

A History of Youth Justice in New Zealand¹

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Introduction

The Children, Young Persons and Their Families Act 1989 revolutionised New Zealand youth justice practices, establishing an innovative set of principles and procedures to govern the response to young offenders, and to manage the role of the State in the lives of young people and their families.

The founding objective of the legislation is 'to promote the wellbeing of children, young persons, and their families and family groups' (section 4). The Act thus seeks to empower families and communities, rather than professionals, in deciding the best measures to respond to offending behaviour in children and young people

This report will explore the background to the youth justice provisions of the Act, both internationally and domestically, with the hope that an understanding of the system's evolution will render a better insight into the principles behind this innovative piece of legislation.

Part One will first outline the international trends in attitudes to youth justice, where shifting philosophies reflect the changing views of children as alternately in need of nurturing and strict control.

Part Two will then explore the New Zealand experience, which initially followed international trends but later introduced ground-breaking systems in response to the problem of youth offending.

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Part I: The last 100 years: an International Perspective

The Founding Of The First Juvenile Courts

The existence of a separate court for young offenders is relatively recent in Western legal systems. Historically, young offenders were convicted and punished as adults in adult courts, and age offered no exoneration. The justice system was characterised by the 'Classical' approach where crime was seen as a rational act of free-will. Punishment consequently focused on deterrence rather than reform and was applied equally to adults and children.

However, in the latter part of the 19th century there was an acknowledgement that children are uniquely vulnerable and a subsequent move towards child-centred, welfare-based treatment.³ The existing court practice of granting pardons to young offenders was soon formalised in English Common Law through the *doli incapax* rule, (inability to do wrong). Children under seven were given immunity, and those between the ages of seven and fourteen were presumed incapable of doing wrong unless there was evidence to the contrary. Children over the age of fourteen continued to be tried and convicted as adults.

Many countries also established reformatories in recognition of the need to keep young offenders separate from adult criminals. To the same end, there was a move to establish a discrete form of prosecution for children. There is some dispute over the whereabouts of the first separate youth court. While many claim Illinois founded the first juvenile court in 1899, the State Children's Act in South Australia established one in 1895.⁴ Other countries were swift to follow suit - England and Canada in 1908, France and Belgium in 1912, Hungary in 1913, Austria and Argentina in 1919, and Germany and Brazil in 1923.⁵ New Zealand formally established a separate youth court in 1925.

These courts were founded on the principle that young offenders were victims of their environment and in need of help rather than punishment. This positivist approach is the basis of the 'welfare model' of youth justice, which held currency to varying degrees in most countries throughout the first half of the 20th century.

³ This was in accordance with the social reforms of the time e.g. the establishment of the child welfare agencies and child labour laws.

⁴ Freiberg, Fox & Hogan (1988), p.2

⁵ Juvenile and Family Court Journal (1998), p. i

The Welfare Model

The welfare model is based on the tenet that criminal behaviour in young people results from undesirable upbringing and environment. The focus of court intervention at the beginning of the 20th century thus shifted to the care and protection of young people rather than the emphasis placed in adult courts on accountability and punishment. Young offenders were handled in the same manner of reform as neglected youths, and courts focused on their 'needs', not their 'deeds'.

The USA adopted a fairly pure form of the model, with the state acting as *parens patriae*, the 'stern but caring parent', and the young offender being the object of the court's benevolence. In England, New Zealand and Australia⁶ this positivism was initially more subdued. In England, the 1908 Children Act formally established a separate court for juveniles, but it adopted a less welfare oriented approach than the *parens patriae*-style of the US courts.⁷ Further measures of benevolent intervention were implemented in the ensuing years,⁸ but it was the two key Labour Government White Papers in 1965 and 1968 that led to the real pinnacle of the welfare approach in England: the 1969 Children and Young Persons Act. This proposed to raise the age of criminal responsibility from ten to fourteen, phase out borstals and detention centres, replace criminal proceedings with care proceedings, and expand diversionary methods.⁹ It has been argued that this legislation was influenced by the radical developments in Scotland where the 1968 Social Work Act had dispensed with juvenile courts in favour of non-criminal Children's Hearings systems.¹⁰ Although large parts of the English 1969 Act were never implemented, it is a good indication of the prevailing strength of support for the welfare response to young offending behaviour.

These systems set up under the welfare model were a great improvement on the 'Classical system' of the 19th century; however, they were not without their problems. Even as England was passing the 1969 Act, the tide of public opinion was beginning to turn.

Critics argued that the unfettered powers of the courts ignored due process and the legal rights of the child. There was no presumption of

⁶ In early stages of New Zealand law-making, legislation generally followed the laws of England. See Seymour (1976), p.5

⁷ Wittman (1995), p.6

⁸ For example, the 1933 Children and Young Persons Act (England)

⁹ Fionda (2001), p.81

¹⁰ Above n.9, p. 81

innocence, no legal counsel, and moreover, the broad discretion given to judges allowed for class and racial discrimination in the treatment of young offenders. Furthermore, critics claimed that 'rehabilitation' was being used to justify unnecessary and significant intrusion in children's lives. The severity of a crime often had no influence on the resulting term of incarceration, as youths were kept in custody as long as necessary to effect rehabilitation. Sanctions were often indeterminate.

In 1964, Francis Allen wrote:¹¹

The semantics of 'socialised justice' are a trap for the unwary. Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality.... We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile court inevitably consists, to a considerable degree, in dispensing punishment.

Concurrent with this censure, many countries also experienced public panic over a 'juvenile crime wave'. There was a feeling that the welfare model was not living up to its promises, it was too permissive and it was failing to hold young offenders accountable. There was a fear that the system was unable to deal with persistent offenders and, in the interests of public protection, many advocated a return to deterrent retributive models.

With such agitation and criticism, many countries revamped their youth justice policies to allow for accountability and due process. The systems adopted in most countries can be seen to be founded on the 'justice model'.

