APPENDIXES

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APPENDIX 1

BACKGROUND: THE SEPARATE COLONISATION HISTORIES OF NEW ZEALAND AND AUSTRALIA

Australia

It is estimated that Aboriginal peoples have lived in Australia for at least 30,000 years.[1] The Portuguese and Spaniards, and later the Dutch, sailed the Southern seas looking for gold as early as the fifteenth and sixteenth centuries. Little is known in the Westernised histories about Asian exploration of the area although recent controversial histories argue that the Chinese, specifically Admiral Zheng, had circumnavigated the world including Australia in the fifteen century.[2] The Dutch were the first to consider settlement with an intention to extend the reach of the Dutch East India Company. In 1642-43 Abel Tasman discovered Van Diemen's Land (Tasmania) and the west coast of the two islands of Staten Land (New Zealand).[3]

From 1717-1776 Britain had sold its convicts to shipping contractors who dispersed them throughout South American colonies. With a revolt in the American colonies in 1776, leading to the gaining of independence from England in 1783, an alternative to transportation to America had to be found. 'Hulks' were used to house prisoners on the River Thames. Riots, contagious diseases and overcrowded prisons forced the English Pitt Government to determine that convicts should be transported to New South Wales.[4] The plan was seen as far less challenging than American transportation, as in the new colony, they would not need to rely on the support of the free settlers, and the upkeep of the convicts would be a charge on the government. Joseph Banks

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[1] R Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787 -1868*, (1987) Collins Harvill, London, 8, and G Blainey, *Tyranny of Distance: How Distance Shaped History*, (1986).

[2] G Menzies, '1412: the Year the Chinese Discovered the World', (2002); W Juxian Zhongguoren, *Faxian Aozhou*, (1960) and D G Mulvaney, *The Prehistory of Australia,* (revised edition, 1975).

[3] C Orange, 'The Maori and the Crown (1769-1840)' *The Oxford Illustrated History of New Zealand*, Oxford University Press, Melbourne (Ed Keith Sinclair) (2nd Ed, 1997) Ch 2, 21.

[4] M Clark, *A Short History of Australia*, (1969) Penguin, Sydney, 13- 23 and D Neal, *The Rule of Law in a Penal Colony- Law and Power in Early NSW*, (1991) Cambridge University Press, Cambridge.

had expressed a view to the government that a colony of felons would be able to support itself in a year.[5]

Hughes's consideration of convict history is interesting in the discussion of this thesis as he notes that most of the history written about this period lacks the voice of the convict and gives reference to formal forms of discourse such as select committees and the records of the administrators of the system.[6] What Hughes's account brings to the history is an analysis of memoirs, letters of convicts and petitions, along with the more formalised sources of this history. What makes his account particularly relevant to the thesis is that it draws on the attitudes to criminality of the time and the treatment of the offender population including child and youth offenders. Some of these attitudes revealed in his history bear some resemblance to the discourse of criminologists and commentators in law and order debates of today.

Hughes notes that Georgian England saw transportation as an opportunity for the 'expulsion of the criminal classes'. Criminality was not perceived at the time as a product of the changes in English society, with burgeoning birth rates, an increase in the populations of the cities, massive unemployment, and the impacts of poverty and deprivation. Notions of a 'deserving' and 'undeserving poor' were ingrained. The latter were considered the criminals. This was reinforced, Hughes notes, by misleading crime statistics which were made up of 'whores' and thieves, with a perception of people *choosing* a life of crime. There were similar attitudes to those with a mental illness at the time. Simplistic notions of people being either wise and good or bad, governed the attitudes of the policy makers. [7] Hughes's view differs: 'All people, but especially the young, tend to become what society says they are'.[8]

The first fleet containing seven hundred and fifty convicts landed at Botany Bay on 20 January 1788. Hughes examines the types and number of crimes for which people were transported. Contrary to folklore, many of those transported were not political

[5] R Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787 -1868*, (1987) Ch 3, 52-57, A Castles, *An Australian Legal History*, (1982), Law Book Company, Sydney, Ch 2, 20, and P Vines, *Law and Justice in Australia: Foundations of the Legal System*, Oxford University Press, Melbourne, (2005) Part 2.
[6] Ibid. Introduction, xiv.
[7]Ibid, Ch 7 162- 167.
[8] Ibid, Ch 7, 167.

prisoners. Most were Londoners and many of whom were convicted of minor theft or petty theft. Most of the crimes were against property and were not violent crimes. Hughes gives names of convicts and examples of the level of offences which include theft of cheese (seven years transportation for the seventy year old woman) and theft of a live and a dead hen (seven years transportation for a male). What is of relevance to this thesis is the number of child convicts and the rationale for sending them to Australia. Those aged under fifteen years of age consisted of three boys and two girls, and those aged sixteen to twenty-five years, consisted of sixty-eight males and fifty-eight females. The youngest child was aged nine years of age and had been a chimney sweep who had stolen clothes and a pistol. The presiding judge stated that 'one would wish to snatch such a boy … from destruction, for he will only return to the same kind of life which he has led before'.[9] The youngest girl was a clog maker who had stolen a gown and a silk bonnet.

To assist Governor Phillip in the new colony, a criminal court, presided over by a judge advocate and six military officers was established. On 6 February 1788, convict women arrived. Law and order, subordination by terror and a 'government designed for men living in servitude rather than free men was established.'[10] According to Clark, up until 1810 the need for convict labour was great. They were used to work on buildings and roads. Convicts, with good conduct and endeavour, could get a ticket-of-leave but were forbidden rights before the courts[11] or to hold land.[12] Harsh punishment was used as the way to prevent further crime. Flogging, solitary confinement and brutality were common. Regulations in 1810 set up standards to reduce these abuses and reflect clemency.[13] Transportation was seen as a way of discarding the unwanted elements of English criminal society, but also an opportunity to enable young people to flourish in a new society.[14]

[9] R Hughes (1987) above n 5, Ch 3, 73- 77.
[10] Clark, (1969) above n 10, 23.
[11] P Vines, *Law and Justice in Australia: Foundations of the Legal System* (2005) Oxford University Press, Melbourne, Part 2.
[12] D Neal, *The Rule of Law in a Penal Colony- Law and Power in Early NSW* (1991) Cambridge university press, Cambridge.
[13] Clark (1969) above n 10, 33-37.
[14] See discussion J Murray, 'The Development of Contemporary Juvenile Justice,' in A Borowski, J M Murray, *Juvenile Delinquency in Australia,* (1985) Methuen, Sydney, Chapter 4, 70-72.

There was no questioning of policies of incarceration and the impact of isolation and deprivation upon the children for many years. In the 1840s, Alexander Maconochie (Parliamentary Secretary to Governor Sir John Franklin) was permitted for a period to experiment and apply a 'mark system' on Norfolk Island which was modelled on the radical idea for the time of rewarding good behaviour. Even the later Governor Gipps had to begrudgingly admit that the ideas of positive reinforcement caused some transformation. The approach was controversial and unpopular and in 1843 Maconochie was recalled by the Colonial Office and there was no further commitment to his system in Australia although it was adopted in Ireland in 1854.[15]

Against this background, for Aboriginal Australians, the consequences of colonisation were tragic. When Aboriginals realised the whites were going to stay, driving them away from the best land, excluding them from food gathering areas and cultural practices, they used the means at their disposal including spearing, to take what had always been theirs, and setting fire to crops. Clark notes that white settlers expected the Aboriginals to be 'grateful for the precious gift of higher civilisation.'[16] Hughes argues that the colonials misread Aboriginal technology, were racist and ignorant. He is critical of the idea that the colonisers believed that they had entered 'empty land' and that colonisation was 'rationalised as natural law.'[17] Hughes observes that nutritionist, artistic and the other attainments of indigenous people were ignored. He argues the views were formed because Aboriginal Australians were so different and unlike Maori, they had no external signs of being religious and were not settled agriculturalists but were a nomadic people. The absence of notions of private property and communality, and their lack of written language - despite the complex structure of

[15] R Hughes (1987) above n 5, Ch 15, 490-515. See also 'Almost a Stranger in the Colony' in WA Miles (1796-1851) *Taking Charge of the Sydney Police, Crime and Policing and Moral Entrepreneurship in England and Australia* 1841-1844, University of Melbourne, History Monographs no 30, Department of History, 2001.

[16] Clark, (1960) above n 10, 76.

