

# Juvenile Justice – New Zealand's Family Oriented Approach

Robert Ludbrook

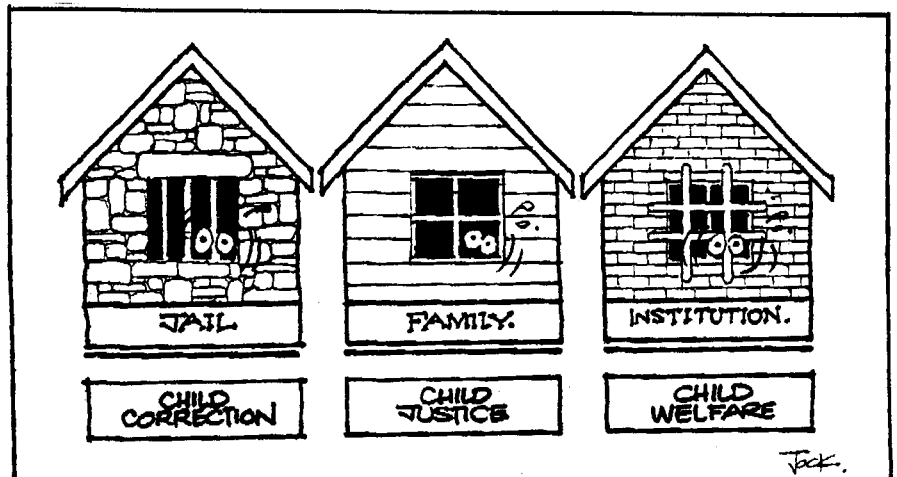
**O**ur perceptions of children tend to vacillate between a romanticised view of them as young innocents whose unacceptable behaviour should be excused because of their youth, immaturity and impressionability and the contrasting view that they are uncivilised barbarians who, for their own good, must be treated firmly, even severely, so they may learn to distinguish right from wrong and to behave properly.

The 'child correction' approach was favoured by the early British settlers in Aotearoa New Zealand. Soon after colonisation there were moves to establish child reformatories on the English model and children were often more harshly treated than adults. It was accepted that the most effective way of correcting children was to hit them with a cane or a whip. Some early observers noted the warmth and affection with which the indigenous Maori people treated their children and contrasted this with the stern and strict attitudes of the Anglo-Saxon colonisers.

The 'child welfare' approach grew in importance in the 20th century and became dominant in the 1960s and 1970s. Decisions about children were made by experts: judges, social workers,

health professionals and educationists and were based on the child's welfare. Often, as a result of these decisions, children were placed in institutional care. In the 1970s there were 28 institutions run by the Department of Social Welfare (there are now four) and other institutions were run by the Education and Health Departments. Many of the institutions were situated in remote areas and family contact was difficult and usually discouraged by the institution.

Neither the 'child correction' nor the 'child welfare' approach solved the problem of youthful misbehaviour. Removing children from their families and placing them in institutions is de-personalising and destructive of their sense of family, cultural and personal identity. Maori children were over-represented in residential institutions and the loss of links with their whanau (family group) and their hapu (tribal affiliation) were particularly damaging to their identity and self-esteem.



It was only in the 1970s and 1980s that the value of institutional care started to be challenged. Social research indicated that children in state care tended to drift between institutions and foster homes in an unplanned way. The child's links with parents, family and community were usually weakened and sometimes lost. A 1982 Human Rights Commission Report on conditions in Social Welfare children's institutions disclosed a series of abuses. Under the guise of promoting their welfare, children were being placed 'out of sight, out of mind' in institutions which, according to the Human Rights Commission, failed to comply with minimum standards guaranteed by the United Nations Covenant on Civil and Political Rights.

Both approaches had the effect of sheltering children from the consequences of their misbehaviour. The child correction approach focuses on punishment of the offender not on the victim who had suffered as a result of the offence. The welfare approach tended to see the young offender as a victim – again shifting the focus from the human consequences of the misbehaviour.

Before 1989, a young person who had taken someone else's car or had burgled a house was paraded in front of a series of public officials: police officers, lawyers, social workers, court staff and judges and, at the end of a lengthy and costly process, would be sent home with a stern warning. A

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repeat offender might be sentenced to corrective training (imprisonment under a regime designed to give young offenders a short, sharp shock) but statistical information showed that nearly 90% of young offenders receiving this sentence reoffended within two years.

Faced with the failure of both the correctional and the welfare approaches and taking notice of the deep hurt and anger felt by the Maori people at the way in which their children were being treated under a system seen as intrusive and alienating, the Lange Labour government in 1989 broke new ground with the Children, Young Persons and their Families Act which came into force on 1 November of that year.

### **Empowering the Family – the Role of the Family Group Conference**

The 1989 Act recognises that the most important influence on a child is likely to be the child's family. Under the previous youth justice system families had no direct say in decisions about the child. It was as if they had forfeited the right to be involved in decisions because of their son or daughter's misbehaviour. The state took control.