The Justice Model

The justice model is often posited at the opposite end of the justice spectrum from the welfare model. It promotes accountability, determinate sentences relative to the offence, respect for the legal rights of young people, and the establishment of more formal procedures. In some respects the justice model is an inversion of welfare ideals, focusing on: offending, not the offender; responsibility and free will, not

¹¹ Cited in above n.4, p.5

determinism; equality of sanction, not individual treatment; and determinate sanctions rather than indeterminate rehabilitation.¹²

The emergence of the justice model at that time has been associated with the collapse of the post-war economic boom¹³. While prosperity cultivated optimism and ‘rehabilitative philanthropy’, (the belief in the inherent good of people), the recession and resulting loss of funds to pay for rehabilitation programmes led to calls for a return to 19th century classicism.

This ‘back to justice’ movement formed the basis of reform in the latter half of the 20th century in a number of countries. While Scotland and Northern Ireland continued their welfare-focused regimes, others dramatically changed their philosophy.

In the United States, the move was spear-headed in the late 1960s by a number of landmark decisions in the Supreme Court ¹⁴, which advocated due-process criminal-style proceedings in youth courts. In the 1970s influential reports were drafted to the government that further supported a return to justice.

While the justice model was seen in its purest form in U.S. legislation,¹⁵ elements of the approach became evident in many other countries. In England the 1982 Criminal Justice Act focused on the importance of accountability and due process and represented a clear ideological shift away from the 1969 Act.¹⁶ In Canada, the 1908 Canadian Juvenile Delinquents Act was attacked as early as 1965 in a report to the government that advocated limiting youth courts’ powers, and protecting children’s legal rights. This influenced the Canadian 1984 Young Offenders Act that eventually replaced the 1908 legislation.

However, the justice model, too, has its critics.¹⁷ The key concern is the lack of substantive justice. Many argue that deliberately ignoring the causes of the crime, especially issues of social disadvantage, and placing importance on equal punishment can lead to injustice in itself.

In reality, of course, no system operates on a pure model and they are rather influenced by a number of philosophies. However, it is useful to

¹² Maxwell & Morris (1993), p.167

¹³ Above n.4, p.59

¹⁴ (*Kent, Gault, Winship*), see above n.4, p.5

¹⁵ Legislation in Washington, Delaware and Iowa displayed particular commitment to this model. See above n.12, p.167

¹⁶ Above n.7, p.13

¹⁷ See above n.12 for a full discussion of these, p.167

understand the philosophical shift in justice paradigms that occurred internationally and provided the setting for the gestation of the 1989 Act in New Zealand.

Part II: The New Zealand Experience

Table I:

Significant Legal Milestones Affecting Youth Justice in New Zealand¹⁸

1867	Neglected and Criminal Children Act passed. This gave courts the power to commit children to industrial schools. It also sought to keep industrial schools distinct from reformatories, which were for 'criminal' children.
1882	Industrial Schools Act passed, repealing the 1867 Act. This placed the guardianship of neglected or criminal children in the hands of the Managers of the Industrial Schools. The Act also increased the power of the Education Department, giving it considerable discretion over where a child was placed and for how long. Justices of Peace Act passed. This distinguished between children (aged under 12 years) and young persons (aged 12 and under 16 years). The Act stated that non-homicide indictable offences committed by a youth could be dealt with summarily (with the parents consent). Penalties available for both children and young persons were imprisonment, fine or whipping.
1893	Criminal Code Act passed. Section 22 stated that no person under the age of 7 could be convicted of an offence and those under the age of 12 were given the benefit of the <i>doli incapax</i> rule. ¹⁹
1900	While reformatories had been legislated for since the 1867 Act, the first reformatories were established to keep criminal children separate from those in need of care. Burnham Industrial School and Te Oranga Home were transformed into reformatories. The age limit of committal to an industrial school was also raised to 16 years.
1906	Juvenile Offenders Act passed. The object of this bill was 'to save children from the degrading influences and notoriety inseparable from the administration of justice in Criminal Courts.' The Act established private hearings for juveniles, stating that Magistrates

¹⁸ From Michael Brown, (2000), pp. 1-2, 37-50, and Seymour (1976)

¹⁹ Above n.6, p.29

	should assign a 'special hour' for hearing of charges against persons under 16 years. ²⁰
1908	Industrial Schools Act passed, consolidating the 1882 Act.
1917	Statute Law Amendment Act passed, giving statutory recognition for the appointment of Juvenile Probation Officers. This represented an attempt to keep juveniles in natural home conditions and relegate an admission to an institution as a last resort.
1924	Prevention of Crime (Borstal Institutions Establishment) Act passed. This recognised the measure used since 1909 of sending some male youths between 15 and 21 to prison.
1925	Child Welfare Act passed, making 'better provision with respect to the maintenance, care and control of children who are specially under the protection of the State and to provide generally for the protection and training of indigent, neglected or delinquent children.' The Act formally established Children's Courts.
1957	Juvenile Crime Prevention section of the Police established.
1961	Crimes Act passed, raising the age of criminal responsibility from seven to ten. The Act formalised the <i>doli incapax</i> rule: No child shall be convicted of any offence... under the age of 10 years. No child shall be convicted of any offence ... when over the age of 10 years but under the age of 14 years, unless the child knew either that the act or omission was wrong or that it was contrary to the law (ss. 21 and 22).
1968	Guardianship Act passed, which formally established the paramountcy principle, stating that the interests of the child or young person shall be the first and paramount consideration (s 23(1)).
1972	Department of Social Welfare formed.
1974	Children and Young Persons Act passed.
1978	Report of the Royal Commission on the Courts published recommending the establishment of a Family Court that should include the Children and Young Persons Act within its jurisdiction.
1979	Report by the Auckland Committee on Racism and Discrimination (ACORD) on the maltreatment of children placed in care in DSW

