observed at every level of the criminal procedure.

Nevertheless, when a child acts illegally and thereby fulfils the actus reus of an offence, the action can be criminally relevant in respect of the liability of any other person alleged to be a party to that offence.

Although the criminal behaviour of children does not justify criminal court proceedings, the committal of a criminal offence may be regarded as an indicator for the need of care and protection. If the youth welfare

---

447 In Germany, a child is a boy or girl under the age of 14 years.
449 As opposed to the law of torts, where children can be held vicariously liable for damages caused under sections 828(2)(1) and 829 BGB.
451 U Eisenberg, Jugendgerichtsgesetz (10th ed 2004), § 1 Rn 3.
department believes that the child is in need of care and protection, it may consider imposing educative measures provided for under the *Kinder- und Jugendhilfegesetz*\textsuperscript{452}. These measures, initiated on the basis of welfare considerations, are similar to those provided for under the *JGG*. In addition to the imposition of welfare measures, which have always been of minor importance in practice, there exists the possibility of taking legal action (section 1666 *BGB*) against the parent or legal guardian of the child before the family and/or guardianship court.

The relevant date to determine the age of a young offender is the point of time at which the offence in question is said to have been committed. The material time, however, is not the point of time at which all elements of the *actus reus* have been completed, but the point of time at which the offender has initiated his or her intention to fulfil the elements of crime. That means if a person aged 17 years wants to kill another person and shoots intentionally at that person, but only wounds the other mortally, the offender is legally a ‘young person’ when being charged for murder, even if the victim does not die until the offender has turned 18. Accordingly, neither the age of the young offender at the time of the criminal proceedings, nor the pronouncement of the judgement, nor the time of execution of the sentence is relevant for determining whether someone is a young person.\textsuperscript{453}

Pursuant to section 1(1), the *JGG* applies if a ‘young person’ or a ‘*Heranwachsender*’ commits an offence punishable under the provisions of general criminal law. Pursuant to section 1(2), a **young person** is a boy or girl over the age of 14 years but under the age of 18 years. From

\textsuperscript{452} ‘Child and Youth Welfare Act’.

\textsuperscript{453} F Schaffstein and W Beulke, *Jugendstrafrecht* (14\textsuperscript{th} ed 2002), p. 55.
this follows that the provisions of the JGG are not applicable to children.454

Unlike adult criminal law, where criminal capacity is always presumed according to section 20 StGB, section 3 requires that the criminal capacity of young persons always needs to be ascertained before procedures may be commenced.455 Therefore, young persons are theoretically only bedingt strafmündig456. Pursuant to section 3, first clause, a young person shall bear criminal responsibility if, at the time of the act, he or she has reached a level of moral and intellectual maturity sufficient to enable him or her to understand the wrongfulness of the act and to conduct him- or herself in accordance with such understanding. The maturity of a young person is determined by the Staatsanwaltschaft or the judge who apply an objective standard after having collected any information available regarding the young person and the offence. If a young offender bears no criminal responsibility due to a lack of maturity, the offence is deemed not to have been committed in terms of criminal law. However, according to section 3, second clause, the Youth Court Judge may, for the purposes of education of the young person,457 order the same measures as a judge responsible for family and guardianship matters.

Although a person aged 18 years and older is legally an adult in Germany and thus is generally tried and sentenced in accordance with adult

454 Ibid, p. 49.
455 See already RGSt 58, 128.
456 ‘Contingently criminally responsible’.
457 Section 3, however, does not apply to young adults because in Germany, the age of majority is 18 years and, as already mentioned, adults are always presumed to be criminally responsible. Therefore, the provisions of the Kinder- und Jugendhilfegesetz do not apply and the judge does not have powers to impose its measures on a person of 18 years or older.
criminal law, some provisions of the *JGG* may – if one (or both) of the
two options of section 105(1) is fulfilled – apply to *Heranwachsende*.
Pursuant to section 1(2), Heranwachsender shall mean anyone who, at the
time of the act, has reached the age of 18 but not yet 21 years. Since the
reform of 1953, every *Heranwachsender* is adjudicated under the
jurisdiction of the Youth Court, regardless of whether sentences of the
*JGG* or the *StGB* are to be applied.\(^{458}\)

According to section 105(1), a *Heranwachsender* shall be judged and
sentenced as a young person if first, a psychological evaluation reveals
that the young adult offender shows a typical youthful personality in
terms of intellectual and emotional maturity and is therefore comparable
to a young person; or, second, if the offence involves typical juvenile
misbehaviour in type, circumstances, or motives. The first alternative
addresses delays in the development of the offender’s personality,
whereas the second option comprises offences which are, from an
objective point of view, typical of those committed by a young person.

The wording of the two options is very broad and indefinite. Therefore,
the *Bundesgerichtshof*\(^ {459}\) has defined some characteristics which indicate
whether the *Heranwachsende* has a ‘typical youthful personality’ or if the
‘offence involves typical juvenile misbehaviour’.\(^ {460}\)

Regarding the first option, the *BGH* ruled that characteristics such as
drug addiction; dysfunction in psychosocial development in childhood
and youth; dysfunction of the relationship between children and their
parents; not growing up with the parents; deficiencies in school or job

\(^{458}\) Section 108(2) in connection with sections 39 following.

\(^{459}\) ‘Federal Court of Justice’, hereafter referred to as *BGH*.

\(^{460}\) See, e.g., A Böhm and W Feuerhelm, *Einführung in das Jugendstrafrecht* (4th ed
2004), p. 49; F Schaffstein and W Beulke, above n 453, p. 72 et seqq.
qualifications; dropping out of school; leaving the parents’ house at an early stage; and gang delinquency - provided that a disposition for obedience is expressed in this regard - may indicate a delay in the young adult’s personal development. However, for confirming delays in personal development, generally a psychological opinion has to be furnished.

As to the second option, the BGH decreed that an offence can be regarded as being ‘typical juvenile misbehaviour’ if the conduct of the action (objectively), or the offender’s motives (subjectively) can be qualified as being ‘typically youthful’. Thus, the term includes offences which – from the objective point of view – show characteristics of juvenile immaturity and accordingly can be qualified as ‘typically youthful’ because of their objective appearance, regardless of whether adults also sometimes commit these type of offences. Per se, each criminal offence can be qualified as typical juvenile misbehaviour. The only relevant factor for the assessment is that the action itself is carried out more often among young persons and, because of that, shows typical characteristics of a common juvenile misconduct. Thus, according to the BGH, ‘typical youthful misbehaviour’ can be assumed if the objective appearance of the offence is characterised by youthful carelessness, absence of consideration, rashness, social immaturity, or amateurish commission of the offence.

An offence can – from the subjective point of view - be characterised as ‘typical juvenile misbehaviour’ if the motivation for committing the offence can be qualified as being ‘specific to juveniles’. In this sense, specific youthful motivations are, for example, showing off, acting like a daredevil, being adventurous, or being led by the desire of to be seen as a grown-up. Specific juvenile motivation can further be assumed if the

461 BGHSt 8, 90, 92.
offence was based on an unplanned, spontaneous idea or was based on actions that can be attributed to peer pressure.

The difference from the first option of section 105(1) (‘delay in the young person’s personal development’) is that the judge does not have to analyse the personality of the offender as a whole and does not have to ask for a psychological assessment. Instead, the judge has only to ascertain that the specific characteristics for youthful immaturity were brought out while committing the offence in question. Thus, in practice, when a judge decides that the JGG is applicable, most of these decisions are based on the second option of section 105(1).

If a Heranwachsender shows one or more of the characteristics defined by the BGH, the judge may assume that the Heranwachsende is comparable to a young person, and, consequently, the provisions of the JGG have to be applied. However, the characteristics developed by the BGH are only indicators and the judge has to examine every case individually. The condition for a sensible application is that every Heranwachsender and their individual case are considered as a whole. The judge must not just ‘add’ the mentioned characteristics and always apply youth criminal law if a certain number is reached. Even if none of the mentioned characteristics apply to the specific Heranwachsen, a judge may yet come to the conclusion that one of the options of section 105(1) is fulfilled.

If one of the two options of section 105(1) is met, the judge must not apply every provision of the JGG, but may, mutatis mutandis, apply the provisions set out in sections 4 to 8; section 9 number 1; sections 10

---

462 BGH NSiZ-RR 1999, 26; see also: F Schaffstein and W Beulke, above n 453, p. 77.
463 F Schaffstein and W Beulke, above n 453, p. 70.
and 11; and sections 13 to 32.\textsuperscript{465} Section 31(2) first sentence, and section 31(3) shall also be applied even if the young adult has already been convicted with legal effect according to the provisions of general criminal law for part of the offences.\textsuperscript{466}

According to the wording of section 105, youth criminal law shall only exceptionally be applied to \textit{Heranwachsende}.	extsuperscript{467} In practice, however, most (especially more serious) cases against \textit{Heranwachsende} are nowadays dealt with under the \textit{JGG}.	extsuperscript{468} The main reason for that is that the statutory ranges of punishment of the general criminal law do not apply if the \textit{JGG} is applicable. Consequently, the Youth Court Judge is not bound to the – otherwise obligatory – life imprisonment sentence for murder or the minimum of 5 years of imprisonment in the case of armed robbery. Instead, the maximum term of imprisonment – which is 5 years for young persons – is 10 years for \textit{Heranwachsende}.	extsuperscript{469} This administration can be seen as contrary to the New Zealand practice, where young offenders are transferred to the (adult) District Court when charged with very serious offences.

Furthermore, even if neither of the two options of section 105(1) is fulfilled, and thus the legal consequences of the general criminal law do apply, the Youth Court Judge can, instead of imposing life imprisonment,

\textsuperscript{465} See Appendix C for English version of the \textit{JGG}.
\textsuperscript{466} Section 105(2).
\textsuperscript{469} Section 105(3).
impose a prison sentence of 10 to 15 years. This practice is justified by the fact that *Heranwachsende*, despite their legal majority, often are still in a physical or psychological transition period. Even if there is biological and physical maturity, in many cases this does not necessarily apply to psychosocial development. The transitional period between youth and adulthood has been extended over the past decades and entrance into the adult world has been made more difficult. Thus, the lack of acceptance and respect for the differences between *Heranwachsenden* and adults may risk failure of adequate justice for the latter. Further, it is believed that criminal proceedings are likely to increase the likelihood of reoffending through factors such as social marginalisation, labelling, and aggregating with other offenders. As the *JGG* provides for less stigmatising and segregating measures, its application to *Heranwachsende* is regarded as more suitable to avoid these adverse factors. Thus, where doubt concerning the maturity of the offender continues to exist beyond a broad investigation by the judge, the principle of *in dubio pro reo* must be followed, and consequently, the judge must apply youth criminal law. This procedure becomes especially important against the background that the age group of 18 to 21 year-olds has the highest rate of criminality in Germany. Among the convictions of the Youth Court, the proportion of *Heranwachsende* to young persons is 3:2. Accordingly, Youth Court Judges have to decide the question of whether to apply youth or general criminal law in about 60% of all cases.

---

470 Section 106(1).
471 Latin for: ‘Giving the accused the benefit of the doubt’.
472 BGHSt 36, 37, 40; H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 105, Rn 22.
473 H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 105, Rn 8.
474 F Schaffstein and W Beulke, above n 453, p. 64.
6.3.2.2 Relevant Scope

The JGG applies if a young person or a young adult ‘commits an offence punishable under the provisions of general law’. Thus, the JGG does not define discrete offences for juveniles. Instead, criminal offences are specifically created by a statutory criminal law provision which defines them. The main statute governing criminal offences is the StGB. The actus reus of, for instance, a murder or theft are solely defined by the provisions of the StGB and are always the same, regardless of whether the offender is an adult or a young person. Further criminal offences are contained in supplementary penal provisions, such as the penal law regarding fiscal offences, the penal law concerning business offences, or the military penal law.

An ‘offence punishable under the provisions of general law’ is either a crime or a misdemeanour as defined under section 12 StGB; whereby a crime is an offence for which the minimum penalty exceeds one year’s imprisonment and a misdemeanour is an offence for which the penalty is either pecuniary penalty or imprisonment of less than one year. By contrast, summary offences are not included in the term ‘offences punishable under the provisions of general law’, because when a summary offence is committed, only an administrative fine may be imposed according to the provisions of the Ordnungswidrigkeiten-gesetz.

The JGG generally takes priority over other legal statutes. This follows from section 2 JGG and section 10 StGB, whereby the general provisions only apply insofar as the JGG does not provide for special provisions. For clarification, section 4 states that the provisions of general criminal

475 Section 4.
476 U Eisenberg, above n 451, § 1 JGG, Rn 21.
477 ‘Summary Offences Act’.
law shall be applied to classify an offence committed by a young person as a crime or a misdemeanour, and in assessing whether the act has become time-barred.

6.3.3 YOUTH JUSTICE PROCEEDINGS AND LEGAL CONSEQUENCES OF AN OFFENCE COMMITTED BY A YOUNG PERSON

The German youth justice system is in fact a modified adult criminal justice system. Unlike in New Zealand, the course of criminal proceedings is similar to the adult system and there is no special decision-making forum (like an FGC). Thus, in Germany, the normal site for decision-making is the courtroom where public prosecutors and judges determine the appropriate response to offending behaviour.

However, as already described, the responses to youth offending of the JGG are characterised by the Subsidiaritätsprinzip and limited by the principle of proportionality, which means that penal action should only be taken if absolutely necessary. Therefore, comparable to New Zealand, the most important response to juvenile offending is diversion.\(^{478}\) The 1990s reform of the JGG extended the legal options for diversion considerably.\(^{479}\) In doing so, the legislature has responded to reforms that have been developed in practice since the early 1980s. Before the 1\(^{st}\) JGGÄndG of 1990, the diversion rates relating to juvenile offenders in West Germany had already increased from 43% in 1980 to 56% in 1989 and steadily increased to 69% for the reunified BRD in 2003.\(^{480}\) In the

\(^{478}\) H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 45, Rn 31.

\(^{479}\) Ibid, § 45, Rn 5.

same year, the remaining 31% of juvenile offenders received formal court orders in the Youth Court.\textsuperscript{481}

The frequency of the application of diversionary provisions, however, varies considerably among the German Federal States.\textsuperscript{482} The Federal States (except Bavaria) have indeed enacted ‘diversionary guidelines’ to ensure a certain uniformity of the application of diversionary provisions as well as an adequate use of the provided possibilities.\textsuperscript{483} Nevertheless, in 2003 only about 62% of cases in Bavaria were settled by using diversionary provisions, compared to 85% of cases in Hamburg.\textsuperscript{484}

In recognition of the principles of the diversion model,\textsuperscript{485} the nationwide expansion of applying diversionary provisions is based on the assumption that diversionary responses to juvenile offending avoid or reduce stigmatisation because the young offender does not pass through the whole criminal procedure and instead is treated ‘educationally’ very early. There are some informal actions available which can be applied before the case against the young person is preferred in court. The broad application of diversionary provisions is justified by the knowledge (received through self-report research) that the commission of minor offences during the adolescence of young persons is ‘normal’ and

\textsuperscript{481} Ibid.
\textsuperscript{482} H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 45, Rn 31.
\textsuperscript{485} See above Chapter Three, 3.5.
‘ubiquitous’ and is generally stopped after growing up.⁴⁸⁶ Thus, formal proceedings ending in convictions should be avoided as often as possible because a formal conviction rather causes damage than help and can be disproportionate, given that the aim of sentencing in youth justice is individual prevention including rehabilitation.

Nevertheless, in addition to these ideological factors, the expansion of applying diversionary provisions is also based on economic aspects. The already overloaded machinery of justice would collapse if the proceedings that are settled informally at the moment had to be completed formally.⁴⁸⁷

The strategy of expanding diversionary responses was proven to be effective, not only to limit the Youth Court’s workload, but also with respect to individual prevention of the individual. Research showed that the reconviction rates of those first-time offenders who were diverted instead of formally sentenced were significantly lower.⁴⁸⁸ Even for repeat offenders the reoffending rates, after having received an informal response, were not higher than after formal sentencing.⁴⁸⁹ From this it can be concluded that the extended application of diversionary provisions does at least not have negative consequences with regard to the crime rates and with respect to general and individual prevention.


⁴⁸⁸ 27% compared to 36%; see F Dünkel and B Geng (eds), Jugendgewalt und Kriminalprävention. Empirische Befunde zu Gewalterfahrungen von Jugendlichen in Greifswald und Usedom/Vorpommern und ihre Auswirkungen für die kommunale Kriminalprävention (2003).

⁴⁸⁹ Ibid.
The following figure provides a diagrammatic description of the possible pathways through Germany’s youth justice system. Each of these different stages in the youth justice process is explained in detail in the text following.
Offence committed

Young person detected for alleged offending by police

Reasonable suspicion

Referral to Staatsanwaltschaft (Public Prosecution Authority)

No reasonable suspicion

End of investigations

Diversion under section 45 JGG

Preferment of a charge in the Youth Court section 170(1) StPO

Honourable dismissal under section 170(2) StPO

Youth Court

Trial

Formal court orders

Acquittal

Educative Measures

Disciplinary Measures

Youth Penalty

Instructions

Educational Assistance

Warnings

Obligations

Youth Detention

Suspended

Unconditional

Residence Conditions

Apprenticeship place

Community service

Supervisory directive

Social training course

Offender-victim reconciliation

Traffic instruction

Other directives

Combined education and disciplinary measures possible
6.3.3.1 Police Contact and Reaction

Just as in New Zealand, a young person’s involvement with the justice system usually begins with police contact. Generally, young persons who are alleged to have committed a criminal offence are apprehended by front line police officers who will then report the case to the criminal investigation department. The investigators gather information on personal and social circumstances, the behaviour of the offender prior to the offence, and all other circumstances relevant for evaluating the offender’s personality as well as his or her psychological and emotional characteristics.\(^{490}\) In doing so, the parent, guardian, or legal representative as well as the schoolteacher or employer should, as far as possible, be heard.\(^{491}\)

Although the *Gerichtsverfassungsgesetz*\(^{492}\) does not state explicitly that special ‘police youth officers’ should exist, most criminal investigation departments in the larger cities employ specifically trained officers for dealing with young persons and *Heranwachsende*. Because police officers have the first contact with the young offender and should therefore be specially skilled in dealing with them, it is considered to be important to legislate for a mandatory establishment of special ‘police youth officers’ in the near future.\(^{493}\) However, in small, rural districts the specialisation of police officers in youth justice issues would barely be possible from the practical point of view.

Generally, the German police are only involved in investigation and clarification of facts, whereas the decision whether or not to prefer the case in court is incumbent on the public prosecutor. Nevertheless, the

---

\(^{490}\) Section 43(1).

\(^{491}\) Section 43(1).

\(^{492}\) ‘Constitution of the Courts Act’, hereafter referred to as *GVG*.

\(^{493}\) F Schaffstein and W Beulke, above n 453, p. 186.
police have recently gained more power with regard to diversionary procedures. In some Federal States, the police lately have been empowered to initiate the conditions that are required to terminate (or not charge) a case. When termination of proceedings pursuant to section 45(1) or (2) comes into consideration, the police have to interrogate the young person and to contact the parents or guardians. To avoid stigmatisation, however, there is no further investigation into the young person’s social background. If section 45(2) might be applicable, a ‘rule-clarifying’ conversation with the young person is undertaken and the juvenile is encouraged to make an apology or to compensate the caused damage. Where the imposition of certain educative measures seems advisable before termination of proceedings under section 45(2) can be considered, the police officer will telephone the public prosecutor and ask whether a ‘diversion-facilitator’ (a specifically skilled social worker) should be involved. If the public prosecutor agrees, the diversion facilitator proposes certain educative measures and informs the young person that complying with these measures is voluntary, but that the compliance would probably fulfil the requirements of section 45(2) and therefore might lead to the termination of proceedings. When the young

494 The Federal States of Berlin, Brandenburg, Lower Saxony, and Schleswig-Holstein enacted diversion-guidelines to regulate that the police can initiate the conditions for termination of proceedings under section 45 by having an ‘education-orientated, rule-clarifying’ conversation with the young offender during which the juvenile should be encouraged to apologise or to compensate the damage caused as soon as possible (‘Bericht über die Erfahrungen im praktischen Umgang mit den neuen Richtlinien zur Förderung der Diversion bei jugendlichen und heranwachsenden Beschuldigten’, [2000] DVJJ-Journal p. 78-83).

495 For a detailed description of the conditions of section 45 see below 6.3.3.2.


497 The term ‘educative measure’ covers all measures that have been enforced or initiated either privately or officially and that are suitable to educate the young person. For more detailed description see below 6.3.3.2.
person agrees, the diversion facilitator initiates the educative measures and gives notice to the police, who will put this information on file and forward the documents to the Staatsanwaltschaft where the public prosecutor can terminate proceedings.

Summing up, in those Federal States that have enacted such diversion guidelines, the police now play quite an important role in preparing and arranging for diversionary responses and therefore have considerable influence over who will be diverted and who will not. This new procedure faces much criticism by practitioners and academics. First of all, it appears to be problematic that the police and the diversion-facilitator exercise powers which exceed even those of a judge under section 45(3). Under the diversion guidelines, the police or the diversion-facilitator can select from a wide range of educative measures without any limitation. The only responses they cannot initiate are youth detention or youth sentence, because the JGG does not qualify them as ‘educative measures’. In addition, although the proposed measures are declared to be ‘voluntary’, the young person might feel pressurised by a proposal made by an ‘authoritarian institution’, and thus might feel obliged to comply with the proposed measures instead of having a choice.

Furthermore, one can object to the police’s autonomous preparation of diversion with respect to the presumption of innocence. The presumption of innocence is a principle of trial which is based on article 6(2) European Convention on Human Rights and therefore is an inherent part of German positive law. With respect to this, it is feared that the police’s autonomous diversion activity could be seen as illegally

---

498 W Herrlinger, above n 496, p. 148.
499 Hereafter referred to as ECHR.
anticipating guilt and would consequently violate article 6(2) *ECHR*. The initiation of conditions which might lead to the termination of proceedings can therefore be seen as an anticipation of a formal verdict of guilty which would be a clear breach of the presumption of innocence.

Last but not least, the involvement of the police in the preparation of diversionary responses is held to be problematic against the background of the strict separation of powers in Germany. If the police, thus a body of the executive branch, are involved in the diversionary process in such a way, de facto they decide which case can be considered for diversion and which measures are going to be initiated, while the public prosecutor is notified only about a measure already initiated or enforced. Indeed, this practice leads to a decrease in the public prosecutors’ workload and may help to settle proceedings against young persons more promptly because the case does not need to proceed to the *Staatsanwaltschaft* and therefore the response might be carried out faster. Nevertheless, the selection, initiation and finally the imposition of educative measures, which can be compared to formal sentences, are, from the constitutional point of view, a task of the judiciary. Because of these critical points, the expansion of police powers within the diversion preparation is regarded with mixed feelings and needs to be handled with care.

---


6.3.3.2 STAATSANWALTSCHAFT

Without a formal indictment by the public prosecutor, no youth justice case may be brought before the Youth Court. Thus, public prosecutors probably play the most important role in connection with proceedings against young persons because they deal with all apprehended young offenders and decide whether section 45, the main diversionary provision, is applied or whether preferment of a charge in court is necessary. Because of that, the Gerichtsverfassungsgesetz provides for special ‘youth public prosecutors’. According to section 36, special youth public prosecutors must be assigned if criminal proceedings fall within the jurisdiction of the Youth Court. Section 37 states that youth public prosecutors should have appropriate education and training as well as experience in the education and upbringing of juveniles.

Regarding criminal proceedings, the principle of mandatory prosecution applies in Germany pursuant to section 152(2) Strafprozessordnung. Accordingly, unlike in common law systems (such as New Zealand), where the prosecutor has complete discretion to decide whether to charge or file the information, the German law enforcement agencies (police and Staatsanwaltschaft) are obliged to prosecute every apprehended criminal offence, and the Staatsanwaltschaft must prefer public charges if the requirements for an indictment are fulfilled. According to section 170(1) StPO, the Staatsanwaltschaft shall prefer a charge by submitting a bill of indictment to the competent court if the investigations offer sufficient reason for indictment, meaning that a later conviction seems more likely than an acquittal. Notwithstanding, there are exceptions where a public prosecutor can waive prosecuting in general criminal law as well as in youth criminal law.

502 ‘Criminal Procedure Code’, hereafter referred to as StPO.
As to general criminal law, the StPO comprehend exceptions to the principle of mandatory prosecution, namely the principle of discretionary prosecution being regulated under sections 153-154(e) StPO. These provisions permit the public prosecutor to terminate proceedings, although the requirements for an indictment are fulfilled, if certain conditions apply. Under the most frequently applied provision, section 153(1) StPO, the Staatsanwaltschaft may, with the approval of the court that would be responsible for opening the main trial, waive preferring a charge if first, the offence is not serious; second, the offender’s culpability is considered as being of a minor nature; and third, there is no especial public interest in preferring the charge. The approval of the court is not required if the act is, legally, a misdemeanour that is not subject to an increased minimum penalty, and if the consequences resulting from the offence are minimal.

Even more relevant than in general criminal law are the exceptions to the principle of mandatory prosecution in youth criminal law. In the JGG, the principle of mandatory prosecution is modified by the principle of discretionary prosecution on the one hand, and by the application of the Subsidiaritätsprinzip\textsuperscript{503} on the other hand.\textsuperscript{504} According to the Subsidiaritätsprinzip, the public prosecutor shall generally terminate proceedings against young persons under diversionary provisions, except where the nature and circumstances of the offence indicate that judicial procedure with formal sentencing is essential.\textsuperscript{505} This practice is based on the provision of section 45 JGG, which is comparable to section 153 StPO and permits the public prosecutor to terminate proceedings pending against a young person if certain conditions are satisfied, and to

\textsuperscript{503} For detailed explanation see below 6.3.1.


\textsuperscript{505} U Eisenberg, above n 451, § 45, Rn 9.
refrain from preferring a charge in the Youth Court. Thus, section 45 is a statutory implementation of the principle of discretionary prosecution which was created specifically for the procedure against young persons.  

Section 45 only applies, however, if the public prosecutor has ascertained that there is a sufficient suspicion. Otherwise, the conditions for a formal indictment in court are not fulfilled and the proceedings must be dismissed *nolle prosequi* pursuant to section 170(2) *StPO*.  

Section 170(2) *StPO* states that the public prosecutor must terminate the proceedings if there is no sufficient suspicion or if there are other impediments to prosecution, for instance lack of criminal responsibility of a young person. Thus, if lack of criminal responsibility is ascertained or the public prosecutor has any doubt concerning its existence, the proceedings against the young person must be dismissed *nolle prosequi* and the application of section 45 *JGG* is barred.  

Section 45(1)-(3) provides for three different diversionary provisions. As the *Subsidiaritätsprinzip* also applies within these three diversionary provisions, subs(1)-(3) of section 45 are in order of priority, meaning that the application of subs(1) always has to be considered before considering the application of subs(2), and the application of subs(2) has to be considered before applying subs(3).  

---

506 H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 45, Rn 2.  
508 H Diemer and A Schoreit and B-R Sonnen - Diemer, above n 442, § 45, Rn 7.  
510 H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 45, Rn 8.
Pursuant to section 45(1), the youth public prosecutor can abstain from prosecuting a young offender without the judge’s consent if the conditions set out in section 153 StGB (see above) are met. Section 45(1) generally applies if the offence is of a petty nature and the young person offended for the first time.

