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THE RIGHTS OF THE YOUNG PERSON IN THE NEW ZEALAND YOUTH JUSTICE FAMILY GROUP CONFERENCE

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PREFACE

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ABSTRACT

The youth justice family group conference (FGC) is a statutory decision making process whereby the young person, their family/whanau, state officials and the victim of the offence come together to decide on a response to offending by that young person. The FGC is an integral part of the youth justice system, involving thousands of young people and their families each year.

There is a considerable amount of literature available on the youth justice FGC, most notably in regard to the purported restorative justice nature of the process. However, for a legal process which involves so many young people on a daily basis, there is little information available on the due process rights of young people in the FGC. This thesis seeks to remedy this gap in the research knowledge.

Firstly, this thesis establishes the theoretical framework for the rights of the young person in the youth justice system. The historical context and theoretical justification for these rights is considered, and the benchmarks for rights coming from international and national human rights standards are identified. A key theoretical issue is the application of rights to the FGC. It is argued that although the FGC differs in format from the adversarial criminal process, it remains a state process involved in resolving a breach of the criminal law, and thus the young person’s rights should be safeguarded.

Secondly, this thesis evaluates legislation, policy and practice relating to the rights of the young person in the FGC. Three key areas of rights are considered: legal assistance, how the offence is proved, and outcomes of the FGC. Reference is made to practice examples derived from observation of the FGC in two centres in New Zealand.

Finally, as the FGC is certain to remain an integral part of the youth justice system, recommendations are made as to how legislation and practice could be improved to better safeguard the rights of young people in this process.
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LIST OF ABBREVIATIONS

CYPF Act  
Children, Young Persons and Their Families Act 1989
CRC  
United Nations Convention on the Rights of the Child
NZBOR Act  
New Zealand Bill of Rights Act 1990
CHAPTER ONE: INTRODUCTION

I. INTRODUCTION

The New Zealand youth justice system has been described as 'world leading' \(^1\) and a 'new paradigm'. \(^2\) The youth justice family group conference has been referred to as the 'jewel in the crown' of this youth justice system. \(^3\) This thesis will give a fresh perspective on this much discussed process by analysing the rights of young people in the youth justice family group conference.

The term 'youth justice family group conference' \(^4\) refers to a statutory process whereby the young person, their family members, state officials (such as the facilitator and police officers), the victim of the offence, and others such as lawyers and social workers, come together to make decisions relating to alleged or proved offending by that young person. About 9,000 of these events take place every year, thus involving thousands of young people and their families. \(^5\) Family group conferencing was first introduced in New Zealand in 1989, but is now an increasingly popular response to offending by youth. Broadly similar models are in use in some Australian states, as well as in Europe. In New Zealand, the youth justice FGC is used principally as a diversionary measure and as a sentencing aid for Youth Court Judges, thus delegating a large measure of power over responses to offending by young people from the state to the family and wider community. Due to the opportunity for victim involvement, the youth justice FGC in New Zealand has become almost synonymous with restorative justice. \(^6\)

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\(^4\) Hereinafter 'FGC' or 'youth justice FGC' in the text.

\(^5\) See Chapter 5(III).

\(^6\) Restorative justice is a model of justice which seeks generally to repair the harm caused to the victim by the offending and to effect reconciliation between offender and victim, and reintegration of the offender to the community. This is addressed in detail in Chapter 7(II) and 13(IV).
Empirical studies have reported positive effects in terms of re-offending rates, family and community involvement and cultural appropriateness.\(^7\)

Despite the existence of a significant body of literature relating to the youth justice FGC,\(^8\) there is a distinct lack of legal commentary, in spite of the fact that, as Judge Inglis QC remarked in *Police v L*, the legislative provisions governing the FGC ‘might almost have been deliberately drafted so as to promote obscurity and to daunt even the most experienced lawyer’.\(^9\) The issue of rights in restorative justice processes generally has attracted a high level of theoretical debate,\(^10\) and some concerns have been raised about rights in family group conferencing.\(^11\) Nonetheless, for a process which involves so many young people and can potentially involve thousands of dollars reparation, and tens of hours of community work, there is little information available about legal aspects of the New Zealand youth justice FGC.

This thesis makes a contribution to the research knowledge relating to the New Zealand youth justice FGC, and makes recommendations about how the rights of the young person could be better protected. In addition, this thesis makes a wider contribution to the subject of the rights of the young person in the youth justice system generally, by analysing the theoretical framework for the rights of the young person in the New Zealand youth justice system.


\(^9\) *Police v L* (1991) 8 FRNZ 123, 125.


especially the legal status and application of international standards for youth justice to the New Zealand legal system.

II. STRUCTURE OF THIS THESIS

The purpose of the first three chapters is to establish the rights framework against which the rights of the young person in the FGC can be evaluated. Chapter 2 sets the context for this research, discussing the evolution of youth justice legislation and policy in New Zealand, with a particular focus on the rights of the young person. There is discussion of the principles underpinning the governing legislation. Chapter 3 argues the importance of rights, setting out the theoretical justification for the rights of children and young people in the youth justice system, and sets out as a theoretical frame of reference the dual status of the child or young person, as accused or offender, and young person. Chapter 4 establishes the benchmarks for a rights based approach to youth justice, considering what rights children and young people have in the youth justice system, and analysing the sources of rights for the child or young person (coming from international and national human rights standards as well as the governing legislation itself).

The next three chapters consider the youth justice FGC, and the theoretical principles concerning the application of rights to this model of justice. Chapter 5 discusses the operation of the youth justice FGC; setting out the powers and functions of the FGC, as well as the operation of the conferencing schemes of other jurisdictions, which are used as points of comparison in this research. Chapter 6 discusses typical practice and procedure at the youth justice FGC, drawing on observation of FGCs carried out in two centres in New Zealand. Chapter 7 is the theoretical ‘hinge’ of this thesis, considering why rights should apply to this particular process, and refuting the key arguments made against the need for rights in this type of process.

The main body of this thesis is concerned with the analysis of three key areas of rights in the context of the FGC process, i.e. legal assistance, how the offence is proved, and the sanctions which result. Chapters 8 and 9 consider the right to legal assistance in the FGC process, discussing why legal assistance is particularly important in the FGC process and analysing the level of access to legal assistance at the FGC. The particular situation of the intention to charge FGC is highlighted, where young people rarely have access to legal assistance. Chapter 9 then considers the quality of the right of legal assistance, in particular whether a
best interests approach is taken by Youth Advocates, and whether the particular format of the FGC requires a different style of legal representation.

Chapters 10 and 11 consider how the offence is established at the youth justice FGC. Chapter 10 analyses the unusual process for proving the offence, in particular whether the admission of the offence at the FGC equates to an acceptance of legal guilt. Chapter 10 is principally concerned with the wider context of the legislative mechanisms, with a particular focus on the divergent approach evident from the case law. Chapter 11 then moves to the specific and examines practice and procedure relating to admissions at the FGC.

Chapters 12 and 13 discuss FGC outcomes. Chapter 12 is concerned with the powers of the FGC to impose sanctions, and criticises the lack of limits on those sanctions. Chapter 13 is concerned with the objectives of the FGC and the implications for the rights of the young person, in particular the increasing orientation of the youth justice system towards restorative justice, and the blurring of lines between care and protection and youth justice.

The final chapter entitled ‘The Way Forward’ draws together the recommendations which are made throughout this thesis. Recommendations, including draft legislative and policy changes are made in relation to safeguards for the rights of the young person in the FGC, as well as commentary on the future direction of the youth justice system. The thesis is accurate as of 16 December 2008, though the newly elected government has signalled its intention to reform the youth justice system.

III. A NOTE ON TERMINOLOGY

This introductory chapter necessarily concludes with a note on terminology. The title of this thesis is ‘The Rights of the Young Person in the New Zealand Youth Justice Family Group Conference’. It is thus important to define the term ‘young person’ before proceeding.

Across the New Zealand legislative sphere, there is a confusing array of terms used to describe those aged less than eighteen years. The term ‘young person’ has a statutory meaning under the legislation governing youth justice, the Children, Young Persons and Their Families Act 1989. There is a legislative distinction between children (those aged ten years or more, but less than fourteen years) and young people (those aged fourteen years and over but less
than seventeen years).  However, the Care of Children Act 2004 defines ‘child’ as ‘a person under the age of eighteen years’.  Similarly, the Children’s Commissioner Act 2003 defines a child as a person under the age of eighteen.  The major rights benchmark for this research (the United Nations Convention on the Rights of the Child) uses the term children to describe all those under eighteen years unless the age of majority is assumed earlier under the law of that state.  In New Zealand, the age of majority is twenty.  A recent discussion document on reform of the youth justice system had the title Safeguarding Our Children: Updating the Children Young Persons and their Families Act 1989), even though it clearly referred to what are legally ‘young people’ (i.e. those aged between fourteen and seventeen years of age.  Similarly, the New Zealand Bill of Rights Act provides for the right, in the case of a ‘child’ in the criminal justice system, to be dealt with in a manner that takes account of the ‘child’s’ age, although under the CYPF Act, ‘children’ may not be prosecuted except in cases of homicide. It seems unlikely that Parliament meant to confine this section to these exceptional occurrences where children are tried for murder and manslaughter.

The situation is complicated further when one looks further afield. The Convention on the Rights of the Child is an important benchmark for rights and uses the term ‘child’ to refer to all those aged less than eighteen years.  Other similar jurisdictions refer to all those under eighteen years as ‘children’.  As will be discussed in Chapter 3, the literature speaks of ‘children’s rights’ and the subject area is ‘children’s rights’.

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12 s 2(1), Children, Young Persons and Their Families Act 1989 (Hereinafter CYPF Act in the text).
13 s 8, Care of Children Act 2004.
14 s 4, Children’s Commissioner Act 2003, s 13 of this Act excludes certain investigations under the CYPF Act from this definition.
15 Article 1, Convention on the Rights of the Child.
16 s 4(1), Age of Majority Act 1970.
18 s 25(i), New Zealand Bill of Rights Act.
19 Article 1, Convention on the Rights of the Child.
20 E.g. the Children Act 2001(Ireland), the Young Offenders Act 1997 (NSW).
21 E.g. the International Journal of Children’s Rights.
This array of terms posed some problems with maintaining a consistent terminology throughout this thesis. Although the term 'child' is frequently used in the youth justice literature to describe those aged less than eighteen years,\(^\text{22}\) to use the term 'child' as a collective term in New Zealand would be likely to be considered pejorative by older teenagers.\(^\text{23}\) Therefore, it was decided to adhere to the legislative definitions in the CYPF Act, using the terms 'young person' and 'child' in their specific statutory contexts,\(^\text{24}\) and the collective term 'children and young people' when referring to both groups.\(^\text{25}\)

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\(^{22}\) See e.g. Kathryn Hollingsworth, 'Judicial Approaches to Children's Rights in Youth Crime' (2007) 19 *Child and Family Law Quarterly* 42.


\(^{24}\) The substantive chapters.

\(^{25}\) Chapters 1 to 7.
CHAPTER TWO: SETTING THE CONTEXT - RIGHTS AND THE YOUTH JUSTICE SYSTEM

The road to penal reform, like the road to hell, is paved with good intentions.  

I. INTRODUCTION

The primary aim of this thesis is to analyse the rights of young people in the context of a particular legal process: the youth justice FGC. This will involve the intertwining of a number of strands, such as children and young people’s rights, human rights law, and youth justice. This chapter will set the context for this research, setting out the historical context for the rights of children and young people in the criminal justice system and the evolution of youth justice legislation and policy in New Zealand.

The history of youth justice in a general sense, and in a specific New Zealand context, is well rehearsed. This chapter will look at how the broad themes of youth justice policy have affected the rights of children and young people. In the second part of this chapter, the discussion will move to the New Zealand context. The reform process which led to the current legislation will be considered. Problems with previous youth justice legislation will be identified, especially concerns about the rights of children and young people. The current legislation governing youth justice will also be discussed and its key features, such as diversion, family involvement in decision making and the separation of care and protection from youth justice, considered.


The chapters which follow will set out the framework of rights with which the youth justice FGC will be analysed. The purpose of this chapter is to set the historical and policy context. The operation of the youth justice system and the theoretical basis of the youth justice FGC itself are the subject of separate chapters. 29

II. EARLY YOUTH JUSTICE

A. Introduction
As a starting point, it is instructive to outline historical attitudes towards children and young people involved in the criminal justice system. Debate around how such children and young people should be treated and what rights they should have, is still divided between the view of the child or young person as a dependent being who needs protection, and the opposing view of the child or young person as an autonomous individual. A discussion of how these ideologies developed will frame their relevance to the moral and ethical justifications for children and young people's rights (which will be analysed in a later chapter).30

B. Early Common Law Views on the Personhood of Children and Young People
Historically, the principal characteristic of children and young people is their powerlessness.31 In the eyes of the common law, a child or young person without an interest in land scarcely existed.32 Children and young people were in effect, the chattels of their father and derived their legal status from him. Up until the nineteenth century, the doctrine of patria potestas had the effect of allowing fathers to mistreat their offspring with impunity. The characteristics of this doctrine included: the autonomy of the household ruled by the father, actual ownership of the child or young person, filial piety and the diminished relationship between the child or young person and the state.33 The common law focused on the legal status of the father as head of the household rather than the rights of individual members of that household. It was from him that the other members of the family derived their status. Any actionable rights at law

29 See Chapters 5, 6 and 7.
30 See Chapter 3.
31 The most famous study of children and young people's status in history is Philippe Ariès, *L'enfant et la vie familiale sous l'Ancien Régime (Centuries of Childhood)* (R Baldick, trans.) (London: Cape, 1964). Ariès argues that the Middle Ages lacked any significant or detailed concept of childhood. There was little or no effort to create a separate world for children and young people insulated from the adult world. See also Margaret Mead and Martha Wolfenstein (eds.), *Childhood in Contemporary Cultures* (Chicago: Chicago University Press, 1955).
belonged to the father. The justification for the subjugation of children and young people is that they were considered not to have a will of their own, and thus not capable of self-determination. Children and young people were seen as lacking any personal identity and possessing little value. As Eekelaar correctly points out, the earliest forms of children and young people’s rights emerged not to protect the children and young people themselves or to recognise the child or young person as an individual of moral worth, but to further the interests of others (usually the interests of the father or the protection of the community’s conventions and norms). Thus, for example, the legal enforcement of parental support obligations in the sixteenth century arose not out of a desire to further the welfare of the child or young person, but from a desire to avert the threat of social instability which would arise out of increased unemployment. According to Breen, the father’s rights doctrine ‘ultimately gave way to the standard of the best interests of the child’. The best interests standard evolved to place limits on men’s power over children and young people, as the child or young person’s father was the sole legal guardian of the child or young person.

In the criminal law sphere, the only recognition of childhood as a distinct period of life was the doli incapax principle. Apart from this legal principle, there was no separate criminal justice system for youth. Even up until the mid-nineteenth century, older young people were subject to capital punishment, corporal punishment and imprisonment on the same basis as


36 John Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies* 161, 166-169. See also Mary Ann Mason, *From Father’s Property to Children’s Rights – The History of Child Custody in the United States* (New York: Columbia University Press, 1994), 24-25, where the author discusses the English Poor Law Act of 1576. This Act provided that the mother and father of an illegitimate child had to pay for its upbringing, thus relieving the public purse of the burden. This change was obviously brought about as an economic measure rather than with the child’s best interests in mind.


39 William Blackstone, *Commentaries on the Laws of England* (Strahan: London, 1809). This legal principle held that there was an irrebuttable presumption that children under the age of seven were incapable of forming the necessary intent for a criminal act. Those between the ages of seven and fourteen were held to be incapable of forming criminal intent, but this could be rebutted by demonstrating that the child comprehended the nature of the act and that it was wrong. Children over the age of fourteen were held liable under the same legal principles as adults. See also Andrew Ashworth, ‘Making Criminals out of Children: Abolishing the Presumption of Doli Incapax’ (1998) 16 *Criminal Justice* 16.
adults. Furthermore, the separate sentencing of adult and youth offenders is a relatively recent development. Early nineteenth century criminal justice saw little disparity between youth offenders and adult offenders. Classical criminology viewed deterrence as the object of sanctions. Accordingly, there was little or no legal recognition of the different needs and capacities of children and young people in the justice system.