The new family-oriented philosophy was outlined in a briefing paper accompanying the Bill which became the 1989 Act:

*The procedures....are based on the belief that, given the resources, the information, and the power, a family group will generally make safe and appropriate decisions for children.*

This philosophy was given legislative form in s5 of the 1989 Act which sets out guiding principles:

(a) *Wherever possible, a child's family, whanau, hapu, iwi, and family group should participate in decisions affecting that child and regard should be had to their views.*

(b) *Wherever possible, the relationship between a child and his or her family group should be maintained and strengthened.*

The Family Group Conference (FGC) is the means by which the family is empowered to make decisions about the child.

#### **BOX 1**

##### **Distinction between 'children' and 'young people'**

*The Children and Young Persons Act 1989 makes a distinction between children (birth to 13 years) and young people (aged 14, 15 or 16 years). The care and protection provisions apply to anyone under 17 years. The youth justice provisions apply only to young people. A child under 14 who commits an offence or offences so serious or so numerous as to give serious concern for his/her wellbeing can be brought before the Family Court as being in need of care and protection.*

When a young person is believed by the Police to have committed an offence then, unless he or she has been arrested, no prosecution can be brought until the matter has been brought before an FGC. The conference is convened by a Youth Justice Coordinator attached to the Department of Social Welfare. Those present at an FGC are likely to include the young person, a youth advocate representing the young person, parents, members of the extended family and anyone they wish to be there, the victim of the offence and a Police representative. If anyone is unable to attend, the Youth Justice Coordinator must ascertain that person's views and advise the conference of them.

The first step at the conference is to find out whether the young person admits or denies having committed the offence. If denied, the matter goes to the Youth Court for a defended hearing. If admitted, the Police advise the conference of the facts. The Youth Justice Coordinator will provide additional background information and the family members are then left to discuss the matter and to come up with a plan or recommendations to deal with the young person and to avoid further offending.

### **Diversion of young offenders from the criminal justice system**

Attempts in earlier youth justice legislation to divert young people

from the courts and the criminal justice system had largely failed. Young people continued to be arrested and processed through the courts even for minor street offences.

The 1989 Act strictly limits the circumstances in which under 17s can be arrested. A Police officer can arrest a young person only for the most serious offences or where the young person refuses to give his or her name and address, or there are reasonable grounds for believing that he/she will commit further offences, tamper with the evidence or will not turn up at court unless arrested. Young people who have not been arrested can be dealt with informally by the Youth Aid section of the Police, can be given a Police warning or Police caution or can be referred to the Youth Justice Coordinator at the Department of Social Welfare for an FGC to be convened.

Since the 1989 Act came into effect there has been a significant drop in the number of arrests of young people. In 1990 only 5 percent of all detected juvenile offenders were arrested.

### **Special protection for juveniles being questioned by the Police**

The most controversial aspect of the 1989 Act has been the special safeguards given to young people being questioned by the Police whether on the street or in the Police station and whether before or after arrest (see Box 2). These safeguards were enacted in the face of opposition from the Police who argued then, and have continued to argue, that they restrict the ability of the Police force to deal with juvenile crime and that they allow young criminals to walk free. Despite the noisy and emotive criticisms, the safeguards were supported by a Review Committee and only minor changes are proposed by the present Minister of Social Welfare.

The safeguards derive their effectiveness from s221(2) which states that unless the procedures are followed any statement obtained by the Police will be inadmissible as evidence in subsequent court proceedings.

Youth Law Project and other youth advice agencies have noticed a significant reduction in the complaints by young people of Police oppression and assaults since the 1989 Act came into force. In most cases under 17s have a family member present while a statement is being taken.

### Victim involvement

Victims of crime have tended to remain on the margins of the criminal justice system. Under the 1989 Act encouragement is given to the victim of an offence committed by a young person to attend the Family Group Conference. The young person comes fact to face with the person who has suffered as a result of the criminal act and is exposed to the anger, annoyance or distress of the victim. This can be a salutary experience for the young person and healing experience for the victim. Often the plan agreed by the FGC will involve some form of reparation. It may be that the young person can do unpaid work for the victim. Sometimes the offender's family will reimburse the victim and look to their son or daughter to make good their loss.

Most victims report good experiences when they attend an FGC but there have been reports of victims who have felt intimidated by the young person or the family or who have felt that everyone is wanting to excuse rather than accuse the young offender. The dynamics of FGCs depend considerably on the skills of the Youth Justice Coordinators and Youth Justice social workers who convene them.

### Children's rights

Children are given independent rights in the 1989 Act. One of the overriding principles requires that their wishes be ascertained and given such weight as is appropriate taking into account their age and maturity. Another requires that endeavours be made to get the child's support for any decision affecting the child.

### Youth advocates

Every young person who appears in the Youth Court charged with an

offence is entitled to free legal representation by a youth advocate. Youth advocates are lawyers specially chosen for the task because of their personality, cultural background, training and experience. They are paid an hourly rate for the youth advocacy work and will represent young people at FGCs, at defended hearings (whether in the Youth Court or before a jury in the District Court or High Court) or on an appeal.

