Youth Justice Reform in New Zealand

Michael Doolan  
National Director (Youth and Community)  
Department of Social Welfare  
New Zealand

On 28 May 1989, Royal Assent was given to the New Zealand Children, Young Persons and Their Families Act 1989 and the Act became effective on 1 November 1989.

The new law introduces principles and procedures for dealing with young people who offend against the law which are in contrast to those of our previous enactments—the Child Welfare Act 1925 and its successor, the Children and Young Persons Act 1974.

The new law, as in the case of its predecessors, covers children and young persons in need of care and protection, as well as those who offend against the law. There is to be, however, a jurisdictional separation between these two groups, to the extent that measures for dealing with young offenders can be seen as an act within an act, without the blurring of principles and processes between care and protection and youth justice, which characterised the previous approach.

Theoretical base

Post-war debate in most western countries about how best to deal with young offenders has centred on two basic paradigms—the 'welfare model' and the 'justice model'. The two models are often represented as opposites, with clear distinctions of ideology, practice imperatives and outcome goals. Ideologically, there has been a shift in New Zealand towards the principles underlying the justice model, but without embracing that model's more doctrinaire aspects, particularly those aspects which contribute to the model's 'just desserts' pseudonym.

Rather than embrace the 'just desserts' approach which attributes offending to full choice of the offender who must be held responsible for the offence, we have attempted to see the principle of justice in a wider context as argued by Holt (1985). The origins of crime may be seen in a broader macro-economic and social context, with well-known relationships, for example, between incidences of crime and unemployment.

A related strand of thought which emerges from research is that there is little to distinguish most young offenders who are caught, from those who are not. Formal involvement in re-offending occurs to a greater extent among those who are caught than amongst those who are dealt with without such formal involvement. This may be explained in part by labelling theory, which argues that formal involvement initiates a process of self-labelling, and labelling by others, of the offender as criminal, thus helping to determine further
decisions to offend. It may also be explained by the increased opportunity to associate with, and learn from other offenders (Woodward 1985).

There is abundant research showing that juvenile justice systems work in a discriminatory way against members of ethnic minorities and working-class youth. Welfare considerations play a significant part in this discrimination (Holt 1985). The New Zealand experience supports this finding. Maori and Pacific Island youth are more fundamentally at risk of the more coercive, intrusive welfare dispositions, under the guise of treatment, and in pursuit of rehabilitation, than are their Caucasian counterparts. New Zealand recognises the fact that most professional decision-makers in the youth justice system are from the dominant white culture, and moreover are rarely identified as working class, contributing directly to this state of affairs.

_Social background_

A number of issues began to emerge contemporaneously which have affected the shape of our new legislation. These can be summarised as:

- A growing dissatisfaction amongst practitioners about the effectiveness of their work with young offenders. They laboured under the unreal expectation that they could control offending behaviour through treatment programs, and gradually a loss of confidence in the goal of rehabilitation built up.

- New and more determined efforts by Maoridom to secure self-determination in a mono-cultural legal system which demonstrably discriminates against them, and holds of little value Maori custom, values and beliefs. The Maori renaissance contributed in turn to a renewed awareness of the plight of Pacific Island cultures in New Zealand society.

- Related to Maori concerns, but also an issue for the wider community, was the growing rejection of the paternalism of the state and its professionals, and a need to redress the imbalance of power between the state and its agents, and individuals and families engaged by the criminal justice system.

- Sixty years of paternalistic welfare legislation had little impact on levels of offending behaviour. Costly therapeutic programs that congregated young offenders, particularly in residential settings, emerged as part of the problem rather than part of the solution. Decarceration and deinstitutionalisation became buzz words for both those seeking to free up locked-in resources for other uses, and those seeking more positive outcomes for individuals.

- Concerns emerged for more decided justice, in both process and disposals. Courts were beginning to dismiss cases where prosecuting authorities had failed to exercise strict procedural safeguards in the questioning and/or arrest of juveniles, and the indeterminate guardianship order as a response to the serious young offender was being reduced. Increasing numbers of young offenders were being sent to the adult court for sentence—over 2,000 in 1988—an indication of the inability of the juvenile system to deal with them effectively.
The Reform Process