C. Early New Zealand Youth Justice Statutes

The first statutes governing youth justice in mid-nineteenth century New Zealand were enacted in reaction to the prevailing social conditions, which meant that there were escalating numbers of abandoned, criminal and neglected young people. The first of these statutes (the Neglected and Criminal Children Act 1867) attempted to distinguish between criminal youth and ‘unfortunate’ neglected youth, however the distinction remained ‘blurred’ both in theory and practice. Under this statute, children and young people who broke the law were to be dealt with primarily through a system of industrial schools and reformatories, but only the industrial schools were actually built. These legislative changes did mark the beginnings of state intervention into work which in previous times was carried out by churches and charitable organisations. A similar system of institutions was established in England and

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40 See Anthony M Platt, *The Child Savers* (Chicago/London: University of Chicago, 1969), 184, where the author details some examples of how children and young people were harshly dealt with by the criminal courts in nineteenth century England. Quoting BEF Knell, ‘Capital Punishment’ (1965) 5 *British Journal of Delinquency* 206, Platt points to the fact that although there are records of many children and young people being sentenced to death for trivial property crimes, the number on which the death sentence was actually carried out is much smaller.

41 The criminal justice system was still based on classical criminological thinking, that is that the offender had made a rational choice to commit the crime, weighing up the benefits and disadvantages of the criminal act. Therefore the punishment for the crime must be harsh enough to deter the offender and others from choosing to commit the crime again. See generally George B Vold, Thomas J Bernard, and Jeffrey B Snipes, *Theoretical Criminology* (Oxford: Oxford University Press, 5th Edition, 2002).


Wales with the aim of reforming ‘criminal’ youth.\textsuperscript{47} Morris and Giller note that reform interventions in England and Wales at the time were frequently ‘unrelated to the nature of the juvenile’s offence’,\textsuperscript{48} and the emphasis in both jurisdictions was on work and moral education.\textsuperscript{49}

The first comprehensive legal recognition of children and young people as a different and separate class of criminal accused came with the Juvenile Offenders Act of 1906. There had previously been some modifications in criminal procedure through the practice of magistrates, but before the 1906 legislation there were few formal legal rules distinguishing youth accused from adult accused.\textsuperscript{50} Children and young people were ‘not recognised as a distinct group of offenders’.\textsuperscript{51} There was the doli incapax rule, which held that children under seven were incapable of forming the necessary mens rea for the purposes of criminal prosecution, but those aged between seven and fourteen years of age could be prosecuted if the necessary mens rea was demonstrable. The stated purpose of the Juvenile Offenders Act 1906 was to differentiate between children and young people and adults in the procedure which magistrates should follow. Special separate magistrate hearings for children and young people under sixteen years of age were established,\textsuperscript{52} and proceedings could be held in camera.\textsuperscript{53} In reality, it is likely that the Juvenile Offenders Act 1906 did little more than formalise the practice of magistrates in having special procedures for young defendants.\textsuperscript{54}

\textsuperscript{47} Reformatory Schools Act 1854, Industrial Schools Act 1861.


\textsuperscript{49} In 1873 the Neglected and Criminal Children Act was amended so that industrial school authorities could apply to have the power of guardianship over their charges while the Industrial Schools Act 1882 increased the number of options available to the authorities in dealing with young people who broke the law.


\textsuperscript{52} s 3(2), Juvenile Offenders Act 1906.

\textsuperscript{53} s 4, Juvenile Offenders Act 1906.

III. THE WELFARE APPROACH TO YOUTH JUSTICE

A. The Child Saving Movement

Significant changes in the law's view of the youth offender did not occur until the late nineteenth century, when the initial signs of a children's rights discourse were observed. The phrase 'children's rights' was first mentioned in an article as early as 1852, but it was not until the end of the nineteenth century that a social reform movement around children and young people developed, including the enactment of child labour laws, the establishment of a compulsory education system and, notably, the beginnings of a modern youth justice system. Separate youth justice systems were established in roughly the same period in the United States, Australia, and Great Britain. Changes in the traditional character of family life added impetus to the movement; the economic benefit of the child or young person had lessened as less agricultural work was done by hand, women and children and young people were increasingly regarded as separate entities rather than the chattels of the husband or father, and the state was beginning to encroach on areas traditionally regarded as falling within the sphere of family privacy. In an American context, the most famous of the 'child savers' were the middle class women of the Chicago Woman's Club who supported youth court legislation and raised awareness of child welfare issues. The 'child-saving' movement saw children and young people as beings that needed to be protected due to their vulnerability and powerlessness. It had a strongly protectionist origin, justifying legal reform on the basis that children and young people needed to be protected from themselves and others, rather than promoting their capacity for self-determination. The perception of children and young people


58 1895 (South Australia), 1905 (New South Wales), 1906 (Victoria), 1907 (Queensland), 1907 (Western Australia), 1918 (Tasmania). See Chris Cunneen and Rob White, Juvenile Justice: Youth and Crime in Australia (Melbourne: Oxford University Press, 2002), ch 1.

59 In the period immediately after the introduction of the Children Act of 1908.

had shifted from being the property of their parents to dependent beings whose successful
transition to adulthood depended on guidance and protection.61

In the criminal justice context, a welfare based approach to the disposition of youth offending
cases became more prevalent at the end of the nineteenth century. In essence, welfare based
youth justice aimed to treat and cure the delinquent youth rather than to punish. The
characteristics of the welfare model of youth justice are informality, lack of due process and a
high degree of discretion in the name of ‘best interests’. The theoretical justification for this
stemmed from the doctrine of parens patriae.62 Although the concept of parens patriae was
originally used in the Middle Ages to protect land tenure rights, in the criminal law sphere the
doctrine permitted coercive court action for neglected or delinquent children or young people.
The increased focus on the rehabilitation and welfare of the youth offender was also
influenced by the rise of positivist criminology. Classical criminology had dominated thinking
up until the mid-nineteenth century. Based on the writings of authors such as Cesare
Beccaria63 and Jeremy Bentham,64 classical criminology viewed criminal behaviour as a
rational choice by the individual. In contrast, positivist criminology sought other explanations
of offending behaviour, for example characteristics of the offender’s personality or his/her
environment.65 These theories were advanced through the recently developed disciplines of
psychology and sociology.66 Belief in the moral degeneracy of the offender was fundamental
and the emphasis was on the malleability and reformation of the child or young person’s
character rather than punishment or accountability. Crime was a disease that could be cured.67
This period also saw the establishment of the first separate penal institutions and reformatory

61 For an English perspective on the ‘child-saving’ movement, see Robert Harris and David Webb, Welfare,

62 The English law concept of parens patriae was historically applied by the Courts of Chancery. It allowed the
Crown to exercise its paternal prerogative to declare a child to be a Ward of the Crown, when the child’s parents
were deemed to have failed to maintain the child. See Sanford J Fox, ‘Juvenile Justice Reform: A Historical


The first court specific to youth offenders was established in Illinois in the United States of America in 1899. Across the common law jurisdictions, these new youth courts discarded the adversarial processes and rigid procedural rules of the traditional criminal court. Instead, the state would intervene through means of treatment (for example institutionalisation) to ensure that the delinquent child or young person received care and guidance.

B. Welfare Based Youth Justice in New Zealand

In New Zealand, the Child Welfare Act 1925 established the Child Welfare Branch which was to be a branch of the Education Department. This agency was given responsibility for the supervision of youth offenders as well as youth who were in need of care and protection. A separate Children’s Court was provided for in the legislation. The Children’s Court was to have separate hearings in separate premises, and was to be presided over by magistrates who were suited by means of experience and personality to deal with children and young people. Press reports on proceedings in the Children’s Court could be published only with the consent of the magistrate and publication of the child or young person’s name was prohibited.

While preceding legislation (e.g. the 1906 Juvenile Offenders Act) was concerned with adapting the existing criminal law for the purposes of young offenders, the Child Welfare Act 1925 appears to have different objectives, notably the re-classification of criminal youth to youth in need of state assistance. Factors influencing the welfarist philosophy included concern about numbers of street youth and the growth in philanthropic movements. Similar conditions in the United States had inspired the American child saving movement. Before the Child Welfare Act of 1925, the direction of youth justice legislation in New Zealand was closely aligned with that of England and Wales. Seymour argues that the 1925 Act was more in line with developments in the United States, and notes that John Beck (Child Welfare

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70 s 28, Child Welfare Act 1925.

Superintendent) had visited the United States and reported on practice there.\textsuperscript{72} This visit may have influenced the direction taken by the Child Welfare Act 1925.

The new Children’s Court had jurisdiction over children and young people who came to the notice of the authorities, but little distinction was drawn between those who were offending and those who were in need of care and protection. In the welfare-based youth justice system, the young offender is perceived as being in need of assistance and the offending behaviour is seen as a symptom of various deficiencies such as poverty. Children and young people are not regarded as making a rational choice to commit a crime; rather they are products of their environment. Reform and re-education of the child or young person are broadly the aims of the system rather than the administration of a proportionate response to the offence. The state does not seek to punish the young offender, but rather to rehabilitate and mould him or her into a functional member of society. The courts were to take a broader approach that children and young people who were offending were in need of guidance and rehabilitation.\textsuperscript{73} One of the distinguishing characteristics of a welfare type approach apparent in the Child Welfare Act 1925 is the provision for a non-specific complaint system meaning that a child or young person could be brought into the court’s jurisdiction even if there was no specific offence involved.\textsuperscript{74}

IV. DEVELOPMENTS IN INTERNATIONAL LAW

Early international recognition of children and young people’s rights was also firmly centred on welfare rights (essentially the right to protection, shelter and sustenance), and the protection of children and young people’s interests as determined by adults. Although the Declaration on the Rights of the Child adopted by the Fifth Assembly of the League of Nations in 1924 was the first formal international recognition of the existence of children’s rights,\textsuperscript{75} the ideology remained protectionist, concerned with promoting welfare rather than self-determination. This document was enacted in the context of post-World War One, and so was concerned almost solely with children and young people’s material needs. Its five

\textsuperscript{72} John A Seymour, \textit{Dealing with Young Offenders in New Zealand: The System in Evolution} (Auckland: Legal Research Foundation, 1976), 32.

\textsuperscript{73} John A Seymour, \textit{Dealing With Young Offenders in New Zealand: The System in Evolution} (Auckland: Legal Research Foundation, 1976), 31.

\textsuperscript{74} s 31, Child Welfare Act 1925.

principles emphasised the welfare and protection of the child or young person, and there was no mention of a right to self-determination. The 1948 Universal Declaration of Human Rights almost completely ignored children and young people. The 1959 United Nations Declaration of the Rights of the Child again emphasised the duties that mankind owed to children and young people. There is significant overlap with the 1924 Declaration in that the emphasis is firmly on welfare and protection of the child or young person. There was no mention in the ten articles of self-determination or autonomy for children and young people, or any recognition that the child or young person’s views might be important.

The 1924 Declaration appears to place the duty of ensuring the child or young person’s welfare on adult men and women rather than on the state; ‘...men and women of all nations, recognising that mankind owes to the child the best it has to give, declare and accept it as their duty...’. Children and young people were not seen as individual right holders but as beings deserving of protection and good treatment. Conversely, the 1959 Declaration states that:

[the child can] enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights.

The 1959 Declaration thus represents the beginning of a conceptual shift to a view of the child or young person as a subject of international law capable of possessing rights and freedoms. While none of these early international rights instruments expressly mentioned youth justice, they represented the first steps in the formation of a set of international norms concerned with minimum standards for state treatment of children and young people. Despite this the emphasis remained on the child or young person’s quality of life rather than the recognition of him or her as a person. Further, the 1959 Declaration had limited legal status, and so did not attempt to impose legal obligations on States Parties. However, the fact that it was adopted

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76 'The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured' 1924 Declaration, Part II.

77 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948). See Article 25 (2) ‘Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.’

78 Declaration of the Rights of the Child, G.A. res. 1386 (XIV). 14 U.N. Doc. A/4354 (1959), hereinafter 1959 Declaration. E.g. the Preamble: ‘Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’ and Principle 2: 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration'.

79 Preamble to the Declaration on the Rights of the Child [author’s italics].
unanimously ‘accords it greater weight’ than other General Assembly Declarations because of the implicit moral approval by the member states. Its wording is outdated and its principles are vague, sometimes to the point of idealism. Nonetheless, the 1959 Declaration had begun the process of re-conceptualising the personhood of the child or young person in international law.

V. PROBLEMS WITH WELFARE BASED YOUTH JUSTICE

A. Some Negative Effects of Welfare-Based Youth Justice

At the least, the welfare-based system recognised that children and young people needed protection due to their vulnerability. Nonetheless, as Platt stresses, the shift in emphasis towards the welfare model was not necessarily a positive one for children and young people. He rightly points out that the welfare approach emphasised the child or young person’s dependence. The state was to be a parent to the delinquent youth and had the power to make paternalistic judgements on the suitability of the child or young person’s home environment. In short, ‘kindness could nip crime in the bud’. Positivism justified interventions which sought to reform the child or young person’s character. As Garland notes:

The proper treatment of offenders required individualised, corrective measures carefully adapted to the specific case or the particular problem – not a uniform penalty mechanically dispensed. One needed expert knowledge, scientific research, and flexible instruments of intervention, as well as a willingness to regulate aspects of life which classical liberalism had deemed beyond the proper reach of government.

The best (and oft quoted) example of the culture and goals of the early twentieth century youth justice is in the discussion of an American judge, Judge Mack. He stated that the problem for the judge dealing with a youth offender was not:


81 See e.g. Principle 5, ‘The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable’.


[has] this boy or girl committed a specific wrong, but what is he, how has he become what he is and what best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence from a criminal court is not the sort of evidence to be heard in such a proceeding.86

This is a classical re-statement of youth justice philosophy in that period. The avowed purpose of betterment of the child or young person’s character was not to be hampered by procedural rules. Although the stated goal of the reform schools and correctional institutions was rehabilitation, the result was often longer terms of imprisonment and reinforcing of traditional societal values. Reform schools were not considered places of punishment, rather of re-education. Penalties had a wide range: from court supervision to institutionalization for the duration of minority status. In the New Zealand context, actions taken 'in the best interests' of children and young people led to many, predominantly Maori children and young people being sent to institutions by the courts until they were twenty, often for minor offences.87

B. Re Gault

The United States was arguably the jurisdiction to most thoroughly endorse the welfare approach to youth justice,88 and thus provided the context for a series of important judicial decisions involving the rights of children and young people in the criminal justice system. The welfare approach was seen by its proponents as an improvement on the classical justice model as it sought to treat children and young people rather than punish them. Did the welfare approach really improve the lot of the child or young person involved in the criminal justice system? At best the classical justice model was required to follow some basic rules of criminal procedure. In the welfare model, a youth offender could potentially be committed to a residential institution until age of majority without the benefit of established procedural rules.89 Some courts had begun to apply the welfarist philosophy with 'such enthusiasm that the procedures ceased to bear any resemblance to those generally prevailing in a court of law'.90 In the case of Re Gault,91 the United States Supreme Court specifically addressed the

89 For an account of the injustices suffered by children and young people in Britain under the welfare model of juvenile justice see Laurie Taylor, Ron Lacey and Denis Bracken, In Whose Best Interests? (Nottingham: The Cobden Trust/MIND, 1980).
young defendant’s right to fairness and due process in such a case. The youth court which was under attack in Re Gault was the descendant of the child-saving movement. It had removed children and young people from the adult court to a court with an emphasis on social and psychological theory, disregarding procedural protections in favour of paternalistic intervention. This had resulted in a ‘deprivation of due process based on the promise of a treatment that was often highly punitive’. The Supreme Court held that children and young people were persons under the Constitution and thus were capable of possessing the rights of due process enshrined in the Constitution, such as the right to be represented by counsel, the right to remain silent and the right to confront witnesses. Re Gault exposed the operation of the youth justice system to be ‘inconsistent and unpredictable’. The welfare model was exposed as not necessarily being a more lenient option as rehabilitation often had a higher price than an ordinary criminal sanction. As the rights culture developed, there was criticism of the welfare model for indeterminacy, intrusiveness, paternalism and violation of due process rights, and the Supreme Court endorsed this criticism. A subsequent Supreme Court decision added to the strength of the Re Gault judgment by holding that the young offender must be proved to be guilty beyond reasonable doubt, as is the case when an adult offender is tried.

