The courts and child protection - aspects of the Children, Young Persons, and Their Families Act 1989

W R Atkin*

The Children, Young Persons, and Their Families Act 1989 heralds a dramatically new approach to child protection cases. The policy is to involve the wider family or whanau in the process of deciding what is to happen to a child who has been ill-treated or abused. The jurisdiction of the courts is constrained unless a "family group conference" has been held. The Act is not however without its legal ambiguities. This article attempts to analyse the parliamentary intention and the scope for judicial intervention under the new system, including judicial review and High Court wardship. It is concluded that there are many problems of interpretation with the Act and that it cannot be assumed that the rules which were developed under the former legislation automatically apply to the new Act.

I A RADICALLY NEW REGIME

We are reminded on various occasions that we should not carry old jurisprudence over into a new statutory code.[1] Away with the past and in with the new. It is hard however, when looking at a new piece of legislation, especially one as long and as bewildering as the Children, Young Persons, and Their Families Act 1989, not to cast a glance over one's shoulder to make comparisons with what happened before. In part this article will be doing that, but more particularly there will be some exploration of the role that the courts will be expected to play under the new Act in the context of child protection.[2] This role will be radically different both in terms of legal rules and in terms of the processes which are put into place by the Act.

There can be no doubt that the 1989 Act represents one of the most far-reaching reforms in child law for decades. No longer is the welfare of the child to be the central consideration but only one along with other factors which emphasise the unity and authority of the family. Instead of the state, including the courts, taking a dominant role in protecting children and making decisions affecting them, the

* Senior Lecturer in Law, Victoria University of Wellington

1 Cf *Re "Tony"* (1990) 5 NZFLR 609; *Slater* v *Slater* [1983] NZLR 166, 173, and cases under the Matrimonial Property Act 1976.

2 The Act deals with both child protection (child abuse, neglect, etc) and juvenile offending. Except in passing, this article will not consider the "youth justice" parts of the Act.

initial and substantial role is given to the family itself. The family is not to be narrowly defined. One of the main reasons for the shape of the reform is that Maori and Polynesian groups considered that the old system left out their basic understandings of human relationships which start with the wider family and tribe and not with the individual or the so-called "nuclear family". The processes laid down in the Act swing the participants away from judicial resolutions, away from social worker and professional strategies and towards the concept of the family group conference. This approach applies no matter what the child's ethnic background - European as much as Maori or Pacific Island.

While the underlying shift in policy is evident from papers leading up to the passage of the Act[3] and from a comparison with the repealed Children and Young Persons Act 1974, a careful analysis of the Act itself leads to rather more uncertainty about the strict intention of Parliament. Under the 1974 Act the courts invoked the principles of that Act, especially the "paramountcy principle", ie that the interests of the child[4] are to be treated as the first and paramount consideration in determining how to interpret the Act.[5] Under the 1989 Act they will have to do just the same. It is therefore intended in this article, to examine some of the principles of the new Act, not from the point of view of the social worker or the policy-maker, but from the point of view of the lawyer trying to construe the provisions of the Act. It is also intended to examine whether the courts have any role in relation to the family group conference and then to see how the express statutory role of the courts may work out. The grounds for making a declaration will be considered and it will be suggested that in some respects there has been quite a shift in the rules compared with the handling of "complaints" under the 1974 Act.

II THE INTENTION OF PARLIAMENT

The Act is replete with hints of parliamentary intention. These statements must be seen against the backdrop of the overall scheme of the Act.

---

3 Cf Department of Social Welfare *Puao-Te-Ata-Tu* (Government Printer, Wellington,1986) - a seminal document which challenged the Eurocentric practices and policies of the Department - and *Review of the Children and Young Persons Bill* (Department of Social Welfare, Wellington,1987). The latter was highly critical of the Bill which had been introduced in 1986 and which was totally replaced by the version which became the 1989 Act. The emphasis of the 1986 Bill was on powers of intervention, mandatory reporting of child abuse and decision-making by child protection teams.

4 The 1974 and 1989 Acts distinguish between a "child" and a "young person", the latter being aged between 14 and 16 inclusive, and a child being under 14. Most of the rules relating to child protection are the same for children and young persons, and references to "child" in this article can therefore be taken to include a young person.

5 Section 4 of the 1974 Act. Cf *Pallin* v *Department of Social Welfare* [1983] NZLR 266 (CA) and *In the Guardianship of S* (1983) 2 NZFLR 65, which both drew on the principle.

A The Title and Objects - "Family" and "Family Group"

After referring to the reforming nature of the Act, the Title sets out some specific goals, the first being to advance the wellbeing of families. The wellbeing of children is mentioned next but, significantly, their wellbeing is " as members of families, whanau, hapu, iwi, and family groups".[6] The wellbeing of children in itself is not therefore a concept embraced within the Title, although a subsequent item mentions rather blandly making provision for matters relating to children in need of care or protection. The main thrust of the Title is therefore the interests of families, and children come into the picture only as part of a family.

The "objects" section of the Act contains one object -"to promote the wellbeing of children, young persons, and their families and family groups".[7] The provision of assistance and services and very general statements about protection of children are then mentioned as ways of achieving the object. The tone of the objects section is on administrative and machinery provisions, rather than on the values and policies which underly the Act.

It might be thought crucial to know what is a family or family group in order to understand whose wellbeing must be advanced. At this point the Act becomes distinctly obscure. "Family" is not defined at all. "Family group" is defined as:

> ... family group, including an extended family,-
> (a) In which there is at least 1 adult member -
> (i) With whom the child or young person has a biological or legal relationship; or
> (ii) To whom the child or young person has a significant psychological attachment; or
> (b) That is the child's or young person's whanau or other culturally recognised family group.

The first thing to notice about the definition is that it is partly circular - a family group is a family group. But then some more flesh is put on this concept. Presumably the Maori community can help in understanding what is now the statutory concept of "whanau" (although the writer is aware that "whanau" can be used in several different ways and is a word which can be adapted for different purposes) and those from other communities can explain what for them is recognised as a family group.[8] What however is to be made of the rest of the definition? Does the reference to one adult member mean that a solo parent situation may constitute a family group? This is surely a family, and it may well

---

6 "Whanau", "hapu" and "iwi" are Maori words referring (roughly) to family (widely defined), sub-tribe and tribe.