Proceedings shall mainly be terminated pursuant to section 45(2) if the offence is petty and would normally have been terminated under section 45(1), but the young person is a repeat offender; or if the offence is of medium severity. According to section 45(2), first sentence, the youth public prosecutor must refrain from prosecuting a young offender if an educative measure has already been enforced or initiated and if the public prosecutor considers that neither participation of the judge pursuant to subs(3), nor preferment of a charge is necessary. The term ‘educative measure’ covers all measures that have been enforced or initiated either privately or officially and that are suitable to educate the young person. Private educative measures can be enforced or initiated by family members or any person the juvenile has contact with privately, whereas official educative measures will generally be enforced or initiated by police, employees of the social welfare department or schoolteachers. Further, the public prosecutor has to take into account any activities the young offender has initiated himself, for example paying restitution, making reparation, working for the victim and/or public services, or taking part in a road traffic seminar. Summing up, section 45(2), first sentence, allows the youth public prosecutor to terminate proceedings if, for example, the young person’s family or school have already adequately responded to the offending behaviour by imposing suitable educative measures, and the public prosecutor believes

511 See above 6.3.3.1.
that any further responses on the part of the Youth Court are unnecessary. Further, section 45(2) reflects the Subsidiaritätsprinzip concerning legal interventions by juvenile justice authorities: if necessary responses to the offending behaviour have already been carried out or initiated, legal reaction would not only be unnecessary but would be disproportional.

Section 45(2), second sentence, clarifies that an attempt by the young person to achieve reconciliation with the victim of the offence shall be regarded as equivalent to an educative measure. This sentence was included by the 1st JGGÄndG of 1990 and reflects the restorative justice approach which was then the new trend in youth justice and criminology and focused on the implementation of provisions for compensation and offender-victim-reconciliation.

Proceedings pending against a young person shall be dismissed under section 45(3) if the offence is more serious or if the offence is petty or of medium severity, but the offender is a repeat offender. While the diversionary provisions of sections 45(1) and sections 45(2) do not entitle the youth public prosecutor to impose educative measures himself, section 45(3) states that the he or she can propose that the Youth Court Judge shall impose an admonition; instructions pursuant to section 10(1), third sentence, numbers 4, 7 and 9; or obligations, if the young person admits his or her guilt, the public prosecutor considers that the imposition of such a judicial measure is necessary, and the preferment of a charge is not appropriate.\textsuperscript{513} If the Youth Court Judge agrees to the proposal, the public prosecutor shall refrain from prosecution. Where instructions or obligations are imposed, however, the public prosecutor shall refrain from prosecution only once the young person has complied with them. If the public prosecutor has refrained from prosecution pursuant to section

\textsuperscript{513} Instructions and conditions are formal court orders. For detailed description see below 6.3.3.4.
45(3), he or she can only prosecute the young person for the same act if new exhibits or facts are submitted.

Section 45(2) and (3) reflect the restorative justice approach by providing for the opportunity to arrange for offender-victim-reconciliation, which refers to the offender’s effort to achieve a settlement with the injured party and in doing so make good his or her offence, or at least try for making good. As offender-victim-reconciliation can also be initiated as a formal instruction issued by the court, it is going to be discussed in detail under 6.3.3.4.

6.3.3.3 Jugendgerichtshilfe

In accordance with one of the objectives of German youth justice, individual prevention, a special agency called Jugendgerichtshilfe was already established in 1923 to represent and safeguard the educational, social, and welfare-oriented aspects of criminal proceedings against a young person. The Jugendgerichtshilfe is administered by the youth welfare office working in conjunction with private youth assistance associations. Accordingly, the responsible body of this service is the youth welfare office which is legally obliged to involve private organisations, such as Caritas or church-based organisations.

The Jugendgerichtshilfe must be notified as soon as proceedings have been initiated against a young person. If they are not notified, they must involve themselves immediately after becoming aware of pending proceedings against a juvenile. The main task of the social workers

---

514 ‘Youth Court Aide Service’.
515 Section 38(1).
516 Section 52 Sozialgesetzbuch VIII.
517 Section 38(3), first sentence.
518 Section 38(3), second sentence.
working in the *Jugendgerichtshilfe* is to help the public prosecutor investigate the personal and social circumstances of the young offender to provide the court with information.\textsuperscript{519} This is a very important pre-trial task, especially because the young persons themselves, as well as their parents, teachers, employees or neighbours, are more likely to provide a social worker with personal information than a police officer or the public prosecutor.\textsuperscript{520} The social worker in charge of the case is obliged to be objective while investigating. He or she must provide the judge with complete and realistic information. Thus, the representatives of the *Jugendgerichtshilfe* often find themselves in difficult situations. On the one hand, they are required to seek the confidence of the young person and affirm this through help and advice; on the other hand, they are not allowed to act as advocates for the benefit of the young person. This antithetic role is criticised by many practitioners who demand that the *Jugendgerichtshilfe* should be allowed to act partially in favour of the young person and to keep certain secrets when the young person has confided in the social worker.

In addition to investigating the offender’s personal and social circumstances, the social worker working as a *Jugendgerichtshilfe*-representative has to perform several other tasks. In custody cases, the *Jugendgerichtshilfe* must report on the results of their investigations without any delay.\textsuperscript{521} Further, the representative of the *Jugendgerichtshilfe* who carried out the investigations concerning the offender’s personal and social circumstances should appear in the main trial before the Youth Court.\textsuperscript{522} In practice, however, this requirement is not met very often. Instead, the youth welfare office mostly sends a so-

\textsuperscript{519} Section 38(2), second sentence.

\textsuperscript{520} F Schaffstein and W Beulke, above n 453, p. 208.

\textsuperscript{521} Section 38(2), third sentence.

\textsuperscript{522} Section 38(2), foruth sentence.
called ‘court-attendant’ to court, who will read out the investigation report his or her colleague furnished. This exercise faces much criticism, because the ‘court-attendant’ often does not even know the young person personally and thus cannot respond to specific questions that might arise with regard to the young person’s personality or stage of development.\footnote{F Schaffstein and W Beulke, above n 453, p. 209.}

Furthermore, where no probation officer is appointed, the Jugendgerichtshilfe-representative must ensure that the young person complies with the imposed instructions and obligations.\footnote{Section 38(2), fifth sentence.} In addition, the representative has to inform the judge of serious failures of compliance.\footnote{Section 38(2), sixth sentence.} During execution of the sentence, the social worker must remain in contact with the young person and assist the young person’s reintegration into society.\footnote{Section 38(2), eighth sentence.} If a probation officer has been appointed, the Jugendgerichtshilfe must work closely with the probation officer during the probationary period.

Additionally, where a young person is placed under the supervision of the youth welfare office pursuant to section 10(1), third sentence, number 5, the Jugendgerichtshilfe must exercise care and supervision unless the judge has entrusted this to another person.\footnote{Section 38(2), seventh sentence.}

\section*{6.3.3.4 YOUTH COURT}

In Germany, all cases that have not been diverted by the public prosecutor are brought before the Youth Court, which has jurisdiction to hear cases involving criminal offences of young persons. As already discussed, youth criminal law in Germany is an integrated part of general

---

\footnote{F Schaffstein and W Beulke, above n 453, p. 209.} \footnote{Section 38(2), fifth sentence.} \footnote{Section 38(2), sixth sentence.} \footnote{Section 38(2), eighth sentence.} \footnote{Section 38(2), seventh sentence.}
criminal law. Therefore, the Youth Court is not an independent court distinct from the jurisdiction of the general Criminal Court, but is a branch of the District Court or a division of the Regional Court, depending on the jurisdiction. Section 33(2) states that the term ‘Youth Court’ means that the Criminal Court Judge sits as a Youth Court Judge, the Court of Lay Assessor sits as the Youth Court of Lay Assessor, and one of the criminal divisions of the Regional Court sits as the Youth Criminal Division.

The jurisdiction of the Youth Court is governed by the JGG. In youth criminal cases the jurisdiction of the courts is not based solely on the expected term of imprisonment (as imprisonment is not imposed very often on juveniles). Instead, if the punishment is likely to be educative measures; disciplinary measures; secondary penalties; incidental consequences; or withdrawal of driver’s licence; and the charge is filed

528 As to the German court hierarchy, see above Chapter Four, 4.3.2.
529 Sections 39-42.
530 Unlike in general criminal law, where the determination of a judge’s responsibility in the first instance depends on the expected term of imprisonment. According to section 24(1) GVG, the District Court Judge has jurisdiction if neither the Regional Court nor the Supreme Higher Regional Court have jurisdiction. In the District Court, the Criminal Judge sits alone if the offence was a misdemeanour and the expected sentence does not exceed a term of two years of imprisonment, while the District Court has jurisdiction as a Court of Lay Assessor if the expected sentence is a term of imprisonment between two and four years. The Regional Court sits if the offence was a crime and neither the Criminal Judge nor the Court of Lay Assessor has jurisdiction, which de facto means in cases where the expected term of imprisonment exceeds four years of imprisonment. The Supreme Higher Regional Court has jurisdiction in the first instance only on rare occasions. The offences which must be tried before the Supreme Higher Regional Court are listed in section 120 GVG and are offences such as treason, high treason, breach of the public peace, and criminal offences against representatives of foreign states or against the constitution.
with a Criminal Court Judge, the Youth Court Judge has jurisdiction, but may neither impose a youth penalty exceeding a term of one year’s imprisonment nor order placement in a psychiatric hospital.

The Criminal Division of the Regional Court has jurisdiction in the first instance in three cases: first, in matters which (if they involved adults) would be heard by the Jury Court, second, in matters which would generally belong to the jurisdiction of the Lay Assessor Court but are submitted to the Regional Court because of their importance; or third, in matters relating to joinders of courses and actions against both young persons and adults if a Grand Criminal Court Division would have jurisdiction when dealing with the adult in accordance with the provisions of general law. Further, the Youth Division of the Regional Court has jurisdiction for appeals against convictions by the Youth Court Judge or the Lay Youth Assessor Court.

Apart from that, the Lay Youth Assessor Court at the District Court, which is made up of two lay assessors and presided over by a District Judge sitting as a Youth Court Judge, hears all other cases in the first instance.

---

531 Section 39(1), first sentence.
532 Section 39(2).
533 Section 41(1) No. 1.
534 Section 41(1) No. 2.
535 Section 41(1) No. 3.
536 The right to appeal is restricted for young offenders. Unlike adults, they must choose between two options: either a full retrial, or a review of their case on legal grounds. By contrast, adult offenders may have their cases reviewed twice.
537 Section 41(2), first sentence.
538 Section 40(1), first sentence.
Youth Court Judges

A sufficient number of District or Regional Court Judges are designated as Youth Court Judges. Section 37 states that judges sitting in the Youth Courts should have appropriate education and training as well as experience in the education and upbringing of young persons. Section 37, however, is only a directory provision, which means that in practice, it is not only specifically skilled persons who are appointed. Although it is acknowledged that Youth Court Judges would need special training in criminology, pedagogy, adolescent psychology and psychiatry, in fact they only have to study law and qualify as a judge. Although this is an issue for many academic and practitioner critics, Parliament has not yet made any attempts to change the requirements for qualification.

The tasks of a Youth Court Judge are regulated under section 34. According to section 34(1), the Youth Court Judge is charged with all tasks incumbent on a Criminal Judge sitting in a District Court in criminal proceedings. Accordingly, the Youth Court Judge, besides administering justice, undertakes tasks such as issuing arrest warrants; ordering confiscations, searches, and examinations; ordering judicial inspections; and performing inspections of the scene of crime.

539 F Schaffstein and W Beulke, above n 453, p. 182.
Section 34(2)\textsuperscript{540} requires that the educational duties and responsibilities concerning the young person, which are generally incumbent on the Family and Guardianship Judge, shall be transferred to the Youth Court Judge. ‘Educational duties and responsibilities incumbent on the Family and Guardianship Judge’ include support of the parent, guardian or caregiver by implementing appropriate measures\textsuperscript{541} and those measures intended to ward off danger from the young person.\textsuperscript{542}

**Lay Assessors in the Youth Court**

Lay Assessors sitting in the Youth Court work on an honorary basis. They shall, as well as the youth public prosecutors and the Youth Court Judges, have appropriate education and training as well as experience in the education and upbringing of juveniles.\textsuperscript{543} A Youth Assistance Committee nominates an equal number of men and women and at least twice the number of persons that are required to act as lay youth assessors and assistant lay youth assessors. From the nominated number of persons, a sufficient number of lay assessors are selected for a period of five years by a special board.\textsuperscript{544} The board\textsuperscript{545} appoints an equal number of men and women.\textsuperscript{546}

\textsuperscript{540} Before 1998, the old version of section 34(2) stated that a Youth Court Judge should, as far as possible, be a Family and Guardianship Judge as well. This provision should assure that the educative measures imposed by the two judicial areas were coordinated and linked to each other. The Family and Guardianship Judge often already knew the young offender and his or her family background from Family or Guardianship Court appearances and thus was able to respond in an appropriate way. However, this provision was not practicable because of the growing circuits and the increasing workload in both the Youth Court and the Family Court. Thus, the old version of section 34(2) was replaced.

\textsuperscript{541} *BGB*, section 1631(3), sections 1800 and 1915.

\textsuperscript{542} *BGB*, sections 1666, 1666a, section 1837(4), and section 1915 *BGB*.

\textsuperscript{543} Section 35(2).

\textsuperscript{544} Section 35(1), first sentence.
**Procedure in the Youth Court**

With certain exceptions, the procedure in the Youth Court follows the provisions of the *StPO*\(^{547}\) and proceedings are therefore similar to proceedings against adult offenders. However, proceedings against young persons are closed to the public.\(^{548}\)

The only people entitled to be present are the usual participants in criminal proceedings (such as the accused person, officers of the court, public prosecutors, and lawyers) and the aggrieved person. Further, parents or legal guardians should be present and the judge may issue an order to summons the parent, guardian, or the legal representative of the young person to assure their presence during the trial.\(^{549}\) Additionally, probation officers, care assistants or social workers are permitted to be present where the young person is subject to the supervision and guidance of a probation officer or the care and supervision of a care assistant, or if a social worker has been assigned to him or her.\(^{550}\) This applies also to the head of the relevant institution when the young person receives educational assistance in a residential home or a comparable institution.\(^{551}\) Furthermore, a representative of the *Jugendgerichtshilfe* must be present during the trial.\(^{552}\) The court must hear the report furnished by the *Jugendgerichtshilfe* in order to comply with the general procedural rule that any evidence relevant to the finding of guilt and determining the appropriate sentence must be heard. Last but not least,

---

\(^{545}\) The board was established in accordance with section 40 *GVG*.

\(^{546}\) Section 35(1), second sentence.

\(^{547}\) Section 2(1).

\(^{548}\) Section 48(1).

\(^{549}\) Section 50(2).

\(^{550}\) Section 48(1), first sentence.

\(^{551}\) Section 48(2), second sentence.

\(^{552}\) Section 50(3).
the judge may permit other persons to be present for special reasons, such as legal education or media coverage due to overriding public interest.\footnote{Section 48(2), third sentence.}

Normally, where a Heranwachsender appears before the Youth Court or a young person is charged jointly with an adult, the proceedings in the Youth Court are open to the public.\footnote{Section 48(3), first sentence.} Nevertheless, the public may be excluded if this is in the educational interests of the young person.\footnote{Section 48(3), second sentence.}

Unlike in New Zealand, the young person is not necessarily allocated a legal counsel or a lawyer. Instead, a lawyer is assigned by the Youth Court Judge only under certain circumstances: first, if this would be compulsory for an adult under general criminal law;\footnote{Section 68 no. 1.} second, if the educative rights concerning the young person were withdrawn from the parent, guardian or legal representative in accordance with the JGG;\footnote{Section 68 no. 2.} third, if the judge considers placement in an institution for the purpose of preparing an expert report on the young person’s personal development;\footnote{Section 68 no. 3.} or fourth, if the young person is either in pre-trial confinement or in the custody of an institution.\footnote{Section 68 no. 4.}

However, the presiding judge can appoint a support person for the accused at any stage during the proceedings if the circumstances do not require the appointment of a compulsory lawyer.\footnote{Section 69(1).} A parent, guardian or legal representative may not be appointed as such a support person if this is regarded as disadvantageous for the young person’s education and
development. The support person can obtain permission to inspect the files and, incidentally, has the same rights during the trial as a lawyer or legal counsel would have.

The general course of proceedings in the Youth Court is the same as in the general criminal court. First, the judge ascertains the attendance of the mandatory participants. Following that, the public prosecutor reads out the bill of indictment. Afterwards, the judge asks the young person if he or she wants to speak out on the charge or prefers to remain silent about it. If the young person denies the charge or remains silent, the court starts hearing the evidence and afterwards, the Jugendgerichtshilfe is heard. At the end of the trial, the public prosecutor and, if allocated, the lawyer of the young person, plead and propose which response should be taken in their opinion. After the young person has had the last word, the judge adjourns to his or her room to consider the judgement which he or she finally presents to the attendees. Thus, unlike in New Zealand, the trial always follows the same pattern regardless of whether the young person denies or admits guilt. In Germany, there are no ‘defended hearings’; instead, if the accused denies the charge, the hearing of the evidence is carried out in the same trial.

---

561 Section 69(2).
562 Section 69(3).
Legal Consequences

The legal consequences that can be imposed if a young person commits an offence are distinct from those sentences that can be imposed on an adult committing a similar offence. For offences committed by adults, the definitions of offences as well as the respective range of punishments are regulated in the StGB. If young persons or Heranwachsende commit an offence, the elements of the offence are also defined by the StGB; the range of punishments, however, does not apply. Instead, the JGG contains a separate system of legal consequences which reflects the particular educative orientation of the German youth justice system. The JGG provides for two possible ways in which a Youth Court Judge can respond to juvenile offending. First, the judge can terminate or suspend proceedings by applying the diversionary provision of section 47. Second, the judge can respond by imposing court orders. These two possible ways of responding to youth offending are briefly introduced in the following.

Termination or suspension of proceedings (section 47)

Section 47 applies to young persons and, except for section 47(1), first sentence, number 4 and section 47(2), fourth sentence, also to Heranwachsende. The requirements for termination or suspension of proceedings set out in section 47 are similar to those set out in section 45.

Under section 47(1), the Youth Court Judge can, after submission of the bill of indictment, terminate pending proceedings at any stage of the trial up to the final judgement if first, the conditions set out in section 153

---

563 Section 18(1), third sentence.
564 U Eisenberg, above n 451, § 47, Rn 2; H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, JGG, § 47, Rn 2.
StGB are met;\(^565\) or second, an educative measure within the meaning of section 45(2) has already been conducted or initiated and therefore a formal judgement seems to be unnecessary;\(^566\) or third, a young person admits the charge, the judge therefore considers a decision by judgment unnecessary, and instead imposes an educative measure listed in section 45(3), first sentence;\(^567\) or fourth, the young person lacks criminal responsibility on the grounds of immaturity.\(^568\)

Section 47(1), second sentence regulates the suspension of proceedings by a judge. Proceedings shall be suspended rather than terminated if the judge is concerned about compliance with the imposed measures. The judge, with the consent of the public prosecutor, suspends the proceedings in the cases of section 47(1), first sentence, numbers 2 and 3 while concurrently imposing obligations, instructions or educative measures. When doing so, the judge sets a time limit of not more than six months in which the young person must comply with the imposed measures. If the young person complies with the obligations, instructions or educative measures in time, the judge must terminate the proceedings;\(^569\) if not, the suspended proceedings continue.

**Formal Court Orders**

The structure of the formal court orders results from section 5, which divides the orders into three categories of measures and sentences. The first category are the *Erziehungsmaßregeln*\(^570\) which are regulated under

\(^{565}\) Section 47(1), first sentence, no. 1.

\(^{566}\) Section 47(1), first sentence, no.2.

\(^{567}\) Section 47(1), first sentence, no. 3.

\(^{568}\) Section 47(1), first sentence, no. 4.

\(^{569}\) H Diemer, A Schoreit and B-R Sonnen - *Diemer*, above n 442, § 47, Rn 11.

\(^{570}\) ‘Educative measures’, hereafter referred to as educative measures.
sections 9-12; the second category are the *Zuchtmittel*\(^{571}\) which are regulated under sections 13-16; and the third category is the *Jugendstrafe*\(^{572}\) which is regulated under sections 17-30. Within these three diversionary provisions, the *Subsidiaritätsprinzip* applies insofar as disciplinary measures or youth penalty shall only be imposed where educative measures do not suffice.\(^{573}\) According to section 8(1), a combination of educative and disciplinary measures may be imposed if the judge deems this expedient, and sections 8(2) and 23 state that youth penalty may be combined with disciplinary measures.

**Educative Measures, sections 9-12 JGG**

Section 5(1) states that, in response to a criminal offence committed by a young person, educative measures can be issued. These measures are limited to educative and not punitive purposes and are intended to avoid reoffending by correcting or eliminating a young person’s educational deficiencies.\(^{574}\) Thus, the first precondition for the imposition of educative measures is that the commission of the offence has indicated educational deficiencies, and therefore the young person is considered to be *erziehungsbedürftig*\(^{575}\). The young person can be regarded as being in need of education if his or her personality indicates that education by means of youth criminal law is required to correct the educational deficiencies. In determining whether a young person is in need of education, the criminal offence must be seen as a symptom of educational deficiency. The second precondition for the imposition of educative measures is that the young person must seem to be *erziehungsfähig*\(^{576}\). A

---

\(^{571}\) ‘Disciplinary measures’, hereafter referred to as disciplinary measures.

\(^{572}\) ‘Youth Penalty’, hereafter referred to as youth penalty.

\(^{573}\) Section 5(2).

\(^{574}\) H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 9, Rn 2.

\(^{575}\) ‘In need of education’.

\(^{576}\) ‘Amenable to education’.
young person can be seen as being amenable to education if the educative measures appear to have an effect on him or her. This will not be so if the education of the young offender seems to be *ab initio* impossible on grounds of the offender’s personality or personal surroundings.⁵⁷⁷ The third precondition for the imposition of educative measures is the young person’s criminal responsibility in the sense of section 3, first sentence.

If the three preconditions are met, the judge may impose educative measures as listed under section 9. In doing so, he or she must choose the measure that seems to be most suitable to eliminate or correct the young person’s educational deficiencies. According to section 9, there are two forms of educative measures, namely the imposition of instructions under sections 10 and the order to be put under educational assistance within the meaning of section 12.

*Instructions, section 10 JGG*

Instructions are the most frequently applied educative measures.⁵⁷⁸ They are statutorily defined by section 10(1), first sentence, which states that instructions are directions and prohibitions that have a positive impact on the young offender’s lifestyle and behaviour patterns while securing and enhancing his or her education and development. Instructions shall be imposed if the offence is of a petty or medium severe nature and was caused by adverse outside influences, educational deficiencies, unsuitable education, mental or intellectual impairment or other psychic disorders.⁵⁷⁹ A catalogue of nine possible instructions is listed in section 10(1), third sentence, numbers 1-9. Accordingly, the judge can instruct

---


⁵⁷⁸ P-A Albrecht, above n 487, p. 158 and 163.

⁵⁷⁹ H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 10, Rn 2.
the young person to attend a road-traffic training course;\textsuperscript{580} to attempt to achieve a settlement with the aggrieved person (offender-victim-reconciliation);\textsuperscript{581} to perform certain work tasks;\textsuperscript{582} to accept an apprenticeship training position or employment;\textsuperscript{583} to attend a social skills training course;\textsuperscript{584} to avoid contact with certain persons or refrain from frequenting places that provide public hospitality or entertainment;\textsuperscript{585} to live with a foster family or in residential accommodation;\textsuperscript{586} to comply with instructions relating to his or her residence;\textsuperscript{587} or to be put under the care and supervision of a specific person (care assistant).\textsuperscript{588}

The judge can exercise a broad discretion in giving effect to, extending, or modifying the possible instructions listed in section 10. Further, he or she may even impose completely different instructions and is thus statutorily enabled to select from an unrestricted number of instructions.\textsuperscript{589} Although this indefiniteness might endanger the personal rights of the young offender, the judge’s broad discretion is by and large looked upon favourably. The proponents emphasise the flexibility given

\textsuperscript{580} Section 10(1) no.9.
\textsuperscript{581} Section 10(1) no.7.
\textsuperscript{582} Section 10(1) no.4.
\textsuperscript{583} Section 10(1) no.3.
\textsuperscript{584} Section 10(1) no.6.
\textsuperscript{585} Section 10(1) no.8.
\textsuperscript{586} Section 10(1) no.2.
\textsuperscript{587} Section 10(1) no. 1.
\textsuperscript{588} Section 10(1) no.5.
\textsuperscript{589} Examples of instructions not listed in the catalogue of section 10 which have actually been imposed by judges are: assisting a foreign classmate with doing his or her homework; writing an application for an apprenticeship or an employment; taking private lessons in a certain school subject; and working on a farm in the afternoons. (F Schaffstein and W Beulke, above n 453, p. 108).
to the judge to be responsive to the individual needs of the young offender and impose instructions that he or she considers to suit the individual person best.\textsuperscript{590} Furthermore, the judge’s discretion regarding the imposition of instructions is restricted in several ways to safeguard the young person’s rights. In this regard, section 10(1), second sentence states that the instructions must not make high or unreasonable demands on young persons or on the way they lead their lives. This prohibition includes physical as well as mental excessive demands. Additionally, instructions may not be imposed for an indefinite term. Instead, the term of any instruction must not exceed two years after final judgement.\textsuperscript{591} If the judge imposes a supervision instruction, the term should not exceed one year, and if the judge instructs the young person to attend a social skills training course, the term should not exceed six months.\textsuperscript{592} Further, constitutional barriers such as the \textit{Bestimmtheitsgrundsatz}\textsuperscript{593} the \textit{Verhältnismäßigkeit} and the young person’s constitutional rights have to be observed.\textsuperscript{594} In this context, the \textit{Oberlandesgericht Hamburg}\textsuperscript{595} found that an instruction enjoining the young person to accept a specific apprenticeship training position or a specific job violates the right of the freedom of occupational choice guaranteed by article 12 Grundgesetz\textsuperscript{596} and is therefore illegal.\textsuperscript{597} The discretion of the judge is further restricted by section 38(3), third sentence, which regulates that the

\textsuperscript{590} P-A Albrecht, above n 487, p. 164.
\textsuperscript{591} Section 11(1), second sentence.
\textsuperscript{592} Section 11(1), second sentence; U Eisenberg, above n 451, § 10, Rn 22a.
\textsuperscript{593} ‘Principle of Determinacy’.
\textsuperscript{594} ‘Principle of Appropriateness’.
\textsuperscript{595} H Ostendorf, \textit{Jugendgerichtsgesetz}, § 10, Rn 2-8; P-A Albrecht, above n 487, p. 166.
\textsuperscript{596} ‘Higher Regional Court of Hamburg’.
\textsuperscript{597} ‘German Constitution’.
judge must hear the *Jugendgerichtshilfe* and consider their opinion before selecting and imposing an instruction.

If a young person does not comply with the instructions, the judge can impose youth detention if the young person had previously been cautioned as to the consequences of culpable non-compliance. The period of youth detention imposed in such cases may not exceed a total duration of four weeks. The judge shall suspend the enforcement of the youth detention if the young person complies with the instruction after the detention has been imposed. In practice, however, this type of enforcement is rarely used.

