1. **History of the Lay Advocate role**

Lay advocates were “created” by the Children, Young Person and Their Families Act 1989 (CYPF Act) and have no known counterpart in any other legislation anywhere in the world. While the specific history of the Lay Advocate role is challenging to track, there are a number of key environmental influences that lead to the enactment of the CYPF Act and the introduction of the Lay Advocate role. It is important to understand these influences.

In the period leading to the enactment of the CYPF Act in 1989, there were mounting concerns that the then youth justice system was ‘welfarist’, mono-cultural and did not accurately represent or include the views of the families and communities that it served. Young people, their families and communities felt frustrated and disempowered by the formalised and official decision making processes, as well as providing important cultural information to the Court.

During this period, Māori concerns were given their strongest voice in the *Pūao Te Ata Tū Report*. Emerging from this report, and subsequent consultation with Māori groups, was the strong message that family and whānau must be at the centre of decision making processes for their children and young people. There was a strong commitment in the reform process and re-drafting the 1989 legislation to create a youth justice system that would better meet the needs and values of Māori and other cultural groups in New Zealand.

One of the most groundbreaking elements of the 1989 Act was that, for the first time, family and whānau status was clearly recognised and enshrined in legislation. The concerns expressed by Māori in the *Puaio-te-ata-tu Report* and elsewhere in the period leading up to the 1989 reform, along with the view that the cultural interests of a child or young person could not be extracted from whānau, hapū and iwi, are now provided for in the legislative framework.

Notwithstanding these broader justifications for increased cultural and whānau representation in the youth justice process, there is little documentation about the specific intentions for the Lay Advocate role at the time.

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1 Jointly written with Sacha Norrie (BA/LLB), Research Counsel to the Principal Youth Court Judge – Kaiwhakawā Mātua o te Kōti Taiohi.
The 1987 Review of the Children and Young Persons Bill provides the most comprehensive explanation for the provision of family and cultural advocacy. The Working Party that was reviewing the Bill encouraged the use of ‘… effective lay, community and extended family advocacy is a better use of resources than the establishment of a new and centralised body for children’s advocacy’. It was the Working Party’s view that there was an ‘… advantage in spreading advocacy across a range of institutions and groups, thus preventing a monolithic, single ideological approach developing’.

It can be inferred from the overall historical context that the role of the Lay Advocate was intended to provide advocacy for, and enable families and communities to be more meaningfully involved in decision making and youth justice processes.

2. **Statutory scope of the Lay Advocate role: Introduction and general principles**

The starting point for defining the scope of the Lay Advocate role must be the relevant statutory provisions, specifically sections 326, 327 and 328 of the CYPF Act. In brief, s 326 relates to the appointment of a Lay Advocate, s 327 outlines the functions of the role and s 328 ensures that Lay Advocates are entitled to attend particular aspects of proceedings. It is helpful to read all three as interrelated as it is clear that they must condition each other.

It is important to note, however, that all specific provisions of the CYPF Act are underpinned by its statutory objects and principles. It is worth analysing these before embarking on a detailed analysis of the specific statutory framework relating to Lay Advocates. There are two key principles that frame the role of the Lay Advocate:

a. The first general requirement, contained in s 5(a) of the CYPF Act, is that wherever possible, a child or young person’s whānau, hapū, iwi and family group should participate in decision making, and regard should be given to their views; and

b. The second relevant principle, contained in s 208(c) of the youth justice provisions, states that measures dealing with offending should be designed to strengthen the whānau, hapū, iwi and family groups of children and young people, as well as designed to foster the ability of these groups to develop their own measures of dealing with offending by the children and young people.

Of less direct relevance to the Lay Advocate role, but also important to the wider philosophies underpinning the CYPF Act are the following principles:

a. That, wherever possible, the relationship between a child or young person and his or her family, whānau, hapū, iwi and family group should be maintained and strengthened (s 5(b));
b. That endeavours should be made to obtain the support of the parents or guardians or other persons having the care of a child or young person to the exercise of any power under the CYPF Act (s 5(e)(i)); and

c. That any sanctions imposed on a young offender should take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapū, and family group (s 208(f)(i)).

These principles represent a clear response to the concerns expressed in Pūao Te Ata Tū that the families and communities of young offenders felt alienated and unable to participate in decision making processes.

The Lay Advocate role is a vehicle through which these family, whānau, hapū and iwi interests and participatory rights can be given practical effect. To date, the Lay Advocate role has been significantly under-utilised. It was not until the introduction of Rangatahi Courts (beginning in 2008) that Lay Advocates were used in a much more meaningful and systematic way.

3. **Section 327 – The main role of the Lay Advocate**

Section 327 is the principal provision that defines the functions of the Lay Advocate role. The two principal functions identified in s 327 are:

a. To ensure the Court is made aware of cultural matters that are relevant to the proceedings.

b. To represent the interest of the child or young person’s whānau, hapū or iwi (or their equivalent, if any, in the culture of the young person) to the extent those interests are not otherwise represented in the proceedings.

The first function is perhaps more easily understood than the second. To provide the court with cultural information that is relevant to proceedings seems reasonably straightforward. The scope of this information can be as wide or as narrow as the particular circumstances of the young person require. For example, a young person from a migrant community will have different and specific cultural circumstances and needs that will be relevant to decision making.

