Youth Justice and the Children, Young Persons, and Their Families Act 1989

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I: INTRODUCTION

The Children, Young Persons, and Their Families Act 1989 ("the CYPF Act") has been credited with creating a "new ... paradigm of justice in New Zealand".[1] Arguably, this new paradigm has been extremely successful. Official figures suggest that offending by young people aged between 17 and 20 has dropped dramatically in the last 5 years.[2] According to the Department of Justice, the decreased offending is "over and above the expected effects from the Children, Young Persons, and Their Families Act 1989".[3] In contrast, during the same period, non-traffic convictions for those aged 35 and over have increased by 33 percent.[4]

II: THE ORIGINS OF THE ACT

Various social factors were instrumental in bringing about the new Act. Determined efforts by Maori to put in place a system of justice in keeping with their

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1 McElrea, "A New Model of Justice" in Brown (ed), *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation 1993) 3.

2 Briefing papers for the Minister of Justice Vol I (1993) 26. For recent analysis of this study, see Robertson, "Court Prosecutions of 17 to 19 year olds and the CYP&F Act" Children No 13 (June 1994) 18.

3 Ibid.

4 Ibid.

cultural values precipitated the process of legislative reform. Maori communities perceived that the Westminster-style legal system discriminated against Maori and took little or no notice of Maori customs, values, and beliefs. The community was increasingly dissatisfied with organs of the state such as the police, the courts, and the welfare services, which were perceived as overly intrusive. This in turn led to feelings of disempowerment and frustration. Further came the realisation that almost 60 years of welfare state and welfare justice had done little to encourage people to take responsibility for themselves.

The reform process developed against this social background. In December 1984 the Government called for submissions, and a Bill was introduced to Parliament in December 1986. The draft Bill was widely criticised, particularly by Maori, who felt that it failed to establish "culturally relevant ways of approaching care and protection and offending issues".[5] In 1987, the Bill was reviewed following the re-election of the Labour Government, and a working party was set up to consider submissions. *Te Whainga i te Tika - In Search of Justice*[6] contained a number of conclusions and recommendations regarding the existing law and the legal system. Clearly the misgivings voiced by Maori in their submissions were heeded by the working party responsible for drafting the new legislation. In early 1988, the Select Committee travelled New Zealand, visiting Maori marae (meeting places) and Pacific Island centres hearing submissions on how to improve the Bill. From this process of consultation emerged the CYPF Act.

Thus, the impetus for the changes came largely from Maori and Pacific Island communities who had become increasingly concerned by the over-representation of their young people in the national crime statistics. What were new concepts in the legislation were in fact familiar to Maori. The traditional whanau conference involved notions of shame and reconciliation in order to heal the rift between the offender and the victim, the individual and the collective. Olsen, Maxwell, and Morris outline four features of the pre-European Maori approach:[7]

> First, the emphasis was on reaching consensus and involving the whole community; second, the desired outcome was reconciliation and a settlement acceptable to all parties rather than the isolation and punishment of the offender; third, the concern was not to apportion blame but to examine the wider reasons for the wrong (an implicit assumption was that there was often wrong on both sides); and fourth, there was less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony.

Jackson describes the traditional Maori perspective of offending:[8]

> The system imposed responsibility for wrongdoing on the family of an offender, not just the individual, and so strengthened the sense of reciprocal group obligation .... These concepts ...

5 Doolan, "Youth Justice - Legislation & Practice" in Brown, supra at note 1, at 17, 20.

6 Department of Justice (1986).

7 Olsen, Maxwell, and Morris, "Maori and Youth Justice in New Zealand" (1993) 3.

8 Jackson, Department of Justice, Wellington (1988) cited in Trapski (ed), *Trapski's Family Law* Vol 1 (1991) A - 228.

> incorporated and reflected the Maori ideals of group control and responsibility within a weave of kinship obligation.

These themes were largely adopted by the legislature.

