

# **Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice**

Report prepared by Dr Nessa Lynch, Faculty of Law, Victoria University of Wellington, in conjunction with Dyslexia Foundation of New Zealand (DFNZ), summarising the contributions of participants at the 2016 Neurodisabilities Forum, hosted by DFNZ in Wellington, 12 May 2016.

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**2016 Neurodisabilities Forum**  
How vulnerability intersects with justice in NZ

 **Dyslexia Foundation**  
of New Zealand  
Recognition • Understanding • Action

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## 1. Introduction

One in four New Zealanders is limited by a physical, sensory, learning, mental health or other impairment, according to the 2013 Disability Survey, conducted by Statistics New Zealand following the 2013 Census.

Neurodisability is a hidden disability: just as you wouldn't expect a person in a wheelchair to run a marathon; you shouldn't expect a person with communication difficulties to understand the complex language and concepts of our justice system. Just as we adapt buildings to allow people with physical disabilities to move around in their daily lives, we should adapt the procedures and parameters of our justice system to facilitate those who have difficulties with communication and comprehension.

On 12 May 2016, the 2016 Neurodisabilities Forum was held in Wellington to discuss the issue of neurodisabilities in the youth justice system. Hosted by Dyslexia Foundation of New Zealand, the Forum was attended by a broad cross section of more than 60 key stakeholders in the justice, health, education, social development and disability sectors.

The Forum was opened by Hon Nicky Wagner, Minister for Disabilities, and keynote addresses were delivered by Principal Youth Court Judge Andrew Becroft and Chair of the NZ Institute for Educational and Developmental Psychologists Rose Blackett. Other speakers included Dr Ian Lambie, Associate Professor, Auckland University, Dr Katie Bruce of JustSpeak, Phil Dinham of CYF Youth Justice Support, Dr Nessa Lynch from Victoria University Faculty of Law, FASD-CAN's Eleanor Bensemann, Sally Kedge from Talking Trouble, Sonia Thursby from YES Disability, and Dyslexia Foundation of New Zealand Chair of Trustees Guy Pope-Mayell.

Stakeholder groups attending included representatives of Child, Youth and Families; Ministry of Justice; Ministry of Education; Ministry of Health; Ministry of Social Development; Police Youth Development; Human Rights Commission; Central Regional Health School; Henwood Trust; SENCO Kapiti College; Dyslexia Foundation of New Zealand; IHC; Autism NZ; NZ Institute for Educational and Developmental Psychologists, AMADA; Blind Foundation; Challenge 2000; Child Wellbeing Network; Education and Achievement Association Inc; Disabled Persons Assembly NZ; Parents of Vision Impaired and People First.

In opening the Forum, the Minister said it was a 'groundbreaking' event bringing together key stakeholders for neurodisabilities for the first time in New Zealand. "There is significant evidence that people with neurodisabilities are over-represented in the youth justice and prison population," she said. This was a huge challenge which was now understood, with an evidence based approach required to move into the future.

This report provides background and context to the issue of how the justice system interacts with young persons with neurodisabilities, summarises the discussions of the Forum, and makes key recommendations for action.<sup>1</sup>

## 2. Executive Summary

People with neurodisabilities are vulnerable when they come into contact with the justice system. This is evidenced by the significant over-representation of individuals with neurodisabilities in both the adult and youth justice systems. Neurodisabilities range from learning differences such as dyslexia and communication disorders through to

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<sup>1</sup> For a comprehensive discussion of the gaps in legal, policy and practice see Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014.

attention deficit hyperactive disorder (ADHD), autism spectrum disorder (ASD), traumatic brain injury (TBI), epilepsy and foetal alcohol syndrome disorder (FASD).

Individuals with neurodisabilities are vulnerable in the justice system due to a number of factors. These can include different degrees of comprehension and social (dis)comfort due to low reading age, limited literacy skills, slower cognitive processing speeds and comprehension, impaired or heightened auditory and visual perception, poor short-term memory and variable concentration, reduced ability to understand procedures and follow instructions, inability to comprehend cause and effect and/or consequences. As well as behavioural propensities that can be mistakenly interpreted as hostility, acting out or evidence of guilt.

Importantly, neurodisabilities do not discriminate – they cross over socio-economic, ethnic, and cultural boundaries. It is estimated that up to 80% of young people in the Youth Court have at some point been subject to a Child, Youth & Family (CYF) notification.<sup>2</sup> It is likely that, in many of these cases, family circumstances are underpinned or compounded by neurodisabilities. FASD, for example, can be intergenerational. This is also the case with a range of other neurodisabilities.

Co-morbidity is also common. Dyslexia, for example, can be co-morbid with autism, attention deficit hyperactivity disorder (ADHD), dyspraxia, dysgraphia and other disorders. Some neurodisabilities, ADHD for example, reduce an individual's ability to assess risk and make them more prone to behaviours that may result in traumatic brain injury, which research has shown can be a marker for propensity to offend.

Due to these factors, over-representation of individuals with neurodisabilities in the justice system could also be seen to represent the criminalisation of mental health issues, with our prisons acting as quasi mental health institutions. It must be acknowledged that where young persons with neurodisabilities commit criminal offences, they have caused harm to victims and society and need to be held accountable, but this must be done in a manner that they understand, reflects their disability, and where appropriate support/rehabilitation/reintegration can be ensured. Public safety is improved where such young persons are appropriately dealt with by the justice system, and where the focus is on appropriate reintegration and decreasing the likelihood of a repeat behaviour/offence.<sup>3</sup> It is also worth noting that a recent New Zealand study showed that in general people favour rehabilitative and restorative approaches, especially those who have been victims.<sup>4</sup>

There are some marked commonalities in how individuals with neurodisabilities may present in the justice context. These create vulnerability and often give rise to misunderstandings in terms of what these characteristics and behaviours mean. In the justice system, where all procedures are essentially word-based, a person's inability to quickly process and comprehend information in written or verbal form leaves them open to manipulation and entrapment. Propensities to take statements literally, to become confused by information and sensory overload, to act impulsively, to not see their actions in context, and to speak before thinking make it difficult to navigate the complexities and nuances of the legal process.

As noted above, common to a range of neurodisabilities are different degrees of comprehension and (dis)comfort in social situations, along with behaviours that might be perceived as hostility, acting out or evidence of guilt. In reality, these are often coping mechanisms often perceived as survival for the individual with neurodisabilities and have

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<sup>2</sup> Practitioners speaking at the 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>3</sup> United Nations Committee on the Rights of the Child *General Comment No 10 (2007): Children's rights in juvenile justice* CRC/C/GC/10 (2007).

<sup>4</sup> Miers, S., Lambie I. D. (December 2014). "Public Attitudes towards youth offenders" School of Psychology, University of Auckland.

no pejorative meaning. For example, young people with neurodisabilities are highly prone to false or exaggerated confessions due to propensity to say 'yes' in order to bring an uncomfortable situation to an end. Lack of eye contact and sensory issues are also common characteristics of neurodisabilities. While this is indicative of anxiety or nervousness in the individual, it can be misinterpreted as guilt, disinterest or belligerence.

While diversion from prosecution and formal orders is a key plank of the New Zealand youth justice system, this does mean that young persons admit responsibility for offences through informal processes, generally without legal, or independent advice. Unfairness in police questioning and investigation may not come to light. Hopkins' study of the access of young persons to legal assistance in the New Zealand youth justice system found that police diversionary practice sometimes lacked consistency and transparency, and there were due process concerns. Similarly, in the adult system, most offending is proved by means of a guilty plea.<sup>5</sup>

Having said that, the New Zealand youth justice system is recognised as world-leading in a pioneering response to the neurodisability issue<sup>6</sup>, and is undoubtedly the best place to deal with individuals – including 17 year olds, and older youth, who are vulnerable by reason of their neurodisability.