[17] There is some debate about the exact origins of the notion of terra nullius (i.e. land belonging to no-one or unoccupied land) which was relied on and overturned to grant Native Title to Aboriginal people in the High Court decision in *Mabo v Queensland* (No 2) (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1. See for discussion of the debate the transcript of Counterpoint Radio National, Terra Nullius – The History Wars, Monday 16 August 2004. <https://www.abc.net.au/rn/talks/counterpoint/stories/s1172945.htm> where historians Henry Reynolds, Andrew Fitzmaurice and Chris Pearson, media commentator, debate the origins of terra nullius.

the many spoken and sung mythology and language - were not understood.[18] Hughes states:

> …take away the territory and they are deprived, not of 'property' but of their embodied history, their locus of myth and their dreaming… to deprive the Aborigines of their territory, therefore was to condemn them to spiritual death – a destruction of their past, their future and their opportunities for transcendence. [19]

One aspect of Western 'civilisation' included the introduction of rum which had a significant and negative impact on Cook's 'happy' natives. Relations became fraught when in 1788 two rush cutters were murdered by Aborigines. In 1791, when a convict stole from an Aboriginal woman, Governor Phillip had him flogged to demonstrate justice. However, according to Clark, the Aboriginals instead cried and were abhorred at the treatment of the convict. This highlights the gulf in understandings referred to earlier by Hughes. In 1800, settlers captured two Aborigines, tied them up with rope and shot them. Instances like these became frequent and highlight the early gulf in cultural understandings between Aboriginal and white people and administrators of the criminal justice system. Soldiers drove Aboriginals away.[20] A series of attacks and misunderstandings on both sides led to massacres.[21] In some areas of Australia Aboriginal people were happy to welcome the white man. In other areas, fighting occurred.

From the earliest times in Australia's colonial history there has been a suspicion of indigenous Australians and a view of white superiority. The author argues in this thesis these have become engrained in the attitudes and methods of dealing with indigenous Australians in a constructive and respectful way in the criminal justice system. Jealousy of the treatment of indigenous Australians arguably emerged in early settlement when the military demonstrated resentment at being treated worse than 'Aboriginal barbarians' who were seen as 'idle, naked falsest species.'[22] Governor Arthur Philips had refused initially to retaliate against attacks by the 'natives'. According to Hughes, this upset the convicts, and the military who believed

[18] Hughes (1987) above n 5, Ch 1, 7-18.
[19] Ibid, Ch 1, 17-18.
[20] Clark (1969) above n 10, 39-42.
[21] H Reynolds, (2003) *The Law of the Land*.
[22] Watling, 'Letters from an Exile,' 7-8 quoted in Hughes (1987) above n 5, Ch 4, 93.

Aboriginals to be a class inferior to them, and therefore unworthy of respectful treatment.[23] One theme which often colours current debates around indigenous Australians is a perception in the Australian psyche that Aboriginals receive better treatment than non-indigenous Australians. This was at its highest levels during the rise of Pauline Hanson's One Nation Party in Australia in the late 1990s.

Cunneen and White have observed that colonisation disrupted whole indigenous communities and nations through the expropriation of the land, or through specific policies aimed at removal of Aboriginal children and young people.[24] They note that during the time of open colonial warfare, Aboriginal young people were treated in the same way as Aboriginal adults. According to Cunneen and White, the issue was Aboriginality rather than the age of the person. Missionaries and colonial administrators looked to children and young people 'as explicit targets for interventionist policies.' Indigenous children were captured and sent to institutions. They note that Governor Macquarie's plan was to use the Institution to 'rescue' these children and use punitive expeditions against indigenous peoples around the Sydney settlement.[25]

With the end of the convict era, the focus on farming and the gold rush saw an influx of free settlers and the development of Australian cities. A movement to have centralised control removed from Britain emerged in the 1880s-1890s, and in 1901, Australia was federated with the *Commonwealth of Australia Constitution Act (Cth) 1900* and a Constitution outlining the jurisdictional powers of States, and the Commonwealth, the legislature and the separation of powers between the judiciary and the Executive was enacted.

In 1909 the New South Wales Government passed the *Aboriginal Protection Act* 1909 (NSW). This was the legislative basis of the Aboriginal Protection Board. Initially, the Board removed neglected children from their Aboriginal families. The broadening of powers however, saw the removal of Aboriginal children for reasons of

[23] Hughes (1987) above n 5, Ch 4, 93-95.
[24] C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia*, (2002) Oxford University Press, Melbourne, 156-157.
[25] J Brook and J Kohen, *The Parramatta Native Institution and the Blacktown : A History of New South Wales*, University of New South Wales Press, Sydney (1991).

government policy. Berendt notes that dark skinned children were more likely to be institutionalised while fair skinned children were more likely to be adopted into white families.[26]

The legislative powers for removal of children were in place until 1969. Such practices continued through departmental policies until much later. The endeavours to round up children and separate them from families, placing them in institutions, continued up until the late 1970s and later, with the use of protection legislation which 'legitimated' police and the Aboriginal Protection Board's intervention into Aboriginal life. It has been estimated that one in ten persons aged twenty-five years and over were separated from their family during childhood.[27] These figures demonstrate that the policies of separation touched the indigenous communities widely. If one reflects on the central role of family in a child's life for support, love, relationships, a sense of identity, and a sense of stability and security, the impact of such dislocation and separation must be significant.

The Human Rights and Equal Opportunity Commission (HREOC) in its Stolen Generations Inquiry in 1999 estimated that between one in ten, and one in three Aboriginal children were removed between 1910 and 1970, depending on the period and the location. [28] According to many accounts before the HREOC Inquiry, indigenous children and their parents were actively discouraged from speaking their language and engaging in cultural practices. They were moved from their lands, many were moved interstate to institutions and missions far away from their families. Food was rationed and withdrawn as a penalty if people were observed using Aboriginal language or cultural practices. The idea was to actively discourage identification with their cultural heritage with a view to assimilating the indigenous peoples into the broader community.

[26] L Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, (2003) The Federation Press, NSW, 68.
[27] R Madden, 'National Aboriginal and Torres Strait Islander Survey,' (1994) AGPS, 1995, 2.
[28] The Bringing Them Home Report: The Stolen Generations, Human Rights and Equal Opportunity Commission, May 1997, http;//www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/

The Royal Commission of Inquiry into Aboriginal Deaths in Custody (RCIADIC)[29] noted the significant impact of removal on the lives of those who died in police custody and the contribution it made to their initial offending by virtue of the lack of stability and disfunction. Of the ninety-nine deaths in police custody, six of these were children. NISATSIC[30] states that most Aboriginal families 'have been affected, in one or more generations by the forcible removal of one or more children'. This view has been reiterated by the Victorian Aboriginal and Torres Strait Islander Child Care Association (VACCA) [31] as still a current factor effecting children and young people of indigenous backgrounds in Victoria, and in discussions by the writer with the Gippsland and East Gippsland Aboriginal Co-operative in late December 2005.[32] The latter two bodies, and Cunneen and White, argue that the long-term consequence of this protection period has been the way it influenced the relationship between Aboriginal people and the police, welfare and juvenile justice authorities.[33]

Returning to the broader Australian population, it was not until the 1820s that there was a transition away from convict colony to a settler and merchant social base. The latter came to hold social, political and economic power and as a result, the use of convicts underwent dramatic changes. In 1819 John Thomas Bigge was appointed to head an inquiry by the Secretary of State to the colonies, and Lord Bathurst was appointed to see if transportation was effective as a punishment. There was deep division between Bigge and Governor Macquarie. According to Clark, Bigge saw Macquarie as being too influenced by the dictates of humanity. Bigge collected evidence and recommended the renovation of the judicial system which included the establishment of juries and criminal cases to be held under prosecution of the Attorney General rather than the Governor. He recommended separate colonies for Van Diemen's Land and New South Wales instead of their treatment as penitentiaries of England. Bigge recommended changes to key features of the convict system including increased severity of punishment, the restrictions of privileges and an end to the appointment of emancipists. The British Government accepted the

[29] RCIADIC 1989, 73.
[30] NISATSIC (1997) 37.
[31] <http://esvc000737.wic021u.server-web.com/about/index.html > at February 2007.
[32] Catholic Commission for Justice Development and Peace *It's not Easy Walkin' in there*: *Aboriginal Reconciliation: Towards Practical and Culturally Respectful Solutions*, Melbourne (ed. L Curran) (1999).
[33] C Cunneen and R White (2002) above n 24, 160.

recommendations and in 1821 all convicts capable of reform were assigned to free settlers and were freed, save for 'incorrigible convicts' who were sent to Port Macquarie or Moreton Bay.[34] The reliance on the settlement as a penal colony finally ended in New South Wales in 1840 when transportation was abolished.

In 1847 a *Select Committee on Criminal Laws, Juvenile Offenders and Transportation* suspended transportation for two years to Van Diemen's Land. A numbers of factors compounded to bring about the end to the penal colony. They included a surge in free emancipation, fear of losing wages to convicts, public indignation about the treatment of convicts and the rise of Abolitionist reformers. There was concern about this from some settlers due to the shortage of cheap labour but other sections of society celebrated the move as a 'triumph for humanity'.[35]

Hughes notes that the imperialist leaders in England were also weary of the system, and that for the descendants of the convicts, the stigma remained for at least another generation. He also notes that for some who had been through the penal system, they were hardened and so conditioned to punishment that they had developed neurosis.[36]

New Zealand

New Zealand, although also colonised by the English, had a very different experience of colonisation. New Zealand was not a penal colony designed to rid England of the criminal classes. It is argued in this thesis that this key distinction may explain some differences in approaches to the criminal justice system and fundamental differences in approach to youth justice between New Zealand and Victoria.

