Making Deprivation of Children's Liberty a Last Resort

Diversion Focused Legislation, Policies, and Practice

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Biography

I retired from the New Zealand Police in May 2012. For the last 17 years I held the position of the National Co-ordinator Youth Aid\(^1\) that oversees Police responses to juvenile offending and care and protection issues. New Zealand is viewed as a world leader in juvenile justice legislation with a high level of Diversion and family involvement in decision making by way of Family Group Conferencing. These processes have significantly reduced the number of juveniles arrested, held in detention prior to their first Court appearance, remanded in detention, and sentenced to detention.

I was involved in developing and implementing Police and multi-agency strategies to reduce offending including the development of the Youth Justice plan. I developed Police responses when investigating juvenile offending to ensure that the rights of the juvenile are protected and respected.

While a member of Police, I worked as a consultant to UNICEF and other agencies in a number of countries advising on Juvenile Justice\(^2\) issues, including compliance with international standards, the development of legislation to achieve this, the non-use of detention, Diversion (including Restorative Justice), and a multi-agency approach to prevention. I have had a particular interest in the development of specialist Juvenile Police Officers who work with other agencies to facilitate community engagement to prevent offending and where possible deal with offending by way of Diversion at all levels.

Since retiring from the Police I have been working on matters relating to children in contact with the law who may be a victim, witness and/or a juvenile offender.

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1 Youth Aid is a specialist group of Police Officers in the New Zealand Police who are trained to deal with children who are in conflict with the law and/or have care and protection issues
2 For the purpose of this paper, “juvenile justice” and “children in conflict with the law” have the same meaning
Introduction

For the purpose of this paper, “Child/ren”, “Juvenile/s”, and “Youth/s” have the same meaning.

Deprivation of Liberty which is more commonly referred to as “detention” should be a last resort. Before there is discussion as to appropriate alternatives to detention, “detention” needs to be defined so everyone is identifying with a common standard. If fewer children are to be detained, two elements are essential for this to occur,

(a) Having the right “attitude”; and

(b) Being “courageous”
to challenge the thinking of others who know no different other than placing children in detention.

Having worked in Police for 36 years I worked in an era where detention was the first option for dealing with children in conflict with the law. My attitudes have changed significantly having witnessed children in conflict with the law being placed in detention for minor offending and once in detention there was no “active case management” to minimise the time in detention.

New Zealand has gained significant international recognition in the juvenile justice world for the Family Group Conference (FGC) but I believe the FGC process would never have been developed had it not been for the Maori people wanting, or should I say “demanding” a change in attitude as to how the state dealt with their children. Maori believed their whanau (family) should be consulted and other options considered, before their child is removed from them and placed in detention - in other words “detention was to be a last resort”.

The Children, Young Persons, and Their Families Act 1989, (hereafter referred to as the “Act”) introduced the FGC but of more significance there was a presumption not to charge, with Diversion being the first consideration. This significantly reduced the number of children who were arrested and placed in detention.

The focus on Diversion and provisions to limit the use of detention from the first point of contact when a child is in conflict with the law to the sentencing by the Court is the only way that it can be said, “deprivation of liberty is a last resort”. The reduction in the use of detention is a “win-win” for all involved as children are exposed to less risk by not being in detention, as fewer detention facilities are required the cost to government also reduces and most importantly victims are empowered by being able to be part of the process.

This paper will examine New Zealand provisions and experience, opportunities for improvement, and what I consider would be model legislation to make the deprivation of liberty a last resort and if used, how to make it for the shortest period possible.

The paper is set you in two parts with the first focussing on the New Zealand legislation the philosophy behind it and international standards. The second part will look at Policies and Practices that make the deprivation of liberty a last resort and how in the future technology can be used to minimise the use of detention and if used, that it is for the shortest appropriate period of time.

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3 The Maori are the indigenous people of New Zealand
4 “Whanau is the Maori word for family and includes the extended family
PART I

BACKGROUND

The issue of detention as a last resort and for the shortest time is a standard we should all strive to achieve. Most will say that we should strive for this standard as to do so, is being consistent with article 37(b) of the Convention on the Rights of the Child (CRC). What motivates me is that where ever possible keeping children in the community with their families will achieve the best outcomes for the child, their family, and the community if well planned and managed.5

It is accepted that there are some cases where there is no option but to use detention but this should only occur after all non-detention options have been examined and considered. Having been placed in detention, there should be active case management to explore non-detention options.

If a juvenile is to be placed or is placed in detention the following should occur;

(a) Where the law allows the juvenile to be placed in detention while the investigating authority6 carry out the investigation. The court should be involved in “active case management” at all phases by first having the investigating authority justify the remand they are seeking and the court giving them the minimal time they require to be consistent with detention being for the shortest appropriate period of time e.g. The law could allow for a remand for up to 14 days, but there is only one enquiry to be made, as a matter of active case management, the judge should make the remand the minimum time required to make the enquiry.

