

## CHILDREN IN CRIME: REPRESENTATION - FACT OR FALLACY?

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### 1. INTRODUCTION

In this paper I propose to discuss the role of the advocate in criminal proceedings involving children. In particular, I would like to contrast the traditional role of advocate as understood in an adversarial context, with that of a mediation approach envisaged by a restorative justice model.

It must be emphasised at the outset that New Zealand has embarked on a new approach to the problem of child offending, an approach that was introduced by the Children, Young Persons and Their Families Act 1989. The role of the Child Advocate must be understood in the context of this legislation and the Youth Justice Model it posits. I will therefore briefly outline the operation of the Act and explain what I believe to be its underlying principles. I will then focus on the role of the Advocate within this scheme.

### 2. THE CHILDREN, YOUNG PERSONS & THEIR FAMILIES ACT 1989 (NZ)

#### (a) Overview

The Children, Young Persons & Their Families Act 1989 ("CYP&F Act") became law on 1st November 1989. Its purpose was to reform the law relating to children and young persons who are in need of care or protection, or who offend against the law. The CYP&F Act seeks to separate those in need of care from those who offend, irrespective of cultural identification.<sup>1</sup>

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<sup>1</sup> See also Appendix One for an overview of the Act.

The Act's cornerstones are accountability, due process, diversion and community. The CYP&F Act signals a change from the previous Department of Social Welfare dominated system and the traditional theories of punishment.

The CYP&F Act attempts, as far as possible, to keep young people out of the criminal justice system.<sup>2</sup> and achieves this through (i) a new diversion process, the Family Group Conference ("FGC") and (ii) separate Youth Courts. Delays are generally kept to a minimum (ss 331(b) & 5(f)). Finally, the Act limits powers of arrest and sets procedural safeguards for police investigations (ss 209-271).

### **(b) The Family Group Conference**

The Family Group Conference is used as a mechanism to facilitate victim-offender participation. Unless a young offender has been arrested, a FGC must be convened before the young offender is summoned to appear before the Youth Court (s 245(1)). In addition, the institution of criminal proceedings must be justified in the public interest. There are further requirements for convening a FGC where a young person has been arrested for most categories of offence (s 246).

The FGC is convened within 21 days from the date on which the Youth Justice Co-ordinator received the report (s 249). Its functions, set out in s 258, include: considering "whether the offence alleged to have been committed should be dealt with by the Court" or dealt with in some other way (s 258 (d)). The implicit function of the FGC is to seek consensus amongst the attendees and to make decisions and formulate plans that are necessary or desirable in dealing with the offender (ss 263 and 260, respectively).

The Act also sets out those persons who are entitled to attend a FGC (s 251). They include:

- the child or young person concerned;
- a guardian or member of the family, whanau or family group;
- a Youth Justice Co-ordinator;
- an advocate representing the child;
- a social worker or a probation officer, if applicable;
- the victim or their representative;
- a member of the police or a representative of another enforcement agency, usually a Youth Aid Worker.

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<sup>2</sup> For example, the sittings of Youth Court are arranged so that those attending are not brought into contact with persons attending other trials (s 331 (a) ).

The victim's attendance is central to the success of the FGC. It enables the young offender to be confronted with the consequences of his/her actions and lays the groundwork for offender-victim mediation. Whilst steps are taken to encourage the victim's attendance, this may not always happen. In such cases, the goals of the FGC are seriously undermined. Where, however, the family, offender, victim and police reach consensus, the FGC is authorised under s 260 to make decisions and recommendations. For example, it may decide to discontinue proceedings, require the offender to make reparation to the victim, or undertake community work.

If the FGC cannot reach consensus, then the matter may proceed to Youth Court.

