5TH INTERNATIONAL CRIMINAL LAW CONGRESS
Sydney, 25-30 September 1994

# Sentencing of Children in New Zealand: A New Direction

***by MARIE DYHRBERG***

from the pages of the
CRIMINAL LAW JOURNAL June 1995

***reprinted with permission***

---

*The Children, Young Persons and Their Families Act 1989 (NZ) reforms the law relating to children and young persons who are in need of care or protection or who offend against the law. It departs from a traditional criminal justice approach by focusing less on punishment and more on "putting things right" between the offender and the victim. Since its enactment, there has been a 46 per cent decrease in the number of offences in the 17 to 20-year age group. The success of the reform has been reinforced by the enthusiastic approval of Youth Court workers, Youth Court judges, the police, youth advocates and even victims and offenders.*

---

## Introduction

In New Zealand, as in many other Western countries, there is a perception that the public has lost faith in the criminal justice system. Horrific and seemingly senseless acts of juvenile crime have attracted media attention, which in turn has further fuelled concerns that the system is not working. However, since the enactment of the Children, Young Persons and Their Families Act 1989 (NZ) (the Act), there has been an overall decrease in the number of offences in the 17 to 20-year age group, with a particular decrease of 46 per cent in the past five years. [1] This figure includes diversions of minor offenders. This trend can be contrasted with the latest statistics for adult offenders, particularly in the over-35-years age group. For example, violence and sexual offences by adult offenders increased 11.75 per cent from 1992 to 1993 alone. [2]

In this article I discuss sentencing in the context of the youth justice system in New Zealand. By way of background I touch briefly upon the principal theories of punishment, which provide an appropriate basis for assessing the restorative model of justice, with which the sentencing policies of the Children, Young Persons and Their Families Act are associated. I then discuss the broad scheme of the Act, its aims and distinctive features.

## Theories of punishment

There are three principal justifications for punishing offenders:
retribution, deterrence and reformation.

## Retribution or "just deserts"

The state, on behalf of the public at large, punishes the offender. The offender's conduct is denounced as falling below a minimum standard of acceptable community behaviour. Offenders are deemed to deserve the consequences of their actions. The focus is on the state exacting revenge without due account being taken of the interests of the victim.

## Deterrence

This form of punishment is directed towards deterring the individual from re-offending. This approach assumes that crime is the result of rational thought and that there is a logical connection between the punishment meted out and the offender's future conduct. The viewpoints of the victim and offender are not considered.

## Reformation

The main focus is on the offender, not on the punishment or upon exacting revenge. The approach is borne out of a "welfare model" and a desire to intervene and treat criminal behaviour. It is a paternalistic view and one that optimistically aims at identifying the causes so that they may be corrected. It is thought that the earlier the intervention, the more effective it will be. Judge McElrea observes that this approach is receiving declining support "perhaps through suspicion of its inherent 'paternalism', or perhaps because of cynicism about its costs and/or its failure to deliver a reduction in crime levels" [3] .

## A restorative model of justice

The restorative model differs from the above three theories in that the focus is less on punishment or treatment and more on "putting things right" between the offender and the victim. It marks a departure from traditional ways of approaching criminal justice. Restorative justice is centred on a more community-based orientation in that input is solicited from the victim, the offender's family and others who may be involved. Although not labelled "restorative justice", the concept bears some similarity to systems in ancient Hebrew, Japanese, American Indian and Maori societies [4] and in modern Polynesian cultures. [5] These cultures emphasise the integration of various concepts such as apology, reconciliation, forgiveness and harmony between individuals.

There have been a number of writings on the restorative justice concept. For instance, Van Ness et al put forward these three principles of restorative justice:

"(1) Crime results in injuries to victims, communities, and offenders: therefore the criminal justice process must repair those injuries.

(2) Not only the State, but also the victims, offenders and communities should be actively involved in the criminal justice system at the earliest point and to the greatest possible extent.
(3) In promoting justice, the State is responsible for preserving order, and the community is responsible for establishing peace." [6]

In a similar vein, Zehr [7] contrasts restorative justice with retributive justice in the following way:

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

In discussing the law in New Zealand, it will be argued that the Children, Young Persons and Their Families Act represents a change in direction from the more welfare-based model to one based on the restorative justice model.

**The new law in New Zealand**

The Children, Young Persons and Their Families Act 1989 became law on 1 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 Act seeks to separate children and young persons in need of care from those who offend, and to provide for community involvement in the process, irrespective of cultural identification. The Act's cornerstones are accountability, due process, diversion and community. Its introduction signals a change from the previous system dominated by the Department of Social Welfare and traditional theories of punishment. Judge Brown comments upon the change in the underlying philosophy of youth justice:

"[It] beckons the practitioner away from the excessive pursuit of rehabilitation, from attempts to explain criminality in the context of individual pathology, from dispositions which are frequently intrusive, coercive and inherently unjust and form an approach which provides little opportunity for the viewpoints of victims, and even of offenders themselves, to be recognised.