### 3. What is Neurodisability?

The British Psychological Society adopts the following definition of neurodisability:<sup>7</sup>

*Childhood neurodisability occurs when there is a compromise of the central or peripheral nervous systems due to genetic, pre-birth or birth trauma, and/or injury or illness in childhood. This definition includes a wide range of specific neurodevelopmental disorders or conditions, with common symptoms including: muscle weakness, communication difficulties, cognitive delays, specific learning difficulties, emotional and behavioural problems and a lack of inhibition regarding inappropriate behaviour*

This encompasses:

- Intellectual disabilities
- Specific learning difficulties
- Communication disorder
- Attention deficit hyperactivity disorder (ADHD)
- Autism spectrum disorders (ASD)
- Traumatic brain injury (TBI)
- Epilepsy
- Foetal alcohol syndrome disorder (FASD)

It has been noted that s 21 (h) of the New Zealand Human Rights Act definition of disability would cover a disabling atypical neurological profile.<sup>8</sup>

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<sup>5</sup> Hopkins, Ziyad. "Diverted from Counsel: Filling the Rights Gap in New Zealand's Youth Justice Model." (2015) <http://www.fulbright.org.nz/wp-content/uploads/2015/08/HOPKINS-Ziyad-PDF-report.pdf>

<sup>6</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>7</sup> British Psychological Society "Position Paper Children and Young People with Neurodisabilities in the Criminal Justice System" (March 2015), p.7

<sup>8</sup> Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014, p.6.

## 4. Overview of the Youth Justice System

A full description of the operation of the New Zealand youth justice system is outside the scope of this report, but a brief overview is provided here to aid understanding of the context.<sup>9</sup>

The youth justice system is governed primarily by the Children, Young Persons and Their Families Act 1989. Key points are:

- The minimum age of criminal responsibility is 10 years
- Children (aged 10-13) are regarded as separate from young persons (14-16)
- 10 and 11 year old children may only be prosecuted for homicide (this has never happened)
- 12 and 13 year old children may additionally be prosecuted in the Youth Court for certain serious and persistent offending. This is rare (20-30 per year)
- At 14, young persons are prosecutable, but almost all prosecutions take place in the specialised Youth Court jurisdiction
- Homicide cases are always dealt with in the High Court, and certain other cases of serious offending may be tried or sentenced in the adult system
- The clear majority of apprehensions (70-80%) are dealt with through Police warnings or diversionary procedures. Police operate a comprehensive, though non-statutory diversion scheme known as alternative action. Police discretion is wide, and so even moderate to serious offences such as property and less serious violence may be dealt with without recourse to prosecution<sup>10</sup>
- The Youth Court is reserved for the most serious and complex cases (around 20% of apprehensions). The Youth Court has jurisdiction over all offences apart from homicide, non-imprisonable traffic offences, liquor ban infringement notices and psychoactive substances offences. Charges may be laid where the young person has been arrested, or there has been an Intention to Charge Family Group Conference held. Even where a charge is laid, defended hearings are very rare
- The family group conference is the forum where the offence is proved through admission, and where a plan is decided on which is presented to the Youth Court. Around half of Youth Court cases result in a s 282(1) discharge which means that the young person does not have a charge or a formal order against their name<sup>11</sup>
- The Youth Court may transfer serious offences to the adult justice system for trial or sentencing (25-30 cases per year<sup>12</sup>).

The youth justice system has a particular ethos designed to respond appropriately, quickly and effectively to youth offending:

- The youth system aims to provide an effective and speedy resolution which holds the young person accountable, while acknowledging their needs, and addressing the causes of offending
- The whanau (and hapu and iwi where relevant) of the young person is central to the resolution of the offence, and measures must involve the victim and have proper regard to their rights and interests
- Discretion and flexibility are key. In particular, the Police have a wide discretion to provide timely and tailored resolutions, including diversion, for minor to moderate offending. It should be noted however that discretion is often facilitated by an admission of responsibility which, especially for those with neurodisability,

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<sup>9</sup> See further Nessa Lynch, *Youth Justice in New Zealand* (Thomson Reuters, Wellington, 2012)

<sup>10</sup> See Alternative Actions That Work <http://www.police.govt.nz/about-us/publication/alternative-actions-work>

<sup>8</sup> A breakdown of Youth Court orders is available at [http://www.stats.govt.nz/tools\\_and\\_services/nzdotstat/tables-by-subject/child-and-youth-prosecution-tables.aspx](http://www.stats.govt.nz/tools_and_services/nzdotstat/tables-by-subject/child-and-youth-prosecution-tables.aspx)

<sup>12</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

may not reflect the full reality of the situation. This is understandable given that frontline police are simply not trained for their encounters with neurodisability

- The youth justice system also provides additional protections for vulnerable youth such as special procedures for arrest, questioning and investigation, as well as specialized court procedure, and restrictions on the use of remand and custody.<sup>13</sup>

It is important to note that the Youth Court is already appropriately nuanced such that tough penalties can and are applied for serious offences in respect of youth aged 14 and over. This is due to the mechanism whereby cases can be transferred to the adult justice system. Thus the Youth Court is not only highly regarded, internationally respected, nuanced and restorative; it has teeth when required.

The Principal Youth Court Judge has noted that: "Anyone who characterizes the Youth Court as a namby pamby, kumbaya-singing, milo-drinking show that cannot hold young people to account is absolutely wrong."<sup>14</sup>

## 5. Prevalence of neurodisability amongst the Youth Justice population

There has been to date no comprehensive or specific study in New Zealand that examines the prevalence of neurodisability in the offender population. Many at the Forum called for more specific research into this issue, to better inform practice and policy. Despite the lack of comprehensive published research, anecdotal evidence is that neurodisabilities are significantly over-represented in the youth justice system; in line with overseas research it is estimated communication disorders alone could affect 60-90%<sup>15</sup> of youth offenders.

There is also some local data that highlights some aspects of neurodisability prevalence:

- From a study of 1709 adolescent fire-setters, 29.1% had learning problems, 15.6% had ADHD, and 15.2% had a head injury. Those with a head injury were 2.17 times more likely to commit an offence post-intervention than those who did not have a head injury<sup>16</sup>
- In a study of 1205 young persons who engage in sexually harmful behaviour, 54.3% had learning/developmental problems, 25.4% had ADHD, and 6.3% had a head injury<sup>17</sup>
- From an audit of the files of 184 female youth offenders from the Auckland Regional Forensic Service client register, 29% had ADHD and 15% had low intellect/cognitive impairment<sup>18</sup>

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<sup>13</sup> For an overview of the principles and processes of the Youth Court jurisdiction see

<http://www.justice.govt.nz/courts/youth/about-the-youth-court/overview-of-principles-and-process>

<sup>14</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>15</sup> Hughes, N., Williams, H., Chitsabeau, P., Davies, R. & Mounce, L. (2012). Nobody made the connection: The prevalence of neurodisability in young people who offend. London: Office of the Children's Commissioner. See also Hughes, Nathan, et al. "The prevalence of traumatic brain injury among young offenders in custody: a systematic review." *The Journal of head trauma rehabilitation* 30.2 (2015): 94-105, Williams, H. (2012). *Repairing shattered lives: brain injury and its implications for criminal justice*. Barrow Cadbury Trust. Available from [www.t2a.org.uk](http://www.t2a.org.uk)

<sup>16</sup> Lambie, I. D., Randell, I., Krynen, A., & Ioane, J. (2014). *Risk factors and offending behaviours among children and adolescents who deliberately light fires*. Commissioning body: New Zealand Fire Service Commission.