(b) In the case of pre-trial detention this will inevitably occur when there is limited time to explore a range of options. Once the juvenile is in pre-trial detention there should be “active case management” to research and develop community options to enable the juvenile to be kept in the community.

(c) If the juvenile has been sentenced to detention by the Juvenile Court, active case management should commence the day the juvenile is sentenced to detention to enable the juvenile and their family to be supported to facilitate their rehabilitation and reintegration.

Juvenile justice was developed on the adult model of criminal justice with the only modification being that juveniles were separated from the adult system. There was no understanding as to why children come into conflict with the law and what the best way to deal with them was. Some of the children were very young and it was thought that if a child was in conflict with the law there was something wrong with the parents, not that it just might be the child had made a wrong decision, like children do as part of their development.

The introduction of the CRC brought to the attention of all governments that children have rights and there should be minimum standards as to the treatment of children. Often overlooked the CRC also acknowledges that parents, extended family, and community also have a right to be involved.7 The CRC has brought about change, but for various reasons, the required changes have not occurred as quickly as they should have.

5 “Managed” includes support and monitoring
6 This can be the Police, Prosecutor or a combination of both.
7 CRC, Article 5
Most Governments want to adhere to the CRC and reduce the number of children in detention but simply do not know how. Many think they have to find options other than detention which is partially correct but the best way to achieve “depravation of liberty as a last resort” is to reform the juvenile justice legislation so that it has a Diversion focus, engages with the juveniles family but hold the juvenile accountable for their actions. Any action taken must be proportionate to the circumstances of the child and their offending.

**WHAT IS DETENTION?**
The intention of Article 37(b) is to minimise the use of detention and if used, for it to be for the shortest appropriate period of time, if it conforms to the law. An unintended consequence of Article 37(b) is that it allows for draconian arrest, detention and imprisonment laws, and practices to be acceptable as they conform to the law. It is accepted that children should not be deprived of their liberty unlawfully or arbitrarily but where some laws are acceptable in some jurisdictions they would be unlawful and arbitrary in others.

In some jurisdictions children who have care and protection issues can be treated as a child in conflict with the law. Children are placed in state care with no judicial oversight or legal representation, and once in detention they can have limited if any support and no one advocating for them.

For detention to be a measure of last resort and for the shortest appropriate period of time laws and practices must reflect this and be consistent with International Standards.

**Convention on the Rights of the Child Article 37(b)**

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

**Beijing Rules**

Beijing Rules, Rule 13 give s guidance for juveniles in detention pending trial and is consistent with Article 37(b) as there is the theme of “measure of last resort and the shortest possible period of time”. Rule 13.2, requires alternative measures to be sought and give a range of options of which bail with conditions is not one. The intention of Rule 13.2 is for alternatives, which we should all desire but few known how to achieve this standard or to do so would be viewed as a risk as juveniles who would have previously been in detention are being placed in the community.

If in Detention, the juvenile is entitled to, “…all rights and guarantees of the Standard Minimum Rules for the treatment of prisoners…..” The question needs to be asked, why are adult standards being applied to children in conflict with the law?

The Beijing Rules are consistent with Article 37(b) but as these rules are specific to Juvenile Justice, it recommends other options for pre-trial detention *(Rule 13.2).*

13. Detention pending trial
  13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

  13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care, or placement with a family or in an educational setting or home.
13.3 **Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.**

13.4 **Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.**

13.5 **While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical, and physical-that they may require in view of their age, sex, and personality.**

**Protection of Juveniles Deprived of Their Liberty**

Article 2 of the JDL’s makes reference to “length of the sanction” and then refers to the possibility of early release. This Article implies that the JDL’s applies to juveniles who have been sentenced and not those in pre-trial detention.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty that were adopted on 14 December 1990 set out minimum standards for children deprived of their liberty. Of significance is article 2:

*Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.*

The lack of definition for the meaning of “detention” creates a problem for all working in juvenile justice to achieve better outcomes for children in conflict with the law. This should be looked at in the broadest context that includes the juvenile, parent/, extended family, victim/s and the community. A common definition as to the meaning of “detention” would have juvenile justice practitioners talking the same language as there would be a common standard.

**New Zealand Experience**

The definition I use to define “detention” is based on a decision by the New Zealand Court of Appeal concerning the New Zealand Bill of Rights Act, which defined detention as, “not free to leave”. The juvenile does not have to be charged with any offence and may not even be detained under any law, it is if the person feels they are not free to leave. When being applied to children in conflict with law, the court will look at the actions of the Police more critically.

Over the years much has been reported internationally about the New Zealand Family Group Conference (FGC) process as it brought about a Restorative Justice approach to decision making. The Family Group Conference process was developed as a way of addressing the issues of the high number of children in the care of the State. This could be in an institution or a Family Home in the community but the children were not free to leave and return to live with their families. Children wanted to be with their families and would abscond and once would located would be placed in a more secure place. This would further escalate a situation that may have been initially low level.