Unlike Australia, New Zealand was not considered as 'terra nullius' prior to British colonisation but as always occupied by its indigenous peoples, the Maori. Hughes notes the contrast that existed in the early perception of Maori in New Zealand to that of the British towards the Aborigines in Australia. He notes that both Cook and the naturalist who sailed with him, Joseph Banks, described the 'brave and bellicose

[34] M Clark (1969) above n 10, 52-58.
[35] M Clark (1969) above n 10, 90 and D Neal, *The Rule of Law in a Penal Colony- Law and Power in Early NSW*, (1991) Cambridge University Press, Cambridge.
[36] R Hughes (1987) above n 5, Ch 4, 93-95.

Maori'. Whilst Maori greeted Cook with the 'haka' and the Tahitians with warmth, the Aboriginal Australians were either disinterested or fled into the trees except in a small number of instances where Aboriginals brandished spears.[37] In early writing about Aboriginal Australians, the colonisers saw them as savages, whereas the depiction of Maori on the whole was as 'noble warriors'. This early respect by many officials for Maori perhaps foreshadows the greater acceptance of Maori tradition and culture into New Zealand society which evident today. The Treaty of Waitangi and the recognition of Maori language in governmental documentation and initiatives (for example, with a set proportion of seats in the Parliament of New Zealand with five Maori electorates in addition to the sixty normal electorates) are all evidence of this. Australia has none of these formalised recognitions of its indigenous peoples.

Biggs states that more than a thousand years ago, a well provisioned catamaran crewed by Polynesians from either the Cook Islands or Tahiti made its way to the north eastern coastline of the North Island.[38] The peoples established themselves naming local flora and fauna, building homes and discovering new parts of New Zealand to settle. It is believed that different settlers came from Polynesia by canoe at different times and settled different areas.[39]

The Maori created their own oral histories over many centuries, as did the Australian Aboriginals with their Dreamtime. Today, Maori have retained much of their old mythology. They tell of the historical sequence of stories of discovery and settlement and the various canoe voyages. The oral traditions of Maori were preserved by their transfer into written form as a consequence of the zeal with which the missionaries learned Maori ways and language and translated the bible into Maori.[40] Most, if not all, Maori, Biggs observed, have named a canoe in their traditions of origin and Maori can trace their genealogy.[41] By contrast, in Australia, it has been difficult for Aboriginal people to sustain such a strong cultural and historical pathway back into their histories due to the lack of a record of Aboriginal histories in writing and the

[37] R Hughes (1987) above n 5, Ch 3, 53.
[38] B Biggs, 'In the Beginning', *The Oxford Illustrated History of New Zealand*, (ed. K Sinclair) Oxford University Press, Melbourne (2nd ed, 1997) Ch1, 1-3.
[39] Ibid. Ch 1, 1- 19.
[40] C Orange, 'The Maori and the Crown' *The Oxford Illustrated History of New Zealand*, (ed. K Sinclair) Oxford University Press, Melbourne, (2nd Ed, 1997), Ch 2, 32 -36.
[41] Biggs (1997) above n 38, Ch1, 1- 19.

displacement of indigenous people created by colonist policies of assimilation, and the forbidding of their use of language and culture. This is not to say that strong oral histories, language and culture do not continue amongst indigenous Australians. It does, however, underline a key difference in a cross-cultural analysis between Australia's Aboriginals and New Zealand's Maori. One can argue that Aboriginal culture has been severely demoralised through the active policies of separation and removal from lands, whilst for Maori culture; there has been a greater capacity to sustain ongoing attachment with each other and with the land. Despite this, Maori still experience the same sort of socio-economic and criminality problems of the Australian Aboriginal.

The various Maori tribes have regions and traditions based on inter and intra racial connections which are extremely complex. Maori trace ancestry and descent through both male and female lines. They have a large number of genealogical lines to remember. This is simplified by their use of 'tahuhu' which consists of using the lines of first born males. This tradition validates in a detailed and consistent way relationships and inter-relationships of tribes. The role of 'mana' is important in the power base for hereditary rank and personal achievement in Maori society. Much of this strong connection and identification is relevant today in Maori communities.

Infringements in pre-colonial times were dealt with by plundering and haranguing the offender and the stripping of possessions, retaliation, fighting (whawhai) and compensation (utu.)[42] Biggs argues that Maori warfare in the indigenous history of New Zealand was common, not as a response to land shortage but to a shortage of cleared land. It was aimed at mainly territorial Maori tribal expansion. An important difference between prehistoric Maori and Australian Aboriginals is that Aboriginals were semi-nomadic Palaeolithic hunters and gatherers with a variety of languages whereas Maori were semi-sedentary horticulturalists with a Neolithic technology and a single language. As a corollary, Maori also had a long tradition of organised tribal warfare, with fortified villages and effective military strategies.[43] This enabled Maori to engage in organised resistance campaigns on a scale which the Australian Aboriginal people were unable to undertake.

[42] B Biggs (1997) above n 38, Ch 1, 1-19.
[43] M King, *The Penguin History of New Zealand,* (2003), Penguin, New Zealand, Ch 5, 70-73.

In New Zealand there was considerable conflict prior to, and during, colonisation. For example, one tribe in the Maori wars during 1821 travelled down the east side of the North Island as far as Wellington and back up the West coast.[44] Famous land wars between Maori and foreigner occurred in 1835, 1843, 1845, 1846 and larger conflicts occurred in the 1860s.[45] This marks a significant difference in the two indigenous histories where Maori dominance continued long after colonial settlement and where British colonial punishment was more respectful of Maori customs. Later colonial conduct also included a disregard for indigenous New Zealanders.

The first contact by Maori with Europeans (Pakeha) involved the Ngati Tumata-kokiri people and Abel Tasman in 1642. Tasman left when the tribe, mistakenly thinking they had been challenged, fought and killed four Europeans. Later, Cook visited New Zealand in 1769 claiming parts of the country for King George III. The Cook exploration brought encounters with Maori and deaths occurred on both sides. Like his view of the Aboriginal people in Australia, Cook's testimony to Maori was favourable although, one could argue, more honouring of their customs, habits, crafts, construction and weaponry.[46] In contrast to the view of Aboriginals as 'savage', the response to Maori by the British was more understanding and respectful of Maori traditions. In addition, according to Orange,[47] there appears to have been more effort by the British to accord 'justice' to Maori. For example in the 1830s, James Busby who was appointed to the colonial office in New Zealand in May 1833, referred to the 'miserable condition of Maori' and argued that Maori had 'some claim of justice upon the protection of the British Government.'[48] Significantly, according to historians, New South Wales, (which until Busby's appointment had jurisdiction over British subjects in New Zealand) had become embroiled in what is referred to as the *Elizabeth* affair in 1830. British subjects were implicated in the torture of a prominent Maori leader and his family. John Marsden in the colony of New South Wales, recognising the need to ensure a settled trade relationship with Maori New

[44] B Biggs (1997) above n 38, Ch 1, 19.
[45]B Biggs (1997) above n 38, Ch 1,18-19.
[46] C Orange (1997) above n 40, Ch 2, 21- 24
[47] Ibid., Ch 2, 21- 24.
[48]Ibid., Ch 2, 42.

Zealand stressed to Governor Darling that Britain had a duty to protect Maori.[49] An example of this is the legislated involvement of whanau[50] in the court process in section 280 of the CYPFA (NZ).[51] By contrast, in Australia's development of the criminal justice system, save for the RCIADIC, Nungi Courts, circle courts and the new Koori Courts in recent times, indigenous people have been largely ignored.