²⁰ Above n.6, p.29

²¹ Department of Social Welfare (1984), p.1

	homes.
	International Year of the Child, focusing public attention upon the rights of children. Discussions during that year resulted in the establishment of the New Zealand Committee for Children and a National Advisory Committee on the Prevention of Child Abuse. ²¹
1980	Revision of Court structure of Court of Appeal, High Court, District Court with separate Family Court created.
1983	Report of the Advisory Committee On Youth and Law In Our Multicultural Society published.
	Maatua Whangai commenced.
1984	The Labour Government established a Working Party to review the existing Children and Young Persons legislation.
1985	Criminal Justice Act passed, forbidding imprisonment of a person under the age of 16 years except for a purely indictable offence.
1986	Puao-Te-Ata-Tu report filed.
	Te Whaingā i Te Tika report to the Minister of Justice.
	1986 Children and Young Persons Bill introduced into the House, largely following the recommendations of the 1984 Working Party.
1987	The Labour Government established a second Working Party to review the 1986 Children and Young Persons Bill. The Working Party's report was referred to Select Committee in December 1987.
1988	State Sector Act passed.
1989	Public Finance Act passed.
	New Zealand signed the United Nations Convention on the Rights of the Child, which states
	In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3.1)
	The child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or indirectly, or through a representative in a manner consistent with the procedural rules of national law (Article 12.2)

	Children Young Persons and their Families Act came into effect November 1 st .
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The Welfare Model in New Zealand

In New Zealand, the pendulum swing of youth justice philosophy initially followed international trends, with the classical approach giving way to the positivist welfare approach at the beginning of the 20th century. The 1925 Child Welfare Act was the first piece of legislation in New Zealand to fully embrace this model, and focused on re-defining the delinquent as a child in need. Seymour argues that although the early legislation in New Zealand was heavily influenced by British law, the 1925 Act adopted the more liberal welfare-based philosophies of American policy-makers.²²

The 1925 Child Welfare Act established a discrete Children's Court 'with the aim and on the principle that [young persons] require protection and guidance rather than disciplinary punishment.'²³ This welfare philosophy prevailed for the next 50 years, reaching an apotheosis in 1974 with the Children and Young Persons Act, which was founded on the principle of 'the interests of the child or young person as the first and paramount consideration...'²⁴

The 1974 Act

The Bill was greeted in 1974 with much enthusiasm and on its second reading, the Minister of Social Welfare commented: 'It would be quite wrong to regard this Bill as merely an updating of the existing child welfare legislation... It is a completely new approach ... one of the major social welfare Bills introduced in New Zealand during this century.'²⁵

The 1974 Act marked the end of the 50-year reign of the 1925 Child Welfare Act and while it certainly offered a more comprehensive approach, many have argued that it was little more than clarification and assimilation of existing practices.²⁶

Yet despite being more reactive than proactive, it offered three key areas of innovation: it legally distinguished children and young persons; it formalised diversionary strategies through the establishment of Children's Boards; and it took steps towards reforming the Children's Courts.

²² Above n.6, p.55. For a more detailed discussion of the evolution of youth justice legislation the 19th Century in New Zealand, see Seymour (1976)

²³ Sir Christopher Parr, Minister of Education, 1925. Cited in above n.6, p.31

²⁴ Cited in Report of the Ministerial Review Team to the Minister of Social Welfare (1992), p.8

²⁵ Cited in Above n.7, p.50

²⁶ Above n.6, p.51

The 1974 Act followed an example set by the 1969 English Children and Young Persons Act by legally distinguishing children and young persons. Children were defined as those under the age of 14 and young persons over 14 and under 17. The Act prescribed a different approach to offenders from either category.

Regarding children, the Act retained the *doli incapax* rule, prescribing the legal age of criminal responsibility at 10 and ruling that no child (under the age of 14) shall undergo criminal proceedings unless under charges of murder or manslaughter. Child offenders came to court only when proceedings were brought against their parents because the child was 'in need of protection'. The Act aimed to divert young offenders from court proceedings wherever possible by establishing Children's Boards that held informal community. Children's Boards were to consist of a member of Police, an officer of the DSW, an officer of the State Services appointed by the secretary for Māori and Island Affairs, and a local resident. The child and his/her family were invited to attend. Section 15 mandated that the Police or DSW report every child offender to a Children's Board. The Board would then decide whether complaint proceedings should proceed, or whether some informal action would suffice.

Unlike children, young persons could be brought to court for prosecution as well as for complaints against their parents. However, for this group too, the legislation put both formal and informal diversionary procedures in place. Instead of making an arrest, police officers could give informal warnings. If further action was necessary they could refer the young person to the Youth Aid section of police who must then consult with an officer from the Department of Social Welfare (DSW) before prosecuting. This legislation merely formalised an existing practice of police consultations with Child Welfare and the Māori community, which had been held since as early as the 1930s.²⁷

The 1974 Act also replaced the Children's Court with the Children's and Young Persons Court.²⁸ This court dealt with both offending and care and protection cases and used the same welfare-based dispositions for all youths coming to official notice. True to the welfare model, this approach was 'based on the belief that all these problems are symptoms of family difficulties which can be treated by social work assistance and therapy.'²⁹ Presided over by specialist Magistrates from the District Court, the court was to be a last resort, dealing with all matters beyond

²⁷ Morris & Young (1987), p.35

²⁸ Seymour argues that this was little more than an exercise in name-changing. See above n.6, p.52

²⁹ Above n.21, p.35

the capacity of Children's Boards. The court could place young offenders under the guardianship of the Director General of Social Welfare but had no custodial powers of its own. It could, however, refer young people over the age of 15 to the District Court for adult sentencing.

The 1974 Act thus embodied many of the principles of the welfare approach. Offenders were dealt with using the same processes as those in need of care and protection and the legislation was clearly focused on rehabilitative goals.

Problems with the Act

The initial excitement that greeted the 1974 Act soon gave way to criticisms similar to those levelled at welfare models of youth justice around the world: too many and inappropriate arrests of young people for minor offences and the subsequent stigmatising; the inherent injustice of open-ended sanctions; and the realisation that many young people who offend do not have any special family or social problems, meaning welfare dispositions are thus inappropriate.