C. Reactions to the Welfare Approach in New Zealand

In New Zealand, there were comparable efforts to counter the potentially harsh effects of the welfare approach embodied in the 1925 Child Welfare Act. There were a number of

91 In re Gault, 387 U.S. 1 (1967). Gault was a fifteen year old boy who was picked up by the Police and taken to the police station accused of making an obscene phone call. His parents were at work at the time. Neither Gault nor his parents were given any description or notice of the charges. He had no legal representation until after the adjudication. There was no record of the hearing and the accused did not get an opportunity to confront witnesses. The boy received an indeterminate sentence for the crime of making an obscene phone call. The same offence committed by an adult would have resulted in a $50 fine or a term of two months imprisonment.


95 Cynthia Price Cohen, ‘An American Perspective’ in Bob Franklin (ed.), The Handbook of Children’s Rights – Comparative Policy and Practice (London: Routledge, 1995), 168-169. Price Cohen also comments that the granting of full ‘adult rights’ to young offenders may also have had the undesirable side effect of moving some youth offender cases for hearings in adult court.

amendments in the decades following the 1925 Child Welfare Act that may be categorised as reactions to the lack of legal safeguards in the legislation. The 1948 Child Welfare Amendment Act abolished the non-specific complaints system contained in the 1925 Child Welfare Act. From then on a charge had to be proven before the Children's Court before any action could result. The Child Welfare Amendment Act 1960 conferred a right of appeal against decisions of the Children's Court, which had not previously existed. These amendments are some evidence of progressive attempts to ensure that some elements of due process existed, at least in theory.

VI. THE PATH TO YOUTH JUSTICE REFORM IN NEW ZEALAND

A. Introduction

Terms such as 'world renowned' and 'new paradigm' are frequently used in connection with the current New Zealand youth justice system. The reform process which resulted in this legislation, and the problems which drove this reform, will now be discussed. Especially important for the purposes of this research is any concerns expressed about the rights of children and young people under the previous legislation, and during the reform process.

B. The Children and Young Persons Act 1974

The terms welfare or justice models are 'shorthand' methods of describing these two foremost approaches to offending by children and young people in modern criminology. The welfare and justice categorisations remain a 'conceptual tool' for academic study. While the
classifications are ‘somewhat crude and oversimplified’,\textsuperscript{104} they have a practical use in demonstrating the policy changes that took place. The welfare approach to youth justice is the defining characteristic of twentieth century youth justice statutes in New Zealand. Conversely, the recognised characteristics of a justice approach are due process, formalism, reliance on the adversarial process and an emphasis on legal procedure.\textsuperscript{105}

Morris and Young stress that it is impossible to file the Children and Young Persons Act 1974 neatly into either the welfare or the justice category, but the legislation appears broadly welfarist in its intent. The single jurisdiction over care and protection and criminal matters remained. The system had a rehabilitative focus. In addition, section 4 of the 1974 Act provided that:

\begin{quote}
any Court which or person who exercises in respect of any child or young person any powers conferred by this Act shall treat the interests of the child or young person as the first and paramount consideration...
\end{quote}

There were also elements of a justice approach. For example, there was provision for children and young people to be legally represented and a requirement that the criminal standard of proof be met.\textsuperscript{106} Despite these efforts to introduce safeguards for the rights of young people, the welfare approach persisted. The new Children and Young Person’s Court had jurisdiction over children and young people who came to the notice of the authorities, but little distinction was drawn between those who were offending and those who were in need of care and protection. The courts were to take a broader approach that children and young people who were offending were in need of guidance and rehabilitation.\textsuperscript{107}

C. Key Stages in the Reform Process

Within ten years of the enactment of the Children and Young Persons 1974, plans for reform of the law relating to children and young people had already begun. Key stages in the reform process were:

\begin{itemize}
\item[\textsuperscript{104}] Allison Morris and Warren Young, \textit{Juvenile Justice in New Zealand: Policy and Practice} (Wellington: Institute of Criminology, 1987), 3.
\item[\textsuperscript{106}] Allison Morris and Warren Young, \textit{Juvenile Justice in New Zealand: Policy and Practice} (Wellington: Institute of Criminology, 1987).
\item[\textsuperscript{107}] Sir Christopher Parr, Minister of Education NZPD, Vol. 206, 1925, 585 (quoted in John Seymour, \textit{Dealing With Young Offenders in New Zealand – The System in Evolution} (Auckland: Legal Research Foundation, 1976), 31).
\end{itemize}
1984: A Working Party was convened by Minister Ann Hercus within the Department of Social Welfare,\textsuperscript{108}

1986: The Children and Young Persons Bill was tabled in Parliament,

1987: The second Department of Social Welfare Working Party was formed,\textsuperscript{109}

1989: The Children, Young Persons and Their Families Bill was tabled in Parliament,


The reform process was a lengthy one. Extensive public consultation was carried out, especially with Maori and Pacific peoples.\textsuperscript{110} The care and protection provisions of the legislation were the most contentious, especially in relation to mandatory reporting of child abuse.\textsuperscript{111}

D. Key Factors Driving Reform

There were a number of factors driving reform of the law relating to children and young people. Some (social and political factors such as neo-liberalism and Maori nationalism\textsuperscript{112}) were unique to New Zealand. Other factors, (lack of due process rights for young people), were a result of the perceived failure of welfare based youth justice and were mirrored in other jurisdictions.\textsuperscript{113} The social context of the legislative reforms has been extensively addressed elsewhere,\textsuperscript{114} but it is useful for the purposes of this research to outline the problems with the previous system in order to compare the present legislation.\textsuperscript{115}


\textsuperscript{110}See e.g. submissions SS/89/303 – SS/89/325, Papers received at the National Hui held at Ruatoki on 7/8 April 1988, SS/89/287 – SS/89/292, Papers received at Auckland Pacific Island Consultation on 19/20 April 1988.

\textsuperscript{111}Mike Doolan, ‘The Youth Justice- Legislation and Practice’ in BJ Brown and FWM McElrea (eds.), \textit{The Youth Court in New Zealand: A New Model of Justice} (Auckland: Legal Research Foundation, 1993)


1. The mono-cultural nature of the youth justice system

There were concerns about the mono-cultural nature of the youth justice system (and indeed the criminal justice system in general). Similar concerns about the appropriateness of the youth justice system for Indigenous young people were being expressed in other jurisdictions with similar colonial backgrounds like Australia and Canada. The youth justice system (like the care and protection process) was run mainly by professionals and decision makers who were generally white and well educated, while there was an over-representation of Maori young people in both care and protection and youth justice proceedings. There were concerns regarding the treatment of young offenders in residential placements (Maori and non-Maori), with allegations of harsh treatment and racism emerging. The 1988 Puao-te-atatū (Daybreak) Report, for example, found evidence of institutional racism within the Department of Social Welfare. There were calls for recognition of the importance of the family structure to Maori, as well as recognition that the paramountcy of the young person's

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115 See also Chapter 13(III).


119 Mike Doolan, ‘Youth Justice Reform in New Zealand’ in Julia Vernon and Sandra McKillop (eds.), Preventing Juvenile Crime (Canberra: Australian Institute of Criminology, 1991), 123.


interests may not be culturally appropriate for Maori. Public criticism of the 1986 Children and Young Persons Bill centred on the mono-cultural approach of the care and protection provisions, and the failure to minimise official intervention into the lives of young people and their families as had been promised.

Families (Maori and non-Maori) were generally disempowered from decision making around their children and young people. Policy imperatives such as a desire to provide a culturally appropriate forum for Maori young people who were offending and the desire to empower families in decision making were key factors in the development of the FGC model. Also relevant were the neo-liberal policy imperatives of reducing state spending and delegating to non-state bodies.

2. Decline of welfare based youth justice

There was evidence of a loss of confidence by professionals in the goals of welfare based youth justice, especially diversion from formal criminal prosecution and rehabilitation. It was apparent that the police had little confidence in the diversionary mechanisms established by the Children and Young Persons Act 1974, as they were found to be bypassing diversion and using arrest to ensure prosecutions in cases where they felt it was necessary. An avowed aim of the pre-1989 youth justice system was to lessen the number of young people appearing before the criminal courts. However, as the 1984 Review of the Children and Young Persons Act reported, the proportion of young people apprehended who later ended up appearing before the Children and Young Persons Court had actually increased. Costly rehabilitative

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124 Mike Doolan, ‘Youth Justice Reform in New Zealand’ in Julia Vernon and Sandra McKillop (eds.), Preventing Juvenile Crime (Canberra, Australian Institute of Criminology, 1991), 123.


programs had limited success rates and this created pessimism about the goal of treatment.\textsuperscript{129} As a result there was a perception amongst both youth justice professionals and the wider public that the system was failing to hold young offenders properly accountable for their offending.\textsuperscript{130}

3. The rights of young people

Thirdly, and most importantly for the purposes of this research, the welfarist philosophy of the Children and Young Persons Act 1974 saw little need for legal safeguards as it was assumed professionals would have the young person’s best interests at heart. Under the welfare-focused approach due process rights were seen as an impediment to measures taken in the best interests of the young person.\textsuperscript{131} The informality and secrecy, combined with a lack of records, led to unease that there was little accountability for the actions of professionals.\textsuperscript{132} In regard to diversionary schemes under the 1974 Act, it was clear that alternatives to court could themselves pose significant problems for young people, since they were left exposed to the full weight of the coerciveness of the youth justice system without the benefit of independent advice or proper legal representation.\textsuperscript{133}

As for the practice of the Children and Young Person’s Court, legal assistance was reported as being of poor quality and inappropriate for young people in many cases.\textsuperscript{134} Inexperienced criminal counsel were found to be using the Children and Young Persons Court as a training ground.\textsuperscript{135} Moreover, an evaluation of the system by Morris and Young found that the Children and Young Persons Court was failing to fulfil its duty to use simple and


\textsuperscript{133} Kenneth Polk, ‘Family Conferencing: Theoretical and Evaluative Concerns’ in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994).

\textsuperscript{134} Terrence Loomis, \textit{An Evaluation of the Children’s Advocate Scheme Pilot in the Auckland Children and Young Persons Court} (Auckland: The Social Research and Development Trust, 1985).

\textsuperscript{135} Terrence Loomis, \textit{An Evaluation of the Children’s Advocate Scheme Pilot in the Auckland Children and Young Persons Court} (Auckland: The Social Research and Development Trust, 1985).
comprehensible terms to explain procedure to the young person. Young people frequently did not understand what had happened during the hearing of their case and felt excluded from proceedings,\textsuperscript{136} while families found the formality of the process alienating.\textsuperscript{137}

Moving to youth justice outcomes, at one end of the scale, there was not enough of a range of sanctions available for young people who committed minor offences.\textsuperscript{138} On the other end, due to the fact that there was generally less of a focus on the offence that the young person had committed and more consideration of the general situation of the young person, disproportionate sanctions such as the indeterminate guardianship order were overused. The 1984 Working Party stressed that ‘an offence by a young person should not be used... to justify the taking of extended powers over the young person’s life for the purposes of rehabilitation’.\textsuperscript{139} The child or young person was worse off than an adult suspect or defendant in the same position. Accordingly, the 1984 Working Party recommended that children and young people ‘should receive the same due process protections as adults, should be dealt with predictably and should receive a disposition similar to that imposed on other juveniles committing the same offence’.\textsuperscript{140}

VII. THE PRESENT LEGISLATION

\textit{A. Introduction}

The result of the drawn-out reform process was the Children, Young Persons and Their Families Act 1989.\textsuperscript{141} The CYPF Act was enacted on 1 May 1989. It is a wide-ranging and lengthy piece of legislation which deals both with children and young people in need of care and protection and those who are offending. This section will analyse the theoretical principles underpinning the current legislation. The operation of the legislation and the place

\textsuperscript{136} Allison Morris and Warren Young, \textit{Juvenile Justice in New Zealand: Policy and Practice} (Wellington, Institute of Criminology, 1987), 104-106.

\textsuperscript{137} Allison Morris and Warren Young, \textit{Juvenile Justice in New Zealand: Policy and Practice} (Wellington, Institute of Criminology, 1987), 100.


\textsuperscript{141} As noted in Chapter 1, this is abbreviated to CYPF Act in the text.
of the youth justice FGC within its structure is discussed in a separate chapter, as is practice and procedure at the FGC.

B. The Principles Underpinning Youth Justice

The CYPF Act gives a legislative base to a ‘comprehensive set of general principles’, which are to guide generally the exercise of powers in relation to young people (section 4) and more particularly the operation of the youth justice provisions of the CYPF Act (section 208). The CYPF Act was unique at the time in codifying the principles on which the youth justice system is to be based, although statements of principles now appear in the youth justice legislation of other jurisdictions. In addition, statements of principles are now increasingly common in other types of New Zealand legislation. In section 208, the CYPF Act provides a distinct set of principles or ‘signposts’ to guide youth justice.

1. Content of the guiding principles

The specific principles guiding youth justice provide that:

- Criminal proceedings should not be commenced with the sole purpose of providing welfare assistance to the child or young person or their family,
- Any sanctions imposed on children or young people should seek to promote their development within their families and take the least restrictive form appropriate in the circumstances,
- Any measures for dealing with offending should seek to strengthen the family and to foster the ability of families to deal with offending by their children and young people,

142 Chapter 5.
143 Chapter 6.
145 See for example s 96 of the Children Act 2001 (Ireland), s 3 of the Youth Criminal Justice Act 2002 (Canada), s 3 of the Young Offenders Act 1993 (South Australia), and s 3 of the Young Offenders Act 1997 (New South Wales).
146 See for example s 7 of the Sentencing Act 2002.
148 s 208(b), CYPF Act. See Chapter 13(V)(C).
149 s 208(f)(i) and (ii), CYPF Act. See Chapter 13(V).
• Children and young people should be diverted from the formal criminal justice system unless it is in the public interest not to.\textsuperscript{151}
• Measures imposed should have due regard to the interests of victims of offences,\textsuperscript{152}
• Age is to be a mitigating factor in deciding whether sanctions should be imposed and what those sanctions should be,\textsuperscript{153}
• Unless public safety is at issue, children and young people who commit offences should be kept in the community,\textsuperscript{154}
• The vulnerability of children and young people entitles them to special protection during the investigation of offences.\textsuperscript{155}

Relevant also are the \textit{General objects, principles, and duties} which deal with all sections of the CYPF Act, both youth justice and care and protection. Section 4(f) of the CYPF Act states that one of the objects of the legislation is to ensure that where young people commit offences that they are ‘held accountable, and encouraged to accept responsibility, for their behaviour’ and also that they are dealt with in a manner that acknowledges their needs and gives them an opportunity to develop in ‘responsible, beneficial, and socially acceptable ways’. Section 5 provides additional guiding principles for the exercise of powers under the CYPF Act including emphasising the value of family participation and support for any decisions made,\textsuperscript{156} due consideration to the wishes of the young person,\textsuperscript{157} and the importance of implementing decisions within a timeframe appropriate to the young person’s sense of time.\textsuperscript{158}

\textsuperscript{150} s 208(c)(i) and (ii), CYPF Act. See Chapter 7(IV).
\textsuperscript{151} s 208(a), CYPF Act. See Chapter 5(II) on the operation of the youth justice system.
\textsuperscript{152} s 208(g), CYPF Act. See Chapter 13(IV).
\textsuperscript{153} s 208(e)(i) and (ii), CYPF Act.
\textsuperscript{154} s 208(d), CYPF Act.
\textsuperscript{156} s 5(a) and (e), CYPF Act. See Chapter 7(IV).
\textsuperscript{157} s 5(d), CYPF Act.
\textsuperscript{158} s 5(f), CYPF Act.
2. The value of guiding principles

In relation to the actual worth of setting out guiding principles for legislation, one submission during the consultative process for the Children, Young Persons and Their Families Bill was '...sceptical as to the value of enshrining objects and principles in legislation. As there is no means of interpreting or applying these principles to individuals cases they are in danger of becoming window dressing'. In practice, however, the guiding principles routinely form the basis of decisions in the Youth Court. In Police v H (a young person), it was stated that there is no doubt but that exercise of powers are to be guided by sections 5 and 208. In addition, the guiding principles formed one of the principal benchmarks for the two major evaluations of the New Zealand youth justice system.