By 1830 different types of Europeans had been to New Zealand including whalers, traders and missionaries. There were 2000 permanent settlers by 1839 with 600 in the South Island and 1400 in the North Island. Estimates of the number of Maori in New Zealand at this time range up to 100,000.[52] In addition, in the 1830s (similar to the introduction of rum to Aboriginal communities) Maori adopted the Western practice of drinking alcohol.[53] With New South Wales not far away, the British began to exploit New Zealand commerce and trade but there were many renegades. With the arrival of sealers and whaling there was a mixing of the races forming significant unions with Maori and white people (Pakeha). One other aspect that gave Maori power in dealing with the new European settlers was that they also retained much of their weaponry and their well developed trade connections.[54]

Shipping created a struggle for patronage of Europeans by the Maori Chiefs. Chiefs became caught up in the exchange of good and services. Maori traded in timber and flax, with and for, Pakeha from the 1820s until the 1840s. This commerce relationship denotes a very different and respectful way of dealing with Maori than was the case of the British in Australia with their dealings with the Aborigines. In addition, Christianity spread with the missionaries, although there were tensions with Maori losing some confidence in their traditions of warfare, polygamy and slavery.[55] There was also a blending of the new Christian beliefs with some of the traditional beliefs of Maori. Ancestral linkages remained strong, skills and knowledge of their culture remained strong and there was a variety of belief and practice of the two. There was,

[49] Ibid. Ch 2, 39.
[50] Refers to the extended family of Maori people.
[51] <https://www.justice.govt.nz/youth/history/part2.html.> See sections 250, 251, 254, and Part VIII of CYPFA (NZ).
[52] Orange (1997) above n 40, Ch 2, 24.
[53] Ibid.Ch 2, 35.
[54] Orange (1997) above n 40, Ch 2, 28.
[55] Ibid. Ch 2, 32-36.

as Orange describes it, a 'selective adoption and blending of the new with the old.'[56] In the 1830s settlers impressed upon the British that Maori were in need of some protection. James Busby was appointed but he did not hold a military or magisterial office. He became, effectively, a facilitator of disputes over land and theft.

At the suggestions of the Maori Chiefs, Busby settled in Waitangi in the north of New Zealand. There he tried to encourage Maori towards a form of government. In 1834 he held a great gathering of chiefs but nothing came of it. Again in 1835 he organised a Declaration of the Independence of New Zealand. This was primarily undertaken as the French were indicating an interest in declaring New Zealand a sovereign state. Busby managed to secure thirty-four signatures (later fifty-two) and ensure Britain was installed as Protector. The Declaration asserted the independence and chieftainship of the land and the signatories asked King William IV to be the 'parent'. An annual congress at Waitangi was held and southern chiefs were invited to join what had largely been a process involving the Northern chiefs of the tribes. The Declaration document was printed in Maori and in English and became for Maori a foundation for their assertion of autonomous rights right up until the present. It is now known as the 'Treaty of Waitangi.' Orange describes the Treaty as 'the foundation for Maori's assertion of their autonomous rights'.[57] The Treaty promised benefits on both sides which included a stipulation that Maori could only sell land through the Crown to avoid prior advantage being taken over them by private interests. It granted Maori all the rights of citizens of England. Busby later argued that due to the 'miserable condition' of Maori, it meant that they had 'some claim of justice upon the protection of the British Government' [58] *The Constitution Act* of 1852 had divided New Zealand into six provinces and the local governments took over land purchases and sales. Many Maori did not want to sell land. The chiefs united to elect a Maori King (The King Movement) and resisted these attempts.

By 1856 the colony of New Zealand was moved constitutionally from the Crown colonial system which precluded direct settler representation and a Crown appointed

[56] Ibid. Ch 2, 36.
[57] Orange (1997) above n 40, Ch 2, 42.
[58] Ibid Ch 2, 42.

governor, to a system of representative and then responsible government.[59] Until 1845, Maori independence was present but gradually the coercive power of the 'Pakeha' (white people) became evident with the establishment of constables and later troops. A series of English leaders Grey, FitzRoy and Hobson all wished to 'subject the Maori with a minimum force'.[60]

During the 1860s the New Zealand land wars took place. By way of example, in one of the most significant wars, the Taranaki Wars which ended on 18 March 1861, British forces increased from 900 to 3500. Maori forces increased from 200 to 1000 men. These wars related to many issues, including the murder of Pakeha, but in the main, were due to the seizure of land by the British and the settlers.[61] The wars ended in a ceasefire. The later New Zealand Wars, commencing on 12 July 1863, resulted when the army invaded the Waikato area of the western coast of the North Island. It resulted from confiscation of lands as reprisal for Maori 'insurrection'. The forces for Britain surged to 14,000. Many soldiers settled in New Zealand and were given small land holdings for their efforts. Confiscation of land laws in 1863 saw the confiscation of the best land from Maori and its allocation to the military that was 'designed to cripple Maori independence.'[62] The process saw Maori lose most of their prime land during the remainder of the 19th Century. Maori suffered greatly with a massive drop in their population and condition.

The government confiscated large sections of Maori land as a reprisal for the wars. The Native Land Court was established in 1864 but in simplifying ownership, it sold land more readily but also caused much friction between Maori families trying to prove succession. Often Maori had to sell their land to pay the cost of proving their lineage and title to land in the Land Court. Belich summarises stating that, '…if Maori independence was a full bottle, then war took the top off it, allowing non-military subversion to slowly empty out its contents'. Until the end of the nineteenth century the Maori's position was precarious.[63] New Zealand became self-governing in 1841.

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[59] J Graham, 'The Pioneers,' *The Oxford Illustrated History of New Zealand*, (ed. K Sinclair) Oxford University Press, Melbourne (2nd ed, 1997) Ch 3, 55.
[60] J Belich, 'The Governor and the Maori,' *The Oxford Illustrated History of New Zealand*, Oxford University Press, Melbourne (ed. K Sinclair) (2nd ed, 1997) Ch 4, 75.
[61] Ibid. Ch 4, 75 -98.
[62] Ibid., Ch 4, 94.
[63] Ibid. Ch 4, 97.

Maori received the vote in 1867. Maori established the Maori Party and won places in Parliament in 1905. Gradually over the latter part of the twentieth century, Maori birth rates rose at a higher rate than Pakeha. Maori lost a lot of their autonomy during the period up until the 1971 *Race Relations Act* which prohibited discrimination. From the mid 1980s onwards, compensation for the earlier loss of the land was made to Maori trusts in recognition of the inappropriate confiscations. Attempts by Pakeha at the military conquest failed in that Maori and their spirit of independence lived on but it succeeded in removing the 'hard shell of Maori independence.' Maori emerged from the Wars without being destroyed in defeat. The so-called Maori 'King Movement' was not destroyed but it was weakened. According to Belich, Maori became less unified and collaborated more with government.[64]

The Treaty of Waitangi, mentioned earlier, had been declared a 'legal nullity' in a controversial statement by Prendergast CJ in 1877[65] as: it had not been ratified by either Maori or English peoples; the English and Maori versions were different (even today this is cause for debate in New Zealand) and the signatories signed without informed consent (many Chiefs were not consulted or refused to sign). Large scale land losses and misappropriations occurred before 1877, in the 1850s and after the decision in 1877. The Treaty was reconsidered and the Waitangi Tribunal was established in 1975 under the *Treaty of Waitangi Act* (1975) (NZ) which created a permanent commission of inquiry.[66] Initially, it could only look at compensation for land claims from 1975. In 1985 the Act was amended to examine claims back to the signing of the Treaty in 1840. The Tribunal is charged with making recommendations on claims brought by Maori relating to acts or omissions of the crown that might breach the Treaty. No such arrangement exists in Australia with its indigenous peoples. Eventually, compensation was paid to Maori for past grievances which included the land confiscation. Tribes formed trusts and money was paid to these. Some tribes did well but prosperity has not followed for all Maori. The ongoing relevance and obligation of the Treaty of Waitangi and the preparedness of

[64] Ibid Ch 4, 97.
[65] M King (2003) above n 43, Ch 21, 326.

[66] *The Offender Assessment Policies Report***,** Waitangi Tribunal Case Report, 10 October, 2005, <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1024/8237665E-0C72-48DD-8F2A-6981F363FF29.pdf>

government to hold it to account to Maori has seen resurgence in Maori patriotism and pride and marks a significant difference to how indigenous people were treated in Australia.

APPENDIX 2

OTHER RELEVANT INTERNATIONAL INSTRUMENTS FOR CHILDREN AND YOUNG PEOPLE

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Rules) were adopted by General Assembly resolution 40/33of 29 November 1985[67], and many aspects of the Rules are recognised in legislation in both New Zealand and Victoria governing children and young people in the criminal justice system before the court, and undertaking court dispositions.

Examples of relevant international human rights standards set out in the Rules are as follows:

> 5. Aims of juvenile justice
>
> 5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

A Commentary provided with the Rules states that:

> Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)
>
> The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

[67] G.A.res.40/33,annex,40 U.N. GAOR Supp. (no.53) at 207, U.N.Doc. A/40/53 (1985)

> By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.
>
> In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

Part 6 covers the "Scope of discretion" which is relevant in the later examination in this thesis concerning judicial approaches:

> 6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
>
> 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.
>
> 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

The Commentary states:

> Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion. Thus, professional qualifications and expert training are emphasized here as a valuable means of ensuring the judicious exercise of discretion in matters of juvenile offenders. (See also rules 1.6 and 2.2.) The formulation of specific guidelines on the exercise of discretion and the provision of systems of review, appeal and the like in order to permit scrutiny of decisions and accountability are emphasized in this context. Such mechanisms are not specified here, as they do not easily lend themselves to incorporation into international standard minimum rules, which cannot possibly cover all differences in justice systems.
>
> 7. Rights of juveniles

> 7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

The Commentary states:

> Rule 7.1 emphasizes some important points that represent essential elements for a fair and just trial and that are internationally recognised in existing human rights instruments (See also rule 14.). The presumption of innocence, for instance, is also to be found in article 11 of the Universal Declaration of Human rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights. Rules 14 seq. of these Standard Minimum Rules specify issues that are important for proceedings in juvenile cases, in particular, while rule 7.1 affirms the most basic procedural safeguards in a general way.