**Offender-Victim-Reconciliation**

According to section 10(1), third sentence, number 7, the judge can instruct the young person to ‘attempt to achieve a settlement with the aggrieved person’ (offender-victim-reconciliation). Its implementation reflects Germany’s endeavours to put aspects of the restorative justice approach into practice and is therefore explained in more detail in the following. Apart from being issued as an instruction by the judge (which was excoriated for violating the voluntary principle of mediation efforts and is rarely used in practice), offender-victim-reconciliation can take place at any stage during criminal proceedings and cause the authorities to either refrain from prosecution (section 45(2) and (3)), or to terminate proceedings (section 47(1) number 3). In practice, offender-victim-reconciliation is mainly achieved in the pre-trial stage (90% of cases in

---

599 Section 11(3), first sentence.
600 Section 11(3), second sentence.
601 Section 11(3), third sentence.
602 F Schaffstein and W Beulke, above n 453, p. 106.
2002), with 80% of cases being initiated by the Staatsanwaltschaft and 4% by the offender, the victims, schools, or social workers.\textsuperscript{603}

If the Staatsanwaltschaft or the judge consider that a case is generally suited for offender-victim-reconciliation, they involve an institution which offers and conducts such projects.\textsuperscript{604} This organisation first of all finds out whether victim and offender wish to enter settlement-discussions, and if so, makes the parties meet face-to-face, leads their discussions, records the results, and supervises the outcomes agreed upon. When the institution regards the settlement attempt as completed, they inform the Staatsanwaltschaft or the judge of success or failure. The period between case-entry and return to judicial organs is about 20 weeks in average.\textsuperscript{605} The most common agreements in offender-victim-reconciliation-processes alongside apologies are the payment of damages or compensation for pain and suffering.\textsuperscript{606}

‘Offender-victim-reconciliation’ was only statutorily implemented by the 1\textsuperscript{st} JGGÄndG in 1990. Its implementation was motivated by the successful outcomes that were achieved by a few experimental pilot-projects which had already been established in 1985.\textsuperscript{607} Offender-victim-

\textsuperscript{603} H-J Kerner and A Hartmann, Täter-Opfer-Ausgleich in der Entwicklung (2005).
\textsuperscript{604} There are a variety of institutions that conduct offender-victim-reconciliation-projects. Most of them are private non-profit organisations; others are public agencies like the Jugendgerichtshilfe. Welfare organisations run by the Christian churches also offer conduct offender-victim-reconciliation-projects. The majority are private institutions and about three quarters of the involved institutions are specialised in offender-victim-reconciliation. (H-J Kerner and A Harmann, Täter-Opfer-Ausgleich in der Entwicklung (2005).)
\textsuperscript{605} H-J Kerner and A Hartmann, above n 603.
reconciliation was soon regarded as an effective method with regard to the JGG’s aim of individual prevention, and should further lead to more informal and thus less disruptive youth criminal law proceedings by reducing detention and imprisonment sentences. As a matter of fact, there was an increase of 60% in the number of offender-victim-reconciliation projects two years after their legal implementation. Research undertaken in the following years has clearly shown that offender-victim-reconciliation does work especially for medium-serious injury and violent offences, that the willingness to participate in such projects is reasonably high, and that the parties usually achieve an agreement and settle the conflict in an acceptable manner. Referring to this favourable evaluation, Kerner and Hartmann stated that ‘[this] leads us to the hope that the acceptance of [offender-victim-reconciliation-projects] will widen…’. Furthermore, practitioners and criminologists have already started to examine the feasibility of replacing formal youth justice proceedings with offender-victim-reconciliation schemes.

However, recently offender-victim-reconciliation programmes have again been used less due to lack of resources as the general economic situation

---

608  F Schaffstein and W Beulke, above n 453, p. 114.

609  F Dünkel, above n 480.


611  Participation in offender-victim-reconciliation-projects is voluntary. The acceptance among the victims varies between 60-70%, while the acceptance among offenders is 90%.

612  H-J Kerner and A Hartmann, above n 607, p. 3.

613  Ibid.
in Germany has led to a cut in funding in many offender-victim-reconciliation-projects.614

**Educational Assistance, section 12 JGG**

Section 12 states that the judge may, under the conditions set out in the *SGB VIII*, and after having heard the youth welfare office, order the young person to undergo educational assistance either in the form of educational support by a social worker within the meaning of section 30 of the *SGB VIII*,615 or in the form of staying in a residential institution or in another form of supervised residence within the meaning of section 34 of the *SGB VIII*.616 Thus, section 12 contains two different types of educational assistance: educational support and supervised residence.

The provision applies to young persons but not to *Heranwachsende*.617 Before educational assistance can be imposed, several requirements have to be met. First, the imposition of educative measures must be applicable under the terms of section 5(2); that is the young person must be considered to be in need of education and must seem to be amenable to educative measures (see above). Second, the constitutional restrictions as mentioned above have to be considered, thus the educational assistance must be in accord with the rights and principles of the *Grundgesetz*. Third, the conditions set out in the *SGB VIII* must be met. As section 12 states that the judge may impose educational assistance as provided for under sections 30 and 34 *SGB VIII*, the conditions for applying these sections, regulated in section 27 *SGB VIII*, must be fulfilled. Section 27 *SGB VIII* states that educational assistance may only be imposed on a young person if the young person’s education is not assured and therefore

---

614 P-A Albrecht, above n 487, p. 171.
615 Section 12 no. 1.
616 Section 12 no. 2.
617 Section 1(2) and 105.
the educational assistance is adequate and necessary. If these three conditions are fulfilled, the judge decides according to his or her best judgement. In doing so, the judge has to observe the *Subsidiaritätsprinzip* and the principle of proportionality. Accordingly, educational support has priority over a supervised residence because it is a less severe intervention. Consequently, supervised residence must only be imposed as a last resort and if it seems to be essential.

**Disciplinary Measures, sections 13-16 JGG**

The second category of formal court orders is the disciplinary measures. They are divided into three subcategories which are listed in section 13(2): the first subcategory is a warning, the second is fulfilling certain obligations, and the third is short-term youth detention. The last two are again divided into several subcategories. Disciplinary measures are the most frequently imposed court orders in youth criminal law, both with regard to young persons and to *Heranwachsende*. Within the disciplinary measures, obligations are imposed most frequently, followed by warnings and short-term youth detention.

The judge must impose disciplinary measures to punish the young person for having committed a criminal offence if the youth penalty is not indicated but it needs to be made clear that the young person has to take responsibility for his or her wrongdoing. Thus, disciplinary measures are suitable for ‘basically good-natured’ young persons who do not show serious educational deficiencies. Nevertheless, disciplinary measures

---

618 H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 12, Rn 9.
619 Ibid, § 12, Rn 17.
620 P-A Albrecht, above n 487, p. 203.
621 Section 13(1).
622 P-A Albrecht, above n 487 p. 205; critical: U Eisenberg, above n 451, § 13, Rn 12.
also aim at having an educational effect. At the same time, however, disciplinary measures are intended to be of a repressive nature and shall ‘come down on the young person like a ton of bricks’. Despite their repressive character, the imposition of disciplinary measures should nevertheless lead to individual prevention. Unlike the educative measures, however, disciplinary measures are not supposed to impact on the young person’s whole way of life. Summing up, disciplinary measures can be characterised as aiming to impress the young person (leading to individual prevention), but not to affect and to change the young person’s whole way of life.

Disciplinary measures are not ‘real’ criminal sentences as they do not entail the legal consequences of real criminal sentences, meaning that they do not enter the criminal record of a young person. Consequently, a young person who was formally convicted in court and was issued with a disciplinary measure is still to be regarded as ‘not previously convicted’.

**Warnings, section 14 JGG**

A warning is a formal rebuke of the young person by the Youth Court Judge which clearly indicates that the action was wrong. Warnings can be issued to young persons as well as *Heranwachsende* and can be seen as the mildest of all the disciplinary measures. A warning is issued to a young offender if the offence is of a petty nature and the young person does not show serious educational deficiencies. Warnings under section

---

623 R Brunner and D Dölling, above n 504, § 13, Rn 2.
624 P-A Albrecht, above n 487, p. 204.
625 Section 13(3).
626 F Schaffstein and W Beulke, above n 453, p. 136.
627 Section 14.
14 are different from admonitions pursuant to sections 45(3), first sentence; 47(1) number 3, because they are formal sentences. An admonition, issued in accordance with the diversionary provisions, may have the same tenor as a warning pursuant to section 14, but they differ in terms of their procedural entity: an admonition issued in accordance with the diversionary provisions is imposed informally and leads to the termination of proceedings while a warning, being imposed as a disciplinary measure, is a formal court order that follows a trial and a formal conviction in the Youth Court. However, both admonitions and warnings are educationally effective only if they are issued individually and emphatically. While issuing a warning, the judge shall emphasise the severity of the young person’s guilt, shall make clear that the offence has affected the general public in an adverse and destructive way, and that the young person will receive a much more severe sentence if he or she reoffends. Thus, it is necessary that the young person takes the warning seriously to avoid gaining the impression that ‘nothing has happened’ although the young offender has passed through the whole youth justice procedure. Because of that, a warning shall be issued only once, for first-time offending. A warning can be issued as an adjunct to some other formal order.

**Obligations, section 15 JGG**

The second subcategory of the disciplinary measures is the obligations. They can be imposed on young persons as well as on *Heranwachsende.* According to section 15(1), first sentence, numbers 1-4, the judge can require the young person to: first, do his or her utmost to make up for the

---

629 F Schaffstein and W Beulke, above n 453, p. 137.
630 Ibid.
632 H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 14, Rn 5.
633 Section 8.
damage caused (reparation); second, apologise personally to the aggrieved person; third, perform community service; or fourth, pay a sum towards a public organisation (fine). These four obligations are exclusive, thus the judge may not amend the existing obligations or impose other obligations.634

Unlike the instructions under section 10, which are intended to influence the way the young person leads his or her life and therefore are generally imposed for a longer period, obligations can be characterised as ‘increased warnings’ because they intend to make clear to the young person the wrongfulness of the offence as well as the damage caused by the offending behaviour.635 Thus, the young person should feel uncomfortable with the obligations imposed on him or her and regard the obligations as an offence-related expiation.636 Nevertheless, an obligation must not make unreasonable demands on the young person.637

The first obligation, ‘making up for the damage caused’, is a specific implementation of a restorative justice approach and therefore may be imposed only with regard to compensation of a victim who suffers damage as a result of the criminal offence committed by the young person. Hence, the young person must be liable under civil law.

The second obligation, ‘personal apology to the victim’ also is an implementation of a restorative justice approach and is considered to be very valuable from the pedagogic point of view. This, however, applies only if the victim is willing to accept the apology.638 However, the

634 H Diemer and A Schoreit and B-R Sonnen - Diemer, above n 442, § 15, Rn 3.
635 F Schaffstein and W Beulke, above n 453, p. 137.
636 R Brunner and D Dölling, above n 504, § 15, Rn 1.
637 Section 15(1), second sentence.
offender’s willingness to apologise is not a prerequisite for imposing an apology-obligation, because it is believed that an apology under compulsion also satisfies the retaliation- and expiation intention of disciplinary measures.\(^{639}\) In practice, however, this obligation is rarely used.

Only since their implementation into the *JGG* by the 1st *JGGÄndG*, community service hours have been disciplinary measures and thus can be imposed with the intention of being repressive and punitive. Under the previous legislation, they could only be imposed as an instruction pursuant to section 10 with the consequence that they could only be applied if the young person’s attitude towards labour needed to be addressed from an educational point of view.\(^{640}\) The judge generally imposes community service hours where the imposition of a fine does not seem feasible for lack of income. Nowadays, the community service obligation is the most frequently imposed obligation, superseding the payment of a fine.\(^{641}\)

The fourth obligation, ‘paying a sum towards a public organisation’ is often used in practice.\(^{642}\) The activity of such organisations must directly benefit the general public. Thus, the Treasury does not qualify and an obligation demanding a payment towards the cost of the prosecution is illegal.\(^{643}\) According to section 15(2), the judge should impose a fine only if the young person has committed a petty offence and if it can be...

---

\(^{639}\) H Diemer, A Schoreit and B-R Sonnen - *Diemer*, above n 442, § 15, Rn 13; different view: R Brunner and D Dölling, above n 504, § 15, Rn 9; W Dallinger and K Lackner, Jugendgerichtsgesetz (2nd ed 1965), § 15, Rn 9.


\(^{641}\) F Schaffstein and W Beulke, above n 453, p. 136.

\(^{642}\) F Schaffstein and W Beulke, above n 453, p. 139.

assumed that he or she pays the sum from money which he or she is allowed to dispose of, or to withdraw the profit the young person has gained from the criminal offence. Accordingly, the financial circumstances of the young person have to be thoroughly evaluated, because the fine would not be effective from an educational point of view if the parents or other persons pay the sum. In practice, this obligation is therefore mainly imposed on Heranwachsende who are already employed and have their own income. The law does not fix the minimum and maximum of the sum. Nevertheless, there is unity among the commentators about the fact that the sum must be in line with the gravity of the misconduct as well as with the financial circumstances of the young person.

Youth Detention, section 16 JGG

The most severe disciplinary measure is youth detention, regulated under section 16. Youth detention can be imposed on both young persons and Heranwachsende, and refers to the placement of the young offender in a special institution distinct from the youth prison.

Youth detention is supposed to be a short-term restriction (no longer than four weeks) of the young person’s liberty and shall compensate for the guilt as well as have an educational effect on the young person by leading to self-reflection on the offending behaviour. Accordingly, youth detention should generally only be imposed on young persons who are regarded as educationally amenable. Nevertheless, in practice, youth detention is also frequently imposed on young persons who do not seem

644 P-A Albrecht, above n 487, p. 216; F Schaffstein and W Beulke, above n 453, p. 139.
645 U Eisenberg, above n 451, § 16, Rn 1; H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 15, Rn 15.
646 H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 16, Rn 1.
to be educationally influenceable to precede the imposition of youth penalty.\(^{647}\)

Pursuant to section 16(1), there are three different types of ‘youth detention’. Accordingly, youth detention can be: first, detention during leisure time; second, short-term detention; or third, long-term detention.

Youth detention during leisure time shall be imposed during the young person’s weekly spare time and shall last for one or two ‘leisure time periods’\(^{648}\) to avoid adverse effects and negative influences caused by longer detention periods.\(^{649}\) From section 16(3) arises the fact that the term ‘leisure time period’ means at most a period of 48 hours, even if the actual spare time of the young person is essentially longer. Detention during leisure time regularly starts on Saturdays at 8 pm\(^{650}\) and ends on Mondays at 7 pm.\(^{651}\) Nevertheless, exceptions are allowed to avoid possible interference with employment or education.

Short-term detention is to be imposed instead of detention during leisure time if an uninterrupted period of incarceration seems to be necessary from the educational point of view and neither the young person’s apprenticeship nor his or her employment are impaired by the detention.\(^{652}\) If the judge imposes short-term detention, he or she shall deem two days of short-term detention to be equivalent to one leisure

---

\(^{647}\) Critical: F Schaffstein and W Beulke, above n 453, p. 141, 142.

\(^{648}\) Section 16(2).

\(^{649}\) H Diemer, A Schoreit and B-R Sonnen - Diemer, above n 442, § 16, Rn 20.

\(^{650}\) If the young person has to attend school on Saturday mornings, it starts on Saturdays at 3 pm.

\(^{651}\) U Eisenberg, above n 451, § 16, Rn 25.

\(^{652}\) Section 16(3), first sentence.
time period. Thus, short-term detention can be imposed from two up to four days. In practice, short-term detention is hardly ever used.

If the judge believes that the young person needs to be concerned with his or her offence and its consequences for a longer period, he or she may impose long-term detention. Long-term detention may be imposed for a period of at least one week but may not last longer than four weeks. The actual duration of long-term detention shall be geared to the purpose of individual prevention. While determining the duration, the judge has to consider the specific personal situation of the young person as well as the possibilities provided for by the respective institution. Nowadays, long-term detention is the most frequently used type of youth detention.

Because youth detention is a subcategory of the disciplinary measures, it is not a ‘real’ criminal sentence and consequently does not enter the young person’s criminal record. For proportionality reasons, the imposition of youth detention is out of the question for petty offences. Instead, youth detention should only be imposed for offences of medium severity.

**Youth Penalty, sections 17-30 JGG**

Youth penalty is the only real criminal sentence in German youth justice that enters the criminal record of the young person so that he or she is seen as having a previous conviction in following proceedings. Youth

---

653 Section 16(3), second sentence.
654 A Böhm and W Feuerhelm, 631, p. 212; F Schaffstein and W Beulke, above n 453, p. 143.
655 Section 16(4).
656 H Diemer, A Schoreit and B-R Sonnen - Sonnen, above n 442, § 16, Rn 24.
657 H Diemer, A Schoreit and B-R Sonnen - Sonnen, above n 442, § 16, Rn 15.
658 A Böhm and W Feuerhelm, above n 631, p. 217.
penalty may be imposed on both young persons and *Heranwachsende*.\(^{659}\)

As the youth penalty is the most severe court order available in the youth criminal jurisdiction, it is intended to be a course of last resort.

According to section 17(1), youth penalty means imprisonment in a youth penal institution. As the statutory ranges of penalties that apply under general criminal law do not apply to young persons,\(^{660}\) the minimum and maximum terms of youth penalty are regulated under section 18. Accordingly, the minimum period of youth penalty is six months; the maximum period is five years.\(^{661}\) For crimes for which the *StGB* provides a maximum term of adult imprisonment of more than 10 years, the maximum youth penalty may not exceed 10 years.\(^{662}\) The reason for the minimum six-months-term of imprisonment (unlike in adult criminal law, where the minimum is one month) is the belief that the treatment and education of a young offender are effective only if a minimum term of incarceration is available.\(^{663}\) As in general criminal law, a youth penalty sentence may be suspended\(^{664}\) or imposed for a probationary period\(^{665}\) if the young offender is low-risk and the sentence does not exceed one year. Further, a young offender serving youth penalty may be paroled after having served one-third of the sentence.\(^{666}\)

According to section 17(2), youth penalty should be imposed only if educative measures or disciplinary measures seem to be insufficient in

\(^{659}\) H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 17, Rn 1.

\(^{660}\) Section 18(1), third sentence.

\(^{661}\) Section 18(1), first sentence.

\(^{662}\) Section 18(1), second sentence.

\(^{663}\) H Diemer, A Schoreit and B-R Sonnen - *Sonnen*, above n 442, § 18, Rn 5; F Streng, above n 509.

\(^{664}\) Section 21.

\(^{665}\) Section 27.

\(^{666}\) Section 88.
relation to the young person’s bad habits or vices that have emerged during the commission of the offence, or given the seriousness of the offence and the young person’s guilt.\textsuperscript{667} This wording reflects the dichotomy of youth sentences (education versus punishment). Although the primary goal of youth criminal law is education, and the guidelines relating to section 17 state that the youth penalty is an educational-orientated penalty which may not be equated with the prison sentence of general criminal law,\textsuperscript{668} the wording of section 17(2) shows that there can be cases where the imposition of a prison sentence of up to 10 years is not based on pedagogic reasons because section 17(2) allows the imposition of the youth penalty for ‘serious crimes’. This is for the sake of general and individual prevention.\textsuperscript{669} Nevertheless, this possibility is controversial with regard to the German youth justice’s prime principle, the principle of education.

Youth penalty is to penalise the young offender for having committed the offence and may therefore be repressive. The young person shall realise that he or she has violated the general public as well as the legal order and now must reconcile this violation. Thus, the young person is supposed to regard his or her offence as a source of some embarrassment and shall see the youth penalty as a ‘great deal of annoyance’.\textsuperscript{670} Although the imposition of the youth penalty may also be based on the young person’s destructive disposition, recent studies of Youth Court

\textsuperscript{667} Section 17(2).
\textsuperscript{668} A Böhm and W Feuerhelm, above n 631, p. 217
\textsuperscript{669} BGH NSZ 1994, 124.
\textsuperscript{670} A Böhm and W Feuerhelm, above n 631, p. 217; F Schaffstein and W Beulke, above n 453, p.151.
decisions show that virtually all impositions of the youth penalty for a term of 10 years were justified by the seriousness of the crime.\textsuperscript{671}

However, the pedagogic value of prison sentences is controversial, especially in the area of youth justice, because in practice, imprisonment is hardly ever educationally orientated.\textsuperscript{672} Instead, various surveys have proved that the likelihood of reoffending is much higher after the execution of a prison sentence without probation, and that youth incarceration has considerable adverse effects for the personal development of a young person.\textsuperscript{673} Hence, it is argued that the prison system for young persons, because of its lack of educational orientation, should be amended.\textsuperscript{674}

Summing up it can be said that the JGG provides for a wide range of different court orders, varying from less severe educative measures to youth penalty of up to 10 years. On the one hand, the orders available enable German Youth Court Judges to sensibly respond to first-time offending, and on the other to impose serious penalties on recidivist offenders. Some of the orders provided for under the JGG are based on approaches that are regarded as being sensible and progressive. In particular, the ‘offender-victim-reconciliation’ instruction and the ‘apology to the victim’ obligation, which led to the implementation of aspects of a restorative justice approach, were seen as being educationally promising and effective. In practice, however, these orders are not used very often. Instead, the most widely imposed court orders are community service and pecuniary sanctions. This practice suggests a miniature model


\textsuperscript{672} F Schaffstein and W Beulke, above n 453, p. 151.

\textsuperscript{673} H Diemer, A Schoreit and B-R Sonnen - Sonnen, above n 442., § 17, Rn 6.

\textsuperscript{674} F Schaffstein and W Beulke, above n 453, p. 291.
of adult sentencing. The predominant use of those rather punitive orders can be explained by their easy conversion into the ‘basic currency of criminal sanctions’ that is, time of the people operating the judicial system. In contrast, measures that are more likely to have an educational impact and are more appropriate for achieving good outcomes for young offenders, like offender-victim-reconciliation and arranging for apologies or reparation with victims, are time consuming for all officials involved. These measures need to be initiated, facilitated, observed and evaluated, and this barely happens because the German machinery of justice and the social services are chronically overloaded, and funding private organisations for this task is often regarded as too expensive. Furthermore, the fact that offender-victim-reconciliation can only be encouraged by the officials but nevertheless remains voluntary does not promote a frequent application.

---

CHAPTER SEVEN
COMPARISON, RECOMMENDATIONS AND CONCLUSION

After having reviewed most of the salient provisions of both New Zealand’s *CYPFA* and Germany’s *JGG*, it is clear that – despite some theoretical and philosophical similarities - both statutes differ significantly. Consequently, the youth justice systems, which have emerged from these legal bases, differ as well. The comparison of both systems shows, however, that each has its advantages and disadvantages.

**Criminal Responsibility and Scope of youth justice legislation**

Regarding the age of criminal responsibility and the scope of the youth justice legislation, the countries have enacted somewhat dissimilar rules. Compared to New Zealand’s legislation, the German rules seem to be much more lenient. In Germany, children under the age of 14 years are not criminally liable while in New Zealand only children under 10 years lack criminal capacity. Children between the ages of 10 and 14 years, however, can only be prosecuted for murder or manslaughter, and this only if they knew either that the act or omission was morally wrong or that it was contrary to law. Therefore, prosecutions of children under the age of 14 are very rare. A similarity in both countries, however, is that children who are not criminally liable – or, in New Zealand, children aged 10 to 13 who have committed any type of offence other than murder or manslaughter – are dealt with under the care and protection provisions of the respective jurisdiction.
In New Zealand as well as in Germany, youth criminal law only applies to persons of a specific age group. In New Zealand, the youth justice provisions of the *CYPFA* apply to ‘young persons’, meaning persons over the age of 14 but under the age of 17 years. In Germany, the *JGG* applies to ‘young persons’ too - but here persons over the age of 14 but under the age of 18 years are included. Furthermore, some provisions of the *JGG* may – under certain conditions – apply to *Heranwachsende*, that is persons over 18 and under 21 years. This possibility is remarkable because it introduces a flexible way of dealing with adolescents in criminal matters and provides for the option to choose an appropriate response from either the juvenile or the adult criminal law by paying attention to the personality and maturity of the individual young offender. In comparison, New Zealand’s legislation does not provide for such a possibility.

In New Zealand, young persons who offend against the law are generally dealt with in the Youth Court. However, the *CYPFA* provides for the possibility of transferring some young offenders to the District Court or High Court for trial or more severe sentencing if certain conditions are fulfilled. Regarding this, the New Zealand system obviously has retained aspects of a crime control model.¹ In contrast to that, the *JGG* does not allow the transfer of young offenders to adult courts and, furthermore, all *Heranwachsende* are actually adjudicated in the Youth Court.

After having compared both systems, the German practice seems to be superior because of the following reasons. First, sufficient regard is given to the fact that in current Western societies the transitional period between youth and adulthood has become prolonged over recent decades and entrance into the adult world has been made more difficult. Today,

education and vocational training – typical aspects of the life phase ‘youth’ - are hardly ever completed before a young person turns 20. Therefore, the development of personality and integration into adult life happens considerably later than some decades ago and young persons, despite their legal majority, remain particularly vulnerable to self-harm, adult influences and reckless risk-taking for a longer time. The Youth Court is specially designed to respond to vulnerable young persons who are in a difficult transition period. Furthermore, the youth criminal law provides for various education-oriented measures and orders which address adolescents in a special way and can be even more unpleasant for an accused person than adult sentences. Consequently, it is not convincing to only apply youth criminal law to persons under 17 years, or to transfer them to the adult court.

This viewpoint is supported by the United Nations Convention on the Rights of the Child, which defines a child as ‘[…] every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.’ In New Zealand, the age of majority is attained when a person turns 20; thus, the age of majority is not ‘attained earlier’ than 18 years. Having ratified UNCRC, New Zealand is under a responsibility to implement its provisions and consequently should at least deal with 17-year-olds as ‘young persons’ under the CYPFA. However, as the criterion established by UNCRC is obviously linked to the age at which a young person attains full age, New Zealand could moreover consider whether adolescents up until the age of 20 should be dealt with under youth criminal law as well. In this regard, New Zealand

---

2 R Thompson, ‘UNCROC Demand That 17-Year-Olds be Dealt With as Young Person’, in (2006) 25 Court in the Act – A Newsletter Co-ordinated by the Principal Youth Court Judge for the Youth Justice Community, p. 3.

3 Hereafter referred to as UNCRC.


5 R Thompson, above n 2, p. 3.
could think about the implementation of a flexible provision similar to the one in Germany that provides for the option to choose an appropriate response from either the juvenile or the adult criminal law by paying attention to the personality and maturity of the individual young offender.

**Youth Justice Principles**

With respect to the theoretical and philosophical principles that underlie the two statutes, New Zealand’s and Germany’s laws interestingly show clear parallels. While New Zealand and Germany adopted different theoretical approaches towards youth offending in the past – New Zealand’s legislation was firmly rooted in the welfare model whereas Germany’s legislation was dominated by a justice approach – both current statutes have adjusted their underlying principles to some extent with New Zealand shifting towards the justice approach and Germany adopting some welfare-aspects.

Today, both the welfare and the justice approach are important parts of New Zealand’s current system. Doolan\(^6\) states that the system has shifted towards the principles underlying the justice approach but without ‘embracing its more doctrinaire aspects’, and has moved away from the welfare approach ‘without a loss of interest in achieving positive outcomes for young persons’. Under the *CYPFA*, jurisdiction concerning care and protection and youth justice issues is now clearly divided, so that welfare aspects no longer determine penalties. Instead, regard is given to the circumstances of the offence and young persons are held accountable for their offending behaviour under an innovative system, made up of the FGC, a new decision-making forum, and the Youth Court processes.

---

In contrast to that, the current German youth justice system can still be characterised as being predominantly a ‘justice model’. Germany’s jurisdiction relating to young offenders always was - and still is - strictly separated from the jurisdiction dealing with children and young persons in need of care and protection. Therefore, welfare aspects have never determined penalties and young offenders were always held accountable for their offending behaviour before criminal courts. However, although Germany’s legislation still includes many of the justice model’s ‘more doctrinaire’ aspects, it has to be acknowledged that the current JGG also comprises some ‘welfare’ aspects. Its primary objective is the principle of education and thus the system aims to achieve positive outcomes for young offenders. Nonetheless, the German juvenile justice system is in fact a slightly modified adult criminal justice system because, except for some special provisions under the JGG, the criminal investigations and proceedings are the same as in general criminal law. Young offenders who are not diverted by the Staatsanwaltschaft are inevitably dealt with in the Youth Court; a specific, education-orientated forum for dealing with young offenders outside the courtroom does not exist. Although this ‘justice-model-orientation’ guarantees the observation of due process; the offender’s legal rights; and procedural safeguards, lack of discretion and formal proceedings prevent moves to novel decision-making arenas and make the system fairly inflexible. In this regard, the German system could – following New Zealand’s example – try to strike a greater balance between the justice and the welfare approach and give thought to the implementation of a decision-making forum other than the courtroom.

In addition to this adjustment regarding justice- and welfare-model aspects, both statutes are in accord regarding many of their key principles.

First of all, both systems have adopted the ‘principle of minimum intervention’. This principle is based on criminological findings resulting
from longitudinal studies which proved that the commission of petty
offences is ubiquitous among juveniles and as many as 70% of young
offenders are one-time offenders. Conclusions drawn from these studies
supported the view that juvenile offending does not necessarily require
official intervention. Imprisonment and the imposition of punitive
measures may in fact discriminate against first-time or petty offenders
and can intensify disintegrative processes. It is therefore believed in both
New Zealand and Germany that official intervention should be avoided
or delayed wherever possible.