III: AN OVERVIEW OF YOUTH JUSTICE IN NEW ZEALAND

1. The Philosophy of the Children Young Persons and Their Families Act 1989

Commentators speak of two contrasting approaches to justice: the welfare approach and the justice approach.[9] The welfare approach stresses the treatment of offenders. It assumes that early intervention to discover the causes of criminal behaviour will enable successful rehabilitation. The welfare model has been criticised for a number of reasons.[10] First, the offence is largely ignored, thus slighting the victim. Second, the approach is subjective, leading to inconsistency and unfairness. Third, it is empirically unsound. Hence, while it may sound plausible to speak of causes of offending and corresponding treatments, these may be unknown or non-existent. Fourth, intervention may be harmful, and fifth, due process is ignored.

In contrast, the justice approach stresses individual accountability for actions. This approach, which has been generally favoured since the 1970s, recognises that intervention should be avoided in cases of less serious juvenile crime, because the consequences of punishment can be counter-productive. The justice model favours reintegration rather than rehabilitation.[11] This involves:[12]

> [A] recognition that a young person is a product of their social environment; that where possible problems are most appropriately dealt with by leaving the young person in the community so that the young person may be assisted to accept responsibility as a member of their community.

Under the CYPF Act there has been a fundamental move away from the welfare model and towards the justice model. However, the CYPF Act combines some elements of both approaches. According to Doolan,[13] the new Act emphasises two goals. First, that young people should face up to the reality of their offending, and second that further offending should be prevented. Society is challenged to find "ways that focus less on treatment and punishment (often indistinguishable in the perceptions of young people) and more on putting right the wrong that has been done".[14] The authors of *Trapski's Family Law* conclude that

9 Supra at note 5, at 18.

10 Maxwell and Morris (eds), *Family, Victims and Culture: Youth Justice in New Zealand* (1993) 66.

11 Trapski, supra at note 8, at A - 18.

12 Ibid.

13 Supra at note 5, at 19.

14 Ibid.

"although the principles [of the Act] may have a basis in the justice model, the model has been considerably altered to meet what has been perceived to be the cultural requirements of New Zealand society".[15] In summary, the Act contains two major shifts: away from the welfare model, and towards traditional Maori perspectives.

(a) The principles as set out in the Act

Section 4(f) of the Act sets out the overriding objective when a young person commits an offence:

> 4. The object of this Act is to promote the well-being of children, young persons and their families and family groups by -
>
> (f) Ensuring that where children or young persons commit offences, -
>
> (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
>
> (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.

In addition, the Act sets out eight principles to guide any person exercising powers conferred under the Act:[16]

(i) Criminal proceedings must be used only as a last resort when no other alternative is available.

(ii) Criminal proceedings must not be used merely to provide any necessary welfare services.

(iii) Measures for dealing with young people must be designed to strengthen the family, whanau, hapu and iwi, and to enable these groups to deal with their young people in their own ways.

(iv) Young offenders must be kept in the community unless that could be unsafe.

(v) A young person's age must be taken into account in deciding whether to impose particular sanctions.

15 Supra at note 8, at A - 228.

16 CYPF Act 1989, s 208.

(vi) Any sanctions must promote the development of the young person within his or her family.

(vii) Any measures for dealing with young offenders must have "due regard to the interests of any victims of that offending".[17]

(viii) Young people are entitled to special protection when under investigation by the police.

(b) Accountability

A major criticism of the welfare approach is that it failed to make young people accountable for their actions. According to Ludbrook, prior to the 1989 Act, our juvenile justice system "had the effect of cushioning young people from the human, social and economic consequences of their behaviour".[18] They were paraded before a line of public officials - police, judges, lawyers, social workers, and residential care workers. As a result, "they often came to see themselves as victims of the system rather than as the cause of suffering and anxiety to ordinary people in the community".[19]

Indeed, it was found that the welfare approach had little impact on levels of offending behaviour. Expensive therapeutic programmes congregated young offenders. This became part of the problem rather than the solution.[20]

However, few jurisdictions have been prepared to abandon considerations of welfare.[21] These are retained in the CYPF Act in the requirements to consider the child's well-being. Nonetheless, the Act ensures that young people are made accountable for their actions. This occurs largely through the family group conference described below.