### **(c) Jurisdiction of the Youth Court**

As stated above, the policy of the CYP&F Act is to keep children and young persons out of the criminal justice system as far as possible, without compromising public safety.<sup>3</sup> For the purpose of the Court's jurisdiction and the general application of the Act, an accused's status as child, young person or adult, is determined by his/her age when proceedings are contemplated or taken. For instance, if a child is over the age of 10 but under 14, no criminal proceedings may be commenced, unless the offence is murder or manslaughter (s 272(1)). In either case, the preliminary hearing of the charge will be before a Youth Court and the CYP&F Act will apply, with certain exceptions, as if the child was a young person.<sup>4</sup> If, on the other hand, the alleged offender is a young person, he/she can be charged with summary or indictable offences in the Youth Court (s 272(3)) and have the same right as an adult to elect trial by jury.(s 273) If the young person is charged with a purely indictable offence other than murder or manslaughter, on the deposition hearing, the Youth Court may give the young person the opportunity to forgo a jury trial and elect to have the matter heard in the Youth Court.<sup>5</sup> If the charge is murder or manslaughter, irrespective of

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3 According to Judge McElrea, currently about 90% of offenders are being diverted from Court. See "A New Model of Justice" in Legal Research Foundation publication No. 34 The Youth Court in New Zealand 1993, at p 3.

4 s 272(2). Exceptions are set out in ss 275 & 276, which provide for a young person to have proceedings determined in the Youth Court. 5 s 275. The provision applies when (i) all the evidence has been given and the Court believes that the evidence is sufficient to go to trial, (ss 275(1) & 274 (1)), or when (ii) the young person indicates he/she wishes to plead guilty.(ss 276(1) & 274(1)) In either case, the young person elects to be dealt with by a Youth Court, the Court may deal with him/her according to the provisions of the CYP&F Act. (ss 275(2) & 276(2))

whether the accused is a child or a young person, the preliminary hearing is held in the Youth Court. In this case, there is no right to forgo a jury trial and the hearing is held in the same way as if the accused was an adult. (ss 272 (2),(4) & 275(1))

The Youth Court is a forum of last resort. Where the charge against the offender is proven, the Court has a broad discretion as to the form of penalty. It may, for example, admonish the offender, impose a fine, or direct community service work (s 283). In imposing an order, the Court must have regard to a comprehensive range of considerations, as specified in s 284. These include the offender's background, attitude towards the offence and any previous convictions.

### **3. THE YOUTH JUSTICE MODEL**

The practical details of the Youth Justice model are described in the CYP&F Act. Part IV addresses the Principles of Youth Justice, including the rights of children and young persons when questioned, charged with offence, or arrested (ss 215-226); custody of child or young person following arrest or pending hearing (ss 234-243), jurisdiction of Youth Courts (ss 272-280), and duties and powers of the Court in relation to orders.(ss 281 -320) In setting out the philosophy of the Act, section 208 in Part IV states eight principles that should guide the Court in exercising its power:

1. 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 (s 208(a));
2. Criminal proceedings should not be instituted against a child or young person solely for the purpose of obtaining any assistance or services for the child or young person or their family (s 208(b));
3. Any measures for dealing with offending by children or young persons should be designed to (i) strengthen the child or young person's family, and (ii) foster the family's ability to develop its own means of dealing with offending by their children or young person (s 208(c)(i),(ii));
4. A child or young person who commits an offence should be kept in the community so far as practicable and providing it does not compromise the public interest (s 208 (d));
5. A child's or a young person's age is a mitigating factor in determining (i) whether or not to impose sanctions in respect of the offending, and (ii) the nature of any sanctions (s 208(e));
6. Any sanctions imposed on a child or young person who has committed an offence should (i) take the form most likely to maintain

and promote the development of the child or young person within his family, and (ii) take the least restrictive form that is appropriate in the circumstances (s 208(f));

1. Any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of the offending (s 208(g)); and
2. The vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person (s 208(h)).