<sup>17</sup> Lambie, I. D., Krynen, A., & Ioane, J. (2014). *Recidivism and risk factors in adolescents with Harmful Sexual Behaviours*. Commissioning body: SAFE, STOP Trust, WELLSTOP Trust; Auckland, Christchurch and Wellington.

<sup>18</sup> Lim, S. (2014). *Violent Female Youth Offenders: An Exploration of the Correlates of Violence Motivation, Victim Type and Ethnicity*. Unpublished Doctor of Clinical Psychology at the University of Auckland.

- Results from a Ministry of Education screening tool trialed in 2008 on 197 prison inmates showed that 90% were not functionally literate and 80% were not functionally numerate.<sup>19</sup>

In addition it is understood that the Ministry of Justice is currently doing research to determine the number of young people in the justice system with mental health needs.

In 2014, Kate Peirse-O'Byrne, now Research Counsel to the Principal Youth Court Judge, completed a dissertation on identifying and responding to neurodisability in the youth justice system, noting that neurodisabilities may result in reduced capacity to comprehend the criminal process, and that without adjusted processes and special explanations, the young offender may disengage from the process.<sup>20</sup>

The Principal Youth Court Judge has said that neurodisabilities have been 'largely invisible' in the Youth Court for the last 25 years, and their prevalence and implications for the youth justice sector were only now just beginning to be understood. "Every one of these disorders has sky high disproportionate prevalence in the New Zealand youth justice system". In respect of FASD, only about one in 300 youth offenders each year that were likely to have FASD would have been diagnosed as such.<sup>21</sup>

In respect of learning difficulties, the Principal Youth Court Judge has previously estimated 65-70% of offenders that come before the Youth Court are not formally engaged within the education system.<sup>22</sup>

Forum participants also noted that:

- Screening is getting better at Youth Court, where it is recognised that there is now 'half the numbers, twice the complexity'. Because most offending is dealt with through diversion, only the most complex cases reach the Court and these will often be made more complex by neurodisabilities
- The presence of the Youth Forensic Service nurses in the Youth Court<sup>23</sup>, along with Education Officers mean that neurodisabilities are spotted more often. However, the young person may be well into their teenage years when they appear at Court, and opportunities for effective intervention will have been missed
- Section 333 health assessor reports are increasingly used to understand the young person's characteristics and to inform decision making
- However, because of high diversion rates, it is only a small percentage of young persons that appear in Court and thus there is a missed opportunity to engage in a more meaningful way at the earliest time.

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<sup>19</sup> Reported by Radio New Zealand, 28 November 2008, referenced in a media statement from Roger Brooking, an accredited alcohol and drug clinician to the Department of Justice, 29 August 2011.

<sup>20</sup> Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014

<sup>21</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>22</sup> <http://www.dyslexiafoundation.org.nz/daw2015/youth-court-perspective.php> citing 'Issues facing the Education Sector: A Youth Court perspective'. Principal Youth Court Judge Andrew Becroft. February 2014.

<sup>23</sup> <http://www.health.govt.nz/publication/youth-forensic-services-development>

Research evidence from the United Kingdom reported in the below table has shown a significant over-representation of neurodisability amongst young persons in custody.<sup>24</sup> It is likely that similar rates are present in New Zealand.

**Table 1. The prevalence of neurodevelopmental disorders**

Neurodevelopmental disorder	Reported prevalence rates amongst young people in the general population	Reported prevalence rates amongst young people in custody
Learning disabilities <sup>3</sup>	2 - 4% <sup>4</sup>	23 - 32% <sup>5</sup>
Dyslexia	10% <sup>6</sup>	43 - 57% <sup>7</sup>
Communication disorders	5 - 7% <sup>8</sup>	60 - 90% <sup>9</sup>
Attention deficit hyperactive disorder	1.7 - 9% <sup>10</sup>	12% <sup>11</sup>
Autistic spectrum disorder	0.6 - 1.2% <sup>12</sup>	15% <sup>13</sup>
Traumatic brain injury	24 - 31.6% <sup>14</sup>	65.1 - 72.1% <sup>15</sup>
Epilepsy	0.45 - 1% <sup>16</sup>	0.7 - 0.8% <sup>17</sup>
Foetal alcohol syndrome	0.1 - 5% <sup>18</sup>	10.9 - 11.7% <sup>19</sup>

The British Psychological Society has reported the following prevalence rates from the literature:<sup>25</sup>

- 30 per cent of juvenile offenders have sustained a previous brain injury
- 14 per cent have possible intellectual disability (IQ under 69)
- 32 per cent have a borderline intellectual disability range (IQ 70 to 79)
- 30 per cent of the youth prison population have clinically diagnosed ADHD
- 50 per cent of individuals convicted for non-violent crimes have a past history of TBI compared with only 5–15 per cent in comparison samples
- Violent offenders have disproportionately more lesions in their brains, particularly in frontal areas.

In terms of dyslexia, which is just one of a spectrum of communication difficulties, the Dyslexia Foundation of New Zealand reports:<sup>26</sup>

- Conservative estimates are that dyslexia affects an estimated one in ten New Zealanders. This is in line with US and UK figures
- British, American and Swedish studies all estimate that 30-50% of prisoners are dyslexic.<sup>27</sup>

Further, many young persons will manifest a number of co-morbid neurodisabilities. At the Forum, such young persons were described as 'alphabet children' in respect of the many acronyms they would have representing diagnoses from ADHD to ASD and FASD.

<sup>24</sup> Hughes, N., Williams, H., Chitsabeen, P., Davies, R. & Mounce, L. (2012). Nobody made the connection: The prevalence of neurodisability in young people who offend. London: Office of the Children's Commissioner. See also Hughes, Nathan, et al. "The prevalence of traumatic brain injury among young offenders in custody: a systematic review." *The Journal of head trauma rehabilitation* 30.2 (2015): 94-105, Williams, H. (2012). *Repairing shattered lives: brain injury and its implications for criminal justice*. Barrow Cadbury Trust. Available from [www.t2a.org.uk](http://www.t2a.org.uk)

<sup>25</sup> British Psychological Society "Position Paper Children and Young People with Neurodisabilities in the Criminal Justice System" (March 2015)

<sup>26</sup> <http://www.dyslexiafoundation.org.nz/daw2015/justice.php>

<sup>27</sup> UK Spelling it Out report, May 2008

## 6. How does neurodisability manifest in the Youth Justice system?

Having a neurodisability does not mean that a young person will offend. But neurodisability is a risk factor for anti-social behaviour and criminal offending, particularly where a young person is undiagnosed and does not receive appropriate support.