(c) Diversion from court proceedings

It is a fundamental principle of the CYPF Act that court proceedings are to be the last resort. Section 20(a) declares that "unless the public interest requires otherwise, criminal proceedings should not be instituted against a child ... if there is an alternative means of dealing with the matter". Maxwell and Morris outline three main features of a diversionary scheme.[22] First, it reduces stigma and exposure to other offenders. Second, it protects people from the adverse effects of

17 Ibid.

18 *Review of The Children, Young Persons, and Their Families Act, 1989* (1992) (Mason Report) 4.

19 Ibid.

20 Doolan, supra at note 5, at 20.

21 Maxwell and Morris, supra at note 10, at 166.

22 Ibid.

treatment, court processes and institutionalisation. Third, it is a path to earlier and better treatment. Doolan further describes the philosophy behind the diversionary process:[23]

> As much offending by young people is opportunistic, trivial and transient, it is vitally important that our responses to it do not catapult young people into associations, or situations, which have the potential to confirm the development of delinquent careers. Thus, formal interventions by way of arrest and court appearances are to be avoided except where sufficient public interest considerations exist.

Clearly, there was concern that traditional methods of dealing with young offenders often made matters worse. Thus, under the new Act, "[p]reference is given to alternative means of confronting offending behaviour which strengthen family systems and foster their ability to develop their own means of dealing with their youthful offenders".[24] Diversion "seeks to avoid formal interventions, and if they cannot be avoided, to minimise the harmfulness of their impact".[25]

(d) Victim involvement

Victims have largely been ignored by our traditional court system. The greatest possible involvement for a victim is to be called as a witness. However, in a court-room situation, the victim must relive the circumstances of the offence in excruciating detail, while being limited to responses to counsels' questions. This can be a traumatic and disempowering experience. Furthermore, all witnesses are subject to cross examination. Issues of credibility may arise and it is not uncommon for a defence lawyer to attempt to discredit the victim in order to raise doubts about the defendant's culpability. In these circumstances, the *victim* is effectively on trial. In spite of recent legislative reforms such as the Victims of Offences Act 1987, which requires the court to have regard to the position of the victim, in many instances the reality is that the process is remote and exclusionary for him or her.

In contrast, the involvement of victims is basic to the philosophy of the new model. This philosophy has two limbs. First, the violated person is able to express his or her anger and resentment directly to the offender. Stewart points out that this has the effect of re-empowerment[26] - returning something taken by the offence. It is a healing process for the victim. Second, the process of victim involvement introduces the element of shame, vital to the success of the family group conference process. Braithwaite comments:[27]

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23 Supra at note 5, at 25.

24 Ibid.

25 Ibid.

26 Stewart, "The Youth Justice Co-Ordinator's Role - A Personal Perspective of the New Legislation in Action" in Brown, supra at note 1, at 43.

27 Braithwaite, "What is to be done about Criminal Justice?" in Brown, supra at note 1, at 33, 38.

> [T]he strength of the New Zealand process is that it is neither individualistic nor dyadic ... but that it engages multiplex communities of concern. Emotions of shame and feelings of responsibility are often brought out because shafts of emotion bounce from person to person within the room in unpredictable ways. When collectivities as well as individuals are targets of shaming, it is harder for responsible individuals to shrug off the shame.

(e) Whanau involvement

Family and whanau are central to the new model provided by the CYPF Act. The family group conference is the mechanism by which the family has been empowered. This is based on a model of Maori extended family (whanau) decision making, and recognises New Zealand's cultural diversity. The new legislation provides both services which are culturally sensitive and a process which is culturally appropriate. The legislature could not have failed to recognise the over-representation of Maori in youth offending.