The CYPF Act states that FGC participants must have regard to the guiding principles when making decisions. However, even a perfunctory consideration of these guiding principles reveals apparently contradictory objectives. For example, can young people be held accountable and their needs addressed at the same time? Can the interests and needs of the victim of the offence be accommodated at the same time as imposing the least restrictive sanction that must also promote the wellbeing of the young person? A 1987 Department of Social Welfare Report acknowledged the task which the legislation faced in reconciling 'frequently incompatible' views, including whether the justice or the welfare model should prevail in relation to responses to youth offending and state intervention versus family autonomy. Is a justice type approach irreconcilable with addressing the needs of the offender? It is a relatively simple matter to separate offending and care and protection. But it is more difficult to reconcile the contradictory expectation that the FGC plan is to hold the

159 The collective term 'guiding principles' is used in the text to refer to the provisions of s 208, CYPF Act as well as s 4 and 5, CYPF Act.


164 s 260(2), CYPF Act.

young person accountable and address needs.\textsuperscript{166} It must be noted here that conflicting objectives are inevitably present in youth justice systems. In particular, tensions will always exist between the need to safeguard the future wellbeing of the young person and the public interest in holding young people accountable for crimes.\textsuperscript{167} The relationship between the rights of the young person and these other considerations will be explored throughout this thesis.

C. Key Features of Youth Justice under the CYPF Act

Earlier in this chapter, the historical context for this research was set by discussing the evolution of youth justice legislation and policy in New Zealand and comparable jurisdictions. The terms ‘welfare’ and ‘justice’ are used as rough categorisations for the two foremost models of youth justice. As discussed, each model of youth justice has been attacked on the grounds that the rights of young people are not properly safeguarded. The positioning of the CYPF Act within the welfare to justice spectrum generally will now be considered. These underlying policy consideration and the implications for the rights of the young person are considered in more detail in the chapter dealing with FGC outcomes.\textsuperscript{168}

1. Welfare or justice?

While the Children and Young Persons Act 1974 dealt with care and protection and offending cases in a similar welfare based manner,\textsuperscript{169} the CYPF Act makes a strict delineation between children and young people in need of care and protection\textsuperscript{170} and those who are offending.


\textsuperscript{168} See Chapter 13, especially V.


\textsuperscript{170} s 14 of the CYPF Act defines a child or young person who is in need of care and protection as

(a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or
(b) The child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or
(c) Serious differences exist between the child or young person and the parents or guardians or other persons having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or
(d) The child or young person has behaved, or is behaving, in a manner that—
   (i) Is, or is likely to be, harmful to the physical or mental or emotional wellbeing of the child or young person or to others; and
   (ii) The child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control; or
Section 208(b) of the CYPF Act sets out the principle that criminal proceedings should not be instituted with the sole purpose of advancing the welfare of the child or young person or their family. Section 284 prevents the Youth Court from ordering supervision, community work, supervision with residence, supervision with activity or transfer to the District Court for sentencing on the sole grounds that the young person is in need of care and protection. The Youth Court is entirely separate from the Family Court and so care and protection proceedings are differentiated from criminal proceedings. Care and protection issues are not to be pursued in the youth justice forum.\textsuperscript{171} As Maxwell and Morris argue ‘...the New Zealand system attempts to move some way towards a justice approach without abandoning the desire to achieve positive outcomes for young people who offend’.\textsuperscript{172}

Section 4 (f) of the CYPF Act sets out principles for dealing with children and young people who commit offences. The first clause states that such children or young people must be held accountable and encouraged to accept responsibility. The second clause states that their needs must be acknowledged so that they can be encouraged to develop in ‘responsible, beneficial, and socially acceptable ways’. Principal Youth Court Judge Becroft refers to these twin objectives as addressing the need and the deed.\textsuperscript{173} This approach of addressing both the need and the deed was a novel concept in youth justice. Previous responses to offending by young

\begin{itemize}
\item[(e)] In the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child; or
\item[(f)] The parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person; or
\item[(g)] The parents or guardians or other persons having the care of the child or young person have abandoned the child or young person; or
\item[(h)] Serious differences exist between a parent, guardian, or other person having the care of the child or young person and any other parent, guardian, or other person having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or
\item[(i)] The ability of the child or young person to form a significant psychological attachment to the person or persons having the care of the child or young person is being, or is likely to be, seriously impaired because of the number of occasions on which the child or young person has been in the care or charge of a person (not being a person specified in subsection (2) of this section) for the purposes of maintaining the child or young person apart from the child’s or young person’s parents or guardians’
\end{itemize}

\textsuperscript{171} s 208(b), CYPF Act.


people tended (as in most common law jurisdictions) to concentrate on *either* the need or the deed.\(^{174}\)

2. *Diversion and decarceration*

The principle of diversion underpins the CYPF Act. The term ‘diversion’ has multiple meanings in youth justice.\(^{175}\) Diversion can mean that no action is taken against the child or young person at all, e.g. when an immediate street warning is given by a police officer in respect of a incidence of offending. Diversion can mean avoiding formal criminal justice interventions like arrest and court appearances in favour of more informal processes like the FGC. Diversion can mean avoiding the use of custodial sanctions in favour of a community-based alternative. Doolan summarises the principle of diversion as the avoidance of formal interventions and if such formal interventions cannot be avoided, the minimisation of harmful impact.\(^{176}\) Maxwell and Morris have defined diversion and decarceration in the New Zealand context as meaning ‘practice with respect to limiting the appearance of young people in court and restricting the use of residential or penal establishments for young people’.

The benefits of diversionary practice have been recognised in New Zealand and overseas for a considerable period of time.\(^{178}\) Diversion of children and young people away from court appearances reduces the negative effects of involvement in formal justice processes.\(^{179}\) Principal among these negative effects is the effect of stigmatising the child or young person by labelling him or her as a criminal.\(^{180}\) Diversion of children and young people from custodial sanctions reflects research that suggests that such sanctions do not prevent recidivism.\(^{181}\)

\(^{174}\) See further Chapter 13(V)(C).

\(^{175}\) Allison Morris and Henry Giller, *Understanding Juvenile Justice* (Kent: Croom Helm Ltd, 1987), 137.


\(^{180}\) Allison Morris and Henry Giller, *Understanding Juvenile Justice* (Kent: Croom Helm, 1987), 138. See Chapter 10, V.

Custodial sanctions may carry the risk of actually increasing recidivism due to association with other young offenders.\textsuperscript{182} Doolan states that such ‘costly therapeutic programmes that congregated young offenders, particularly in residential settings, emerged as part of the problem’.\textsuperscript{183} In other jurisdictions, residential institutions for young offenders have been described as ‘schools for crime that corrupted the innocent and confirmed the redeemable in the path of chronic criminality’.\textsuperscript{184} There is also a pecuniary benefit in reducing the use of expensive court processes and residential institutions in favour of cheaper community based alternatives.\textsuperscript{185} Diversion has been shown to be a cost effective method of dealing with offending by children and young people when compared to the formal court system.\textsuperscript{186}

It is evident that New Zealand has been successful in establishing a comprehensive statutory diversion scheme where the majority of children and young people coming to notice of the police will be dealt with without recourse to prosecution.\textsuperscript{187} Even when a young person is prosecuted in the Youth Court, there is a strong legislative presumption against the use of formal orders or custodial sentences.\textsuperscript{188} Practice at the Youth Court is indicative of decarceration with custodial sentences having dropped sharply in the years following the introduction of the CYPF Act.\textsuperscript{189}

\textsuperscript{182} John Braithwaite, ‘What is to be done about Criminal Justice’ in BJ Brown and FWM McElrea (eds.), \textit{The Youth Court in New Zealand: A New Model of Justice} (Auckland: Legal Research Foundation, 1993), 33.


\textsuperscript{185} Allison Morris and Henry Giller, \textit{Understanding Juvenile Justice} (Kent: Croom Helm, 1987), 139.


\textsuperscript{187} In 2006, 29% of cases coming to notice are dealt with through prosecution, and about one third of these prosecutions will result in a s 282 discharge (as if the charge was never laid). Jin Chong, \textit{Youth Justice Statistics in New Zealand: 1992 to 2006} (Wellington: Ministry of Justice, 2007). These figures are the latest available as of October 2008. The 2007 figures have been delayed and are not expected until early 2009 (Personal communication from the Ministry of Justice, November 2008).

\textsuperscript{188} s 290 and s 208(d), CYPF Act.

3. **Restorative justice**

Due to the potential for involvement by the victim, potentially leading to reconciliation and repair of harm between the victim and the offender, the youth justice system in New Zealand is held out as an example of restorative justice in practice. A succinct definition of restorative justice is that provided by the United Nations, which describes restorative justice as:

> any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

Restorative justice and its implication for the rights of the young person is discussed in greater detail in later chapters.

4. **Family decision making**

As noted, the reform process leading up to the CYPF Act had identified the empowerment of families as a key policy imperative. Section 4 sets out the object of the 1989 Act as the promotion of the wellbeing of children, young people and their families. Any measures imposed in respect of offending should seek to strengthen the family group and ‘foster the ability’ of family groups to devise their own means of dealing with offending by their children and young people. Any sanctions imposed should ‘take the form most likely to maintain and promote the development of the child or young person within his her family’.

In contrast to previous models of youth justice which were likely to intervene and take over the role of the family when the child or young person was engaged in the commission of criminal offences (e.g. through placement in residential institutions or the use of the indeterminate guardianship order), the New Zealand system now seeks to give increased

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192 See Chapter 7(II) and 13(IV).

193 s 208(c)(i), CYPF Act.

194 s 208(c)(ii), CYPF Act.

195 s 208(f)(i), CYPF Act.
responsibility to families for dealing with offending by their children and young people. This idea of a partnership between families and state agencies in dealing with offending by children and young people is a ‘novel’ one. Maxwell et al state that ‘The intention of the legislation is to enable families to influence outcomes’, and the integral part that the FGC plays in the youth justice system results in a transfer of state power to the family and wider community. In the FGC process, the (extended) family can have direct input and take responsibility for formulating a plan to deal with offending by their children and young people.

VIII. CONCLUSION

This chapter has set the context for this research by considering the historical context of rights in youth justice and discussing the evolution of youth justice policy in New Zealand. It is apparent that welfare based youth justice was the dominant theme in New Zealand legislation for most of the twentieth century. Rights issues such as lack of checks on discretion, and lack of restrictions on youth justice outcomes were identified in the reform process leading up to the CYPF Act. The availability and quality of legal assistance for young people in the Children and Young Person’s Court was also criticised. It is useful to identify these issues in order to compare the operation of the current system.

The CYPF Act 1989 was innovative and unique at the time of enactment, e.g. in providing for statutory diversion and the involvement of family members in the decision making process. Having set the historical and policy context for this research, the next two chapters will establish the rights framework which will be used to evaluate the youth justice FGC.

196 s 208(c)(ii), CYPF Act.


199 See Chapter 7(IV).
CHAPTER THREE: THE IMPORTANCE OF RIGHTS

I. INTRODUCTION

The theoretical foundation of children and young people's rights is a wide ranging and frequently contentious subject, which could occupy a doctoral thesis (or several) easily. However, the rights of young people who are over the age of criminal responsibility in the youth justice sphere are generally less contentious than those of younger children. As will be discussed more thoroughly in the next chapter, it is generally accepted in New Zealand that children and young people over the age of criminal responsibility have the same due process rights as adults in similar situations, when being questioned by the police, prosecuted or sentenced in the court system. The issue of application of rights arises more when the matter is disposed of outside the formal judicial system, e.g. through the youth justice FGC. The application of existing rights standards to the different model of the youth justice FGC, rather than the theoretical foundations of the rights of children and young people ab initio, is the key theoretical issue to be addressed by this research. Chapter 7 discusses these issues in detail.

Nonetheless, in any analysis pertaining to rights, it is necessary to have some discussion on the general theoretical context of rights, thus this chapter will consider the application of prevailing theories of rights to the child or young person. The key purpose is to provide a theoretical frame of reference for the discussion of the sources of rights for children and young people in the youth justice system, and specific issues addressed in the substantive chapters.

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201 Those participating in the youth justice FGCs under discussion range from fourteen to seventeen years of age. See Chapter 6(II).


203 Chapters 4 and 7.

204 See e.g. discussion of the ‘best interests’ model of legal representation for young people (Chapter 9(II) and III), individual rights in the context of the communitarian model of restorative justice (Chapter 7(II)) and individual rights in the context of the welfare model of youth justice (Chapter 13(IV)).
II. THE THEORETICAL FOUNDATIONS OF RIGHTS

A. Introduction
The existence of individual rights is the cornerstone of liberal political theory. In any discussion about rights, it is first essential to consider what it means to possess a ‘right’. There are two competing theories on the subject of what it means for an individual to have a right, and both have been applied to the debate surrounding children and young people’s rights. One of these theories is commonly referred to as the will or choice theory, the other as the welfare or interest theory.

B. Application of the Will Theory
The will theory holds that an individual must be competent to make choices in order to possess rights. The will theory views rights as the protected exercise of choice, or, in other words, the power to enforce or waive the duty that the right in question entails. So, if the right in question accords me the right to have the free services of a lawyer, the will theory sees this right as the power to enforce the duty of someone to provide me with these services. Consequently, only those capable of claiming or waiving a right can be bearers of such a right. Effectively, the will theory views rights as normative powers to determine the duties of others. The will theory establishes competence as a prerequisite for autonomy, and consequently for entry to the category of rights holders. It is often argued that ‘the constantly-recurring fundamental argument for denying children and young people autonomy and rights is their alleged incompetence in making informed decisions’. Some argue that the relatively slow development of children and young people’s mental capacity renders the majority of children and young people unfit to take complete responsibility for their own decisions until

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they reach mid adolescence. This type of argument relies mainly on the work of the developmental psychologist Piaget. Piaget laid out clearly defined stages of cognitive development in children and young people. He believed that these stages 'are ordered temporally and arranged hierarchically along a continuum from infantile 'figurative' thought, which has a relatively low status, up to adult, 'operative' intelligence, which has a high status'. Aspects of Piaget's work has fallen out of favour in recent times as experts raise objections to the idea of a universal measure of child developmental stages. Even very young children are now considered to be capable of displaying decision making abilities, with one recent article even arguing that premature babies could be considered as agents.

Federle has discussed the shortcomings of rights theories in the context of children and young people's rights, and reiterates the difficulty that the will theory has in accommodating the rights of children and young people, as some consider them to lack the capacity which is necessary to exercise or waive a choice. But what is competence in terms of exercising a right? Is it Gillick competency, i.e. that the child or young person in question had sufficient intelligence, maturity and understanding to weigh up the pros and cons of the decision? Is it criminal competency? To be deemed to be competent in a criminal sense is to be deemed capable of making a choice to do an act which is legally wrong. The age of criminal responsibility in New Zealand is ten years of age, however those aged less than fourteen cannot be prosecuted for criminal offences except manslaughter and murder, and only then when it can be proven that the child knew that what he or she did was wrong. This

211 L Fox Harding, Perspectives in Child Care Policy (London: Longman, 1997), ch 5.
217 Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.
219 s 21, Crimes Act 1961.
220 s 22(1), Crimes Act 1961.
presumption of doli incapax for children under fourteen was well established in the common law since the seventeenth century.221 Young people aged fourteen and over can be prosecuted for all types of offences, both in the youth justice system, and in the adult criminal justice system, and from the age of fifteen can be sentenced to an adult prison.222 Those who would deny that a child or young person in this situation should not have rights because the child or young person does not have the capacity to possess such rights are surely on shaky theoretical foundations.