*...those with neurodisabilities have characteristics that increase the likelihood of offending, such as hyperactivity and impulsivity, low intelligence and cognitive impairment, alienation, and aggressive behaviour. These traits can directly lead to offending: low impulse control and social immaturity could, for example, result in deviant sexual behaviour. They can also lead to life choices that increase the likelihood of offending; a sense of alienation, combined with cognitive impairment, renders a child particularly vulnerable to the influence of gang culture. Having a neurodisability also means being less likely to have traits that "moderate the effects of exposure to risk", such as resilience, a sense of self-efficacy, a positive, outgoing disposition, and high intelligence.<sup>28</sup>*

Recent case-law demonstrates the complex profiles of such persons:

- DP<sup>29</sup> – a 13 year old child tried and sentenced in the High Court for manslaughter. Exhibited signs of FASD. Had a traumatic brain injury (hit by car) – evidence was that brain injury was to the level that an adult would have to take two years off work and avoid stimuli. DP did not receive any treatment for his TBI and this left him vulnerable to anti-social influences and unable to process complex situations.
- Teina Pora<sup>30</sup>, whose murder conviction was quashed by the Privy Council after evidence, including of FASD, showed his conviction could not be relied upon. He was 17 years old when he was questioned without a lawyer present. Pora was described as gullible and easily led.

In an example provided at the Forum:

- A boy was ordered by the Youth Court to supervision with residence, with a military style activity camp element. He did very well in the structured environment of the residence. He left the residence, and after two days he had committed three very serious offences. With a new Youth Advocate and a different Youth Court Judge, he was referred for assessment and diagnosed with FASD. It was concluded that previous rehabilitative efforts had probably been in vain as his condition was unknown. A very structured environment with a strict supervision regime was constructed for him and now he is desisting from offending.

Chair of the NZ Institute for Educational and Developmental Psychologists Rose Blackett, and FASd-CAN's Eleanor Bensemman spoke at the Forum about their experiences with neurodisability in the youth justice system. They were also interviewed on the Nine-to-Noon programme on 12 May.<sup>31</sup>

- Blackett discussed some of the key characteristics which those affected by neurodisability display, including communication difficulties, processing issues, lack of inhibition, poor concentration, and controlling emotion.
- Bensemman discussed her story bringing up a grandson affected by FASD. His characteristics mean he is open to influence by anti-social peers, and has

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<sup>28</sup> Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014, p. 8

<sup>29</sup> *R v DP* [2015] NZHC 1796; *DP v R* [2016] NZCA 128

<sup>30</sup> *Teina Pora v The Queen* [2015] UKPC 9.

<sup>31</sup> <http://www.radionz.co.nz/national/programmes/ninetoon/audio/201800436/calls-for-offenders-to-be-screened-for-neurodisability>

difficulty in stressful situations such as interactions with the police and authority. He has spent time in prison, and she struggles with navigating the complex bureaucratic processes to access support for him.

## 7. Areas of concern for persons with neurodisabilities in the Justice System

The complex profiles of young persons with neurodisability are being dealt with by the justice system with varying degrees of success. As highlighted in the Forum:

### *Prevention and early intervention*

- Neurodisabilities have been invisible, but their visibility is slowly increasing
- Practitioners report their experience that some of the over-representation of young persons with neurodisabilities involves the criminalisation of a health issue. This echoes comments made by Justice Minister Amy Adams to Radio NZ recently in which she was reported as saying 'her ministry was picking up the pieces and she wanted the health sector to take more responsibility' and to 'take a more holistic approach and consider the benefits across the entire system, not just the health sector':  
*"The justice system is picking up where the health system hasn't really addressed some of these issues, and I need them to change their thinking in the same way we have to change ours. They need to be assessing the cost benefit analysis, if you want to put it in fiscal terms, right across the whole of the sector."*<sup>32</sup>
- FASD is probably the only fully preventable disability<sup>33</sup>
- Early intervention is key. It is expensive, but there is a return on investment where a young person can live a good and crime-free life, and participate in society
- There should be a proactive and preventative approach to identifying children from birth who may require assistance with communication and language i.e. vulnerable children e.g. those born to parents where a parent is in prison, children born in contexts of vulnerability e.g. family violence/ drugs/alcohol/gangs/mental health/siblings of young offenders<sup>34</sup>
- There is a strong economic argument for early intervention. With appropriate intervention a young person can be a productive member of society through employment
- In terms of public safety, a recent New Zealand study showed that in general people favour rehabilitative and restorative approaches, especially those who have been victims<sup>35</sup>
- Young persons may prefer to be known as a 'criminal' rather than 'dyslexic' due to stigma about neurodisabilities. This must change. We must not label young persons, we must offer them hope
- Whanau, hapu and iwi solutions must be harnessed for Maori children and youth who are overrepresented in the justice system. Likewise, cultural/family support solutions must be integrated for Pasifika youth
- Partnership, information sharing and collaboration between justice, health, social development and education is vital.

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<sup>32</sup> <http://www.radionz.co.nz/news/political/302976/justice-system-picking-up-after-health-system-amy-adams>

<sup>33</sup> Leversha, A. M., and R. E. Marks. "The prevalence of fetal alcohol syndrome in New Zealand." *The New Zealand Medical Journal* 108.1013 (1995): 502-505.

<sup>34</sup> Talking Trouble NZ [www.talkingtroublenz.org](http://www.talkingtroublenz.org)

<sup>35</sup> Miers, S., Lambie I. D. (December 2014). "Public Attitudes towards youth offenders" School of Psychology, University of Auckland.

### Screening and diagnosis

- The Police operate a screening tool for basic risk factors, but this does not explicitly screen for neurodisability<sup>36</sup>
- Police may not be adequately equipped to deal with such young persons in diversion and the intention to charge family group conference (FGC)
- Assessment reports are very expensive, but there is a return on investment where tailored interventions can then be delivered
- It is not enough to have the diagnosis, and sometimes diagnosis can just sit on a report. Diagnosis, assessment and understanding must be followed by wrap-around services that support young people to reach their potential

### Interactions with Police

- Police questioning and investigation is an area of concern. Young persons with neurodisabilities are highly prone to false or exaggerated confessions<sup>37</sup>
- They may become stressed or overwhelmed in police situations and have difficulty with sensory processing<sup>38</sup>, including getting headaches from bright lights and/or being enclosed in small rooms
- A number of Forum participants related experiences with young persons agreeing with interviewers in an effort to escape from the situation
- They will answer 'yep', 'yup' or 'yes' as a default answer
- They will struggle with explanations of complex issues such as 'you have a right to a lawyer and/or a nominated person'
- They will struggle to understand the consequences of their actions and may not have the cognitive ability to 'learn their lesson'
- Front-line Police need more guidance/training and tools to recognise neurodisability and to deal appropriately with these young persons. This should decrease instances of statements being ruled admissible
- False confessions are not in the public interest<sup>39</sup>

### Understanding and participation in justice processes

The law requires that defendants are fit to stand trial.<sup>40</sup> Fitness to stand trial is a reasonably low standard however, requiring simply only the ability to understand the plea and instruct counsel, and have a basic understanding of the process.<sup>41</sup> While this protects some individuals with higher level neurodisabilities, it does not mean that all over this standard are fully capable of the appropriate understanding of, and participation in, all aspects of the justice system.<sup>42</sup>

- In the justice system, where all procedures are essentially word-based, a person's inability to quickly process written or verbal information and comprehend leaves them open to manipulation and entrapment<sup>43</sup>

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<sup>36</sup> <http://www.police.govt.nz/about-us/publication/youth-offending-risk-screening-tool-yorst-reports>

<sup>37</sup> See Pora v The Queen. Brown, Natalie Novick, Gisli Gudjonsson, and Paul Connor. "Suggestibility and Fetal Alcohol Spectrum Disorders: I'll tell you anything you want to hear." *The Journal of Psychiatry & Law* 39.1 (2011): 39-71. Fast, Diane, and Julianne Conry. "The challenge of fetal alcohol syndrome in the criminal legal system." *Addiction biology* 9.2 (2004): 161-166.