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8 These are also known as the JDL’s
9 Underlined for emphasis
10 New Zealand law has a presumption that a juvenile is vulnerable during the Police investigation process.
A disproportionate number of the children in the care of the state were Maori who are the indigenous people of New Zealand. They were frustrated and it would be reasonable to say “angry” that their children had been put in the care of the State without any reference or discussion as to what the child’s parents and extended family could do to prevent the child being taken out of their care and into the care of the State. Once in the care of the state the child could be placed in an institution.

Looking back, the basis for developing the Family Group Conference was to give the child’s family to have input into the “decision making” to explore a range of options about what should happen to the child rather than the child being placed into the care of the state. What they were asking for was that State to respect their whanau (family), in other words, “detention should be used as a last resort”.

Victims were a late consideration in the Family Group Conference process but with the inclusion of victims in the FGC process, it was seen as having a Restorative Justice focus. While it introduced the Restorative Justice element, the focus of the Act was about having “family involved” in the decision making and where ever possible keeping children out of the care of the State hence the name Family Group Conference.

Because of the desire for family to be involved in the decision making, the word “Family” was inserted into the name of the Act, and the Act became known as the Children, Young Person’s and Their Families Act 1989.

Having worked in frontline Policing under the Children and Young Persons Act 1974, the arrest of children was more frequent as the arrest provisions that applied to the arrest of adults was used to arrest children. Police did have a Policy as to how the arrest provisions should be applied to children in conflict with the law but this Policy was not vigorously enforced.

For very low level offending, such as stealing something from a shop, the child may not be arrested but if arrested the child may be bailed or they would be sent to a Residence when they would be bought before the Youth Court. The Court had limited options when compared to the present situation as to how they could remand the case when a child was in conflict with the law.

**CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989**

The 1989 Act had a number of provisions that reduced the opportunities to have children placed in detention. Having worked with this legislation at an operational level when I was in front line Policing and then in a position where I was responsible for Youth Justice in the New Zealand Police I have seen the strengths, weaknesses and practices of this legislation in relation to children being placed in detention.

When the legislation was introduced in 1989 it was severely criticised by operational Police and the Police Association. Much of this criticism was because of poor implementation, training, and ignorance of the legislation while others just did not want the legislation to work as it curtailed Police powers when they were dealing with children in conflict with the law.

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11 Underlined for emphasis
12 Underlined for emphasis
13 In comparison to the Children, Young Person, and Their Families Act 1989
14 “Residence” is the term used in New Zealand to describe a Youth Justice Detention facility.
15 The Police Association is the Police Union
In fairness to Police, the Act was badly drafted, in that it was too wordy and not easy to read. There is a common criticism that the Act is complex and in my opinion it is. The lesson that comes out of this is for new laws and policies to work as intended, keep in simple!! If something is simple people are more likely to accept it and make it work. One only has to see how the Smart Phone has been accepted. If something is complex people will be reluctant to embrace it and/or they will find problems with it so they do not have to use it and will revert to the easiest option.

**Objects and Principles**

The Act has object and principles that guide decision making when a child is in conflict with the law and these have facilitated the significant reduction in the use of detention.

There are a number of objects and principles and to go into detail about all of them would in itself be a comprehensive paper. I will identify those that in I believe have contributed to the reduction in the use of detention.

Section 4(f) is an object that is specific to children in conflict with the law;

- Ensuring that where children or young persons commit offences,—
  - (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and
  - (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways

This object requires that children in conflict with the law and that they accept responsibility for their “behaviour”, the Act uses the word “behaviour” and not “offending”. The second part of the object requires that their needs be acknowledged and they be given the opportunity to develop in responsible, beneficial and socially acceptable ways, in other words the opportunity to become a good adult. This object is consistent with the International Standards, but the response is proportionate to the circumstances of the child and their offending.

The Youth Justice principles are in Section 208 of the Act with principles (a), (d) and (h) facilitating the non-use of detention. Section 208(a) makes Diversion the first consideration and not prosecuting by requiring the Police to identify the public interest issue/s that require prosecution and that there are no alternative means of dealing with the matter. If Police bring proceedings, and if the public interest is not obvious to the Youth Court, Police will be asked to explain what the public interest is and what alternatives have Police considered, and why those alternatives are not considered appropriate.

**Section 208**

*Any court which, or person who, exercises any powers conferred by or under this Part of the Act shall be guided by the following principles:*\(^{16}\)

   (a) *the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child\(^{17}\) or young person\(^{18}\) if there is an alternative means of dealing with the matter:*

\(^{16}\) This sentence has been abbreviated

\(^{17}\) “Child” is a boy or girl under 14 and young

\(^{18}\) “Young Person” is a boy or girl 14 year of age or older and under 17, Youth Justice in New Zealand is not compliant with the CRC
The importance of this principle cannot be overstated enough. This principal is the game changer as it took matters out of the Court that otherwise may have gone to Court by introducing a culture of diversion when dealing with children in conflict with the law. I believe those involved in drafting the Act could never have envisaged that impact this one provision would have. It created a Youth Justice culture where Diversion is the first consideration, as it is the first Youth Justice Principle of the Act

Whenever I write or talk about the New Zealand Act and the changes it brought, the most significant is the principle that the family were to be involved in the decision making and the requirement that criminal proceedings should not be instituted if there is an alternative means for dealing with the matter. “Alternative” means to look for other options, in other words consider Diversion options. If you are considering Diversion you are not considering detention.

