

**Stuck in Detention – *the Connection*  
*between Disengaging from School and Youth*  
*Offending in New Zealand***

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A dissertation submitted in partial fulfilment of the degree of  
Bachelor of Laws with Honours at the  
**University of Otago - Te Whare Wānanga o Otāgo**

October 2015

## ACKNOWLEDGMENTS

To *Helen* and *Briony*, for your continual encouragement and expert proof reading.

To my *parents*, for their quiet and dependable support throughout the years of my study and for this final push.

To *Ben*, for celebrating with me when I needed it.

To *Calum*, for reassuring me that I was on the right track and for being my rock.

And most of all, thank you to my supervisor, *Professor Mark Henaghan*, for guiding me through this project with confidence and wisdom, and for being the inspiration for my degree, providing an example of dedication and passion for me to follow.

Thank you all from the bottom of my heart.



**DECLARATION CONCERNING DISSERTATION PRESENTED FOR THE DEGREE OF**

**Bachelor of Laws with Honours**

*I, Kesia Ngairé Sherwood*

*Solemnly and sincerely declare, in relation to the dissertation entitled:*

***Stuck in Detention – the Connection between Disengaging from School and Youth Offending in New Zealand***

- (a) That the work was done by me, personally, *and*
- (b) The material has not previously been accepted in whole, or in part, for any other degree of diploma

*Signature:*

*Date:*

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## INTRODUCTION

The incidence of youth offending in New Zealand is a cause for nationwide concern. Not only does it reflect badly on society generally, but the overrepresentation of certain groups of young people in the justice system strongly suggests that some young people are not receiving the support they need to lead positive and productive lives. Young people suffering from mental, physical and neurological deficits are significantly overrepresented in New Zealand's youth offending population, calling in to question the impact their disabilities have had on their social development. A significant factor in successful adolescent development is childhood engagement in school; conversely, early disengagement in education constitutes a significant risk factor for later youth offending.<sup>1</sup> This dissertation will discuss the extent to which disability affects engagement in school, and the legal obligation upon the New Zealand State to provide support to children at risk of disengaging.

Chapter one examines the four fundamental pillars of child and adolescent development (family, school, peers and community) with a focus on school. This chapter emphasises the difference between school engagement and academic achievement, and emphasises the most significant benefits are obtained through mere participation in the school environment.

Chapter two explores the various causes of disengagement from school, taking a snapshot of several impediments to learning that can be grouped in to three broad categories: learning disabilities, behavioural problems and physiological impairments. This chapter outlines the process by which a child suffering from an impediment to learning becomes disengaged, with an acknowledgment of both the role their disability plays and the role of our current school system.

Chapter three examines and analyses New Zealand's legislative context. The legislative context in isolation provides a solid foundation for the contention that there exists an obligation on the State to provide support to the children discussed in chapter two. However, judicial interpretation of the relevant provisions has rendered the obligation hollow in substance. This chapter concludes by acknowledging the judicial interpretation but

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<sup>1</sup> Robyn Gibbs and Jenny Poskitt *Student Engagement in the Middle Years of Schooling (Years 7-10): A Literature Review* (Ministry of Education, Research and Evaluation Report, 2010) at 16.

suggesting recent recommendations by the Human Rights Commission indicate this interpretation can no longer be considered wholly applicable.

Chapter four outlines New Zealand's international law obligations and cements the argument that in light of these, the prior judicial interpretation of the right to education is erroneous.

Chapter five considers that legislative amendment is necessary in order to make the obligation on the State explicit. This chapter discusses international examples with a focus on recent legal developments in Scotland.

Chapter six concludes by suggesting how legislative amendment might work in New Zealand and what would need to be included to ensure children at risk of disengaging from school are provided adequate support.

## CHAPTER ONE: SCHOOL ENGAGEMENT AND THE FOUR PILLARS OF CHILD AND ADOLESCENT DEVELOPMENT

The occurrence of youth offending in an individual can often be traced to a disruption of one of four key areas of the child or adolescent's life.<sup>2</sup> Family, school, peers and community make up the foundational pillars of child and adolescent development, providing the context in which children learn the skills required to create positive relationships with others, apply themselves in an educational setting and respond effectively to adversity. The school setting in particular offers an opportunity for the New Zealand government to ensure children are provided with the tools they need to remain engaged in education. Engagement in school reduces the incidence of anti-social behaviour and provides a positive buffer against prevalent risk factors in the child's family, peer group or community.<sup>3</sup> Although the education sector cannot solve the problem of at-risk youth alone, it remains the best point of entry for the state to identify and address the issues facing these youth and their families.<sup>4</sup>

### *Family, Peers and Community*

A child's family is generally the source for major risk factors of later youth offending. Low levels of parental support, lack of affection between family members and parental antisocial behaviour are some of the compounding issues that contribute to an increased risk for children.<sup>5</sup> Appropriate parent-child relationships based on openness and honesty are crucial to positive and effective family functioning – youth raised in families where there is a lack of

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<sup>2</sup> Andrew Becroft "Youth Offending: Factors that Contribute and how the System Responds" (presented to Symposium Child and Youth Offenders: What Works, August 2006); Alison Sutherland "The Relationship Between School and Youth Offending" (2011) 37 Social Policy Journal of New Zealand 1 at 1; Ministry of Social Development *Improving Outcomes for Young People in Counties Manukau* (Ministry of Social Development, plan of action, 2006) at 6 and 7.

<sup>3</sup> Tim Moore and Morag McArthur "If only I, they, we had done things differently: Young people talk about school difficulties and crime" (2014) 44 Children and Youth Services Review 249; Bill Henry and others "Staying in School Protects Boys with Poor Self-regulation in Childhood from Later Crime: A Longitudinal Study" (1999) 23 ISSBD 1049; Jon Douglas Willms *Student Engagement at School: A Sense of Belonging and Participation (results from PISA 2000)* (OECD, France, 2003) at 55; K L McLaren *Tough is not Enough-Getting Smart about Youth Crime* (Ministry of Youth Affairs, Wellington, June 2000) at 31.

<sup>4</sup> Above n 2.

<sup>5</sup> Above n 2.

honesty and emotional bonding are therefore at higher risk of developing unchecked anti-social tendencies.<sup>6</sup>

Association with an anti-social peer group can have a negative impact on a child by increasing the likelihood of later youth offending.<sup>7</sup> This is especially relevant where the child has a lack of effective parental monitoring, poor communication skills, a lack of engagement with school and a lack of pro-social models.<sup>8</sup> The effect of an anti-social peer group on overall offending prevalence and frequency is significant;<sup>9</sup> however, when any one of the abovementioned positive factors are present, involvement with anti-social peers loses much of its power. Although a child's peer group is an important pillar for positive development, "protective factors" in the form of support provided through the child's school, family or community can effectively counter the negative effects of anti-social peer involvement.<sup>10</sup>

It is unsurprising that children and young people living in communities struggling with poverty, crime and high-drug availability are more likely to offend than those who are not.<sup>11</sup> Child neglect rises as poverty increases, and with high rates of child neglect come high rates of youth offending.<sup>12</sup> It is not the state of the community directly that appears to have a negative effect on youth offending rates, rather the stress placed on parents living in such an environment. Community economic and social pressures result in interrupted parenting patterns, thereby rendering children more at-risk of developing anti-social tendencies and associating with an anti-social peer group.<sup>13</sup> Children living in a community that has adequate resources and support networks are more likely to be exposed to pro-social role models,

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<sup>6</sup> Craig Dowden and D. A. Andrews "Does family intervention work for delinquents?: Results of a meta-analysis" (2003) 45(3) CJCCJ 327.

<sup>7</sup> Per-Olof H. Wikstrom and David A. Butterworth *Adolescent Crime* (Routledge, 2013).

<sup>8</sup> Above n 6.

<sup>9</sup> Above n 7.

<sup>10</sup> K L McLaren *Tough is not Enough-Getting Smart about Youth Crime* (Ministry of Youth Affairs, Wellington, June 2000) at 29.

<sup>11</sup> Don Weatherburn and Bronwyn Lind "Poverty, Parenting, Peers and Crime-Prone Neighbourhoods" (Trends and Issues paper, Australian Institute of Criminology, 1998) at 5: it has been found that over 50% of poorly supervised youth living in crime-prone areas are involved in crime, compared with 33% living in neighbourhoods that are not crime-prone. This figure suggests that community and subsequent parenting factors interact to increase likelihood of youth offending.

<sup>12</sup> Above n 10 at 30.

<sup>13</sup> Above n 10 at 30. See also Weatherburn and Lind "Poverty, Parenting, Peers and Crime-Prone Neighbourhoods" (Trends and Issues paper, Australian Institute of Criminology, 1998) at 2.

providing a positive buffer against youth offending risk factors present in other facets of the child's life.<sup>14</sup>

The aforementioned pillars of child and adolescent development (family, peers and community) constitute a significant source of risk factors for youth offending. Positive family relationships, a pro-social peer group and a supportive community each contribute to a reduction in risk of later youth offending. However, the family sphere is intensely private, a child's peer group is near impossible to dictate and a community that is suffering from poverty and hardship cannot easily be transformed in to one that is strong enough to support its most vulnerable members. Public schools, on the other hand, provide a unique opportunity for systematic and nationwide intervention. Up to 80% of youth appearing in the Youth Court are not formally engaged in education, and police statistics indicate that 25% of youth offending takes place within school hours.<sup>15</sup> Although ensuring the continued engagement of children in school will not solve the problem of youth offending on its own, it has the potential to make a significant impact.<sup>16</sup>

### *School*

Engagement in education manifests itself both behaviourally and psychologically, emphasising the importance of both participation in school and the sense of belonging or attachment that often results.<sup>17</sup> This reflects Kaye McLaren's Ministry of Youth Affairs' review on what works to reduce youth offending; it is not academic achievement that has the greatest positive impact on youth offending, rather the simple act of *participating* in school.<sup>18</sup> Similarly, the Dunedin longitudinal study has found that adolescent social connectedness is a better predictor of adult wellbeing than academic achievement.<sup>19</sup> A psychologist's study regarding the prediction of university success in children also found that a test assessing

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<sup>14</sup> Above n 6.

<sup>15</sup> Above n 2 (Becroft).

<sup>16</sup> Above n 2 (Becroft).

<sup>17</sup> Jon Douglas Willms *Student Engagement at School: A Sense of Belonging and Participation (results from PISA 2000)* (OECD, France, 2003).

<sup>18</sup> Above n 7 at 31.

<sup>19</sup> Craig A. Olsson and others "A 32-Year Longitudinal Study of Child and Adolescent Pathways to Well-Being in Adulthood" (Research paper, J Happiness Stud, 2013) at 1069.

“strength of character” was three times more successful than assessing IQ.<sup>20</sup> Mere participation in a school environment provides children and adolescents with the opportunity for social inclusion, a positive sense of self, and a sense of belonging – all of which constitute protective factors against anti-social behaviour and criminal offending.<sup>21</sup> Providing children with the support they need to actively participate in school ensures the behavioural aspect of engagement. The resulting positive factors listed above provide the psychological component, together forming the basis of effective educational engagement.

Engaged students do more than achieve academically (although this is often a welcomed by-product); they also become motivated to expend effort, learn the value in persisting at a task, self-regulate their behaviour towards goals, and enjoy the process of challenging themselves to succeed.<sup>22</sup> The curiosity that results in these learned behaviours applies to activities outside the school; students that are engaged are more likely to seek out extra-curricular activities that lead to success or learning.<sup>23</sup> These students that are cognitively engaged are likely to demonstrate greater interest in academic pursuits and approach challenging tasks with optimism. Setbacks and adversities will be responded to with resilience and energy rather than a sense of failure or self-deprecation.<sup>24</sup> The application of these attitudes to the child’s wider sphere of living constitutes a significant protective factor against adversities in the child’s family, peer group or community.<sup>25</sup>

In addition to the cognitive benefits associated with educational engagement, high self-esteem in children and young people has been found to improve determination and persistence in the face of failure.<sup>26</sup> Conversely, children with low self-esteem seek out anti-social activities as an avenue to enhance their sense of self-worth.<sup>27</sup> Through the peer group that school attendance provides, children and adolescents are able to develop a positive sense

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<sup>20</sup> Paul Tough *How Children Succeed: Confidence, Curiosity, and the Hidden Power of Character* (Arrow Books, Random House Group, 2014) at 72. For the purpose of the study, “strength of character” was said to include: being “conscientious, responsible, insistently orderly, not prone to daydreaming, determined, persevering”.