<sup>38</sup> Greenspan, Stephen, and John H. Driscoll. "Why People with FASD Fall for Manipulative Ploys: Ethical Limits of Interrogators' Use of Lies." *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives*. Springer International Publishing, 2016. 23-38.

<sup>39</sup> Ian Freckleton, 'Fetal Alcohol Spectrum Disorders, Expert Evidence and the Unreliability of Admissions during Police Interviews; (2016) 23(2) *Psychiatry, Psychology and the Law* 173-183.

<sup>40</sup> Bell, Sylvia A., and Warren J. Brookbanks. *Mental health law in New Zealand*. Thomson/Brookers, 2005.

<sup>41</sup> Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4(1).

<sup>42</sup> See further <https://talkingtroublenz.org/presentations-publications/>. Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014

<sup>43</sup> Hand, Linda, et al. "Oral Language and Communication Factors to Consider When Supporting People with FASD Involved with the Legal System." *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives*. Springer International Publishing, 2016. 139-147. See also Pora v The Queen

- Remorse may be an issue – a young person affected by neurodisability may appear sullen or defiant. Such young persons may struggle with eye-contact, grunt in response to questions and be reluctant to speak up. This can be misinterpreted by decision makers and victims
- Propensities to take statements literally, to become confused by information and sensory overload, to act impulsively and to speak before thinking make it difficult to navigate the complexities and nuances of the legal process<sup>44</sup>
- There was particular concern about the family group conference, where the process depends on oral communication and victims may expect expressions of remorse. Meeting victims' needs means that young persons must be facilitated to communicate<sup>45</sup>
- Legal advice is generally only provided when the young person has been charged, and access in the family group conference can be a postcode lottery. Earlier Youth Advocate involvement can protect vulnerable young persons and assist them to navigate the system
- Lay advocates can provide background and context, and assist the young person in participation and understanding
- Communication assistance is an enormously useful tool for young persons to navigate complex procedures
- Poor attention to detail (both written and verbal) and thus comprehension can be due to an obvious connection such as ADHD, however it can also equally be the result of a fertile imagination as in the case of dyslexia
- Talking Trouble reports that speech and language therapists are increasingly appointed as Communication Assistants (neutral, impartial role to assist the child/young person to understand legal proceedings and express themselves in that context) in various courts including Youth Court (this has included communication assistance in FGC), High and District for both witnesses and defendants<sup>46</sup>
- Professionals spoke of communication techniques to illustrate bail conditions, such as a chart of the young person's week, and where they needed to be at particular times, or assisting the young person to put a reminder on their cell phone
- Where a young person understands the requirements, e.g. bail conditions, curfews, non-association conditions, they are much more likely to comply.

#### *Outcomes, sanctions and services*

- Fitness to stand trial is screening out some higher-level cases which are then dealt with through the mental health system
- Parents and whanau may have the same difficulties: FASD may be intergenerational, for instance
- Many rehabilitative programmes are communication and word-based e.g. cognitive behaviour therapy, group programmes – this causes challenges
- The idea of appropriate accountability is central. Young persons must be held accountable where they cause harm through offending, but in a manner which is proportionate to their culpability, where they understand the process, and where the sanction encourages support, rehabilitation and reintegration. This was emphasised by the Court of Appeal in the recent case of DP
- Culturally appropriate and responsive services are vital
- Services and programmes need to incorporate the voices of young persons. Young persons are often well placed to know what they need
- Need to avoid generic FGC plans and have tailored interventions supported by professionals. The Intensive Monitoring Group in Auckland is a good model

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<sup>44</sup> <http://www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/cia-issue-72/view>

<sup>45</sup> Talking Trouble NZ [www.talkingtroublenz.org](http://www.talkingtroublenz.org)

<sup>46</sup> <https://talkingtroublenz.org/specialised-communication-assistance-in-justice-contexts/>

- Custodial placements may not be appropriate for young persons with neurodisabilities as they are particularly prone to the effects of aggregation of young offenders
- Appropriate support, rehabilitation and reintegration is strongly in the public interest, as the neurodisability may make the young person vulnerable to misread situations in times of stress and increases risk of aggressive or violent behaviour.

## 8. The age of Penal Majority

Participants at the Forum were universal in their agreement that including 17 year olds in the youth justice system is a historic opportunity. New Zealand's youth justice system is regarded internationally and by experts as providing an evidence-based and tolerant approach. Many jurisdictions have adopted and adapted elements of the legislation and policy as best practice. However, the exclusion of 17 year olds from the Youth Court jurisdiction is a major element of the legislative structure which has been described by the Principal Youth Court Judge as an 'enduring stain' on New Zealand's otherwise good youth justice record. Moreover, the "singular advantage of including 17-year-olds would be including a cohort that probably most need a thoughtful, nuanced approach to neurodevelopment disorders".<sup>47</sup>

It was noted that the Government-appointed Expert Panel has also recommended the change as well as consideration of a 'halfway-house' jurisdiction for vulnerable 18/19 year olds:

*"The Panel recommends moving the upper age setting for the youth justice system from age 16 to 17, so that only those 18 years of age and above would be considered adults for justice purposes and become part of the adult justice system. In addition, where a person aged 18 or 19 is charged with an offence, a court would have the power to transfer the case to the Youth Court, if the court considers it is in the interests of justice to do so, taking into account the age and maturity of the alleged offender, the nature of the offence and the person's previous offending."*<sup>48</sup>

The Expert Panel recommendation carries a critical truth in recognising that in some cases individuals older than 17 may also require the type of nuanced response to offending that is a key strength of New Zealand's internationally recognised, highly regarded, restorative youth justice system. Some of the cited advantages of the youth justice system include a real awareness of, and focus on, neurodisability; high levels of non-charging interventions with good community based programmes, taking neurodisability into account; only the most serious of offenders come to the Youth Court, where there is a multi-disciplinary approach with Health, Education, Social Development, Justice, CYFs, and Police working collaboratively; Family group conference plans can be tailored to an individual's needs; and in the Youth Court effective accountability and a completed response can result in a clean record.<sup>49</sup>

If lifting the Youth Court age is considered to be a blunt instrument, an alternative could be introduction of a mechanism to allow the District Court to refer down to the Youth Court where individuals present with neurodisabilities or a younger cognitive development age that makes it inappropriate for them to be dealt with in the adult system. In other words, introduce a 'refer down' mechanism that is comparable to the 'refer up' mechanism whereby the Youth Court can refer serious offenders through to the

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<sup>47</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016.

<sup>48</sup> Expert Report on the Modernisation of CYF, p 97

<sup>49</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

adult system for trial and sentencing (25-30 cases per year<sup>50</sup>). This type of approach would be a pointed instrument, allowing case-by-case referral of individuals with specific neurodisabilities down to the Youth Court which is better equipped to deal with them and provide the wrap-around support that delivers rehabilitative and restorative outcomes. In this way, vulnerable 18-19 year olds – or those up to age 25 in line with new CYFs legislation recognising vulnerability of young people – could receive some elements of the youth justice system, e.g. nominated persons during police questioning and investigation.