In line with international trends, New Zealand also faced a public loss of faith in the welfare model as it seemed to be having little impact on the levels of youth offending. This was exacerbated by the perceived increase in numbers of street kids³⁰ and a belief that the system was unable to deal with persistent young offenders. Later amendments to the Act exemplify attempts to counter these accusations: a 1977 amendment allowing children to be tried for murder, and in 1981 and 1982 police were granted greater powers to deal with street kids. The public was calling for control rather than benevolence.

There was also strong criticism of the lack of accountability for young offenders. As Robert Ludbrook observed³¹

Our juvenile justice system prior to the 1989 Act had the effect of cushioning young people from the human, social and economic consequences of their behaviour. By parading young people before a line of public officials – Police, Judges, lawyers, social workers and residential care workers, they were sheltered from the consequences of their misbehaviour. They often came to see themselves as victims of the system rather than as the cause of suffering and anxiety to ordinary people in the community. Both the welfare and the punishment philosophy stressed the role of the young offender as “victim” ...

³⁰ Above n.7, p.59

³¹ Cited in above n.24, p.4

Compounding these general criticisms of the welfare approach were more specific practical problems with the system. These criticisms centred around three areas: the diversionary procedures did not work as expected; the courts' role was consequently far too active; and there was increasing concern that the youth justice system was unable to meet the needs of young Māori.

i) Diversion

The 1974 Act placed a great emphasis on diversion. Studies in New Zealand had shown that the stigma of court appearance increased the likelihood of further offending. It was thus hoped that Children's Boards and Youth Aid consultation processes would ensure that the court was an avenue of last resort. However, in the 1980s, it became evident that the systems were not working as hoped. In a 1987 report on juvenile justice policy and practice in New Zealand, Morris & Young³² found that the police had no confidence in the diversionary systems and tended to bypass them altogether and simply make an arrest if they believed prosecution was necessary. Those they did refer to Children's Boards and to Youth Aid were cases that they had already decided were unsuitable for prosecution. The police were thus taking arbitrary control as 'gatekeepers' to the court system. An amendment to the Act in 1982 attempted to increase the number of referrals to the Boards by stipulating that courts must refuse to hear a complaint that has not come through a Children's Board except in specific circumstances. It is unclear how effective this was.³³

There were further criticisms:³⁴ lack of follow up; domination of the consultations by police who held exclusive control of information (and resulting disempowerment of the officer for the Social Welfare Department); a failure to involve communities and families; and domination by professionals and a resulting lack of understanding and participation by children. It was argued that the diversionary procedures also had a 'net-widening' effect, formalising the procedures in dealing with petty offenders who would otherwise have been dealt with informally.

In their 1987 report, Morris & Young concluded that the diversionary schemes established by the 1974 Act were failing:³⁵

³² Above n.27, p.124

³³ Above n.27, p.63

³⁴ See above n.27, pp.124-125, n.5, p.61

³⁵ Above n.27, pp.124-125

Children's Boards are not effective either as screening devices or as hearings providing informal community assistanceThe consultation process is similarly unable to act as a filter before prosecution ...

ii) Courts

The failure of the diversion strategy resulted in an undue reliance on court procedures. The 1984 Working Party, which was set up to review the Children and Young Persons legislation, reported that although the rates of children and young people coming to official notice had declined since the inception of the 1974 Act, the proportion of those appearing in court had increased.³⁶

The courts faced further criticism over the intrusive interventions practiced in the name of rehabilitation. Since 1925, judges had been able to exercise the indeterminate Guardianship Order as a response to persistent offending.³⁷ This led to what English practitioners called 'Mars Bars kids' – young people who had been committed into custody for shoplifting chocolate.

The court was also challenged for its formality and alienating processes. The 1974 Act stipulated that the court had a duty to explain the proceedings to the child or young person in simple language in order to create a court environment that was relaxed and informal. However, Morris & Young showed that young people and their parents felt neither able to participate in the proceedings nor even understood them properly. One boy told them he had been 'abolished and discharged'.³⁸

These inadequacies were further highlighted when they were compared with the Family Court, which had been established in 1980, and had been praised for its ability to meet the needs and resolve the differences of dysfunctional families through a less formal mediation process.³⁹ Many argued that this new court should include the Children and Young Persons Act within its jurisdiction.

iii) Cultural Issues

³⁶ Above n.21, p.37

³⁷ Doolan (1988), p.1

³⁸ Above n.27, p.101

³⁹ New Zealand Law Society (1989), pp.3-4

The 1980s saw new and determined efforts by Māori for self-determination and autonomy, which led to increased dissatisfaction with the mono-cultural nature of the 1974 Act. It was argued that the ‘paramountcy principle’ in the 1974 Act, which provided that ‘the interests of the child or young person shall be the first and paramount consideration’, ignored the importance and subsumed the responsibility of the whanau, hapu and iwi in the child’s life.⁴⁰

Furthermore, the adversarial system was totally at odds with Māori philosophy and it was apparent that young Māori were suffering. Between 1980 and 1984 rates for Māori coming to official notice were over six times higher than for non-Māori. Disproportionate numbers of young Māori received custodial sentences compared with non-Māori youths⁴¹. There were calls for some form of Māori justice.

In 1986, ‘Te Whaingā i Te Tika’, a Report to the Minister of Justice, claimed⁴²

The present system is based wholly on the British system of law and justice, completely ignoring the cultural systems of the Māori and breaking down completely that system, completely alienating the Māori, leaving them in a simple state of confusion and at the whim of the existing system.

These calls were not new, and even before the 1974 legislation became law it was described as a ‘racially repressive piece of legislation, unconvincingly decked out in the terminology of white liberalism’. ⁴³ The increasing politicisation of Māori demands in the 1980s was given further impetus by the 1984 promise by the Labour government to honour the Treaty of Waitangi. This promise was to lead to wholesale review of much of the country’s legislation, not least the Children and Young Persons Act of 1974.