In this context, the first youth justice principle mentioned in the CYPFA\(^8\)
states that ‘unless the public interest requires otherwise, criminal
proceedings should not be instituted against a child or young person if
there is an alternative means of dealing with the matter.’ This implies that
the use of formal court proceedings should be avoided wherever possible,
that Youth Court orders should only be used when necessary, and that a
conviction and transfer to the adult court should be used as a last resort.
Comparable to that, the JGG applies the Subsidaritätsprinzip, requiring
that restrained responses to juvenile offending should be given emphasis,
penal action should only be taken if absolutely necessary, and Youth
Court orders should only be imposed if this seems essential.

Furthermore, both countries agree that the primary aims of responding to
youth offending should be rehabilitation and reintegration into society.
Criminological research findings suggest that punitive sentences and
incarceration are not conducive to making young persons give up their

\(^7\) H Krüger, ‘Rückfallquote rund 30%’, *Kriminalistik* (1983) 37, 326, 327; V
Grundies, ‘Polizeiliche Registrierungen von 7- bis 23jährigen. Befunde der
Freiburger Kohortenuntersuchung’ in H-J Albrecht (ed) *Forschungen zu
Kriminalität und Kriminalitätskontrolle am Max-Planck-Institut für Ausländisches

\(^8\) Section 208(a).
criminal lifestyle, but, on the contrary, add to the young person’s difficulties in adjusting to societal demands.\(^9\) Various surveys have actually proved that youth incarceration has considerable adverse effects for the personal development of a young person and that the likelihood of reoffending is much higher after the completion of a prison sentence.\(^10\) Consequently, both countries stipulate that young offenders should be dealt with by other means than punishment and incarceration wherever possible to avoid disintegrative processes. In this regard, section 4(f) CYPFA requires that children and young persons are dealt with in ways that ‘give(s) them the opportunity to develop in responsible and socially beneficial ways’, and section 208(d) emphasises that ‘a child or young person who commits an offence should be kept in the community so far that is practicable and consistent with the need to ensure the safety of the public’. Section 208(f) further states that ‘any sanction must take the form most likely to promote the development of the child or young person within his or her family, whanau, hapu or iwi […]’. The German JGG stipulates similar aims by adopting ‘individual prevention’ as the sole sentencing goal which is geared to rehabilitating and improving the young offender through reinforcement of society’s norms and values.

In addition, both statutes require that the sanction imposed should be proportionate to the offence and the circumstances, but should be the least intrusive sentence available. In this regard, section 208(f) CYPFA states: ‘any sanction […] must take the least restrictive form that is appropriate in the circumstances’; while Germany applies the Verhältnismäßigkeitprinzip, requiring that the particular response chosen must be sufficient to achieve the goal that is sought but has to be the least severe measure among those available and must be proportional to its goal.


To satisfy these aforesaid principles, both statutes to a large extent include aspects of a diversion and decarceration approach and at present, both countries’ primary means of dealing with young offenders are diversionary responses. In New Zealand today, the majority of young offenders (about 85%) is diverted from court appearances, custody and convictions. In Germany, diversion is also the most important response to youth offending, with about 70% of young offenders being diverted from court appearances or convictions.

**Police Diversion**

Both statutes provide for a range of diversionary responses to youth offending. These, however, differ significantly. In New Zealand, police diversion is the main method for dealing with less serious and first-time juvenile offending. The young offenders who are dealt with by police diversion schemes receive alternative sanctions and therefore completely bypass formal criminal proceedings. Consequently, police diversionary schemes protect young persons from being adversely influenced by criminal proceedings and help to prevent young persons from being stigmatised as criminals. However, two critical aspects concerning New Zealand’s police diversion schemes need to be mentioned. First, as already discussed under 6.2.3.1, an officer may impose alternative actions on a young person for an offence ‘alleged to have been committed’, even where there has been no admission or proof of commission of the offence.\(^{11}\) It is questionable whether it is proper statutorily or otherwise to approve police officers requiring an individual to undertake certain actions as an alternative to a prosecution where the guilt of the individual has not been established.\(^{12}\) This administration might violate the presumption of innocence. With regard to a young person’s rights, it

\(^{11}\) *Abbott and Thompson District Courts Practice (Criminal) (NZ), Children, Young Persons, and Their Families Act*, CYP209.3 Comment.

\(^{12}\) Ibid.
seems to be essential that there should first have been proof of guilt - or at least an admission by the young person - that he or she committed the alleged offence. If this is not assured, a young person might have to complete alternative actions without even having committed an offence. This would be a material breach of legal rights and due process.

The second critical aspect is that New Zealand’s police diversionary schemes are – except for the police warning – not legislated for. Consequently, police officers have a wide discretion (which is only restricted by police guidelines) and are therefore empowered to impose basically any kind of penalty, including labour orders, for (alleged) criminal behaviour. To avoid arbitrary action and to protect the young person’s legal rights, these powers should at least be defined and legally regularised.

Unlike in New Zealand, police diversion schemes do not exist in Germany. Instead, young offenders are diverted either by the Staatsanwaltschaft or by Youth Court Judges after criminal proceedings have already been initiated against them. Thus, diversion in Germany is not exercised in terms of bypassing the whole formal proceedings. Consequently, young offenders always enter the justice system and might therefore to some extent be stigmatised. However, despite this negative aspect and even though police diversion schemes are very effective in New Zealand, their implementation in Germany would not be feasible because police diversion would not conform to the Grundgesetz as well as several other statutory provisions. As already described under 6.3.3.1, police diversionary action as exercised in New Zealand would violate the Grundgesetz that stipulates a strict separation of powers of the legislature, judiciary, and the executive branch. This rule can be traced back to the abuse of police powers that occurred under the Nazi regime. As responding to criminal action is, from the constitutional point of view, a task of the judiciary, the police, a body of the executive branch, is not
allowed to exercise such powers. Having German history in mind, the strict separation of powers is an essential and important constitutional principle which cannot and must not be abolished. Furthermore, Germany operates the principle of mandatory prosecution, which means that police officers are obliged to prosecute every apprehended suspect and do not have discretion as to whether they want to file or charge a case. Apart from that, an accused usually has to be considered guilty by the judiciary before a body of the state may intervene and impose sanctions. The police’s autonomous diversion activity might therefore illegally anticipate guilt and for that reason would violate the presumption of innocence stipulated by article 6(2) ECHR.\textsuperscript{13}

In the light of the above analysis, it becomes apparent that an implementation of police diversion would neither be worthwhile nor feasible from the German perspective.

\textbf{Family Group Conferences versus \textit{Staatsanwaltschafts-diversion}}\textsuperscript{14}

Apart from police diversion, the \textit{CYPFA} provides for another way of dealing with young offenders outside the courtroom: the Family Group Conference. The FGC-process was a wholly new concept when introduced in 1989\textsuperscript{15} and is the lynchpin and most outstanding feature of New Zealand’s youth justice system today. In New Zealand, the court cannot make a decision in respect of youth offending until an FGC has


\textsuperscript{14} See below page 352 et seqq. for discussion of the FGC-process in connection with restorative justice, cultural appropriateness and family decision-making and page 356 et seqq. for comparison with the German situation in relation to these issues and the question of suitability of the device for adoption of an FGC-forum in Germany.

been held. The FGC is a diversionary option for dealing with more serious youth offending and for holding young offenders accountable without necessarily charging them in court. Although the FGC-process might to some extent be stigmatising as well because it is in fact a formal youth justice instrument that only comes into play when the young offender has already entered the youth justice system, it nonetheless prevents the young person from the negative effects of a trial. If the FGC has determined what action and or penalty should result, it formulates a plan and sets a time limit for compliance. When the young person has completed the tasks under the plan, the matter is either settled – or, if information had been laid in court and the FGC had been court-directed – the young person might be discharged under section 282. The FGC-process responds to young offenders by keeping them in the community and therefore enhances rehabilitation and reintegration. Furthermore, young offenders can be held accountable without having to appear before court, being convicted or incarcerated.

In contrast to that, in Germany the only institution to impose diversionary responses outside the courtroom is Staatsanwaltschaft. At present, the most frequently applied diversionary provision is section 45(1) JGG, which means that proceedings against young offenders are mostly terminated without any further response to the offence. Although this method keeps the young person in the community, it does not hold the young person accountable in any way. Given that the main principle in German youth justice is the principle of education, it is debatable if a complete non-reaction really meets educational philosophies. However, as about 70% of young offenders are one-time offenders who do not require educational intervention, termination of proceedings pursuant to section 45(1) JGG is sufficient for them.

Nonetheless, section 45(1) JGG should not be applied to offenders who reoffend or who have committed more serious crimes. Thus, if the
offence is petty and would normally have been terminated under section 45(1) \textit{JGG}, but the young person is a repeat offender; or if the offence is of medium severity, proceedings are to be terminated under section 45(2) \textit{JGG}. According to this provision, the youth public prosecutor must refrain from prosecuting a young offender if an educational measure has already been enforced or initiated. This means, the youth public prosecutor may terminate proceedings if, for example, the young person’s family or school have already adequately responded to the offending behaviour by imposing suitable educational measures, or if the young person took part in an offender-victim-reconciliation-programme.

On close examination, section 45(2) \textit{JGG} basically covers situations which are quite similar to those resulting from an FGC in New Zealand. In both countries, proceedings against a young person may be dropped or dismissed if the young person has tried to achieve reconciliation with the victim of the offence and has additionally complied with tasks imposed on him or her by family members or the community. However, Germany’s rules differ significantly from New Zealand’s in one important point: while an FGC is to be held mandatory, and the young person, the victim, the young person’s family, and possibly someone from the community must jointly agree on a plan under which the young person is obliged to perform certain tasks, the German youth public prosecutor does not have the powers to order offender-victim-mediation, or to oblige families or other community members to impose educational measures. In fact, the German youth public prosecutor may only terminate proceedings if measures have been voluntarily initiated by persons mentioned above.

This exercise is not convincing. It seems to be inequitable to only terminate proceedings where people belonging to the young person’s social surroundings have coincidentally responded to the offending behaviour in the right way, while another young person would be
indicted only because his or her family or school did not voluntarily respond to the offending. Section 45(2) implies that proceedings may be terminated where the offence in question was sufficiently responded to by the community or the young person’s family. This poses the question why the German youth justice system has not yet implemented a mandatory forum comparable to the FGC during which families, victims and community members would have to come up with responses to the offending behaviour that would – after compliance – lead to the termination of proceedings. If an FGC were mandatory wherever a young person cannot be diverted under section 45(1) JGG, every ‘medium-serious’ young offender would get a chance to be diverted after having completed measures imposed by the conference.

An implementation of an FGC-forum could also integrate the provision of section 45(3) JGG, which enables the Staatsanwaltschaft to propose that the Youth Court Judge impose an admonition, instructions, or obligations. If the Youth Court Judge agrees, the Staatsanwaltschaft will refrain from prosecution. This provision is designed to address offending behaviour which is of such severity that the involvement of a judge seems necessary. This necessity, however, could also be ascertained during an FGC because the conference always has to agree upon a plan that responds to the offending behaviour in the right way. A plan could therefore also include a proposal that the young person should be admonished by a Youth Court Judge or should be issued other court orders.

In the light of these matters, Germany should consider the implementation of a mandatory FGC-forum by modifying sections 45(2) and (3) JGG accordingly.
Restorative Justice, Cultural Appropriateness and Family Decision-Making

In addition to the diversionary approach, New Zealand’s FGC system reflects ideas and customs of the indigenous New Zealand dispute resolution traditions which were employed in pre-colonial times by Maori. Today, the FGC is regarded as being one of the most promising models of restorative justice that enables offenders, victims, and their families and supporters to come to some agreement which offers reparation as well as assisting in the offender’s reintegration.⁶

The inclusion of aspects of traditional Maori customary law arose out of a deep concern about the disproportionate number of indigenous children and young persons who - under the guise of the previous welfare-oriented system - were placed in foster care and institutions. As the responsibility for those decisions rested with the courts, and families did not have a say, these proceedings were being criticised as discriminating and culturally inappropriate. Furthermore, the existing youth justice proceedings proved to be ineffective in addressing the overrepresentation of Maori children and young people in the crime statistics. The Maori way of settling disputes in the community by involving victims and the offender in searching for solutions that enable reconciliation, the repair of relationships, and reassurance was completely disregarded.

In response to these criticisms, the CYPFA introduced a new forum for child protection and youth justice decision-making: the FGC. This new forum heavily relies on community-decision-making by involving victims and families in the process and intending that families undertake the responsibilities of childcare as much as possible, with state

⁶ K Akester, Restoring Youth Justice, New Directions in Domestic and International Law and Practice, p. 28.
intervention kept to a minimum. This shift in power enabled Maori people to deal with their offending offspring in the community and to solve disputes in their traditional way by creating obligations to put things right. Today, New Zealand’s youth justice system can therefore be described as being culturally sensitive and appropriate.

‘Being culturally sensitive and appropriate’, however, does not only mean that the FGC-system exclusively addresses indigenous people. Instead, the involvement of victims and families in decision-making in fact accommodates every ethnicity.

The FGC-process – trying to enhance agreement and reconciliation between the affected parties and to achieve healing for victims - represents the restorative justice approach by redefining crime as an injury to another person rather than as a violation of society, the state and the law.

Furthermore, the involvement of families is more than an indigenous way of dispute resolution. Today, most problems in children’s and young persons’ lives – regardless of their ethnicity - are related to difficult family backgrounds, poor parenting, lack of family support, or disputes that arise within the family. Research has revealed that offending often is a symptom of these negative factors. However, as taking young persons away from their families and placing them in institutions or foster care may have harmful and damaging effects, the family is generally regarded as the best place for a child or young person. Furthermore, responding to offending behaviour should always aim at addressing its underlying causes. It is therefore believed that finding solutions should include and – wherever possible – be led by the families. Accordingly, the CYPFA stipulates that measures to deal with young offenders should strengthen

17 Sections 13(b)(i) and 13(b)(ii).
family groups and foster their skills for dealing with offending by their children and young persons. The FGC system requires that family become partners in the decision-making process as well as the key players in the future lives of their children. During the FGC, families are required to formulate recommendations and to come up with a plan, which, under the CYPFA legislation, is very influential, although in the end the court must decide the issue. Apart from being included in the decision-making, families are further urged to monitor (parts of) the FGC-plan, to support the young person in completing his or her obligations, and to encourage their offspring in giving up the criminal lifestyle. The FGC-process therefore helps getting ‘non-supportive’ families re-involved in the education of their adolescents and gives them some guidance in the way they should deal with their young people.

In Germany, research on the causes of youth offending carried out in the 1950s and 1960s already pointed to broken families, poor parenting and truancy. It was soon acknowledged that neither incarceration nor punishment could sufficiently address these causes. Instead, it was believed that strengthening the roles of family, community, neighbourhood, church institutions, and schools in handling problem behaviour would be a more effective way of dealing with juvenile offending. As a consequence, the JGG established diversionary and community-based measures, such as community-service and social

18 Section 208(c)(i)-(ii).
training courses, that should help to strengthen the roles of the mentioned social institutions. Additionally, in 1990, Germany legally implemented restorative justice measures, namely restitution and offender-victim-reconciliation programmes. A considerable number of offender-victim-reconciliation programmes have been successfully established since then. After surveys had confirmed the acceptance of restitution by the public and by the victims, the programmes began to receive strong support outside and inside the criminal justice system and practitioners and criminologists started to examine the feasibility of replacing formal youth justice proceedings with offender-victim-reconciliation schemes. Following that, strong arguments have been made to require offender-victim-reconciliation as a prerequisite for terminations of proceedings. These ideas, however, seem to be far from being put into practice at present. Currently, restitution and offender-victim-reconciliation schemes can only be encouraged by the officials while remaining voluntary, and, due to financial reasons, have recently been used less in practice.

As offender-victim-reconciliation programmes work very successfully in Germany and practitioners as well as criminologists would appreciate the establishment of a restorative justice forum that could replace formal court proceedings in youth justice, the implementation of an FGC-system comparable to the one employed in New Zealand seems to be a promising idea. The FGC involves victims and leads to restitution and healing while holding young offenders accountable without exposing

them to formal court appearances. Since the implementation of FGCs in New Zealand, the Youth Court no longer plays an important role as the vast majority of young offenders can be sufficiently dealt with outside the courtroom. This is fact is revolutionary, because in most other countries that employ restorative justice programmes today, the courtroom is still the norm and restorative justice is just an ‘add-on’.  

Considering the implementation of an FGC-model in Germany would also make sense from another perspective. The existing offender-victim-reconciliation schemes do not involve families in the decision-making process and the current German youth justice system does not offer a specific, family-strengthening forum for dealing with young offenders outside the courtroom. This is particularly astonishing given that German criminologists and practitioners have pointed to the necessity of strengthening the roles of families and the community in dealing with youth offending behaviour over 30 years ago. Notwithstanding these demands, decisions concerning young offenders are invariably made by the Staatsanwaltschaft or by judges, and families are neither included in decision-making nor in monitoring outcomes. In practice, there is often not even a family member present when the young person appears before court. Furthermore, diversionary obligations or court orders are often not, or not satisfactorily, monitored because the persons who are in charge of supervising the young person are social workers, and there are insufficient social workers available to ensure proper control. In practice, young offenders sometimes appear before court on a second indictment and have not even completed their previous order because nobody had monitored the compliance. This situation, indeed, is unsatisfactory and it would be worthwhile to establish a forum that includes families in decision-making as well as monitoring of outcomes. If Germany

implemented an FGC-model, families would be obliged to deal with their young person and his or her offending behaviour, to come up with a plan which extends over for several months and which actively includes the family members in controlling certain aspects in the young person’s life, such as ensuring school attendance and monitoring and assisting with homework. This procedure seems to be much more promising than the existing one, where the court imposes short-term measures, such as community work, the completion of those measures is not satisfactorily observed, the families are not included, and the underlying causes of the offending behaviour – such as truancy, school problems, and non-supportive families – are not, or not sufficiently, addressed.

Apart from the lack of family involvement, the German youth justice system also does not even endeavour to be culturally appropriate. Although 8.9% of the total German population is not ethnically German, and young migrants and members of ethnic minorities have become a key problem for the German juvenile justice system because they are heavily overrepresented in the crime statistics,\(^{25}\) there has not yet been an attempt to amend the \textit{JGG} in order to better address these young persons.

As discussed in Chapter Four, most of Germany’s foreign inhabitants come from the littoral states of the Mediterranean region and by far the largest number comes from Turkey. Many foreign employees came to Germany between the mid-1950s and the end of 1973, and numerous foreign workers later sent for other members of their family and stayed in Germany. As most of these foreign workers were recruited from rural areas in the Mediterranean region, they predominantly lived and still live

\(^{25}\) Most of these foreign young people were born in Germany. Their overrepresentation applies particularly to violent offences. The Turkish minority especially plays a significant role in this regard. Self-report studies reveal that the rate of violent young offenders is twice as high among the Turkish population group compared to the same German age group.
in extended family households. Family and community play a very important role among those people; many foreign families tend to live in areas where a lot of other foreigners from their home country already live and form ethnic sub-communities. As a result, they do not learn the German language properly and consequently they have huge problems with assimilating. Especially the children of these former guest workers, the so-called second- and third-generation immigrants, are exposed to a very difficult situation because they live between two distinct cultures. Their grandparents or parents, who migrated to Germany some decades ago, generally do not speak German, live their traditional lifestyle and have therefore not assimilated to German culture. The young person, however, grew up in Germany and attended a German school. Therefore, he or she generally has a German peer group. This can create enormous conflicts between the traditional norms and lifestyle valued by parents and the values and norms of the peer group, and this confusion often causes rebellion and offending behaviour. If such a young person now enters the German youth justice system, several problems arise: the family of the young person often cannot read and understand formal letters sent to them informing them about initiated proceedings. As a consequence, foreign families seldom turn up at the police station or in the courtroom and therefore may not provide support.\(^{26}\) If they are present, however, language barriers often prevent them understanding the proceedings. Furthermore, the proceedings might not be in accordance with their cultural way of solving disputes and the orders imposed might not be suitable for addressing the special situation of their young persons.

\(^{26}\) This does also count with regard to diversion under section 45(2) JGG (see above p. 251). Under section 45(2), proceedings may be terminated where the offence in question was sufficiently responded to by the community or the young person’s family. However, due to the discussed assimilation problems, many foreign families are not capable to respond to their young person’s offending in an appropriate way. Consequently, their young people tend to rather be indicted than other young persons.
Apart from that, it would be desirable if those families received some support regarding in dealing with their troubled young persons. Therefore, youth justice proceedings that try to be culturally flexible and appropriate and help to foster those families’ skills in dealing with their offending young persons are needed. It would be helpful if a forum for working with the whole family of those young persons existed so that the difficult cultural issues could be sufficiently addressed. From the author’s point of view, this could be achieved by the implementation of a forum comparable to the FGC.

After having pointed out these weaknesses of the current German youth justice system, it appears that Germany could well take a leaf out of New Zealand’s book. Under consideration of the above-mentioned shortcomings in the German system, the implementation of Family Group Conferences seems to provide a promising solution for many unsolved problems and unsatisfactory circumstances.

**Formal Court Orders**

In addition to the diversionary responses to youth offending, both New Zealand’s and Germany’s statutes provide for a great range of formal court orders. Although these do not vary notably, it appears that the JGG provides for an even greater variety of different orders than its New Zealand counterpart.

In New Zealand, the formal court orders a Youth Court Judge may impose are regulated in section 283 *CYPFA*. Pursuant to this section, the Youth Court Judge has the opportunity to do one or more of the following: he or she can discharge the young person from the proceedings without further penalty; admonish the young person; order the young person to come before court if called upon; order the disqualification from holding or obtaining a driver’s licence for a motor vehicle; impose a fine; order the young person to pay a sum towards the
cost of the prosecution; order the young person to make restitution; order
the payment of reparation; make an order for the forfeiture of property;
impose a community work order, make a supervision, supervision with
activity, or supervision with residence order; or transfer the charge to the
District Court.

The German *JGG* contains three different categories of formal court
orders (educative measures, disciplinary measures, and youth penalty),
which – comparable to New Zealand’s orders under section 283
*CYPFA* – may be combined with each other. The following sanctions are
similar to the opportunities a New Zealand Youth Court Judge has under
section 283 *CYPFA*. A German Youth Court Judge may also discharge a
young person without further penalty;\(^27\) warn the young person;\(^28\) or
suspend proceedings while concurrently imposing obligations.\(^29\) Further,
the judge can also order the young person to pay a sum towards a public
organisation (fine).\(^30\) However, as opposed to the provision of section
283(e) *CYPFA*, it is illegal in Germany to demand a payment towards the
cost of the prosecution. The judge can moreover instruct a young person
to make restitution or pay reparation by ordering the young person to
attempt to achieve a settlement with the aggrieved person\(^31\) or to do his
or her utmost to make up for the damage caused.\(^32\) A German judge can
further also order a young person to perform community service\(^33\) and
instruct the young person to be put under supervision (either under the
care and supervision of a specific person (care assistant);\(^34\) or in the form

\(^{27}\) *JGG*, section 47(1), first sentence, no. 1.

\(^{28}\) *JGG*, section 14.

\(^{29}\) *JGG*, section 47(1), first sentence, numbers 2 and 3.

\(^{30}\) *JGG*, section 15(1), first sentence, number 4.

\(^{31}\) *JGG*, section 10(1) no.9.

\(^{32}\) *JGG*, section 15(1), first sentence, number 1.

\(^{33}\) *JGG*, section 15(1), first sentence, number 3.

\(^{34}\) *JGG*, section 10(1) no.5 *JGG*. 
of staying in a residential institution or in another form of supervised residence).\footnote{JGG, section 12 no. 2 JGG.}

The comparison of those court orders shows that the \textit{JGG} basically provides for similar provisions as listed under section 283 \textit{CYPFA}. The only orders that are not explicitly mentioned are ‘forfeiture of property’ and ‘disqualification of a young person from holding or obtaining a driver’s licence for a motor vehicle’. These responses, however, could be imposed pursuant to section 10(1) \textit{JGG}, because its catalogue only suggests nine possible instructions by way of example.

In addition to the mentioned court orders, the \textit{JGG} explicitly provides for more possible outcomes than its New Zealand counterpart. The German Youth Court Judge may additionally order a young person to attend a road-traffic training course;\footnote{JGG, section 10(1) no.9.} to perform certain work tasks;\footnote{JGG, section 10(1) no.4.} to accept an apprenticeship training position or employment;\footnote{JGG, section 10(1) no.3.} to attend a social skills training course;\footnote{JGG, section 10(1) no.6.} to avoid contact with certain persons or refrain from frequenting places that provide public hospitality or entertainment;\footnote{JGG, section 10(1) no.8.} to undergo educational assistance in the form of educational support by a social worker,\footnote{JGG, section 12 no. 1.} to live with a foster family or in residential accommodation;\footnote{JGG, section 10(1) no.2.} to undergo youth detention;\footnote{JGG, section 16.} to comply
with instructions relating to his or her residence;\textsuperscript{44} or to apologise personally to the aggrieved person.\textsuperscript{45}

Summing up, the German statute contains sufficient options for responding to juvenile offenders and a modification of the German legislation based on the model of New Zealand does not seem necessary.

Furthermore, the \textit{JGG} empowers the German Youth Court Judge to ‘sentence’ the young person to youth prison for a maximum of 10 years.\textsuperscript{46} This practice completely differs from the one in New Zealand, where the Youth Court Judge may not impose a ‘sentence’ but, rather, makes ‘orders’. The term ‘sentencing’ is only used in section 283(o), which provides for young persons of over 15 years of age to be convicted and ‘[…] brought before a District Court for sentence or decision.’ In this case, not the Youth Court Judge, but the District Court Judge may ‘sentence’ a young person. That means that the most serious order a New Zealand Youth Court Judge may impose is the ‘supervision with residence order’. The duration of such an order is three months in the custody of the Chief Executive who can even reduce the duration to two months if the young person does not abscond or commit further offences during the custodial placement.

This restriction of a New Zealand Youth Court Judge’s powers is not convincing. As shown in Chapter Five, the development of a juvenile justice system distinct from the adult system was based on the belief that young persons are particularly vulnerable and adult criminal proceedings would therefore affect them adversely. Consequently, distinct Youth Courts with pedagogically specialised and experienced prosecutors and

\textsuperscript{44} \textit{JGG}, section 10(1) no. 1.
\textsuperscript{45} \textit{JGG}, section 15(1), first sentence, no. 2.
\textsuperscript{46} \textit{JGG}, sections 17 and 18.
judges were established. The opportunity of transferring young offenders to the District Court for sentencing ignores these psychological and pedagogical cognitions and therefore violates a fundamental youth justice philosophy. When regarding the powers of a German Youth Court Judge, it could be considered whether New Zealand’s Youth Court Judges’ powers should not be expanded. If a Youth Court Judge in New Zealand were able to sentence young offenders to youth prison, the young persons could still be dealt with before the specialised Youth Court and would not need to be transferred to the adult court with its adversarial proceedings. Expanding the powers of New Zealand’s Youth Court Judges would also address the criticisms raised by all practitioners being interviewed during the research for this thesis. They have stressed in unison that the ‘supervision with residence order’ does not serve recidivist offenders. Most of them have argued that the system under the CYPFA needs more ‘teeth’ in responding to this group of offenders. Providing the Youth Court Judges with the powers of imposing youth imprisonment would be one possibility to address the raised criticisms.