Part V deals with Provisions Relating to Procedure in Youth Court, including time frames (s322), appointment of youth and lay advocates (ss323-328), children and young persons' rights to be present and make representations (ss 329-330), and Court reports (ss 333-339). In balancing the common rights ascribed to all citizens of New Zealand<sup>6</sup> with the more conciliatory approach taken by the Youth Court, the appointment of Youth Advocate is specifically addressed in Part V, ss 323-324:

323. Appointment of Youth Advocate to represent child or young person-(1) Where a child or young person appears before a Youth Court charged with an offence, then unless- (a) The child or young person is already represented by a barrister or solicitor in those proceedings; or (b) The Court is satisfied that legal representation has been arranged, or will be arranged, for that child or young person in those proceedings, - the Court shall appoint a barrister or solicitor to represent that child or young person in those proceedings. (2) Where the Court appoints a barrister or solicitor under subsection (1) of this section, it shall, so far as practicable, appoint a barrister or solicitor who is, by reason of personality, cultural background, training, and experience, suitably qualified to represent the child or young person. 324. Further provisions relating to Youth Advocate- (1) A Youth Advocate appointed to represent a child or young person in any proceeding shall have, in relation to the representation of that child or young person in those proceedings...the

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<sup>6</sup> See generally the New Zealand Bill of Rights Act 1990. The Act was passed to (i) affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (ii) affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Sections 21-25 describe the rights of persons in relation to search, arrest and detention. There is no minimum age to which these rights accrue.

same rights, powers, duties, privileges, and immunities that the Youth Advocate would have had if he or she had not been appointed pursuant to section 323 of this Act but had been retained by that child or young person to provide legal representation.

Thus the Youth Advocate is for all intent and purposes to view the child or young person as he or she would any client who walks through the door. Criminal legal aid is not available; fees and expenses are instead paid for out of a Consolidated Account from monies appropriated by Parliament for the purpose.<sup>7</sup>

#### **4. THE CONTEXT FOR REPRESENTATION**

It can be seen that the CYP&F Act has taken the bold initiative of marginalising the formal role of the criminal justice system. Judge McElrea observes:

There is a division of function between the Family Court, which handles "care and protection" cases, the focus there being on family dysfunction, and the Youth Court which handles offending by young persons (over 14 years but not over 17 years of age).

...A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a youth advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (beyond reasonable doubt) and the admissibility of evidence.<sup>8</sup>

The changes have seemingly created little consequential increase in offending despite some uncertainties in application<sup>9</sup> and a greater

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<sup>7</sup> Legal Services Act 1991, s 5(2), and s 325(1), respectively

<sup>8</sup> From The Intent of the Children, Young Persons, and Their Families Act 1989--Restorative Justice ? presented to the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) Inc in February 1994, p 14.

<sup>9</sup> Stephen O'Driscoll, Laws NZ, Children and Young Persons, para 182.

emphasis on the role of the family and family group to resolve matters. It has been suggested that under the CYP&F Act, young persons now have the rights of adults and yet have the advantages of a more conciliatory system with a greater range of orders available to the Court. It may, for example, admonish the offender, impose a fine, or direct community service work (s 283). In imposing an order, the Court must have regard to a comprehensive range of considerations, as specified in s 284. These include the offender's background, attitude towards the offence and any previous convictions.

## **5. ROLE OF YOUTH ADVOCATE**

As stated above, when a child or young person appears before the Youth Court charged with an offence, the Court is under a duty under s 323(1) to appoint a barrister or solicitor (a "Youth Advocate") to represent the accused's interests. The Youth Advocate has the same lawyer-client relationship as if the client was of full age. The Youth Advocate will also have the same rights, powers, duties, privileges and immunities as if retained by the child or young person. In essence, the role of the Youth Advocate is to: (i) give initial advice as to criminal liability, (ii) make an appearance on interlocutory applications if custody is an concern, and (iii) make submissions on disposal.

### **(a) Advice**

Initial advice as to criminal liability is a traditional role of criminal lawyers. The Youth Advocate will mainly focus upon safeguarding the young person's interests at the time of arrest and questioning, including, of course, the admissibility of statements. At the hearing this may involve a voir dire if the procedures detailed in ss 214-232 have not been complied with and a confession is the principal prosecution evidence. The Youth Advocate will also be responsible to ensure police compliance with statutory requirements in terms of testing evidence under cross-examination.