However, if the will theory is the preferred theory of rights for the child or young person in the youth justice system, this fails to take into account the immaturity of children and young people, which is the reason for having a separate youth justice system with reduced penalties for offending. The legal rights of children and young people in many jurisdictions remain as one writer puts it: 'a confusing accumulation of inconsistencies'.223 There are significant anomalies in the way the law views the child or young person accused or convicted of committing a criminal offence with how it views the child or young person in the family and wider society. The law views the child or young person as a vulnerable being deserving of protection and largely incompetent to make decisions until he or she comes in conflict with the criminal law.224 Then the child or young person appears to undergo a legal transformation into an individual capable of making rational and informed choices.225 This attitude is most prevalent in the United States where young people are increasingly treated as adults when being prosecuted and punished for offences,226 but is not confined to that jurisdiction. This divergence in the law’s view on children and young people raises some important questions.


222 For a detailed description of the operation of the youth justice system, see Chapter 5.


Is there a double standard for a child or young person accused or convicted of a criminal offence? Are children and young people considered ‘most competent when they are most delinquent’?\footnote{Jacqueline Cuncannon, ‘Only When They’re Bad: The Rights and Responsibilities of Our Children’ (1997) 51 Washington University Journal of Urban and Contemporary Law 273, 291.} In considering a child or young person to be capable of being considered criminally responsible, the law must view the child or young person to be a rational actor.\footnote{See further: Stephanie J Millet, ‘The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard’ (1995) 28 Vanderbilt Journal of Transnational Law 295 and Lisa Micucci, ‘Responsibility and the Young Person’ (1998) 11 Canadian Journal of Law and Jurisprudence 277.} According to Cuncannon, there is a ‘growing acceptance that adolescents possess sufficient competence and legal capacity to be held criminally responsible’.\footnote{Jacqueline Cuncannon, ‘Only When They’re Bad: The Rights and Responsibilities of Our Children’ (1997) 51 Washington University Journal of Urban and Contemporary Law 273, 276.} At present there would seem to be no consistency between the age at which children and young people are granted full adult rights and the age at which children and young people will be held criminally responsible for delinquent actions.

Sociologists talk of the ‘individualisation’ of childhood; the ‘rise of childhood agency’.\footnote{Allison James, Chris Jenks and Alan Prout, Theorizing Childhood (Cambridge: Polity Press, 1998), 6.} The situation remains that this change affects different groups of young people differently, as Nasman has commented, ‘children are identified, registered, evaluated and treated as individuals in some contexts as adult citizens but in others not’.\footnote{Elisabet Nasman, ‘Individualisation and Institutionalisation of Childhood in Today’s Europe’ in Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger (eds.), Childhood Matters (Aldershot: Avebury, 1994).} There has also been debate as to whether the increased focus on autonomy rights for children and young people in other spheres such as family law and medical decision making might disadvantage the child or young person in the criminal law sphere. In a recent book, Guggenheim states his belief that the changing image of children and young people from vulnerable to competent and autonomous has worsened the lot of the young offender as society increasingly views such children and young people as sophisticated and culpable.\footnote{Martin Guggenheim, What’s Wrong With Children’s Rights (Cambridge, Mass.: Harvard University Press, 2005), ch 8, especially 258–264.} Other commentators have expressed similar views, Dolgin argues that:

only because children are no longer widely and clearly distinguished morally and psychologically from adults, have society and the law become willing to entertain proposals to hold some children fully
There may be some truth to this statement. Children and young people in general are now perceived as more sophisticated and less innocent than in previous times, though these changes in the perception of young people are probably not so much related to the recognition of young people’s legal and autonomy rights, rather to changing societal attitudes. Unfortunately Guggenheim - in what Freeman has described as a utilitarian analysis uses this as part of the argument towards his conclusion that it would be better for society as a whole if young people did not have rights at all.

Young offenders are more commonly held to adult standards than their non-delinquent counterparts. It seems society is willing to hold children young people responsible for criminal acts before it is willing to confer rights on them. Is it that young offenders must take on the liabilities of both worlds (childhood without its protections, adulthood without its freedoms and rights)? Minow has suggested that some recent developments in criminal justice would surprise and probably dismay the child liberationists from the 1960s/1970s. For example, young offenders (especially in the United States) are increasingly being treated as adults in terms of prosecution, sentencing and procedure. The US Supreme Court has gone as far as to deny that carrying out the death penalty on an offender who committed his crime as a minor, constituted a cruel and unusual punishment. As Fionda notes:

In the latter half of the twentieth century and the beginning of the twenty-first, children who commit crimes have been increasingly viewed, and therefore treated, as though they are fully competent, aware of the significance and repercussions of their actions and mature enough to accept responsibility for them in the form of a proportionate punishment. The notion of children as objects of concern, as lacking competence to think their actions through and as capable of outgrowing their troublesome and immature

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234 Kay S Hymowitz, Ready or Not: What Happens When We Treat Children as Small Adults (New York: Free Press, 1999).


behaviour has, to some extent been sidelined in the quest for a politically expedient and therefore highly retributive response to youth crime.240

In summary, if the will theory holds that rights depend on the capacity to exercise rights, then the child or young person accused of a criminal offence – if he or she is deemed competent to commit a criminal offence – must be competent to exercise a right. However, the clear problem with saying that children and young people have the same rights as adults in the criminal justice system, is the corollary argument that children and young people should have the same responsibilities for offending. Children and young people obviously do not have the same maturity and attributes as adults. This is the basis for treating children and young people in a separate youth justice system.

B. Application of the Interest Theory

The interest theory would view a right as the protection of an interest of sufficient importance to impose on others certain duties in order to permit the right holder to enjoy that right. Taking again the example of a right to the free services of a lawyer, the interest theory would view this right as my possessing an interest in having free legal advice which is important enough for others to be under an enforceable duty to provide me with such services. If the interest theory prevails, children and young people have interests that can be protected by rights. According to the interest theory, while all humans have interests that need to be protected, some humans (children and young people, the disabled, and the unconscious) do not have the capacity to exercise choice. Prima facie, the interest theory would appear preferable for younger children because it allows the idea of children and young people’s rights without reference to their power to obligate others, which must depend on competence to make choices. But can actions taken solely in the furtherance of a child or young person’s interests properly acknowledge the moral worth of the child or young person?241 Some children or young people, especially younger children, may lack the fully developed cognitive abilities e.g. the appreciation of consequences, and it is correct to say that most children and young people are in need of protection due to their vulnerability and their lesser capacities. The foremost criticism of the interest theory is that the arguments presented for denying children and young people rights could just as easily be used to deny the same rights to


241 See Chapter 9(III)(C).
sections of the adult community. Children and young people are not unique in lacking certain cognitive abilities. If competence, experience or understanding was the test, Freeman says, many adults could be denied rights.

1. **Protection a basis for rights**

Some commentators follow what Rogers and Wrightsman would describe as the nurturance orientation. These believe that society must protect children and young people from harm, and decisions involving children and young people should be determined by their best interests. What is deemed desirable for children and young people is decided by authority figures such as parents, caregivers, social workers and the judiciary. The protectionist sees a duty to create rights for children and young people based on their lesser abilities and capacities which leave them weaker and more vulnerable than adults. The purpose of the rights is to protect the right-holder's interests. Although Federle concedes that 'rights for excluded groups evolve from paternalistic notions of the need to protect the weak and care for the ignorant to fuller accounts that recognise autonomy and competence, for this has been the experience of women and minorities', it is plain that the legal status of children and young people is different from other oppressed groups seeking to have their rights recognised or vindicated. According to O'Neill, the fundamental difference between oppressed groups such as people of colour and women, and children and young people, is that children and young people's powerlessness is transitory. While her 'main remedy' for children and young people's powerlessness and dependency is for them to 'grow up', this is clearly an unsatisfactory remedy.

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245 See Chapter 9(III)(C).


Significantly though, viewing children and young people’s rights solely as interests that need to be protected inevitably results in paternalistic interventions which promote the child or young person’s dependence and incapacity. On the merits of the ‘protection of interests’ theory in relation to children and young people, Federle suggests that this theory may promote the powerlessness of children and young people by propagating a ‘caretaker ideology’. Federle emphasises that the court’s interpretation of what is in children and young people’s interests has ‘actively’ disadvantaged children and young people. This can be directly related to the unfair and indeterminate treatment which may occur when the justice system has the youth offender’s ‘best interests’ as its avowed purpose. Benevolent though the aim may be, actions taken by authority in the furtherance of the child or young person’s interests have the potential to be indeterminate and unfair.

2. The ‘caregiver’ ideology

Another strain of the protectionist ideology holds that children and young people’s care-givers will adequately safeguard their needs and interests, and thus there is no need for children and young people to have rights. These would take a laissez-faire attitude that the parents or other adults in charge of the child or young person will have the child or young person’s best interests at heart. This argument is commonly applied in the debate surrounding family autonomy in family law proceedings but also has relevance to youth justice. In their series of books, Goldstein, Goldstein, Freud and Solnit argue that childhood is a time of dependency and incompetence; and are in favour of giving parents far-reaching autonomy in decisions regarding their children and young people. Their views have been criticised as placing limitations on state intervention which could be detrimental in the cases of children and young people who are being abused or neglected. The non-interventionist stance can be traced to


250 Katherine Hunt Federle, ‘Children, Curfews and the Constitution (1995) 73 Washington University Law Quarterly 1315. Federle discusses how courts in the United States have permitted significant intrusions in the lives of children and young people (e.g. curfews) on the basis of protection of the child or young person’s interests.


252 See Chapter 2(V)(A), and Chapter 13(V).


common law ideas of the inviolability of the family which was discussed earlier in this thesis.\textsuperscript{255}

This non-interventionist ideology can be construed as viewing the child or young person not as an individual right-holder but as a part of a broader familial and societal rights network.\textsuperscript{256} This construction could have a number of effects on the child or young person in the youth justice system. On one hand, the 'caretaker' ideology can affect the child or young person's participation in proceedings (in formal judicial proceedings or informal events such as the youth justice FGC) as the proceedings become a discussion between adults on how best to manage the child or young person's offending behaviour. This has been consistently observed in studies of youth court dispositions. For instance, in Naffine's study of youth courts in Australia, the author's 'overwhelming impression' of the proceedings was that of administrative efficiency: 'with experts running the matter, it is possible to proceed with the aid of a sort of legal shorthand...the norm is for defendants to remain completely silent'.\textsuperscript{257} The construct weakens the child or young person as an individual. It is suggested that restorative justice holds similar views in relation to individualism, viewing the youth offender less as an individual and more as a member of his or her (extended) family and community.\textsuperscript{258} While there is undeniably a benefit in involving the child or young person's family and community in dealing with a child or young person's offending, it is vital not to lose sight of the child or young person as an individual right-holder.\textsuperscript{259} The interrelationship in the CYPF Act between the rights of the child or young person and the rights of other groups such as the family of the child or young person and the victim of the offence, is discussed more fully in a later chapter.\textsuperscript{260}

\textsuperscript{255} Chapter 2(II)(B).

\textsuperscript{256} See also Jennifer Nedelsky 'Re-conceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 \textit{Yale Journal of Law and Feminism} 7.


\textsuperscript{258} See Chapter 7(II), and Chapter 12(IV).

\textsuperscript{259} See Chapter 7(IV).

\textsuperscript{260} See Chapter 4(IV)(C).
That is not to deny the importance of moral values in a child or young person's life. Wardle has warned of the dangers of the overuse of the rhetoric of rights in relation to children and young people and is critical of those who hold a 'mystical belief' in the powers of rights. Feminist thought views rights as being premised on relationships and interdependence rather than creating conflict and promoting individualism. Many feminist commentators reject the notions of autonomy and individual rights in favour of discussion which focuses on relationships and interdependence. There has been some debate as to whether children and young people's needs and interests are served best by the legalistic nature of rights at all. There is a clear parallel here with the kinds of arguments mounted against the need for rights in potentially restorative processes such as the youth justice FGC. Some argue that these processes have a higher purpose such as reconciliation and re-integration, thus rights are not needed. Further, it is argued that such processes are family-based and communitarian, and thus individual rights are not needed.

III. A THEORETICAL FRAME OF REFERENCE: THE DUAL STATUS OF THE CHILD OR YOUNG PERSON IN THE YOUTH JUSTICE SYSTEM

The above discussion has examined the application of the prevailing theories of rights to the situation of the child or young person in the youth justice system. Under the will theory, if a child or young person is competent in a criminal sense, it should follow that the child or young person must be competent in the sense of exercising a right. If this is true, a child or young person considered to have infringed the criminal law should not be any worse off in terms of rights than an adult in the same situation. As Sebba has commented:

> to posit that the rights of minors in the justice system should be examined from the perspective of general principles of rights is not necessarily to argue that juveniles are to be equated with adults, but rather that the same philosophical framework be adopted ab initio.

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264 See Chapter 7(II).

265 See Chapter 7(III).

The child or young person considered to have infringed the criminal law must then be guaranteed at least the same protections accorded to an adult in the same situation (the right to legal counsel, the right to be heard, the right to present a defence, the presumption of innocence and so forth). 267

However, that is not to deny the child or young person extra rights based on his or her characteristics as a child or young person, e.g. immaturity and vulnerability. As was discussed in the preceding chapter, the welfare orientated youth court was meant to be non-adversarial in nature and had a broad discretion to facilitate understanding of the child or young person and his or her circumstances. 268 But, welfare-orientated youth justice with its ‘best interests’ approach often led to indeterminate sanctions and lack of participation by the child or young person. In reality, welfare focused systems embraced the protectionist ideology to the point that it did not resemble a criminal court in any shape or form. A ‘kangaroo court’ is how one of the presiding Justices in Re Gault described it. 269 As Federle illustrates, young people generally have not been advantaged by paternalistic behaviours on the part of the state. 270

Procedural due process is a right of protection for the child or young person against the abuse of unchecked state (adult) power. The important issue is that the child or young person is not disadvantaged in terms of rights simply by being a child or young person. An analogy may be drawn with international human rights law: although children and young people may have additional rights based on their characteristics as children or young people, their basic rights as persons are not affected. 271

Some have questioned whether the child or young person who commits a criminal offence should be regarded primarily as a child or young person, or as an offender. 272 Is such a distinction necessary? On the one hand, it is vital to ensure that children and young people accused or convicted of a criminal offence are not worse off than an adult in the same situation by virtue of being a child or young person (e.g. by receiving a harsher sentence than

267 See Chapters 4, 8, 9, 10, 11 12 and 13.

268 See Chapter 2(V).


an adult would for the same offence or not being permitted to speak in his or her own
defence). On the other hand, there must be recognition that children and young people have
different needs due to their innate vulnerability and immaturity. As Freeman has stated, 'to
take children's rights seriously requires us to take seriously nurturance and self-
determination'.273 The youth justice system should not have to choose between protecting
children and young people and protecting their rights.

IV. CONCLUSION

This chapter has discussed the general theoretical foundations of the rights of children and
young people. As noted, it is the application of existing rights standards to the different model
of the youth justice FGC which is the focus of this research, rather than an in depth analysis
of the theoretical foundations of the rights of children and young people. Nonetheless, it is
important to have a theoretical frame of reference to lead into the discussion of the sources of
rights for children and young people, which is the subject of the next chapter. The application
of the prevailing theories of rights to the particular situation of the child or young person, and
the shortcomings of these theoretical approaches was considered. The theoretical approach
which will be used here is the concept of the child or young person in the youth justice system
as having a dual status as accused/offender and child or young person. The child or young
person should not be any worse off in terms of rights than an adult in the same situation, but
should be entitled to extra protections based on his or her status as a child or young person.