<sup>21</sup> Above n 3 at 249.

<sup>22</sup> Sandra L. Christenson; Amy L. Reschly; and Cathy Wylie *Handbook of Research on Student Engagement* (Springer, London, 2012).

<sup>23</sup> Above n 1.

<sup>24</sup> Above n 1.

<sup>25</sup> Above n 1 at 16.

<sup>26</sup> Kali H. Trzesniewski and others “Low Self-Esteem During Adolescence Predicts Poor Health, Criminal Behaviour, and Limited Economic Prospects During Adulthood” (2006) 42 Dev. Psychol. 381 at 388.

<sup>27</sup> Above n 26.

of belonging and social inclusion, factors that contribute to strengthened self-esteem.<sup>28</sup> Providing children with the support and encouragement they need to remain engaged in education increases the chance of them developing high self-esteem throughout adolescence, constituting a positive buffer against risks of youth offending.

Prolonged engagement in school offers children and adolescents the opportunity to develop positive social relationships, the ability to face tasks with curiosity, optimism and persistence and increased levels of self-esteem. Additionally, school engagement can provide children and adolescents with the sometimes unexpected experience of having an adult figure take them seriously, believe in their abilities and challenge them to improve themselves.<sup>29</sup> This helps foster perseverance and focus: qualities that children will develop as infants if they are exposed to a supportive and attentive family environment, but will miss out on if their family environment is lacking in support.<sup>30</sup>

The characteristics supported through school engagement are essential tools of development, equipping children with the life-skills necessary to overcome adverse situations and respond constructively to negative influences in their family, peer group or community. Public schools in New Zealand are largely controlled and provided for by the State.<sup>31</sup> Although it may be difficult to intervene effectively in a child's family, peer group or community, ensuring the continued engagement of children in school is well-within the State's control. In order to understand what is required by the State to ensure engagement in school, it is necessary next to explore the varied causes of *disengagement*.

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<sup>28</sup> Above n 1.

<sup>29</sup> Above n 20 at 120 and 121.

<sup>30</sup> Above n 20 at 120 and 121.

<sup>31</sup> See for example section 60A Education Act 1989 which gives the Minister the power to publish "national education guidelines".

## CHAPTER TWO: DISENGAGEMENT

There are a multitude of reasons why a child may disengage from school. This chapter will consider language difficulties (including dyslexia), poorly managed or understood behavioural problems and physiological impairments (predominantly hearing problems). The concept of youth offenders displaying a high prevalence of these conditions is not new.<sup>32</sup> This chapter will be focusing on the causes of this connection, with specific attention given to the effect on school engagement and the critical importance of early intervention.

The connection between learning and behavioural disabilities and youth and adult offending is difficult to ignore. In the United Kingdom, it is estimated that 1% of the general population suffer from a speech, language or communication problem.<sup>33</sup> However, a Young Offenders Institution in Scotland found that at least 10% of screened offenders had significant problems with speech, language or communication.<sup>34</sup> In the New Zealand context, youth with Attention-Deficit/Hyperactivity Disorder (ADHD) and dyslexia are overrepresented in the youth justice system by 80% (with ADHD affecting approximately between 2 and 5% of the general child population of New Zealand<sup>35</sup>).<sup>36</sup> The question thus becomes not whether youth offenders have learning and behavioural difficulties, but rather what impact have these difficulties had on their development and subsequent level of school engagement? In the following discussion it will become apparent that the impact of learning and behavioural difficulties on school engagement is a significant contributory factor of later youth offending.

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<sup>32</sup> See for example Terrie E. Moffit and Phil A. Silva "Self-Reported Delinquency, Neuropsychological Deficit, and History of Attention Deficit Disorder" (1988) 16 JACP 553; and Karen Bryan "Preliminary study of the prevalence of speech and language difficulties in young offenders" (2004) 39 Int. J. Lang. Comm. Dis 391.

<sup>33</sup> Above n 32 (Bryan) at 391.

<sup>34</sup> Above n 32 (Bryan) at 392.

<sup>35</sup> Ministry of Health *New Zealand Guidelines for the Assessment and Treatment of Attention-Deficit/Hyperactivity Disorder* (Ministry of Health, July 2001) at 5.

<sup>36</sup> Principal Youth Court Judge *Court in the Act: The Youth Court; Children, Young Persons and their Families Act 1989; and topical issues arising for NZ Youth Justice practitioners* (Newsletter, No. 9, 2003) p 6.

## *Language Difficulties*

Language difficulties experienced by primary-school aged children include (but are not limited to) oral language competence<sup>37</sup>, auditory processing disorders<sup>38</sup>, and dyslexia<sup>39</sup>. Oral language competence refers to the set of auditory-verbal skills that are usually acquired in a steady, uninterrupted pattern from birth, continuing throughout the various stages of child development.<sup>40</sup> Oral language deficiencies can severely impact upon a child's social cognition; the skills required to be able to recognise cultural and social norms and interpret social cues (such as facial expression and tone of voice).<sup>41</sup> Additionally, oral language competence is vital for children entering the school system, where the transition to literacy often occurs rapidly and with the assumption that children possess the relevant skills required to adapt.<sup>42</sup> Children who are unable to interpret the oral and visual cues of their teachers and peers and struggle to cope with the rapidly increasing skill-set required of them will often externalise their frustration in disruptive and uncooperative behaviour.<sup>43</sup> However, early-years teachers "are not always proficient at identifying children whose oral language skills fall below expected levels".<sup>44</sup> As a result, such children are often labelled and subsequently managed as "problem children" with their underlying oral language deficits going unnoticed and unsupported.<sup>45</sup> Such an approach leads to an increased likelihood of disengagement from school, substantially increasing the likelihood of these "problem children" entering the youth justice system.<sup>46</sup>

Auditory processing disorders (APD) exhibit symptoms such as difficulties following or understanding verbal instructions, poor attention, high distractibility, and communication,

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<sup>37</sup> Pamela Snow and Martine Powell "Youth (In)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence" (2012) 435 Trends & Issues 1.

<sup>38</sup> Melanie A. Ferguson and others "Communication, Listening, Cognitive and Speech Perception Skills in Children with Auditory Processing Disorder (APD) or Specific Language Impairment (SLI)" (2011) 54 JSLHR 211.

<sup>39</sup> William E. Tunmer and James W. Chapman "Language-Related Differences between Discrepancy-Defined and non-Discrepancy-Defined Poor Readers: A Longitudinal Study of Dyslexia in New Zealand" (2 August 2006) Wiley Interscience [www.interscience.wiley.com](http://www.interscience.wiley.com).

<sup>40</sup> Above n 37 at 1.

<sup>41</sup> Above n 37 at 2.

<sup>42</sup> Above n 37 at 2.

<sup>43</sup> Above n 37 at 2.

<sup>44</sup> Above n 37 at 3.

<sup>45</sup> Above n 37 at 2.

<sup>46</sup> Above n 37 at 3.

language, reading and academic difficulties.<sup>47</sup> These symptoms tend to be exacerbated in degraded listening conditions (such as a noisy classroom) and also have a detrimental effect on the child's cognitive abilities.<sup>48</sup> In a study measuring (among other things) cognition, language and reading, and speech intelligibility, children with APD scored significantly poorer results than those of their non-APD counterparts.<sup>49</sup> Due to a significant overlap with conditions such as dyslexia and autism spectrum disorder, children with APD tend to be diagnosed with different conditions depending on the particular referral route taken.<sup>50</sup> If a child with APD is diagnosed instead with dyslexia, the management and support offered for their condition will potentially be targeting the wrong area, leaving the real cause of their difficulty unsupported. Similar to the oral language deficiencies discussed above, the lack of support for a child with APD increases the risk of the child disengaging from school as a result of frustration and unmet needs.

Dyslexia is a learning disability that impairs a child's reading ability and leads to a child's reading level being significantly lower than expected, despite the child often being of normal intelligence.<sup>51</sup> It was not until 2007 that dyslexia was formally recognised by the New Zealand government as a specific learning disorder.<sup>52</sup> In the context of New Zealand's education system, children are expected to learn to read by reading, with minimal attention being given to word-level skills and strategies.<sup>53</sup> This approach was used as a justification for not requiring specific recognition and support for children with dyslexia: it was believed that the holistic approach to teaching would, by default, take different reading abilities into account, regardless of the cause of a child's reading difficulties.<sup>54</sup> However, a study conducted in 2006 found that poor readers were not having their needs adequately addressed by this general teaching approach.<sup>55</sup> Since the recognition of dyslexia in 2007, whether or not a student receives support still appears to be dependent on the particular teacher, parent or school's understanding (or lack thereof) of dyslexia.<sup>56</sup> Students that *do* receive support have

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<sup>47</sup> Above n 38 at 212.

<sup>48</sup> Above n 38 at 212.

<sup>49</sup> Above n 38 at 219.

<sup>50</sup> Above n 38 at 212.

<sup>51</sup> Anonymous "What is dyslexia?" (2009) 59 J Pract Nurs 27 at 27.

<sup>52</sup> Linda Rowan "Learning with dyslexia in secondary school in New Zealand: What can we learn from students' past experiences?" (2010) 15 Australian Journal of Learning Difficulties 71 at 71.

<sup>53</sup> Above n 39 at 43.

<sup>54</sup> Above n 39 at 44.

<sup>55</sup> Above n 39 at 61.

<sup>56</sup> Above n 52 at 75.

reported feeling singled out or patronised through the support systems put in place.<sup>57</sup> Such a haphazard and non-uniformed approach poses a risk of children suffering from dyslexia developing poor self-esteem, a risk factor for school disengagement and subsequent anti-social behaviour as discussed in chapter one.<sup>58</sup>

### *Behavioural Problems*

Misunderstood and poorly managed behavioural problems can lead children to feel isolated from the school community, increasing the risk of disengagement. Behavioural problems in primary-school aged children can be a result or manifestation of varying causes or conditions, including the experience of early trauma, autism spectrum disorder and ADHD.

The experience of early childhood trauma profoundly affects the subsequent development of a child's brain, suppressing the functioning of the prefrontal cortex.<sup>59</sup> The prefrontal cortex is the part of the brain that is responsible for executive functioning – it provides us with the ability to deal with confusing or unpredictable situations or information. For example, the fact that the letter “C” is pronounced like a “K” except when it is pronounced like an “S”.<sup>60</sup> The ability to understand such information is linked to cognitive impulse control, which in turn is connected to emotional impulse control (eg the ability to refrain from punching a child who just took your favourite toy).<sup>61</sup> For children who have been subjected to trauma or stress early in life (such as abuse or neglect), the prefrontal cortex is overrun by the body's stress response system, and thus they are unable to process the complex academic and social interactions required of them by the school system. The ongoing physiological effects of trauma manifest themselves as behavioural issues, presenting a risk that such children will be dealt with as “problem children”, with their underlying needs unrecognised and unsupported.

Autism spectrum disorder covers a wide range of behavioural and social complexities, but most notably is found in children displaying persistently disruptive behaviour.<sup>62</sup> In the United Kingdom in 2010, a study to confirm the hypothesis that disruptive school children may have

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<sup>57</sup> Above n 52 at 76.

<sup>58</sup> Above n 52 at 72.

<sup>59</sup> Above n 20 at 93.

<sup>60</sup> Above n 20 at 93.

<sup>61</sup> Above n 20 at 93.