(f) Restorative justice

According to Judge McElrea, the principles of youth justice in New Zealand are those of a restorative model of justice.[28] Zehr summarises this model of justice by contrasting it with our familiar retributive paradigm:[29]

> According to retributive justice, (1) crime violates the state and its laws; (2) justice focuses on establishing guilt (3) so that doses of pain can be measured out; (4) justice is sought through a conflict between adversaries (5) in which offender is pitted against state; (6) rules and intentions outweigh outcomes. One side wins and the other loses.
>
> According to restorative justice, (1) crime violates people and relationships; (2) justice aims to identify needs and obligations (3) so that things can be made right; (4) justice encourages dialogue and mutual agreement, (5) gives victims and offenders central roles, and (6) is judged by the extent to which responsibilities are assumed, needs are met, and healing (of individuals and relationships) is encouraged.

28 McElrea, "The Intent of the Children, Young Persons, and Their Families Act 1989 - Restorative Justice?" Paper presented to the Youth Justice Conference, New Zealand Youth Court Association 1994, p1.

29 Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990) 211 cited in McElrea, ibid, p3.

2. The Mechanisms of the Act

(a) Diversion

Section 208(a) of the CYPF Act 1989 declares that "unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter." This principle of diversion is designed to keep young people out of court. No arrest can be made unless it is necessary to prevent further offending, the absconding of the young person, or the interference with evidence or witnesses.[30] No summons can be issued unless the matter has been referred to a Youth Justice Co-ordinator, who will convene a family group conference.[31] If all members of the conference agree, the matter will not go to court.

(b) The Family Group Conference

The family group conference is the instrument through which youth justice is administered.

(i) Composition

The following people are entitled to attend any family group conference:[32]

(i) the child or young person in respect of whom the conference is held;

(ii) the young person's family or any member of that person's family, hapu, or whanau;

(iii) the Youth Justice Coordinator convening the conference;

(iv) a member of the police, usually a Youth Aid Officer;

(v) the victim;

(vi) a lawyer or Youth Advocate; and

(vii) a social worker.

30 Section 214.
31 Section 245.
32 Section 251.

(ii) Functions

The ultimate function of the family group conference is to arrive at an outcome which resolves the young person's offending. This outcome must be satisfactory to *all* the parties present. In other words, the offender, the victim, and the police must all agree to the solution offered.[33] The conference has wide powers to make decisions or recommendations, and to formulate plans. Thus, the group may decide that:[34]

(i) proceedings against the child either proceed or be discontinued; or

(ii) the child or young person make reparation to any victim of the offence; or

(iii) an appropriate penalty be imposed on that young person.

Options include a written or verbal apology, community work, work undertaken for the victim, a payment of money to the victim, a donation to a charitable cause, and the imposition of a curfew on the offender. There may also be some other measure aimed at addressing the young person's difficulties, for example an undertaking to attend school regularly.

If no agreement can be reached, the matter may then proceed to the Youth Court which has the jurisdiction to impose its own orders.[35] The Court has very wide powers, including ordering discharge, admonition, the imposition of a fine, supervision, or community work. Section 284 stipulates what the Court must take into account when arriving at an appropriate sentence. Considerations include the young person's background, the nature of the offence, any previous convictions, the attitude of the young person towards the offence, and the response of the young person's family or whanau.

(iii) The involvement of victims

At a family group conference, the offender and the victim face each other. The young person, in the presence of his or her family, is held solely accountable for his or her actions. Stewart outlines the dynamics of the process:[36]

> The violated person is able to express her/his anger and resentment directly to the violator; the 'victim' has begun the process of being back in control, of being "re-empowered" - something s/he was robbed of by the event of the offence. This is the first step in the healing process.