⁴⁰ Review of the Children and Young Persons Bill (1987), p.9

⁴¹ Lovell & Norris (1992), cited in above n.7, p.82

⁴² cited in above n.40, p.82

⁴³ The Auckland Committee on Racism and Discrimination (ACORD), cited in above n.7, p.81

The Process of Reform

The economic, social and political climate in New Zealand in the 1980s was one of flux: increasing importance was being placed on the role of the Treaty and rangatiratanga; an economic slump was generating a new economic order and leading to government pressure for efficiency and accountability; and there was a questioning of the welfare state ethos and a move towards less government interference.

Duncan and Worrall commented in 2000⁴⁴

The economic and political climate [in the 1980s]... was most receptive to any cost-cutting measure and there had been a progressive lessening of State responsibility for family and child welfareThe complementary relationship between the State's level of economic health and the degree of support it gives to families has drawn comment by social policy analysts and historians. There is evidence that, in periods when governments need to reduce costs, they tend to place responsibility on families.

These economic and political pressures, compounded by criticisms of the existing Children and Young Persons legislation, provided sufficient impetus for legislative review. When the Labour Government came to power in the 1984 election, it determined that the controversy over the Children's and Young Persons Act could not be remedied by piecemeal changes. The new Minister of Social Welfare, Ann Hercus, called for a full review of the Children's and Young Persons legislation. This was the first step in a 'turbulent and protracted path'⁴⁵ toward legislative change that was to last four years.

The process was as follows:⁴⁶

- 1) Ann Hercus established a departmental working party of officials (without Māori representation) in 1984. A discussion paper was produced and circulated by the Working Party and submissions were invited.
- 2) New legislation was drafted and in 1986 the Children and Young Persons Bill was presented by the Minister of Social Welfare. The Bill was then referred to Social Services Select Committee, who called for further submissions. The Bill attracted widespread public criticism, especially for its complexity and perpetration of a mono-cultural system of law.

⁴⁴ Duncan & Worrall (2000) cited in Brown (2000), pp.12-13

⁴⁵ Above n.40, p.5

⁴⁶ See Doolan (1993), pp.20-21

- 3) In 1987, the Labour government was re-elected and introduced a new Minister of Social Welfare, Dr Michael Cullen. That year, based on the strength of dissatisfaction, the Minister commissioned a second working party to review the bill.
- 4) The Working Party presented its report in December 1987 and it was referred to the Select Committee and for public comment. Between 1987 and 1989 the Select Committee worked with the DSW to recast the Bill. The Bill was returned to the House for its second reading in April 1989. It was available for discussion for only a limited time before passing through its final stages and on 1st November 1989 the Children Young Persons and their Families Act became law.

Each step in that process will now be analysed in detail.

1) The 1984 Review

In the introduction to its review of the Children and Young Persons Act, the DSW Working Party explained its existence by stating⁴⁷

... overhaul of social legislation becomes necessary at times of rapid social, demographic and technological change. There has been accelerated change in New Zealand society over the past decade that has brought about a remarkable alteration in patterns of living and the structure of the family.

As aforementioned, this social change was coupled with vicissitudes in the economic and political spheres, and prompted major criticisms of the youth justice system.

In line with international opinion, the recommendations of the Working Party displayed a rejection of the philosophies of the welfare model of youth justice. Indeed, the Working Party acknowledged⁴⁸

Many young people who commit offences do not have any special family or social problems. Any problems they or their families have are more likely to be exacerbated than improved by official intervention triggered by the young person's prosecution.... Thus an offence by a young person should not be used, as it can be under the present law, to justify the taking of extended powers over the young person's life for the purposes of rehabilitation.

⁴⁷ Above n.21, p.1

⁴⁸ Above n.40, p.35

To this end, the Working Party's intention was to establish justice-oriented proceedings for young offenders that would be clearly separated from welfare-oriented care and protection proceedings. This discrete youth justice system would offer accountability, preservation of legal rights and would prevent unnecessary institutionalisation.

The Working Party rejected the 1978 Royal Commission on Courts recommendations that the Family Court oversee the Children and Young Persons Court. Instead, they proposed transferring care and protection issues to Family Court jurisdiction, but establishing a Youth Division of the District Court to address youth offending. This would be presided over by specialist judges whose training, experience and personality properly equipped them to deal with young offenders. In line with the growing emphasis on young people's legal rights it was believed that the District Court would offer better protection in terms of legal representation and due process.

In order to reposition the courts as an avenue of last resort, the Working Party proposed restrictions on Police powers of arrest. Their recommendations focused instead on more informal procedures in an attempt to reduce the chance of stigmatising petty offenders. Specifically, they advocated the establishment of Youth Assessment Panels to be made up of a member of police, an officer of the DSW, a mātua whangai worker and, where appropriate, a member of the Pacific Island community. These panels would replace Children's Boards and Youth Aid consultations, and act as gatekeepers to the courts. As a preferable alternative to recommending prosecution, panels would have a number of intermediate diversionary measures available to them. These would include warnings or referral to community-based mediation groups such as Māori Committees or Community Resolution Meetings. The Working Party did acknowledge the likelihood of continued net-widening with this system, but countered that the potential benefits of a reconciliation between the offender, victim and community outweighed these concerns.

It was further hoped that these proposals would offer a more sensitive response to cultural concerns, both through the composition of the Youth Assessment Panels and by providing jurisdiction to Māori Communities through the Community Resolution Meetings.

2) The 1986 Children and Young Persons Bill

The Children and Young Persons Bill that was introduced into the House in December of 1986 largely followed the line of the Working Party. This was despite an overwhelming rejection of the proposal in public

submissions.⁴⁹ The legislation established a new Youth Division of the District Court to replace the Children's and Young Persons' Court. However, the Bill maintained some aspects of the welfare approach, allowing a Court to find a child in need of care and protection if s/he committed an offence that raised concern for his/her wellbeing.