### **(b) Custody Pending Hearing**

The Youth Advocate may also represent the accused if there is an application for secure care by the Department of Social Welfare (under ss 367-383) or an application for bail (under ss 234-243). In making submissions, the Youth Advocate needs to be guided by the principles set out in s 208 (above) and the Act's new justice approach in terms of due process and accountability.

### **(c) Family Group Conference**

Sections 251(g) and 324(3) entitle a Youth advocate to attend a FCC, in the latter case, if the child or young person makes the request. Under s 324(3), the Youth Advocate may make representations on behalf of the child or young person at the Conference. The ability to attend a FCC and the restorative justice philosophy behind the FCC, however, create some conflict. With the Youth Advocate essentially buffering the accused, much of the mental and emotional force of making the accused confront their wrong doing in the presence of the victim(s) is diverted. To some degree this minimises accountability for wrongdoing which is one of the cornerstones of the new CYP&F Act.

In addition there is potential between the respective roles of the social worker or the Youth Justice coordinator and the Youth Advocate. The Youth Advocate's involvement may be regarded as intrusive as well as being directed to different goals than that of the other participants. There may well be resentment at the view that the lawyer is simply trying to 'get their client off'.

However Trapski suggests<sup>10</sup> there may be a few instances where the FGC process will be enhanced by the presence of a Youth Advocate. The first may be where there are a large number of victims or where complex family dynamics are involved (such as cases where there has been child abuse). Another example is where there are defended matters and the young person, family or officials attending do not understand the available defences or indeed those that may be relevant to raise. In addition, the presence of a Youth Advocate helps to ensure that the report to the Court records what transpired at the FGC and reflects the FCC's recommendations.

### **(d) Perspectives on the Advocate's Role**

The Youth Advocate's duty is to the minor: to represent their views and to serve their needs. Whilst it may be easier for the Advocate to see the case from an adult perspective and decide what is best for the accused, it is not his/her role to do so. Neither is appropriate to take the viewpoint of other adults involved in the case, even if they are the accused's parents. An Advocate is appointed to act for the child or young person; the resulting obligations require skill and sensitivity. As one commentator has noted:

It is the function of the family group conference, the Judge and the department to make decisions about what is best for the juvenile. It is not for the advocates to take on their role. This view is consistent with the emphasis in the youth justice provisions of the CYPF Act on a justice approach.

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<sup>10</sup> Trapski's Family Law volume 1: Children, Young Persons, and Their Families, Wellington, Brokkers, 1991, p A-311.



However, the family group perspective of the Act <sup>11</sup> lends credence to the view that counsel should take on an independent overview of the situation and promote what they perceive to be the best interests of the juvenile having regard to the juvenile's wishes and his/her wider interests in maintaining and strengthening the juvenile's relationship with his/her family, whanau, hapu, iwi, and family group. <sup>12</sup>

As to how any particular Advocate discharges his/her duty, will depend as much on the individual Advocate as on the age and maturity level of the client. The role of the advocate will encompass the following:

- (i) At a basic level, the Advocate must work to establish trust and open lines of communication. The personal and professional qualities of the Advocate may assist the process, and it is for that reason the Act mentions "...personality, cultural background, training, and experience..." <sup>13</sup> as considerations in the Court's appointment of an Advocate.
- (ii) The Advocate will need to advise on likely steps in proceedings and, depending upon an individual's view of the role, either advise on legal options or the accused's best course.
- (iii) The Advocate will need to explain the practical consequences of any option or decision. He/she will need to ensure their client understands the options and has been given the opportunity to discuss the "best course". It goes without saying that a minor's understanding will be quite different to that of an adult, not the least for differences in time perception, maturity and language skills.

## **6. YOUTH ADVOCATE OR MEDIATOR?**

It is not surprising that the role of Youth Advocate is ambiguous in the context of a system that emphasises diversion and marginalisation of the criminal justice system. In this regard, I would like to speak to three issues where the role of Youth Advocate may be compromised or frustrated.