<sup>62</sup> R. Donno and others “Social communication deficits in disruptive primary-school children” (2010) 196 BJ Psych 282 at 282.

undetected autism spectrum disorders was conducted. This assessed the neurocognitive skills, communication abilities, attention and executive function and social cognition of children from 56 primary schools in Hackney, London.<sup>63</sup> The study found that a high proportion of children had social communication impairments and that 35% of them suffered from an undetected autism spectrum disorder.<sup>64</sup> The authors considered it likely that “social communication difficulties had a causal role in the development of disruptive behaviour” and that such communication deficits were often overlooked.<sup>65</sup> It was emphasised that interventions for disruptive behaviour were unlikely to be successful if the communication needs of these children were not acknowledged. Consideration that a child displaying disruptive behaviour may have an underlying neurodevelopmental condition was considered an important step in addressing the needs of this group, and that a collaborative approach between various child support services was necessary.<sup>66</sup>

Children suffering from ADHD typically find it difficult taking turns, talk excessively, often appear not to be listening and tend to interrupt and intrude on others’ games, conversations, or classroom discussions.<sup>67</sup> The prefrontal cortex of children with ADHD has been found to be of decreased size, negatively affecting response inhibition in a similar way to that of children who have suffered early childhood trauma discussed above.<sup>68</sup> As a result of these deficits, ADHD children are more likely to experience behavioural problems that lead to their suspension or expulsion from school, constituting a predictive element of later youth offending.<sup>69</sup>

In New Zealand, teachers play a crucial role in referral, diagnosis, treatment and monitoring of children with ADHD.<sup>70</sup> Teachers’ knowledge of ADHD (its symptoms, prevalence and systems of support) is therefore crucial in ensuring children with ADHD receive appropriate support. A study analysing the response rates of 84 teachers randomly selected throughout schools in New Zealand found that most teachers had received no pre-service or in-service

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<sup>63</sup> Above n 62 at 283.

<sup>64</sup> Above n 62 at 287.

<sup>65</sup> Above n 62 at 287.

<sup>66</sup> Above n 62 at 288.

<sup>67</sup> D. Daley and J. Birchwood “ADHD and academic performance: why does ADHD impact on academic performance and what can be done to support ADHD children in the classroom?” (2010) *Child: Care, Health and Development* 455 at 455.

<sup>68</sup> Above n 67 at 455.

<sup>69</sup> Above n 67 at 457.

<sup>70</sup> Alia Dilaimi “New Zealand Primary School Teachers’ Knowledge and Perceptions of Attention-Deficit/Hyperactivity Disorder (ADHD)” (Master in Educational Psychology Thesis, Massey University, 2013) at ii.

training regarding ADHD and 90% wanted more training.<sup>71</sup> A weak understanding of ADHD may lead to unsuccessful intervention attempts (such as disciplinary action focusing on disruptive behaviour rather than acknowledging and supporting the underlying cause of the child's distraction).<sup>72</sup> Children with unsupported impulsivity issues stemming from ADHD tend to be rejected by their peers, befriending "other unpopular adolescents and mak[ing] irrational or rash decisions about peer group, illegal undertakings and other serious life situations [...]".<sup>73</sup> Additionally, unsupported ADHD can lead to other mental health problems such as low self-esteem, anxiety and depression, all of which increase the risk of a child disengaging from school and engaging in anti-social behaviours.<sup>74</sup>

### *Physiological Impairments*

In a prisoner health survey conducted in New Zealand in 2006, it was found that one in three prisoners had difficulty hearing in group conversations.<sup>75</sup> This statistic indicates that there perhaps exists a causal connection between undetected hearing problems and criminal offending. Children at primary school suffering from undiagnosed or untreated hearing problems are at risk of impaired language development which in turn affects intelligence, reading attainment and behavioural problems.<sup>76</sup> Classrooms are typically auditory-verbal environments and depend upon the ability of children being able to hear and understand speech.<sup>77</sup> Even mild hearing problems (such as those caused by a build-up of ear wax) that are undetected can have a significant and ongoing impact on children in the early years of primary school, putting them at risk of falling behind their peers and suffering from low self-esteem.<sup>78</sup>

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<sup>71</sup> Above n 70 at ii.

<sup>72</sup> Above n 70 at 7.

<sup>73</sup> Above n 70 at 27.

<sup>74</sup> Above n 70 at 28.

<sup>75</sup> Kirstin Lindberg *Results from the Prisoner Health Survey* (Ministry of Health, Public Health Intelligence Occasional Bulletin No. 37, 2006) at 62.

<sup>76</sup> Phil A. Silva and others "Some Audiological, Psychological, Educational and Behavioural Characteristics Of Children With Bilateral Otitis Media With Effusion: A Longitudinal Study" (1986) 9 *J Learn Disabil* 165 at 168.

<sup>77</sup> Mohd Khairi Md Daud and others "The effect of mild hearing loss on academic performance in primary school children" (2010) 74 *Int J Pediatr Otorhinolaryngol* 67 at 69.

<sup>78</sup> Above n 77 at 69.

### *Importance of Early Intervention*

The sample of reasons for children's disengagement from school discussed in the preceding paragraphs presents a relatively bleak outlook. However, they share a common feature that has the potential to be utilised by the government in preventing their ongoing detrimental effects. These various language, behavioural and physiological problems generally start making their biggest impact and become most visible upon school entry. It may not be readily apparent that a child suffering from an oral language deficit or dyslexia has a learning disability until they are thrust in to an environment that wholly depends upon those skills. Similarly, disorders that manifest in behavioural problems may be dismissed as sibling rivalry at home, but become more glaringly obvious when viewed in the context of school and peer relations. Catching these problems early and providing the child with the support they need has the potential to prevent them from slipping further behind their peers, increasing the risk of disengagement with school.<sup>79</sup> However, if left unacknowledged or unsupported for too long, the risk of a child already having disengaged from school when interventions are attempted will increase.

In 2001, the Ministry of Education commenced a pilot programme aimed at increasing the educational achievement of students by improving access to in-school health assessment and care.<sup>80</sup> The schools involved (known as Achievement in Multi-cultural High Schools (AIMHI)) were decile one year 9-13 schools, the students typically coming from the most deprived areas in New Zealand.<sup>81</sup> In a 2008 evaluation of the project by the Ministry of Health, the results were tentatively very positive.<sup>82</sup> The students at AIMHI schools generally had higher levels of academic achievement and lower levels of truancy than their non-AIMHI decile one peers.<sup>83</sup>

This project represents a step in the right direction for the New Zealand government in addressing the needs of vulnerable youth in need of support. However, with AIMHI targeting

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<sup>79</sup> Sue Goode, Martha Diefendorf and Siobhan Colgan "The Importance of Early Intervention for Infants and Toddlers with Disabilities and their Families" (2011) The National Early Childhood Technical Assistance Centre at 1.

<sup>80</sup> Ministry of Health *Evaluation of Healthy Community Schools Initiative in AIMHI Schools* (Ministry of Health, Report, 2009) at xiii.

<sup>81</sup> Above n 80 at xiii.

<sup>82</sup> Above n 80 at 11.

<sup>83</sup> Above n 80 at 11.

only secondary schools, there remains a high risk that adolescents will have already disengaged from school by the time they reach year 9 (13 years of age). This problem was acknowledged by Susan Baragwanath of the New Zealand parole board; during an investigation of the right to education of youth offenders, Baragwanath presented a snapshot of four young prisoners in New Zealand.<sup>84</sup> Of the four, three were truanting by the age of 10 years and one had already left school.<sup>85</sup> This small sample by no means tells the story of every youth offender in New Zealand. However, it does suggest that initiatives such as AIMHI need to be implemented as early as possible so that children can receive the support they need well before they become at risk of disengaging.

The Vulnerable Children Act 2014, the Children, Young Persons and their Families Act 1989 and the Education Act 1989 have created a legal landscape in New Zealand that purports to place children's welfare at the centre of the nation's concerns. The United Nations Convention on the Rights of the Child similarly emphasises the importance of children's welfare. The statutory and international law obligations of New Zealand therefore provide the context in which it can be argued that implementing initiatives such as AIMHI early is not only desirable but is required of the State by law.

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<sup>84</sup> Susan Baragwanath "Boys in Prison: What about their education?" (IPS Criminal Justice Forum, February 26 2009).

<sup>85</sup> Above n 84.

## CHAPTER THREE: NEW ZEALAND'S LEGISLATIVE CONTEXT

The New Zealand State purports to be committed to protecting the welfare and interests of the nation's most vulnerable members and has enshrined this commitment in statute.<sup>86</sup> The Vulnerable Children Act 2014, the Children, Young Persons and their Families Act 1989 and the Education Act 1989 all reinforce this concept and provide a solid foundation for the existence of a legal obligation on the State to provide support to children at risk of disengagement from school. The explicit provision of a right to education for all children in the Education Act 1989 coupled with a legislative focus on protecting the positive and successful development of children in the other abovementioned statutes combine to articulate a legal obligation upon the State to ensure these admirable goals are achieved in practice. For the purpose of this dissertation the Education Act 1989 is most pertinent; however the other statutes mentioned provide additional support for the contention that currently the State of New Zealand is not adequately discharging its obligation to provide support and lessen the risk of youth offending through child disengagement from school.

### *Education Act 1989*

Section 3 of the Education Act 1989 states that it is a right of every New Zealand child between the ages of five and 19 to be enrolled in a State school and receive free education.<sup>87</sup> This provision acknowledges that education is not only a fundamental right in itself but is also a vehicle through which other human rights are realised.<sup>88</sup> As discussed in chapter one, receiving education and participating in the school environment enables children and young people to develop a sense of self-worth and respect for others.<sup>89</sup> Additionally, education is the primary vehicle through which economically and socially disadvantaged children can lift themselves out of poverty, constituting a protective factor against youth offending by diminishing the power of a struggling or disadvantaged community environment. Unfortunately, the children most in need of the protection and enhancement of the right

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<sup>86</sup> See for example the Children, Young Persons and their Families Act 1989 s 6.

<sup>87</sup> Education Act 1989 s 3.

<sup>88</sup> Human Rights Commission *Disabled Children's Right to Education* (Human Rights Commission, 2009) at 3.

<sup>89</sup> Above n 88 at 3.

enshrined in section 3 are not receiving the support that is necessary to enable them to translate their right to education in to a reality.

Children with disabilities (such as those discussed above in chapter two) are equally entitled to enrol in state schools and receive free education, as stipulated and emphasised in section 8.<sup>90</sup> Section 9 goes on to provide for the circumstances in which a particular child's needs are such that additional support is required. In that instance, the chief executive of the Ministry of Education shall, with agreement of the child's parents, direct that the child be enrolled in a particular school or receive particular additional support.<sup>91</sup> This provision further acknowledges the importance of the right to education and explicitly stipulates that it extends to all children, including those requiring additional support. Despite this statutory assurance, in 2009 the Human Rights Commission found that disabled children and young people were being denied their right to education.<sup>92</sup>

The Commission identified that in the period since 2002, over half of the complaints and inquiries received were on behalf of children with Autism spectrum disorder or ADHD.<sup>93</sup> The complaints related to four broad categories: problems surrounding enrolment (with schools resisting enrolment of children with such disabilities); children being excluded from school (as a result of behavioural problems stemming from their disabilities); funding or the need for special assistance; and the inability of disabled students to participate fully in the wider school environment.<sup>94</sup> The Commission considered these broad categories of complaints and noted that "typically when a disabled child faces barriers accessing or fully participating in education it has far-reaching effects not only for the child but for the family as a whole".<sup>95</sup> This acknowledgment ties back to the connection discussed in chapter one regarding the four fundamental pillars of child and adolescent development. If a child's family is struggling with the pressures of poverty, their child's inability to access and interact with state education will constitute an additional source of pressure for the family, further weakening that pillar and increasing the risk of youth offending.

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<sup>90</sup> Education Act 1989 s 8.

<sup>91</sup> Education Act 1989 s 9.

<sup>92</sup> Above n 88 at 30. The Commission noted specifically that education was not sufficiently available for disabled children and that their participation rates signalled problems with the accessibility of education. Additionally, the provision of education for disabled students did not promote acceptability and was not adequately adaptable.

<sup>93</sup> Above n 88 at 7.

<sup>94</sup> Above n 88 at 7.

<sup>95</sup> Above n 88 at 9.