Rather than having to justify Diversion, you had to justify the reason/s for Prosecution. What is so significant about this is that it makes Diversion the default position. Human nature is such that people will all ways revert to the default position first when deciding what to do.

Section 208(d) makes the presumption that a child or young person who commits an offence “shall be kept in the community” so there is a clear intention of the non-use of detention. The principle is also realistic in that there is a point where for various reasons it is not practicable to keep a juvenile in conflict with the law in the community and there is also a need to ensure the safety of the public. Before a youth is placed in detention by the Court, the Court will examine all of the information and evidence presented, and all community options have been examined but they are not practicable in the circumstances. If there is an identified public safety issue, supported by information/evidence, in these circumstances it is difficult to justify any option other than detention.

Section 208
(d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public.

Section 208(h) has a presumption of vulnerability during the investigation process that gives a child or young person who is or suspected or being in conflict with the law another level of protection. This principle along with other provisions protect the rights of the child or young person, reducing the likelihood and opportunity for the miss-use of arrest and detention.

Section 208
(h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

19 The decision making is at all levels, from first contact with Police to sentencing at the
20 Underlined for emphasis
21 Because of the word Alternative in the principal, interventions other than Court or a Family Group Conference are known as “Alternative Action”.
CONCLUSION IN RELATION TO LEGISLATION

The main reason for the significant reduction in the number of children before the courts and in detention is that the intent of the Act is keeping children in conflict with the law out of the Court processes. This is not achieved by one particular provision but by objects, principles, and specific provisions that underpin that practice of at the first opportunity the child, should exit the formal youth justice processes.

Once out of the formal Youth Justice system the child is less likely to come into contact with others who are in the system thus minimising their exposure to a negative peer group.22 If you place a low level offender in detention the reality is they will get to know high level and/or risk offenders hence the reason detention should only be used as a last resort. This prevents the mixing of first time offenders with serious offenders.

Keeping children out of detention has been achieved by having legislation that has an accountability and diversionary focus. It is important to have an “accountability” focus as this makes it perfectly clear to the child and their family that the child is responsible for their actions but the accountability must be proportionate to the circumstances of the juvenile and their offending.23 With a Diversionary focus non court interventions can be developed and implemented that are proportionate to the circumstances of the child and their offending.

PART II

POLICIES AND PRACTICE

Having considered how legislation is able to bring about changes to make, “Deprivation of Children’s Liberty a Last Resort” the next challenge is how to implement the legislation. When developing policies and practices it should be based on legislation and consistent with International Standards.

The Policies and Practices will be based on the New Zealand legislation but will include comment and explanation, where Policies and Practices can be improved.

When a child is in conflict with the law, the first opportunity where detention can occur is arrest. To minimise the use of arrest the Act24 allows for arrest to occur in the following circumstances;

When a child was in conflict with the law Police could only arrest in limited circumstances, if they believe on reasonable grounds;25

(a) The identity of the child was unknown and/or their identity could not be established

Explanation – it is only reasonable that Police be able to establish the identity of a child but once the identity is established, Police must fully review if detention can be justified

(b) The child is likely to abscond.

Explanation – If the circumstances are that the child will not appear on Court and/or they will abscond, they are arrested and once arrested if the decision is made to charge them options are explored26 to see if the child can be released prior to their Court Appearance.

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22 Contact with a negative peer group, increases a juveniles risk of offending
23 This is based on the presumption that the child has reached the age of criminal liability.
24 Section 214 of the Act
25 Reasonable Grounds means there must be evidence to support this belief.
26 One of the options could be very strict bail conditions
(c) May commit further offences.
Explanation – if the circumstances are such that at the time the child is apprehended they may commit further offences then there is no option but to arrest them. The situation may be that the child has been located in a stolen car and if left there they may steal another car.

(d) Prevent the loss or destruction of Evidence.
Explanation – The suspect/offender must be denied the opportunity to destroy or suppress evidence

(e) Prevent interference with any victim or witness.
Explanation – For any Juvenile justice process to have credibility victim and witnesses must be protected.

When a member of Police did make an arrest they are required to submit a report within 72 hours to the Commissioner of Police, specifying the reason for the arrest. This was another level of accountability and oversight when children in conflict with the law were arrested.