33 Section 264.

34 Section 260.

35 Section 283.

36 Supra at note 26, at 43-44.

> The offender's reaction to this event is clearly visible to all present. The most frequent response ... is one of shame and remorse .... The majority will then proffer an apology. The victim then has the opportunity to accept the apology and often in doing so begins to display the first signs of forgiveness, and compassion .... By focusing on the needs of the victims for healing, *their* need to be restored to the feeling of being in control of their own lives, of being re-empowered, the young person and her/his family when proposing a plan to deal with the matters, can offer a creative, constructive solution.

The victim's attendance at the conference is essential to the success of the process, because it is largely through the dynamics of offender-victim mediation that the young person is made to feel shame and remorse for his or her actions and ultimately, responsibility for the effect which those actions had on the victim.

(c) The Youth Court

The Youth Court must review family group conference decisions. Usually, the court will simply accept the conference's recommendation, as the Act places the primary power with the conference. Although the court has the power to impose a wide range of orders,[37] its main function is to act as a backstop in difficult cases and to oversee the day to day running of the system in order to preserve its integrity. Judges are not allowed to attend meetings of their own motion. They may do so only if invited as observers, and then, only if they are in no way connected to the particular case.

Section 281 prevents the Court from making any order unless a family group conference has been convened. Previously, the Court was at the centre of the process and it was expected to be the principal way of dealing with young people who acted illegally. Now the Court is only used as a last resort. According to published figures, about 90 percent of young people's offending is diverted away from the court.[38] However, the Act does not completely remove the control of the court. There is provision for it to reject the recommendation of a family group conference. This should occur only in the event of either an extremely lenient or excessively onerous decision by the family group conference, in which case the judge may refer the matter back to a subsequent conference for reconsideration or simply decline to accept the recommendation.

Under the previous system the judge controlled the proceedings and could impose punishment or direct intervention in people's lives for welfare reasons. By contrast, under the new model, the judge's primary role is "to facilitate and encourage the implementation of solutions devised through the family group conference procedure, and to act as a backstop if those solutions are not implemented".[39] Traditionally, the judge was surrounded by the trappings of power,

37 Including institutionalisation, supervision, conviction and referral to the District Court for sentencing. See s 283.

38 McElrea, supra at note 1.

39 Ibid, 4.

ritual, and mystique. Legal jargon and courtroom protocol guaranteed that the system remained the preserve of the legal profession. The people for whom the outcome of the case mattered the most, namely the victim, the offender, and his or her family, had little or no input. By contrast, the new justice model encourages the involvement of a wide cross-section of individuals. Youth advocates may be appointed to represent the young person, but the right to speak is not limited to the lawyers. The outcome involves input from all interested parties and must be a unanimous decision. Consequently, the judge's position is closer to that of a partner working with others, than that of a far-removed and detached official.[40]

(d) Controls on Police

Previously the police, like the judge, played a prominent role in the youth justice process. Pursuant to the wide powers of arrest and detention vested in them, they could issue summons for courtroom appearances, or arrest suspects without having to consult. Now, in accordance with s 245 of the Act, the police must discuss the matter in a family group conference setting before they can issue a summons. If the conference decides that the matter should be dealt with in another way, then no summons will result.

Section 214 sets out a number of guidelines which further limit the police power of arrest. Before the police can make an arrest, they must be satisfied that it is necessary to ensure the young person's attendance in court or to prevent him or her from committing further offences, or from destroying evidence. Other restrictions on the manner of dealing with young persons appear under s 215.[41] The police, like the courts, have had to relinquish some of their control over proceedings in order to transfer some authority to the community. This is given mainly to the offender's family, to address more effectively the offender's problem.

IV: CRITIQUE OF THE ACT

Overall, it appears that the Act has been successful. However, there are also several areas which require further attention.

1. Positive Features

(a) The move from welfare to justice

40 Ibid, 5.

41 Section 215 provides that the child or young person must be informed of his or her rights before being questioned by the police.