7 Section 4.

8 For example, "aiga" is the Samoan family group. For a discussion of ethnic understandings of family, see *Dangerous Situations, The Report of the Independent Inquiry Team Reporting on the Circumstances of the Death of a Child* (Department of Social Welfare, Wellington, 1989) 126.

be a family which is in need of assistance, but is it also by itself a family group? The implication to be taken from the references to whanau and "extended family" is that a family group is to be wider than this and should involve grandparents, maybe uncles, aunts, cousins, etc. The way in which the family group conference is designed to operate[9] would certainly envisage a wider group than one solo parent. So, does this mean that the family group does not have to live together? That the group whose wellbeing the Act is catering for may be a dispersed collection of individuals whose relationships apart from blood or adoption may be tenuous and spasmodic? If this is so, then the idealism of the Act starts to look less attractive. The one adult person who must belong to the family group may be anybody related by blood (ie "a biological ...relationship") or by adoption (ie a "legal relationship") and need not necessarily be a parent. A step-parent, who is within the Act's definition of "parent", may possibly be included through being married to a natural parent (is this a legal relationship?) or else would have to come within the phrase "a significant psychological attachment". This phrase is probably designed to take account of the step or foster parent situations, but it is a very clear indication that the Act is not solely concerned with natural kin. There will be cases where a child is part of a family with which it has no biological or adoptive links. What however if that child's estranged natural family also claims an interest in the child's welfare? Can they be regarded as part of the child's family group? Or does the child have two family groups? What if the child's kin or some of them are Maori and the child belongs to an identifiable whanau or hapu? Can the whanau take precedence over the foster family? How far are we to take the phrase "significant psychological attachment"? Some children at boarding school may consider that they have such an attachment with their favourite teacher. Does this place the teacher and the school in a special position? Presumably this could not be seriously suggested as being within the intention of the Act and yet on the strict words it is by no means outlandish.

Enough has been said to indicate that the concepts of "family" and "family group" as used in the Act are vague and ill-defined. And yet they are fundamental to the aims and objects of the Act. The importance of these concepts will re-emerge in other parts of this article, particularly in Part III dealing with the family group conference.

B The Principles of the Act

In sections 5 and 6 of the Act there are principles which govern the operation of the whole Act, including both the care and protection and the youth justice parts. In addition, in section 13 there is a separate set of principles which apply only to the care and protection part, with a corresponding but substantially different set of principles in section 208 for the youth justice part. The number of different principles means that there are at least 18 principles for care and protection, more if the principles which really contain more than one idea are divided. A court searching for the intention of Parliament has therefore plenty of material upon

---

9 See Part III of this article.

which to draw, but maybe it is more an embarrassment of riches as the principles often tug in different directions.

The principles bind the court and persons exercising powers under the Act. Clearly they are at least an essential aid to interpretation and they can be invoked to challenge actions and decisions made under the Act. It is submitted that not only do they bind the courts and the Director-General of Social Welfare, along with all other official agencies, but they also bind the family and the family group, especially in the context of the family group conference.

In summary the "general principles" are:[10]

+ Family participation in decisions
+ The maintenance of relations between the child and the family (not it will be noticed between the child and its parents)
+ The welfare of the child and the stability of the family
+ The wishes of the child
+ Obtaining, if possible, the agreement of parents and children to proposed courses of action
+ The child's sense of time.

Although the first of these principles emphasises the family, the remainder strengthen the position of the child. However there are qualifications on the child oriented principles. The welfare of the child is coupled with the stability of the family, which arguably means that they are to be read together. In other words, the welfare of the child is not to be seen in isolation from family stability but only as part of it. The child's wishes are also circumscribed by the age, maturity and culture of the child. One can readily understand the need for the child to be old and mature enough before its views will carry much weight (although if there is someone to speak on behalf of a young child, can the problem not be partially overcome?), but the mention of "culture" is obscure. Does this mean that the wishes of a mature child can be ignored if this is consistent with the child's ethnic background?

The "welfare and interests" of the child are given greater prominence in section 6 but in a way which invites controversy. Where there is a conflict of interests or principles, the welfare and interests of the child "shall be the deciding factor". In *Director-General of Social Welfare* v *L*[11] Richardson J obiter thought that the section was merely "a contemporary re-statement" of the paramountcy principle found in the old Act and this may well have been the politicians' aim. However whether that view is correct has been doubted.[12] The child's welfare is the deciding

---

10 Section 5.

11 [1989] 2 NZLR 314, 319.

12 M Brown, L Goddard and S Jefferson *Children, Young Persons, and Their Families Act 1989* (NZ Law Society seminar, Wellington, 1989) and Butterworths *Family Law Service* (loose-leaf) 6601 ff.

factor only if there is a conflict of principles or interests, and is thus a fallback or secondary rather than a primary consideration.[13] Which principles and what or whose interests are referred to here? It is submitted that "principles" means the principles laid down in the Act and that "interests" may be those of the child, the parents or the family. At one level, wherever there is child abuse there may be a clash of interests between the victim and the abuser, but at another level, it might have to be proven on the facts of each individual case that such a conflict exists but this could require assessing the very issues in dispute. For example, if the accusation is false, there is no conflict of interests between parent and child, but the falsity has first to be established. Or to take a quite different situation, conflict between the interests of child and family is less obvious where the alleged abuser is a friend or lodger. Further, in interpreting section 6 we must be aware of the injunction not to carry forward the ideals of the past. Section 6 must be read in the light of the rules and procedures of the Act including some of the specific principles in section 13.

Section 13 contains the principles which relate only to the care and protection provisions. The first principle is the protection of children, the upholding of their rights and the promotion of their welfare. But, as Tapp points out,[14] this is qualified by subsequent principles. In section 13(b)(ii), intervention into family life must be kept to the minimum necessary to ensure the child's safety and protection. This minimum intervention principle is a strong statement to discourage action in the interests of the child. In section 13(e), a child may be removed from its family (not necessarily its parents) "only if there is a serious risk of harm to the child..." Note that on one interpretation the harm does not have to be serious, thus a small risk of serious harm will not justify removal, and the strong probability of slight harm will be consistent with removal. On the other hand, "serious risk of harm" might be construed as one whole phrase, so that there must be a strong probability of serious harm. How to measure seriousness is obviously a difficult matter but it is also unclear what is meant by harm. It is submitted that it should embrace not only physical harm but also emotional and psychological harm and arguably in the context of the 1989 Act cultural and spiritual harm as well. Whatever precisely we make of the phrase "serious risk of harm", it is clear that there is a powerful statutory injunction against splitting a child from its family. This has led Tapp to say that "[t]he Act classifies family violence by adults against children far towards the private end of the continuum".[15]

Most of the remaining principles in section 13 are family oriented. They relate primarily to the desirability of the child's continuing association with its family, even where it has been removed. In section 13(b) there is the novel principle that the family, whanau, hapu, iwi and family group have the "primary role in caring for and protecting" a child, whereas the traditional European view and that which is

---

13 Under article 3(1) of the United Nations Convention on the Rights of the Child, "the best interests of the child shall be a primary consideration".

14 P Tapp "Family Law" [1989] NZ Recent Law Rev 143, 145.

15 Above n14, 144.

stated in the United Nations Convention on the Rights of the Child[16] is that the primary role rests with the child's parents. Indeed, section 13(b) goes on to say that the family itself must be supported and protected. What is surprising is that these principles are not general ones covering the whole Act but ones which relate to care and protection. In other words, they are relevant to situations where the family is dysfunctional, where the weakest members of the family are at risk and where there is a distortion of the commonly accepted patterns of child rearing.