**Arrest and Charging**

With the Act having a specific provision for the arrest of children in conflict with the law, there was a reduction in the number of children being arrested. Once the child was brought back to the Police station enquiries could be made as to whether the reason for the arrest was no longer justifiable. It needs to be emphasised that at the time of the arrest, the arrest was justifiable, and made in good faith but enquiries could no longer justify the continued detention following the arrest. Some examples of this situation are;

(a) A child who gave a false name is brought back to the Police station, they give their correct name, a parent or other person is contacted to establish confirm their identity, there are no longer grounds to justify detention

(b) Police arrive at an incident, the offender runs off, he is unknown and absconding. Once arrested they are co-operative, explain how they ran off as they panicked, unless there are other reasons, detention cannot be justified.

(c) A child is intoxicated and/or under the influence of drugs and because of their condition they must be arrested as they could commit other offences such as disorder. Once the effect of the alcohol and/or drugs has worn off there is no longer a risk of their offending

(d) The child is arrested as their clothing is required as evidence and if they leave the evidence it will be lost. Once the evidence is secure the detention cannot be justified.

(e) At the time of arrest they may have been trying to talk to a witness. Once arrested this was prevented and at the Police station the issue can be resolved.

Police were of the mistaken view that once the juvenile had been arrested they had to be taken to Court but this is not the case. Arrest and charging are two separate processes, as once the arrest is made Section of s208(a) comes into play and alternatives to prosecution have to be considered and there has to be a public interest issue to justify prosecution. Having to arrest for an offence on its own does not justify a public interest issue and prosecution. The consideration to prosecute is an ongoing process, you may believe at the time of the arrest and even a few hours after the arrest that prosecution can be justified, but as more information becomes available, prosecution is no longer a justifiable option.
The juvenile is still held accountable as the file is referred to a specialist Youth Aid Officer. The Beijing Rules refers to specialist Police Officers and the Youth Aid Officers, because of their training and experience are able to give advice and guidance to all Police who may have to deal with a juvenile who is a suspect or offender. Because of their knowledge, they have an understanding of the requirements of Diversion and that detention should only be used as a last resort and for the shortest period of time. Having Youth Aid Officers, results in a high level of compliance with the Act but also they are able to assist investigators as they can ensure a high level of compliance with the investigation process.  

**ACTION FOLLOWING ARREST**

By having to justify a reason to prosecute it requires an objective test to justify why you should prosecute the matter rather than deal with it by way of Diversion. This is where the Diversion default position of the juvenile justice process starts to play an active role in decision making. The child is released and the matter referred to a Youth Aid Officer.

An example of when there would be a public interest to prosecute would be when a juvenile is found having broken into a house; he is in breach of bail curfew and tries to abscond when the Police apprehend him. Following arrest, if Police decide the juvenile needs to be prosecuted that is not a reason for the child to be kept in detention and the following option should be considered;

(a) Release the juvenile and they can be summonsed at a later date. *Explanation – In New Zealand before a Youth can be summoned to the Youth Court a Family Conference must first be held to explore options other than prosecution.*

**POLICE BAIL**

When the Act became law in 1989, Police could release a child on bail but were legally authorised to impose conditions of bail. This could only be done by the Youth Court. This resulted in juveniles being kept in Police detention until they could go to Youth Court and when they got to Court there was no objection to bail and conditions were agreed to.

In the mid 90’s the law was amended to allow Police to release persons arrested on conditions of bail until their first Court appearance which must be within a week of being given Police bail. This provision had the benefit of minimising the time the juvenile spent in Police detention following arrest. While not required by law, as a matter of good practice the parent or caregiver should also agree to the conditions of bail being imposed by the Police and sign alongside the juvenile. This is a good example where a law change minimised the time a juvenile spent in Police detention and policies and practices were developed to support this process.

With Police being able to release juveniles on conditions of bail the only juveniles in Police custody for any period of time are those who Police wish to make application to the Youth Court to have remanded in pre-trial detention.

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27 My experience has been that then specialist Youth Justice Police Officers have supported investigators, the Police have never lost a case.  
28 An example some of the conditions of bail could be a curfew, non-association with certain persons, attend school, not to contact the victim.  
29 The law requires that a Youth be brought before the Court as soon as possible and if required a special Youth Court sitting is held. It the arrest is an overnight arrest the Court will hear the bail application in the morning but should an arrest occur during the day efforts are made to have the bail application heard that day.  
30 The juvenile is bailed to the day the Youth Court sits
Following arrest the juvenile should only need to stay in Police detention for a maximum of about four hours unless;

(a) Identity not confirmed;
   Explanation – Before Police can consider releasing any juvenile, their identity must first be confirmed.

(b) Parent/s or caregiver or person willing to take responsibility for the juvenile cannot be located;
   Explanation – The parent/s or caregiver of a juvenile who has been arrested must be informed of the arrest and reason for it. The juvenile should be released into their custody but if they cannot be located and/or are not available, enquires should be made to locate a suitable adult into whose custody the juvenile can be released. This could be a relative or a family friend who knows the juvenile. Following arrest a juvenile should not be released and unsupervised.

(c) Other offenders are yet to be located;
   Explanation – If Police are yet to locate a co-offender/s, the juvenile should stay in detention until the co-offenders are located.