## *Interpreting the Right to Education*

The meaning and scope of the right to education was broken down by the Commission into four key markers: availability, accessibility, acceptability and adaptability.<sup>96</sup> The Commission considered that for disabled children, these markers were not being met. The availability of education for disabled children was being negatively impacted by an insufficient number of people with specialist education training; the participation rates of disabled children was disproportionately low, reflecting problems with accessibility; the school environment was not always a safe one for disabled children, who are more susceptible to bullying and social exclusion; and the provision of education was not sufficiently adaptable, with disabled students achieving disproportionately low results.<sup>97</sup> In an effort to improve disabled children's right to education and discharge their obligation under the Education Act 1989, the New Zealand State implemented Special Education 2000 ("SE 2000") in the mid 1990's, an initiative aimed at educational inclusion for all.<sup>98</sup>

SE 2000 involved several components aimed at improving access to education for disabled children, including the Ongoing and Reviewable Resourcing Scheme (ORRS), the Severe Behaviour Initiative (SBI), the Severe Language Initiative (SLI) and the Special Education Grant (SEG).<sup>99</sup> ORRS guarantees funding for students with ongoing high or very high needs.<sup>100</sup> SBI provides resource teachers and behaviour support teams to help manage children with challenging behaviours as a result of their disabilities.<sup>101</sup> SLI incorporates training programmes for teachers and allows for the possibility of a speech-language therapist to work in the classroom.<sup>102</sup> SEG is a bulk funded grant given to each school based on decile rating and roll number. How the grant is then utilised is at the particular school's discretion.<sup>103</sup> Similar to the AIMHI initiative discussed in chapter two, SE 2000 makes some attempt to acknowledge the State's legal obligation to provide support to children struggling to remain engaged in school; however, its deficiencies leave a lot to be desired.

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<sup>96</sup> Above n 88 at 9.

<sup>97</sup> Above n 88 at 9.

<sup>98</sup> E J Ryan "Failing the System? Enforcing the Right to Education in New Zealand" (2004) 35 VUWLR 735 at 740.

<sup>99</sup> Above n 98 at 741.

<sup>100</sup> Above n 98 at 741.

<sup>101</sup> Above n 98 at 741.

<sup>102</sup> Above n 98 at 742.

<sup>103</sup> Above n 98 at 742.

The definition for “high or very high” needs is incredibly narrow, and parents must provide extensive written applications to be considered for ORRS.<sup>104</sup> The funding criteria are inflexible, which can lead to schools acting specifically to bring the child’s behaviour within the criteria (for example, a suspended child is likely to qualify over a child displaying the same disruptive behaviours but who has not yet been formally suspended).<sup>105</sup> Additionally, SEG is allocated regardless of the *actual* number of special needs students present at the particular school. Thus, a school well-known for its inclusive and effective special-needs environment is likely to attract more special-needs students, but will not necessarily be given additional funding to adequately provide for the greater number of students requiring support.<sup>106</sup>

These problems with this well-intentioned initiative were outlined and discussed in *Attorney-General v Daniels* in 2003.<sup>107</sup> In *Daniels*, a group of concerned parents were bringing claims that the SE 2000 scheme infringed upon their children’s right to education.<sup>108</sup> The High Court found that there was indeed a justiciable right to education, and that section 8 conferred a substantive right which the State was under obligation to provide.<sup>109</sup> However, the Court of Appeal held that there is no general right to education enforceable by individual students, rather the rights are “essentially those specifically established by and under the legislation which [...] do in themselves provide for regularity and system and are designed to ensure appropriate quality”.<sup>110</sup> The Court of Appeal reasoned that any right for education to be “regular and systematic” (as advanced by Baragwanath J in the High Court) was met by statutory requirements, for example the requirement for schools to be open during set times.<sup>111</sup> Thus an acknowledgment of the right did not require an “all or nothing” approach contended for by Baragwanath J, rather the Court of Appeal could accept a justiciable right to education without accepting a substantive right for each individual child. In other words, the right to education is procedural only and is provided for by the State simply through enacting appropriate legislation.

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<sup>104</sup> Above n 98 at 743.

<sup>105</sup> Above n 98 at 744.

<sup>106</sup> Above n 98 at 744.

<sup>107</sup> [2003] 2 NZLR 742.

<sup>108</sup> Above n 107 at [3].

<sup>109</sup> Above n 107 at [2].

<sup>110</sup> Above n 107 at [83].

<sup>111</sup> Above n 107 at [82].

The reasoning of the Court of Appeal wholly fails to acknowledge the concerns espoused by Baragwanath J, that the statutory language used in the Education Act 1989 requires the authorities to evaluate the *particular needs* of each individual student. If the right to education is met by statutory requirements stipulating the regulatory framework of schools, students who are unable to access education *in fact* will have no remedy or recourse; their right to education is void of substance under the Court of Appeal's interpretation.

The interpretation in *Daniels* directly conflicts with the decision by the House of Lords in *Phelps v Hillingdon London Borough Council*.<sup>112</sup> In this case, the House of Lords held that there was a duty on education authorities to assess and respond to individual students' needs.<sup>113</sup> The House of Lords justified their conclusion in this case by emphasising that a failure to fulfil the duties by an authority "either generally *or in a particular case*" could have a serious effect on the particular child's education, well-being and future life.<sup>114</sup> This reasoning acknowledges the importance of a right to education being interpreted substantively, in order to ensure individual children are *in fact* receiving the education guaranteed to them by the relevant statutory provisions.

The Court of Appeal in *Daniels* distinguished *Phelps* due to the fact that *Daniels* involved a group claim.<sup>115</sup> However, this distinction is superficial; although *Daniels* was a group claim it concerned the substantive rights of individual students. By interpreting the right to education so narrowly, the Court of Appeal has rendered it virtually unenforceable. In the context of special education this carries a potentially huge social cost.<sup>116</sup>

The Education Act 1989 explicitly confers a right to education for all New Zealand children. This right imposes a correlative positive obligation on the State to provide such education. In the case of children with disabilities requiring additional support, this obligation is acknowledged by the statute. Although SE 2000 has been reviewed since the Commission's report, the most substantial deficiencies have not been addressed.<sup>117</sup> The Court of Appeal's narrow interpretation in *Daniels* is wholly inconsistent with the recognised importance of the

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<sup>112</sup> [2000] 3 WLR 776 (HL).

<sup>113</sup> Above n 112 at 666.

<sup>114</sup> Above n 112 at 651.

<sup>115</sup> Above n 107 at [67].

<sup>116</sup> Above n 98 at 767.

<sup>117</sup> The criteria for receiving ORRS are still incredibly narrow. See Ministry of Education "Ongoing Resourcing Scheme criteria" (10 June 2015) Ministry of Education [www.minedu.govt.nz/NZEducation/EducationPolicies/SpecialEducation/ServicesAndSupport/OngoingResourcingScheme/ApplyingforORS/ORSCriteria.aspx](http://www.minedu.govt.nz/NZEducation/EducationPolicies/SpecialEducation/ServicesAndSupport/OngoingResourcingScheme/ApplyingforORS/ORSCriteria.aspx).

right to education as well as the interpretation proffered by the House of Lords in *Phelps*. Additionally, the wider statutory environment of New Zealand supports the contention that the current initiatives of the State fall well short of discharging its obligation to provide support to children at risk of disengaging from school.

### *Children, Young Persons and their Families Act 1989*

The Children, Young Persons and their Families Act 1989 (CYPTF Act) section 4 states that its object is to promote the wellbeing of children, young persons and their families. The emphasis of this Act is to provide for the stability of the family group as a whole, as well as protecting the welfare of individual children.<sup>118</sup> As previously discussed, a child who is not provided sufficient support to be able to interact with the school environment will constitute an additional source of pressure on his or her family. The stability of the family group is enhanced if the child is provided with a strong support network that improves their ability to remain engaged in the school environment. Included in the vision of the CYPTF Act was that it would be culturally relevant.<sup>119</sup> This acknowledges the fact that each child has unique needs and that a “one size fits all” approach is inappropriate.

It is important to note that the CYPTF Act applies to children “in need of care and protection”. This is defined in section 14(1)(b) as being children whose development<sup>120</sup> is being, or is likely to be, seriously impaired or neglected and that the impairment or neglect is avoidable. To determine what will constitute “serious impairment” of development, the words used in the provision need to be interpreted in light of the statute’s purpose in promoting the wellbeing of children.<sup>121</sup> Children who are suffering from disabilities will often experience impaired academic and social development as a result, as discussed in chapter two. This impairment constitutes a risk of that child disengaging from school and becoming at risk of youth offending. It does not require strained interpretation of the provision to conclude that, bearing in mind the statute’s purpose, the impairment of a child’s development in this case would be considered “serious” pursuant to s 14(1)(b). Section 4 of the CYPTF Act states that a child’s wellbeing must be promoted by “establishing [...]

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<sup>118</sup> Marie Connolly “An Act of Empowerment: The Children, Young Persons and their Families Act 1989” (1994) 24 Br J Soc Work 87 at 90.

<sup>119</sup> Above n 118 at 89.

<sup>120</sup> Or the child’s physical, mental or emotional wellbeing.

<sup>121</sup> Interpretation Act 1999 s 5.

services and facilities [...] that will advance the wellbeing of children”. This section suggests more than mere regulatory provision is required to meet the needs of this group.

### *Vulnerable Children Act 2014*

The purpose of the Vulnerable Children Act 2014 is to “support the Government’s setting of priorities to improve the wellbeing of vulnerable children and ensure that children’s agencies work together to improve the wellbeing of vulnerable children”.<sup>122</sup> The definition of “vulnerable children” is children whose wellbeing is being harmed due to their developmental needs not being met.<sup>123</sup> The Vulnerable Children Act stipulates that improving the wellbeing of children includes “improving their education”.<sup>124</sup> Similarly to the CYPTF Act discussed above, it is difficult to see how the provisions provided by the Vulnerable Children Act do not impose upon the Government an obligation to provide support to children to ensure their continued engagement in school. However, based on the limited interpretation the courts are giving to State obligations (as evidenced in *Daniels*), it appears to be necessary to explicitly stipulate the ambit and content of such State obligation through legislative amendment. The process through which this may be done will be discussed in chapters five and six.

The legislative landscape of New Zealand provides ample evidence for the contention that there exists a legal obligation upon the State to provide support to children to prevent disengagement from school. Although the Court of Appeal’s interpretation in *Daniels* does not reflect this, the Human Rights Commission in New Zealand has recently identified that New Zealand’s international obligations “call in to question the ongoing applicability of [...] the Court of Appeal’s decision”.<sup>125</sup> The ratification of international conventions has had the effect of “increasing obligations”, creating a binding duty on the State to provide and ensure inclusive education.<sup>126</sup> Currently, it appears that providing procedural safeguards is considered adequate. Based on the varied and extensive statutory provisions emphasising the

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<sup>122</sup> Section 4.

<sup>123</sup> Paula Bennett *The White Paper for Vulnerable Children* (Ministry of Social Development, White Paper) at 6.

<sup>124</sup> Vulnerable Children Act 2014 s 6.

<sup>125</sup> Human Rights Commission *United Nations Committee on the Rights of Persons with Disabilities: Day of General Discussion on the Right to Education for Persons with Disabilities* (Human Rights Commission, Submission of New Zealand Human Rights Commission, April 2015) at 11.

<sup>126</sup> Above n 125 at 11.

importance of protecting the welfare of individual children, coupled with an analysis of New Zealand's international obligations discussed in the following chapter, it will be contended that this approach is woefully deficient. As identified by the Human Rights Commission, amending New Zealand's legislation is an essential step in explicitly bringing the law in line with current State obligation.

## CHAPTER FOUR: INTERNATIONAL OBLIGATIONS

International treaties and covenants that have been ratified by New Zealand constitute authoritative sources of law, and must be carefully considered when establishing the scope of any potential legal obligation or duty. The United Nations Convention on the Rights of the Child (CRC or the Convention) was ratified by New Zealand in 1993, four years after it was adopted by General Assembly resolution in 1989.<sup>127</sup> The CRC establishes the minimum standard for children's rights, acknowledging a world-wide shift in thinking to considering children as independent agents deserving of respect and recognition.<sup>128</sup> There are several articles within the CRC that are of particular relevance when discussing the State's obligation to support children at risk of disengaging from school; namely Article two (the right of non-discrimination), Article four (Government protection of rights), Article six (right to life and development), Article 23 (children with disabilities) and Articles 28 and 29 (right to education).<sup>129</sup>

New Zealand's obligation in regards to international law instruments was articulated by Richmond P in *Tavita v Minister of Immigration*.<sup>130</sup> In that case, it was argued that because the relevant legislation did not explicitly confer upon the Minister an obligation to consider international instruments, they were entitled to ignore them.<sup>131</sup> The Court of Appeal held this to be an "unattractive argument", implying New Zealand's adherence to international law instruments has been "at least partly window-dressing". Consequently, it is incumbent upon New Zealand to have due regard to international legal documents and to consider any obligations stipulated therein when making decisions.