C *Where Does This Leave the Interests of the Child?*

Even though the welfare and interests of the child may be the deciding factor under section 6, we have seen that this section is less straightforward than at first it appears, and that when seen in the overall context of the principles in the Act, the interests of the child tend to be backseated by the minimalist intervention philosophy and family favouritism. There are however other provisions in the Act which counterbalance the tendencies just recorded.

The principle of child participation is present in the Act.[17] The child's wishes are mentioned in section 5. Under sections 8, 10 and 11, children are to receive information and explanations about decisions and proceedings affecting them and are to be positively encouraged and assisted to participate in court proceedings, depending on their age and maturity. There are nevertheless qualifications to these duties. For instance, a child may be denied information because it is unable to understand, or because "[i]t is plainly not in the child's ... interests to be so informed".[18] Presumably the latter is judged by the person who is taking the action or making the decision in question. The duty to encourage participation is restricted to proceedings before the court, and the time before a case reaches adjudication, most notably during the stage when the case is before a family group conference, is not covered by the duty. There is no duty on the family group to encourage the child to participate.

An important protection for the child is the appoinment of counsel to represent the child.[19] Appointment is mandatory when the child is the subject of proceedings, but will often not have been made when a family group conference meets to attempt to resolve the case. There is also a discretionary power to appoint a "lay

---

16 Article 18.

17 This principle was found in the 1974 Act, s4B(1)(d), although it was cast in more general terms than in the 1989 Act. It is noteworthy that the principle of voluntariness - that the child should be free to make its own decisions depending upon its level of understanding - is absent from the 1989 Act. See s4B(1)(c) of the 1974 Act. The inclusion of this principle, which is consistent with the approach of the House of Lords in the leading case of *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, was recommended by the committee which reviewed the Children and Young Persons Bill 1986 : *Review*, above n3, 30.

18 Section 8(2).

19 Sections 159-162.

advocate".[20] The lay advocate is supposed to appear in support of the child[21] but the role and responsibilities of the lay advocate become thoroughly confused by a subsequent provision which states that the lay advocate is "[t]o represent the interests of the child's or young person's whanau, hapu, and iwi (or their equivalents (if any) in the culture of the child or young person)." This strange conflict can perhaps only be explained if the position of lay advocate is peculiarly designed for Maori and Pacific Island people and that within those cultures the conflict is less apparent. But there is no limitation on the appointment of a lay advocate and so the confusion may still cause problems. A further problem is the uncertain boundary line between counsel for the child and the lay advocate. Their roles are, in some respects at least, identical.

The new office of Commissioner for Children[22] is clearly a significant step in advancing the interests of children. The Commissioner is given very wide functions, some of them being ombudsmanlike in handling individual complaints, and others being more like those of the Human Rights Commission in fulfilling a general advocacy role with the government and society on behalf of children. What is of special interest is that the Commissioner's statutory functions are child and not family oriented and indeed several of these functions explicitly mention the welfare of the child.

What about the safety of the child? A major and valuable report on a parental manslaughter recommended that the slogan "The child must be made safe, now" be incorporated as a central feature of the new legislation.[23] This recommendation was not taken up and safety of the child is not a dominant element in the Act's principles. Nevertheless, in one area where the safety of the child is crucial - where there is a need to take urgent action to protect the child - the Act contains procedures which, as under the 1974 Act, enable officials to act very quickly to remove a child from danger. Place of safety warrants and warrants to remove can be obtained from judicial officers and where it is critically necessary to protect the child from injury or death, the police can remove without a warrant.[24] These emergency powers are temporary measures only and do not protect the child's long-term safety.

---

20 Sections 163-165.

21 Section 163(1).

22 Sections 410-422.

23 *Dangerous Situations*, above n8, 62 : "[The slogan] should be in the Act, if not in the exact language of the slogan then at least in a sharper and more memorable presentation of the idea of safety than the present 'interests of the child'." Note that far from wishing to see the paramountcy principle go from the legislation, this report wanted it strengthened.

24 Sections 39-42.

D *A Multi-facetted Parliamentary Intention?*

It is submitted that there is no one simple underlying parliamentary intention with respect to the Children, Young Persons, and Their Families Act 1989. The intention of Parliament as gauged from the text of the legislation and its parliamentary history has several facets to it, which must be juggled by the courts in order to reach a correct interpretation of the Act. The welfare of the child is still an important principle, which, although downplayed compared with the 1974 Act, is given more substance by, for instance, the creation of the office of Commissioner for Children. At the same time the Act is at pains to enhance the position of the family. It is the family rather than parents who are to be assisted and indeed protected under the legislation. Despite difficulties in defining the parameters of "the family", we can confidently say that the composite phrase "family, whanau, hapu, iwi and family group" means that the Act is not particularly interested in the so-called "nuclear family" and wishes to tap the resources and wisdom of the extended family. Another major current running through the Act is the desire to set up procedures and lay down groundrules which are much more in tune with Maori and Pacific Island attitudes. Where appropriate, therefore, the Act should be construed consistently with those cultural understandings.

With these points in mind, we can now consider more directly what place is left for the courts in the new system.

III FAMILY GROUP CONFERENCES

A *The Role and Membership of the Conference*

A central place is given in the new Act to the family group conference. Little decision-making can be done without the conference first being convened and having an opportunity to find a solution. For instance an application to the court cannot normally be made unless there has been a conference.[25] If an application to the court has been made, the court may not grant a declaration that the child is in need of care or protection unless there has been a conference, the only exception being in the case of abandonment.[26] The typical course of a case will be for a conference to be called following the investigation of a report of child abuse. Reporting by members of

---

25 Section 70. See Part V of this article. For an excellent discussion of the topic, see P Tapp "Family Group Conferences and the Children, Young Persons and Their Families Act 1989: an ineffective statute?" [1990] NZ Recent Law Rev 82.

26 Section 72. Note however that under s78, the court can place the child in temporary custody where there has been emergency action, where the court is satisfied that the child is in need of care or protection (presumably this would be without the benefit of a full hearing on the issue) or where the child has been offending. There is no need to wait for a family group conference before taking temporary action under this provision.

the community is not mandatory[27] but may be made with immunity from legal action.[28] If on investigation by a Social Welfare social worker or member of the police it is concluded that there is substance to the report, the matter is handed over to a care and protection co-ordinator (a departmental appointee) who has the responsibility for convening a family group conference and ushering it through its decision-making process.

The task of the family group conference is to make decisions or recommendations and to formulate plans for a child in need of care or protection.[29] It also has a downstream task to review what has happened to the child and may consider in a general way matters relating to the care and protection of the child. Much of the conference's work is dependent upon the initial question of whether the child is "in need of care or protection", a phrase which will be looked at more closely later in this article.[30] What is unclear from the legislation is how the conference is required to go about addressing this basic question. While the care and protection co-ordinator has an obligation to ensure that the conference receives all necessary information and advice and this may include information and advice from specialists,[31] the decision that the child is in need of care or protection appears to be one which the conference has to make as best it can on the available evidence. How it will resolve a conflict of evidence or a refusal to contribute by the alleged perpetrator of the abuse or how it will test the veracity of claims made to it is not covered in the Act except in the general rubric that the conference can regulate its own procedure.[32]

Another matter which legally is somewhat obscure is membership of the conference and attendance at its meetings. The Act is internally contradictory and a minefield, should the issue ever have to be litigated. The problem of knowing who constitutes the "family" and the "family group" has already been discussed. This problem is compounded by the provisions on conferences.