However, although the possibility of imposing youth prison sentences might improve the opportunities for Youth Court Judges to respond to serious and repeat offending more adequately, it obviously does not lead to reduced numbers of recidivist offenders. At present, both New Zealand and Germany face a number of about 5% of ‘hard-core’ offenders who are responsible for the majority of offences committed by juveniles and who tend to reoffend. In both countries, these young persons have caused concern and have received considerable attention in the media. This has led to a growing interest in identifying early signs of recidivist offending behaviour in both New Zealand and Germany. However, it has still not been possible to convert the retrospective findings on risk factors of
serious and repeat youth offending into ethically and economically feasible prospective prevention strategies.47

**Final Conclusion**

This study’s starting point was the aspiration of finding valuable reform ideas for the German juvenile justice system. As New Zealand’s juvenile justice system had recently become the focus of extensive international interest among practitioners, academics, policy advisers and the media, and has already been adopted and adapted by other jurisdictions, it was presumed that a comparison between Germany’s and New Zealand’s youth justice systems might lead to innovative reform ideas for the German legislation. After having ascertained that the two countries’ political, moral, social and economic values do not differ significantly, it could be assumed that efficient methods employed in one country might most likely be effectively introduced into the other country’s legislation. The comparison of both youth justice statutes revealed that each has its advantages and disadvantages. Particularly after having evaluated insights gained through interviews conducted with 10 practitioners working in the field of youth justice, it could be concluded that New Zealand’s FGC proved to be an extraordinary and effective model and its implementation would be worthwhile from the German point of view.

However, the comparison of the actual amount of juvenile delinquency in both countries revealed that young persons make up about 22% of all apprehended persons in New Zealand, while in Germany, 23% of all police-apprehended suspects are young persons and Heranwachsende. Further, both countries’ statistics display a figure of 5% for young ‘hard-

---

core offenders’. These similar numbers could lead to the assumption that neither system helps to reduce juvenile delinquency and that neither system can therefore be regarded as being better or more successful as such. However, after having examined the historical development of juvenile justice, it turned out that the phenomenon of juvenile delinquency exists since ‘youth’ was recognised as a special life phase in the transitional period between childhood and adulthood. It could be observed that increases in crime figures concerning juveniles were closely connected to social changes and societal problems, such as political changes, the breakdown of social control systems, the decrease of interpersonal relationships, poverty, unemployment, and discrimination and marginalisation of minority groups. As a (youth) justice system cannot solve or compensate for general societal problems, it has to be acknowledged that youth criminal justice can only play a marginal role regarding the reduction of youth offending behaviour.

This fact was already identified by Franz von Liszt, who - shortly after 1900 - stated that a good social policy would be the best criminal policy.\(^{48}\) This statement points the way to dealing with the causes of juvenile delinquency by addressing societal problems. Accordingly, the success of a youth justice system cannot solely be determined by looking at the crime statistics, but rather by the extent to which it tries to address the prevailing societal problems.

New Zealand’s Family Group Conference is an exemplary model in this regard. Both qualitative and literature-based research revealed that it successfully addresses various societal problems. As the German legislation does not provide for a comparable legal institution, the implementation of a decision-making forum similar to the FGC would seem to be expedient and worthwhile.

\(^{48}\) Quoted in F Dünkel, above n 47, p. 32.
BOOKS


Akester, Kate, *Restoring Youth Justice, New Directions in Domestic and International Law and Practice* (London 2000).


Ebert, Kurt Hanns, Rechtsvergleichung – Einführung in die Grundlagen (Bern 1978).


Eisenberg, Ulrich, Jugendgerichtsgesetz (10th ed, Munich 2004).


Ezell, Michel Eugene and Cohen, Lawrence E, Desisting from Crime: Continuity and Change in Long-Term Crime Patterns of Serious Chronic Offenders (New York 2005).


Green, Judith M and Thorogood, Nicki, Qualitative Methods for Health Research (Sage Publications Ltd. 2004).


Hartmann, Arthur, Schlichten oder Richten, Der Täter-Opfer-Ausgleich und das (Jugend-)Strafrecht (München 1995).

Hasenclever, Christa, Jugendhilfe und Jugendgesetzgebung seit 1900 (Göttingen 1978).

Häußling, Josef M, Brusten, Manfred and Malinowski, Peter, Jugendkonflikte (Stuttgart 1981).


Kuhn, Anne, Aushandeln statt verurteilen, Der Täter-Opfer-Ausgleich in der Jugendstrafrechtspflege (Tübingen 1989).


Laine, Marlene de, Ethnography, Theory and Applications in Health Research (Sydney 1997).


Levine, Marlene Wolfzahn and Wyn, Helen, Orders of the Youth Court and the Work of Youth Justice Co-ordinators (Wellington 1991).

Levine, Marlene Wolfzahn et al, Creative Youth Justice Practice (Wellington 1998).


MacRae, Allan and Zehr, Howard, The Little Book of Family Group Conferences, New Zealand Style (USA 2004).


Maxwell, Gabrielle and Morris, Allison, *Rethinking Youth Justice: For Better or Worse: A Comment on Proposals by New Zealand Children and Young Persons Service to Amalgamate Youth Justice and Care and Protection Services* (Wellington 1994).


Neugebauer, Manuela, *Der Weg in das Jugendschutzlager Moringen: Eine
devolutionspolitische Analyse nationalsozialistischer Jugendpolitik*
(Mönchengladbach 1997).

Nohl, Arnd-Michael, *Interview und dokumentarische Methode – Anleitungen
für die Forschungspraxis* (Wiesbaden 2006).

Norris, Marion and Lovell, Ron, *Patterns of Juvenile Offending in New
Zealand: No. 5, Summary Statistics for 1981-1985*, Research Section
Department of Social Welfare (Wellington 1988).

O’Driscoll, Stephen, *The Laws of New Zealand, Children and Young Persons*
(Wellington 1993).

Obergfell-Fuchs, Joachim, *Kommunlae Kriminalprävention* (Freiburg 2001).

Olsen, Teresa, Maxwell, Gabrielle and Morris, Allison, ‘Maori and Youth
Justice in New Zealand’ in K M Hazelhurst (ed), *Popular Justice and
45 et seqq.

Ostendorf, Heribert, *Jugendgerichtsgesetz, Kommentar* (5th ed, Cologne, Berlin
2000).

Platt, Anthony M, *The Child Savers. The Invention of Delinquency* (2nd ed,
Chicago 1977)


Priestley, Philip, Fears, Denise and Fuller, Roger, *Justice for Juveniles, The
1969 Children and Young Persons Act: A Case for Reform?* (London,
1977).

Radbruch, Gustav, *Jugendgerichtsgesetz vom 16. Februar 1923 mit Einleitung,
Erläuterungen und Schlagwortregister*, ZblVorJug 1923, p. 249 et seqq.

Ramsden, Eric, *Marsden and the Missions: Prelude to Waitangi* (Dunedin
1936).


Schuldzinski, Wolfgang, ‘Jugendstrafrecht in der Bundesrepublik Deutschland’ in G Losseff-Tillmanns, C Steindorff and J Borricand (eds), *Jugend(kriminal)recht in Deutschland und Frankreich* (Bonn 1992) p. 32 et seqq.


Searle, Wendy and Spier, Philip, Christchurch Youth Drug Court Pilot: One Year Follow-Up Study (Ministry of Justice, Wellington 2006).


Shore, Heather, (with Cox, Pamela), ‘Re-inventing the Juvenile Delinquent in Britain and Europe 1650-1950’ in P Cox and H Shore (eds), Becoming Delinquent: British and European Youth, 1650-1950 (Hampshire 2002).


Tesch, Renata, *Qualitative Research: Analysis Types and Software Tools* (Bristol 1990).


Woldenberg, Andrea van den, Diversion im Spannungsfeld zwischen ‘Betreuungsjustiz’ und Rechtsstaatlichkeit (Frankfurt a.M. 1993).


**JOURNAL ARTICLES**


Schöch, Heinz, ‘Die Rechtsstellung des Verletzten im Strafverfahren’ [1984] 
NSZ 385-391.

Schreckling, Jürgen and Pieplow, Lukas, ‘Täter-Opfer-Ausgleich, Eine 
Zwischenbilanz nach zwei Jahren Fallpraxis beim Modellprojekt „Die 

Schulz, Holger, ‘Die Höchststrafe im Jugendstrafrecht (10 Jahre) – eine 
Urteilsanalyse. Zugleich ein Beitrag zur kriminalpolitischen Forderung 
nach Anhebung der Höchststrafe im Jugendstrafrecht’, (2001) 84 
MschrKrim 310.

Streng, Franz, ‘Die Öffnung der Grenzen und die Grenzen des Strafrechts’ 

Trenczek, Thomas, ‘Täter-Opfer-Ausgleich, Grundgedanken und Mindest- 

Walter, Michael, ‘Jugendkriminalität und Jugendkontrolle als soziale Probleme 

Wandrey, Michael, ‘Organisation, Kooperation und Methodik: Zentrale 
Problemfelder bei Durchführung des Täter-Opfer-Ausgleichs’ [1991] 
DVJJ-Journal 143.

Watson, Alan, ‘Aspects of Reception of Law’ (1996) 44 American Journal of 
Comparative Law 335.

ZfRS123.

GOVERNMENT REPORTS


New Zealand, Ministry of Social Development; Ministry of Justice, Youth Offending Strategy: Preventing and Reducing Offending and Re-Offending by Children and Young People Te Haonga (Wellington 2002).


TABLE OF CASES

New Zealand

Brough [1995] 1 NZLR 419.


Police v C (Unreported, YC, Wellington, CRNO285015569, Carruthers DCJ).

Police v CMT (Unreported, YC, Wanganui, CRI 2004-283-44, Judge Callinicos DCJ, 6 May 2005)


Police v S [2000] NZFLR 188.


R v Autagavia [1985] 1 NZLR 398 (CA).


R v Knowles [1984] 1 NZLR 257 (CA).


Tavita v Ministry of Immigration [1994] 2 NZLR 257, 266.
Germany

Decision of the Reichsgericht – Supreme Court of the Reich

RGSt 58, 128.

Decisions of the Bundesgerichtshof (BGH) – Federal Court of Justice

BGHSt 8, 90.

BGHSt 36, 37.


BGH [1999] NStZ-RR.

Decisions of the Oberlandesgericht (OLG) – Higher Regional Court


TABLE OF STATUTES

New Zealand

Age of Majority Act 1970

Arms Act 1983

Bail Act 2000

Child Welfare Act 1925

Child Welfare Amendment Act 1927

Child Welfare Amendment Act 1948

Children and Young Persons Act 1974

Children and Young Persons Bill 1986

Children, Young Persons, and Their Families Act 1989

Crimes Act 1961

Criminal Code Act 1893

Criminal Justice Act 1985

District Courts Act 1947

English Laws Act 1858
Industrial Schools Act 1882

Industrial Schools Act 1908

Justices of the Peace Act 1882

Justices of the Peace Act 1908

Juvenile Offenders Act 1906

Land Transport Act 1998

Marriage Act of 1955

Misuse of Drugs Act 1975

Neglected and Criminal Children Act 1867

New Zealand Royal Titles Act 1953

Police Act 1958

State Sector Act 1988

Statute Law Amendment Act 1917

Summary Offences Act 1981

Summary Proceedings Act 1957

Supreme Court Act 2003

Transport Act 1962
Germany

1. JGG-Änderungsgesetz (1. JGGÄndG) 1st Juvenile Justice Amendment Act

Allgemeines Landrecht für die Preußischen Staaten (ALR) of 1974 Common Country Laws of Prussian States

Asylverfahrensgesetz Asylum Procedure Act

Ausländergesetz Alien Act

Bürgerliches Gesetzbuch (BGB) of 1900 Civil Code

Constitutio Criminalis Carolina (CCC) of 1532

Gerichtsverfassungsgesetz (GVG) of 1877 Constitution of the Courts Act

Gesetz über die Eingetragene Lebenspartnerschaft (LpartG) of 2001 Act Governing the Legal Rights of Unmarried Couples

Grundgesetz für die Bundesrepublik Deutschland of 1949 (GG) German Constitution

Jugendgerichtsgesetz (JGG) of 1923 Juvenile Justice Act, literally translated as Juvenile Courts Act

Jugendwohlfahrtsgegesetz (JWG) of 1922 Juvenile Welfare Act

Kinder- und Jugendhilfegesetz (KJHG) of 1991 Child and Youth Welfare Act
*Ordnungswidrigkeitengesetz (OWiG)*  
Summary Offences Act of 1968

*Sozialgesetzbuch VIII (SGB VIII) of 1991*  
Code of Social Law VIII

*Strafgesetzbuch (StGB) of 1871*  
Criminal Code

Original version: *Strafgesetzbuch für das Deutsche Reich (RStGB)*  
Criminal Code of the German Reich

*Strafprozessordnung (StPO) of 1879*  
Criminal Procedure Code

*Straßenverkehrsgesetz (StVG) of 1909*  
Road Traffic Act

Verordnung zum Schutze gegen jugendliche Schwerverbrecher of 1939  
Decree dealing with the Treatment of ‘Dangerous Juvenile Criminals

---

**Treaties and Conventions**

*European Convention on Human Rights (ECHR)*

*Treaty of Waitangi Act 1975*

*United Nations Convention of the Rights of the Child (UNCROC)*
<table>
<thead>
<tr>
<th>TABLE OF INTERNET RESOURCES</th>
</tr>
</thead>
</table>

Ministry of Justice,
#Maori%20Over-Represented%20In%20Key%20Crime%20Statistics at 9 December 2006.


Schormann, Julia, *Jugendarbeitslosigkeit in Deutschland verfestigt sich* (2005),

Scoop Independent News, 1st February 2006,

Staatistisches Bundesamt Deutschland,

Staatistisches Bundesamt Deutschland,

Statistics New Zealand,


United Nations Convention of the Rights of the Child,  

Watt, Emily, A History of Youth Justice in New Zealand, Youth Court New Zealand,  

Wikipedia, The Free Encyclopaedia,  

Wikipedia, The Free Encyclopaedia,  

Wikipedia, The Free Encyclopaedia,  

Wikipedia, The Free Encyclopedia,  

Wikipedia, The Free Encyclopedia,  

Young, Warren, Conviction and Sentencing of Offenders in New Zealand 1992-2001, Chapter 7: Court Statistics on Young Offenders,  

Young, Warren, Victoria University of Wellington, World Factbook of Criminal Justice Systems,  
TABLE OF VIDEO RECORDINGS

Legal Resources Trust, Children and Young Persons Services, ‘Eddie’s Aiga – A Samoan Youth Justice Story’ in *Family Group Conferences, A Series of Educational Videos* (Wellington 1995).

Legal Resources Trust, Children and Young Persons Services, ‘Penny’s Family – A Pakeha Youth Justice Story’ in *Family Group Conferences, A Series of Educational Videos* (Wellington 1995).

Legal Resources Trust, Children and Young Persons Services, ‘Stephen’s Whanau – A Maori Youth Justice Story’ in *Family Group Conferences, A Series of Educational Videos* (Wellington 1995).
Family Group Conference Plan

Date of Conference: 20 August 2006

Plan for:
Name: Katja Wiese
Date of Birth:
Age:
Legal Status:

1. Katja is going to write a letter of apology to victim XY. Katja’s sister will assist her with writing the letter. Verification will be through a letter from the victim which will be forwarded to the monitor of the plan.

2. Katja will complete 60 hours of community work, with a minimum of five hours being completed per week. Katja’s mother will arrange for this work at the Salvation Army’s home for the elderly. Verification will be through a letter from the Salvation Army recording the hours completed, which will be forwarded to the monitor of the plan.
3. Katja will be going to school every day. Katja’s father will wake her up at 7 o’clock and will drive her to school every day. Verification will be through a letter from the truancy officer …

4. Katja will undergo an anger-management course. Social worker XY will arrange for this in the Anti-Anger-Programme of Christchurch, which will verify attendance.

- Signatures of FGC all participants -
APPENDIX B:
INTERVIEW GUIDES

INTERVIEW GUIDE FOR YOUTH COURT JUDGES

PART 1: INDIVIDUAL RELATED QUESTIONS

1.) I know you are District Court Judge with a Youth Court warrant. What other kinds of District Court or family Court cases do you hear?

2.) How many years have you been a judge? How many years have you been hearing Youth Court cases?

3.) Which geographical areas are parts of your area of responsibility? Have you always worked in the same geographical area?

4.) Did you work in another field before you specialised in youth justice issues? If so, how long did you work in that area?

5.) Is there special training persons dealing with young offenders have to undergo?
6.) Did you have to qualify in a special way for dealing with young offenders?

7.) Were you already working in your current position under the previous system (before the introduction of the *Children, Young Persons, and Their Families Act*)? If yes,

   a) could you please describe your experiences with the old system?
   b) did your personal workload change under the new system?
PART 2: EXPERIENCES AND APPRAISALS

8.) Can you estimate approximately how many young offenders you deal with in your courtroom per year?

9.) Of these, could you give a rough estimate of how these are decided?

10.) Do the young persons you are dealing with tend to live in cities or in rural areas?

11.) On a rough estimate, what proportions of young offenders come from the following major ethnic groups:

   a) Pakeha (New Zealander of European descent);
   b) Maori
   c) Pacific Islands
   d) Asian
   e) Other

12.) What kind of court orders are available to judges and which ones do you impose most frequently?
PART 3: DIVERSION

13.) What do you think about diversion as a reaction to juvenile offending?

14.) The *Children, Young Persons, and Their Families Act* emphasises diversion processes. For the first time, a legislative base exists for diversion and emphasis is given to diversionary measures which shall strengthen families and allow them to foster their own means of dealing with their offending young people. Could you please describe how the diversionary process works?

15.) In your area of responsibility, how many young offenders do you estimate are dealt with by diversionary measures and therefore do not appear before court?

16.) Approximately 76% of New Zealand’s youth offending is dealt with by police diversion schemes devised and operated by specialist officers. What do you think of the way police officers respond to juvenile offending?
PART 4: FAMILY GROUP CONFERENCES

17.) Approximately 8% of New Zealand’s young offenders are referred by the police to Family Group Conferences. In which cases is a Family Group Conference to be held and which cases can be completed by police alone?

18.) In the other 16% of cases the young person is arrested and is referred directly to the Youth Court, which must refer all proved cases within its jurisdiction to a Family Group Conference for a recommendation. What are your experiences with these recommendations and what are they like?

19.) Could you please describe the role a judge plays in connection with Family Group Conferences?

20.) How does a plan on which all participants in a Family Group Conference have agreed look like? Who supervises the young offender in completing their obligations under the plan?

21.) The process endeavours to address the statistics that suggest that Maori children and young people comprise around half of all youths apprehended by the police, having had a youth justice Family Group Conference or having been prosecuted in court.

a) Do you think, Family Group Conferences have the potential to better cope with cultural diversity than previous youth justice processes?

b) Do you think the current system addresses Maori and Pacific Island people in a better way than the old model?
c) Does the system, in your opinion, also address the needs of other ethnic/cultural groups?

d) From your experience, how does the Family Group System work with cases in which victim and offender have the same cultural background?

e) How does the system work, when offender and victim do not have the same cultural background?

22.) From your experience, how do you evaluate the acceptance of Family Group Conferences among

a) the general public?

b) Maori people?

c) the victims?

d) the offender?

e) the families?
PART 5: COMMENT AND OPINION

23.) What do you think of the measures available to the police and of the court orders available to the Court under the *Children, Young Persons, and Their Families Act*? Do they help to prevent young persons from re-offending?

24.) Many young offenders have a difficult social background, do not have a stable family and often live with a single parent or are neglected by their parents. I assume that those parents may be likely to refuse to participate in a Family Group Conference or would not be supportive with supervising the plan agreed upon by the Conference. In such cases, the concept of Family Group Conferences might probably be undermined. What is your experience concerning this topic? How can less supportive family members be motivated or forced to take part in the process?

25.) About 5% of all young offenders are so-called ‘hard-core offenders’ who commit serious offences and tend to re-offend. Do you think that the New Zealand juvenile justice system addresses those offenders and responds to them in the right way? If not, what do you think would work to respond to those offenders?

26.) When the *Children, Young Persons, and Their Families Act* was introduced in 1989, it was called ‘a new paradigm’ which ‘turned the old model on its head’. It has been in force for 17 years so far. What do you think of the Act? What are its strengths and weaknesses from your point of view?
INTERVIEW GUIDE FOR LAWYERS

PART 1: INDIVIDUAL RELATED QUESTIONS

1.) Would you please describe the position you are working in?

2.) How many years have you been working in that particular position?

3.) Which geographical areas are parts of your area of responsibility? Have you always worked in the same geographical area?

4.) Did you work in another field before you specialised in youth justice issues? If so, how long did you work in that area?

5.) Is there special training persons dealing with young offenders have to undergo?

6.) Did you have to qualify in a special way for dealing with young offenders?

7.) Were you already working in your current position under the previous system (before the introduction of the Children, Young Persons, and Their Families Act)? If yes,

   a) could you please describe your experiences with the old system?

   b) did your personal workload change under the new system?

   c) Can you please describe your duties and responsibilities during a youth justice case?
PART 2: EXPERIENCES AND APPRAISALS

8.) Can you estimate approximately how many young offenders you deal with per year?

9.) Of these, could you give a rough estimate of how these cases are decided?

10.) Do the young persons you are dealing with tend to live in cities or in rural areas?

11.) On a rough estimate, what proportions of young offenders come from the following major ethnic groups:

a) Pakeha (New Zealander of European descent);

b) Maori

c) Pacific Islands

d) Asian

e) Other
PART 3: DIVERSION

12.) What do you think about diversion as a reaction to juvenile offending?

13.) The *Children, Young Persons, and Their Families Act* emphasises diversion processes. For the first time, a legislative base exists for diversion and emphasis is given to diversionary measures which shall strengthen families and allow them to foster their own means of dealing with their offending young people. Could you please describe how the diversionary process works?

14.) Do the police have to contact a youth justice lawyer before offering or agreeing to diversion for the young offender?

15.) In your area of responsibility, how many young offenders do you estimate are dealt with by diversionary measures and therefore do not appear before court?

16.) Approximately 76% of New Zealand’s youth offending is dealt with by police diversion schemes devised and operated by specialist officers. What do you think of the way police officers respond to juvenile offending?
PART 4: FAMILY GROUP CONFERENCES

17.) Approximately 8% of New Zealand’s young offenders are referred by the police to Family Group Conferences. In which cases is a Family Group Conference to be held and which cases can be completed by police alone?

18.) In the other 16% of cases the young person is arrested and is referred directly to the Youth Court, which must refer all proved cases within its jurisdiction to a Family Group Conference for a recommendation. What are your experiences with these recommendations and what are they like?

19.) Could you please describe the role a lawyer plays in connection with Family Group Conferences?

20.) Could you please explain

a. Who attends a Family Group Conference;
b. where it is normally held;
c. the normal procedure for a conference and
d. what sort of atmosphere is common at FGCs

21.) How does a plan on which all participants in a Family Group Conference have agreed look like? Who supervises the young offender in completing their obligations under the plan?

22.) The process endeavours to address the statistics that suggest that Maori children and young people comprise around half of all
youths apprehended by the police, having had a youth justice Family Group Conference or having been prosecuted in court.

a. Do you think, Family Group Conferences have the potential to better cope with cultural diversity than previous youth justice processes?

b. Do you think the current system addresses Maori and Pacific Island people in a better way than the old model?

c. Does the system, in your opinion, also address the needs of other ethnic /cultural groups?

d. From your experience, how does the Family Group System work with cases in which victim and offender have the same cultural background?

e. How does the system work, when offender and victim do not have the same cultural background?

23.) From your experience, how do you evaluate the acceptance of Family Group Conferences among

a. the general public?

b. Maori people?

c. the victims?

d. the offender?

e. the families?
PART 5: COMMENT AND OPINION

24.) What do you think of the measures available to the police and of the court orders available to the Court under the Children, Young Persons, and Their Families Act? Do they help to prevent young persons from re-offending?

25.) Many young offenders have a difficult social background, do not have a stable family and often live with a single parent or are neglected by their parents. I assume that those parents may be likely to refuse to participate in a Family Group Conference or would not be supportive with supervising the plan agreed upon by the Conference. In such cases, the concept of Family Group Conferences might probably be undermined. What is your experience concerning this topic? How can less supportive family members be motivated or forced to take part in the process?

26.) About 5% of all young offenders are so-called ‘hard-core offenders’ who commit serious offences and tend to re-offend. Do you think that New Zealand’s juvenile justice system addresses those offenders and responds to them in the right way? If not, what do you think would work to respond to those offenders?

27.) When the Children, Young Persons, and Their Families Act was introduced in 1989, it was called ‘a new paradigm’ which ‘turned the old model on its head’. It has been in force for 17 years so far. What do you think of the Act? What are its strengths and weaknesses from your point of view?
INTERVIEW GUIDE FOR CYF-EMPLOYEES AND POLICE OFFICERS

PART 1: INDIVIDUAL RELATED QUESTIONS

1.) Would you please describe the position you are working in?

2.) How many years have you been working in that particular position?

3.) Which geographical areas are parts of your area of responsibility? Have you always worked in the same geographical area?

4.) Did you work in another field before you specialised in youth justice issues? If so, how long did you work in that area?

5.) Is there special training persons dealing with young offenders have to undergo?

6.) Did you have to qualify in a special way for dealing with young offenders?

7.) Were you already working in your current position under the previous system (before the introduction of the Children, Young Persons, and Their Families Act)? If yes,
   i. could you please describe your experiences with the old system?
   ii. did your personal workload change under the new system?

8.) Can you please describe your duties and responsibilities during a youth justice case?
PART 2: EXPERIENCES AND APPRAISALS

9.) Can you estimate approximately how many young offenders you deal with per year?

10.) Of these, could you give a rough estimate of how these cases are decided?

11.) Do the young persons you are dealing with tend to live in cities or in rural areas?

12.) On a rough estimate, what proportions of young offenders come from the following major ethnic groups:

   a) Pakeha (New Zealander of European descent);
   b) Maori
   c) Pacific Islands
   d) Asian
   e) Other
PART 3: DIVERSION

13.) What do you think about diversion as a reaction to juvenile offending?

14.) The *Children, Young Persons, and Their Families Act* emphasises diversion processes. For the first time, a legislative base exists for diversion and emphasis is given to diversionary measures which shall strengthen families and allow them to foster their own means of dealing with their offending young people. Could you please describe how the diversionary process works?

15.) In your area of responsibility, how many young offenders do you estimate are dealt with by diversionary measures and therefore do not appear before court?

16.) Approximately 76% of New Zealand’s youth offending is dealt with by police diversion schemes devised and operated by specialist officers. What do you think of the opportunities police officers have to respond to juvenile offending?
PART 4: FAMILY GROUP CONFERENCES

17.) Approximately 8% of New Zealand’s young offenders are referred by the police to Family Group Conferences. In which cases is a Family Group Conference to be held and which cases can be completed by police alone?

18.) In the other 16% of cases the young person is arrested and is referred directly to the Youth Court, which must refer all proved cases within its jurisdiction to a Family Group Conference for a recommendation. What are your experiences with these recommendations and what are they like?

19.) Could you please describe the role a Youth Justice Coordinator plays in connection with Family Group Conferences?

20.) Could you please explain

   a) how a Family Group Conference is made up;
   b) where it is normally held;
   c) how the general course is; and
   d) how the atmosphere is?

21.) How does a plan on which all participants in a Family Group Conference have agreed look like? Who supervises the young offender in completing their obligations under the plan?

22.) The process endeavours to address the statistics that suggest that Maori children and young people comprise around half of all
youths apprehended by the police, having had a youth justice Family Group Conference or having been prosecuted in court.

a) Do you think Family Group Conferences have the potential to better cope with cultural diversity than previous youth justice processes?

b) Do you think the current system addresses Maori and Pacific Island people in a better way than the old model?

c) Does the system, in your opinion, also address the needs of other ethnic/cultural groups?

d) From your experience, how does the Family Group System work with cases in which victim and offender have the same cultural background?

e) How does the system work, when offender and victim do not have the same cultural background?

23.) From your experience, how do you evaluate the acceptance of Family Group Conferences among

a) the general public?

b) Maori people?

c) the victims?

d) the offender?

e) the families?
PART 5: COMMENT AND OPINION

24.) What do you think of the measures available to the police and of the court orders available to the Youth Court under the *Children, Young Persons, and Their Families Act*? Do they help to prevent young persons from re-offending?

25.) Many young offenders have a difficult social background, do not have a stable family and often live with a single parent or are neglected by their parents. I assume that those parents may be likely to refuse to participate in a Family Group Conference or would not be supportive with supervising the plan agreed upon by the Conference. In such cases, the concept of Family Group Conferences might probably be undermined. What is your experience concerning this topic? How can less supportive family members be motivated or forced to take part in the process?