There are significant, compelling arguments in favour of raising the Youth Court age to include 17 year olds. Many of these could equally apply to adopting a 'refer down' mechanism:

- The Government has already agreed to introduce legislation to raise the care and protection age to 18. It would be incongruous, impractical and unworkable to have two different ages within the CYPF Act. It would mean that a 17 year old would potentially be in the care of the state as a vulnerable young person, but would be treated by the justice system as being of full capacity
- In the adult justice system, the law presumes full capacity to understand information on rights, and court procedures, rather than taking into account the protections for young persons and limitations of neurodisabilities
- Police discretion is constrained in the adult justice system, and as such young persons may be remanded and sentenced to adult prison<sup>51</sup>
- Young persons are highly vulnerable in custodial settings.<sup>52</sup> A 17 year old remand prisoner was killed by an adult prisoner while being transported by Corrections in 2006<sup>53</sup>
- In addition, the Vulnerable Children Act 2014, Part 1, 5(1)a, defines a child as a person who is under the age of 18 years
- While orders of the Youth Court are not classed as convictions, adult convictions on the other hand mean that young persons' employment prospects and ability to travel overseas are compromised. As the Expert Panel notes:  
*"The less mature reasoning and behaviour of young people should be taken into account when dealing with offending. A formal criminal record has long-term consequences for employment and social engagement. Being labelled as 'criminal' at a relatively early age can too easily become a self-fulfilling prophecy, rather than holding out the expectation for changed behaviour and a crime-free life"*<sup>54</sup>
- Labelling 17 year olds as adult criminals is not effective in reducing re-offending
- As Maori young persons are over-represented in the youth justice system, bringing 17 year olds into the effective and tailored system provides an opportunity to address some of this over-representation. 17 year olds could then access the successful Rangatahi courts.
- At 17, teenagers who are likely to be in full-time secondary education, wear a school uniform and be entirely in the care of their family, are not fully mature. With brain development not complete, they are often naïve, impulsive, full of themselves, confrontational, unwilling to believe they need help, and/or anxious and withdrawn

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<sup>50</sup> Principal Youth Court Judge Andrew Becroft Keynote speech to 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>51</sup> Lambie, I., Ioane, J., & Best, C. (2013). 17 year olds and youth justice. *New Zealand Law Journal*, 316-320

<sup>52</sup> *"I think I must have been born bad": Emotional wellbeing and mental health of children and young people in the youth justice system.* Berelowitz and Hibbert 2011—

<http://www.childrenscommissioner.gov.uk/content/publications/content>

<sup>53</sup> Louise McDonald *Investigation of the Circumstances Surrounding the Death at Auckland Public Hospital of Prisoner Liam John Ashley of Auckland Central Remand Prison on 25 August 2006, Report to: Chief Executive Department of Corrections* (Department of Corrections, Wellington, 2006).

<sup>54</sup> Expert Report p.98

- Longitudinal studies show the adolescent brain continues to mature well into the 20s and that teenagers are often not equipped to employ rationale thinking<sup>55</sup>
- United States research mapping human cortical development also shows that the brain does not fully mature until the second or third decade of life<sup>56</sup>
- The current Youth Court age is also out of step with much of the Western world (e.g Ireland, England and Wales, Canada and many American states<sup>57</sup>). All Australian states except Queensland have an age of 18
- JustSpeak has reviewed the incongruity of the age of 17 with other markers of adulthood in the law. The following legislation use the age of 18 as the marker of full capacity: Electoral Act 1993, Marriage Act 1955, Social Security Act 1964, Care of Children Act 2004, Prostitution Reform Act 2003, Crimes Act 1961 (where setting out a parental duty towards children which they have care and charge of), Sale and Supply of Alcohol Act 2012, Smoke Free Environment Act 1990, Wills Act 2007<sup>58</sup>
- The United Nations Convention on the Rights of the Child defines a child as all those aged less than 18 unless the majority is reached earlier (Article 1). The Committee on the Rights of the Child has recommended that the New Zealand Government consider raising the age of penal majority to 18.<sup>59</sup>

It is also noted that, according to Just Speak, an extension of the Youth Court's jurisdiction to include 17 year olds has already been costed and was judged to be accepted by the Cabinet's Business Committee. That other jurisdictions have implemented similar policies and have not incurred significant extra costs. And that lower recidivism rates would create additional savings in respect of victims of crime, members of the public and correctional facilities.<sup>60</sup>

It is also noted that at the recent 'Youth Justice at the Margins' Workshop, held at the Office of the Children's Commissioner in Wellington, there was specific comment and general alignment that the Youth Court could cope with the projected increase in numbers if 17 year olds were to be included in its jurisdiction. This comment was supported by estimations that increased numbers would not likely exceed the maximum numbers that have historically been managed by the Youth Court.<sup>61</sup>

## 9. Concluding comments

The prevalence rates of neurodevelopment disorders amongst New Zealand youth offenders are said to be 'sky high', evidencing correlations between neurodisabilities and youth offending shown by United Kingdom research and a small number of New Zealand studies that have been done to date.

Neurodisabilities make young people vulnerable in the justice system due to a number of factors. These can include different degrees of comprehension and social (dis)comfort

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<sup>55</sup> Rose Blackett, Chair of the NZ Institute for Educational and Developmental Psychologists Keynote speech to 2016 Neurodisabilities Forum

<sup>56</sup> Gotgay, N., Giedd, J.N., et al. (2004) Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academy of Sciences*. 101 (21). 817-8179

<sup>57</sup> See <http://raisetheagency.com/get-the-facts>

<sup>58</sup> <http://justspeak.org.nz/extending-the-youth-court-jurisdiction/>

<sup>59</sup> United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by States parties under article 44 of the Convention CRC/C/NZL/CO/3-4* (2011); see also Action for Children and Youth Aotearoa Incorporated *Children and Youth in Aotearoa 2010: New Zealand Non-Governmental Organisations Alternative Periodic Report to the United Nations Committee on the Rights of the Child* (2010).

<sup>60</sup> <http://justspeak.org.nz/extending-the-youth-court-jurisdiction/>

<sup>61</sup> 'Youth Justice at the Margins' Workshop, Office of the Children's Commissioner, Wellington, 16 May 2016

due to low reading age, limited literacy skills, slower cognitive processing speeds and comprehension, impaired or heightened auditory and visual perception, poor short-term memory and variable concentration, reduced ability to understand procedures and follow instructions, inability to comprehend cause and effect and/or consequences. As well as behavioural propensities that can be mistakenly interpreted as hostility, acting out or evidence of guilt. Lack of eye contact, and propensities to say 'yes' to questioning in order to bring an uncomfortable situation to an end are example of this.

Neurodisabilities do not discriminate – they cross over socio-economic, ethnic, and cultural boundaries. They are often co-morbid, and can be intergenerational. It is estimated that up to 80% of young people in the Youth Court have at some point been subject to a Child, Youth & Family (CYF) notification.<sup>62</sup> It is likely that, in many of these cases, family circumstances are underpinned or compounded by neurodisabilities.

Over-representation of individuals with neurodisabilities in the justice system could also be seen to represent the criminalisation of mental health issues, with our prisons acting as quasi mental health institutions.

New Zealand has generally been considered to be a world leader in youth justice policy. Initiatives such as the family group conference, Police Alternative Action and the Rangatahi Courts have involved bold, innovative and brave thinking. And the recent Expert Panel Report on the modernisation of Child, Youth and Family has made revolutionary recommendations to raise the maximum age at which the state is required to provide care for abused and neglected children and young persons, and to reconceptualise the relationship between such children, parents, whanau and the state.<sup>63</sup>

New Zealand now has a historic opportunity to make further bold and innovative changes; to raise the age of penal majority to 18 years and introduce a mechanism for 18 and 19 year olds to be referred down to the Youth Court (as further recommended by the Expert Panel), and to use the latest evidence on neurodisability to inform practice and procedure across the youth justice system. This would be a powerful, simple step to address vulnerability of individuals with neurodisabilities. An equally bold and innovative change, if the age of penal majority is not raised, would be to introduce a 'refer down' mechanism to allow case-by-case consideration, care and protection for all people with neurodisabilities who are vulnerable in the justice system to be transferred to the Youth Court. These are not 'soft on crime' options, but rather recognition of the vulnerability of these individuals and the need to mitigate further criminalisation of mental health issues.