Other instruments in international law, relevant to children and young people in the criminal justice system, can be found in the *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*. This was adopted and proclaimed by General Assembly Resolution 45/112 of 14 December 1990.[68] The first Part outlines the fundamental principles of the Guidelines. Those relevant in number order to the discussion in this thesis are as follows:

> 1. The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.
>
> 2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.
>
> 3. For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control.
>
> 4. In the implementation of the present Guidelines, in accordance with national legal systems, the well-being of young persons from their early childhood should be the focus of any preventive programme.

[68] G.A. res.45/112,annex,45 U.N.Doc A/45/49 (1990)

> 5. The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognised. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:
>
> > (a) The provision of opportunities, in particular educational opportunities, to meet the varying needs of young persons and to serve as a supportive framework for safeguarding the personal development of all young persons, particularly those who are demonstrably endangered or at social risk and are in need of special care and protection;
> >
> > (b) Specialized philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and a service delivery network aimed at reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions;
> >
> > (c) Official intervention to be pursued primarily in the overall interest of the young person and guided by fairness and equity;
> >
> > (d) Safeguarding the well-being, development, rights and interests of all young persons;
> >
> > (e) Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood;
> >
> > (f) Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.
>
> 6. Community-based services and programs should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort.

Of further relevance to the discussion of international law in relation to the operation of the youth criminal justice system is Part Three of the Guidelines. Its significance is enhanced by the increasing use of both therapeutic and restorative justice programs attached to the courts in New Zealand and Victoria where courts, and child and youth offenders, rely on the capacity of social service organisations, government and other

programmatic responses in the dispensation of sentences or diversionary options. The degree to which these standards at international law are implemented in practice is discussed in this thesis in relation to the court observations and interview outcomes with youth programs. Part Three is headed the 'Socialisation Process'. Article 9 of Part 3 states:

> 9. Comprehensive prevention plans should be instituted at every level of Government and include the following:
>
> > (a) In-depth analyses of the problem and inventories of programs, services, facilities and resources available;
> >
> > (b) Well-defined responsibilities for the qualified agencies, institutions and personnel involved in preventive efforts;
> >
> > (c) Mechanisms for the appropriate co-ordination of prevention efforts between governmental and non-governmental agencies;
> >
> > (d) Policies, programs and strategies based on prognostic studies to be continuously monitored and carefully evaluated in the course of implementation;
> >
> > (e) Methods for effectively reducing the opportunity to commit delinquent acts;
> >
> > (f) Community involvement through a wide range of services and programs;
> >
> > (g) Close interdisciplinary co-operation between national, State, provincial and local governments, with the involvement of the private sector representative citizens of the community to be served, and labour, child-care, health education, social, law enforcement and judicial agencies in taking concerted action to prevent juvenile delinquency and youth crime;
> >
> > (h) Youth participation in delinquency prevention policies and processes, including recourse to community resources, youth self-help, and victim compensation and assistance programs;
> >
> > (i) Specialised personnel at all levels.

Article 10 of Part 3 states:

> Emphasis should be placed on preventive policies facilitating the successful socialisation and integration of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. Due respect

> should be given to the proper personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes.

This fairly comprehensive set of guidelines also discusses the value of education in Part B in Articles 20-24 and Drug or substance abuse in Article 25.

Part C deals with the role of the community and discusses the availability and range of services which should be accessible to children and young people. Article 34 states:

> A range of services and helping measures should be provided to deal with the difficulties experienced by young persons in the transition to adulthood. Such services should include special programs for young drug abusers which emphasise care, counselling, assistance and therapy-oriented interventions.

A further key international instrument governing the treatment of children and young people in the criminal justice system is the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*,[69] but these Rules guide the treatment of young people *after* the court has dealt with them and so are not as pertinent to the topic of this thesis which is concerned with the treatment of young people in contact with the Youth Court in New Zealand and the Children's Court in Victoria.[70]

[69] G.A.res.45/113, annex, 45 U.N. GAOR Supp.(no.49A) at 205, U.N.Doc. A/45/49 (1990)

[70] These UN Rules could relate to the bail/remand issue and use imprisonment as a sentence.

APPENDIX 3

FIELD RESEARCH: QUESTIONS AND GUIDING THEMES

Questions to answer in order to organise issues in court observations:

1. What were the main issues that contributed to offending by young offenders in the cases observed?
2. What mechanisms exist in the criminal justice system in relation to children and young people in terms of legislation and processes?
3. What were the strengths in practice in terms of observed cases in the Victorian Children's Court and the New Zealand Youth Court of the legislation and processes mentioned above?
4. What were the problems in practice in terms of observed cases in the Victorian Children's Court and the New Zealand Youth Court of the legislation and processes mentioned above?
5. What were the judicial approaches to youth and their offending in practice in terms of observed cases in the Victorian Children's Court and the New Zealand Youth Court?

Questions Used in Interviews with child and youth service programs (Representatives of Eight Organisations Interviewed)

1. What does your organisation do in its work with child and youth offenders?
2. What works well and why?
3. Do you have any ideas about what could be done to make further positive differences for child and youth offenders?

APPENDIX 4

SELECTED CASE STUDIES FROM THE NEW ZEALAND CASES OBSERVED

Clearly, with eighty-six cases observed, there were a lot of issues emerging. These cases have been selected to provide some background to how the court proceedings were conducted, to highlight different judicial approaches and models of justice used, and their level of effectiveness. They also feature the key issues identified in Part II such as adult systems failure, poverty, and an absence of education.

Case Study One

This case involved a sixteen year old boy on multiple motor vehicle charges which were 'not denied.' He had no experience of Youth Court but had had his Family Group Conference (FGC) prior to the court date. He was present at court with his step father. The judge said it was good the step-father had come to support the boy and commented that it is rare for father-figures to attend court and that it was good to see.

The judge explained the process including the fact that it had been an opportunity for the youth to face the victims. The boy said that it had been hard to see the victim face-to-face and hear of the inconvenience he had caused. He had not thought about the impact of his actions before.

The boy was not at school and had not been at school since third form. The Youth Justice Coordinator (YJC) reported that the boy had been living a 'transient life style for many years' and this had meant "it was hard to get things even to this point." The boy had been involved in some further matters before the court since the FGC. The judge noted that the plan did not address the boy's educational situation nor did it address his lack of stable home life. Youth Aid noted that they had been working closely with the boy trying to see how they might be able to link him back into school. The judge said that this was promising. The judge said that given the times of offending during school hours, and the boy's clear desire to further his schooling, it

seemed that this would be a critical issue to be addressed. The judge said he wanted another FGC to bring all matters together and to address the gaps including education and to assess the boy's needs. He asked the YJC to look into the boy's eligibility for a new pilot in linking kids back into education with support.

Bail was given with stringent conditions which included tight curfew and directions as to places the young person could not go. The boy was asked to explain what his curfew meant. The boy explained clearly.

Case Study Two

This case involved a fourteen year old Pacific Islander girl charged with a series of assaults the previous Friday night whilst under the influence of alcohol. Two of her aunties were present to support her. The young girl had spent the weekend in police cells. She presented as unemotional and rigid and initially did not seem to be interested in the proceedings. The police prosecutor explained that the girl had a difficult background and had been through some serious personal trauma. The social worker called the girl 'unresponsive' to which the Youth Advocate and the police prosecutor commented 'you would be too if you had been through what she has.'

The judge asked the girl directly if she was in school to which the girl responded 'No, I was kicked out a year ago.' The judge ensured throughout the discussions that he made eye contact with the girl and asked her lots of questions about herself. His tone was calm, gentle and reassuring. He asked her why she was in court. She replied 'cause of an assault' 'When?' She answered '4pm on Friday.' She looked down the whole time as she answered in a mumbled way. Then the judge asked her what she had thought of the police cells. She looked up for the first time seemingly surprised she had been asked her view and caught the judge's eye. She responded, 'awful.' The judge went on and said well 'we would like to keep you out of them so let's all see what we can all do to prevent you having to return.' Would you be prepared to work with us and put an effort in as we will to make this happen?' She responded, 'Yes'. Her body language started to change and it appeared she was interested in what this man - the judge - was putting to her. He explained, 'You are going to come back to this court often and you are going to have to engage in an FGC.' He explained this

process. You will come back to court regularly and have to account to me of your progress.' 'Yes, that sounds OK' she replied. The directness of the judge and the fact he spoke to her and included her in discussions seemed to make her respond differently than was initially the case in the proceedings when she was being spoken about.