26.) About 5% of all young offenders are so-called ‘hard-core offenders’ who commit serious offences and tend to re-offend. Do you think that New Zealand’s juvenile justice system addresses those offenders and responds to them in the right way? If not, what do you think would work to respond to those offenders?

27.) When the *Children, Young Persons, and Their Families Act* was introduced in 1989, it was called ‘a new paradigm’ which ‘turned the old model on its head’. It has been in force for 17 years so far. What do you think of the Act? What are its strengths and weaknesses from your point of view?
APPENDIX C:

JUVENILE JUSTICE ACT

(JUGENDGERICHTSGESETZ)

CONTENTS

Part I
Scope
- Scope as to persons and substantive scope ............................................ section 1
- Application of general law ................................................................. section 2

Part II
Juveniles

First Title
Misconduct of juveniles and its consequences

First Chapter
General provisions
- Criminal liability ................................................................. section 3
- Legal classification of acts committed by juveniles ................ section 4
- Consequences of juvenile offences ............................................. section 5
- Incidental consequences ........................................................ section 6
- Measures of reform and prevention .......................................... section 7
- Combination of measures and youth penalty ........................ section 8

Second Chapter
Educative Measures
- Types of measures ................................................................. section 9
- Instructions ........................................................................ section 10
- Duration of, and subsequent amendments to, instructions;
  consequences of failure to comply ........................................ section 11
- Educational assistance ......................................................... section 12

Third Chapter
Disciplinary Measures
- Types of measures and their application ................................ section 13
- Warnings ........................................................................... section 14
- Obligations ......................................................................... section 15
Youth Detention ................................................................. section 16

Fourth Chapter
Youth penalty

Form and conditions ............................................................. section 17
Duration of youth penalty ...................................................... section 18
(Deleted) ............................................................................... section 19

Fifth Chapter
Probationary suspension of youth penalty

(Deleted) ................................................................................ section 20
Suspension of sentence .......................................................... section 21
Probationary period ............................................................... section 22
Instructions and obligations .................................................. section 23
Probationary assistance ......................................................... section 24
Appointment and duties of the probation officer ..................... section 25
Revocation of probationary suspension of sentence ................ section 26
Remission of youth penalty .................................................... section 26a

Sixth Chapter
Suspension of imposition of youth penalty

Conditions ............................................................................... section 27
Probationary period ............................................................... section 28
Probationary assistance ......................................................... section 29
Imposition of youth penalty; spending of sentence ................. section 30

Seventh Chapter
Combination of offences

Commission of several offences by a juvenile ........................ section 31
Combination of offences committed at different ages and
different stages of maturity .................................................... section 32

Second Title
Constitution and procedure of Youth Courts

First Chapter
Constitution of Youth Courts

Youth courts ............................................................................. section 33
Tasks of the Youth Court judge .............................................. section 34
Lay youth assessors ............................................................... section 35
Youth Public prosecutors ......................................................... section 36
Selection of Youth Court judges and public prosecutors
at Youth Courts .................................................................. section 37
Youth courts assistance service .............................................. section 38
Second Chapter
Jurisdiction
Substantive jurisdiction of the Youth Court Judge .................... section 39
Substantive jurisdiction of the Lay Youth Assessors’ Court ........ section 40
Substantive jurisdiction of the Youth Criminal Division ............ section 41
Geographical jurisdiction ....................................................... section 42

Third Chapter
Youth criminal proceedings

First Subchapter
Preliminary proceedings
Scope of investigations ......................................................... section 43
Questioning the accused ....................................................... section 44
Dispensing with prosecution ................................................ section 45
Principal results of the investigations ................................... section 46

Second Subchapter
The main proceedings
Termination of proceedings by the judge .............................. section 47
Pre-eminence of the Youth Courts ....................................... section 47a
Exclusion of the public ....................................................... section 48
Administering of oath ....................................................... section 49
Presence at the main hearing ............................................ section 50
Temporary exclusion of participants .................................. section 51
Credit for investigation custody when calculating youth
detention .............................................................. section 52
Credit for investigation custody when calculating youth
imprisonment ......................................................... section 52a
Transfer of matters to the Family or Guardianship Judge ..... section 53
Grounds for the judgment ................................................ section 54

Third Subchapter
Legal remedies
Contesting decisions .......................................................... section 55
Partial enforcement of an aggregate penalty ......................... section 56

Fourth Subchapter
Procedure for probationary suspension of youth penalty
Decision on suspension ...................................................... section 57
Further decisions ............................................................ section 58
Contesting decisions ....................................................... section 59
Probation plan ............................................................... section 60
(Deleted) .................................................................... section 61

Fifth subchapter
Procedure for suspension of imposition of youth penalty
Decisions ................................................................. section 62
Contesting decisions ....................................................... section 63
Sixth Subchapter
Supplementary decisions

Subsequent decisions on instructions and obligations .................................. section 65
Supplementation of decisions in force for multiple convictions .................. section 66

Seventh Subchapter
Common provisions on procedure

Position of the parent or guardian and the legal representative .................. section 67
Compulsory defence counsel ........................................................................ section 68
Adviser ........................................................................................................... section 69
Notifications .................................................................................................. section 70
Preliminary orders on supervision ................................................................. section 71
Investigation custody ...................................................................................... section 72
Involvement of the Youth Court assistance service in custody matters ........ section 72a
Placement for observation purposes ............................................................. section 73
Costs and expenses ....................................................................................... section 74

Eighth Subchapter
Simplified youth procedure

(Deleted) ......................................................................................................... section 75
Conditions for applying the simplified procedure ....................................... section 76
Rejection of the application ........................................................................... section 77
Procedure and decision ................................................................................ section 78

Ninth Subchapter
Suspension of other provisions of general procedural law

Penalty order and accelerated procedure .................................................. section 79
Private prosecution and private ancillary prosecution ................................ section 80
Compensation for the aggrieved person ....................................................... section 81

Third Title
Enforcement and execution

First Chapter
Enforcement

First Subchapter
Status of enforcement and jurisdiction

Enforcement officer ....................................................................................... section 82
Decisions in enforcement proceedings ......................................................... section 83
Geographical jurisdiction .............................................................................. section 84
Surrender and transfer of enforcement ......................................................... section 85
Second Subchapter
Youth Detention

Conversion of detention during leisure time........................................... section 86
Enforcement of youth detention .......................................................... section 87

Third Subchapter
Youth penalty

Suspension of remainder of youth penalty ........................................... section 88
(Deleted) ................................................................................................ section 89
Interruption and enforcement of youth penalty in
combination with imprisonment..................................................... section 89a

Second Chapter
Execution

Youth detention .................................................................................. section 90
Purpose of executing youth penalties ................................................ section 91
Youth penalty institutions .................................................................. section 92
Investigation custody ......................................................................... section 93
Placement in an institution for withdrawal treatment....................... section 93a

Fourth Title
Striking from the criminal record

(Deleted)

s 94 to 96
Striking from the criminal record by judicial instruction .................. section 97
Procedure ......................................................................................... section 98
Decision ............................................................................................. section 99
Striking from the criminal record following remission of
penalty or of a remainder of penalty............................................... section 100
Revocation ......................................................................................... section 101

Fifth Title
Juveniles brought before courts with jurisdiction for general criminal matters

Jurisdiction ........................................................................................ section 102
Joinder of several criminal matters .................................................. section 103
Proceedings against juveniles ......................................................... section 104

Part III
Young Adults (Heranwachsende)

First Chapter
Application of substantive criminal law

Application of youth criminal law with regard to young adults .................. section 105
Mitigation of general criminal law with regard to young adults ................ section 106
Second Chapter
Constitution of the court and procedure

Constitution of the court .............................................................. section 107
Jurisdiction .................................................................................. section 108
Procedure ...................................................................................... section 109

Third Chapter
Enforcement, execution and striking from the criminal record

Enforcement and execution .......................................................... section 110
Striking from the criminal record .................................................. section 111

Fourth Chapter
Young adults appearing in courts with jurisdiction for general criminal matters

Application mutatis mutandis .......................................................... section 112

Part Four
Special provisions applicable to soldiers in the Federal Armed Forces

Application of youth criminal law .................................................. section 112a
Educational assistance by the disciplinary officer ......................... section 112b
Execution ....................................................................................... section 112c
Hearing the disciplinary officer ...................................................... section 112d
Proceedings before courts with jurisdiction for general
criminal matters ............................................................................ section 112e

Part Five
Concluding and transitional provisions

Probation officers ............................................................................ section 113
Execution of imprisonment in youth detention institutions ............. section 114
Regulations on execution issued by the German Federal Government ................................ section 115
Temporal application ...................................................................... section 116
Composition of the court ................................................................ section 117
(Out of date) ................................................................................... section 118
Custodial sentences ....................................................................... section 119
References ..................................................................................... section 120
Transfer of enforcement ............................................................... section 121
(Provision on variance and revocation of enforced orders) ................ section 122
Special provision for Berlin ........................................................... section 123
Berlin clause .................................................................................. section 124
Entry into force .............................................................................. section 125
Part I

Scope

Section 1: Scope as to persons and substantive scope

(1) This Law shall apply if a juvenile or young adult engages in misconduct punishable under the provisions of general law.

(2) “Juvenile” shall mean anyone who, at the time of the act, has reached the age of fourteen but not yet eighteen years; “young adult” shall mean anyone who, at the time of the act, has reached the age of eighteen but not yet twenty-one years.

Section 2: Application of general law

(1) The provisions of general law shall apply only insofar as not otherwise provided for in this Law.

Part II

Juveniles

First Title

Misconduct of juveniles and its consequences

First Chapter

General provisions

Section 3: Criminal liability

A juvenile shall bear criminal liability if, at the time of the act, he has reached a level of moral and intellectual maturity sufficient to enable him to understand the wrongfulness of the act and to conduct himself in accordance with such understanding. For the purposes of education, the judge may order a juvenile who bears no criminal liability due to a lack of maturity to comply with the same measures as a judge responsible for Family and Guardianship matters.

Section 4: Legal classification of acts committed by juveniles

The provisions of general criminal law shall be applied to classify an illegal act by a juvenile as a crime or misdemeanor and in assessing when the criminal conduct shall be barred by statute.
Section 5: Consequences of juvenile offences
(1) Educative measures may be ordered in response to a criminal offence committed by a juvenile.
(2) Where educative measures do not suffice, disciplinary measures or youth penalty may be imposed to sanction an offence committed by a juvenile.
(3) Disciplinary measures or youth penalty may be dispensed with if placement in a psychiatric hospital or institution for withdrawal treatment renders punishment by the judge dispensable.

Section 6: Incidental consequences
(1) The court may not hand down a decision entailing loss of the capacity to hold public office, to attain public electoral rights or the right to elect or vote in public matters. The court may not order public announcement of the conviction.
(2) There shall be no loss of the capacity to hold public office and attain public electoral rights (section 45, subsection 1, StGB).

Section 7: Measures of reform and prevention
Placement in a psychiatric hospital or an institution for withdrawal treatment, supervision of conduct or withdrawal of permission to drive (section 61, numbers 1, 2, 4 and 5, StGB) may be ordered as measures of reform and prevention.

Section 8: Combination of measures and youth penalty
(1) Educative measures and disciplinary measures, as well as several educative measures or several disciplinary measures, may be ordered in combination. Youth detention may not be combined with an order to provide educational assistance pursuant to section 12, number 2.
(2) The judge may impose only instructions and obligations and order supervision by a social worker in combination with youth penalty. Where the juvenile is subject to probationary supervision any concurrent order for supervision by a social worker shall be suspended until expiry of the probationary period.
(3) In addition to educative measures, disciplinary measures and youth penalty the judge may order imposition of those incidental penalties and incidental consequences admissible under this Law.

Second Chapter

Educative measures

Section 9: Types of measure
“Educative measures” shall mean:

1. the issuing of instructions;
2. an order to avail oneself of educational assistance within the meaning of section 12.

Section 10: Instructions

(1) Instructions are directions and prohibitions by which the juvenile can conduct his life and which are intended to promote and guarantee his education. Instructions must not place unreasonable demands on the way the juvenile conducts his life. In particular the judge may instruct the juvenile to:

1. comply with instructions relating to his residence;
2. live with a family or in residential accommodation;
3. accept a training place or employment;
4. perform certain work tasks;
5. submit himself to the care and supervision of a specific person (care assistant);
6. attend a social skills training course;
7. attempt to achieve a settlement with the aggrieved person (settlement between offender and victim);
8. avoid contact with certain persons or frequenting places providing public hospitality or entertainment; or
9. attend a road-traffic training course.

(2) With the consent of the parent or guardian and the legal representative the judge may also require the juvenile to undergo specialist rehabilitative treatment or addiction withdrawal treatment. If the juvenile is more than sixteen years of age such obligation should be imposed only with his consent.

Section 11: Duration of and subsequent amendments to instructions; consequences of failure to comply

(1) The judge shall determine the duration of instructions. The duration may not exceed two years; in the case of an instruction pursuant to section 10, subsection 1, third sentence, number 5, the duration should not exceed one year; in the case of an instruction pursuant to section 10, subsection 1, third sentence, number 6, it should not exceed six months.

(2) The judge may amend instructions, lift them or prior to expiry extend their duration to no more than three years if this is conducive to the purposes of the supervision.

(3) If the juvenile by his own failing does not comply with instructions youth detention may be imposed if he had previously been cautioned as to the consequences of culpable non-compliance. The period of youth detention imposed in such cases may not exceed a total duration of four weeks if there is a conviction. The judge shall dispense with enforcement of the youth detention if the juvenile complies with the instruction after the detention has been imposed.

Section 12: Educational assistance

After hearing the youth welfare office the judge may, under the conditions set out in the Eighth Book of the Code of Social Law, require the juvenile to avail himself of educational assistance:

1. in the form of educational support by a social worker within the meaning of section 30 of the Eighth Book of the Code of Social Law; or
2. in a day and night-time institution or in another form of supervised accommodation 
within the meaning of section 34 of the Eighth Book of the Code of Social Law.

Third Chapter

Disciplinary measures

Section 13: Types of measure and their application

(1) The judge shall apply disciplinary measures to punish the criminal offence if youth 
penalty is not indicated but if the juvenile must be made acutely aware that he must 
assume responsibility for the wrong he has done.

(2) “Disciplinary measures” shall mean:

1. warnings;
2. imposition of obligations;
3. youth detention.

(3) Disciplinary measures shall not carry the same legal consequences as a sentence.

Section 14: Warnings

The purpose of issuing a warning is to make absolutely clear to the juvenile the 
wrongfulness of his actions.

Section 15: Obligations

(1) The judge can require the juvenile to:

1. make good, to the best of his ability, for damage caused as a result of the 
criminal offence;
2. apologise personally to the aggrieved person;
3. perform certain tasks; or
4. pay a sum of money to a charitable organisation.
In so doing no unreasonable demands may be made of the juvenile.

(2) The judge should order payment of a sum of money only:

1. if the juvenile has engaged only in minor misconduct and if it is to be assumed 
that he will pay the sum from money which he is allowed to dispose of; or
2. the profit which the juvenile has gained from his criminal offence or the payment 
which he received for committing the criminal offence is to be withdrawn from him.

(3) The judge may subsequently vary obligations or dispense with compliance with 
them either in full or in part where this is conducive to the purposes of the supervision. 
Section 11, subsection 3, shall apply mutatis mutandis where the juvenile by his own 
failing does not comply with obligations. Where youth detention has been enforced the 
judge may declare obligations to have been met either in full or in part.
Section 16: Youth detention

(1) “Youth detention” shall mean detention of the juvenile during leisure time, or short-term or long-term detention.

(2) Detention during leisure time shall be imposed during the juvenile’s weekly leisure time and shall be counted as one or two periods of leisure time.

(3) Short-term detention shall be imposed in lieu of detention during leisure time if an uninterrupted period of execution appears expedient given the purpose of the supervision and neither the juvenile’s education and training or his employment are adversely affected. A two-day period of short-term detention shall be deemed equivalent to one leisure period.

(4) Long-term detention shall be at least one week and not more than four weeks in duration. It shall be counted in entire days or weeks.

Fourth Chapter

Youth penalty

Section 17: Form and conditions

(1) “Youth penalty” shall mean deprivation of liberty in a youth detention centre.

(2) The judge should impose youth penalty if, as a result of the bad habits and vices demonstrated by the juvenile during the act, educative measures or disciplinary measures are not sufficient for the purposes of supervision or if such a penalty is necessary given the seriousness of the juvenile’s guilt.

Section 18: Duration of youth penalty

(1) The minimum duration of youth penalty shall be six months, its maximum duration shall be five years. If the act constitutes a serious criminal offence for which general criminal law prescribes a maximum sentence of more than ten years’ deprivation of liberty, the maximum duration of youth penalty shall be ten years. The statutory range of penalties under general criminal law shall not apply.

(2) Youth penalty shall be calculated such as to make it possible to achieve the desired educational aim.

Section 19
Fifth Chapter

Probationary suspension of youth penalty

Section 20
Deleted

Section 21: Suspension of sentence
(1) Where sentencing involves the imposition of youth penalty not exceeding one year the judge shall suspend enforcement of the sentence on probation if it can be expected that the juvenile will regard the sentence itself as a warning and, as well without gaining the experience of serving the sentence, will gain from the educational influence of the probation and henceforth conduct himself in a law-abiding manner. Account shall be taken of the juvenile’s personality, his prior life, the circumstances in which he acted, his conduct after the act, his living environment and the effects which suspension of sentence can be expected to have on him.

(2) In accordance with the conditions set out in subsection 1, the judge shall also suspend on probation enforcement of a longer period of youth penalty not exceeding two years if enforcement is not indicated on grounds relating to the juvenile’s personal development.

(3) Suspension of sentence cannot be limited to part of the youth penalty. It shall not be excluded because of credit given for periods of investigation custody or other deprivations of liberty.

Section 22: Probationary period
(1) The judge shall fix the duration of the probationary period. It may not exceed three years’, nor be of less than two years’, duration.

(2) The probationary period shall commence on the day the decision to suspend the youth penalty enters into force. It may subsequently be shortened to one year or, prior to its expiry, be extended to a maximum of four years. However, in the cases referred to in section 21, subsection 2, the probationary period may be shortened to no less than two years.

Section 23: Instructions and obligations
(1) The judge should exercise an educational influence on the juvenile’s conduct during the probationary period by the issuance of instructions. He may also impose obligations on the juvenile. He may also make, vary or revoke such orders subsequently. Section 10, section 11, subsection 3, and section 15, subsections 1, 2 and 3, second sentence, shall apply mutatis mutandis.

(2) If the juvenile gives assurances concerning his future conduct or offers to provide services apt to make amends for the wrong he has done the judge will, as a general rule, temporarily refrain from imposing instructions and obligations if it can be expected that the juvenile will comply with his assurances or offers.
Section 24: Probationary assistance

(1) For a maximum of two years during the probationary period the judge shall place the juvenile under the supervision and guidance of a full-time probation officer. The judge may also place the juvenile under the supervision of a volunteer probation assistance if this appears conducive to the purposes of the supervision. Section 22, subsection 2, first sentence, shall apply mutatis mutandis.

(2) The judge may vary or revoke a decision taken in accordance with subsection 1 prior to expiry of the probationary period; he may also issue a new order placing the juvenile under supervision during the probationary period. In such cases the maximum duration referred to in subsection 1, first sentence, may be exceeded.

(3) The probation officer shall provide the juvenile with help and assistance. Acting in agreement with the judge he shall monitor fulfilment of instructions, obligations, assurances and offers. The probation officer should promote the juvenile’s supervision and wherever possible work together on a basis of trust with the juvenile’s parent or guardian or his legal representative. In the exercise of his office he has rights of access to the juvenile. He may require the juvenile’s parent or guardian, his legal representative, his school or the person providing him with training to provide information about the juvenile’s conduct.

Section 25: Appointment and duties of the probation officer

The probation officer shall be appointed by the judge. The judge may issue instructions for the performance of his tasks in accordance with section 24, subsection 3. The probation officer shall report, at intervals fixed by the judge, on the manner in which the juvenile conducts himself. He shall inform the judge of serious or persistent violations of instructions, obligations, assurances and offers.

Section 26: Revocation of probationary suspension of sentence

(1) The judge shall revoke probationary suspension of youth penalty if the juvenile:

1. commits a criminal offence during the probationary period and thereby demonstrates that the expectation on which the suspension was based has not been fulfilled;
2. seriously or persistently violates instructions or persistently evades the probation officer’s supervision and guidance and thereby gives cause for concern that he will commit further criminal offences; or
3. seriously or persistently violates obligations.

Sentence 1, number 1, shall apply mutatis mutandis if the act is committed in the period between the time when the decision to suspend sentence is taken and the time when that decision enters into force.

(2) However the judge shall refrain from revocation of suspension if it is sufficient:

1. for further instructions to be issued or obligations to be imposed;
2. to extend the suspension or supervision period to a maximum of four years;
3. to place the juvenile under the supervision of a probation officer once more prior to expiry of the probation period.

(3) No reimbursement shall be made for services provided by the juvenile in compliance with instructions, obligations, assurances or offers (section 23). However if the judge revokes suspension he may give credit against the youth penalty for services provided by the juvenile in compliance with obligations or corresponding offers.

Section 26a: Remission of youth penalty

If the judge does not revoke the suspension he shall release the offender from serving the youth penalty upon expiry of the suspension period. Section 26, subsection 3, first sentence, shall apply.

Sixth Chapter

Suspension of imposition of youth penalty

Section 27: Conditions

If, after exhausting all forms of investigation, there can be no certainty as to whether while committing the criminal offence the juvenile’s bad habits and vices were demonstrated to such an extent as to necessitate imposition of youth penalty, the judge may issue a finding as to the juvenile’s guilt while suspending the decision to impose youth penalty for a probationary period which the judge shall fix.

Section 28: Probationary period

(1) The probationary period may not exceed two years’, nor be of less than one year’s, duration.

(2) The probationary period shall commence on the day the judgment establishing the juvenile’s guilt enters into force. It may subsequently be shortened to one year or, prior to its expiry, be extended to a maximum of two years.

Section 29: Probationary assistance

The juvenile shall be placed under the supervision and guidance of a probation officer for all or part of the probationary period. Section 23, section 24, subsection 1, first and second sentences, section 24, subsections 2 and 3, section 25 and section 28, subsection 2, first sentence, shall apply mutatis mutandis.

Section 30: Imposition of youth penalty; spending of sentence

(1) If it results, primarily from the juvenile’s poor conduct during the probationary period, that the offence censured in the court’s verdict against him is a result of the juvenile’s bad habits and vices demonstrated to an extent requiring imposition of youth penalty, the judge shall order imposition of that penalty which he would have handed down at the time of the verdict had a certain assessment of the juvenile’s bad habits and vices been possible.

(2) If the conditions set out in subsection 1 do not obtain upon expiry of the probationary period the sentence shall be considered spent.
Seventh Chapter

Combination of offences

Section 31: Commission of several offences by a juvenile

(1) Even if a juvenile has committed several offences the judge shall impose only one set of educative measures, disciplinary measures or a single youth penalty. Insofar as provided for in this Law (section 8) different types of educative measures and disciplinary measures may be ordered in combination or measures may be combined with youth penalty. The statutory maximum limits applicable to youth detention and youth penalty may not be exceeded.

(2) If the juvenile’s guilt has already been finally established in relation to some of the criminal offences or a educational measure, disciplinary measure or youth penalty determined though not yet completely implemented, served or otherwise disposed of, account shall be taken of the judgment and similarly only measures or youth penalty imposed. The judge shall have discretion to give credit for periods of youth detention already served when imposing youth penalty.

(3) If conducive to the purposes of the supervision, the judge may refrain from including offences for which a conviction has been obtained in the new decision. In so doing he may declare educational or disciplinary measures spent if he imposes youth penalty.

Section 32: Combination of offences committed at different ages and different stages of maturity

If sentence is passed simultaneously for a combination of offences of which youth criminal law would apply to some and general criminal law to the others, youth criminal law shall be applied to them all if the main focus lies with those offences which would be assessed under youth criminal law. If that is not the case, general criminal law shall apply to them all.

Second Title

Constitution and procedure of Youth Courts

First Chapter

Constitution of Youth Courts

Section 33: Youth courts

(1) The Youth Courts shall have jurisdiction to hear cases involving offences of juveniles.
(2) “Youth courts” shall mean the criminal court judge sitting as a Youth Court judge, the court of assessors (lay youth assessors’ court) and the criminal panel (youth criminal division).

(3) The governments of the Länder shall have the authority to issue legal directives permitting a judge sitting in one of the local courts to be appointed as a Youth Court judge for the districts of several local courts (district Youth Court judge) and permitting a joint lay youth assessors’ court for the districts of several local courts to be established in one of the local courts. The governments of the Länder may issue a legal directive by which that authority is transferred to the judicial administrations of the Länder.

Section 33a

(1) The lay youth assessors’ court shall be composed of the Youth Court judge who shall preside and two lay youth assessors. One man and one woman shall be present as lay youth assessors at each oral hearing.

(2) The lay youth assessors shall not participate in decisions taken outside the oral hearing.

Section 33b

(1) The youth criminal division shall be composed of three judges including the presiding judge as well as two lay youth assessors (grand youth criminal division); in appeal proceedings concerning the facts and law of judgments of the Youth Court judge it shall be composed of the presiding judge and two lay youth assessors (small youth criminal division).

(2) At the opening of the oral hearing the grand youth criminal division shall decide that in the oral hearing it shall be composed of two judges including the presiding judge as well as two lay youth assessors insofar as the provisions of general law, including the provision set out in section 74e of the Constitution of the Courts Law, do not stipulate that the case falls within the competence of the jury court or, given the scope or difficulty of the case, the participation of a third judge does not appear necessary. If a case has been referred back by the court examining the appeal on law only, the youth criminal division which has regained jurisdiction may establish its composition afresh in accordance with the first sentence.

(3) Section 33a, subsection 1, second sentence, and subsection 2, shall apply mutatis mutandis.

Section 34: Tasks of the Youth Court judge

(1) The Youth Court judge is charged with all tasks incumbent on a judge sitting in a local court in criminal proceedings.

(2) The educational functions incumbent on the family and guardianship judge for matters concerning juveniles should be transferred to the Youth Court judge. Deviation from the aforementioned is permissible for special reasons, id est. if the Youth Court judge is appointed to sit in the district of several local courts.

(3) “Educational functions incumbent on the family and guardianship judge” shall mean:
1. supporting the parent, the guardian or the carer by appropriate measures (section 1631, subsection 3, sections 1800 and 1915 of the Civil Code);
2. those measures intended to ward off a danger to the juvenile (sections 1666, 1666a, section 1837, subsection 4, and section 1915 of the Civil Code).

3. (Deleted)

**Section 35: Lay youth assessors**

(1) The assessors sitting in the Youth Courts (lay youth assessors) shall be elected upon a proposal of the youth assistance committee for a period of four years in the court’s calendar by the committee prescribed by section 40 of the Constitution of the Courts Law. The latter committee should elect an equal number of men and women.

(2) The youth assistance committee should propose an equal number of men and women and at least twice the number of persons as are required to act as lay youth assessors and assistant lay youth assessors. The individuals proposed should have appropriate education and training as well as experience in the education and upbringing of juveniles.

(3) The youth assistance committee’s list of proposed candidates shall constitute a list of candidates within the meaning of section 36 of the Constitution of the Courts Law. Inclusion in the list shall require the assent of two thirds of the committee’s voting members. The list of candidates shall be displayed at the youth welfare office for public inspection for a period of one week. The time at which it is to be displayed shall be announced publicly in advance.

(4) The Youth Court judge shall chair the lay youth assessors’ electoral committee at which decisions are taken on objections to the youth assistance committee’s list of candidates and at which the lay youth assessors and assistant lay youth assessors are elected.

(5) The lay youth assessors shall be included on lists of lay assessors which shall be kept separately for men and women.

**Section 36: Youth public prosecutors**

Youth public prosecutors shall be assigned to proceedings falling within the jurisdiction of the Youth Courts.