Maxwell and Morris[42] conclude that the Act's basic philosophical shift from welfare to justice has been achieved. They claim that most young people are indeed being held accountable for their actions, and that "the State is no longer using indeterminate institutional placements on the grounds of welfare needs".[43] According to the authors, both parents and young persons "seemed satisfied with the outcomes and generally felt that the decisions of the court were fair".[44]

Before 1989, the Children and Young Person's Court was dominated by representatives of the Department of Social Welfare. They were responsible for assessing young persons and writing reports for the Court. Their considerable input at all stages of the process, including the running of the welfare institutions, and the Court's tendency to give significant weight to their reports at sentencing time, assured them disproportionate status in the process. Under the new legislation, there is a clear demarcation between Youth Justice and Care and Protection proceedings. The former is the responsibility of the Youth Court, the latter that of the Family Court. This is the result of the principle that:[45]

> [C]riminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the person or young person or his or her family, whanau, or family group.

As a result, the role of experts is now quite different. The emphasis under the new model is on accountability and responsibility rather than on previously fashionable sociological concepts such as determinism and notions of the offender being a product or victim of his or her environment:[46]

> [The experts] are there now to advise families at family group conferences, not to instruct them and tell them what is good for the family. They can offer advice and suggestions, but that is all.

(b) Outcomes of family group conferences

Many family group conferences are arriving at novel and creative outcomes. In some cases the victims have offered their homes or businesses as venues for community work penalties. Some victims involve themselves in the young person's plans and remain involved with that person well after the completion of the plan. In one remarkable case,[47] the victim of an armed robbery, a 60 year old woman, had originally asked that one of the young offenders be referred to the High Court for sentencing. After the conference she changed her position to

42 Supra at note 10, at 162.
43 Ibid.
44 Ibid.
45 CYPF Act, s 208.
46 McElrea, supra at note 1, at 10.
47 Reported in McElrea, ibid, 8.

support a non-custodial sentence. She requested that the young man come and live with her family and work in the shop so that he could benefit from "a more regular household and normal discipline".[48]

In another case,[49] a young person had been charged with the burglary of a supermarket. At the family group conference he was confronted by the store manager, who suggested that he should be engaged in unpaid work at the supermarket. As a face-saving concession to the young person, the manager required him to telephone and request an interview for the job. Later, he was offered part-time work and eventually he obtained a full-time position.

(c) The involvement of victims

The most positive aspect of the CYPF Act is that victims are now able to take part in a system that imposes justice on offenders. Even by their mere presence, victims enrich the procedure, and are themselves enriched. In a family group conference, the reality of the victim's experience is inescapable for the young offender. The victim and his or her supporters may meet the offender face to face. The exchange is witnessed by the offender's family group who may in turn vocalise its anger and disappointment. There is no alternative for the offender other than to accept responsibility for his or her acts. The victim also has a say in the fate of the offender. Indeed, the victim must agree to any outcome. There are some moving examples of victims showing forgiveness and taking a genuine interest in the young person's future welfare. Judge McElrea speaks of:[50]

> [M]any [cases] where the victim is genuinely impressed by a sincere expression of remorse and wishes to do something to help the young person recover his dignity and move forward in life, perhaps by offering unpaid work in lieu of receiving reparation, or even paid work to provide a legitimate source of money.

(d) Restorative justice

Our traditional criminal justice system is premised on notions of the state versus the individual, where the state's rights have in some way been infringed. It then becomes the state's prerogative to prosecute and punish the offender. This dichotomy is further reinforced in the formal courtroom setting. In contrast, there are no winners or losers in the new model. Instead, the emphasis is on putting things right. Rather than polarising the parties by forcing them to engage in a process of legal sparring, this model attempts to bring them together and encour-

48 Ibid.

49 Reported in Stewart, supra at note 26, at 45.

50 Supra at note 1, at 8.

age a mutually beneficial solution. This is achieved through the process of shaming the offender before his or her family or whanau and forcing the young person to take responsibility for his or her actions. Only then can the healing process begin, with the victim being made whole again and often showing forgiveness towards the young person, and the offender being reintegrated and affirmed. The new model draws upon these indigenous concepts of shame and forgiveness and fuses them with traditional western concepts of justice. The result is a synthesis of the strengths of both perspectives.