(d) Further evidence is outstanding and needs to be secured;
   Explanation – If released the juvenile could destroy evidence.

(e) Are a risk to themselves if released;
   Explanation – The juvenile to be kept in custody as it is in their best interests when they are affected by alcohol and/or drugs or emotionally disturbed for any number of reasons. In these circumstances it is my experience that it is available that the juvenile be allowed to “sleep it off”. After a few hours the effects of the alcohol and/or drugs wear off and often the emotional distress is linked to the alcohol and/or drugs.

**COURT BAIL**

When the juvenile is brought before the Youth Court a specialist lawyer known as a Youth Advocate is assigned to them.\(^{31}\) As the number of Youth Advocates is limited it enable good working relationship to be developed with all players in the Youth Justice process. A member of Police Youth Aid prosecutes in the Youth Court and rather than having an adversarial approach there is discussion to identify possible options rather than placement in a Youth Justice Residence. This discussion is guided by the objects and principles of the Act.

Because of the experience of Youth Aid officers and their expertise with the Act they will only make application for a remand in a Youth Justice Residence\(^ {32} \) when there is evidence to support the application and there will be high probability of success as they are Diversion focussed.

If a juvenile is remanded to a Youth Justice Residence, an FGC must be organised within 7 days and held within 7 days of the FGC being organised to enable options other than detention in a Youth Justice Residence to be explored. This is another provision focussed on minimising the time spent in detention.

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\(^{31}\) Youth Advocates are a selected small group of lawyers who are provided to the juvenile for no cost. Youth Advocates bring to the Youth Court knowledge of the Act, and they too are guided by the objects and principles.

\(^{32}\) A Youth Justice detention facility is known as a “Residence”
**Reasons for Remand in Detention**

A juvenile in conflict with the law is innocent until proven guilty but if detention is to be used as a last resort then there should be a strict criteria for this to occur not for the fact that they have been charged with a serious offence. In some jurisdictions, juveniles are remanded in detention because of the serious charge/s they face, and for no other reason. By remanding in detention in these circumstances it can encourage police/prosecutors to over-charge for the sole purpose of having the juvenile remanded in detention.

Experience has shown that a juvenile charged with murder is released on bail conditions, lives at home, parents were willing to supervise and there were no other significant risk factors, detention could not be justified. In contrast to this, juveniles who are charged with less serious offences can be remanded in detention because of the risk factors they present with.

When the Court is considering remanding a child to detention who is in conflict with the law, the factors to consider are:

(a) The child is likely to abscond
(b) May commit further offences
(c) Preventing loss or destruction of evidence
(d) Prevent interference with the victim/s and/or witnesses
(e) Are not likely to comply with their bail conditions

**Active Case Management**

When a juvenile is placed in detention by the Court, this usually brings relief to those who have been dealing with such a challenging juvenile. Once placed in detention Police, youth justice worker/s tend to forget about them as while in detention everyone can relax. If detention is to be for the shortest period to time Active Case Management should be implemented and a family meeting convened to discuss options other than detention. In New Zealand this would be a Family Group Conference.

At the time the Court makes the order placing the juvenile in pre-trial detention it may be the only option for a number of reasons. After a period of time in the Detention issues relating to the juvenile have been stabilised and/or good work by the Youth Justice social worker has developed a plan to support the juvenile in the community. If the social worker has a multi-agency focus they would have approached the Police and/or prosecutor to get their support for the proposed plan.

Once the plan is developed the Court should be approached to arrange a special sitting for the application for bail to be heard. It is not acceptable to wait until the next Court sitting day or when the next court appearance is scheduled we all have a responsibility to minimise the time spent in detention.

Reducing the time juveniles spend on pre-trial remand has a number of benefits of which some are:

(a) Reducing the number of “bed nights” frees up capacity and reduces the number of physical beds required thus reducing costs.

| 33 | The conditions can vary depending on the circumstances of the juvenile and/or their family |
| 34 | These factors must be based on evidence |
| 35 | The evidence would be based on the juvenile having previously been on bail for other matters and has not complied with those conditions. |
| 36 | “Bed Nights” is a measure of the time a juvenile spends in detention |
(b) If not sentenced to a term of detention the juvenile can be released back into the community to commence their community sentence

(c) Reintegration with their family and community is easier

(d) If the case is resolved the victim is able to move on

(e) It demonstrates a commitment to the International standards and that detention will be used as a last resort and for the shortest period of time.

When a juvenile is sentenced to detention rehabilitation and reintegration, plan should be made available to the sentencing judge. There should also be community options as this can allow the court to impose a sentence of non-detention but should the community imposed conditions not be complied with the juvenile can be brought back to the Court to be resentedenced. In these circumstances the Court has little option but to impose a sentence of detention.

As part of any sentence to detention there must be a rehabilitation component to allow the juvenile to be reintegrated in the community.