It must be acknowledged that where young persons with neurodisabilities commit criminal offences, they have caused harm to victims and society and need to be held accountable, but this must be done in a manner that they understand, reflects their disability, and where appropriate support/rehabilitation/reintegration can be ensured. Public safety is improved where such young persons are appropriately dealt with by the justice system, and where the focus is on appropriate reintegration and decreasing the likelihood of a repeat behaviour/offence.<sup>64</sup> It is also worth noting that a recent New Zealand study showed that in general people favour rehabilitative and restorative approaches, especially those who have been victims.<sup>65</sup>

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<sup>62</sup> Practitioners speaking at the 2016 Neurodisabilities Forum, Wellington, 12 May 2016

<sup>63</sup> Final Report of the Expert Panel on Modernising Child Youth and Family  
<http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/index.html>

<sup>64</sup> United Nations Committee on the Rights of the Child *General Comment No 10 (2007): Children's rights in juvenile justice* CRC/C/GC/10 (2007).

<sup>65</sup> Miers, S., Lambie I. D. (December 2014). "Public Attitudes towards youth offenders" School of Psychology, University of Auckland.

## 10. Key recommendations

We urge that:

1. The Government recognise and acknowledge that young people with neurodisabilities are highly vulnerable in the current justice system. And that urgent action is required to address this.
2. The Government accept the recommendation of the Expert Panel on the Modernisation of CYF that the age of penal majority is raised to 18 and the Panel's additional recommendation that a mechanism be introduced for 18 and 19 year olds to be referred down to the Youth Court or introduce an alternate 'refer down' mechanism by which vulnerable individuals with neurodisabilities can be dealt with in Youth Court.
3. Urgent funding and resourcing be made available for a specific study on the prevalence of neurodisability in the New Zealand justice system, and the system's response to such individuals.
4. In the youth justice system, a mandatory educational and developmental psychologist's report be required for each individual to discern and make transparent material information on any neurodisabilities. Although a mechanism to report school background currently exists, it relies on the young person's school data having identified these issues. In lower decile schools particularly, this is most often not the case and well evidenced by NZQA. Making a psychologist's report a compulsory requirement would alert all parties to the increased vulnerability of specific individuals when it comes to comprehending court process and discerning the consequences.
5. In the adult justice system, a similar mandatory report be ordered by the court for all serious offenders, unless explicitly waived by the defence. This would be a fundamental change in the system, which, would further illuminate prevalence and impacts of neurodisabilities.
6. Frontline police and other justice practitioners are equipped with better knowledge as to how neurodisabilities present and how best to manage this. Keeping questions short and simple; addressing one issue at a time; checking comprehension and making sure a support person is always present are simple changes that can make a big difference. See Appendix for an example of an introductory resource in this area.
7. Appropriate funding is made available for screening and diagnosis of neurodisability across the justice system.
8. All information given to young persons in the justice system be audited for comprehensibility.



## APPENDIX: NEURODISABILITY TENDENCIES CHECKLIST

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One in four New Zealanders is limited by a physical, sensory, learning, mental health or other impairment.<sup>1</sup> Neurodisabilities, which are often invisible at first glance, range from learning differences such as dyslexia and communication disorders through to attention deficit hyperactive disorder, autism, traumatic brain injury, epilepsy and foetal alcohol syndrome disorder. There are some marked commonalities in how individuals with neurodisabilities may present in the justice context. These create vulnerability and often give rise to misunderstandings in terms of what these characteristics and behaviours mean. In the justice system, where all procedures are essentially word-based, a person's inability to quickly process and comprehend information (written or verbal) leaves them open to manipulation and entrapment. Propensities to take statements literally, to become confused by information and sensory overload, to act impulsively and to speak before thinking make it difficult to navigate the complexities and nuances of the legal process.

Common to a range of neurodisabilities are different degrees of comprehension and (dis)comfort in social situations, along with behaviours that might be perceived as hostility, acting out or evidence of guilt. In reality, these are often coping mechanisms for the individual with neurodisabilities and have no pejorative meaning. For example, young people with neurodisabilities are highly prone to false or exaggerated confessions due to propensity to say 'yes' in order to bring an uncomfortable situation to an end. Lack of eye contact is another common characteristic of neurodisabilities. While this is indicative of anxiety or nervousness in the individual, it can be misinterpreted as guilt, disinterest or belligerence.

The below checklist<sup>2</sup> sets out some of the common characteristics of neurodisabilities, and how different the interpretation of these might be from the young person's reality. Importantly it outlines simple steps that can make a big difference in addressing misunderstandings across the points of intersection with the justice system – from first police contact to caregiver engagement, legal representation, the court process and so on.

Overall, keeping questions short and simple; addressing one issue at a time; and making sure a trusted support person is always present are simple changes that can make a big difference. In order to ensure an individual has full understanding and comprehension of the situation, it is also recommended that a court appointed Communication Assistant<sup>3</sup> be engaged where required.

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<sup>1</sup> 2013 Disability Survey, conducted by Statistics New Zealand following the 2013 Census.

<sup>2</sup> This checklist has been compiled by Dyslexia Foundation of New Zealand, in consultation with 2016 Neurodisabilities Forum stakeholders and Rose Blackett, Chair of the NZ Institute for Educational and Developmental Psychologists. 30 May 2016.

<sup>3</sup> This role involves being appointed by the Court to carry out a specialised assessment of the speech, language and communication skills of the person with a particular focus on how they are likely to manage the communication demands posed by a court context e.g. listening to, understanding and giving evidence, cross examination, instructing lawyers etc. Our assessment explores what enables them to communicate as easily as possible e.g. strategies that modify language, use of visual supports etc. Our report and recommendations are sent to the Court for consideration. We have sometimes then been appointed as an Officer of the Court to act in a neutral, impartial role to assist all to communicate with the person in court proceedings. See <https://talkingtroublenz.org/specialised-communication-assistance-in-justice-contexts/> for more detail.

<b>HOW NEURODISABILITIES MAY PRESENT 'TURN YOUR ND RADAR ON'</b>	<b>HOW THIS MIGHT BE INTERPRETED BY AUTHORITY</b>	<b>POSSIBLE PERSPECTIVE OF THE YOUNG PERSON</b>	<b>SIMPLE THINGS THAT CAN MAKE A BIG DIFFERENCE</b>
<b>Can't hold eye contact or is easily distracted.</b>	Guilt, belligerence, disinterest.	<p>Eye contact is very unpleasant and very confronting at a deep level. Eye contact creates anxiety, nervousness, and overwhelm.</p> <p>There are also cultural considerations in that while eye contact is considered important in Western culture; for many others – including Maori, Pasifika, Asian, Middle Eastern and Latin American cultures – significant eye contact can be seen as inappropriate, be subject to gender rules and in some cases be considered intensely disrespectful. More information on Maori protocols can be found at <a href="https://www.mcnz.org.nz/assets/News-and-Publications/Statements/Best-health-outcomes-for-Maori.pdf">https://www.mcnz.org.nz/assets/News-and-Publications/Statements/Best-health-outcomes-for-Maori.pdf</a> (see p21).</p>	Don't expect eye contact. Ensure an appropriate trusted support person who is familiar to the young person is present.
<b>Answering 'yes' quickly &amp; frequently to questions.</b>	Guilt.	A typical well practised coping strategy to bring an uncomfortable situation to an end.	Be alert for rapid, repetitive 'yes'. Lower your voice and try to sound non-confrontational. Frame questions as open-ended questions that cannot be answered with yes or no. Keep questions short. Avoid the use of double negatives – they are very confusing. Allow time for the individual to process what it is they are being asked. Ensure an appropriate trusted support person who is familiar to the young person is present.