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<sup>127</sup> Ministry of Justice "United Nations Convention on the Rights of the Child" Ministry of Justice [www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/united-nations-convention-on-the-rights-of-the-child](http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/united-nations-convention-on-the-rights-of-the-child)

<sup>128</sup> Kathryn Libal and others "The United Nations Convention on the Rights of the Child: Children Can Wait No Longer for their Rights" (2011) 56 Social Work 367 at 367.

<sup>129</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered in to force 2 September 1990).

<sup>130</sup> [1994] 2 NZLR 257 (CA).

<sup>131</sup> Above n 130.

## History

The CRC came to fruition amidst a growing desire to articulate the rights of children throughout the 20<sup>th</sup> Century.<sup>132</sup> The occurrence of two world wars exposed the atrocities suffered by children and fuelled a growing intolerance of the abuse of their vulnerability.<sup>133</sup> Various international conventions and organisations were established to reflect this sentiment. The International Labour Organisation was established in 1919 prohibiting children from working in hazardous conditions; the Declaration of Geneva was formed to protect children's rights in 1924; and in 1959 the United Nations Declaration of the Rights of the Child was established, constituting the immediate precursor to the CRC.<sup>134</sup> These various instruments reflected a shift in understanding from considering children's rights to be solely the right to be *protected* and *looked-after*, to acknowledging the right of the child to act fully and independently in their capacity as an individual.<sup>135</sup> Reformers throughout this period also began to understand the connection between poverty and a lack of realisation of children's rights, and saw the school environment as the ideal platform through which the lives of all children could be improved.<sup>136</sup>

The following discussion includes reference to “children with disabilities” and “disabled children”, in keeping with the language used in the CRC. The Convention itself does not expand upon what constitutes a disability, and the UN Committee on Economic, Social and Cultural Rights has pointed out that an internationally accepted definition of the term is yet to exist.<sup>137</sup> The discussion on what constitutes a disability is extensive enough to justify an entire dissertation in its own right. For the purpose of the current argument, I will be adopting the general definition that disability includes a number of “functional limitations” that may be

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<sup>132</sup> Paula S. Fass “A Historical Context for the United Nations Convention on the Rights of the Child” (2011) 633 AAPSS 17 at 17.

<sup>133</sup> Above n 132 at 23.

<sup>134</sup> Above n 132 at 17.

<sup>135</sup> Above n 132 at 18.

<sup>136</sup> Above n 132 at 20.

<sup>137</sup> Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International, The Hague, 1999) at 382.

medical, physical, intellectual, mental or sensory.<sup>138</sup> This definition encompasses the impairments discussed in chapter two.

### Article two

Article two of the CRC affords children the right of non-discrimination. The elements required to constitute a breach of this right have been broken down in to three distinct components.<sup>139</sup> Firstly, that there has been some sort of distinction (including exclusion, restriction or preference) based on the prohibited grounds listed in article two (which includes distinction based on disability).<sup>140</sup> Secondly, that the distinction impairs the enjoyment of or ability to exercise rights, and thirdly that the impairment is of rights contained within the CRC.<sup>141</sup> The right of non-discrimination contained within the CRC is not constrained or limited by words such as *disproportionate*, *unfair*, or *unreasonable*; interpretation of breach does not require any balancing to be conducted.<sup>142</sup> Element one is a simple factual inquiry, and elements two and three require an analysis of whether the welfare of the rights holder have been negatively affected based on an inability to fully exercise one of the rights listed.<sup>143</sup>

It is important to note that Article two does not require every child to receive the *same* treatment.<sup>144</sup> Such an interpretation would render article one (defining “child” and thereby stipulating who the CRC applies to) superfluous.<sup>145</sup> Instead, Article two requires equality in dignity; similar to the Education Act 1989 discussed in chapter three, the CRC requires State Parties to do more for those who start out with lower levels of wellbeing.<sup>146</sup> To take disability as an example, because disabled children are more likely to disengage from education early (see chapter two), anti-discrimination is not enough. State Parties must take affirmative action, since its ordinary measures have proved insufficient for children suffering from disability, to ensure disabled children have the same level of wellbeing as their non-disabled

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<sup>138</sup> Committee on Economic, Social and Cultural Rights *General Comment 5* (Eleventh Session, 1994) at [3].

<sup>139</sup> Bruce Abramson *A Commentary on the United Nations Convention on the Rights of the Child: Article 2 The Right of Non-Discrimination* (Martinus Nijhoff Publishers, Leiden, 2008) at 19.

<sup>140</sup> Above n 139.

<sup>141</sup> Above n 139.

<sup>142</sup> Above n 139.

<sup>143</sup> Above n 139 at 20-23.

<sup>144</sup> Above n 139 at 31.

<sup>145</sup> Above n 139 at 31.

<sup>146</sup> Above n 139 at 31.

counterparts.<sup>147</sup> Article two requires New Zealand to take positive action to produce equivalent outcomes in wellbeing for disabled children at risk of disengaging from school.

### Article six

One of the most pertinent articles in the CRC is Article six: the right to life, survival and development. Article six has been articulated as one of the CRC's "general principles", and is the only right to be described as "inherent" to the enjoyment of the other rights contained within the Convention.<sup>148</sup> Thus it must be interpreted in a comprehensive manner, its scope stretching far beyond protecting the mere survival of children, and including a positive obligation to ensure successful development.<sup>149</sup> In practice, this translates to an obligation upon State Parties to "create an environment which enables all children [...] to develop their personality, talents and mental and physical abilities to their fullest potential [...]".<sup>150</sup> It has been noted that the successful development of children depends on a large extent to their enjoyment of the right to education enshrined in article 28.<sup>151</sup> It can therefore be readily seen that in order for a child to be able to develop their talents and abilities "to their fullest potential", an environment of support must be established by New Zealand to ensure the continued engagement in school for all children.

### Article 23

The CRC acknowledges the particular vulnerability of disabled children and has provided an article affording special protection in recognition of this vulnerability.<sup>152</sup> Article 23 was included in the CRC to emphasis the idea that disabled children "should be considered as a specific category of children entitled to special treatment".<sup>153</sup> The importance of access to education for disabled children is underlined in this Article, with the Committee on the Rights of the Child expressly requesting State Parties to report on "the measures taken to

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<sup>147</sup> Above n 139 at 76.

<sup>148</sup> Manfred Nowak *A Commentary on the United Nations Convention on the Rights of the Child: Article 6 The Right to Life, Survival and Development* (Martinus Nijhoff Publishers, Leiden, 2005) at 17.

<sup>149</sup> Above n 148 at 14.

<sup>150</sup> Above n 148 at 2.

<sup>151</sup> Above n 148 at 45.

<sup>152</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered in to force 2 September 1990) art 23.

<sup>153</sup> Above n 137 at 378.

ensure adequate training, including specialised training, for those responsible for the care of disabled children, including [...] within relevant institutions”.<sup>154</sup> Schools are an example of relevant institutions in which the care of disabled children has the potential to significantly affect their ability to exercise their rights under the CRC. It is thus incumbent on the New Zealand State to provide support to teachers and educators to ensure disabled children are afforded appropriate care in the school environment.

### Articles 28 and 29

Articles 28 and 29 of the CRC detail the right of all children to education. Article 28 begins by outlining that States Parties, “with a view to achieving this right progressively and on the basis of equal opportunity”, shall “take measures to encourage regular attendance at schools and the reduction of drop-out rates”.<sup>155</sup> This Article therefore expressly conveys an obligation upon States Parties to take positive steps to ensure children remain engaged in education and the school environment. The right to education relates back to the rights conveyed in Article 23, including the obligation on States Parties to ensure that disabled children have “effective access to and *receive*” education.<sup>156</sup> The nature of the wording of this particular obligation stipulates that the right of disabled children to education is more than merely procedural. The right extends to an obligation upon the State to not only provide for mechanisms through which education *can* be attained, but also ensure that such education *is*, in fact, attained by disabled children. This supports the argument outlined in chapter three that the Court of Appeal in *Daniels* was erroneous in concluding the right to education can readily be interpreted as procedural only.

The Convention details the various aims of education in Article 29. Most relevant for the purpose of this dissertation is firstly the aim outlined in Article 29(1)(a): “The development of the child’s personality, talents and mental and physical abilities to their fullest potential”; and secondly the aim outlined in article 29(1)(d): “The preparation of the child for responsible life in a free society, in the spirit of understanding, peace [and] tolerance [...]”. Together, these aims support the argument that States Parties must ensure all children are afforded the opportunity to develop “to their fullest potential” and that they are prepared for a

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<sup>154</sup> Above n 137 at 389.

<sup>155</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered in to force 2 September 1990) art 28(1)(e).

<sup>156</sup> Above n 155 art 23(3).

life of law-abiding acceptance and tolerance for others. Children at risk of youth offending due to disengagement from school are not being prepared for “responsible life in a free society” and are therefore not having their rights under Article 29 of the CRC protected by the State of New Zealand.

#### Article four

The abovementioned rights gain currency only with an understanding of how far the scope of the State’s obligation extends. Article four of the CRC gives an indication of the extent of State Parties’ obligations by including the requirement to undertake all “legislative, administrative, and other measures” to ensure effective implementation of the rights.<sup>157</sup> The inclusion of “other measures” was inserted as an additional, deliberate extra, to emphasise that there will be necessary measures that go beyond legislative and administrative steps; for example the requirement in Article 23 for disabled children to have access to extra assistance.<sup>158</sup> The Committee on the Rights of the Child (the Committee) have made it clear in concluding observations that evidence of “reviewing policies” is paramount to the protection of children’s rights, and is an explicit example of something falling within the ambit of “other measures”.<sup>159</sup>

It is important to note that although deliberately and explicitly wide in scope, Article 4 is subject to a distinct qualification; that with regards to economic, cultural and social rights, State Parties’ “[...] shall undertake such measures to the maximum extent of their available resources [...]”. This qualification is to primarily acknowledge the struggle for resources suffered by developing countries; however, the Committee has made clear that to the “maximum extent” requires prioritisation of children and children’s issues in resource allocation.<sup>160</sup> Additionally, the Committee emphasised in its General Comment no. 5 that “special attention” regarding resource allocation needed to be paid to those children that are most disadvantaged.<sup>161</sup> The Committee has also made it clear that resources include both human and financial resources, and that this may require the allocation of funds to ensure that

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<sup>157</sup> Above n 155 art 4.

<sup>158</sup> Mervat Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child: Article 4 The Nature of States Parties’ Obligations* (Martinus Nijhoff Publishers, Leiden, 2006) at 4.

<sup>159</sup> Above n 158 at 5.

<sup>160</sup> Above n 158 at 28.

<sup>161</sup> CRC Committee *General Comment no. 5: General measures of implementation of the Convention on the Rights of the Child* (Thirty-fourth session, 27 November 2003) at [8].

there are adequate numbers of well-trained professionals to serve as the vehicle through which children's rights are realised.<sup>162</sup>

### The relevance of the United Nations Convention on the Rights of the Child in New Zealand

The discussion of the rights afforded by the CRC above is wholly pertinent to the legal obligations of the New Zealand State, New Zealand having ratified the Convention in 1993.<sup>163</sup> New Zealand's fifth periodic report on the Convention reiterates several reservations New Zealand upholds on its commitment to the CRC; for example, reservation to Article 37(c) regarding the separation of youth and adult offenders.<sup>164</sup> However, none of the reservations pertain to the rights discussed above. New Zealand has unreservedly committed to observing and upholding the right of non-discrimination, the right of development, the rights of disabled children and the right to education.