**Observations of Polices and Practice**

A major failing for children in conflict with the law is the delay in any intervention occurring to prevent further offending at the very least providing support to the parent/s of the child to maintain a relationship with their child. When a child comes into conflict with the law a basic needs and risk assessment should identify any issues of concern. The majority of first time offenders will need little if any support unless an issue is identified in the needs and risk assessment. When there is repeat offending, obviously something is seriously wrong and immediate intervention is required.

If there is repeat and/or serious offending, it is most likely that that matter will go to Court and until the Court decides the outcome the juvenile and their family have no support. Invariably family relationships are strained which creates another risk factor requiring immediate intervention to de-escalate the situation. This seldom occurs and, the juvenile does not comply with their bail conditions, and/or they reoffend resulting in the juvenile being remanded into pre-trial detention.

If detention is going to be used as a last resort, supports must be in place to allow juveniles, their parent/s and if required the extended family the opportunity to manage their child or family member. The supports should be designed to meet the needs of the juvenile, parent/s, and extended family.

This pre-trail support is called supported bail and is put in place as part of bail conditions imposed by the Court. Supported Bail will develop a plan where every hour in the juvenile’s day is accounted for specifying what they will be doing in that particular hour and who will be supervising and responsible for what is occurring.

A well-developed supported bail intervention plan will assist in stabilising the juvenile in the community and once this is achieved the relationship with the juvenile and their family improves. The positive response to the community support, this gives the court evidence that the juvenile can be kept in the community with a well-developed, implemented, and supported rehabilitation and reintegration plan. This approach is similar to a health model in which, if a person is diagnosed with a health problem, and a medical intervention is required such as an operation, an intervention is put in place to prevent the person’s health from deteriorating further and if required there is ongoing monitoring.
(a) Restrictions on the use of arrest
   Explanation – Limits the circumstances when a child can be arrested as once arrested the juvenile is not free to leave as they are “detained”

(b) Diversion as the first consideration
   Explanation – If arrested a prosecution can only be brought if it is in the public interest which limits the number of juveniles going to Court.

(c) Police being able to release on bail conditions enabling Police to release the juvenile, rather than having to keep them in detention until the Court can impose bail conditions.
   Explanation – Previously Police were unable to impose bails conditions, this could only be done by the Youth Court. There was no option but to keep a juvenile in Police detention until the juvenile could be taken to Youth Court and bail conditions imposed even though there was no objection to the bail conditions. This significantly reduced the time a young person spent in Police detention until bail conditions were imposed.

(d) The Youth Court being able to impose a range of bail conditions to match the needs and risk/s of the juvenile to be bailed,
   i. Conditions of bail such as (but not limited to) curfew, non-association, not to use alcohol and drugs, geographical restrictions etc.
      Explanation – This permits the Court to impose conditions that will reduce the risk of the juvenile being in situations that puts them at risk of offending. Police will seek conditions and the Judge will hear submissions from the juvenile, their lawyer but most importantly the parent/s as to their view as to suitable conditions.
   ii. Supported Bail
      Explanation - The day bail is imposed there is a support worker assigned to the juvenile and their family. A comprehensive detail plan is developed, that accounts for every hour of the juvenile’s day, and because of this support the juveniles family feel supported. As a result of this early and comprehensive intervention, non-detention sentences become viable.
   iii. Electronic Bail
      Explanation – An electronic tag that emits a signal is attached to the juvenile’s ankle with a relay being placed at the location they are required to reside at. During specified hours the juvenile must be at their residence and if they are not an alarm will be activated as the electronic tag is out of range.

(f) Police having a power of arrest to enforce bail conditions
   Explanation – If bail conditions are not enforceable then why have them? A juvenile could be warned for not complying with their bail conditions but any response must be proportionate to the seriousness of the breach/es

37 If the Court thinks it appropriate, it can impose conditions, supported bail, and electronic bail.
38 Research has validated the effectiveness of supported bail for the high risk juvenile, their family and community
(g) If a juvenile is remanded in detention by the Court a Family Group Conference must be held to discuss options other than detention. Explanation – This purpose of this Family Group Conference is to seek options other than pre-trial detention. Too often juveniles are remanded in detention and once in detention they are forgotten about as there is no active case management to explore options other than detention.

(h) Community NGO providers were supported to develop programmes based in the community. Explanation – By having NGO community providers, it gave the Court sentencing options other than detention. If these sentencing options were not available, there is an increased likelihood of the juvenile being sentenced to detention.

(i) Supervision Plans developed prior to release Explanation – This is to ensure the juvenile and their family are aware of what is expected of them and the supports in place to assist the juvenile’s rehabilitation and reintegration back to their family and the community.

THE FUTURE AND TECHNOLOGY

Having looked at the New Zealand experience and my observations, this paper would not be complete if it did not look at the future to develop better mechanisms to further reduce the use of detention. If technology is used the time spent in detention is minimised as much as possible, but just as important, the juvenile and their family are supported throughout the process. This minimises the risk of re-offending and facilitates re-integration.