**Section 37: Selection of Youth Court judges and youth public prosecutors**

Judges sitting in the Youth Courts and youth public prosecutors should have appropriate education and training as well as experience in the education and upbringing of juveniles.

**Section 38: Youth courts assistance service**

(1) Assistance for the Youth Courts shall be provided by the youth welfare offices working in conjunction with the youth assistance associations.

(2) Representatives of the Youth Court assistance service shall highlight the educational, social and care-related aspects in proceedings before the Youth Courts. For this purpose they shall support the participating authorities by researching into the
accused’s personality, his development and his environment and shall express a view on measures to be taken. In custody cases they shall report without delay on the results of their enquiries. In the main hearing the representative of the Youth Court assistance service who carried out the enquiries should be sent to appear. Insofar as no probation officer is appointed to do so, they shall ensure that the juvenile complies with instructions and obligations. They shall inform the judge of serious failures of compliance. Where a juvenile is placed under their supervision pursuant to section 10, subsection 1, third sentence, number 5, they shall exercise care and supervision unless the judge has entrusted this to another person. During the probationary period they shall work together closely with the probation officer. During execution of the sentence they shall remain in contact with the juvenile and they shall look after the juvenile’s reintegration into society.

(3) The Youth Court assistance service shall be involved at all stages of the proceedings against a juvenile. It should involve itself as early as possible. The representatives of the Youth Court assistance service shall always be heard prior to the imposition of instructions (section 10); if a care order can be considered, they should also express a view as to who should be appointed as care assistant.

Second Chapter

Jurisdiction

Section 39: Substantive jurisdiction of the Youth Court judge

(1) The Youth Court judge shall have jurisdiction to deal with juvenile offences providing only educative measures, disciplinary measures, incidental penalties and consequences permissible under this Law or the withdrawal of permission to drive are to be expected and providing the public prosecutor files charges before the criminal court judge. The Youth Court judge shall not have jurisdiction to deal with matters brought against juveniles and adults joinded pursuant to section 103 if the judge at the local court would not have jurisdiction to deal with such matters under the provisions of general law. Section 209, subsection 2, of the Code of Criminal Procedure shall apply mutatis mutandis.

(2) The Youth Court judge may not hand down youth penalty exceeding one year’s duration; he may not order placement in a psychiatric hospital.

Section 40: Substantive jurisdiction of the lay youth assessors’ court

(1) The lay youth assessors’ court has jurisdiction to deal with all juvenile offences which do not fall within the jurisdiction of another Youth Court. Section 209 of the Code of Criminal Procedure shall apply mutatis mutandis.

(2) Up until the opening of the main proceedings the lay youth assessors’ court may of its own motion obtain a decision from the youth criminal division as to whether it wishes to accept a particular matter for adjudication as a result of the particular scope of the matter.

(3) Before issuing an order to accept a matter for adjudication the presiding judge of the youth criminal division shall invite the indicted accused to indicate within a particular
time frame whether he wishes to apply for specific evidence to be taken prior to the main hearing.

(4) The order by which the youth criminal division decides to accept or refuse a case for adjudication is not subject to appeal. The order accepting the matter for adjudication shall be joined with the decision to open the hearing.

**Section 41: Substantive jurisdiction of the youth criminal division**

(1) The youth criminal division, as a court capable of handing down decisions in the first instance, has jurisdiction in matters:

1. which fall within the jurisdiction of the jury court according to the provisions of general law including section 74e of the Constitution of the Courts Law;
2. which it accepts for adjudication following a submission of the lay youth assessors’ court as a result of the special scope of the matter (section 40, subsection 2); and
3. brought against juveniles and adults joindered pursuant to section 103 if a grand criminal panel would have jurisdiction for dealing with the adults in accordance with the provisions of general law.

(2) The youth criminal division shall also have jurisdiction for deliberating and deciding on appeals on fact and law as a legal remedy against judgments of the Youth Court judge and the lay youth assessors’ court. It shall also take the decisions listed in section 73, subsection 1, of the Constitution of the Courts Law.

**Section 42: Geographical jurisdiction**

(1) In addition to the judge who has jurisdiction in accordance with general procedural law or to the special provisions, jurisdiction lies with:

1. the judge entrusted with performing the educational functions assumed by the family and guardianship judges concerning the accused;
2. the judge in whose district the accused is at liberty at the time the charges are brought;
3. until the accused has served the youth penalty in full, the judge entrusted with the tasks of the enforcement officer.

(2) If possible the public prosecutor should bring the charges before the judge responsible for performing the educational functions of the family and guardianship judge; however, until the accused has served the youth penalty in full, they should be brought before the judge entrusted with the tasks of the enforcement officer.

(3) If the defendant changes his place of residence the judge may, with the consent of the public prosecutor, transfer the case to the judge in whose district the defendant is resident. If the judge to whom the case has been transferred has concerns about accepting the case, the matter shall be referred to the next court superior to them both.
Third Chapter
Youth criminal proceedings

First Subchapter
Preliminary proceedings

Section 43: Scope of investigations

(1) Once proceedings have been initiated investigations should be conducted without delay into the life and family background of the accused young person, his development, his previous conduct and all other circumstances apt to assist in assessing his psychological, emotional and character make-up. The parent or guardian and the legal representative, the school and the person providing him with training should insofar as possible be heard. The school or person providing training shall not be heard if the juvenile could as a result fear suffering undesirable disadvantages, id est. loss of his training place or his job. Account shall be taken of section 38, subsection 3.

(2) If necessary, id est. to establish the state of his development or any other characteristics relevant to the proceedings, the accused shall undergo examination. Where possible an expert specialising in examining juveniles shall be assigned to carry out the order.

Section 44: Questioning the accused

If youth penalty is to be expected the public prosecutor or the president of the Youth Court should question the accused before charges are brought.

Section 45: Dispensing with prosecution

(1) The public prosecutor may dispense with prosecution without the judge’s consent if the conditions set out in section 153 of the Code of Criminal Procedure are met.

(2) The public prosecutor shall dispense with prosecution if an educational measure has already been enforced or initiated and if he considers neither the participation of the judge pursuant to subsection 3 nor the bringing of charges to be necessary. An attempt by the juvenile to achieve a settlement with the aggrieved person shall be considered equivalent to a educational measure.

(3) The public prosecutor shall propose issuance of a reprimand, of instructions pursuant to section 10, subsection 1, third sentence, numbers 4, 7 and 9 or obligations by the Youth Court judge if the accused admits his guilt and if the public prosecutor considers that the ordering of such a judicial measure is necessary but the bringing of charges not apposite. If the Youth Court judge agrees to the proposal the public prosecutor shall dispense with the prosecution; where instructions or obligations are imposed he shall dispense with the prosecution only once the juvenile has complied with them. Section 11, subsection 3 and section 15, subsection 3, second sentence, shall not be applied. Section 47, subsection 3, shall apply mutatis mutandis.
Section 46: Principal results of the investigations

The public prosecutor should set out the principal results of the investigations in the bill of indictment (section 200, subsection 2, Code of Criminal Procedure) such as to ensure that knowledge of them shall as far as possible involve no disadvantages for the accused person’s education and development.

Second Subchapter

The main proceedings

Section 47: Termination of proceedings by the judge

(1) If the bill of indictment has been submitted the judge may discontinue the proceedings if:

1. the conditions set out in section 153 of the Code of Criminal Procedure have been met;
2. an educational measure within the meaning of section 45, subsection 2, which renders a decision by judgment dispensable, has already been conducted or initiated;
3. the judge considers a decision by judgment dispensable and orders a measure listed in section 45, subsection 3, first sentence, against a juvenile who has confessed his guilt; or
4. the defendant lacks criminal liability on the grounds of insufficient maturity.

In the cases referred to in the first sentence, numbers 2 and 3, the judge may with the consent of the public prosecutor temporarily discontinue the proceedings and fix a period of no more than six months in which the juvenile must comply with the obligations, instructions or educative measures. The decision shall be handed down as an order of the court. That order is not subject to appeal. If the juvenile complies with the obligations, instructions or educative measures the judge shall discontinue the proceedings. Section 11, subsection 3, and section 15, subsection 3, second sentence, shall not apply.

(2) Termination of proceedings shall require the consent of the public prosecutor unless the latter has already given consent for their preliminary discontinuation. The order discontinuing proceedings may also be issued in the main proceedings. It shall set out the grounds for the decision and is not subject to appeal. The defendant shall not be informed of the grounds if it is to be feared that knowledge of them could involve disadvantages for his education and development.

(3) Fresh charges may be brought for the same act only on the basis of new facts or evidence.

Section 47a: Pre-eminence of the Youth Courts

After the main proceedings have been opened a Youth Court cannot declare itself to lack jurisdiction on the ground that the case should be heard by a court of the same or a lower level dealing with general criminal matters. Section 103, subsection 2, second and third sentences, shall remain unaffected.
Section 48: Exclusion of the public

(1) The deliberations before the decision-taking court, including the announcing of its decisions, shall not be open to the public.

(2) Besides the participants to the proceedings, the aggrieved person and, where the defendant, is subject to the supervision and guidance of a probation officer or the care and supervision of a care assistant or if a social worker has been assigned to him, the probation officer, care assistant and the social worker are permitted to be present. The same shall apply to the head of institution in cases in which the juvenile receives educational assistance in a residential home or comparable institution. The judge may admit other persons for special reasons, id est. for training purposes.

(3) If young adults or adults are also defendants in the proceedings the deliberations shall be held in public. The public may be excluded if this is in the educational interests of juvenile defendants.

Section 49: Administering of oath

(1) In proceedings before the Youth Court judge an oath shall be administered to witnesses only if the judge considers it necessary to do so given the decisive importance of the testimony or in order to obtain truthful testimony. The Youth Court judge may refrain from administering an oath to experts in all cases.

(2) Subsection 1 shall not be applied if young adults or adults are also defendants in the proceedings.

Section 50: Presence at the main hearing

(1) The main hearing may take place in the absence of the defendant only if this would be permissible under the provisions of general law, if there are special reasons to do so and with the assent of the public prosecutor.

(2) The presiding judge should also issue an order to summons the guardian and the legal representative. The provisions concerning summonses, the consequences of a failure to appear and compensation for witnesses shall apply mutatis mutandis.

(3) The representative of the Youth Courts welfare office shall be informed of the place and time of the main hearing. He shall be permitted to speak on request.

(4) If a probation officer assigned to the juvenile participates in the main hearing he should be heard as to the juvenile’s development during the probationary period. The first sentence shall apply mutatis mutandis to a care assistant assigned to the juvenile and the leader of a social skills training course attended by the juvenile.

Section 51: Temporary exclusion of participants

(1) The presiding judge should exclude the defendant for the duration of discussions in the deliberations which could be disadvantageous to his education and development. He shall inform the defendant of the deliberations held in his absence insofar as is necessary for the purposes of his defence.
(2) The presiding judge should also exclude the defendant’s relatives, parent or guardian and the legal representative from the deliberations if there are misgivings about their presence.

Section 52: Credit for investigation custody when calculating youth detention

Where youth detention is ordered and where its purpose has been achieved in full or in part by serving investigation custody or some other form of deprivation of liberty resulting from the act, the judge may stipulate in the judgment that, or the extent to which, the youth detention shall not be enforced.

Section 52a: Credit for investigation custody when calculating youth penalty

(1) Where the accused has had investigation custody or another form of deprivation of liberty imposed on him as a result of an act which is or has been the subject of the proceedings, this shall be credited against the youth penalty. The judge may however order that credit shall be withheld in full or in part if credit is not justified given the defendant’s conduct after the act or for educational reasons. Educational reasons shall be deemed to exist if, once credit has been given for deprivation of liberty, the remaining educational effect required on the defendant is not guaranteed.

(2)

Section 53: Transfer of matters to the family or guardianship judge

In his judgment the judge may leave it to the judge responsible for family or guardianship matters to select and order educative measures if he does not impose youth penalty. The judge responsible for family or guardianship matters must then order imposition of a educational measure providing the circumstances on which the judgment were mainly based have not changed.

Section 54: Grounds for the judgment

(1) If the defendant is found guilty the grounds for the judgment shall also set out which circumstances were decisive to fixing his punishment, for the measures ordered, for leaving the selection and ordering of them to the judge responsible for family or guardianship matters or for refraining from imposing disciplinary measures and punishment. Account should be taken here in particular of the defendant’s moral, intellectual and physical make-up.

(2) The defendant shall not be informed of the grounds for the judgment if there is cause to fear that doing so might be disadvantageous for his education and development.

Third Subchapter

Legal remedies

Section 55: Contesting decisions

(1) A decision which orders only educative measures or disciplinary measures or which leaves the selection and ordering of educative measures to the judge responsible for family or guardianship matters cannot be contested on the basis of the extent of the measures nor can it be contested because other or farther-reaching educative measures or disciplinary measures ought to have been ordered or because the selection and ordering of educative measures has been left to the judge responsible for family or guardianship
matters. This provision shall not apply if the judge has ordered making use of educational assistance pursuant to section 12, number 2.

(2) Whoever submits an admissible appeal on fact and law may no longer submit an appeal on law only against the judgment in the first-mentioned appeal. If the defendant, the parent or guardian or the legal representative has submitted an admissible appeal on fact and law, none of the aforementioned may avail themselves of an appeal on law only as a legal remedy against the judgment in the appeal on fact and law.

(3) The parent guardian or the legal representative may withdraw a legal remedy filed by him only with the consent of the defendant.

Section 56: Partial enforcement of an aggregate penalty

(1) If a defendant has been sentenced to an aggregate penalty as a result of several criminal offences the appeal court may, prior to the main hearing, declare the judgment concerning part of the penalty to be enforceable if the findings on the guilt in relation to one or several criminal offences have not been contested. The order shall be admissible only if it is in the accused’s recognised interest. The part of the penalty shall not exceed the penalty applicable to a conviction for those criminal offences where the findings on the defendant’s guilt have not been contested.

(2) An immediate complaint may be filed against this order.

Fourth Subchapter

Procedure for probationary suspension of youth penalty

Section 57: Decision on suspension

(1) Probationary suspension of youth penalty shall be ordered in the judgment or subsequently by order of the court if enforcement of the penalty has not yet commenced. Jurisdiction for issuing the order subsequently lies with the judge who handed down the decision on the matter at first instance; the public prosecutor and the juvenile shall be heard.

(2) If the judge has refused suspension in the judgment it may subsequently be ordered only if, since the judgment was handed down, circumstances have come to light which, on their own or in conjunction with the circumstances which are already known, justify probationary suspension of youth penalty.

(3) Where consideration can be given to instructions or obligations (section 23) the juvenile shall, in suitable cases, be asked whether he can give assurances concerning his future conduct or he offers to provide services suitable to make amends for the wrong he has done. Where consideration can be given to an instruction to undergo rehabilitative treatment or addiction withdrawal treatment a juvenile who has reached sixteen years of age shall be asked whether he gives his consent thereto.

(4) Section 260, subsection 4, fourth sentence, and section 267, subsection 3, fourth sentence, of the Code of Criminal Procedure shall apply mutatis mutandis.
Section 58: Further decisions

(1) Decisions which become necessary due to the suspension (sections 22, 23, 24, 26 and 26a) shall be taken by order of the judge. The public prosecutor, the juvenile and the probation officer shall be heard. Where consideration can be given to a decision pursuant to section 26 or to imposition of youth detention the juvenile shall be given the opportunity to comment orally before the judge. Grounds shall be set out in the order.

(2) The judge shall also supervise enforcement of the provisional measures pursuant to section 453c of the Code of Criminal Procedure.

(3) Jurisdiction lies with the judge who ordered the suspension. He can transfer all or part of the decisions to the Youth Court judge in whose district the juvenile resides. Section 42, subsection 3, second sentence, shall apply mutatis mutandis.

Section 59: Contesting decisions

(1) An immediate complaint is admissible against a decision ordering or rejecting suspension of youth penalty if such order is to be contested alone. The same shall apply if a judgement is contested solely because the penalty has not been suspended.

(2) A complaint may be filed against a decision on the duration of the probationary period (section 22), the duration of the period of probationary assistance (section 24), a fresh order to undergo probationary assistance during the probationary period (section 24, subsection 2) and on instructions and obligations (section 23). The complaint may relate only to the fact that the probationary period or the period of probationary assistance was subsequently lengthened, that probationary assistance was ordered afresh or that an order which has been imposed is illegal.

(3) An immediate complaint is admissible against the revocation of suspension of youth penalty (section 26, subsection 1).

(4) The order concerning remission of youth penalty (section 26a) cannot be contested.

(5) If an admissible appeal on law only is filed against a judgment and a complaint filed against a decision relating to probationary suspension of youth penalty ordered in the judgment, the court hearing the appeal on law only shall also have jurisdiction to hand down a decision on the complaint.

Section 60: Probation plan

(1) The presiding judge shall set out the obligations and instructions imposed in a probation plan. He shall give the plan to the juvenile and at the same time caution him as to the significance of the suspension, the period of probation and probationary assistance, the instructions and obligations and about the possibility of revoking the probation. At the same time he shall be instructed to give notice each time he changes the place where he resides or where he receives training or works during the probationary period. Where changes are subsequently made to the probation plan the juvenile shall also be advised as to the main content.

(2) The probation officer’s name shall be included in the probation plan.
(3) By his signature the juvenile should confirm that he has read the probation plan and promise that he wishes to comply with the instructions and obligations. The parent or guardian and the legal representative should also sign the probation plan.

Section 61:
(Deleted)

Fifth Subchapter

Procedure for suspension of imposition of youth penalty

Section 62: Decisions
(1) Decisions pursuant to sections 27 and 30 shall be handed down in the form of a judgment based on main proceedings. Section 267, subsection 3, fourth sentence of the Code of Criminal Procedure shall apply by analogy to the decision to suspend imposition of youth penalty.

(2) With the consent of the public prosecutor an order that the guilty verdict be considered spent may be also ordered after expiry of the probationary period without a main hearing.

(3) If a main hearing conducted during the probationary period reveals that youth penalty is necessary (section 30, subsection 1), an order shall be issued stating that the decision to impose the penalty shall remain suspended.

(4) Section 58, subsection 1, first, second and fourth sentences and section 58, subsection 3, first sentence shall apply by analogy to the other decisions which become necessary as a result of the suspension of imposition of youth penalty.

Section 63: Contesting decisions
(1) An order that the guilty verdict be considered spent (section 62, subsection 2) or that the decision to impose youth penalty shall remain suspended (section 62, subsection 3) may not be contested.

(2) In other cases section 59, subsections 2 and 5 shall apply by analogy.

Section 64: Probation plan
Section 60 shall apply by analogy. The juvenile shall be advised of the significance of the suspension, the period of probation and the period of probationary assistance, of the instructions and obligations and that he can expect a youth penalty to be imposed if he demonstrates poor conduct during the probationary period.

Sixth Subchapter

Supplementary decisions

Section 65: Subsequent decisions on instructions and obligations
(1) Subsequent decisions relating to instructions (section 11, subsections 2 and 3) or obligations (section 15, subsection 3) shall be taken by order of the judge at first instance after hearing the public prosecutor and the juvenile. Insofar as necessary the
representative of the Youth Court assistance service, the care assistant appointed pursuant to section 10, subsection 1, third sentence, number 5, and the leader of the social skills training centre acting in accordance with section 10, subsection 1, third sentence, number 6, shall be heard. Where consideration can be given to imposing youth custody the juvenile shall be given the opportunity to comment orally before the judge. The judge may transfer the proceedings to the Youth Court judge in whose district the juvenile is resident if the juvenile has changed his place of residence. Section 42, subsection 3, second sentence, shall apply mutatis mutandis.

(2) If the judge has refused to change instructions his order cannot be contested. If he has imposed youth custody an immediate complaint may be filed against the order. That complaint shall have a delaying effect.

Section 66: Supplementation of decisions in force for multiple convictions

(1) Where measures or youth penalty have not been fixed as an aggregate (section 31) and where the educative measures, disciplinary measures and penalties recognised in the legally effective decisions have not yet been implemented, served or otherwise disposed of in full, the judge shall hand down a like decision thereafter. This shall not apply insofar as the judge had dispensed with taking account of criminal offences for which final sentence has been passed in accordance with section 31, subsection 3.

(2) The decision shall be taken by judgment based on a main hearing if applied for by the public prosecutor or if the presiding judge considers it appropriate. If no main hearing is conducted the judge shall take his decision by order. The same shall apply to jurisdiction and procedure for issuing the order as applies to the subsequent formulation of an aggregate penalty under the general provisions. If youth penalty has been served in part, jurisdiction shall lie with the judge entrusted with the tasks of the enforcement officer.

Seventh Subchapter

Common provisions on procedure

Section 67: Position of the parent or guardian and the legal representative

(1) Insofar as the accused has a right to be heard, to ask questions and make applications or to be present during acts of investigation, the same rights shall also accrue to the parent or guardian and the legal representative.

(2) Where provision is made for notices to the accused, the corresponding notice should also be addressed to the parent or guardian and the legal representative.

(3) The legal representative’s right to select defence counsel and to file for legal remedies also accrues to the parent or guardian.

(4) The judge may remove such rights from the parent or guardian and the legal representative insofar as they are suspected of participating in the accused’s misconduct or insofar as they have been convicted of participation. Where the parent or guardian or the legal representative fulfils the conditions set out in the first sentence the judge may remove those rights from both parties if abuse of those rights is to be feared. If the parent or guardian and the legal representative no longer hold those rights the judge responsible for family or guardianship matters shall appoint a carer to preserve the
accused’s interests in the proceedings which are pending. The main hearing shall be suspended until the carer has been appointed.

(5) Where there are several parents or guardians, each of them may exercise the rights of parents and guardians set out in this Law. At the main hearing or in any other hearing before the judge the absentee parent or guardian shall be deemed to be represented by the parent or guardian who is present. Where provision is made for notices or summonses to be issued it shall be sufficient for these to be addressed to one of the parents or guardians.

Section 68: Compulsory defence counsel

The presiding judge shall appoint defence counsel for the accused if:

1. defence counsel would have to be appointed for an adult;
2. the parent or guardian and the legal representative have had their rights withdrawn in accordance with this Law;
3. consideration may be given to placing the accused in an institution for the purpose of preparing an expert report on his personal development (section 73); or
4. investigation custody or provisional committal is to be enforced against him pursuant to section 126a of the Code of Criminal Procedure if he has not yet reached eighteen years of age; defence counsel shall be appointed without delay.

Section 69: Adviser

(1) The presiding judge can appoint an adviser for the accused at any stage in the proceedings if the circumstances do not warrant the appointment of compulsory defence counsel.

(2) The parent or guardian and the legal representative may not be appointed as adviser if this could be expected to be disadvantageous to his education and development.

(3) The adviser can be permitted to inspect the files. He shall otherwise have the same rights in the main hearing as defence counsel.

Section 70: Notifications

The Youth Court assistance service, in appropriate cases also the judge responsible for family and guardianship matters, the family judge and the school shall be informed of the initiation and outcome of the proceedings. They shall inform the public prosecutor if they become aware that other criminal proceedings are pending against the accused. The judge responsible for family and guardianship matters shall inform the public prosecutor of other measures taken by the family and guardianship courts and of the variance or lifting of such measures where the judge responsible for family and guardianship matters does not consider that the interests meriting protection of the accused or of any other person affected by the notification override such notification.

Section 71: Preliminary orders on supervision

(1) Until the judgment enters into final effect the just may issue preliminary orders concerning supervision of the juvenile or suggest the provision of services in accordance with the Eighth Book of the Code of Social Law.
(2) The judge may order temporary placement in a suitable youth welfare services home if this is also apposite, given the measure which is to be expected, in order to protect the juvenile from a further risk to his development, in particular from committing further criminal offences. Sections 114 to 115a, 117 to 118b, 120, 125 and 126 of the Code of Criminal Procedure shall apply by analogy to the temporary placement. The temporary placement shall be conducted in accordance with the rules applicable to the youth welfare service home.

Section 72: Investigation custody

(1) Investigation custody may be enforced and executed only if its purpose cannot be achieved by a preliminary supervision order or by other measures. In assessing its proportionality (section 112, subsection 1, second sentence, of the Code of Criminal Procedure) account shall also be taken of the special strain which executing custody has on juveniles. Where investigation is imposed the detention order shall set out the reasons which demonstrate that other measures, particularly temporary placement to a youth welfare service home, are not sufficient and that the investigation custody is not disproportionate.

(2) Until as the juvenile has reached sixteen years of age imposition of investigation custody due to a risk of flight shall be admissible only if he:

1. has already absconded from the proceedings or made efforts to do so; or
2. he has no fixed abode or residence within the area in which this Law is applicable.

(3) The decision on enforcement of a custody order and on the measures to avoid it being enforced shall be taken by the judge who issued the custody order or, in urgent cases, by the Youth Court judge in whose district the investigation custody would have to be executed.

(4) Temporary placement in a youth welfare service home (section 71, subsection 2), may also be ordered under the same conditions for issuing a custody order. In this case the judge may subsequently replace the placement order with a custody order if that proves to be necessary.

(5) If a juvenile is being held in investigation custody the proceedings shall be conducted particularly expeditiously.

(6) The competent judge may, for important reasons, transfer all or some of the judicial decisions concerning investigation custody to another Youth Court judge.

Section 72a: Involvement of the Youth Court assistance service in custody matters

The Youth Court assistance service shall be informed without delay of the enforcement of a custody order; it should be informed already when a custody order is issued. The Youth Court assistance service shall be informed when a juvenile is placed under temporary arrest if it can be expected from the investigations so far that the juvenile will be brought before the judge pursuant to section 128 of the Code of Criminal Procedure.

Section 73: Placement for observation purposes

(1) In order to prepare an expert opinion on the accused’s state of development the judge may, after hearing an expert and the defence counsel, order that the accused be
taken to an institution appropriate for the examination of juveniles and that he be placed under observation there. In the preparatory proceedings the decision shall be taken by the judge who would be competent to open the main proceedings.

(2) An immediate complaint against the decision shall be admissible. It shall have a delaying effect.

(3) The period of custody in the institution shall not exceed six weeks’ duration.

Section 74: Costs and expenses
In proceedings against a juvenile the imposition of costs and expenses on the defendant may be dispensed with.

Eighth Subchapter

Simplified youth procedure

Section 75
(Deleted)

Section 76: Conditions for applying the simplified procedure
The public prosecutor may apply to the Youth Court judge in writing or orally for a decision to be taken by simplified procedure for matters involving juveniles if it can be expected that the Youth Court judge will impose only instructions, order supervision by a social worker or probation officer, apply disciplinary measures, impose a driving ban, withdraw permission to drive and impose a bar not exceeding two years or order forfeiture or seizure. The public prosecutor’s application shall be equivalent to public charges.

Section 77: Rejection of the application
(1) The Youth Court judge shall decline to take a decision by simplified procedure if the matter is not suitable for the procedure, id est. if it is probable that educational assistance within the meaning of section 12, number 2, will be ordered or youth penalty will be imposed or if the taking of comprehensive evidence is necessary. The decision may be taken until the time when the judgment is pronounced. The decision may not be contested.

(2) If the Youth Court judge refuses to take a decision by simplified procedure the public prosecutor shall submit a bill of indictment.

Section 78: Procedure and decision
(1) The Youth Court judge shall issue a decision under the simplified youth procedure by judgment on the basis of an oral hearing. He may not impose educational assistance within the meaning of section 12, number 2, youth penalty or placement in an institution for withdrawal treatment.

(2) The public prosecutor shall not be obliged to attend the hearing. If the public prosecutor does not attend his consent shall not be required for the proceedings to be discontinued during the hearing or for proceedings to be conducted in the absence of the defendant.
(3) To simplify, accelerate and structure proceedings in a youth-friendly manner it shall be permissible to deviate from the provisions on procedure providing such deviation does not detract from the investigation of the truth. The provisions concerning the presence of the accused (section 50), the status of the parent or guardian and the legal representative (section 67) and notification of decisions (section 70) must be observed.

Ninth Subchapter

Suspension of other provisions of general procedural law

Section 79: Penalty order and accelerated procedure
(1) No penalty order may be issued against a juvenile.