Instead we are encouraged to pursue twin goals of ensuring that young people face up to the reality of their offending and its effects on others, and to seek ways of responding which reduce the likelihood that further offending will occur - ways that focus less on treatment and punishment (often indistinguishable in the perceptions of young people) and more on putting right the wrong that has been done." [8]

It is the view of Judge McElrea and others that the Act is substantially a restorative model, albeit more through application than as an explicit feature of the legislation. Nonetheless, the Act contains the following features of the restorative justice model:

- there is an emphasis on offender accountability and responsibility: s 4(f);
- the court is used as a last resort with a solution being encouraged from the community: s 208(a);
- discouragement of a justice intervention to achieve a welfare end; if any sanctions are imposed, these should "IIt]ake the least restrictive form that is appropriate in the circumstances": s 208(b), (f);
- a requirement that the proceeding should have "due regard to the interests of any victims of that offending" (s 208(g)) and that victims (or their representatives) have the right to attend every family group conference: s 251;
- young offenders "should be kept in the community so far as that is practicable" unless public interest requires otherwise: s 208(d); and
- the provision for family group conferences by the Act allows for a restorative approach to justice.

Thus, when compared to the elements of restorative justice outlined above, there is an apparent similarity of approach. The Act seems to couch youth justice in a more positive perspective than hitherto, and looks more to a non-retributive, community-agreed way of making offending youth accountable for their actions.

**The New Zealand model of youth justice**

The youth justice model is described in the Act. Section 208 sets out eight principles that should guide the court in exercising its power. Judge McElrea [9] notes that many of the Act's features are common to other systems, including:

- an adversarial system to determine liability;
- retaining the option of sentencing by an adult court;
- an emphasis upon diversion from the courts;
- involving the victim, in a similar way to overseas schemes of victim-offender mediation; and
- a framework which allows a flexibility of approach.

The New Zealand system also has a number of unique features which make it stand out as a modern approach in youth justice. Doolan observes:

"[fjor the first time, a legislative base exists for diversion, and emphasis is given to diversionary measures which strengthen families and foster their own means of dealing with their offending young people."' [10]

For instance:

- the court is now used as a last resort (s 208(a) and (d)), with about 90 per cent of offenders being diverted from court; [11]
- victim and offender participation is not voluntary in the same way as victim-offender mediation schemes overseas;
- the system is applied across the board to all young persons in all parts of the country through legislation, a restorative model is embraced as the basis for justice.

In addition, Judge McElrea states there are three radical changes that make the Youth Court model a unique approach to justice:

(i) the transfer of power from the state, principally the courts' power, to the community;

(ii) the family group conference as a mechanism for producing a negotiated, community response; and

(iii) the involvement of victims as key participants, making possible a healing process for both offender and victim. [12]

At the centre of the model is the family group conference.

**The family group conference**

The family group conference (FGC) is the mechanism used 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 receives 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 among 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.

The victim's attendance is central to the success of the FGC. It enables the young offender to be confronted with the consequences of her or his actions and lays the groundwork for offender-victim mediation. While 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, the offender, the victim and the 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 the Youth Court.

**Role of the Youth Court**

It will be seen that 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.

**Conclusion**

The *Children, Young Persons and Their Families Act* has now been in force for nearly five years. Overall it has been recognised as a positive step in reconciling the interests of all parties, including the victim, the state, the offender's family (and other community affiliations), and of course, the offender. With its central feature the family group conference, there is a clear commitment towards a more holistic response to offending. In the process, it takes the bold initiative of marginalising the formal role of the criminal justice system. The results so far are encouraging [13] and it is hoped that the New Zealand experience will provide a helpful model for other youth justice systems.

1 "Crimes Statistics Surprises", New Zealand Herald 15 Dec 1993. p 4.

2 Report of the New Police for the Year Ended 1993, p 112.

3 Judge F W M McElrea (Auckland District Court judge and Youth Court judge), "The New Zealand Youth Court: A Model for Development in Other Courts?" (paper presented to the National Conference of District Court Judges in Rotorua, April 1994). p 1.

4 Judge McElrea, ibid.

5 Judge D Harvey (Auckland District Court judge), *Reparation: A Conflict in Goals: Community Interests Versus Victims' Rights* (Legal Research Foundation publication No 37, 1994), p i.

6 From Von Ness et al, *Restorative Justice: Theory, Principles and Practice, USA in Justice Fellowship* (1989), cited by Judge McElrea, op cit n 3.

7 H Zehr, *A New Focus for Crime and Justice: Changing Lenses* (Herald Press, Scottdale, PA, USA, 1990), p211.

8 M J A Brown (Principal Youth Court Judge), address to the International Women Judges' Conference in Wellington, Sept 1993, reprinted in (1994) 6 *Criminal Justice Quarterly 2* .

9 Judge McElrea, paper presented to the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) mc, Feb 1994, p 7.

10 Doolan, "The Youth Justice Legislation and Practice" in The Youth Court in New Zealand (Legal Research Foundation publication No 34, 1993), p 21.

11 Judge McElrea, "A New Model of Justice" in The Youth Court in New Zealand, op cit n 10, p 3.

12 Op cit n 9, p 4.

13 *Northern Law News* , 4 March 1994, p 2, cites the comments of the Minister of Youth Affairs, Roger McClay, that since the Act came into force the number of young offenders appearing before the criminal courts has dropped from up to 13,000 cases a year to 1,800.

---

* Marie Dyhrberg gratefully acknowledges the research assistance of Carrie Dahl-Devonshire BA Hons (Law) (Cantab), Barrister and Solicitor of the High Court of New Zealand. A version of this article was presented at the Fifth International Criminal Law Congress in Sydney, 25-30 Sept 1994.