In the last ten years technology as moved to a level that could not have been imagined 10 years ago and the one thing most of us are aware of, is, that children/juveniles adapt to quicker to these technologies than adults. What is significant is that technology was once developed for the commercial market (businesses) where now, it is the consumer (the general public/families) that purchases modern technology and drives development.

Looking back 25 years mobile phones were very expensive and big, people used fax machines with some being able to have a computer, the internet was being developed, over time laptop computers became available, cameras used film became digital. The internet developed in a way that no one could have envisaged, (Bill Gates of Microsoft fame said that the internet would not come to anything!!!) products were developed that could use the internet such as Skype. The mobile phone became that “smart phone” tablets were developed and with these devices came a wide range of applications were developed that are known as “apps”. These devices have the capacity to carry out functions that 10 years ago a personal computer would not have been capable of.

As they capability has increased, the price has reduced making it affordable hence the reason it has become so widely accepted. An example of this is those who work with children in contact with the law as victims of abuse having to give evidence. To reduce the trauma for the child victim’s evidence, closed circuit television (“CCTV”) was installed at great expense. Normally the victim would be giving their evidence in another location within the court building that had a CCTV link to the court room installed.

What once took a CCTV network to do, can now be achieved by using a mobile smart phone from another location in the world using applications like Skype or Viber. Companies that once required a CCTV networks to have a video conferencing can now achieve this by sitting in front of a computer or a modern television with built in internet capacity.
The question to be asked is how this technology can be developed and used to, *reduce the use of detention and if used, it is for the shortest appropriate period of time?* It would be negligent not to look at the future and identify how modern technology can be used.

Some thoughts for the use of technology are:

(a) Following arrest, Police are not prepared to grant bail, rather than keep the juvenile in Police custody until they can be transported to the Court, bring the juveniles parent/s to the police station, their lawyer can be present or at another location and organise a Skype link to the Court where the judge is situated. This could happen at any time of the day and the location of the juvenile and the court is not limited.

(b) Conditions of bail could include;
   i. The juvenile must carry a mobile phone and be contactable at any time *(while this is a tool provided additional supervision it also provides support to the juvenile as they can be contacted and issues of concern can be identified and dealt with)*
   ii. If on supported bail the juvenile is contactable at specified times to enable their support worker to contact then, de brief what has occurred and plan what is to occur.
   iii. If on a curfew the juvenile could be called at the location they are required to be at as a condition of their curfew, an application such as Skype could be used at any time to confirm they are at their curfew location. *(A video link is required to confirm the location)*
   iv. To wear an electronic ankle bracelet, this could be either a location bracelet 39 where there is a transmitter at the location and transmits the signal from the bracelet to confirm the juvenile is at the location. The other type of electronic bracelet is one that transmits the location of the juvenile.
   v. CCTV could be installed at the location where the juvenile is living and monitored via the internet *(policy protocols would need to be developed for the use of CCTV)*.

(c) If the Court remands a juvenile in detention, enquires to identify a community placement and a plan is developed. Rather than wait until the juveniles remand date, arrange for a hearing using Skype with the juvenile in detention facility to determine if bail can be granted.

(d) If the juvenile is sentenced to detention, technology could be used to;
   i. Provide regular contact with the juvenile and prepare them for their release. *(the detention facility may be in a location away from where live after release)*
   ii. Allow professionals to case conference the juveniles progress and release
   iii. The sentencing judge may use technology to monitor progress if early release is to be considered

(e) Following release the same technologies to monitor bail could be used to monitor a juvenile following release, but this monitoring must be planned with its use progressively reduced to facilitate a full rehabilitation and reintegration.

39 A “location bracelet” is used when as a condition of bail, the person is required to be at a specific location that could be for 24 hours a day or between specified hours such as a night time curfew.
The introduction of technology to reduce the use of detention is inevitable, but at the same time it enhances community placements and support to a level that could never have been envisaged. In developing this use of technology, it is important the juveniles are involved in its development. Juveniles understand how juveniles relate to and how they use technology to keep in contact with one another and what they would do if they did not want someone to contact them.

**CONCLUSION**
Using detention as a last resort and for the shortest period of time is achievable without extra resources as long as you have the right attitude and be courageous. If detention is used as a last resort, costs to government will be reduced as fewer beds and staff will be required. If there is a focus on improving outcomes the surplus resources could be transferred to support juvenile justice work in the community.

The use of detention is part of a juvenile justice process and in minimising its use, there needs to be a focus not just on detention but a focus on the juvenile justice legislation, its intent, and philosophy. There must be a philosophy of Diversion but at the same time holding the juvenile accountable in a way that is proportionate to the circumstances of the juvenile and their offending.

Research has shown that the use of detention should be avoided but this can only be achieved if credible community alternatives are developed, implemented, and well supported. If the juvenile is not compliant, this is dealt with immediately to ensure they are held accountable for their non-compliance and for the credibility of the juvenile justice process in the eyes of the public. Managing juvenile offenders in the community does have risks, but the risks for the community are greater if detention of juveniles in conflict with the law is not used as a last resort.

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