The newly elected 1984 Labor Government determined that problems with the care and protection aspects of the Children and Young Persons Act 1974, could not be remedied by amendment, and authorised a full review for children and young persons legislation. It could not have been conceived at that time, either how long or how radical the outcomes would be. The legislation has been debated exhaustively in New Zealand, over a four-year period. Much of the attention focussed on care and protection issues—arguments for and against mandatory reporting of child abuse; arguments for and against professional expert power; debate about whether it was possible to harness the energy and commitment of extended family systems, in European, Maori and Pacific Island cultures, to counter the incidence and effects of physical and sexual abuse. The reforms underway in youth justice elicited little debate, either because they were swamped by the child abuse debate, or because they had widespread acceptance. The process of reform occurred went as follows:

- A government appointed working party (without Maori representation) was appointed in 1984.
- A public discussion document was issued by the working party in December 1984, and submissions were called for.
- The government introduced its Bill in December 1986, with the Bill following the line adopted by the working party in most major respects.
- There was widespread public dissatisfaction with the Bill, expressed to the Select Committee of the House of Representatives. Maori people were particularly critical of its failure to establish culturally relevant ways of approaching care and protection and offending issues. Criticisms also centre on the Bill's complex, bureaucratic and professionally dominated provisions.
- Following an election in August 1987 and the return of the Labor Government, the new Minister of Social Welfare, having considered the weight of submissions about the Bill, established a new working party within the Department of Social Welfare to review the Bill, and to advise the Select Committee how the Bill could be recast to make it simpler, more flexible, more culturally relevant, and more directed to providing resources for services rather than for infrastructure.
- That working party reported in December 1987, and from February to April 1988, the Select Committee travelled to Maori marae and Pacific Island centres throughout the country, hearing submissions on how to recast the Bill.
- From April 1988 until April 1989 when the Bill was returned to the House for its second reading the Select Committee and officials worked together to produce what was, in effect, a new piece of legislation—one that had an immediately favourable response from Maori and Pacific Island interests. The young offender aspects achieved almost total political unanimity.
Features of the New Law

Principles

Youth justice aspects of the Act have their own set of principles, distinct from principles governing care and protection issues. Summarised, the principles state that:

- Unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.
- Criminal proceedings are not to be instituted solely to provide assistance or services needed to advance the welfare of the young person or their family group.
- Measures taken should be designed to strengthen families and foster their own means of dealing with their offending young.
- Young offenders should be kept in the community where practicable and consonant with the need to ensure public safety.
- Age of itself is a mitigating factor in determining whether a sanction should be imposed, and in determining the nature of the sanction.
- Sanctions should take the form most likely to maintain and promote the development of the offender within their family group, and be the least restrictive form appropriate.
- Any measures taken should have regard to the interests of victims.
- The vulnerability of young people entitles them to special protection during any investigation relating to the commission or possible commission of an offence by them.

Limitations of arrest, and procedural safeguards during investigations

For the first time in New Zealand, the law limits the power of police, or other enforcement agencies, to arrest in preference to proceeding by summons. Currently, in excess of 60 per cent of young persons facing charges in the Children's and Young Persons' Courts in New Zealand, have been arrested. There is some evidence in the literature that suggests that whether or not a young offender has been arrested affects later disposals. New procedural law is introduced to govern enforcement authorities' actions in questioning children and young persons they suspect of offences, and to establish the rights of the young people to consult with others. No statement made by a child or young person will be admissible as evidence, unless made in the presence of a trusted or neutral adult, not being a member of the enforcement authority.

There has been an anticipated reaction by some enforcement agencies to what they regard as law aimed at frustrating criminal investigations and lacking in trust of police generally. The legislature was persuaded by objective evidence, however, that current procedural guidelines contained in judicial and police rules, are not always adhered to. These rules now have the force of law.
A new diversionary process

Previous diversionary mechanisms adopted in New Zealand have been shown to have two major defects:

- they have been largely constructed around panels of officials and professionals—the Children’s Boards and Youth Aid Conferences—quasi-judicial bodies; and

- they have always been bypassed whenever police exercised their powers of arrest.

With more than 60 per cent of young offenders appearing on arrest, less than 40 per cent of those who appeared had been considered for a diversionary option. Worse still, there was evidence (Morris & Young 1987) that the diversionary mechanisms were having a net-widening effect, by drawing into their ambit very petty offenders who should and could have been handled in much less formal ways.

The policy imperatives, then, were to find a diversionary mechanism that was not bypassed by arrest, that was not susceptible to net-widening, and which eliminated the quasi-judicial panel approach. The result has become known as the Family Group Conference, (FGC) convened and facilitated by a new statutory official, known as the Youth Justice Coordinator (YJC).