Section 22(1) sets out a long list of people who are "entitled" to attend a conference, "entitled" presumably in the sense of "as of right" without having to seek anyone else's permission. The list includes the child, parents, members of the

---

27 As was proposed in the 1986 Bill, but heavily criticised by groups making submissions to Parliament.

28 Sections 15, 16 and 444.

29 Section 28.

30 See Part IV.

31 Section 23. Note that "care and protection resource panels" are appointed throughout the country to assist with this process : ss428-432. In part they are the successors to the former "child protection teams" which had sprung up to deal with child abuse cases, but their role is entirely advisory and not executive. Their role, which is very loosely defined in the Act, may in practice be quite significant.

32 Section 26(1). It is not clear that in practice conferences are carefully considering these questions. Instead, the family group may simply rely on the view of the social worker but it may be doubted whether this is adequate. Under s28(b), the conference must "consider" the child to be in need of care or protection.

family, whanau, or family group (not of the hapu or iwi, necessarily), the care and protection co-ordinator, the social worker, police officer, or representative of the agency which initiated the convening of the conference, the agent of the High Court where the child is under the guadianship of that Court, counsel for the child, lay advocate,[33] and anyone else who attends in accordance with the wishes of the family. Note that, although called a "family group conference", members of the family and whanau who do not belong to the child's immediate family group are entitled to attend (eg birth families of adoptive or fostered children). In addition to this list, it appears that professional advisors have a right to attend for information and advice purposes only.[34] This list of entitled persons is however significantly qualified. The child may be excluded from the conference, not by the family, but by the co-ordinator if the child's attendance would not be in the child's interests, if for any other reason the co-ordinator thinks it would be "undesirable", or if the child is too young or immature to understand what is going on.[35] It is suggested that this extraordinarily wide power is a statutory discretion which is subject to the rules of administrative law. The co-ordinator has a corresponding power of exclusion with respect to parents and members of the family, the grounds being the interests of the child or undesirability of attendance "for any other reason".[36] One can readily understand why it might be undesirable for the child to have to face its alleged abuser in front of an official gathering of the family. Indeed the law of giving evidence has recently been amended to take account of this point in the context of criminal trials.[37] However it is still rather strange that such a broad and vaguely defined discretion is given to an officer of the Department, when the family itself is supposed to be marking out the way forward and regulating its procedures. A further complication is added by section 22(2). Most of the non-family people "entitled" to attend the conference are not "entitled" to attend when the conference is engaged in "any discussions or deliberations". The only person, apart from the child or family, who retains the right to attend is an agent of the High Court,[38] all others being present solely at the request of the family. The significance of the exclusion of people from the conference depends somewhat on the scope of the phrase "any discussions or deliberations". Given a narrow meaning it may refer only to the final weighing up of evidence and options. But the phrase on its face is not as limited as this and it is submitted that it embraces virtually the whole of the conference proceedings with the exception of administrative matters which may be in the hands of the co-ordinator and information and advice sessions under section 23(2). It might be thought a spokesperson for the child or a representative of the alleged perpetrator might need to be present at the crucial stages in the process when the future of the child is at stake, but this is not so.

---

33 The lay advocate also has separate authority to attend under s164(2)(b)(iv) and it unclear whether this gives the lay advocate any superior status at the conference.

34 Section 23(2).

35 Section 22(1)(a).

36 Section 22(1)(b).

37 Evidence Amendment Act 1989.

38 Even though the lay advocate derives authority to attend from both s22 and s164, it is submitted that the wording of s22(2) means that that person must be excluded.

B *The Conference and the Role of the Court*

The family group conference has many advantages - it harnesses the cultural bias towards families which exists in key sectors of the community, it reduces court time, it avoids an officialdom approach to child problems (although the care and protection co-ordinator can be in a very powerful and controlling position) and, through the intimate knowledge of family members, may be able to come up with innovative solutions. On the other hand, there are questions about the functioning of conferences which may involve the courts in other ways. What if a person claims they have been wrongly left out of a conference? What if the family group has been defined too narrowly or, taking the other extreme, too broadly? What if, as in a sex abuse situation, the allegations are denied and a proper "hearing" has not been given to the "accused"? What if a person claims that the decision that the child was in need of care or protection was wrongly made? What if the family refuses to hold a conference or only the alleged abuser turns up? What if the conference makes an entirely inappropriate decision which leaves the child in danger?[39]

There are several answers to these questions short of court action. The help of the Commissioner for Children could be sought. The conference can reconvene and reconsider its decisions.[40] Importantly, the decisions of the conference will only be implemented if the original social worker, police officer or agency agrees with the solution,[41] and furthermore, the Director-General and the police need not action the decisions if they are "clearly impracticable or clearly inconsistent with the principles set out in sections 5, 6 and 13".[42] While the task of weighing up the large number of potentially conflicting principles will not be an easy one for the Director-General or the police, we nevertheless see in these rules a significant claw-back of power from the family to the state, and this may represent a major safeguard against the family group conference going wrong.

There may however still be dissatisfaction with the outcome of the whole process. A family member may fall into this category, or an interested "outsider" such as a godparent, a teacher, a doctor, a priest...anyone who has had some involvement with the child or the family. It is submitted that once a family group conference has been held, then an application to the Family Court can be made for a declaration that the child is in need of care or protection. As the conference has been held, the court will have jurisdiction to hear the case.[43] It is also submitted that the High Court may be used in exceptional cases either through its wardship jurisdiction or by judicial review.

---

39 Eg in a sexual abuse case, denials are backed up by the powerful members of the family and the social worker colludes in the outcome. For an example of a case involving a denial of sexual abuse, see *Nelson* v *M* (1988) 5 NZFLR 97.