In pursuance of discharging its obligations under the CRC, New Zealand has promoted various initiatives aimed at recognising the importance of education. The AIMHI initiative was discussed briefly in chapter 2, and although it goes some way to addressing the problems faced by children at risk of disengaging from school, it falls well short of the legal obligation on New Zealand imposed by statute and the CRC. In response to recommendations by the Committee on the Rights of the Child, New Zealand has created the Positive Behaviour for Learning (PB4L) initiative. Although this initiative has produced some positive results, it fails to adequately address the scope of problems leading to disengagement, and poses substantial risk of children falling through the gap.

### *The Achievement in Multi-cultural High-Schools Initiative*

The AIMHI initiative grew out of an increasingly bleak outlook for the youth of Counties Manukau; police reports of increasing levels of youth offending and violent assaults

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<sup>162</sup> Above n 158 at 30.

<sup>163</sup> Karen J Hoare and Denise L Wilson "The Place for Children's Centres for New Zealand Children" (2007) 31(1) Aust Health Rev 123 at 123.

<sup>164</sup> *United Nations Convention on the Rights of the Child: Fifth Periodic Report by the Government of New Zealand 2015* (2015) at 5.

prompted the Government to act.<sup>165</sup> It was acknowledged that students who are supported in school are more likely to achieve better educational outcomes, and that school-based health and social services reduced barriers to learning and increased engagement.<sup>166</sup> Thus in 2001 the initiative began, with the aims of reducing barriers to learning, increasing effective learning time, improving health and social services within schools and gaining greater connectivity and congruency of the school with its community.<sup>167</sup> In furtherance of achieving these aims, AIMHI schools (several low decile secondary schools) were equipped with access for students to health and social service facilities within the school itself.<sup>168</sup> In some schools this meant access to a fully resourced purpose-built centre with reception staff and full- and part-time staff available to cater to students' needs.<sup>169</sup>

The AIMHI initiative has produced positive results: the educational results of AIMHI students compared with students at non-AMHI decile-1 schools are higher and truancy is lower.<sup>170</sup> These results are indicative of increased levels of student engagement. However, currently the initiative only extends to nine secondary schools within the Auckland area and does not include primary schools within its scope at all.<sup>171</sup> This fails to reflect the nationwide extent of the problem of disengaged youth going on to offend and the importance of early intervention as discussed in chapter 2. A child who has struggled with hearing problems for seven years of primary school is highly likely to start disengaging from school well before year 9; as was discussed in chapter 2, youth offenders often will have started truanting from school by the age of 10 or 11. In the context of a legal obligation upon the State to ensure all children (including those with hearing, behavioural or other psychological impediments to learning) develop to their “fullest potential”, an initiative that does not extend to children aged five to twelve years falls woefully short of discharging this obligation.

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<sup>165</sup> Auckland Youth Support Network *Improving Outcomes for Young People in Counties Manukau* (Ministry of Social Development, Ministry of Justice, Ministry of Education, New Zealand Police, Ministry of Youth Development, Counties Manukau District Health Board, 2006) at 3.

<sup>166</sup> Ministry of Health *Evaluation of Healthy Community Schools Initiative in AIMHI Schools* (Ministry of Health, Wellington, October 2009) at iii.

<sup>167</sup> Above n 166 at xiii.

<sup>168</sup> Above n 166 at xvii.

<sup>169</sup> Above n 166 at xvii.

<sup>170</sup> Above n 166 at 11.

<sup>171</sup> “Case Study on engagement in AIMHI schools” (31 July 2014) AIMHI [www.aimhi.ac.nz/news.php?id=23](http://www.aimhi.ac.nz/news.php?id=23).

### *The Positive Behaviour for Learning Initiative*

The PB4L initiative originated from the Taumata Whanonga behaviour summit in 2009 and incorporates several programmes aimed at addressing the root cause of disruptive behaviour in the classroom.<sup>172</sup> The initiative is based on principles that acknowledge the fact that disruptive behaviour is a major impediment to engagement and achievement at school and that addressing the issue demands a response targeted at the wider school environment rather than merely the individual child.<sup>173</sup> “PB4L School-Wide” refers to one of the specific programmes in the PB4L initiative and involves the implementation of a team of representatives from the school who, alongside a Ministry of Education practitioner, are responsible for setting behaviour expectations and teaching behaviour as part of the school curriculum.<sup>174</sup> Another programme involves school referrals to a nominated psychologist who develops an individualised plan with the child and the child’s support network to address continuing and severe behaviour problems.<sup>175</sup>

Despite being a relatively new initiative, the results of PB4L are tentatively positive; an evaluation in 2010 showed that since the implementation of the programmes in 2009, stand-down rates had decreased and the numbers of students staying on at school had significantly increased.<sup>176</sup> Similar to the results of the AIMHI initiative, these results do suggest increased levels of engagement. However, an initiative focusing on behaviour limits its scope to children who are outwardly manifesting their issues, and additionally results in intervention as a form of cure rather than as a preventative measure. As discussed in chapter two, early intervention would more effectively identify children who are at risk of displaying disruptive behaviours, resulting in their specific needs being met before their levels of frustration escalated. Preventative measures (such as the presence in classrooms of primary school teachers well-trained in recognising learning and behavioural disabilities) would result in the implementation of support strategies for children at risk of disengaging rather than reactive measures focused on behaviour that has escalated as a result of unmet needs. Children who suffer early childhood trauma may manifest their struggle outwardly; however, some children

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<sup>172</sup> Ministry of Education *Positive Behaviour for Learning* (Ministry of Education, Update, 2013) at 4.

<sup>173</sup> Above n 172 at 4.

<sup>174</sup> Above n 172 at 14.

<sup>175</sup> Above n 172 at 17.

<sup>176</sup> Above n 172 at 12.

(especially girls) will subconsciously cope with the effects of trauma by dissociating.<sup>177</sup>

Dissociating children may simply appear quieter than their classmates, and will not necessarily attract the attention of teachers for unusual behaviour. As a result, these children may fall through the gaps of initiatives focused on disruptive behaviour, consequently increasing the risk of their disengagement going unnoticed.

In order to comply with the legal obligations imposed by statute and international law, the New Zealand State needs to do more to prevent and counter risks of disengagement by offering effective support to children with additional needs. The initiatives currently in place address some of the elements of the State's obligation, but fail to acknowledge the scope of the issue or the importance of early intervention. Currently, children at risk of disengaging are not being given the opportunity to develop to their "fullest potential" and the New Zealand State is not employing the "maximum extent of their available resources". This deficiency could be remedied through clear and plain legislative amendment to ensure the State's obligations are made explicit. A Bill currently being passed through the Scottish Parliament aims to address a similar issue regarding State obligation by introducing a focus on outcomes and increased accountability. An analysis of this Bill in the following chapter reveals a possible starting point for New Zealand to better address the needs of children at risk of disengaging from school and going on to offend in youth.

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<sup>177</sup> Jennfer Parlee "The Fragmented Child: Disorganised Attachment and Dissociation" (12 April 2013) The Trauma and Mental Health Report <[trauma.blog.yorku.ca/2013/04/the-fragmented-child-disorganised-attachment-and-dissociation/](http://trauma.blog.yorku.ca/2013/04/the-fragmented-child-disorganised-attachment-and-dissociation/)>.

## CHAPTER FIVE: AN INTERNATIONAL FRAMEWORK

The right to education has been grappled with by courts and policy makers world-wide.<sup>178</sup> New Zealand is not unique in its struggle to provide consistent interpretation and application of the legally stipulated right. The varied and conflicting decisions coming out of Europe are testament to this struggle; courts are simultaneously restricting the right based on resources and practical realities<sup>179</sup>, and interpreting it widely, acknowledging the inherent flexibility required in the provision of education.<sup>180</sup> An example of the inconsistent nature of interpretation is discussed below. What has remained constant is the frequency and certainty with which children with special education needs have been found to have been let down by local education providers, government authorities and legislators.<sup>181</sup> In general, reports have found that parents need to be listened to more and systems need to be “more ambitious” for children.<sup>182</sup> Early in 2015, the Scottish Parliament decided to act on these inequalities in outcome by reforming their education legislation. What these reforms will mean in practice can be seen already reflected in the practical educational approach taken by Finland, and together these jurisdictions provide a framework for New Zealand to follow.

### *Interpreting the Right to Education in Europe*

Throughout Europe, courts are attempting to define what a right to education means for both the individuals claiming it and the government responsible for providing it. In some instances, courts are recognising the diversity and complexity of individual students, and holding this needs to be reflected in the provision of education. In *Kjeldsen, Busk, Madsen and Pedersen v Denmark*, the European Court of Human Rights ruled that education needed

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<sup>178</sup> See for example: *Belgian linguistic case (No. 2)* (1968) 1 EHRR 252 where the value of the right to education was analysed; *A v Head Teachers and Governors of Lord Grey School* [2006] UKHL 14 where the subjective nature of the right was affirmed; and *DH v Czech Republic (GC)* no. 57325/00 [2008] ECHR where the issue of discrimination in regards to the direction of special education was discussed.

<sup>179</sup> *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14.

<sup>180</sup> *Irfan Temel and Others v Turkey* no. 36458/02 [2009] ECHR; *Phelps v Hillingdon London Borough Council* [2000] 3 WLR 776 (HL).

<sup>181</sup> Brian Lamb *The Lamb Inquiry: Special Educational Needs and Parental Confidence* (DCSF Publications, Annesley, Nottingham, 2009).

<sup>182</sup> Above n 181 at 1.

to be provided in a pluralistic<sup>183</sup> and objective manner.<sup>184</sup> This case was focused on making clear to the State that “pursuing an aim of indoctrination” through education was forbidden, and the curriculum needed to reflect the diversity of its students. Although this case does not explicitly discuss the right of *access* to education, it indicates an acknowledgment by the courts of the inherently unique nature of individual educational needs, and an obligation to reflect this in school curriculums.

However, in *A v Essex County Council & National Autistic Society (Intervener)* the United Kingdom Supreme Court found that a local education authority taking 18 months to find a placement for a child with special education needs was no breach of the child’s right to education.<sup>185</sup> The Supreme Court reasoned that the right to education was a right of access to the particular education system in place at any given time, and this will only be held to have been denied in cases where the right has been so reduced as to “impair its very essence and deprive it of its effectiveness”.<sup>186</sup> An 18 month delay was not considered by the Court as a denial of the “very essence” of a right to access available education.<sup>187</sup> The two cases discussed thus represent opposite ends of a spectrum and they are not the only ones.<sup>188</sup>

As a result of this uncertainty surrounding the application of the right to education, children with special education needs, those at highest risk of disengaging from school, are consistently obtaining lower educational outcomes than other children.<sup>189</sup> The reports coming out of the United Kingdom (UK) addressing this issue reflect similar sentiments as those espoused in New Zealand.<sup>190</sup> In 2008 the Children’s Legal Centre in the UK analysed the

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<sup>183</sup> *Pluralism* refers to the conviction that various religious, ethnic, racial and political groups and attitudes should co-exist: Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary* (12<sup>th</sup> edition, Oxford University Press, Oxford, 2011) at 1104.

<sup>184</sup> Nos 5095/71, 5920/7 and 5926/72 [1976] ECHR.

<sup>185</sup> [2010] UKSC 33.

<sup>186</sup> Above n 185 at [16].

<sup>187</sup> Above n 185 at [57].

<sup>188</sup> See also *Simpson v UK* no. 14688/89 [1989] ECHR where it was found the withdrawal of funding for specific education provision for a dyslexic child was not a breach of the child’s right to education where general education was still available, and that the right could be realised merely by access to public facilities “which have been created at a given time and the *possibility* of drawing benefit from the education received”; and *Irfan Temel and Others v Turkey* no. 36458/02 [2009] ECHR where it was contrastingly held that suspension from a *particular* university constituted an unreasonable and disproportionate restriction on the students’ right to education, suggesting the right goes further than merely the right to have access to education *in general*.

<sup>189</sup> Above n 181 at 21.

<sup>190</sup> Above n 88 at 9. The Human Rights Commission report for New Zealand found the key markers for access to education for children with special needs were not being met. The Children’s Legal

issue based on the “4S” framework (accessibility, adaptability, availability and acceptability).<sup>191</sup> The report found that there was a lack of suitable education provision for children with special education needs (SEN), and that a flexible continuum of provision should be made available in local authorities.<sup>192</sup> Additionally, it was found that children with SEN were not being properly assessed in terms of the type of provision and support they required, and mainstream schools were not sufficiently adaptable in meeting the needs of SEN children.<sup>193</sup> These deficiencies were negatively affecting the educational outcomes of children with SEN.