273 MDA Freeman, 'The Limits of Children's Rights' in MDA Freeman and Philip Veerman (eds.), The
Ideologies of Children's Rights (Dordrecht: Martinus Nijhoff Publishers, 1992), 98 [author's italics].
CHAPTER FOUR: BENCHMARKS FOR THE RIGHTS OF THE YOUNG PERSON IN THE YOUTH JUSTICE SYSTEM

State-sanctioned human rights are vital for regulating the tyrannies of informal justice.\(^{274}\)

I. INTRODUCTION

The preceding chapter has set out the theoretical foundations of children and young people’s rights and argued the importance of such rights. This chapter will set out the rights standards which will be used to evaluate the youth justice FGSC. There is a distinct lack of commentary on the rights of children and young people in the youth justice system in New Zealand, with the exception of the official non-governmental reports to the United Nations Committee on the Rights of the Child.\(^{275}\) Therefore it is necessary to discuss rights standards in more detail than originally envisaged at the initial stages of this research, including their legal status in international and domestic law.

Sources of rights for the child or young person in the youth justice system are in three categories, which will be considered separately. The first category of rights is those rights derived from international law to which New Zealand has agreed to be bound. This encompasses relevant provisions of the International Covenant on Civil and Political Rights and as well as the specific human rights convention for children and young people: the United Nations Convention on the Rights of the Child. The standards for youth justice contained in the non-binding standards such as the United Nations Standard Minimum Rules on the Administration of Juvenile Justice are also pertinent. This chapter will set out the legal status of these international instruments, as well as their application to the child or young person in the New Zealand youth justice system. The second category of rights is those derived from

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domestic human rights legislation: the Bill of Rights Act 1990. The legal status of the rights contained in this Act will be discussed, as well as their application to the particular situation of the child or young person in the youth justice system. The third category is the young person’s rights within the theoretical framework of the CYPF Act. Specific rights are the subject of the substantive chapters, but a general overview will be given here of the rights framework in the CYPF Act.

The framework of rights explored in this chapter will provide the benchmarks against which the youth justice FGC can be evaluated from a rights perspective. It will be apparent from an examination of these rights standards that most were drafted with the formal adversarial (or inquisitorial) criminal process in mind. One of the key theoretical issues in this thesis is the application of rights standards to the extra-judicial criminal process represented by the FGC. This issue is considered in a separate chapter, and in the context of the specific areas of rights that are analysed in the substantive chapters.

II. RIGHTS DERIVED FROM INTERNATIONAL LAW

A. Application of General Human Rights Instruments

Relevant here are certain sections of the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights. The Universal Declaration of Human Rights is the United Nations’ post-war declaration on the rights of mankind. It sets out the rights enjoyed by all human beings based on the ‘dignity and worth of the human person’. People share certain immutable characteristics that are typical of all members of the human race. Article 1 of the UDHR states that all humans are equal in dignity and rights, and children and young people as young humans would fall within this definition.

The International Covenant on Civil and Political Rights codifies the rights set out in the UDHR, and, unlike the UDHR is legally binding on States Parties. New Zealand signed the

276 Chapter 7.


278 Preamble of the Universal Declaration of Human Rights.


ICCPR on 12th November 1968 and ratified it on 28th December 1978. One of the purposes of the New Zealand Bill of Rights Act 1990 was to incorporate the protections of the ICCPR into domestic law. The Preamble to the ICCPR also extends its protections to all members of the human race based on the ‘inherent dignity’ and the ‘equal and inalienable rights of all members of the human family’. Children and young people in the criminal justice system (as members of the human family) possess the rights of due process enshrined in the ICCPR. These include basic rights of criminal procedure like the presumption of innocence, the right not to be arbitrarily detained, and the right to appeal to a higher authority.

In addition to the rights accorded to all persons in the criminal justice system, the ICCPR also provides some specific rights for children and young people, and was the first international human rights convention to impose an express obligation on States Parties to provide a separate and different procedure for children and young people involved in the criminal justice system. Article 10.2(b) provides that ‘children’ accused of criminal offending must be separated from adult accused and that their cases must be determined as promptly as possible. Article 10.3 mandates that child offenders be treated separately from adults and in a manner suitable to their age and maturity. What is the definition of child or juvenile in the ICCPR? There is no definition supplied in the ICCPR, but the Human Rights Committee is of the opinion that all those under the age of eighteen years should be treated as juveniles. Article 14.4 then states that ‘in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation’.


1. Introduction

As was explored in Chapter 2, early international law concerning children and young people was firmly based on a care and protection ideology and was not legally binding. 1979 was

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281 See the Preamble which states that it is ‘An Act ...(b) To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights’.

282 Article 14(2), ICCPR.

283 Article 9(1), ICCPR.

284 Article 14(5), ICCPR.


286 See further Chapter 13(II).

287 See Chapter 2(IV).
the International Year of the Child and the publicity it gained gave an impetus to the adoption of the United Nations Convention on the Rights of the Child\textsuperscript{288} in 1989. The CRC stands out from other human rights standards as having reached ‘virtual universality’.\textsuperscript{289} The CRC moved beyond protection rights, providing for over forty different rights, not only civil and political rights but also social, economic, cultural and humanitarian rights.\textsuperscript{290} The CRC ‘assumes that the child is not merely an object of solicitude and care. [Rather] the child is a subject of fundamental rights and basic liberties.’\textsuperscript{291}

2. The relationship with other human rights instruments

The CRC contains many rights that have been set down in previous human rights instruments such as the presumption of innocence.\textsuperscript{292} It also recognises additional rights, for instance the right to be heard and the right to participate.\textsuperscript{293} Conversely, the ICCPR contains some rights which are not found in the CRC, such as the prohibition on double jeopardy.\textsuperscript{294}

Given the existence of this child and young person-specific rights instrument, does this mean that the rights applying to all human beings which are codified in general human rights documents such as the ICCPR no longer apply to children and young people? Frances Olsen has commented that rights for women and children and young people are usually seen as ‘complementary, not as zero sum game’.\textsuperscript{295} The question then arises as to what greater legal


\textsuperscript{289} Rebecca Rios-Kohn, ‘The Convention on the Rights of the Child: Progress and Challenges’ (1998) 5 \textit{Georgetown Journal on Fighting Poverty} 139, 140. All but two (the United States and Somalia) of the world’s nations have either signed or ratified the Convention. The United States participated fully in the drafting process of the CRC and became a signatory in February 1995; however the CRC has not yet been transmitted to the Senate by the White House to facilitate the commencement of the ratification process. See further Paula Donnolo and Kim K Azzarelli, ‘Ignoring the Human Rights of Children: A Perspective on America’s Failure to Ratify the United Nations Convention on the Rights of the Child’ (1996) 5 \textit{Journal of Law and Policy} 203.


\textsuperscript{292} Article 2(b)(i). CRC.

\textsuperscript{293} Article 12. CRC.

\textsuperscript{294} Article 10, ICCPR.

protection is afforded to the child or young person by the CRC, as most of the standards contained there are simply a restatement of those found in other human rights instruments. The CRC affirms the application of existing human rights standards to children and young people. Lopatka states that:

A grant to the child of certain additional human rights that are specific to him or her, or adjustment of the rights due to all the child's properties, is by no means exceptional in the system of promotion and protection of human rights...certain additional human rights have been granted to these groups of persons who are weaker than the others for a variety of reasons.

Thus the provision of extra rights for children and young people on the basis of their special characteristics (e.g. immaturity and vulnerability, as recognised in the Preamble to the CRC) does not negate the rights that they possess as human persons. The fact that children and young people have special rights does not mean that the generally recognised rights cease to apply. According to Heintze, 'the duplication of the language from prior instruments should not automatically distract from the promotion of the human rights of children'. Article 40, which sets out the rights of the child or young person alleged or accused of infringing the criminal law begins with the phrase; 'having regard to the relevant provisions of international law'. Does this mean that any provisions of the CRC must conform to the other provisions of international law? The answer lies in Article 41 of the CRC which may be described as a 'savings' clause. It states that:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
(a) the law of a State Party; or
(b) International Law in force for that State.

This clause is a common feature of international human rights instruments, and reflects a concern by States Parties that child-specific protections would not derogate from the protections agreed to by States Parties in the ICCPR. The purpose of such a clause is to ensure that human rights instruments specific to a group are not used by States Parties as a


299 For example Article 5.2 of the ICCPR and Article 60 of the European Convention on Human Rights.

basis for ‘denying or limiting other more favourable or more extensive’ rights already provided for the individual under international or national law. 301

3. Legal status of the CRC in international law
The CRC represents the first human rights treaty specifically concerned with the rights of children and young people. 302 At the time of the 1959 Declaration on the Rights of the Child a majority of United Nations Member States had opposed the introduction of a binding treaty, 303 and so the resulting document was not legally binding. With the introduction of the CRC, international law shifted to an approach which holds governments legally accountable. 304 The CRC is a treaty based instrument and is therefore legally binding on States Parties who undertake to fulfil its obligations. However, the only international implementation mechanism provided for in the CRC is the system of periodic reporting by States Parties to the relevant human rights treaty body, the Committee on the Rights of the Child. 305 The Committee’s procedures are cumbersome and are not readily adaptable to emergency situations. There is no provision for ad hoc recommendations, nor is there a mechanism for individual complaints to be brought before the Committee. The CRC presently has only two monitoring mechanisms available: the monitoring treaty body that receives reports, and the provision of technical assistance. Once the reports are received and reviewed, 306 the Committee simply makes suggestions and other forms of constructive criticism to the State Party. This method of assuring compliance is limited by the signatories’ willingness to comply. 307 It does not


302 The ICCPR contained some references to the administration of youth justice. Article 10.2 provides for the separation of accused youth from adult accused and for speedy adjudication in their cases. Article 14.4 provides that the trial procedures for youth should take the age of the youth into account and emphasize their rehabilitation.


306 These reports must detail the ‘measures they have adopted which give effect to the rights recognized [in the CRC] and on the progress made on the enjoyment of those rights.’ (Article 44 (i)) States Parties must also ‘indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention.’ (Article 44.2).

actually punish non-compliance with the CRC or force compliance in the future, though compliance is 'requested' by the Committee. Moreover, there is no provision that allows for complaints from third parties regarding violations of the CRC, whether by individuals or organizations within or outside of that state. In carrying out its work, the Committee does not take a confrontational approach but rather seeks to engage States Parties in a constructive dialogue with a view to critically assessing the situation of children and young people and encouraging cooperation for implementation of the CRC.\textsuperscript{308} Indeed, the essential aim of the international monitoring process is not to replace but to strengthen the national capacity to ensure and monitor the realization of children and young people's rights.\textsuperscript{309}

The individual communication procedure, as provided by the Optional Protocol to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination,\textsuperscript{310} and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,\textsuperscript{311} allows individuals alleging human rights violations by a State Party (and not attributable to an individual) to lodge complaints to the monitoring body (e.g. the Human Rights Committee for the ICCPR). However, the CRC did not provide for an individual communications procedure, as the function of the Committee is only to engage in a continued constructive dialogue with States Parties. The Committee is not a court and does not intervene in individual cases. It is, therefore, at the national level that the implementation of the CRC is most critical and that the role of the judiciary is fundamental.\textsuperscript{312} Although reports to the Committee show that in many countries the ratification of the CRC has brought about legislative reform and other important measures, the only option currently available is for an individual to claim his or her rights under the CRC through the domestic courts.\textsuperscript{313} The weight


\textsuperscript{309} General Guidelines Regarding Reports (UN document CRC/C/58) (Adopted by the Committee at its 343rd meeting, 11 October 1996).


\textsuperscript{313} In at least thirteen legal systems, the courts have cited the CRC in legal opinions. These include: Australia, Canada, England and Wales, Federal Republic of Germany, France, India, Ireland, Italy, New Zealand, Northern Ireland, Scotland, South Africa and the United States of America. See Jonathon Todres, ‘Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and its Early Case Law’ (1998) 30 Columbia Human Rights Law Review 159, 268.
that a national court can accord the CRC depends upon the legal system of the state regarding the use of international law, the applicable national laws, and the willingness of domestic courts to hear arguments based on international human rights laws.\textsuperscript{314} The Committee is also not empowered to impose sanctions on States Parties who are in contravention of the CRC.\textsuperscript{315} The CRC is a significant milestone, but it is unrealistic to expect poorer countries to ensure that their national youth justice systems comply with the CRC when a large proportion of them struggle to vindicate their children's basic right to life and adequate nutrition. In addition, the majority of developed countries have not yet implemented the provisions of the CRC.\textsuperscript{316}

4. Legal status of the CRC in New Zealand

The CRC was signed by New Zealand on 1st October 1990 and ratified on 12\textsuperscript{th} March 1993 (subject to three formal reservations).\textsuperscript{317} New Zealand has not formally incorporated the CRC into domestic law.\textsuperscript{318} Given the lack of legal commentary on the subject of the CRC in New Zealand,\textsuperscript{319} it is necessary to discuss its legal status.

The traditional view of unincorporated international human rights treaties in New Zealand is that which was expressed by Lord Atkin in \textit{Attorney-General for Canada v Attorney General for Ontario}.\textsuperscript{320} As Geiringer explains this view envisages:

\begin{quote}
\[\text{an}\] orthodox "dualist" conception of the relationship between international and domestic law in which the two are envisaged as independent and largely unconnected legal systems. The primary rationales for dualism are the doctrines of separation of powers and parliamentary sovereignty. Treaty making is, in New Zealand’s constitutional tradition, a function of the executive government. The power to enact
\end{quote}


\textsuperscript{315} See http://www.unicef.org/crc/monitoring.htm (last viewed 11 October 2008).


\textsuperscript{317} See the text of New Zealand's reservations at http://www.unhchr.ch/html/menu3/b/treaty15.asp.htm (last viewed 11 November 2007). The third reservation is the only one directly related to youth justice. New Zealand has reserved the right to mix juveniles and adults in correctional facilities.

\textsuperscript{318} There has been some incorporation in the Care of Children Act 2004. For more detail on the relationship between international law and domestic law in New Zealand see the Law Commission Report, \textit{A New Zealand Guide to International Law and Its Sources} (Wellington: Law Commission, 1996).


\textsuperscript{320} [1937] AC 326, 347.
laws is, on the other hand, the province of Parliament. Accordingly, for treaty obligations entered into by the executive to be given force of law within New Zealand, those obligations must, in keeping with orthodox doctrine, be "transformed" through a process of legislative implementation.\textsuperscript{321}

Some later judgments may counter this traditional dualist view of the legal status of the CRC's provisions.\textsuperscript{322} The CRC has been cited in argument in the New Zealand courts, principally in family law and immigration law cases, most notably by the Court of Appeal in the \textit{Tavita} case.\textsuperscript{323} The case involved a judicial review of an immigration removal warrant served against a Western Samoan overstayer. The man concerned had married a New Zealand resident, with whom he had a child. The child was automatically a New Zealand citizen by virtue of being born in the country. The applicant was the child's primary caregiver and cited Article 9 of the CRC, which inter alia, maintains the child or young person's right not to be separated from his or her parents (except by competent authorities).\textsuperscript{324} In the course of the judgment, there was discussion of the status in domestic law of New Zealand's international obligations (such as the CRC) where the President of the Court of Appeal, Sir Robin Cooke (as he then was) stated that:

\begin{quote}
    a failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism should extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention human rights, norms or obligations, the executive is necessarily free to ignore them.\textsuperscript{325}
\end{quote}

Geiringer argues that \textit{Tavita} represented 'a new era in the judicial use of international human rights'\textsuperscript{326} (it was of course an interim decision). However, in subsequent cases with similar factual scenarios, the courts appear reluctant to rule conclusively on the status of unincorporated human rights treaties like the CRC.\textsuperscript{327} Notable though, is the fact that the New

\begin{itemize}
    
    
    \item [\textsuperscript{323}] \textit{Tavita v Minister of Immigration and Attorney General} [1994] NZFLR 97.
    