The judge asked if she would stay with her auntie after checking first with the auntie if this was OK. The auntie said, 'I would love to have her; she has been through too much for a girl her age already.' The judge asked if she wanted to go to her auntie. The girl said 'Yes'. The judge commented that it was good wasn't it that her auntie was there to support her. The girl looked up somewhat surprised and said 'Yes I guess it is.' Bail conditions with strict curfews were imposed and she was given a list of people she was not to associate with who had also been involved in the assault. This was the girl's first experience of the Youth Court.

On clarifying later with the court what the 'background' of the girl was, it appeared that in the year prior, her father, who is a member of a well-known gang, had gang raped his daughter with a number of members of his gang. This caused severe internal organ damage. The young girl had a fragmented family life which involved violence and parental drug and alcohol abuse.

Case Study Three (Drug Court)

This case involved a fourteen year old Pacific Islander boy on charges for serious assault. He has been brought back to court having almost completed his FGC plan and to check on his progress. Victims were present at the FGC and in court on the day of the observation. The judge said 'Remember me?' The boy responded 'Yes, of course.' The judge asked, 'Well how is the Plan. Have you kept to it?' The boy responded with a smile and replied with pride, 'Yes, I have. It's the first time I think I'm ever going to complete anything in my life.'

The judge said 'Well I remember the first time I ever met you and you were smoking and drinking and you looked pretty worse for wear. I reckon you might not have made some of the dumb decisions you made then, now?' 'Nup, I wouldn't now.'

The judge responded, ‘But look at you now. We can all see how far you’ve come. We don’t expect perfection. You’ve stumbled and made some terrible mistakes but have you learned from them?’

The youth worker spoke, ‘Your Honour he has been looking at a career and he has now been linked into training.’ The judge asked what the boy was interested in. ‘I want to cook and be good at it.’ The youth worker added, ‘His mum who had lost interest (you will recall your Honour some time ago) is back on board as she has seen his progress and the hard work he has put in relation to completing his community work under the plan and his taking responsibility. Having previously washed her hands of him she can see his hard work. He is now spending more time with his mum and his sister and he has made a new circle of friends and kept away from…’ [names of earlier young associates involved in criminal activity].[71]

The judge then asked the victim what he thought. ‘He has come so far. When I met him I was scared but I came to realise all the things he had to put up with in his life and why he was so angry. I am really pleased to see his progress and that through the Plan he might have a better chance in life now.’

The judge said, ‘Well, see you have a lot of people on your side now supporting you. In the end though, it is up to you to take the right path and to make sure you get on the right track. I note that your Youth Advocate has asked earlier for a curfew review and I am prepared to relax it to enable you to do your training. Please note that I am doing this also because you have shown you are more responsible. Can you see that if you do well then we can place more trust in you but if you slip back, which I am confident you will not, I can always tighten it again. I am impressed with you. You are getting on to where you have to be. I can reduce your hours under curfew with a stroke of this pen. See I can relax the curfew if you are good. See even the police are shaking their heads in agreement. You’ve made an impression on everyone here. Good luck with the cooking course.’

[71] Brackets inserted by the author.

Case Study Four (Drug Court)

This case involved a Maori boy aged fourteen years charged with burglaries, drug related offences and thefts. His father was present at court. The boy was fourteen but had the stature of a seven or eight year old being thin and small in frame. He was almost on the point of completing a Plan. The judge noted from the Plan his schooling was an issue given the boy had not been in school for quite a few years.

The judge asked the social worker, 'How is he?' but the judge was looking at the boy at the same time to include him.

The social worker responded, 'He's great, he's fitting in with the other kids. He has been doing his drug and alcohol in Odyssey (a treatment service) prior to this. It will of course take him a few days to adjust to his new setting but we are really impressed at how considerate he has been of others.' (The boy was placed in a care and protection facility for his personal protection from sexual abuse by family members).

The father interrupted saying, 'It's not good he should be abstaining completely.'
The judge politely asked the father to not interrupt whilst she was receiving a report form the team working with the boy.

The judge asked, 'How long since you had a smoke?'
The boy responded, 'It's been two months.'
The judge asked if the opportunity presented though would you have a puff.
The boy responded, 'Nope' The social worker said, 'We are quite sure that he knows the consequences now of his own personal behaviour and the consequences and that he would keep away from offending.'
The judge responded, 'Well if previous attendances and comments by him are anything to go by he does seem to understand and have changed his approach for the better. Do you think you have?'
'I hope so.' The boy responded smiling hopefully at the judge.

The social worker stated that the boy had completed the letters of apology some time ago, had managed to pay restitution and that he had met almost all the treatment

requirements that he could at this time. He also had become much more aware and constructive in addressing his drug addiction. She said that the boy really wanted to stay with his father, a person whom the boy really sought approval from. She explained that in the recent months, they had been working up to letting the boy spend a weekend with his father. The youth worker had now got the permission for weekend release from the residence and that the boy was really excited about seeing the father who had made clear indications that he would be happy to have him.

The father shouted, 'Well I don't want him dumped on me, I have changed my mind. I'm not happy anymore having him for the whole weekend.'
The boy looked down and started to push his fingers into the table and would not look up for the remainder of the proceedings. The judge responded addressing the boy directly, 'I am glad you have been having a good week, your social worker, the police and all the people you've been working with are clearly impressed.'

The YJC said, 'Yes we are all pleased.'
The judge asked, 'Is there something else you can do if you cannot spend the weekend with your father?' The boy looked down and used his fingers on the table to push them in as if they were a pen. The judge asked the social worker a question and the response was, 'Well his father had definitely indicated on repeated occasions he was happy to have him and it's been organised with the detention facility. I know his youth worker would be happy to have him but she is on holiday overseas. It's unfortunate timing really.'

'We must sort something out especially as he is doing so well.'
The father interrupted, 'Well I don't want him.'
The boy put his head down behind the desk.
The judge said, 'Let's stand the matter down and see what you can do between now and this afternoon. This is not your fault, sometimes we adults stuff up but it's not your fault.'
'It is always me.' The boy quietly mumbled.

Case Study Five

This case involved a boy who was almost seventeen. He was charged with a series of motor vehicle and theft charges. His father and mother were present in court to support him. He had completed his Plan which included community work, a course of training for the military, and he had written 'an excellent and detailed letter of apology' to the victims. The victim was not present in court as he could not attend but had asked the police prosecutor and YJC to make a note that he was 'impressed by how far the youth had come since his first meeting with him.'

The young man entered court confidently and said 'Hello everyone.'

The judge said, 'I have a report here that says you have been pretty outstanding. Wow. How can someone be described as this and have had all these criminal charges. What a change. This is great, really good.'

'I really want to get into the military. I need to get credits in chemistry and then I can.'

The judge said, 'It looks like you do a lot of fitness training.'

He responded, 'Yes I run everyday. About ten kilometres. When I was training I had to run up hills with a full pack.'

The judge said, 'I note here a pretty good character reference from the course.'

She asked the police prosecutor what his thoughts were, 'I cannot believe it. He is a different person and feels very bad about what he did and really wanted to make amends to the victim. This Plan was not an easy one and he has done it.'

The young man looked at the police prosecutor and said, 'Wow, thanks.'

The judge said 'what are we going to about this chemistry thing. Can't we do something here?'

The YJC said that there might be some tuition that they could arrange. The judge said for her to follow that up and see if there are options with the Maori Contestable Fund for tuition.[72] The judge said, 'Look, let's adjourn it for two weeks. I will release you on bail conditions as you've been good but you have to stay at your mum's. I will see

[72] A fund to assist Maori with educational and training needs.

you back here in two weeks and let's see if the YJC can put something in place about chemistry tuition.'

The young man turned to everyone in court and leaned over to shake the hand of the social worker and the YJC and smiled at the police prosecutor saying 'I have learned so much. Thank you all for making me see things more clearly.'

APPENDIX 5

SELECTED CASE STUDIES FROM THE VICTORIAN CASES OBSERVED

A lot of issues emerged from the eighty-six cases observed in Victoria. These cases in this Appendix as in Appendix 4 have been selected to provide some background as to how the court proceedings were conducted, to highlight different judicial approaches and models of justice used and their effectiveness. They also feature the key issues identified in Part II, for example, adult systems failure, poverty, and an absence of education.