(e) Involvement of families

The new model empowers families. This is a radical departure from the old system where the offender's family was largely impotent. Through the family group conference, families are now central to the process. The young person's actions reflect on the family members just as much as they do on the individual. Collectively, the family is encouraged to take responsibility for the young person's behaviour. Under the old system, the offender was regarded as the individual to be punished. State mechanisms such as the police, the courts, and the welfare services were brought into action against the individual in an impersonal and ritualistic process. The emphasis under the new legislation is to stress the young person's interrelationship with the family and the community. Instead of concentrating on the consequences of offending for the young person, the new model seeks to deal with the consequences for the offender's wider family. The young person is shamed both in the eyes of the victim and his or her family group. He or she cannot avoid their disapprobation by slipping into relative anonymity, as was possible within the old criminal justice system.

By directly involving the offender's family in the proceedings, the family can also be examined. The young person's behaviour, which culminated in the offence, may have been due to a lack of proper parental supervision or discipline over a long period of time. The family group conference encourages the family to address its own shortcomings at the same time as affirming the authority of the family to take responsibility for their young. In cases where the family is the instigator of the abuse against the young person, whether physical, sexual, or psychological, the matter is dealt with by the Family Court, not the Youth Court, pursuant to the Care and Protection provisions of the CYPF Act.[51]

51 CYPF Act, Part II.

2. Areas Requiring Further Attention

(a) Victim involvement

Regrettably, there are instances where the victim, for various reasons, may not attend the conference. Furthermore, the system can ignore victims' interests. For example, it can result in the infringement of the weaker party's rights, or use subtle forms of coercion to encourage agreement. It must be recognised that to some extent, the victim's and offender's interests are in competition.

The opportunity for reconciliation is lost for a victim who feels, for whatever reason, that he or she cannot attend the family group conference. Stewart emphasises the important role played by the victim at the conference:[52]

> The participation of a victim ... brings about an inescapable and direct involvement of the young person in the process. It is virtually impossible for the offender to remain aloof, to distance himself from the accusation, the demands for explanation, and the expressed need of the victim for a response from the young person and for *appropriate* sanctions to be applied.

Whether or not a victim attends a conference depends largely on how easy the process is made for that person. The system has yet to be organised uniformly to make it easier for victims to attend. The 1993 Amendment Bill currently before the House implements in part the recommendations of the Ministerial Review Team on the Act.[53] Clause 36 substitutes a new s 250. The current provision requires a Youth Justice Co-ordinator to consult with members of a child's or young person's family or whanau in relation to holding a family group conference. The amendment reiterates that requirement, and adds the following proviso:

> (2) The Youth Justice Co-ordinator shall also make all reasonable endeavours to consult with -
>
> (a) Any victim of the offence or alleged offence to which the conference relates: and in relation to the date on which, and the time and place at which, the conference is to be held, and, in convening the conference, shall take into account, in relation to those matters, the views of the person or persons consulted.