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11 ss 5, 208(c), (f)

12 Supra note 10 at p A-308.

13 s 323(2).

**(a) Not Running A Defence**

The dictates of accountability and conciliation are largely irreconcilable with the traditional adversarial situation where the prosecution is put to the test and there is a denial of guilt.

If the former prevails, the Advocate may refrain from advancing a defence, or from requiring a prosecution to establish guilt beyond a reasonable doubt. In this setting, a defence may not be raised if the Youth Advocate believes that the child or young person would be better helped by the FCC or by one of its recommendations; or, the accused is deemed too young or immature; or, if there is agreement on facts, the defence can not be tested.

**(b) The Nature of the Role**

Functioning within a restorative model of justice has its own downsides as much as benefits. In terms of the former, due to the conciliatory philosophy of the CYP&F Act, there is a pressure not to put forward a defence and either ride with the consensus of opinion or else to push a "best interests" solution on the client. There is the danger, therefore, of diminishing the role of Advocate and returning to a welfare approach.

**(c) An Inadequately Trained or Equipped Lawyer**

The Youth Advocate requires a lawyer who can establish communication between him/herself and the juvenile client. Professional as well as personal qualities are therefore a consideration in the choice of Youth Advocate.<sup>14</sup> As stated above, they are there to represent the client and not necessarily to achieve the client's best interests as they or others perceive them.

Similarly it would be easy for the Youth Advocate to make decisions for their client merely on the basis of the latter's youth and immaturity. However, this is not the nature of the relationship: the Youth Advocate is there to inform the client of their legal rights and to take instructions.

Thus, the Youth Advocate must be sensitive to exercising the traditional role of representation in a system which is philosophically at odds with advocacy.

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<sup>14</sup> See also discussion above, and s 323(2).

## 8. CONCLUSION

It will be seen that the youth justice model plays a pivotal role in defining the function of advocate in child proceedings. Whilst it is tempting to suggest that all vestiges of the traditional adversarial system have been eliminated, I believe this would be an oversimplification. There is no doubt that the prevailing philosophy of the CYP&F Act is to establish a different regime for young offenders. This emphasises an approach associated with restorative justice. At the same time, particularly in the more serious classes of offences, the Youth Advocate must be prepared to safeguard their client's legal rights. Certainly the role requires sensitivity and a deft balancing of competing interests. I believe the direction taken in the New Zealand model is one that may commend attention elsewhere.

The following material appears with the kind permission of Judge McElrea, from "The Intent of the Children, Young Persons, and Their Families Act 1989-- Restorative Justice?" presented to the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) Inc in February 1994.

### APPENDIX ONE

1. In 1989 the New Zealand legislature enacted the Children, Young Persons and Their Families Act 1989, thereby introducing the current scheme for dealing with offending by young people. The principal structural features of the Act are as follows:
2. There is a division of function between the Family Court, which handles "care and protection" cases, the focus there being on family dysfunction, and the Youth Court which handles offending by young persons (over 14 years but not over 17 years of age).
3. A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a youth advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (beyond reasonable doubt) and the admissibility of evidence.
4. For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to remain in the Youth Court - ss 275 and 276.
5. At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to

prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator ("YJC") who then convenes a Family Group Conference ("FGC") - s245. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court.

6. The FGC is attended by the young person, members of his family (in the wider sense), the victim, a youth advocate (if requested by the young person), a police officer (usually a member of the specialist YAid division), a social worker (in certain cases only), and anyone else the family wish to be there: s251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.
7. The YJC (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting.
8. Where the young person has not been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s258(b)), with a presumption in favour of diversion (s208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary programme, and its implementation is essentially consensual. Where the young person has, been arrested the court must refer all matters not denied by the young person to an FGC which recommends to the court how the matter should be dealt with. Occasionally an FGC recommends a sanction to be imposed by the court. Usually it puts forward a plan of action, eg apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan, with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.
9. The Youth Court nearly always accepts such plans, recognizing that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985: s283(o).
10. As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations) as in 8 above.

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