### *The Education (Scotland) Bill*

To address these inequalities in outcome, the Scottish Parliament introduced the Education (Scotland) Bill (the Bill) on the 23<sup>rd</sup> March 2015. The Bill aims to “improve educational attainment for all” and incorporates new legislative provisions to place “additional responsibilities on the Scottish government and local authorities [...] to reduce inequalities in outcome”.<sup>194</sup> The Bill recognises the disparities in school engagement between children with SEN or those from low socio-economic areas and other children, and aims to increase engagement by more clearly stipulating what the government’s obligations are. One of the tools with which the Bill aims to achieve this is by providing a legislatively enshrined duty on the government and local education authorities to report on progress every two years.<sup>195</sup> The criteria for assessing “progress” under the Bill refers to an analysis of any “educational benefits” attained by students experiencing inequalities of outcome as a result of steps taken by education authorities.<sup>196</sup> This mandatory reporting requirement avoids the interpretation of the right to education as procedural only, as discussed in previous chapters. By enshrining a duty to report on progress in legislation, the Bill ensures positive state action to produce actual results.

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Centre in the UK analysed the issue with reference to the same key markers, arriving at largely similar conclusions.

<sup>191</sup> The Children’s Legal Centre *The Right to Education in England* (The Children’s Legal Centre, Alternative Report to the Committee on Economic, Cultural and Social Rights, September 2008).

<sup>192</sup> Above n 192 at 3.

<sup>193</sup> Above n 192 at 4 and 5.

<sup>194</sup> Education (Scotland) Bill (explanatory note) at 3 and 4.

<sup>195</sup> Above n 194 at 14.

<sup>196</sup> Education (Scotland) Bill s 4(1)(c).

The reporting requirement for local authorities must include an outline of the steps taken to fulfil their duties, a record of the positive effects the steps have had on the students in their area and the proposed steps and intended benefits for the next two years.<sup>197</sup> Section 4(2) places a similar obligation on Scottish Ministers to report in respect of their duty to reduce inequalities in educational outcome; these reports must be laid before Parliament every two years.<sup>198</sup> The importance of this reporting requirement reflects the acknowledgment by the Scottish Parliament that an element of accountability is necessary if the right to education is to be translated in to a reality for disadvantaged children. The drive for accountability comes from a recognition that engagement in education results in not only academic achievement for children but also attainment of “knowledge and skills they will need for life”.<sup>199</sup> This acknowledgment is a direct acceptance of the discussion in chapter one. Prolonged engagement in school provides children with the mental and social skills necessary to avoid anti-social behaviour patterns that lead to youth offending.

The Scotland (Education) Bill has a focus on reducing inequalities in outcome of educational attainment. This is one aspect of the Bill that makes it unique; it is not assessing general educational achievement – its goal is not to ensure school systems are effectively producing high results – rather it is ensuring the school system is reducing the gap between the outcomes of disadvantaged children and their non-disadvantaged counterparts. This focus reflects the discussion of risk factors of youth offending regarding the four pillars of child and youth development; children in struggling community environments with little or no family support network heavily rely on a supportive school environment to strengthen and encourage school engagement. Through the Bill, the Scottish Parliament is recognising the increased difficulty children from low socio-economic backgrounds face in sustaining school engagement, and the importance of government intervention to ensure these children are offered appropriate support.<sup>200</sup>

Section 2 of the Bill deals with consultation and advice in regards to the creation and implementation of the two-yearly plans.<sup>201</sup> This section imposes a mandatory requirement upon education authorities to seek and have regard to the views of persons listed, and to provide advice and support to such persons in relation to any decisions they are making or

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<sup>197</sup> Above n 194 at 14.

<sup>198</sup> Above n 194 at 15.

<sup>199</sup> Education (Scotland) Bill (policy memorandum) at 2.

<sup>200</sup> Above n 199 at 3.

<sup>201</sup> Education (Scotland) Bill s 2.

steps they are implementing. The persons listed include head teachers, students, and parents of students, “as the authority thinks appropriate”. This section acknowledges the importance of including those who are affected by decision-making in the process itself; this is something that is often neglected, especially when the persons affected are children. The New Zealand Children, Young Persons and Their Families Act 1989 goes some way to addressing this issue; various sections within the Act include consultation requirements with the child or young person’s wider whānau, acknowledging that positive change can only occur if everyone affected is involved.<sup>202</sup> The Education (Scotland) Bill goes further in that the mandatory requirement is to seek and have regard to the advice of such persons, rather than a requirement to merely keep them informed. Additionally, extending this consultation requirement to the education sector is something New Zealand has not yet considered in its legislation. At present, the structure and content of educational provision is still something that happens *to* children, with little to no involvement by the children themselves.

The Scotland (Education) Bill has yet to come in to force; although on paper it appears to significantly reform the approach in providing education to those children who are struggling to engage, it may be difficult to see how these provisions will work in practice. What will an education system with an explicit focus on reducing inequalities in outcome look like? The approach to the provision of education in Finland goes some way in answering this question, and provides a useful starting point for considering what impact such a legislative framework would have in New Zealand.

### *A Comparison with Finland*

Finland’s legislation addressing the provision of education for children at risk of disengaging is relatively young, but has seen significant amendments and reforms in light of an increasing focus on children with special education needs.<sup>203</sup> Amendments to the Basic Education Act 628/1998 were presented to the Ministry of Education in 2007, and what followed was an internal review of the approach by local authorities.<sup>204</sup> Several municipalities began developing strategies on how to implement special education, how to prevent unnecessary

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<sup>202</sup> See for example ss 8 and 21.

<sup>203</sup> Henri Personen and others “The Implementation of New Special Education Legislation in Finland” (2015) 29 Educational Policy 162 at 163.

<sup>204</sup> Above n 203 at 163.

special education placements by emphasising early intervention and how to increase training for teachers over the three-year period of the educational development project.<sup>205</sup> After the new law took effect in 2011, local authorities had the flexibility to develop the provision of special education in various ways, allowing the individual needs of particular students to be taken in to account.<sup>206</sup>

A distinct and crucial element of Finland's legislation is that it focuses on recognising *educational* needs rather than *mental health* needs. Section 16 of the Basic Education Act addresses remedial teaching and special needs and identifies students who have “temporarily fallen behind” or have “difficulties in learning or in schoolgoing”.<sup>207</sup> In practice, this provision means teachers can seek services for struggling students based on educational observation rather than requiring a formal diagnosis to be made for the student to be eligible for support.<sup>208</sup> As a result, there is a focus in Finland on intensive training for teachers, to ensure that they are able to recognise early signs of potential disengagement. Teacher education in Finland is a “highly competitive field of masters’ degree university studies” and is revered by the wider community.<sup>209</sup> In addition to the recognition that student disengagement may not stem from a diagnosable problem, Finland’s provision of education does not focus on numeracy and literacy.<sup>210</sup> Instead, it takes a broader approach, giving equal value to the varying aspects of individual growth, creativity, knowledge and skills.<sup>211</sup> This reflects the oft repeated maxim: “Everybody is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid” – a child is more likely to engage in school if their individual talents and passions are acknowledged and encouraged.

The reflection of this legislative framework can be seen in Finnish public “basic education” schools. Each school is administered at a municipal level, and provides daily meals, healthcare, and mental health, psychological and counselling services to all students.<sup>212</sup> Every school has access to at least one trained special education teacher, and throughout the years of

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<sup>205</sup> Above n 203 at 164.

<sup>206</sup> Above n 203 at 164.

<sup>207</sup> Basic Education Act 628/1998 (Finland) s 16.

<sup>208</sup> Above n 203 at 164.

<sup>209</sup> Olli-Pekka Malinen and Others “Teacher education in Finland: a review of a national effort for preparing teachers for the future” (2012) 23 *The Curriculum Journal* 567 at 567.

<sup>210</sup> Above n 209 at 577.

<sup>211</sup> Above n 209 at 577.

<sup>212</sup> Jennifer Stephenson (Refereed Paper) “Special Education in Finland” (2013) 22 *Special Education Perspectives* 45 at 46.

basic education 30% of children will receive special education assistance at some point.<sup>213</sup>

There is a focus on early intervention, with all children at 6 years of age (the year before formal school entry) being assessed for possible learning difficulties.<sup>214</sup> Each school also has a student welfare group comprising of the school principal, the school psychologist, the school nurse, special education teachers and general teachers; the role of this welfare group is to meet and review classes, students and individual special education plans to ensure the students are not falling behind.<sup>215</sup>

Finland's education legislation and its approach in implementing consistent education practices has led to extensive flexible support being offered to students at risk of disengaging. This, in turn, has increased the level of student engagement, as seen reflected in Finland's academic outcomes.<sup>216</sup> The sort of wraparound, collaborative approach taken by basic education schools in Finland reflects the recommendation proposed by the United Kingdom study discussed in chapter two, which emphasised the importance of child support services working together. Scotland has taken the first step in ensuring children at risk of disengaging are provided with appropriate support that goes beyond mere procedural recognition; how New Zealand may be able to follow suit is discussed below.

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<sup>213</sup> Above n 212 at 46.

<sup>214</sup> Above n 212 at 48.

<sup>215</sup> Above n 212 at 48.

<sup>216</sup> Marjatta Takala, Raija Pirttimaa and Minna Törmänen "Inclusive special education: the role of special education teachers in Finland" (2009) 36 *British Journal of Special Education* 162 at 162.

## CHAPTER SIX: A PROPOSAL FOR NEW ZEALAND

As the preceding discussion highlights, New Zealand's current legal framework is proving insufficient to cater for the needs of the country's most vulnerable children. Children at risk of disengaging from school (thus significantly increasing their risk of going on to offend in youth) need access to wrap-around and effective services to support their needs.<sup>217</sup>

Unfortunately, although New Zealand's domestic and international legal obligations stipulate the State is responsible for providing such support, such obligations have thus far been interpreted to extend to procedural measures only.<sup>218</sup> Legislative amendment is necessary in order to explicitly address the practical steps required by the State to improve the chances of engagement for these children. The Bill introduced in Scotland provides a framework for developing a proposal for New Zealand. However, in the following chapter it will also be necessary to analyse how an amendment will need to be structured and where the priorities in offering services should lie.

The discussion in chapter two highlighted various reasons children may disengage from school. In considering legislative amendment, it is important to have regard to these factors, but it is imperative to understand where these conditions are most likely to manifest themselves unacknowledged and unsupported. The policy context surrounding the Scottish Bill reflects an international acknowledgment that socio-economic disadvantage has a profound negative impact on school attainment.<sup>219</sup>

### *Socio-economic Disadvantage and Ethnicity*

In New Zealand, year 11 students (15-16 year-olds) attending schools with a decile 8-10 rating are over 20% more likely to remain in school the following year than their decile 1-3 peers.<sup>220</sup> Students at decile 1-2 schools are over five times more likely to be stood down for behavioural issues than students at decile 9-10 schools.<sup>221</sup> Māori students are being stood-

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<sup>217</sup> Above n 62.

<sup>218</sup> Above n 107.

<sup>219</sup> Education (Scotland) Bill (briefing document) at 4.

<sup>220</sup> NZQA *Annual Report on NCEA and New Zealand Scholarship Data and Statistics (2014)* (New Zealand Qualifications Authority, May 2015) At 64

<sup>221</sup> Ministry of Education *Stand-Downs, Suspensions, Exclusions and Expulsions from School* (Ministry of education, Education Counts, 2014) at 6.

down 2.5 times more than European/Pākehā students with Pasifika students being stood-down 1.5 times more (although it is worth noting that this is partly due to the fact that proportionally more Māori and Pasifika than Pākehā children attend low decile schools).<sup>222</sup> These statistics suggest that children from lower socio-economic backgrounds are more likely to disengage from school or be excluded from school due to problematic behaviour. As discussed in chapter two, learning, physiological and neuro-developmental deficiencies can often manifest in disruptive behaviour patterns in children. These statistics indicate any legislative amendment needs to prioritise New Zealand's most disadvantaged children.