Clause 37 of the Amendment Bill amends s 251 of the CYPF Act. This amendment gives the victim of the offence the right to bring a reasonable number of persons to the family group conference (being members of his or her family group or any other persons) for the purpose of providing support.[54]

These proposed amendments should go some way to encouraging reluctant victims to attend a conference. Clearly, the conference should be arranged at a

52 Stewart, supra at note 26, at 44.

53 Children, Young Persons, and Their Families Amendment Bill 1993.

54 Ibid.

time and in a place most convenient to the victim. If, for example, the victim cannot get time off work, the meeting should take place in the evening. If that does not suit, provision should be made for financial support to compensate the victim if he or she attends during working hours. The victim may feel more comfortable in familiar surroundings such as his or her home or that of a close friend or relative. The Youth Justice Co-ordinator must make all reasonable endeavours to encourage the victim to attend. Other active steps could include the wide distribution in the community of pamphlets in different languages containing, among other things, information for the victim about how the youth justice system works and what the benefits of attendance are.

(b) Diversion

There are a number of difficulties associated with the diversion process currently in operation. First, deterrence is reduced. Second, more young people will be brought into the system. Third, there is potential for discriminatory or arbitrary decision making, and fourth, there is little emphasis on due process. However, diversion has been practised by the police unofficially for some time. It is certainly an improvement to recognise the practice by statute.

(c) Family empowerment

Currently, much of the Act's success depends on the skills of individual families. It is vital that families are aware of what is expected of them, and what to expect of others present at the family group conference. Families who are unaware of the options available to them are likely to continue to operate within existing belief systems. Their choices will be severely limited.

To avoid this, appropriate resources must be given to the family group conference process. Such resources are not available at present. In addition, the Mason Report recommended that the Commissioner for Children be given the power to undertake independent research to evaluate family group conference outcomes for all parties.[55] Statistical records should be kept, and the Police, Children and Young Persons Service and Youth Court must devote more attention to the family group conference process.

55 Supra at note 18, at 33-34.

(d) The child's well-being

On some occasions, the focus of enquiry must move from youth justice to the care and protection of the young person. This is especially so in cases where the young person has been subject to abuse or where the family will not or cannot take responsibility for the young person. Maxwell and Morris conclude that care and protection issues are often overlooked.[56] The Mason Report recommended that a clearly defined process be established to deal with this situation.[57]

(e) Other concerns

It could be argued that the system is not dealing with repeat offenders adequately. There will always be some individuals beyond the reach of any system. However, the Mason Report concludes that with better monitoring of the family group conference process, and more residential facilities, society would be in a better position to deal with repeat offenders.

Changes may be required to give children and young people greater say in family group conferences. Article 12 of the United Nations Convention on the Rights of the Child accords a child who is capable of forming views the right to express a view on all matters affecting him or her, and the right to have due weight given to that view. Maxwell and Morris stress that there must be fundamental changes in adults' and professionals' attitudes, to enable young people to have an effective voice in what happens to them.[58]

Maxwell and Morris are also critical of the extent and effectiveness of the accountability in the new system. Their findings reveal that sanctions recommended by families were often quite severe compared to those which might normally be awarded by the court. Furthermore, "tasks agreed to at the FGC [Family Group Conference] were not always completed and the lack of follow up by the system means that the extent of this was not known".[59]

Other criticisms relate to problems with the multiplicity of judges, the failure of the appointments system, the seeming pointlessness of the many brief appearances that occur for young people and their families, and the visibility of the young person to many unknown participants in the courtroom. The rituals of standing in the dock and being escorted by the police remain unchanged in most courtrooms.[60]

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56 Supra at note 10, at 179-180.

57 Supra at note 18, at 45.

58 Supra at note 10, at 184.

59 Ibid, 162.

60 For a more detailed summary of these conclusions, see ibid, 162-164.

V: CONCLUSION

The CYPF Act's new approach to justice is a fundamental departure from the welfare model followed in the past. It challenges traditional institutions such as the court, the judge, the adversarial legal system, the police, and the expert. It encourages the involvement of both the victim and the offender's family in decision making. Here, as with any major departure from an earlier model, there has been resistance to the fundamental reshaping of an entrenched system. While significant concerns do exist, many of these are the result of a lack of resources. If the new paradigm of justice is to empower family and whanau effectively, it requires both adequate financial support and a commitment to changing attitudes.