The Bill did not adopt the recommendation that Youth Assessment Panels be established and it also abolished the Children's Boards and Youth Aid consultations. This rendered diversion the sole responsibility of the Police. While the Bill attempted to limit police powers of arrest and prosecution in order to minimise children's and young people's contact with courts, their approach clearly ignored the 1984 Working Party's observation that⁵⁰

The central duties of the Police are the prevention, detection and control of criminal behaviour. The normal outcome of successful Police action is a prosecution. To ask the Police to act as the main agency for keeping young people out of court creates a conflict in the various roles to be played by an individual Police Officer and may lead to conflict with his/her colleagues.

Furthermore, by dispensing with Youth Assessment Panels, the Bill failed to make any concessions to the rights or needs of minority groups, a fact that did not go unnoticed by interest groups.

When considering how the 1986 Bill would achieve its objectives, Morris & Young commented at the time that⁵¹

The likelihood is that the present ambivalent and confused approach to the problem of juvenile offending will continue, and that the measures adopted in the Bill will do little either to promote the use of diversionary strategies or to advance due process considerations.

3) The 1987 Working Party

The progress of the 1986 Bill was slowed by a number of contemporaneous factors. When Minister of Social Welfare, Ann Hercus, left Parliament upon Labour's re-election in 1987, the 1986 Bill lost its key proponent. The incoming Minister, Michael Cullen, inherited a Bill burdened by opposition.

⁴⁹ Above n.7, p.114

⁵⁰ Above n.21, p.41

⁵¹ Above n. 27, p.135

Critics noted that the Bill made no reference to the recommendations of Puaote-Aata-tu (Daybreak), the 1986 report by the Ministerial Advisory Committee, to provide a framework for a bicultural approach in the Department of Social Welfare. Ann Hercus had accepted the Report's recommendations and asked the DSW to adopt them. It had thus been expected that the 1986 Bill would reflect the spirit of the Report, but failed to do so.⁵²

Similarly, the Director General of the DSW had, in his report to Parliament in 1986, indicated a firm commitment to minimising intervention in young people's lives.⁵³ The diversion strategies of the 1986 Bill did not appear to live up to those promises.

Public submissions were thus strongly critical, especially of the care and protection issues, which were proving highly controversial⁵⁴. In Youth Justice areas as well, submissions displayed a real hostility towards the Bill. There was a lack of support for split jurisdiction of the Child and Young Persons Courts - most submissions favoured one court based in the Family Court jurisdiction. Objections also focused on the excessive powers being conferred on police without any checks and balances. But perhaps the most vigorous condemnation was for the failure of the Bill to provide any form of culturally appropriate justice.

It is not clear whether the objections to the youth justice legislation alone would have offered impetus for a wholesale review. However, the concerns over the care and protection legislation appeared to create an impasse. In light of these criticisms, the new Minister set up a Working Party to review the legislation with the objectives of making it more simple, flexible, affordable, and culturally sensitive.⁵⁵

In its introduction, the Working Party acknowledged the conflicts that the new legislation must try to resolve:⁵⁶

In the course of its development the Bill has become the focus for frequently incompatible views concerning, among other things, state intervention versus family autonomy, the application of welfare versus justice models for dealing with young offenders, the priorities given to

⁵² Above n.7, p.118

⁵³ Above n.37, p.5

⁵⁴ Care and protection issues in the Bill had met with strong opposition, especially following concerns over child abuse, the quality of care in Department of Social Welfare homes. Issues of cultural appropriateness and the proposed powers and composition of Child Protection Teams were creating hostility. See above n.7, p.114

⁵⁵ Renouf (1987), letter of introduction, above n.40

⁵⁶ Above n.40, p. 6

prevention versus intervention, and the role of ‘professionals’ versus that of ‘lay’ members of the community in dealing with matters affecting children and young persons.

In matters of youth justice the report focused on issues of jurisdiction and diversion.

Regarding the courts, the Working Party recommended that the separation of jurisdiction for care and protection and youth offending be maintained, as established in the 1986 Bill. However, they recommended that the Youth Court become a sub-division of the Family Court rather than the District Court. This Youth Court would be presided over by Family Court judges and warranted District Court judges. It was argued that the existing Children and Young Person’s Court, (under the District Court), was failing to meet the needs of young offenders, and the Family Court would be better equipped in the assessment and disposition of young offenders. It would also guard against the stigma associated with the District Court, which was seen to be concerned with condemnation and punishment.

The Working Party addressed criticisms of the Bill’s inadequate diversionary procedures (and the resulting increase of police powers), and recommended the establishment of a ‘Family Advisory Panel’. This was a diversion and consultation process similar to that of the Children’s Boards and was to be composed of members of the community and co-ordinated by social workers. In order to minimise the net-widening effect, it was stressed that the Panel should be used only when more informal dispositions such as cautions were seen to be ineffectual.

The report was presented to the Minister in December 1987, and in a letter of introduction to the report, the Chairperson wrote⁵⁷

We believe that our recommendations will go some way towards overcoming the dissension about the current Bill and meet the government’s requirement that legislation and procedures exemplify the spirit of the Treaty of Waitangi.

4) The Select Committee Review

The report went to the Select Committee in December 1987, which spent the next eighteen months re-casting the Bill.

⁵⁷ Above n.55

In April 1988, Annette King, a key Labour M.P. on the Select Committee, identified two issues of concern:⁵⁸

First, the need to find a suitable balance between the formal powers and structures required to meet the child's needs for care, control and protection, and the extended family's rights and responsibilities in relation to their children. Second is the need to develop flexible, culturally appropriate structures which harness effectively both the formal and informal resources available to resolve family difficulties and to care for, protect and control children and young persons.

The Committee was also concerned about the adequacies of the consultation process, especially in light of the dearth of Māori submissions. In an effort to overcome this, the Select Committee spent the early part of 1988 travelling to marae and Pacific Island centres through out the country, seeking input on how to recast the Bill.

The Committee also consulted further with the DSW who made a number of recommendations that were to ultimately override those of the 1987 Working Party. The DSW was heavily influenced by a 1988 report by Mike Doolan, National Director (Youth and Employment) of DSW. His report, *From Welfare to Justice (Towards New Social Work Practice with Young Offenders)*, was the result of a three-month study tour in the U.K. and North America.