40 Section 36.

41 Section 30.

42 Sections 34 and 35.

43 See Part V of this article.

1 Wardship

The popularly known "wardship" jurisdiction, which derives from the inherent parens patriae powers of the High Court, is now codified in section 9 of the Guardianship Act 1968. It may be invoked by the child, parents, guardians, near relatives and the Director-General as of right, and anybody else may apply with leave of the court. It is an important source of residual power which in recent times has been used to deal with such questions as the sterilisation of girls with intellectual handicap[44] and the treatment of new-born babies.[45] The scope of the jurisdiction is not however limited and may cover any matter that normally forms part of the guardianship of a child. In some cases the High Court will be able to dispose of a case directly, but in other instances it will appoint some person or agency to act as its agent. While the scope of the jurisdiction is very broad, its use is not automatic. Indeed the High Court will intervene only if it is really necessary. In the context of child protection, where there is a statutory framework in existence and an arm of state charged with responsibility in the area, the High Court is going to tread very warily. The use of wardship in England, where local authorities fulfil the function performed by the Department of Social Welfare in New Zealand, has been extremely restrictive.[46]

The approach in New Zealand can be gauged from the case of *In the Guardianship of S.*[47] The case did not challenge the process of taking a child into care, but rather the system of care which the state then provided for the child. A boy had been under the guardianship of the Director-General of Social Welfare for over six years and had a long history of placements with foster parents and institutions. Davison CJ commented that the boy had been moved "from pillar to post" and that there was a "rather dismal record of failed placements".[48] At the time of the proceedings he had spent numerous weekends with the applicants, where he had developed a good relationship with the family and especially another boy in the family's care. There was no question as to the family's suitability to be foster parents but the relationship between them and the Department had apparently become very poor. The Department however had another family in mind and it was the intention that this family should adopt the boy. At an earlier stage, the boy had been made a ward of the High Court with the Director-General appointed as agent. The applicants then sought to have the wardship order confirmed but with the Director-General's agency removed, while the Director-General sought the discharge of the wardship order entirely. Davison CJ found for the applicants and made them agents of the court in place of the Director-General. His Honour noted that the parens patriae role had been largely taken over in practice by the Department and

---

44 *In re B (A Minor)(Wardship : Sterilisation)* [1987] AC 199.

45 *In re C (A Minor)(Wardship : Medical Treatment)* [1989] 3 WLR 240.

46 Cf *A* v *Liverpool City Council* [1982] AC 363 and *In re W (A Minor)(Wardship : Jurisdiction)* [1985] AC 791.

47 (1983) 2 NZFLR 65.

48 Above n47, 77 and 74.

that there were limits on the exercise of the wardship jurisdiction. Thus, the courts will interfere only where there are special circumstances, judged against the backdrop of the welfare of the child.[49] On the facts of the case, Davison CJ held that there were special circumstances in that the Director-General had failed to discharge the statutory obligations towards the boy.

In some ways *In the Guardianship of S* highlights the inadequacies of the system operating under the 1974 Act and the real possibility of serious failure following state intervention. The 1989 Act, it is hoped, might avoid this by casting much greater responsibility upon the shoulders of the wider family at an early time. Nevertheless there is no guarantee that all families will have the resources or the determination to meet the needs of abused children. There is also no guarantee that the process of decision-making under the new Act will be free from fault. It is submitted that High Court wardship remains as a residual protective power to operate in the interests of the child.[50] One reason for this, which justifies a less restrictive approach than in England, is that wardship is expressly mentioned in the Act, namely in the context of custody and guardianship orders, which may be granted by the court under the Act. While a guardianship order under the 1989 Act will normally supercede High Court guardianship,[51] the High Court can subsequently make a wardship order, which will have the effect of replacing the order under the 1989 Act.[52] The policy of the Act is therefore to preserve the powers of the High Court and it is submitted that these powers can be used at any stage during the processes put in place by the 1989 Act. It follows that the High Court has jurisdiction to step in before, during or after a family group conference. Whether it will do so is another matter, and in the light of the traditional approach of the courts in cases such as *In the Guardianship of S*, it is likely to do so only in the rarest of circumstances. Prima facie the High Court is not going to want to upset in any way the normal running of a conference. But if there is evidence that a conference is being manipulated fraudulently or where there is collusion or bad faith between the family and the authorities to the detriment of the interests of the child, then the High Court may be persuaded that there are special circumstances justifying intervention. This is thought to be less likely at an early stage of proceedings, but if as in *In the Guardianship of S* the matter is of long standing, a basis for intervention may be easier to establish.

---

49 By s23 of the Guardianship Act, the welfare of the child is the first and paramount consideration in exercising the wardship jurisdiction.

50 Note that wardship need not necessarily be sought by an aggrieved party; the Department of Social Welfare itself might apply (see J Masson and M Morton " The Use of Wardship by Local Authorities" (1989) 52 MLR 762 and note *E* v *Director-General of Social Welfare* (Unreported, Rotorua High Court, M 7/90, 28 March 1990) where a youth advocate (appointed under the youth justice parts of the Act) applied.

51 Section 114(1)(b). Under s117(2)(b), the Family Court may order that High Court wardship continues.

52 Sections 117(2) and 120(2). Under s117(3), the High Court can decide that the order under the 1989 Act continues, thus creating a situation of co-existing guardianships.

2 *Judicial review*

Various persons are given discretions under the 1989 Act, notably social workers, co-ordinators and the family group conference. It is submitted that all these are subject to the administrative law rules of judicial review. As noted above, social workers and the family group conference are charged with making significant decisions about an allegation of child abuse, first whether the child is in need of care or protection (which may require assessment of the evidence) and secondly, what is to happen to the child in order to ensure its protection. There are few examples of judicial review cases in the context of family law or social work.[53] This is no reason why a social worker or a family group conference could not be challenged on the the grounds of lack of jurisdiction, procedural unfairness, failure to take account of relevant material, reliance on false statements, or other grounds for judicial review.

The possibilility of judicial review is well illustrated by the English Court of Appeal decision in *R* v *Harrow London Borough Council, ex parte D*.[54] The local authority in that case operated a child abuse register, which contained a list of children thought to be at risk. Following an acrimonious divorce, a mother was given custody of the three children of the marriage, but the father accused her of hitting the children. A case conference was held, which the mother was refused permission to attend but to which she was able to make written submissions. The outcome of the conference was that the three children were put on the child abuse register. The mother, being concerned about the stigma attaching to having her children on the register, sought judicial review of the decision. The basis of the challenge was not that she had been prevented from attending the case conference, but that, in not giving her an opportunity to know about and to meet the material allegations made against her, the conference had breached the lowest degree of administrative law fairness. The Court of Appeal rejected the mother's claim but in so doing indicated that judicial review would certainly be possible given the right facts. In the instant case, it was held that there was no breach of fairness because the mother had been able to make written submissions, as did a friend of hers. The conference had the advantage of expert paediatric evidence. The procedure and the result did not offend the *Wednesbury* principles. However given the importance of the topic, Butler-Sloss LJ[55] made wider comments on judicial review. While rejecting the argument that there could never be judicial review and accepting that

---

53 For a recent New Zealand example of judicial review of a decision of the Family Court, see *Martin* v *Ryan* (Unreported, Hamilton High Court, M188/89, 8 March 1990) where Fisher J discussed extensively the grounds for judicial review of illegality, irrationality (known as "*Wednesbury* unreasonableness" from *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223), procedural impropriety and misrepresentation. His Honour also referred to substantive fairness, but did not have to rely on this ground in order to reach his conclusion.

54 [1989] 3 WLR 1239.

55 Note that Butler-Sloss LJ chaired the famous inquiry into the removal of suspected child sexual abuse victims in the North of England : *Report of the Inquiry into Child Abuse in Cleveland* (HMSO, London, Cm 412, 1987).

an application could lie if a decision of a case conference was utterly unreasonable, her Lordship stated:[56]

> In coming to its decision, the local authority is exercising a most important public function which can have serious consequences for the child and the alleged abuser...recourse to judicial review is likely to be, and undoubtedly ought to be, rare.