Features of the diversionary process are:

- Where a child or young person is charged with an offence, no information may be laid until a FGC has been held. The prosecuting authority must refer the matter to the YJC.

- Where the offender has been arrested, the court may not enter a plea, but must refer the matter to a YJC to convene a FGC. The exceptions are where the charge is a purely indictable offence, or where on legal advice, the young person indicates a non-guilty plea.

- The FGC is authorised to find alternatives to prosecution in dealing with an offender who admits guilt.

- Families are entitled to deliberate in private and to arrive at decisions and plans, which must then be negotiated with the officials present.

- Where a FGC agrees on an alternative measure, the YJC is bound to try to persuade the prosecuting authority to accept that decision.

- Where a FGC does not agree on an alternative, the matter proceeds to court for adjudication. The law provides, however, that the court be informed of the wishes of the Family Group, so that prosecuting authorities may be held accountable should they override without acceptable cause, the plans, decisions or recommendations of the Family Group.

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1 A 'Family Group' is defined in law to recognise different cultural understanding of family. It includes whanau, hapu and iwi for Maori, and equivalents in the various Pacific Island cultures. Basically, it means extended family, something more than the nuclear care giver family. A 'Family Group Conference' is a meeting of the culturally defined family group, with officials.
Where the Family Group Conference is unable to prevent a prosecution, the conference has a role in advising courts on appropriate sanctions for the young offender.

Court Jurisdiction

The new law maintains the distinction between a child and young person. The legal age of criminal responsibility is ten years, but except for charges of murder and manslaughter, no child between ten and thirteen years may undergo criminal proceedings. Instead, they must be dealt with under care and protection legislation, that is civil proceedings, which are now to be heard in the New Zealand Family Court system (previously confined to marriage dissolution and child custody issues).

A young person is defined as someone of fourteen years and up to the age of seventeen years. A new court, known as the Youth Court, of purely criminal jurisdiction and applying due process procedural safeguards, has been established for young persons charged with offences.

Features of the new court are:

- No judge may be designated a Youth Court judge unless he or she is suitable to deal within the jurisdiction by means of his or her training, experience, personality and understanding of the significance and importance of different cultural perspectives and values.

- All young persons must be legally represented with the court appointing a youth advocate where no private arrangements have been made.

- Courts, may, in addition, appoint lay advocates, to ensure the court is made aware of all cultural matters relevant to the proceedings.

- The Family Group has a status in any proceedings and has the right to make representations.

- Hearings of the Youth Court are to be held separately from any other court, and courts are to minimise waiting times, the association of offenders awaiting hearings, and the extent to which parents are obliged to congregate in common waiting facilities, by scheduling hearing times.

Court Orders

The Youth Court will have the standard disposal options of discharge, admonishment, conditional discharge, and orders for fines, restitution and forfeiture of property.

Disposals involving long-term and more coercive sanctions, have been formed with regard to the following principles (see Freiberg, Fox & Hogan 1988):

Proportionality: the principle which limits excessive attempts at rehabilitation and open-ended orders, where these could not be applied to adults committing the same offence, and which recognises the mitigating factor of youthfulness, and youth time-frames.

Equality: the principle that responses to like offences should be similar, that seeks to limit the influence of personal, social, cultural or economic status factors
in determining individual outcomes, and which limits the more coercive, controlling sanctions to certain classes of offence, rather than classes of offenders.

**Determinancy:** the principle that all sanctions should have definite limits, known in advance.

**Specificity:** the principle that the exact nature of any sanctions should be known, in advance.

**Frugality:** the principle that the sanction should be the least restrictive option.

The orders available, in ascending order of severity are:

- **Supervision Order:** with or without conditions, limited to a maximum of 6 months.

- **Community Work Order:** with the consent of the young person, the court may order not less than 20 hours and not more than 200 hours of supervised work in the interests of the community, within a 12-month period.

- **Supervision-with-Activity Order:** with the consent of the young person a 3 month order of structured supervision activity, which may be followed by a 3 month Supervision Order.

- **Supervision-with-Residence Order:** an order which totals 9 months in all, the first 3 months of which is spent in the custody of the Department of Social Welfare. The custodial period reduces automatically to 2 months provided the young person does not offend while in, or abscond from, the custodial placement. The appropriate place of custody is determined by the Director-General of Social Welfare, not the court.

- **Transfer to the District (Adult) Court for Sentence:** where the Youth Court declines to sentence, usually on the grounds of seriousness of the offence(s). Only 15 and 16-year-olds may be so transferred.