Case Study One

The case involved a girl who was sixteen years of age who was charged 'in concert' with other co-offenders with an array of assaults and shop thefts. Twenty-five matters had been consolidated in one proceeding in the Children's Court. The girl alleged that there had been ongoing problems in her school and with bullying. Some of the assaults occurred on the school premises, others occurred after a dispute on the train when the defendant punched a thirteen year old victim in the head and then kicked her whilst she was on the ground. On a separate occasion she had stolen sweets from a shop and assaulted the shop owner. On being asked why she offended, after making full admissions to the police, the girl stated, 'Peer group pressure' and 'Cause I wanted to.' A later assault involved an incident where the defendant was near a train station and called to another girl, 'Hey bimbo, hey Barbie.' Then on being joined by other girls they proceeded to jostle a young girl asking for her mobile phone and slapping her. Another co-offender collided with the victim as the boom gates descended. The victim suffered a haematoma to the head, tenderness in the neck muscles and needed ongoing treatment for her injury.

The defendant had failed to appear at court on the previous occasion and when asked for a reason explained that, 'She forgot.' She had been apprehended and had spent two weeks in custody. She had no prior convictions. The girl's grandmother, mother and sister were present in court.

The background of the girl was submitted to the court by the lawyer. It was revealed that the girl's parents had separated when she was twelve years of age. She had resided with her mother but did not relate to her stepfather.

The lawyer explained that the girl had left school at the end of 2003 as she had very few friends and had been bullied. She had found company with a group of boys and girls who were also not in school. She admitted that when she commits offences she 'feels bad.'

In the court's exchange between the magistrate and the child's lawyer, the magistrate commented that the child had complained about bullying by others towards her and yet here she was herself, bullying people who were younger than herself and replicating the bullying behaviour. The lawyer tried to comment and the judge went on commenting that she was a young lady with anger management problems. The girl in the dock was getting visibly angry on hearing this. The magistrate went on to say that, 'She doesn't impress me, she falls in with bad people, assaults others and then commits theft.' The child's lawyer stated that the child's co-offenders were part of a group trying to gain acceptance and taking on a particular persona.

The magistrate commented that the girl was 'not happy when she observes what her friends do to other people' and yet the girl 'still hangs out with them.' The magistrate noted that 'one offence was very serious as there was a train about to appear at the time of the assault at the train station'. The lawyer responds saying 'yes, but on his instructions, the girl says she didn't realize the train was bearing down on the girl when she slapped her'. The magistrate stated that 'the girl has pre-knowledge of what can happen and her actions show a lack of foresight especially as in the material she had knowledge of another person she knew being run down by a train'. He noted, '…yet she still engages in conduct that could replicate the circumstances of her own friend's death.'

The lawyer noted that the girl was 'genuinely mortified' and as a consequence was keen to change her behaviour. He stated that since the last charges the girl was invited to live with a friend and the friend's mother and that they have been helping her. She is linked into Centrelink which will enable her to gain her own accommodation and

she has enrolled in secondary college. The lawyer noted that the girl had not been charged for further offences for the past four months and that 'since her arrest she had opened her eyes to the hardship of a custodial environment. On one occasion, a young person in the Youth Justice facility approached and pushed her and she did not strike back. This demonstrated a change in her aggressive responses towards others'. The lawyer stated that the client had said she 'did not fit in with the people in the youth facility'.

The case was adjourned for a further assessment from Juvenile Justice. After the adjournment, it was noted that the housing placement remained available. The magistrate indicated he was uneasy. He asked what the lawyer and Juvenile Justice proposed. The lawyer suggested a pre-sentence report be prepared for the Court by Juvenile Justice which will take four to five weeks. The magistrate asked, "Do you propose I give her bail?"

The lawyer responded stating that 'although she did fail to appear, there has been no re-offending in the time before she was taken into custody and that now having spent weeks in custody she realises what will happen if she misbehaves again'. The lawyer then asked if he could give the magistrate a hand written letter from the defendant. He argued that she says she can change, has stable accommodation and wants to sort herself out. The magistrate asked if bail was given, the girl would have to have strict conditions. These were then discussed and related to where she will reside, that she not be allowed near trains, that she stay in touch with the WAYS program, observe a strict curfew, and that she must attend school.

The prosecutor noted that 'the main offending was at night time and around train stations'. He stated he does not 'want to set her up to fail by not having time constraints as, while the accommodation is supported, it is not supervised, and so some time constraints will help her not fail.' The magistrate adjourned the case to await a pre-sentence report and a clinical assessment of the girl.

Bail was granted with strict curfew conditions and non-association provisions. The magistrate told the girl that, with two failures to appear, if she got into trouble again she would have a custodial penalty. The magistrate stated that the girl 'can't say she

won't do anything wrong and then do something wrong and not expect him to come down heavily'. He said he wanted her lawyer to 'stress to her and ensure she understands what could happen if she breaches the court's faith and that this was a last chance'. He stated that when he got an assessment after the adjournment he would consider the penalty to be imposed. The magistrate added speaking loudly that he was noting for the clinic that 'if you fail to attend, it will be a breach of bail but also if you fail to appear.' The reason for giving her bail was stated as 'the girl's lack of priors, the time elapsed without re-offending and the prosecution's positive attitude.' The magistrate stated, 'I want to see her do some anger management training and address the peer group pressure. It's not an excuse. She says in her letter to me she doesn't like where she is. Well she will end up in custody if she doesn't do something about herself. I will keep her letter on file and so if she reneges I have it to remember her promises.'

The offender was referred to as 'she' by the magistrate who did not address her directly. At sixteen she was out of home and had been out of school and there was a gang style influence in the case. The length of the time from the offending to the court proceedings was lengthy.

Case Study Two

A fourteen year old girl appeared in court on charges of assault related to her 'seriously acting out'. The child had been assessed, since a first court appearance, and found to have a serious intellectual disability. The child had never been assessed before. The prosecutor was 'hopeful' that she now had some service support and noted that her brother (her main support) had been in court on the last occasion and that he also appeared to have some similar issues. The prosecutor indicated that his view was that he would withdraw the charges on the basis that she was now getting some support and counselling which she previously had not had. He drew the magistrate's attention to a forensic report by the Children's Court Clinic and expressed surprise that she had not been tracked to support services in the community much earlier.

Case Study Three

A sixteen year old girl was charged with criminal damage, lawful assault, assault with a weapon, wilful damage and assault which occurred when she was fifteen years of age. All arose from incidents at home. There was also a breach of an intervention order. The charges related to a fight over use of the phone between the defendant and her sister. There had been tension between the sisters and the sister was injured by a knife. The Department of Human Services (DHS) had been involved with the family. Her reason for the offending was that 'her sister was being a show off.' The offender had a prior for shop theft which had been proven and dismissed. The magistrate noted that there had been a protection application which had lapsed. The mother spoke up in court when asked her view. She stated that the two girls had a history of tension and that both girls were to blame. The magistrate noted, facing the mother, that this did not excuse their behaviour. According to the mother, the offender had previously lived in and out of home and had recently been living with her father. She claimed relations between the sisters were improving.

The child's lawyer said that the defendant really wanted to move back home and although it was serious misbehavior, her behaviour was now much better and as a consequence her relationship with her sister and mother were much better. The defendant had DHS involvement since living out of home and the lawyer submitted rather than a conviction, a Good Behaviour Bond ought to be considered.

The magistrate noted that she had only been back at home for less than two months and that the Court wanted the 'child to take their behaviour very seriously and not think this was the way to behave.'

The magistrate asked why this was not a matter for a deferral of sentence. He noted that there had been a pattern of behaviour and that this was not a one-off with the breach of intervention order. The magistrate noted that initially the family had been concerned enough to get a court order against the defendant and that the breach and use of a knife were serious. The magistrate noted that DHS saw the need for an order also. The magistrate stated, 'My view is she needs better testing of her claim and she

will not be a problem. I know she will disagree with the disposition I am considering and it is not what you seek but I am just not sure from a rehabilitation point of view. I am not suggesting Juvenile Justice involvement but I think a time delay that allows a growth period will help allow her to learn to live together with her sister in the one house and if she can't then she will see there are consequences for her actions. A straightforward deferral is what I am considering.'

Throughout the magistrate's comments the girl is shaking her head stating 'it's been resolved.'

The magistrate adjourned the case for three months and said if there were no problems then a Good Behaviour Bond might be considered. Bail was not being opposed.

Case Study Four: Children's Koori Court

A young boy of thirteen years of age was charged with burglary and theft. He attended premises (with two co-offenders) of the victim who was known to the offenders and while the victim was outside, they entered the premises taking nine DVDs and a model car, and walked out of the front door with the victim's car keys and mobile phone and a can of soft drink. The victim returned, the offenders panicked and ran throwing things they had stolen in the bushes. They were taken to the police station and made full admissions to police. The other co-offenders were not charged as there was deemed not to be sufficient evidence against them. One, however, was dealt with by a supervision order as he had multiple prior convictions.

The lawyer explained the defendant had been living in the country with his father but had moved to live with his mother in Melbourne for the period since the offence. The lawyer stated that 'The defendant can remember little about his previous court cases, he just responds with "yes that could have been me- I dunno."'