A Lay Advocate’s second principal function is to take on an advocacy role to represent the interests of a young person’s whānau, hapū and iwi, or any equivalent in the young person’s culture, to the extent those interests are not otherwise represented in the proceedings. This responsibility is far reaching and, arguably, has not been fully understood or utilised to its intended capacity to date. This is particularly so with respect to representation of the interests of hapū and iwi, or their equivalents.
An initial observation is the importance of the advocacy component of a Lay Advocate’s role. The legislation is clear: the Lay Advocate’s role is to ‘represent’ or advocate for whānau, hapū and iwi interests. The New Zealand Oxford Dictionary describes an advocate as a person who pleads or speaks for another, especially in a Court of justice. The Lay Advocate has an active responsibility to gather the views of the whānau, hapū and iwi and to present these interests at an FGC or in court, to the extent that those interests are not already represented. While it may appear challenging in theory (and in practice) to separate the interests of a young person’s family from the young person’s interests, the legislation is clear that the advocacy component of the Lay Advocate’s role primarily relates to the family, whānau, hapū and iwi, not the young person, whose interests should already be represented by their Youth Advocate and Social Worker.

This is a subtle distinction but an important one. It may be the case that the family have a particular view on the proceedings, or a perspective conditioned by their familial and cultural environment, that they are not fully confident, or indeed, able, to communicate that view to the FGC or Youth Court. It may be the case that a parent is unable to attend the FGC or Court appearance but wishes to have his or her interests represented on their behalf. It may be the case that a family member is having trouble understanding certain aspects of the proceedings. In all of these situations, the Lay Advocate’s principal role is to be the primary representative for the family, to communicate their views and interests and to help guide them through the Youth Court process.

However, it is equally important to note that the legislation limits the function of the Lay Advocate to representing the interests of the family, whānau, hapū and iwi ‘to the extent that those interests are not otherwise represented’ [emphasis added]. For example, it may be the case that the family’s interests and views may be adequately represented by the Social Worker or Family Group Conference Coordinator. Section 327 is clearly not intended to create a “double-up” in roles between Lay Advocates, Youth Advocates, Social Workers and Family Group Conference Coordinators.

Perhaps even more challenging in practice is the Lay Advocate’s responsibility to represent the interests of a young person’s hapū and iwi. While there are a number of provisions in the CYPF Act that offer hapū and, in particular, iwi the opportunity to play a more autonomous role when responding to young Māori offenders, for the most part, these opportunities have not yet been seized upon in any meaningful way. There are a number of reasons for this, including that many iwi do not yet have sufficient resource to do so, and that iwi social service organisations currently remain in their limited roles as contracted providers of government services.

It may be that the CYPF Act originally envisaged that a Lay Advocate appointed for a young Māori offender should not only be of appropriate standing in their community, but also a person who is acquainted with, immersed in, and even mandated by their own iwi. Such an advocate could easily provide an iwi, hapū and also whānau perspective. With this in mind,
there may be scope for the Lay Advocate role to be more closely connected with iwi and to draw upon any resources provided by the iwi that may be available to the young person.

In any case, the role of the Lay Advocate presents an exciting opportunity to “bridge the gap” between iwi and whānau, and to act as a conduit between a young person’s whānau, iwi and the youth justice process.

4. The interplay between ss 326 and 327 and “secondary functions” of the role

Section 326 is the mechanical provision that enables the appointment of a Lay Advocate, rather than describing the function of the role. Section 326 is clear that, if the Youth Court is to appoint a Lay Advocate, it should endeavour to appoint a Lay Advocate that has the ‘necessary standing’ in the child or young person’s culture by virtue of his or her personality, cultural background, knowledge and experience.

While the wording of s 326 states that the Lay Advocate is appointed to appear ‘in support’ of a child or young person, this appears to be a statutory mechanism to connect the Lay Advocate to the child or young person’s particular proceeding, rather than a description of the Lay Advocate role.

Furthermore, when read in conjunction with s 327, it becomes clear that the primary role of the Lay Advocate focuses on representing the family, whānau, hapū and iwi, and relevant cultural considerations, rather than simply to represent the young person. The young person’s interests will already be represented by their Youth Advocate and Social Worker. This is what the law envisages.

However, s 327 clearly does not prescribe exclusive functions. There may be secondary aspects of the Lay Advocate role that do (and in many cases will) directly support the young person. For example, a Lay Advocate is regularly enlisted to help a young person to research, prepare and practice their pepeha. This is clearly a task that requires the Lay Advocate to directly support the young person. However, because s 327 only refers to the ‘principal functions’ of the Lay Advocate, undertakings such as supporting a young person with their pepeha might be described as ‘secondary functions’ of the Lay Advocate role. What may constitute a ‘secondary function’ of the Lay Advocate role has been left open in the legislation and has the potential to be applied with a wide scope. What are appropriate secondary functions will be determined by the specific circumstances of the case and will change on a case by case basis. Each case will have its own particular needs and challenges.

What is clear is that the CYPF Act envisages Lay Advocates as persons of mana who will advocate for a young person’s whānau, hapū and iwi and advise the court of any cultural and community context of which it would not be aware, which would be relevant to any decision making about the young person.
5. **Conclusion - the rise and rise of Lay Advocates**

One final concluding comment. It should perhaps be observed that the statutory name ‘Lay Advocate’ viewed through a 2015 lens, now seems unfortunate and misleading. Lay Advocates are no well-meaning amateurs, untrained do-gooders, or second-tier participants in the process. Rather they might be better understood as ‘community advocates’, ‘cultural advocates’, or ‘family/whānau advocates’. They will be highly trained and/or experienced in working with young people and their families/whānau. They will inevitably be highly respected within their communities. They will have significant standing within their own culture. And they will have a highly developed knowledge of different cultural perspectives and values. They have the potential to significantly contribute to, and become a vital and independent voice, in the Youth Court process. Lay Advocates, as their role evolves, will help to usher in a new era for youth justice in Aotearoa New Zealand.