The Court may not order Supervision-with-Residence or Transfer to the District Court unless:

- the offence is purely indictable; or

- the nature and circumstances of the offence, had it been committed by an adult, would have resulted in a mandatory whole-time custodial sanction for that adult; or

- the court is satisfied that because of the special circumstances of the offence or the offender, any order of a non-custodial nature would be clearly inadequate.

The court may not order Supervision-with-Activity, unless the nature and circumstances of the offence are such that, but for the availability of the order, the court would have considered a Supervision-with-Residence Order. Thus while a custodial option is provided for, the court also has a clear option of a high tariff community-based alternative. New resources have been obtained from the government to resource this new order.
Orders other than Supervision-with-Residence, may nominate with their consent any person or organisation who is willing to carry out the administration of the order, thus opening the way for tribal and cultural authorities to take a direct role in work with their young people who offend. The Department of Social Welfare will resource this work.

**Plans and report back to courts**

The Youth Court may not order any of the orders listed above until it receives a plan, detailing how that order is to be implemented, including:

- the arrangements made for the care and control of the young person in custody or under supervision; and

- the nature of any program that would be provided to the young person during the period.

The plans are to be prepared by the person or organisation which agrees to administer the order, or by a social worker where the Department seeks the order.

As both a means of ensuring accountability to courts for the administration of orders, and as an attempt to build with courts the credibility of community-based sanctions, the person or organisation nominated by the order is required to report in writing to the court on the expiry of the order, on the effectiveness of the order, the young person’s response to it, and any other matter considered relevant by the writer.

**Practical Approach**

We are becoming convinced in New Zealand that managing and minimising the impact of the criminal justice system on young people and their families has more chance of producing positive outcomes for them, and therefore the wider community, than targeting professional services to control young offenders. For that reason government funds have been obtained for the development of such latter services targeted to adjudicated young offenders, by the voluntary or private sectors. Social workers, iwi and cultural authorities will be able to purchase services of the mix required according to the individual case. The goal of all supervision orders is to ensure, first and foremost, that the young person is supervised and the chances of reoffending reduced, during the life of the order. Helping and educative services may be offered, but require voluntary acceptance by the young person. The Department will still provide direct supervision services where necessary, and will be the only agency charged with arranging appropriate Supervision-with-Residence.

However, the prime focus for the Department's youth justice social workers will be systemic management. Social workers will be expected to take the initiative in promoting the principles and strategies of youth justice work, with the other primary actors in the criminal justice system—notably police, judges and the legal profession. They will have an educative function in persuading others about such factors as:

- the benefits of avoiding or delaying the first prosecution;

- the need for rigid gatekeeping of the criminal justice and care systems;

- the promotion of family decision-making as the prime discretionary measure;

- applying the principles of proportionality, equality, frugality, determinancy and specificity in practice;
• recognising the negative impact of pre-adjudication custody, or disposals; and
• strict control of pre-sentence report contents, given the potential these have to promote young people on the tariff of disposals.

Future Possibilities

While the immediate future will be occupied with monitoring the impact of new legislative form, and advocating for the practice change necessary to realise policy imperatives, there will be opportunities to advance the reform beyond this present effort. Two possibilities arise, the former more likely in the short-term, than the latter:

- A recent revision of the Crimes Act has resulted in a Bill currently before Parliament which, if passed, will raise the age of criminal responsibility to 12 years. If this occurs, lowering the minimum age of a young person from 14 to 12 years will be seriously considered. The effect will be to have all offending matters proceeding to a hearing, heard in the Youth Court, and eliminate from care and protection proceedings in the Family Court, the ground that the child has committed an offence or offences. Then the separation of care and protection, and offending matters, will be complete.

- There is clear evidence in England and Scotland that successful diversion of offenders in the juvenile system, can result in harsher treatment of them immediately they reach the ambit of the adult system: in New Zealand, that is when a young person reaches 17 years of age. Government is increasingly giving messages to young people that they should stay in education or vocational training until they are 18 years of age. Certainly, they get minimal income support before that age, are unable to vote, or enter licensed premises, or join the armed forces before they are 18-years-old. These grounds, plus the need to extend efforts directed towards decarceration, commend an extension of the youth jurisdiction upwards by at least a further year.

Select Bibliography

Doyle, S. & Hester, R. 1985 (unpublished), 'The Rainer Project Southend: the juvenile justice process 1st April 84 to 31 December 85'.