In his report, Doolan identified goals for a youth justice service:⁵⁹

Given that:

- most young people grow out of their offending behaviour by adulthood, and
- intervention by way of prosecution does have harmful effects ... and can be demonstrated to increase chances of reoffending

a Youth Justice service would strive to:

- Confine prosecution to those cases where it is clearly in the public interest to prosecute
- Reduce to a minimum the number of occasions young persons lose their liberty
- Control the negative effects of professional activity

These goals were translated into the 1989 Act, evidenced by section 208(a) which sets out a guiding principle that: 'unless public interest requires otherwise, criminal proceedings should not be instituted against

⁵⁸ Cited in above n.7, p.144

⁵⁹ Above n.37, p.6

a child or young person if there is an alternative means of dealing with the matter.’

The DSW recommended a separation of the Youth Court from the Family Court and a return to the system proposed by the 1984 Working Party with the Youth Court under the ambit of the District Court. A Principal Youth Court Judge should then be appointed, whose role would be to develop a philosophy to meet youth justice goals. Doolan argued that the main reason advanced for placing the Youth Court within the Family Court jurisdiction, was the lack of stigma associated with the Family Court and that court’s widespread credibility. He countered⁶⁰

it seems likely that the Family Court enjoys that credibility [with Māori people in particular] simply because it does not exercise criminal jurisdiction, and the proposal to give it criminal jurisdiction will almost certainly affect its credibility in the course of time. Courts of criminal jurisdiction do involve stigma – I do not believe this can be avoided. The solution is to use them only as a matter of last resort.

In order to prevent further the blurring of welfare and justice processes, it was recommended that the Youth Court should have no welfare dispositions available to it. Dispositions should be limited to non-custodial options such as un/conditional discharge, reparation, fines or supervision by social worker⁶¹. It was hoped that this would help keep care proceedings separate and ensure that dispositions for offences were time-limited, commensurate with the offence, and just. While it may seem that this was merely advocating a return to a culturally inappropriate adversarial system, it was hoped that the proposed Family Group Conferences would counter this and empower the community.

The DSW recommendations disposed of the Family Advisory Panels, which were seen to have the same flaws as the Children’s Boards. It was believed that they would suffer the same problems of net-widening, being by-passed by police, and remaining unfocused. Doolan further argued that the Panels would protract the blurring of welfare and justice processes and would swallow resources in establishing the infrastructure that could be better spent by carrying out the diversionary process⁶².

Instead, Doolan proposed a statutory process that would give power and resources to the whanau/family in decision-making and retain the diversion process within the judicial framework. The Family Group Conference was to involve the offender, the victim and their families, and

⁶⁰ Above n.37, p.13

⁶¹ Above n.37, pp.18-19

⁶² Above n.37, p.11

would be convened by a Youth Justice Co-ordinator. This would precede a Youth Court disposal and would attempt to either resolve a conflict without prosecution or suggest effective outcomes to prosecution. Resolutions would be registered with the court to be endorsed (or overruled) by the judge. The proposal reflected aspects of indigenous methods of mediation, consensus and reconciliation. It was hoped that this system would allow Māori real ownership of the process.

Some of these techniques had been tested in a pilot programme in West Auckland by Judge MJA Brown, and later by Judge David Carruthers in the Porirua District Court. In carrying out this pilot programme, Judge Brown advised Judge Carruthers: 'There are three questions you must ask: Who is your community? What are its strengths? And how are those strengths best made use of?'⁶³ This shift in power from the judge to the community was a radical departure from traditional court systems.

Clearly, Mike Doolan's report was immensely influential in the final recasting of the 1989 Act. His suggestion of the whanau/family conference and his arguments for a separate court for young offenders as a branch of the District Court were both swiftly incorporated into the 1989 legislation. These proposals were appealing in that they seemed to offer a solution to the prevalent concerns: cultural appropriateness, due process, family empowerment, and a need to offer effective diversionary procedures without placing too much power with the Police.

When the Bill was reintroduced into the House of Representatives for its second reading in April 1989, it was a very different document from its 1986 incarnation. The dramatic changes were testimony to the law-making process that required four years, two government working parties, and over nine hundred submissions.⁶⁴ The youth justice provisions met with little objection from the House of Representatives and on the 1st November 1989, The New Zealand Children, Young Persons and their Families Act became law.

⁶³ McElrea (1993), p.5

⁶⁴ Above n.7, p.169

The 1989 Act: 'A New Paradigm'

The 1989 Children, Young Persons and their Families Act was hailed upon its inception as 'A New Paradigm'⁶⁵ in that it went beyond traditional philosophies of youth justice and offered a completely new conceptual approach.

The legislation was unique in that it codified statutory principles and objectives (sections 4 and 5) and it established specific youth justice principles separate and distinct from those governing care and protection procedures.

These Youth Justice Principles are listed in section 208 and are as follows:⁶⁶

- Criminal proceedings should not be used if there is an alternative means of dealing with the matter
- Criminal proceeding should not be used for welfare purposes
- Measures to deal with young offenders should strengthen family groups and foster their skills to deal with offending by their children and young people
- Young people should be kept in the community as far as is consonant with public safety
- Age is a mitigating factor when deciding on appropriate sanctions
- Sanctions should promote the development of the youth and be the least restrictive possible
- Due regard should be given to the interests of the victim
- The child or young person is entitled to special protection during any investigation or proceedings

These objectives reflect the contemporary trends and concerns pervading youth justice practice: the separation of justice and welfare processes, the importance of diversion, empowering victims, strengthening families, and offering culturally appropriate law. It is in the interplay of these objectives that the new paradigm was founded.

Objectives of the 1989 Act

While the 1989 Act makes a clear attempt to strike a balance between the competing demands of the justice and welfare models, the legislation

⁶⁵ Morris and Maxwell (1990). *Juvenile Justice in New Zealand: A New Paradigm*, Victoria University of Wellington, Wellington.