    \item [\textsuperscript{324}] It turned out that the decision to issue a warrant for the applicant's removal had been made before the birth of the child so the CRC was not relevant at the time. The case was adjourned to allow the Minister of Immigration to re-consider the case in the light of the child's New Zealand citizenship.
    
    \item [\textsuperscript{325}] [1994] NZFLR 97, 107.
    
    
    \item [\textsuperscript{327}] Rajan v Minister of Immigration [1996] 3 NZLR 543; Puli'wea v Removal Review Authority [1996] 3 NZLR 538.
\end{itemize}
Zealand Immigration Service and the Removal Review Authority appear to have proceeded on the basis that Tavita is good law. In a similar vein to Tavita is the Australian case of Teoh.

Cooke P is quoted above in Tavita as warning that ‘a failure to give practical effect’ to the conventions which New Zealand is party might attract criticism. What does giving ‘practical effect’ mean? The Court’s statement in Tavita and the citing of the CRC in a number of other cases involving children and young people may be indicative of a more rights based approach to children and young people by the courts and a recognition that children and young people must be considered as principals in cases involving them. In the case of Re the W Children, Judge Inglis QC described the CRC as a ‘useful touchstone’ which was ‘legitimate, even essential to fall back on… when the Court was required to ensure that the fundamental rights of the child were recognised and protected’. The Judge appeared to consider the CRC as not truly determinative but as a guiding principle.

In New Zealand Air Line Pilots’ Association Inc v Attorney-General, Keith J stated that it was a ‘presumption of statutory interpretation’ that in ‘so far as its wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations’. Although the Bangalore Principles referred to the duty of the judiciary to interpret and apply the law in the light of the universality of human rights, the judiciary’s approach to the status

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328 See Removal Review Authority decisions at www.removalreviewauthority.govt.nz (last viewed 21 August 2007) e.g. Removal Appeal Nos 46278, 46284, 46285.

329 A Malaysian national facing deportation proceedings from Australia argued that the CRC would have to be taken into account as deportation would have a negative effect on children and family life. Although Australia had not incorporated the CRC, the Australian High Court stated; ‘The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law…A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law…’ Minister for Immigration and Ethnic Affairs v Teoh (1995) CLR 273 para 28, per Mason CJ and Deane J.


of the rights contained in the CRC remains ambiguous. New Zealand's relationship with international human rights law was arguably advanced by increased rights consciousness due to the enactment of the NZBOR Act in 1990.335

In contrast to these family law cases, the CRC is rarely cited in youth justice cases.336 In a recent unreported High Court decision, Gendall J stated that 'it is beyond doubt that sentencing Courts in New Zealand must have regard to the United Nations Convention on the Rights of the Child'.337 In addition, in Police v H (a young person), Thorburn DCJ recognised the importance of the CRC, arguing that 'having ratified the Articles of the Convention on the Rights of the Child, New Zealand’s alignment with that international instrument would generally be conveying the message to the community of nations that special protections and procedures for juveniles are in the public interest'.338 Overall though, there is little mention of the CRC's youth justice provisions in the case law. Of course, most offending by young people is resolved outside the court system,339 and Youth Court cases are largely unreported.

5. What are the characteristics of a CRC compliant youth justice system?

The purpose of this chapter is to set out the rights framework which will be used to evaluate a particular legal process (the youth justice FGC) from a rights perspective. The main body of this thesis will be taken up with analysing the three key areas of rights (legal assistance, how the offence is established, and sanctions resulting from the FGC) using the international and national rights standards set out here. Thus the applicable provisions of the CRC will be analysed in greater detail in their specific context. Nonetheless, it is useful to give a broad overview here of what constitutes a CRC compliant youth justice system.340


336 Superior court decisions where the CRC has been cited include Attorney General v Youth Court at Manakau [2007] NZFLR 103 (delay) and R v H 20/07/02, CA 215-02 (rights of young person when being questioned by Police).


Article 40 of the CRC is the key provision dealing with the rights of children and young people in the youth justice system. Essentially, the child or young person is afforded the same basic rights as an adult in the criminal justice system. These include the presumption of innocence, the prohibition on retrospectivity and the right to legal assistance. The child or young person then has certain extra rights based on his or her status as a child or young person, e.g. the CRC requires that the best interests of the child or young person should be a primary consideration in all matters affecting them. The recent General Comment issued by the Committee on the Rights of the Child provides specific guidance on the rights of the child or young person in the youth justice system. The General Comment reiterates the importance of key principles of the CRC such as non-discrimination and best interests.

Further guidance was also provided by the Committee on the Rights of the Child in relation to contemporary youth justice processes, taking into account the increase in the prevalence of non-court dispositions, and the development of interventions such as restorative justice and family group conferencing. International standards for youth justice were generally formulated before the spread of more informal methods of dealing with offending like the youth justice FGC. Approaches like the FGC emphasise:

[the importance of participation and outcome, rather than the process as an end in itself. Nevertheless, international human rights law does set out minimum standards applicable to all criminal justice models, including restorative justice. These standards are now quite specific and include fundamental rights such as security of person and due process. Any model that relies upon criminal proceedings and sanctions and that fails to comply with these standards will be incompatible with international human rights law, whatever its aim.]

Above all the Committee on the Rights of the Child emphasises that when the child or young person is diverted from formal judicial proceedings, human rights and legal safeguards must always be respected.

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341 Article 40, CRC.
342 Article 3, CRC.
345 Kate Akester, Restoring Youth Justice – New Directions in Domestic and International Law and Practice (London: Justice, 2000), 13.
346 Article 40.3(b), CRC. See especially Chapter 11.
6. Can the CRC's general principles limit rights?

As noted, the CRC obliges States Parties to ensure that children and young people have certain rights when they are accused or convicted of a criminal offence. Are these rights absolute in all situations? The CRC provides certain guiding principles to aid interpretation of the CRC’s provisions. Article 3 is central in the interpretation of the CRC. It requires that the best interests of the child or young person be a primary consideration in all actions and proceedings concerning children and young people. This has been taken to indicate that the best interests of the child or young person are a consideration of ‘first importance among other considerations, but that they do not have absolute priority above other considerations’. The definitions and application of this standard has provoked much debate. For example, could States Parties interpret this to mean that the right of the child or young person to legal representation was not in the child or young person’s best interests? Van Bueren has suggested that ‘the rights in the CRC may be used as signposts by which the best interests of the child may be identified.’ So would there be a presumption that the rights in the CRC are in the best interests of the child or young person? Does the CRC provide the ‘broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests standard’? Alston comments that the use of the phrase ‘a primary consideration’ rather than ‘the primary consideration’ means that the best interests standard has not been completely rejected but rather it permits a certain flexibility that would allow other people’s interests to prevail in certain extreme cases.

347 In the New Zealand case law see Hullia v Chief Executive Department of Labour [1999] NZAR 412, Huang Xiao Qiong v Minister of Immigration [2007] NZAR 163.


350 See Chapter 9(III).


Article 4 forms the basis of a State Party’s obligations when it accedes to the CRC. States Parties are to undertake ‘all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in this Convention’. Lesser standards are set for ‘economic, social and cultural rights’ in regard to which States Parties are only obliged to ‘undertake such measures to the maximum extent of their available resources’. It follows that the more onerous obligations, applicable to all rights other than economic, social and cultural (i.e. civil and political rights) are not subject to availability of resources.  

Further, Article 5 of the Convention obliges States Parties to:

...respect the responsibilities, rights and duties of parents or, where applicable, the members if the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

What does this mean? This Article’s intention is the recognition of the role that parents have in guiding the child or young person in his/her exercise of rights. But, in practice, those responsible for providing guidance for the child may have an interest in the child or young person not exercising their rights or exercising them in a certain way. For instance, a parent may believe that legal advice is not necessary in the youth court system because of a belief that outcomes will be benign. The word ‘appropriate’ introduces an objective element. The relationship between the rights of the young person and the rights of the family under the CYPF Act is considered later in this chapter.

Eekeelar poses the question: can any of these principles ‘cut down on the substance of the specific rights inasfar as such rights are delineated in the Convention’? His answer is that they cannot. Article 41 of the CRC confirms Eekelaar’s view. It states:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
(a) The law of a State party; or
(b) International law in force for that State.


This clause mandates that the CRC must not disadvantage the child by allowing States Parties a ‘get-out clause’ from their obligations under other human rights conventions such as the ICCPR.

C. The ‘Beijing Rules’

In the youth justice sphere, the provisions of the CRC are complemented by the Standard Minimum Rules for the Administration of Juvenile Justice. These Rules are not a legally binding treaty of themselves, being simply United Nations recommendations on minimum standards for national youth justice systems. The Beijing Rules were formulated before the CRC was signed. Nonetheless, some of the Beijing Rules are re-statements of binding international standards. For example, Rule 7.1 affirms the presumption of innocence which at the time was internationally recognised by both Article 11 of the UDHR and Article 14 of the ICCPR, and was later included in Article 40.2(a)(i) of the CRC. In addition, the Beijing Rules may provide more detail on the content of rights contained in the CRC. For example, the CRC requires that where possible, States Parties divert children and young people from judicial proceedings. The Beijing Rules then provide more detailed guidelines on such diversion schemes, e.g. by recommending that children and young people should freely consent to involvement in diversion. The Beijing Rules provide principles on which national youth justice systems should operate, which are general enough to be applicable to differing national legal systems and codes. Other human rights instruments provide guidelines for the prevention of youth offending, and standards for the treatment of children and young people in detention. What of the effect of the Rules on domestic New Zealand law? The Beijing


358 Article 40, CRC.

359 Rule 11.3, Beijing Rules.


Rules are technically ‘soft law’ and thus are not binding on states. However, Van Bueren has commented that:

One of the extraordinary but unchallenged extensions of the UN Committee [on the Rights of the Child]’s mandate is in relation to the legal force it ascribes to the three sets of UN Rules. Rather than seeing them as mainly non-binding per se, States appear to have accepted without comment the application of the rules to the child criminal justice system.

D. The Value of International Law for the Child or Young Person

Freeman has stressed the importance of the CRC as being ‘the fullest legal statement of children’s rights to be found anywhere’. He goes on to argue that ‘no international convention before or since has so ignited world opinion’. In terms of the rights of the child or young person in the youth justice system, international law is specifically designed to be general enough to cover differing legal systems and cultures. Nevertheless, international law does stress the importance of a minimum guarantee of rights, including due process rights and the expectation of proportionate, fair and rational sanctions. As noted, enforcement mechanisms are cumbersome and international law must be implemented and supported by States Parties to attain its full purpose. The gaps between law and practice are often wide and rights are useless without services to back them up. The situation in many countries remains that children and young people in the criminal justice system are suffering the worst of both worlds: they are not accorded the full selection of rights which adult offenders possess, nor are they accorded the considerations extended to children and young people in civil law proceedings.

Moving to the specific New Zealand context, the status of the CRC in domestic law remains interpretative rather than definitive. Nonetheless, the CRC has a vital role in providing a benchmark against which the New Zealand youth justice system can be measured. The reporting process to the Committee on the Rights of the Child has identified a number of


major rights issues with the system – including a low age of criminal responsibility, mixing of adults and youth in custodial institutions and lack of meaningful participation by children and young people.\textsuperscript{369} The alternative report submitted by a coalition of New Zealand NGOs has been particularly useful in identifying deficiencies in legislation and practice.\textsuperscript{370}

Proposals to enact the CRC into domestic legislation or to enshrine its importance in the youth justice legislation have not been successful.\textsuperscript{371} Thus, although the CRC is ‘very persuasive’,\textsuperscript{372} it cannot override legislation. In its reports to the Committee on the Rights of the Child, New Zealand has stated that it ‘takes its obligations under United Nations human rights machinery seriously’ and reiterates its ‘strong commitment to ensuring that the rights of children are protected’.\textsuperscript{373} At a policy level, the profile of the CRC has been raised in recent years, with a five year work plan towards compliance developed.\textsuperscript{374}

In relation to the use of the CRC as a benchmark for improving practice, the legislation governing youth justice – the CYPF Act– is currently under review by the Ministry of Social Development. The Discussion Document relating to the review emphasises the importance of ensuring that any legislative developments reflect New Zealand’s commitments under the CRC.\textsuperscript{375} International standards such as the CRC provide clear benchmarks for legislation and practice, especially as New Zealand lacks the protections of a written constitution or a European Convention on Human Rights. Unlike children and young people in European


countries, children and young people in New Zealand are unable to take cases to an international human rights body. There is a developing jurisprudence around the rights of children and young people under the ECHR, which acts as a useful check on the actions of states.\textsuperscript{376} There is of course no individual right of petition to the Committee on the Rights of the Child.

E. Concluding Remarks

This section has considered international standards for the rights of children and young people in the youth justice system. Children and young people have the same minimum guarantees as adults in the criminal justice system. Rights such as the presumption of innocence, the prohibition on retrospectivity and the right to legal assistance are guaranteed under the ICCPR and the CRC. The CRC contains extra rights for children and young people, such as the right to participate and the right to be heard in matters affecting the child or young person.

As the CRC is to be an important benchmark for this research, the legal status of the CRC in both international and domestic law was considered. The CRC is a binding international legal instrument to which New Zealand has agreed to be bound. The legal status of the CRC remains ambiguous in New Zealand, but the status of the CRC is improving. The CRC is increasingly being used as a benchmark for government policy and the Government is making efforts to ensure that legislation is in compliance.

III. RIGHTS DERIVED FROM DOMESTIC HUMAN RIGHTS LAW

A. The New Zealand Bill of Rights Act

The New Zealand Bill of Rights Act was enacted in 1990.\textsuperscript{377} It is domestic human rights legislation, reflecting ‘rights and freedoms long established in the Anglo-New Zealand tradition’.\textsuperscript{378} The Canadian Charter of Rights and Freedoms had an influence on the drafting of the NZBOR Act.\textsuperscript{379} The Preamble of the NZBOR Act describes its purpose as the affirmation

\textsuperscript{376} Ursula Kilkelly, \textit{The Child and the ECHR} (Aldershot: Ashgate, 1999)

\textsuperscript{377} Hereinafter NZBOR Act in the text.

\textsuperscript{378} Paul Rishworth, Grant Huscroft, Scott Optician and Richard Mahoney, \textit{The New Zealand Bill of Rights} (Melbourne: Oxford University Press, 2003), 1.

and promotion of human rights and fundamental freedoms and the expression of New Zealand’s commitments to the ICCPR. The aim of the NZBOR Act is to ‘create a set of rights for individuals which limit the power of executive, government and public actors’.\textsuperscript{380}

The caveat is that these purposes are to be achieved within the concept of parliamentary sovereignty.\textsuperscript{381} The NZBOR Act is unlike constitutional bills of rights in other jurisdictions,\textsuperscript{382} in that it cannot be used as a basis to strike down legislation.\textsuperscript{383} A meaning consistent with the rights protected in the NZBOR Act is preferred. However, if there is a direct conflict with the terms of the statute, the statute will remain in force.\textsuperscript{384} This situation has been criticised by the United Nations Human Rights Committee.\textsuperscript{385} The NZBOR Act can be considered to be an expression of fundamental values. It may be used in the purposive interpretation of legislation (such as the CYPF Act),\textsuperscript{386} and as a ‘benchmark for acceptable governmental conduct and law’.\textsuperscript{387} In addition, the courts have extended the ambit of the NZBOR Act to provide remedies for breaches of section 23 and section 22 despite the fact that Parliament did not include any express mention of remedies in the NZBOR Act. Simpson v A-G (Baigent’s Case) involved an appeal against the High Court striking out of the appellant’s cause of action against the police for an alleged unreasonable search of a dwelling.\textsuperscript{388} One of the appellant’s

\begin{footnotesize}
\begin{enumerate}
\item[382] Constitution of the United States of America, Canadian Charter of Rights and Freedoms and the Constitution of Ireland.
\item[386] \textit{Flickinger v Crown Colony of Hong Kong} [1991] 1 NZLR 439.
\item[388] [1994] 3 NZLR 60.
\end{enumerate}
\end{footnotesize}
claimed causes of action was that the police had breached section 21 of the NZBOR Act by conducting an unreasonable search of the dwelling. The Court of Appeal held that damages could be awarded despite the express absence of a remedies provision in the NZBOR Act. The usual remedy for such a breach, namely the exclusion of the evidence in question, was not considered appropriate as the appellant was innocent of any wrongdoing. This judgment demonstrated the Court's willingness to take a purposive approach to human rights legislation, i.e. a recognition on the part of the courts that effective remedies should be available for breaches of rights.