(2) The accelerated procedure set out under general procedural law shall be inadmissible.

Section 80: Private prosecution and private ancillary prosecution
(1) No private prosecution may be brought against a juvenile. Misconduct which under the provisions of general law may be pursued by private prosecution shall also be prosecuted by the public prosecutor if educational reasons or a justified interest of the aggrieved person which does not go against the aim of the supervision so require.

(2) A counter action is admissible against a juvenile who brings a private prosecution. No youth penalty may be imposed.

(3) Private ancillary prosecution is inadmissible.

Section 81: Compensation for the aggrieved person
The provisions of the Code of Criminal Procedure governing compensation for the aggrieved person (sections 403 to 406c of the Code of Criminal Procedure) shall not be applied in proceedings against a juvenile.
Third Title

Enforcement and execution

First Chapter

Enforcement

First Subchapter

Status of enforcement and jurisdiction

Section 82: Enforcement officer

(1) The enforcement officer shall be the Youth Court judge. He shall also perform the tasks assigned by the Code of Criminal Procedure to the criminal enforcement panel of the court.

(2) Insofar as the judge has ordered educational assistance within the meaning of section 12, jurisdiction shall otherwise be assigned according to the provisions of the Eighth Book of the Code of Social Law.

Section 83: Decisions in enforcement proceedings

(1) Decisions of the enforcement officer pursuant to sections 86 to 89a, section 92, subsection 3, and sections 462a and 463, of the Code of Criminal Procedure shall be deemed to be decisions of the Youth Court judge.

(2) Jurisdiction for judicial decisions which shall become necessary during enforcement in response to an order made by the enforcement officer shall lie with the youth criminal division in cases in which:

1. the decision at first instance was taken by the enforcement officer himself or by a lay youth assessors’ court of which he was the presiding judge;

2. the enforcement officer, in performance of the tasks of the criminal enforcement panel of the court, would be required to take a decision concerning an order he himself issued.

(3) The decisions taken in accordance with subsections 1 and 2 may, unless otherwise provided, be contested with an immediate complaint. Sections 67 to 69 shall apply by analogy.

Section 84: Geographical jurisdiction

(1) The Youth Court judge shall initiate enforcement in all proceedings in which the decision at first instance was taken by him or by a lay youth assessors’ court of which he was the presiding judge.

(2) Except in the cases referred to in subsection 1, where a decision taken by another judge is to be enforced, initiation of enforcement lies with the Youth Court judge at the local court who bears responsibility for the educational functions of the family and
guardianship judge. If in these matters the sentenced person has reached the age of majority responsibility for initiating enforcement shall lie with the Youth Court judge at the local court which would have had responsibility for the educational functions of the family and guardianship judge if the individual concerned had lacked legal majority.

(3) In the cases referred to in subsections 1 and 2 enforcement shall be assured by the Youth Court judge unless otherwise provided for under section 85.

Section 85: Surrender and transfer of enforcement

(1) Where youth detention is to be enforced the Youth Court judge who first had jurisdiction shall surrender enforcement to the Youth Court judge with jurisdiction in the capacity of enforcement officer pursuant to section 90, subsection 2, second sentence.

(2) Where youth penalty is to be enforced, enforcement shall be transferred, after reception of the person convicted in the youth penalty institution, to the Youth Court judge at the local court in whose district the youth penalty institution is located. The governments of the Länder shall be authorised to issue regulations stipulating that enforcement shall be transferred to the Youth Court judge at a different local court if this appears more expedient for contact reasons. The governments of the Länder may issue regulations transferring such authority to the judicial authorities of the Länder.

(3) Where one of the Länder maintains a youth penalty institution within the territory of one of the other Länder, the Länder concerned may agree that the Youth Court judge at a local court of the Land which maintains the youth penalty institution should have jurisdiction. Where such agreement is reached enforcement is transferred to the Youth Court judge of the local court in the district of which the authority responsible for supervising the youth penalty institution has its headquarters. The government of the Land which maintains the youth penalty institution is authorised to issue regulations according to which the Youth Court judge of another local court shall acquire jurisdiction if this appears more expedient for contact reasons. The Land government may issue a regulation transferring such authority to the judicial authorities of the Land.

(4) Subsection 2 shall apply mutatis mutandis to enforcement of a measure of reform or prevention pursuant to section 61, number 1 or 2, of the Criminal Code.

(5) For important reasons the enforcement officer may surrender,-reserving the right of revocation, enforcement to a Youth Court judge who would otherwise not have or who no longer has jurisdiction.

(6) Where the convicted person has reached twenty-four years of age the enforcement officer with jurisdiction pursuant to subsections 2 to 4 may surrender enforcement of youth penalty executed according to the provisions applicable to execution of adult penalties, or of a measure of reform and prevention, to the enforcement authority with jurisdiction under the provisions of general law if execution of the penalty or measure is likely to continue longer and, in the light of the convicted person’s personality, the basic characteristics special to youth criminal law are no longer significant to future decisions; the surrender is binding. Upon the surrender the provisions of the Code of Criminal Procedure and the Constitution of the Courts Law concerning enforcement of sentence shall be applied.
(7) Section 451, subsection 3, of the Code of Criminal Procedure shall apply *mutatis mutandis* with regard to the jurisdiction of the public prosecutor in enforcement proceedings.

**Second Subchapter**

**Youth detention**

**Section 86: Conversion of detention during leisure time**

The enforcement officer may convert detention during leisure time into short-term detention if the conditions set out in section 16, subsection 3, have subsequently been met.

**Section 87: Enforcement of youth detention**

(1) Enforcement of youth detention shall not be suspended on probation.

(2) Section 450 of the Code of Criminal Procedure shall apply by analogy to the crediting against youth detention of periods spent in investigation custody.

(3) The enforcement officer shall refrain from enforcing youth detention in full or, if youth detention has been served in part, from enforcing its remainder if, since the judgment was handed down, circumstances have become known which, alone or in conjunction with the circumstances already known, justify refraining from enforcement on educational grounds. If more than six months have elapsed since the judgment entered into full force he shall refrain from enforcement in full if that is apposite for educational reasons. He may refrain from enforcing youth detention in full if it can be expected that youth detention, in parallel with a penalty imposed against the convicted person as a result of a separate act or which he can expect to be imposed as a result of a separate act, will no longer fulfil its educational purpose. Prior to the decision the enforcement officer shall if possible hear the judge who took the decision, the public prosecutor and the representative of the Youth Court assistance service.

(4) Enforcement of youth detention is inadmissible if one year has elapsed since the decision entered into full force.

**Third Subchapter**

**Youth penalty**

**Section 88: Suspension of remainder of youth penalty**

(1) The enforcement officer may suspend enforcement of the remainder of the youth penalty on probation if the convicted person has served part of the sentence and if suspension can be justified given the juvenile’s development and also having due regard to the security interests of the general public.

(2) If six months of the sentence have not yet been served an order to suspend enforcement of the remainder may be issued only on especially important grounds. In the case of youth penalty exceeding one year suspension is admissible only if the convicted person has served at least one third of the penalty.
(3) In the cases referred to in subsections 1 and 2 the enforcement officer should take his decision sufficiently early to allow the measures required to prepare the convicted person for life after release to be taken. The enforcement officer may revoke his decision up until the convicted person’s release if, by virtue of new facts or facts that have subsequently come to light relating to the juvenile’s development, and also having due regard to the security interests of the general public, responsibility can no longer be taken for suspension.

(4) The enforcement officer shall take his decision having heard the public prosecutor and the head of the executing institution. The convicted person shall be given an opportunity to comment orally.

(5) The enforcement officer may fix time periods not exceeding six months prior to the expiry of which an application by the convicted person to suspend the remainder of sentence on probation shall be inadmissible.

(6) If the enforcement officer orders enforcement of the remainder of youth penalty to be suspended, section 22, subsection 1, subsection 2, first and second sentences, and sections 23 to 26a shall apply by analogy. The judge who hears the case shall be substituted by the enforcement officer. Section 58, section 59, subsections 2 to 4, and section 60, shall be applied mutatis mutandis to the procedure and the contesting of decisions. A complaint by the public prosecutor against the order to suspend the remainder of sentence shall have a delaying effect.

Section 89

Section 89a: Interruption and enforcement of youth penalty in combination with imprisonment

(1) If a prison sentence is also to be enforced against a convicted person sentenced to youth penalty, youth penalty shall generally be served first. The enforcement officer shall interrupt enforcement of the youth penalty if half of the youth penalty, with a minimum of six months, has been served. He may interrupt enforcement earlier if consideration can be given to suspending the remainder of the penalty. A remainder of sentence which is enforced because its suspension has been revoked may be interrupted if half of the remainder, with a minimum of six months, has been served and consideration can be given to its renewed suspension. Section 454b, subsection 3, of the Code of Criminal Procedure shall apply mutatis mutandis.

(2) In the cases referred to in subsection 1, section 85, subsection 6, shall apply mutatis mutandis with the proviso that the enforcement officer may surrender enforcement of the youth penalty if the convicted person has reached twenty-one years of age.
Second Chapter

Execution

Section 90: Youth detention

(1) Execution of youth detention should arouse the juvenile’s sense of self-respect and make him fully aware that he must take responsibility for the wrong he has done. Execution of youth detention should be structured in an educational manner. It should help the juvenile to overcome those difficulties which contributed to his commission of the criminal offence.

(2) Youth detention shall be executed in the Land judicial authority’s youth detention centres or facilities for detention during leisure time. The officer responsible for execution of penalties is the Youth Court judge in the place of execution.

Section 91: Purpose of executing youth penalties

(1) Execution of youth penalty should teach the convicted person to lead his future life in a law-abiding and responsible manner.

(2) The concept of order, work, learning, physical education and purposeful occupation during leisure time shall be the bases of such teaching. The convicted person’s professional achievements are to be promoted. Training facilities shall be established. Spiritual guidance shall be guaranteed.

(3) In order to achieve the desired educational aim, execution may be relaxed and, in appropriate cases, implemented in a broadly liberal manner.

(4) The officers must be suitable and trained to perform the educational task of the execution of youth penalties.

Section 92: Youth penalty institutions

(1) Youth penalty shall be executed in youth penalty institutions.

(2) There shall be no requirement to execute youth penalty in a youth penalty institution vis-à-vis a convicted person who has reached eighteen years of age and who is not suitable for execution of youth penalty. Youth penalty not executed in a youth penalty institution shall be executed in accordance with the provisions relating to execution of sentences applicable to adults. If the convicted person has reached twenty-one years of age, youth penalty should be executed in accordance with the provisions relating to execution of sentences applicable to adults.

(3) The enforcement officer shall decide on removal from execution of youth penalty.

Section 93: Investigation custody

(1) Where possible a juvenile shall be placed in investigation custody in a special institution or, at least, in a special department of the prison or in a youth detention institution.

(2) Execution of investigation custody should be structured in an educational manner.
(3) Representatives of the Youth Court assistance service and, if the accused has been placed under the supervision and guidance of a probation officer or the care and supervision of a care worker or if a social worker has been appointed to him, the assistant and the social worker shall have the same rights of contact with the accused as defence counsel.

Section 93a: Placement in an institution for withdrawal treatment

(1) The measure set out in section 61, number 2, of the Criminal Code shall be executed in an institution in which the therapeutic resources and social assistance required to treat juveniles suffering from addiction are available.

(2) In order to achieve the desired aim of the treatment, execution may be relaxed and implemented in a broadly liberal manner.

Fourth Title

Striking from the criminal record

Sections 94 to 96

(Repealed)

Section 97: Striking from the criminal record by judicial instruction

(1) Where the Youth Court judge has been convinced that a juvenile sentenced to youth penalty has proved himself to be a law-abiding individual by dint of irreproachable conduct, he shall declare of his own motion or on application of the convicted person, of the parent or guardian or of the legal representative, that the entry be struck from the criminal record. This may also occur upon application of the public prosecutor or, if the convicted person is still a minor at the time of the application, upon application of the representative of the Youth Courts assistance office. Such declaration shall be inadmissible in the case of a conviction pursuant to sections 174 to 180, or section 182, of the Criminal Code.

(2) The order may not be made earlier than two years after serving or remission of the penalty unless the convicted person has demonstrated himself to be particularly worthy of having the entry struck off. The order shall be inadmissible while the penalty is being executed or during a probationary period.

Section 98: Procedure

(1) Jurisdiction shall lie with the Youth Court judge of the local court responsible for educational functions of the family and guardianship judge for matters concerning the convicted person. If the convicted person is a major, jurisdiction shall lie with the Youth Court judge in whose district the convicted person resides.

(2) The Youth Court judge shall as a preference assign the body which has looked after the convicted person since he served his sentence to investigate his conduct and his period of probation. The Youth Court judge may also conduct investigations of his own. He shall hear the convicted person and, if the latter is a minor, the parent or guardian and the legal representative as well as the school and the competent administrative authority.
(3) Once the investigations have been completed the public prosecutor shall be heard.

Section 99: Decision

(1) The Youth Court judge shall give his decision by order.

(2) If he considers that the conditions applicable to the striking from the criminal record have not yet been fulfilled he may defer the decision by not more than two years.

(3) An immediate complaint may be filed against the order.

Section 100: Striking from the criminal record following remission of penalty or of a remainder of penalty

Where, in the case of a conviction entailing no more than two years’ youth penalty, remission of penalty or of a remainder of penalty is ordered after probationary suspension, the judge shall at the same time declare that the offence be struck from the criminal record. This shall not apply in the case of a conviction pursuant to sections 174 to 180, or section 182, of the Criminal Code.

Section 101: Revocation

Where the convicted person who has had an entry struck from his criminal record receives a further custodial sentence due to a conviction for a serious criminal offence or a deliberate misdemeanour prior to expiry of the file note, the judge shall, in the judgment or subsequently by order, revoke the striking of the entry from the criminal record. In special cases he may refrain from revocation.

Fifth Title

Juveniles brought before courts with jurisdiction for general criminal matters

Section 102: Jurisdiction

The provisions of this Law shall be without effect to the jurisdiction of the Federal Court of Justice and the higher regional court. In criminal matters falling within the jurisdiction of the higher regional courts at first instance (section 120, subsections 1 and 2, of the Constitution of the Courts Law) the Federal Court of Justice shall also take decisions on complaints against decisions of those higher regional courts which order or refuse to grant probationary suspension of youth penalty (section 59, subsection 1).

Section 103: Joinder of several criminal matters

(1) Criminal cases brought against juveniles and adults may be joined in accordance with the provisions of general procedural law if this is apposite in order to investigate the truth or on other important grounds.

(2) Jurisdiction shall lie with the Youth Court. This shall not apply if the criminal matter against adults would, according to the provisions of general law including the provision set out in section 74e of the Constitution of the Courts Law, fall within the jurisdiction of the economic crimes panel or the criminal panel referred to in section 74a of the Constitution of the Courts Law; in a case of this type these criminal panels shall
also have jurisdiction for the criminal case against the juvenile. To determine whether the economic crimes panel or the criminal panel have jurisdiction according to section 74a of the Constitution of the Courts Law in the matter referred to in the second sentence, section 6a, section 225a, subsection 4, section 270, subsection 1, second sentence, of the Code of Criminal Procedure shall be applied mutatis mutandis; section 209a of the Code of Criminal Procedure shall be applied on the condition that these criminal panels may be assimilated to higher level courts also in relation to the youth criminal division.

(3) Where the judge orders separation of the joined matters, then the matter which has been separated off shall immediately be surrendered to the judge that would have been competent had the joinder not taken place.

Section 104: Proceedings against juveniles

(1) In proceedings against juveniles before the courts with jurisdiction for general criminal cases the provisions set out in this Law shall apply to:

1. juvenile offences and their consequences (sections 3 to 32);
2. the inclusion and legal status of Youth Court assistance service (section 38, and section 50, subsection 3);
3. the scope of investigations in preliminary proceedings (section 43);
4. dispensing with prosecution and discontinuation of the proceedings by the judge (sections 45 and 47);
5. investigation custody (sections 52, 52a and 72);
6. the grounds for the judgment (section 54);
7. procedures applicable to legal remedies (sections 55 and 56);
8. the procedure for probationary suspension of youth penalty and sentencing to youth penalty (sections 57 to 64);
9. the participation and legal status of the parent and guardian and the legal representative (section 67 and section 50, subsection 2);
10. compulsory defence counsel (section 68);
11. notifications (section 70);
12. placement for observation purposes (section 73);
13. costs and expenses (section 74); and

14. the suspension of other provisions of general procedural law (sections 79 to 81).

(2) The application of further procedural provisions set out in this Law shall be at the discretion of the judge.

(3) Insofar as is required for reasons of state security, the judge may issue an order dispensing with the involvement of the Youth Court assistance service and participation of the parent and guardian and the legal representative.

(4) Where the judge considers compulsory care measures necessary he shall leave it to the judge responsible for family and guardianship matters to select and order them. Section 53, second sentence, shall apply mutatis mutandis.

(5) Decisions which become necessary after probationary suspension of youth penalty shall be transferred to the Youth Court judge in whose district the juvenile resides. The same shall apply to decisions following suspension of imposition of youth penalty with
the exception of decisions on the fixing of the penalty and the spending of sentence (section 30).

Part III

Young adults

First Chapter

Application of substantive criminal law

Section 105: Application of youth criminal law with regard to young adults

(1) Where a young adult engages in misconduct punishable under the provisions of general law the judge shall apply the provisions applicable to a juvenile set out in sections 4 to 8, section 9, number 1, sections 10 and 11, and 13 to 32, *mutatis mutandis* if:

1. the overall assessment of the perpetrator’s personality, taking account of his living environment, demonstrates that at the time of the act he was assimilable to a juvenile in terms of his moral and intellectual development; or

2. the type, circumstances and motives of the act indicate that it constituted youth misconduct.

(2) Section 31, subsection 2, first sentence, and section 31, subsection 3, shall also be applied even if the young adult has already been convicted with legal effect according to the provisions of general criminal law for part of the offences.

(3) The maximum period of youth penalty applicable to young adults shall be ten years.

Section 106: Mitigation of general criminal law with regard to young adults

(1) Where general criminal law is to be applied in response to the criminal act by a young adult the judge may hand down a custodial sentence of ten to fifteen years’ duration in place of life-long imprisonment.

(2) The judge may not order placement in a secure institution. He may order that the loss of the capacity to hold public and attain public electoral rights (section 45, subsection 1, German Criminal Code) shall not obtain.

Second Chapter

Constitution of the court and procedure

Section 107: Constitution of the court

Of the provisions on the constitution of Youth Courts set out in sections 33 to 34, subsection 1, and sections 35 to 38, shall apply *mutatis mutandis* to young adults.
Section 108: Jurisdiction

(1) The provisions on the jurisdiction of the Youth Courts (sections 39 to 42) shall also apply to misconduct by young adults.

(2) The Youth Court judge shall also have jurisdiction for misconduct by young adults if it can be expected that general criminal law will apply and if, according to section 25 of the Constitution of the Courts Law, the criminal court judge would have taken the decision.

(3) The lay youth assessors’ court may not impose a custodial sentence exceeding four years as a result of misconduct by a young adult. If a longer custodial sentence is to be expected, jurisdiction shall lie with the youth criminal division.

Section 109: Procedure

(1) Of the provisions on criminal proceedings against juveniles (sections 41 to 81) sections 43, 47a, section 50, subsections 3 and 4, section 68, numbers 1 and 3, and section 73, shall apply mutatis mutandis to proceedings against a young adult. The Youth Court assistance service and, in appropriate cases, also the school shall be informed of the initiation and outcome of the proceedings. They shall inform the public prosecutor if they become aware that other criminal proceedings are pending against the person charged with the offence. The public may be excluded if this is apposite in the young adult’s interest.

(2) If the judge applies youth criminal law (section 105), section 45, section 47, subsection 1, first sentence, numbers 1, 2 and 3, and section 47, subsections 2 and 3, sections 52, 52a, section 54, subsection 1, sections 55 to 66, subsection 74, subsection 79, subsection 1, and section 81, shall apply mutatis mutandis. Section 66 shall also be applied if no single set of measures or youth penalty has been established pursuant to section 105, subsection 2. Section 55, subsections 1 and 2, shall not be applied if the decision was taken in accelerated proceedings under general procedural law.

(3) Section 407, subsection 2, second sentence, of the Code of Criminal Procedure shall not be applied in proceedings against a young adult.

Third Chapter

Enforcement, execution and striking from the criminal record

Section 110: Enforcement and execution

(1) Of the provisions on enforcement and execution applicable to juveniles section 82, subsection 1, and sections 83 to 93a, shall apply mutatis mutandis to young adults provided the judge has applied youth criminal law (section 105) and imposed measures admissible pursuant to this Law or youth penalty.

(2) Section 93 shall apply mutatis mutandis where the individual who was a young adult at the time of the act has not reached twenty-one years of age. In the case of young adults who have reached twenty-one but not yet twenty-four years of age, investigation custody may be executed according to the provisions of section 93.
**Section 111: Striking from the criminal record**

The provisions concerning striking from the criminal record (sections 97 to 101) shall apply *mutatis mutandis* to young adults insofar as the judge has imposed youth penalty.

*Fourth Chapter*

**Young adults appearing in courts with jurisdiction for general criminal matters**

**Section 112: Application mutatis mutandis**

Sections 102, 103, section 104, subsections 1 to 3 and 5, shall apply *mutatis mutandis* to proceedings against young adults. The provisions referred to in section 104, subsection 1, shall be applied only insofar as they are not excluded according to the law applicable to young adults. Where the judge considers it necessary to impose instructions he shall leave it to the Youth Courts judge in whose district the young adult resides to select and order them.

*Part Four*

**Special provisions applicable to soldiers in the Federal Armed Forces**

**Section 112a: Application of youth criminal law**

Youth criminal law (sections 3 to 32, section 105) shall apply, with the following derogations, to the duration of a juvenile or young adult’s period of service with the Federal Armed Forces:

1. Educational assistance within the meaning of section 12 may not be ordered.
2. If the juvenile or young adult requires special educational aid as a result of his state of moral or intellectual development the judge may order the provision of educational assistance by the disciplinary officer as a educational measure.
3. When issuing instructions and obligations the judge should take account of the special characteristics of service in the armed forces. He should adjust instructions and obligations which have already been issued to those special characteristics.
4. A soldier can be appointed as a voluntary probation officer. He shall not be subject in that activity (section 25, second sentence) to the judge’s instructions.
5. A probation officer who is not a soldier may not monitor matters for which the juvenile or young adult’s military superior is responsible. Measures by the disciplinary officer shall take precedence.

**Section 112b: Educational assistance by the disciplinary officer**

(1) Where the judge has ordered educational assistance (section 112a, number 2) the next-ranking disciplinary officer shall ensure that the juvenile or young adult is monitored and cared for, including when not on service.
(2) For this purpose duties and restrictions shall be imposed on the juvenile or young adult which can relate to the service activities, leisure time, holidays and the payment of wages. Details shall be enacted by regulation (section 115, subsection 3).

(3) Educational assistance shall be provided until its purpose has been fulfilled. It shall however end at the latest after having lasted for one year or when the soldier reaches twenty-one years of age or leaves military service.

(4) Educational assistance can also be ordered in combination with youth penalty.

Section 112c: Execution

(1) The executing officer shall declare the educational measure pursuant to section 112a, number 2, complete when its purpose has been fulfilled.

(2) The executing officer shall refrain from executing youth detention imposed as a result of an act committed prior to commencement of the period of service against soldiers in the Federal Armed Forces if this is required due to the special characteristics of service in the armed forces and if account cannot be taken of those special characteristics by deferring execution.

(3) The decisions of the executing officer pursuant to subsections 1 and 2 shall be considered judicial decisions within the meaning of section 83.

Section 112d: Hearing the disciplinary officer

Before the judge or the executing officer imposes instructions or requirements on a soldier in the Federal Armed Forces, orders or declares spent the educational measure referred to in section 112a, number 2, refrains from executing youth detention pursuant to section 112c, subsection 2, or appoints a soldier as probation officer, he should hear the juvenile or young adult’s next-ranking disciplinary officer.

Section 112e: Proceedings before courts with jurisdiction for general criminal matters

In proceedings against juveniles or young adults before the courts with jurisdiction for general criminal matters (section 104), sections 112a, 112b and 112d shall be applied.

Part Five

Concluding and transitional provisions

Section 113: Probation officers

At least one full-time probation officer shall be appointed for the district of each Youth Court judge. The appointment may be made for several districts or be dispensed with entirely if disproportionately high expenditure would be incurred as a result of the very low number of criminal matters. Details concerning the activities of the probation officer shall be set out in legislation of the Länder.
Section 114: Execution of imprisonment in youth detention institutions

Custodial sentences imposed under the provisions of general criminal law may also be executed in youth detention institutions in the case of convicted persons who have not yet reached the age of twenty-four years and who are suitable for youth detention.

Section 115: Regulations on execution issued by the German Federal Government

(1) The German Federal Government is authorised, with the assent of the Bundesrat, to issue regulations containing provisions on the execution of youth penalty, youth detention and investigation custody concerning the type of placement, treatment, living conditions, the educational, spiritual and vocational care, working conditions, teaching, healthcare and physical training, leisure time, contact with the outside world, good order and security in the penal institution and the punishing of violations thereof, reception and release as well cooperation with authorities and agencies which care and provide for young people.

(2) For the purposes of sanctioning violations against the good order and security in the penal institution, the regulations issued by the German Federal Government may provide only for punishments within the institution imposed by its governor or, in the case of investigation custody, by the judge. The most severe in-house punishments shall be restricting contact with the outside world to emergencies for up to three months and confinement for up to two weeks. More lenient in-house punishments shall be admissible. Confinement in the dark shall be prohibited.

(3) The German Federal Government is authorised, with the assent of the Bundesrat, to issue provisions for the implementation of section 112b, subsection 2, on the nature, extent and duration of the duties and restrictions which may be imposed on a juvenile or young adult with respect to their service, leisure time, holidays and the payment of their wages or which can be imposed by the next-ranking disciplinary officer.

Section 116: Temporal application

(1) This Law shall also be applied to misconduct engaged in prior to its entry into force. The minimum term of youth penalty applicable to such misconduct shall be three months.

(2) Youth penalty may not be imposed upon a young adult if the criminal offence was committed prior to the entry into force of this Law and if under the provisions of general criminal law imposition of a custodial sentence of less than three months would have been expected.

(3)

Section 117: Composition of the court

(1) The election of lay youth assessors pursuant to section 35 shall take place for the first time within six months of the entry into force of this Law, thereafter at the same time as the election of assessors to the lay assessors’ courts and the criminal panels.

(2) Where a youth welfare committee does not yet exist, the list of candidates pursuant to section 35, subsection 3, shall be drawn up by the youth welfare office.
Section 118
(Out of date)

Section 119: Custodial sentences
Juvenile prison sentences handed down to a juvenile prior to entry into force of this Law shall be assimilated to youth penalty for the purposes of applying this Law.

Section 120: References
References to provisions of the Reich Youth Court Law of 6 November 1943 (Reich Law Gazette Part I, page 637) shall be considered references to the provisions of this Law which have superseded them.

Section 121: Transfer of enforcement
Where one of the Länder maintains a youth penalty institution in the territory of one of the other Länder (section 85, subsection 3, in the version in force on 1 December 1990), the Youth Court judge at the local court in whose district the supervisory body responsible for the youth penalty institution has its headquarters shall, until 4 September 1991, have competence enforcement of youth penalty.

Section 122
(Without object)

Section 123: Special provision for Berlin
Part Four (sections 112a to 112e) and section 115, subsection 3, shall not be applied in the Land of Berlin. Part Five (concluding and transitional provisions) shall be applied in the Land of Berlin as Part Four.

Section 124: Berlin clause
This Law shall also apply in the Land of Berlin under the proviso set out in section 13, subsection 1, of the Third Transition Law of 4 January 1952 (Federal Law Gazette Part I, page 1). Regulations issued on the basis of the authorisations contained in this Law shall apply in the Land of Berlin according to section 14 of the Third Transition Law.

Section 125: Entry into force
This Law shall enter into force on 1 October 1953.