Whilst in the country he met up with school friends and they suggested the break-in. The victim was a teacher at their school. Prior to living in the country town the defendant had moved around with his father a fair bit and was trying to fit in. Since moving to Melbourne he had been able to say 'no' and choose friends unlike those in

the country. The lawyer noted the defendant had been back in school and was thriving at a school with a Koori-specific program. On questioning from the Elders, the defendant revealed he had become involved in music and was learning how to drum. He was going into Year Eight in the following year. Since being at the city school he had been identified as having severe learning difficulties which had not been identified before and as having a borderline intellectual disability. He was now being supported through his difficulties with an Access Group Program. He had also engaged with a police youth program. He now lived with his mother and sister since his father had developed a heart condition. He was getting on well with his mother and sister. His mother had many years before had problems and this was why he had gone to live with his father but his mother was now well again.

One Elder asked him 'Who wins the fights at home?' The boy responded 'Mum' The child's lawyer indicated it was the boy's first time before the court and asked for an undertaking.

The other Elder asked the boy if he played sport. The boy responded, 'Yes, with dad' He was asked about his music. The boy starts energetically explaining that he loves drums and is learning from a well-known musician and wants to be a drummer and even write music in future and is learning about writing lyrics.

The Elder, after further similar exchanges, stated directly to the boy, 'Your mum's here to support you today that's really good. It's very good to have that support and you tell me you've learned you have to say 'no' that you did so last time you were up country and you don't follow the others, that's good too. You've got your music. Do the right thing. Respect yourself and follow and listen to your mum. Good luck with school. See how much better things can be if you do the right thing.'

The judge then stated, 'You know what everyone wants – your aunties and uncle and mum all want to be proud of you. You haven't offended in the last twelve months and that's a big lesson learned.' (Boy cries into a tissue as the judge says this.)

The prosecutor stated, 'I am very encouraged by what I am hearing. School is a hard process and you're doing well.'

The Juvenile Justice worker added 'It's great you now have all this support, let alone your parents (Boy still crying but also smiling). You need to continue to strive, be strong and say no, do well in your schooling and make our community proud and I know you can do this. Hopefully you will make us all proud.'

The judge gave the boy an accountable undertaking.

The judge asked the lawyer, 'Can you explain what can happen if he mucks up.' After the hearing there was a discussion about the defendant whether the boy should go down to the police cells as one Elder suggested, to see, 'what it's like if you continue to re-offend.' A discussion occurred about whether this could be too upsetting and cause harm to the child. The prosecutor indicated that even he gets upset. The judge stated 'Well if you want to go and see it, we can arrange it. It's not a nice place even to visit, let alone to be sentenced to.'

The Juvenile Justice worker concluded: 'It's best for him to go if he's wants to with his mum, I think.'
The Judge concluded, 'The next time we hear about you we want it to be something good, like you as Australia's star drummer.'

Case Study Five

A young person who was seventeen years of age was charged with reckless cause injury, assault in company and assault with a weapon. The latter charge was withdrawn. The boy was supported by his step- father. The circumstances giving rise to the charges were that the defendant had a conversation with the victim about a friend. The defendant was chased by the victim and defended himself and struck the victim with his skate board and jumped on the victim. The lawyer noted the boy had 'no priors and a difficult past.' He indicated that he had no contact with his father. He noted that his mother and he had been subjected for many years to domestic violence. He has three brothers, a foster sister, and his mother. He was diagnosed with Asberger's Syndrome and the lawyers said 'it is a characteristic of his condition that he doesn't think things through and process them.' The lawyer explained that the boy

could not live with his younger siblings due to his temper and so was living for some time in an adult hostel. He had tried to do Year Eight at the same time but got into trouble with other children and then went back to try Year Ten.The lawyer stated that the boy 'had missed a lot of school due to long periods of being transient and has difficulty occupying his time.' The lawyer suggested that a pre-sentence report would be good. The defendant also had a worker and manager at a health service trying to deal with the defendant's recent use of alcohol. The lawyer explained that when the boy lacked money he drank metholated spirits and that the boy now had access to a youth worker and had formed a constructive relationship. The youth worker was trying to gain some accommodation that was safer and longer-term.

The magistrate adjourned the matter to gain a pre-sentence report and extended bail with conditions including a curfew and for the defendant to stay out of the city. The magistrate called for a pre-sentence report.

APPENDIX 6

PRINCIPLES AND POLICIES FOR GOVERNING LEGISLATION AND APPROACHES TO CHILD AND YOUTH JUSTICE

This Appendix sets out the ideas and principles for policy and legislation to improve the Youth Justice Court system. It also sets out some suggestions for government in a wider context of factors which might contribute to offending.

A. At Court

1. The Child and Young Persons legislation should be configured to enable many pre-court diversion opportunities in Victoria. This includes the need to ensure intervention is both timely and purposeful. With purposeful intervention a young person can have their negative, law-breaking behaviour challenged.
2. A legislative requirement in Victoria should be included that 'a child or young person not be charged unless the public interest requires.'
3. There be a 'slowing down' of the court process to engage more effectively with the child or young person appearing before the court in both Victoria and New Zealand. Time could be saved by professionals at the court acting more speedily in meeting their obligations, for example, fewer unnecessary delays in the provision of reports so that court time can be used more constructively.
4. The team of people in the Children and Youth Courts should use a multidisciplinary approach to maximise outcomes for the child or young person and work together rather that in 'silos' and with their own Departmental imperatives.
5. The provision of specialist training for representing children for lawyers and members of the judiciary through professional development programs in both Victoria and New Zealand.
6. Adopt a more inclusive process with interactive exchanges between the judge, child and lawyer, to ensure the more effective impact on the child/young person in coming to terms with their offending and the measures needed to overcome them. Considerations could include:

i. The continuity and an interventionist role of the judge.
ii. The reinforcement of all personnel that recovery is not only a personal commitment but that it is a compact between the young person and the court and justice system.
iii. The encouragement of accountability, by indicating how each participant is progressing, providing immediate feedback on successes and failures, ensuring that the offender is aware of the consequences of their actions.
iv. The encouragement of rehabilitation by demonstrating that someone in authority cares, rewarding and sanctioning progress in a timely manner.
v. Reporting on progress, developing trust, identifying barriers and seeking to remove them.
vi. Celebrating achievements.
vii. Immediate and comprehensive feedback from treatment providers.
viii. A form of 'graduation' where a successful offender's guilty plea is vacated or the charges dismissed.[73]

7. The courts be well-versed in the circumstances of the offence and offending. This means the court should be provided with detailed reports before a child first appears before a court so they know about the child's circumstances. These should be provided after a quick assessment which would cause no delay in the court's processing of the case.
8. A court should be capable of putting in place measures that resolve many of the issues for the offender and using the linkages in the community and government sector.
9. The consideration of the development, in consultation at all levels with Maori, of a specific Maori Cultural Court for child and youth offenders, and the extension of the Children's Koori Court in Victoria so as to address indigenous children and young people's over-representation in the criminal justice system.
10. The development of a problem-solving approach and more inclusive approach to child and youth offenders within the traditional models of justice in both the

[73] A Phelan, 'Solving Human Problems or Deciding Cases : Judicial Innovation in New York and its Relevance to Australia', Part 1 (2003-2004) 13, *Australian Journal of Judical Administration,* 98, 115.

Youth Court of New Zealand and the Victorian Children's court (with the concept of the Plan and consistent exposure to the one judge in the monitoring of the Plan)

B. Beyond the Court

1. The removal of police involvement in prosecutions with the role being transferred to the Office of Public Prosecutions.
2. A mixed model of legal aid service delivery, such as that of Victoria Legal Aid should be adopted in New Zealand with a role of salaried legal aid lawyers in case work and an organisational structure for research, education, law reform and publications.
3. A specialist Youth Aid Unit of police be established in Victoria similar to the model in New Zealand to deal with children and young people from the day of alleged offending through to the conclusion of the court case.
4. Improved training for professionals connected with the court about the philosophy, aims and objectives of the CYPA and its successor and the CYFA.
5. Culturally appropriate and non-discriminatory approaches with regular independent evaluations of these approaches.
6. Greater professional standards and accountability for professionals working in the court system and a greater adherence by the court to ensuring agencies comply with the provisions of the Act to avert Adult Systems Failure. This would involve the integration of greater accountability into the frameworks which operate around police, youth workers, court personnel, social workers, the judiciary and the legal profession. If this can occur then a transparent tool for examining the standards of organisational behaviour and system operation would be available.
7. Improved police culture and training for all 'rank and file' police on issues affecting children and young people and appropriate responses.
8. A real commitment from government, community and business to reducing poverty, income inequality and the creation of opportunities for young people in recognition, that without such initiatives, cycles of offending will continue.

9. In schools, opportunities for more restorative approaches before exclusion or expulsion are considered. This has been modeled in the Porirua example in Part III