And later:[57]

> The important power of the court to intervene should be kept very much in reserve, perhaps confined to the exceptional case which involves a point of principle which needs to be resolved, not only for the individual case, but in general...In this area unbridled resort to judicial review could frustrate the ability of those involved in their effort to protect the victims of child abuse.

The language here is reminiscent of that used by Davison CJ, quoted above when discussing the wardship jurisdiction. In other words, the underlying policy for both judicial review and wardship is very similar. Butler-Sloss LJ's reasons are particularly interesting. She notes that case conferences are unstructured and informal, not to be regarded as a judicial process. The welfare of the child must be taken into account in a way which would, if there is doubt, justify entry of the child's name on the child abuse register. In this respect, "the interest of an adult may have to be placed second to the needs of the child" and those making decisions in this delicate area "should be allowed to perform their task without looking over their shoulder all the time for the possible intervention of the court".[58]

In the course of the judgment, another English case with similar facts was referred to with approval and given as an example of where judicial review was appropriate. In *R* v *Norfolk County Council Social Services Department, ex parte M*[59] a plumber's name was put on a child abuse register as a suspected abuser, following allegations of sexual abuse by a teenage girl living in a house where he was working. His employers were informed and he was suspended from work. The plumber knew nothing about the entry on the register or the passing on of the information to his employers until after the events. It was held that informing the employers was unreasonable and unfair.

The *Harrow* and *Norfolk* cases show, it is submitted, how judicial review might be approached by a New Zealand court asked to consider the operation of a family group conference. There is potential for unreasonableness and unfairness in the proceedings during and surrounding a conference but given the informality of the decision-making process of family group conferences, as with case conferences in England, judicial review should be kept for the exceptional situation. There are one or two differences from the English position which might however be relevant. The

---

56 Above n54, 1243.
57 Above n54, 1244.
58 Idem.
59 [1989] 3 WLR 502.

family group conference is a statutory institution, unlike both the case conference and the register in *Harrow* and *Norfolk*. This might justify greater vigilance by the courts in reviewing the conference and ensuring that the statutory rules have been complied with. In other words there may be greater scope for challenging the jurisdiction of the conference and a heightened sense of procedural fairness might, arguably, be called for. Another noteworthy point is that decision-making under the Children, Young Persons, and Their Families Act is not based simply upon the welfare of the child, as emphasised by Butler-Sloss LJ in *Harrow*. Is it now so easy in New Zealand to say that adults may have to take a back seat to the interests of children? Arguably, the courts on judicial review should be more willing to assist adults, especially members of the family or whanau, even where the person is the alleged abuser. If the allegation is manifestly groundless, then perhaps there should be few qualms in reviewing the decisions of the conference and declaring them "invalid".[60] One final point about the New Zealand position which may be a practical difficulty is that the proceedings of a family group conference are privileged, so that information, statements and admissions made during a conference cannot be admitted as evidence in any court. This may be a powerful mechanism for preventing a successful challenge based on what was said at the conference. However, the corresponding privilege applying to counselling and mediation under the Family Proceedings Act 1980[61] is limited.[62] It is submitted that the privilege applying to family group conferences will also not relate to facts about who was present, who was heard, and what happened as a result of decisions taken.

Part of the conference's decision-making process is the determination that the child is in need of care or protection and it is to this concept that we must now turn.

IV "IN NEED OF CARE OR PROTECTION"

The basis for action under the 1989 Act is that a child is in need of care or protection. Section 14 sets out the meaning of this phrase. Unless a case can be brought within this section, it cannot be dealt with as a care and protection situation. Many of the categories in section 14 are reflections of the categories in section 27 of the Children and Young Persons Act 1974, but there are significant changes. It is intended to focus primarily on abuse and neglect, but it should be noted that there are other grounds for deciding that a child is in need of care and protection, ranging from parental incompetence and conflict to uncontrollable

---

60 It is submitted that the language of "invalidity" with respect to family group conferences is entirely appropriate and consistent with the Act : see the reference to "validity" in s 25(4).

61 Section 18.

62 *Milner* v *Police* (1987) 4 NZFLR 424, where the counsellor was able to give evidence that a murder victim had been in a certain place at a certain time for the purposes of counselling.

behaviour and child (as opposed to young person) offending.[63] The two principal grounds which relate to abuse and neglect are:

(a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or

(b) The child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable.

It will be noticed that these provisions are complex and contain many different combinations. Compared to the 1974 Act, the main change is that neglect and the similar concepts of deprivation and impairment must be "serious", which means that the threshold before satisfying the legal standard is quite a bit higher than in the past. Howsoever "seriousness" is to be measured, and this is inevitably not a matter which can be done with precision, the new law demands a more rigorous assessment of the facts. In contrast, where there has been abuse, ie ill-treatment or harm, it is not necessary to show that the abuse was serious. It is enough that the abuse exists or is likely.

Under the 1974 Act several rules were developed for determining whether a child was in need of care or protection. In *H* v *Social Welfare Department*[64], Barker J held that in considering whether a child has been neglected the court should endeavour to reflect the community's minimum standards of parenthood and that it is wrong to look at the range of orders which the court could make, decide that one of them might be useful for the child and then determine that the case of neglect has been made out. The stage of deciding whether there had been neglect (known as the "adjudicative stage") was distinct from the subsequent stage of deciding what might happen to the child (the "dispositional stage"). These two stages needed to be kept quite separate. On the facts, Barker J held that the trial judge had been influenced by what appeared to be beneficial to the child rather than by an analysis of the facts, which both taken cumulatively and in isolation did not amount to a case of neglect. This negative assessment would possibly be easier to make under the 1989 Act with its addition of the "serious" criterion. While the separation of stages became an accepted ruling under the 1974 Act, the minimum community standards test was confined to neglect cases. In *Department of Social Welfare* v *J*,[65] where there was evidence that a 5 year old girl was being hit, thrown to the floor and locked up, the trial judge dismissed the complaint laid against the mother by

---

63 A new ground is where the child's bonding is prejudiced because the child has been left too often with others (including friends or relatives). On the face of it this ground has the potential to cut across the policy of the Act favouring wide family responsibility for the care of children.

64 Unreported, Auckland High Court, M 1338/78, 4 Dec 1978.

65 (1988) 5 NZFLR 403.

applying a minimum allowable standard. The judge had balanced the instances of "abuse" with the love and care offered by the mother at other times. On appeal, Williamson J refused to accept the minimum standard test as applying to cases of ill-treatment. Abuse could not be ignored or minimised by reference to community standards. Furthermore, the law did not allow for the balancing of good and bad aspects of parenting - if there was ill-treatment then it was wrong to dismiss the complaint just because there were other good features. Those good features were relevant at the second stage of deciding what kind of order to make and doubtless less drastic steps would be taken where such features were present.