#### BOX II

#### **Rights of children and young people being questioned by the Police**

*A Police officer must explain to a young person that:*

- *A young person whom the Police have good cause to suspect of an offence is required to give their name and address to the Police officer and can be arrested if they refuse.*
- *A young person is not required to go with the officer to the Police station unless arrested and, if they agree to go with the Police officer to the Police station without being arrested, they can leave at any time.*
- *A young person does not have to say anything unless they wish to and they can change their mind at any time.*
- *A young person has the right to consult privately with a solicitor and the right to have their solicitor present while being questioned.*
- *A young person has the right to consult privately with a person of their own choice and to have that person present while being questioned. (This is in addition to the above).*
- *A young person who is arrested must be informed of these rights again, unless the Police have already done so in the past hour.*
- *A young person is entitled to have a parent, carer, adult family member or friend present during any Police interview and has a right to consult privately with this person. If the child fails to nominate someone the Police must nominate a suitable person to provide support for the young person.*

The Youth Court can also appoint a Lay Advocate, someone of standing in the young person's culture, who can acquaint the court of any relevant cultural considerations and represent the interests of the young person's extended family group.

### Reduction of delays

In New Zealand's criminal justice system as in most other countries delays are endemic. It is generally recognised that for children and young people delays and uncertainty are particularly stressful. The 1989 Act states as one of its principles that decisions will, wherever practicable, be made within a time frame appropriate to the young person's sense of time. More important, the Act sets fixed time limits for calling FGCs and for other procedural steps. While there is room for improvement, there has been a noticeable speeding up of youth justice procedures.

### Secure care

The 1989 Act sets in place effective limitations on the keeping of children and young people in lock ups in Department of Social Welfare residential homes.

Placement in secure care is possible only to prevent the child or young person from absconding where he or she has previously absconded and there is a real likelihood that he or she will do so again. It must further be shown that the child's physical, mental or emotional wellbeing is likely to be harmed if he/she further absconds. The only other ground for placement in secure care is to prevent the child or young person from behaving in a manner likely to cause physical harm to him/her or to someone else.

Parents or carers must be notified of the placement in secure care and no one must be kept there for more than 72 hours without the approval of a Youth Court judge. Hearings are usually held in the residential home and the child or young person is represented by a youth advocate.

### Youth Court

Prior to the 1989 Act there was a separate court for young offenders, the Children and Young Persons Court. Although it was intended that specialist judges should preside this did not always happen and there was little attempt to develop a common philosophy and approach. When the

1989 Act came into force a Principal Youth Court Judge was appointed, and the appointee, Judge Mick Brown, has worked very hard to ensure that the high ideals of the legislation are given practical effect. He has also been an effective apologist for the 1989 Act when it has been under attack.

There are statutory requirements that waiting time in the Youth Courts shall be kept to a minimum, that they are to be separate from adult courts. Judges and lawyers have a legal duty to explain to all young people appearing before the Court in language that they can understand the nature of the proceedings and of any order made.

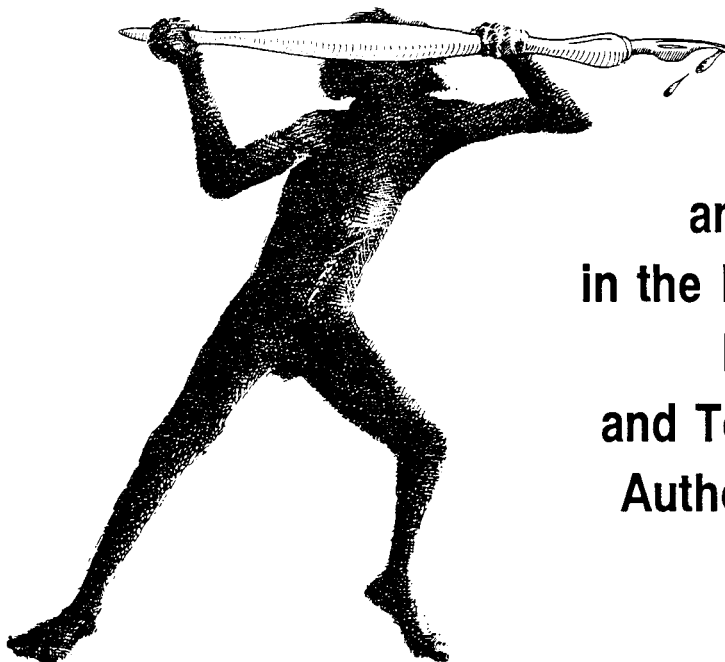
The Court and the prosecution are guided by a number of principles set out in s208 which encourage diversion from the criminal justice system, strengthening and empowering families, keeping young people within the community, treating the youthfulness of the offender as a mitigating factor and choosing sanctions which maintain the youth's relationship with his/her family group and which involve the least possible restriction of liberty.

Recent research has suggested that the Youth Courts have been slow to change and their procedures differ little from adult criminal courts. Conservatism of the judiciary and time constraints, have made some courts slow to respond to the new philosophy.

The Youth Court cannot impose a prison sentence but it can refer young people aged 15 or over to the District Court or the High Court which have full sentencing powers. The Youth Court can sentence a young offender to 'supervision with residence' for up to six months and this can involve residential care. ♦

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