Looking specifically at rates of youth offending, Māori and Pasifika youth are significantly overrepresented in the youth justice system. In 2014, Māori youth made up over 50% of the Youth Court “proved” (without discharge) numbers, while Pasifika youth made up 11% of those same numbers.<sup>223</sup> However, the most dominant explanation to account for such ethnic disparity is socio-economic status.<sup>224</sup> Research has found that after controlling for relative socio-economic status, the gap between ethnicity in regards to negative psychosocial outcomes lessens.<sup>225</sup> Consequently, in proposing amendments for New Zealand's educational access legislation it will be crucial to acknowledge that priority needs to be given to children of low socio-economic status, with recognition that this will likely involve a focus on Māori and Pasifika children.

### *Proposed Legislative Amendment*

#### Focus on outcomes

The Scottish Bill has a specific focus on reducing inequalities of *outcome* for school children.<sup>226</sup> This is important, because rather than focusing on the quality or success of educational provision as a whole, the Bill is focused on reducing the gap between the experience of school engagement of children suffering disadvantage and their peers. This is acknowledging the fact that an attainment of education gap that opens up in primary school is

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<sup>222</sup> Above n 221 at 5.

<sup>223</sup> Statistics New Zealand “Children and young people charged in court – most serious offence calendar year” (2014) Statistics New Zealand <nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7361#>.

<sup>224</sup> Danette Marie, David M Fergusson and Joseph M Boden “Childhood socio-economic status and ethnic disparities in psychosocial outcomes in New Zealand” (2014) 48(7) ANZJP 672 at 677.

<sup>225</sup> Above n 224 at 678.

<sup>226</sup> Education (Scotland) Bill s 1(3).

likely to widen, resulting in disparities later in life in areas such as successful employment, poverty, and physical and mental health (all of which constitute risk factors for offending).<sup>227</sup> Focusing solely on the academic achievement of students from a particular school as a whole fails to reflect an accurate picture. Whilst a significant cohort from the school may be performing highly and engaging well, there may be a more than negligible group who are struggling to engage. The overall achievement of the school may therefore look to be average, with the overwhelming difference in outcome remaining unaddressed.

In New Zealand, by recognising the right to education as procedural only, the State is bypassing their obligation to provide support to ensure children suffering disadvantage are *in fact* engaging in and receiving education. As the discussion above highlights, this approach is resulting in significant differences in outcome for children with low socio-economic backgrounds. Currently, our education legislation fails to explicitly provide for and protect against these gaps widening. As a result, children from low socio-economic backgrounds are significantly more likely to become youth offenders. If our legislation were to specifically address this risk of disparity, such children would be prioritised in the provision of support, and their subsequent engagement in school would serve as a positive buffer against youth offending.

I recommend therefore for a new section 3A to be inserted in to the Education Act 1989 reading:

### **3A     Inequalities in Outcome**

In ensuring the right to education provided for by section 3 of this Act, consideration must be given to the probability that a disadvantaged child will require additional support for their right to be realised.

For the purpose of this section and s 325, factors to consider in determining whether a child is a “disadvantaged child” include:

- (a) socio-economic status of the child’s parents or caregivers;
  - (b) any health, developmental or behavioural condition the child suffers from; and
  - (c) any other characteristic of the child that may serve as an impediment to learning.
- (1) In considering the socio-economic status of the child, factors to consider include:
- (a) whether they are from a sole parent household;

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<sup>227</sup> Education (Scotland) Bill (policy memorandum) at 3.

- (b) whether or not their parent(s) or caregiver(s) work; and
  - (c) their age.
- (2) To avoid any doubt, the Government of the day has a duty to ensure such additional support as is necessary is provided for the children mentioned in this provision.

Paragraph (c) acknowledges the importance of not restricting support to those students with a medically recognised or diagnosed condition. Impediments to learning appear on a spectrum, and while a child may not have specific mental or physical health needs, they may nevertheless have important educational needs that need to be addressed through the provision of support.<sup>228</sup> Section 3A additionally precludes the interpretation of the right to education in s 3 extending to procedural measures only by specifically referring to “additional support” (suggesting substantive rights) required by *individual* children. Subsection 2 removes any doubt as to where the obligation to substantively uphold the right to education lies.

#### Introducing accountability

An important focus of the Scottish Bill is to increase accountability on the issue of inequalities of outcome by introducing a mandatory reporting requirement.<sup>229</sup> This requirement, extensively addressed by s 4 of the Bill as discussed in chapter 5, explicitly confers responsibility on both local education authorities and government ministers, making them accountable by requiring them to outline what practical steps they have taken to address the issues highlighted in the Bill. By mandating both a retrospective and prospective focus in the reports themselves, the Bill is ensuring adequate steps will be taken to increase the educational engagement of disadvantaged children *in fact*, rather than merely providing procedures through which engagement is made *possible*. The stipulation that such reports are to be made every two years ensures the issue of educational engagement of disadvantaged children is a priority that needs to be in the forefront of ministerial decision-making.<sup>230</sup>

In New Zealand, the only significant reporting requirement is found in s 325 of the Education Act 1989. This section stipulates that the Chief Review Officer shall, when directed by the Minister to do so or of the Chief Review Officer’s own motion, administer reviews. Such reviews may relate to either general or specific matters regarding the performance of a school or educational body. Reports must be administered to the Minister when reviews are

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<sup>228</sup> See: Basic Education Act 628/1998 (Finland) s 16.

<sup>229</sup> Above n 227 at 6.

<sup>230</sup> Education (Scotland) Bill s 4(1).

undertaken. The requirement in s 325 does not provide for regular reviews, nor does it acknowledge the importance of reviewing specific steps taken and targets for the future. It does not acknowledge the need to address inequalities in outcome or level of engagement. Such a requirement risks resulting in reviews presenting an inaccurate picture of a school by focusing on the performance of the body as a whole, as discussed earlier in this chapter. The reviews that have been undertaken pursuant to s 325 tend to be expressed in broad, generalised terms, rather than addressing the specific needs of disadvantaged groups.<sup>231</sup>

Section 325 does not encompass a sufficient element of accountability to ensure children at risk of disengaging from school are having their needs met. I therefore recommend amending s 325 to read:

**Chief Review Officer to perform certain functions**

The Chief Review Officer shall—

(a) administer—

- i. at least every 2 years; and
- ii. when directed by the Minister to do so; or
- iii. notwithstanding section 32 of the State Sector Act 1988, of the Chief Review Officer's own motion—

reviews in regards to applicable organisations.

(b) Reviews under (a) must address:

- i. what steps have been taken to ensure disadvantaged children are having their right to education realised under s 3A; and
- ii. what steps are being proposed for the next 2 year period to ensure disadvantaged children's right to education is realised under s 3A; and
- iii. any improvements in engagement that have occurred as a result of taking the steps mentioned in (i).

(c) In considering proposed practical steps under (b)(ii), the Chief Review Officer must have regard to the cultural needs of Māori and Pasifika children.

(d) The Chief Review Officer must administer the preparation of reports to the Minister on the undertaking of such reviews; and

(e) give the Minister such other assistance and advice on the performance of applicable organisations as the Minister from time to time requires.

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<sup>231</sup> See for example *Green Island School Education Review* (Report, August 2015).

By providing a specific time frame in which reviews must be conducted, and outlining that the reviews must address the engagement of education of disadvantaged children, the amended s 325 introduces an element of accountability. Such an element of accountability is likely to result in the issue of school engagement, especially by disadvantaged children, being prioritised and recognised as a fundamental step in improving the outcomes for these children, including reducing the risk of youth offending.

### Consultation requirement

The Scottish Bill includes a consultation requirement in its section regarding 2-yearly reports.<sup>232</sup> The requirement stipulates that when considering what decisions to make in relation to implementing steps to address inequalities in outcome, education authorities *must* “seek and have regard to” the views of certain listed persons. The list of persons includes “such pupils as the authority thinks appropriate”.<sup>233</sup> This provision aims to acknowledge the fact that an important vehicle for change is that the community that will be affected has the opportunity to shape important decisions being made on their behalf.<sup>234</sup> This is especially important in relation to children and adolescents; there is still an attitude persisting that children and young people are individuals that need to be “looked after” and “provided for” by imposing paternalistic structures of care with little or no regard for what the children or young people themselves think.<sup>235</sup> As discussed in chapter four, international child rights instruments have made clear that this approach is outdated, and that acknowledging children as autonomous individuals with the capacity to act fully and independently is a crucial step in recognising their individual rights.<sup>236</sup>

New Zealand’s statutory landscape generally acknowledges this shift in attitude. The Care of Children Act 2004 provides a specific provision which mandates for the child involved to be given reasonable opportunity to express their views and for those views to be taken in to account.<sup>237</sup> However, currently there are no comparable requirements in New Zealand’s education legislation to consult with relevant children at any stage. Arguably, based on the main contention of this dissertation, the provision of education (especially for those at risk of

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<sup>232</sup> Section 2.

<sup>233</sup> Section 2(3).

<sup>234</sup> Above n 227 at 6.

<sup>235</sup> Sarah Fotheringham, Jean Dunbar and Dale Hensley “Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence” (2013) 28 J Fam Viol 311 at 311.

<sup>236</sup> Above n 132 at 18.

<sup>237</sup> Section 6(2)(a) and (b).

disengaging) is a hugely significant aspect of a child's life and they should therefore be consulted with in relevant decision-making.

The Scottish Bill's consultation requirement leaves much to the education authority's discretion, by stipulating they must only seek the views of those pupils "as the authority thinks appropriate". Such a wide discretion has the potential to negate the effectiveness of such a consultation requirement. As a result, I recommend for New Zealand to insert an additional paragraph under section 325 reading:

(f) In considering proposed practical steps under (b)(ii), the Chief Review Officer must seek and have regard to the views of students likely to be affected by the proposals.

(i) "students likely to be affected" are those students whom the proposed practical steps are targeted at. This group will often (but not always) be the "disadvantaged children" at a particular school (pursuant to the definition in s 3A).

The wording of this paragraph introduces a mandatory consulting requirement to acknowledge the importance of including children and adolescents in the decision-making process, as discussed above.

Despite current domestic and international law stipulating an obligation on the State to provide support to children at risk of disengaging from school<sup>238</sup>, erroneous judicial interpretation and practical realities dictate change is needed. Amending New Zealand's legislation would more clearly outline the State's obligation in regards to disadvantaged children and would negate the possibility of the right to education being interpreted as procedural only. The Scottish Bill provides a suitable framework for New Zealand to follow, and with careful consideration of the specific requirements of New Zealand's disadvantaged children, the proposed amendments would serve to ensure such children are considered, acknowledged, and provided with support.

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<sup>238</sup> Refer to chapters three and four.

## CONCLUSION

New Zealand's current legal obligation to provide support to children at risk of becoming youth offenders has been interpreted virtually out of existence. The right to education provided for in the Education Act 1989 has been judicially weakened to the point that it no longer reflects a positive obligation on the State to do any more than provide the potential means by which education can be accessed. For children most at risk of disengaging from school, this approach is woefully inadequate.

The above discussion has argued that New Zealand's wider legal context, including international obligations, supports the view that the current interpretation is not only insufficient in a practical sense, but is legally erroneous. The Human Rights Commission in 2015 produced a report that supports this contention; in light of legal developments, both domestically and internationally, the interpretation of the right to education can no longer be legally justified as procedural only.

The most effective and reliable means of curing this interpretive deficiency is through legislative amendment. The legal developments in Scotland with the Education (Scotland) Bill provide a framework through which New Zealand can satisfy the lacuna that currently exists in our legislation. By making the duties on the State explicit and enshrining them in statute, the protection of disadvantaged children's rights to education is ensured, not only procedurally, but substantively, as dictated by our obligations at international law.

Legislative amendment would provide children at risk of disengaging the necessary support to guarantee them the best chance at full development. Although prolonged engagement in school will not solve the problem of youth offending completely, the statutory provisions recommended in chapter six would introduce unavoidable duties on the State to at least give these youth the best possible starting point. By making the State explicitly accountable, there is an expectation that motivation will develop to place these youths' needs at the heart of decision-making, something that the current system has failed to prioritise.

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