These rules do not survive intact following the 1989 reform. As already noted, neglect cases must be serious, and it may follow that a mere breach of minimum standards may not be enough to satisfy the new ground. Take for instance the case of *Department of Social Welfare* v *H*,[66] where there was evidence of a very tough regime of discipline set for two boys by their stepmother, even down to rules about how to eat and chew food, along with signs of bruising. The boys were described by a psychiatrist as "cowed, withdrawn and fearful children". From the stepmother and father's point of view they were simply maintaining control within the home, but Judge Inglis QC held that "the management of these children in the home went well beyond mismanagement and into emotional and physical cruelty".[67] In other words, the level of discipline fell below the minimum standards the community can accept. But it is a quite different question whether the discipline and its effect on the boys were sufficiently serious to satisfy the new Act.

The separation of the adjudicative and dispositional stages must also be looked at afresh. When considering simply whether a child is in need of care or protection, as a family group conference is required to do, then the traditional division of stages applies with all its vigour. However the position of the court is radically altered under the 1989 Act. A court is prevented from declaring that a child is in need of care and protection unless it has first explored all other practicable and appropriate means of providing for the child.[68] Thus, even if a court is satisfied that a child is seriously neglected, a court cannot declare that to be so before it has assessed the range of options available for disposing of the problem. On the other hand, the division of stages still applies in the sense that, if one of the orders laid down in the Act would be useful for the child, that does not in itself justify a finding of serious neglect, ill-treatment, etc.

---

66 (1988) 5 NZFLR 80.

67 Above n66, 87. His Honour also thought that the state of affairs was "avoidable", a criterion carried forward from the 1974 Act into the 1989 Act. For further discussions of avoidability see *Y* v *Department of Social Welfare* (Unreported, Christchurch High Court, AP 106/88, 16 February 1989) and *Department of Social Welfare* v *H and H* (1987) 4 NZFLR 397.

68 Section 73(1).

Two further rules appear from the House of Lords' decision in *In re D (A Minor)*[69] where it was held that a baby born with drug addiction to parents who were drug addicts could be taken straight into care from birth. The argument against this was that the case depended upon events occurring before birth and not upon the present situation. Their Lordships held that it was necessary to find a continuing state of affairs, but that in considering the present state of affairs it was legitimate to look back into the past to assess what was likely to happen. The mere fact of some past avoidable neglect would not in itself be enough, but the evidence of drug taking meant that the parents were unlikely to be able to care properly for the child. The time at which a court had to consider whether there was a continuing state of affairs was at the time the proceedings were begun, the second rule in the case. To take any other time would alter the basis upon which the evidence would have to be gathered and might frustrate the outcome. For the child might well have been in good alternative care during the interval between application and hearing and so no longer be in need of care (as defined by statute). *In re D (A Minor)* was followed in New Zealand in *Director-General of Social Welfare* v *B*.[70] Subsequent to the laying of a complaint, two children were placed into foster care where they had remained for two years. Their mother agreed to enter a drug rehabilitation programme which appears to have proven successful. The trial judge dismissed the complaint, essentially because he thought that the mother could now care for the children, but this was held on appeal to be wrong by Tipping J. His Honour held that the question was to be determined at the date of the complaint and not the date of hearing. Events between those two dates could be relevant to the question of disposition but not adjudication. Thus, if a complaint was not valid at the date it was laid, subsequent events could not make it valid. If need be, a new complaint would have to be laid. Conversely, a complaint does not cease to be valid by subsequent events.

It is submitted that the rule in *Director-General of Social Welfare* v *B* about the significance of subsequent events is no longer good law under ther 1989 Act. There are several reasons for this. First, as mentioned above, the court cannot make a declaration unless it has considered other means of dealing with the problem. If in the interim a parent has obtained or regained the necessary parenting skills that were lacking, then surely placing the child in the care of that parent is the logical solution which fits with the philosophy of the Act. If this is so, then under section 73(1) the subsequent rehabilitation prevents the declaration from being made - disposition decides adjudication. Secondly, under the 1974 Act a complaint was laid by a social worker or police officer "who reasonably believes" that the child was in need of care protection or control.[71] With this language, the proof of the complaint turned very naturally on the basis for the belief at the time of laying the

---

69 [1987] AC 317. Note also the drug addiction case of *Re F (in utero)* [1988] 2 All ER 193, where it was held that a wardship order could not be made with respect to an unborn child, despite the pregnant mother being mentally disturbed, suffering from drug abuse and living a nomadic lifestyle.

70 (1988) 5 NZFLR 584.

71 Section 27(1) of the 1974 Act.

complaint. Under the 1989 Act, this language disappears, so that an application under section 8 is simply made. The third reason follows on from this. Under the 1974 Act the court made a finding under section 31 that the grounds of the complaint were proved. In other words the focus was on the grounds that were specified in the original complaint. Under the 1989 Act by contrast, the court may make a declaration under section 67 "that the child or young person *is* in need of care or protection" (emphasis added). So the emphasis is on the present and not on proof at an earlier point. Finally under section 73(2), the court may take into account evidence (a) that the harm will not continue or be repeated, or[72] (b) that the parent, guardian or caregiver can ensure that harm will not be continued or repeated. Clearly such evidence may include changes in family lifestyle and circumstances which have occurred since proceedings began.

While there are plenty of reasons to suggest that the rule in *Director-General of Social Welfare* v *B* is no longer good law, it is less easy to weigh up the applicability of the other aspects of *In re D (A Minor)*. It is submitted that there is no reason under the 1989 Act why in assessing whether a child is presently in need of care or protection, the court should not take account of past events, so long as they speak to a continuing situation. However if the assessment of the baby affected at birth is to be done later at the time of the hearing, then the baby may be in good foster care and have recovered from the effects of the drugs. In other words it would not presently be in need of care or protection, even though the birth parents, on available evidence, would not be able to cope with the child. The child's status in (temporary) care would be thrown in jeopardy and it might have to be returned to the parents. This situation would obviously be intolerable and it is thought unlikely that a court would construe the Act in this way. A fair, large and liberal construction taking into account the intention of Parliament would surely allow the court to find a way around this difficulty. A further point to note is that under the new Act one of the first steps would be the convening of a family group conference shortly after the birth of the child. If there is little delay, it would be much easier to reach the conclusion that the child is in need of care or protection.

Another potential problem is where there is only one allegation of misconduct towards the child. This happened in *Nelson* v *M*[73] where one occasion of sexual abuse was denied. Judge Keane held that special care is needed in weighing up the evidence and yet, if there is ground for grave suspicion of sexual abuse, that must be given full weight in the interests of the child, even if it may appear that some injustice may result to a parent or other person vitally concerned.[74]

---

72 The subsection does not say "or" or "and" but it is submitted that as it refers to "any" evidence, there is no reason why both limbs of the subsection have to be satisfied. The subsection is based on s29A(2) of the 1974 Act which used the word "and" and was, it is submitted, conjunctive. The preamble to the new provision is framed in a quite different way from s29A(2).

73 (1988) 5 NZFLR 97.