⁶⁶ From above n.12, p.1-2

also goes some way toward promoting other contemporary principles and concerns.

i) Striking a Balance between Justice and Welfare

There are obvious attempts by the policy makers of the 1989 Act to reconcile the dichotomies of the justice and welfare models. The legislation displays some efforts to move towards a justice approach while still giving appropriate consideration to the needs of the young offender.⁶⁷

Support for justice dictates can be seen in the establishment of a separate criminal jurisdiction in the District Court. This was intended to prevent the blurring of welfare and justice, and to promote due process, which, it was argued, would be better protected within the District Court ambit.

While the youth justice section clearly favours the justice model, the guiding principles of the 1989 Act also address welfare objectives. Section 4 states 'The object of this Act is to promote the wellbeing of children, young persons, and their families and family groups.'

Section 4(f) aims to blend the systems of welfare and justice in relation to young offenders and lays out the object that 'where children and young people commit offences; i) they are held accountable ...; and ii) they are dealt with in a way that acknowledges their needs...' This focus on needs as well as deeds represents a clear attempt to ensure that the New Zealand law did not become only a 'just desserts' model.

It must be noted that there are obvious dangers in pigeon-holing the legislation within the confines of either the justice or the welfare framework, as this can lead to a rejection of the objectives of the model not chosen.

ii) Diversion

The objectives of diversion became increasingly important with the realisation that the adverse effects of court processes, including the resulting stigma, tended to increase the likelihood of re-offending.

Section 208(a) of the 1989 Act states with unprecedented clarity that criminal proceedings are to be a last resort. The legislation severely limits

⁶⁷ Above n.12, p.2

Police powers of arrest without warrant, and prevents non-arrest charges being laid in the Youth Court until there has been a Family Group Conference. Currently up to 84% of youth offending is dealt with out of court.

However, the Act did not directly address concerns about the Police acting as gatekeepers to the courts and it is to the Police's credit that in practice 76% of all young offending is dealt with by informal police diversionary strategies. In this way, the approach taken by Police has been fundamental to the Act's success.

iii) Victim and Offender Empowerment

The 1989 Act aims to empower both victims and offenders so that they may feel more involved in the process and satisfied with the outcome.

Traditional justice systems have tended to alienate young offenders, who often came to see themselves as victims of the system, rather than causes of distress to others.⁶⁸ Legislators made a significant step towards avoiding this problem by banishing the word 'juvenile' from NZ justice terminology. Mike Doolan noted:

... in my experience young people find [the word 'juvenile'] deeply offensive. They are the first to realise that juvenile is usually only used as a companion to the word delinquent. Juvenile is not a word used in relation to young people except where they are involved with the criminal justice system and thus it is a stigmatising term.⁶⁹

More practically, the Act attempts to involve the young offender and the victim in the decision-making process with the objective of reaching a group consensus on a 'just' outcome. Traditionally, justice systems offered neither representation nor empowerment of the victim, and their interests were largely ignored. Victims were thus left feeling excluded from the process, and less likely to feel satisfied with the outcome. Similarly, the young offender was offered no real opportunity to understand the consequences of and witness the distress caused by their actions.

Family Group Conferences attempt to address these issues and offer a forum for the mediation of concerns between the victim, the offender and their families with the aims of achieving reconciliation, restitution, and rehabilitation. Although Family Group Conferences have the primary aim

⁶⁸ See n.31

⁶⁹ Mike Doolan (2003), private correspondence

of family empowerment, by including the victim in the decision-making process they can achieve many of the aims of restorative justice for the victim. Thus, while ‘restorative justice’ is not a term used in the Act, and nor was a restorative justice approach necessarily contemplated by its policy makers, the Family Group Conference is widely seen as a restorative justice model that could be transplanted into the adult system.

iv) Strengthening Families

One of the key objectives of the 1989 Act is to empower families and communities, rather than professionals, when dealing with young offenders.

To this end, the 1989 policy makers repealed the 1974 paramountcy principle in respect of youth justice, and instead took steps to acknowledge the autonomy and responsibility of the family group. Section 5(a) establishes

The principle that, wherever possible, a child’s or young person’s family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to [their] views.

The Family Group Conference attempts to meet these objectives, returning autonomy and responsibility to the family group and offering them the opportunity and the resources to have a real impact in the outcomes for their young offenders.

iv) Indigenous Concerns

There was a strong commitment by the Select Committee when re-drafting the 1989 legislation to offer a model of youth justice that would better meet the needs and values of Māori and other cultural groups in New Zealand.

The legislation seeks to introduce elements of indigenous responses to offending by offering a community group consensus process to deal with notions of redress and responsibility. The Family Group Conference, while not a distinctly Māori model, is certainly consistent with an indigenous approach to resolving offending. The Conference system represents an attempt to empower Māori (and other ethnic and minority peoples) to make decisions about their young people.

A New Paradigm

Clearly then, the 1989 Act was founded on a number of principles, striving not only to achieve a balance between the polarised goals of the welfare and justice models, but also to realise the objectives of effective diversionary strategies; to provide processes allowing for mediation between victims, offenders and their families; to empower whanau/families; and to offer appropriate services that are culturally sensitive.

The legislation was created in a volatile political and social setting in which there were attempts to reconcile on-going conflicts such as the role of the Treaty and rangatiratanga; the role of the state vs. the responsibility and autonomy of the family; the role of police; the justice vs. welfare models; and the rights of the child vs. the rights of family to control and discipline.

The resulting precepts endeavour to reconcile these conflicts and at the same time to meet New Zealand society's unique needs. At its introduction, the 1989 Act was seen as a completely new process of youth justice – a New Paradigm - and it has since become 'an international trendsetter.'⁷⁰ As District Court Judge FWM McElrea concluded in 1993⁷¹

We indeed do have a new paradigm of justice. It is not simply an old model with modifications. A new start has been made, new threads woven together and a new spirit prevails in Youth Justice in New Zealand.

⁷⁰ Wundersitz (2000) p.110

⁷¹ Above n.63, p.13

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