<p><b>Individual appears 'shut down'. May also display tics or put clothing or hands over eyes, ears, or nose.</b></p>	<p>Uncooperative and uninterested in proceedings, sullen, moody.</p>	<p>'Sensory overload'. Unable to cope with any more sensory input or visual, auditory, or olfactory stimuli, e.g. bright long run/fluorescent lights, loud noises, small spaces. A coping/survival strategy to block out light, noise, and smell.</p>	<p>Aim for a calm, ordered, and stable environment without strong smells (including perfume and body odour). If possible, move to quieter surroundings. Minimise outside noise and dim lights if possible. Give 'rest breaks' – this can mean the difference between a situation escalating to a 'fight' or 'flight' response from client. Offer food/drink.</p>
<p><b>Literacy and comprehension difficulties: Appears to be 'daydreaming' during conversations. Cannot follow explanations of complex issues such as 'you have a right to a lawyer and/or a nominated person'. Cannot follow instructions and gets lost after one or two instructional commands. Can't recall what he/she is supposed to do next. Doesn't appear to be listening when you explain the process they are about to go through. Withdrawn.</b></p>	<p>Obstructive. Not engaged in the process. May get 'lippy', swear, or become physically aggressive. Suspicious behaviour, belligerence, disinterest.</p>	<p>Feels embarrassed, inferior or inadequate. Will do anything to avoid admitting to literacy/comprehension difficulties. This is just 'school experience' happening again. Needs clarity so may ask same question over and over.</p>	<p>Break information into bite-size chunks. Scaffold and support each step/don't presume comprehension. Refer to key events chronologically (rather than moving backwards and forwards). Allow frequent breaks to restore concentration. Read out statements and other documentation to the interviewee as necessary. Use visuals if possible/available to structure conversation – can be used as a memory aid. A court-appointed Communication Assistant can assess and recommend strategies where comprehension difficulties preclude effective communication.</p>

<p><b>Communication difficulties:</b>  <b>Has trouble expressing ideas, can't find the right word, difficulty sharing what they know and supporting an argument or getting to the point.</b>  <b>Difficulty with correct sequence of events.</b>  <b>Doesn't understand hidden messages or connotative language or sarcasm, difficulty understanding proverbs and idioms.</b>  <b>Gives a statement which is 'unbelievable'; the story has holes in it, general evasiveness on details.</b></p>	<p>Guilt.  Shifting conversation to avoid telling the truth.  Acting stupid.</p>	<p>Confusion.  Overwhelm.  No idea what's going on.</p>	<p>Break information into bite-size chunks.  Use simple language.  Don't presume comprehension.  Allow plenty of time.  Refer to key events chronologically (rather than moving backwards and forwards).  Allow the person being questioned to jot down notes – or make a rough sketch if this is more helpful – and then refer back to check details.  A court-appointed Communication Assistant can assess and recommend strategies where communication difficulties preclude effective communication.</p>
<p><b>Little concept of consequences of actions:</b>  <b>Unable to link cause and effect or comprehend impacts of actions on others.</b>  <b>May appear nonchalant when you are speaking (e.g. particularly if you tell anecdotal stories of another youth's crime and resulting consequences).</b></p>	<p>Lack of remorse or empathy.  Suspicious behaviour.  Not taking the matter seriously.</p>	<p>Confusion.  No idea what you're talking about.  Confronted.</p>	<p>Extra time required for processing information and making connections between actions and consequence.  The time between the incident/situation and the consequence may mean the client does not link the consequence itself to the incident. It therefore is NOT likely to act as a deterrent for the client engaging in this behaviour/action/choice again in the future.</p>
<p><b>Inappropriate social conduct/impulsive emotive reactions:</b>  <b>Displays inappropriate emotional responses.</b>  <b>Poor control of emotions and behaviours, especially anger.</b></p>	<p>Guilt, rudeness, aggression  belligerence.</p>	<p>Scared and threatened.  Feeling anxious, trapped, attacked and/or isolated.</p>	<p>Give verbal/visual reminders about expected behavior.  Model positive communication skills in the way you interact with the individual.</p>

<p><b>Non-compliant, poor time keeping: Doesn't arrive on time, or arrives at wrong place, forgets important documents, ignores police summons etc. Struggles with following instructions and time management.</b></p>	<p>Lack of respect, deliberate non-cooperation. Doesn't care.</p>	<p>Poor short-term memory, concentration, spatial awareness. Struggles with anything requiring 'executive function'.</p>	<p>Refer to key events chronologically (rather than moving backwards and forwards). Allow the person being questioned to jot down notes – or make a rough sketch if this is more helpful – and then refer back to check details. Scaffold and support each step/don't presume comprehension.</p>
<p><b>Pulling clothing over head, banging head or kicking surfaces, hitting self.</b></p>	<p>Shame, rudeness, aggression.</p>	<p>Calming technique to escape visual and auditory stimuli. Coping / survival strategy. Self soothing – through firm or repetitive deep pressure contact on body. Sense of claustrophobia – too many people in a small space.</p>	<p>Offer a 'rest break' in a low stimulation environment.</p>
<p><b>Fidgeting or tapping, often with an object such as a pen, phone or clothing elements.</b></p>	<p>Disinterest, rudeness, suspicious behaviour.</p>	<p>Calming repetitive action that is a necessary tool to aid concentration and focus. If unable to do this, the individual will have to exert considerable energy trying NOT to fidget or tap, making them unable to focus or prone to shutting down.</p>	<p>Allow client to have the pen or similar object of their interest to assist with their need to actively process information.  (It is acknowledged that pens and similar can be used as a weapon, so this risk factor needs to be taken into account on a case-by-case basis.)</p>
<p><b>Jittery, sweaty, anxious, slurred or rapid speech, hyperactive, aggressive, jerky movements or seizures.</b></p>	<p>Disruptive and suspicious behaviour.</p>	<p>Alcohol and drug addiction OR medical condition for example diabetes, traumatic head injury or epilepsy.</p>	<p>Recognise that their addiction may be doing the talking. Health nurse or medical support person available to assess. Offer food/drink.</p>

<p><b>Absence seizures (where the individual appears to zone out): Non-responsive individual, may not answer to their name or may seem unable to focus eyes or hear.</b></p>	<p>Ignoring the situation. Uncooperative.</p>	<p>If undiagnosed, may not be aware what is happening. Afterwards may be tired but have no memory of the incident.</p>	<p>Recognised medical condition. Rapid breathing (hyperventilation) can trigger an absence seizure. Usually begin and end abruptly, sometimes lasting only a few seconds.</p> <p>Signs and symptoms of absence seizures include:</p> <ul style="list-style-type: none"> <li>• Sudden stop in motion without falling</li> <li>• Lip smacking</li> <li>• Eyelid flutters</li> <li>• Chewing motions</li> <li>• Finger rubbing</li> <li>• Small movements of both hands</li> </ul> <p>Recognise individual will be tired afterwards, seek medical help.</p>
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