74 Above n73, 101.

The complaint was held satisfied on the facts, but would it be so easy today if the matter is to be considered as at the date of hearing? A family group conference will have been held and perhaps its solution has not worked. (On the facts of the case, the social worker had attempted to solve the problem by involving a grandmother before filing a complaint.) Arguably by the time there is a hearing, the abuser will have got wind of the accusations and will have laid low. Proof of a continuing state of affairs may be absent and reliance on one past alleged event would not be enough for declaring the child to be in need of care or protection. This state of the law surely leaves the child in this situation seriously at risk.

The final point which should be made with respect to the phrase "in need of care or protection" relates to culpability. The fact that it is not proven that a parent, guardian or other caregiver was responsible for abuse or neglect does not prevent a court from declaring that a child is in need of care or protection assuming that other evidence establishes the grounds in section 14.[75] This non-culpability provision entered the 1974 Act after a decision that mens rea had to be proven for a successful complaint,[76] a rule subsequently cast aside by the Court of Appeal.[77] The substance, though not the form, of the provision is still the same under the 1989 Act as under the 1974 Act, but under the 1974 Act parents had an absolute comeback if they could show that no harm would happen again.[78] Now, such evidence is merely something that the court can, but is not obliged to, take into account.[79]

V MAKING A DECLARATION

The Family Court has power to grant a wide range of orders, including counselling, services, restraining, support, custody and guardianship orders. But these orders can be made only if the court first makes a declaration that the child is in need of care or protection.[80] Some restrictions on the ability of the court to make a declaration have already been noted. Under section 73(1) a judicial declaration is a step of last resort, available only if the court is satisfied that there are no other practicable and appropriate means of dealing with the child. The court will therefore have to address the question of options other than a declaration, even if the need of the child for care and protection is manifest.

The jurisdiction of the court is also significantly circumscribed by the need to hold a family group conference. Under section 70, an application to the court can be made in the absence of a conference only in three situations - where emergency action has been taken under warrant or without warrant to remove a child into the

---

75 Section 71.

76 *R* v *J* (1983) 2 NZFLR 49.

77 *Pallin* v *Department of Social Welfare* [1983] NZLR 266.

78 Section 29A(2). For a discussion of this subsection, see *Department of Social Welfare* v *H and H*, above n67 and *Nelson* v *M*, above n73, 102 - 103.

79 Section 73(2). See above n72.

80 Section 83.

Director-General's custody, where a restraining or custody order is needed as a matter of urgency, and where the child has been abandoned by its parents. Even if an application has been made, a declaration can be made without the holding of a family group conference only in the case of abandonment.[81] The problems that these rules give rise to have already emerged in the decision of *Application of Atkinson*.[82] A family group conference was convened in that case but the family refused to participate. Some kind of action by the court was obviously necessary, but it was held, entirely correctly it is submitted, that as no conference had been held, the court had no jurisdiction to act. Many subsidiary questions spring to mind, such as what if only one member of a family attends, has the conference been held so as to give the court jurisdiction? On the facts, there was no basis for arguing that the matter could be treated as a matter of urgency as the child was in good alternative care, although urgency does not in itself enable the court to make a declaration.[83] It could also not be argued that there was any evidence of abandonment, as the parents, though unco-operative with the authorities, were still involved. The position of the child is therefore thrown at risk. On the face of it, if the court has no jurisdiction the child should be returned to the parents.[84]

On the other hand, once a family group conference has been held, a court will have jurisdiction to grant a declaration, and the curious thing about this is that it appears that there is nothing in the legislation to prevent a declaration even where the conference has come up with a plan which has been agreed to by the authorities. If the court does not consider the plan to be practicable or appropriate under section 73(1), then on the face of it, it can override the conference. It may wish to do so at the behest of someone outside the family group - a doctor or independent social worker being good examples - and under section 68(c) the court can grant leave to anyone to apply for a declaration. A court may also make a consent order following a family group conference.[85] But doubt has been expressed over the extent of the court's jurisdiction to grant such orders. In one case, it was said by Judge O'Donovan:[86]

> ... there will be cases where despite the fact that everybody agrees that it is appropriate that the declaration be made, that the circumstances nevertheless fall short of satisfying the Court that the statutory grounds for the making of the declaration have been satisfied. In such a case it seems to me that the Court would be obliged to refuse

---

81 Section 72.

82 (1989) 6 NZFLR 97. Judge Mahony, noted by M Henaghan in 2 Family Law Bulletin 78. See also P Tapp, above n25. It is understood that the effect of this decision may be altered by legislative amendment in the near future.

83 It may justify a temporary custody order under s78.

84 An order under s78 might be made, but if the court has no jurisdiction to make a declaration, it is hard to see how the child can be kept for long "pending the determination of the application" (s78(1)). The application might be said to be determined once it is discovered that jurisdiction is lacking.

85 Section 202. Note that under s174 a consent order may be made after a mediation conference.

86 *Police* v *X* (Unreported, Whangarei District Court, CYPF 888/096/90, 24 May 1990).

to make the declaration despite the fact that all interested persons and partied consented thereto.

Finally, the question of the standard of proof which is required before the grounds for a declaration are made out should be noted. Under the 1974 Act the widely accepted rule was first stated by White J in *Social Welfare Department* v *M*[87] to the effect that the test was the civil standard of the balance of probabilities, but that it was important to have regard to the serious nature of the allegation, thus tipping the balance slightly closer to the criminal standard. Section 197 of the Children, Young Persons, and Their Families Act 1989 states expressly that the standard of proof is that "applying in civil proceedings". Whether the gloss about the seriousness of the allegation remains will have to await judicial pronouncement.

VI CONCLUSION

It has not been the purpose of this article to examine the policy behind the new Children, Young Persons, and Their Families Act 1989. Although the policy is controversial, it has innovative and challenging aspects which could play a major role in developing social policy in the 1990s. Whether the new Act adequately legislates for that policy is another matter and it has been pointed out that no one simple parliamentary intention can be discerned. In this article the role of the courts under the new framework has been examined. That role is a more constrained one than in the past. Except in the emergency situation, the courts have deliberately been made a last port of call. The power to decide the future wellbeing of children in danger is placed squarely with the family group (whatever that concept might really mean) and with the social workers and others who have executive functions under the Act. It has been suggested that the High Court retains a residual protective role through the rules of judicial review and wardship. It has also been suggested that several of the groundrules relating to the jurisdiction of the Family Court are different from those which gave the former Children and Young Persons Court jurisdiction under the Children and Young Persons Act 1974.

From the point of view of legal analysis, there are numerous question marks over the interpretation of the 1989 Act, and this article has touched on only a few. Perhaps it is inevitable, given that the Act's gestation was a long period of public debate from which no consensus emerged, that there will be teething troubles. The history of the Act is very young and its success can only be monitored as the next decade unfolds.

---

87 [1976] 2 NZLR 180. Approved by the Court of Appeal in *Pallin* v *Department of Social Welfare* [1983] NZLR 266, 270.