B. Application to the Youth Justice System

1. Minimum guarantee of rights in the criminal process

In the criminal law sphere, the significance of the NZBOR is in its affirmation and codification of the long-established minimum standards of criminal procedure which come from common law. In this regard, the NZBOR Act's function is to ensure the fair and humane treatment of such individuals. In this aspect, concern has been expressed that the NZBOR Act has the 'potential to harm the primary mission of criminal law, the protection of the public', by protecting the rights of 'those who victimise society'. It is true that societal opinion often criticises the substantial body of rights accorded to both adults and children accused or convicted of crimes.

In sections 21 to 26, the NZBOR Act clarifies the traditional protections for the accused which should apply equally to adults or children and young people, covering the minimum rights accorded to those arrested or detained, charged with an offence and in the determination of the charge. These include: the right to be presumed innocent until proven guilty, the right not to be compelled to confess guilt, the right to present a defence, to examine and hear witnesses, and to appeal the outcome.

391 s 25(c), NZBOR Act. See Chapters 10 and 11 on how the offence is established at the FGC.
392 s 25(d), NZBOR Act.
393 s 25(e), NZBOR Act.
394 s 25(f), NZBOR Act.
395 s 25(h), NZBOR Act.
2. Children and young people

While the rights mentioned above would apply equally to adults or children/young people in the criminal justice system, the only specific mention of the rights of the child or young person in the youth justice system is contained in section 25(i) of the NZBOR Act which provides that the 'child' charged with an offence has the right to 'be dealt with in a manner that takes into account the child’s age' in the determination of the charge. Note the use of the term 'child'. As discussed in the introductory chapter, the term 'child' refers in a youth justice context to those aged ten and over but under fourteen years. Does this mean that young people are not covered by this provision? This is unlikely, given that child offenders may not be prosecuted except in cases of homicide. In both Attorney General v Youth Court at Manakau and Trifilo v Police, section 25(i) of the NZBOR Act was held to apply to individuals who would be classed as young people in law. This is another example of the confusing spread of terminology used in New Zealand legislation in relation to young people in different legal contexts.

As for what the right 'to be dealt with in a manner that takes account of the child’s age' means, there is little judicial authority on the section. It is likely that this provision is derived from Article 14(4) of the ICCPR which states that 'in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation'. Unlike international standards which require that human rights and legal safeguards be ensured when the child or young person is diverted from the formal judicial system, the NZBOR Act does not contain any provisions dealing with diversionary or restorative justice processes.

3. Use of the NZBOR Act in youth justice cases

There is a lack of case law in the youth justice sphere in New Zealand. Most offending is dealt with outside the court system. However, searches of case law reveal that the NZBOR Act is used regularly in the reported cases. The NZBOR Act has been used recently in Youth Court

396 [2007] NZFLR 103.
397 [2006] DCR 796.
398 See Chapter 1(III) for a discussion on the confusing array of terminology used to describe those aged less than eighteen years in New Zealand law.
399 Article 40.2 (b), CRC.
cases involving the right to elect trial by jury, the right to be tried without undue delay, and the right to a fair trial.

IV. RIGHTS OF YOUNG PEOPLE IN THE CYPF LEGISLATION

A. Introduction

The key features of the youth justice provisions of the CYPF Act (such as diversion and the importance of family involvement in decision making) were discussed in the preceding chapter. Examination of the evolution of youth justice policy in New Zealand demonstrated how previous legislation such as the Child Welfare Act 1925 and the Children and Young Persons Act 1974 was centred on children and young people and their best interests. International standards for youth justice also require that the youth justice system be child or young person centred. However, the CYPF Act explicitly recognises the interests and rights of other groups such as families and victims of offences. Therefore the relationship of the rights of the young person with the rights of these other groups must be considered. The focus in this section is what place rights have in the legislative framework. The specific rights are the subject of the substantive chapters.

B. The Rights of Children and Young People under the CYPF Act

The specific rights (or lack of rights) which young people have are discussed in detail in their respective chapters. However it is useful to give a brief overview of what rights children and young people in the youth justice system have under the CYPF Act. The general principles

400 Hudson v Youth Court at Palmerston North [2007] NZFLR 331.


404 See Chapter 2(II) and (III).


406 Chapters 8 and 9 examine the right to legal assistance, Chapters 10 and 11 consider how the offence is established, and Chapters 12 and 13 discuss FGC outcomes.

407 This section is confined to discussion of the youth justice provisions of the CYPF Act, and the general legislative provisions as they apply to youth justice.
of the CYPF Act provide some rights for children and young people.\textsuperscript{408} Consideration must be given to taking the child or young person’s welfare into account when making decisions,\textsuperscript{409} consideration must be given to taking the child or young person’s wishes into account when making decisions,\textsuperscript{410} endeavours should be made to ensure that measures taken have the support of the young person,\textsuperscript{411} and decisions should ‘wherever practicable’ be made and implemented in an appropriate time frame for the child or young person.\textsuperscript{412} Sections 10 and 11 of the CYPF Act provide for the right of the child or young person to be given information and explanations about proceedings in the Family or Youth Court. Both the Judge and counsel advising the child or young person, have the duty to explain (and to satisfy themselves that the child or young person understands) in age appropriate language, the nature of the proceedings and any orders that the Judge may make.\textsuperscript{413}

In terms of rights, the provisions dealing with the questioning of children and young people by the police are the most comprehensive and prescriptive. Section 208(h) of the CYPF Act emphasises the importance of protecting the rights of the young person during the investigation of the offence due to the ‘vulnerability’ of young people,\textsuperscript{414} and consequently there are extensive provisions dealing with the rights of young people when being questioned by the police.\textsuperscript{415} The young person must be informed of his or her rights, especially the right not to accompany the police officer to the station unless a formal arrest has been made.\textsuperscript{416} The

\textsuperscript{408} See also Chapter 2(VII).
\textsuperscript{409} s 5(c), CYPF Act.
\textsuperscript{410} s 5(d), CYPF Act. However, this is qualified with the provision that these wishes ‘should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person’.
\textsuperscript{411} s 5(e)(ii), CYPF Act.
\textsuperscript{412} s 5(f), CYPF Act.
\textsuperscript{413} s 10(1) and 2, s 11, CYPF Act.
\textsuperscript{414} The importance of this principle was confirmed recently by the Court of Appeal in R v Z [2008] NZCA 246. See further Nessa Lynch, ‘Young Suspects’ (2008) New Zealand Law Journal 357.
\textsuperscript{415} ss 215-232, CYPF Act. See also R v Irwin [1992] 3 NZLR 119.
\textsuperscript{416} These rights are set out in s 215. The police officer must warn the young person that if he or she refuses to give his or her name and address they may be arrested; that they are not obliged to accompany the officer to a place for questioning, and, if he or she gives his or her consent to do so, that consent may be withdrawn at any time; that there is no obligation on the young person to make a statement, and, if he or she consents to making a statement, that consent may be withdrawn at any time; that any statement made or given may be used in evidence in any proceedings; and that the young person is entitled to consult with and make or give any statement in the presence of a lawyer (a barrister or solicitor) and any person nominated by the young person.
police must allow the young person to nominate a supportive adult. The duties of this adult are set out in a 1994 amendment to the CYPF Act. The persons who may be nominated are specified in section 222 of the CYPF Act. These are the parent or guardian of the young person, an adult member of the family, whanau or family group of the young person or any other adult selected by the young person. If the young person fails to nominate any of the above, any adult nominated for that purpose by the police may fulfill the role.

There was resistance by the police to these provisions at the time that the CYPF Act was brought in. The police claimed that the requirements of the Act were impeding them in carrying out their duties. This initial resistance on the part of the police was matched by public disquiet after a high profile homicide case in which the young person’s testimony was dismissed because the police had failed to observe the procedural requirements of the CYPF Act. The provisions do go further than those relating to adult suspects but, as the CYPF Act states, this is due to the vulnerability of young people when dealing with the police. A 1993 research report raised concerns about police adherence to these provisions. Furthermore, a 2004 evaluation found that the police appear to have discontinued the practice of recording whether the correct procedures were followed in the questioning of young people.

See The Queen v Z [2007] NZCA 401 (understanding the right to legal advice) and R v T [1997] 1 NZLR (the role of the nominated person).

s 221, CYPF Act. These include taking reasonable steps to ensure that the young person understands his/her s 215 rights and to support the young person during questioning and the making of statements. This provision recognises the principle that young people in the police station are vulnerable to police pressure (s 208 (h), CYPF Act). See also R v T [1997] 1 NZLR.


s 298(h), CYPF Act.


C. Competing Rights

1. The rights of children and young people

Unlike victims of offences, there is no express provision in the CYPF Act requiring that the rights or interests of the child or young person be taken into account when powers are exercised under the legislation. The CYPF Act governs both care and protection proceedings, and criminal proceedings against children and young people. While the care and protection part of the CYPF Act is governed by section 6 which requires that the welfare of the child or young person be the first and paramount consideration,425 Part IV of the CYPF Act (which deals with youth justice) is exempt from this provision. This is in contravention of New Zealand’s obligations under the CRC, which states that the best interests of children and young people should always be a primary consideration.426 During the legislative reform process,427 the Human Rights Commission recommended that a statement similar to that of Article 40 of the CRC be inserted here, that is that the aim of the youth justice system should be to reform and rehabilitate the child or young person,428 but a statement of this nature is not found in the final CYPF Act. Similarly, another submission argued that a clause should be inserted in the Bill to emphasise the principle that:

A child or young person suspected of offending should be accorded the same legal protections as an adult suspect, save in so far as that child or young person may need extra protection by reason of his or her age, maturity or level of understanding.429

Statements emphasising the importance of the rights of the young person are to be found in the youth justice legislation of other countries. For example, the Preamble to the Canadian youth justice legislation states that:

Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms.430

Further, in the section headed Declaration of Principle, the Canadian legislation states that the youth criminal justice system must emphasize inter alia ‘enhanced procedural protection to

425 ‘having regard to the principles set out in sections 5 and 13’.
426 Article 3, CRC.
427 See Chapter 2(VI).
428 Human Rights Commission, Submissions on Children and Young Persons’ Bill (Submission to the Parliamentary Select Committee on Social Services). Submission number SS/89/157/35W.
429 Warren Young and Neil Cameron, Submissions on the Children and Young Persons Bill (Submission to the Parliamentary Select Committee on Social Services. Submission number SS/89/108/89, para 3.1.
430 Preamble, Youth Criminal Justice Act 2002 [italics in original].
ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.\footnote{431} Also, special considerations apply to proceedings against young people including that:

young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms.\footnote{432}

The only explicit mention of the rights of the young person in the CYPF Act is to be found in the provision relating to investigation of offences. Here, it is stated that:

the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.\footnote{433}

Proposals to include a statement of principle emphasising the importance of the child or young person’s rights were put forward during the recent public submission process on reform of the CYPF Act.\footnote{434} These proposals have not yet translated into legislation. A statement of this nature would be a valuable addition to the principles of the CYPF Act.\footnote{435}

2. The rights of victims of offences

In previous youth justice legislation, the focus was firmly on the child or young person and their needs and rights.\footnote{436} The CYPF Act was innovative in recognising the interests and rights of other groups such as families and victims of offences. Traditional court based criminal justice accords only a minimal role to victims of crime, but in the last twenty years, both in New Zealand and overseas, there has been increasing recognition of the interests and needs of victims of crime. The Preface to the Victims Task Force Report to the Minister of Justice identifies three contributory influences for the growth of the victims’ rights movement.\footnote{437} These are: pressure from diverse political groups (e.g. feminists, conservative law and order

\footnote{431} s 3(1)(b)(iii), Youth Criminal Justice Act 2002.
\footnote{432} s 3(1)(d)(1), Youth Criminal Justice Act 2002.
\footnote{433} s 208(h), CYPF Act.
\footnote{435} See further Chapter 14(VI).
\footnote{436} For example the Child Welfare Act 1925 and the Children and Young Persons Act 1974. See Chapter 2(IV).
groups), increased recognition of the traumatic effects of crime; and New Zealand's acceptance of the United Nations principles relating to the treatment of crime victims. The enactment of the Victims of Offences Act 1987 formally recognised the interests and needs of victims in New Zealand law. This legislation provided inter alia for the use of victim impact statements in court proceedings and recognised that formal court based processes generally offer little support or opportunity for victims to participate in the process. This has now been superseded by the Victims' Rights Act 2002. The growth of the restorative justice movement that strongly encourages participation by victims may be another contributory factor. Maxwell and Morris also note that indigenous dispute resolution systems (including those of Māori) accord a central rather than peripheral role to the victim. The move towards the legitimisation of the victim's interests is evident in section 208(g) of the CYPF Act which states that any measures dealing with offending by children or young people should have 'due regard' to the interests and needs of victims. In addition, the CYPF Act permits victims of offences to attend the FGC thereby allowing them a direct role in negotiating FGC outcomes.

Parliament clearly intended that the interests of the young person would not be paramount in the youth justice provisions of the CYPF Act, by exempting the youth justice provisions from the best interests provision in section 6, CYPF Act. Under a proposed amendment to the CYPF Act, the position of the victim would be strengthened. This would mean that it will be mandatory to take the interests and rights of victims of offences into account e.g. when arranging the time and venue of the youth justice FGC and when deciding on outcomes in the FGC. The effect of this on FGC outcomes for the young person is considered in Chapter 13.


442 s 251(f), CYPF Act. See Chapter 13(IV)(C) and Chapter 6.

443 Children, Young Persons and Their Families Amendment Bill (No. 6). This Bill was reported back from Select Committee on 11 August 2008, but as of 16 December 2008, no further progress has been made towards enactment.

444 See Chapter 13(IV)(C)(2).
3. The rights of the family

In contrast to previous models of youth justice where the state was likely to intervene and take over the role of the family (e.g. through placement in residential institutions or the use of the indeterminate guardianship order), where the young person was found to be offending, the New Zealand system now seeks to give increased responsibility to families over responses to offending by their young people. Section 4 sets out the object of the 1989 CYPF Act as the promotion of the wellbeing of children, young people and their families. Any measures imposed in respect of offending should seek to strengthen the family group, and ‘foster the ability’ of family groups to devise their own means of dealing with offending by their children and young people. Any sanctions imposed should ‘take the form most likely to maintain and promote the development of the child or young person within his her family’. In addition, Freeman has identified an additional caveat in the provisions dealing with participation by children and young people in matters concerning them. Rather than the more usual provision that the views of the child or young person should be given weight according to the age and maturity of the child or young person, the CYPF Act adds culture to these requirements.

It is apparent from the consideration of the reform process leading up to the enactment of the CYPF Act, that the prominence given to the importance of the family was in recognition of the important part the extended family has in Maori and Polynesian culture. The CYPF Act states that services and facilities provided under the CYPF Act should be ‘appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups’ and those persons administering these facilities and services should be ‘sensitive to the cultural perspectives and aspirations of different racial groups in the community’.

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446 s 208(c)(ii), CYPF Act.

447 s 208(c)(i), CYPF Act.

448 s 208(c)(ii), CYPF Act.

449 s 208(f)(i), CYPF Act.


451 s 4(a)(i), CYPF Act.

452 s 4(a)(iii), CYPF Act.
This concept of a partnership between families and state agencies in dealing with offending by young people is a ‘novel’ one. Maxwell et al state that ‘the intention of the legislation is to enable families to influence outcomes’. The clearest expression of this policy imperative is the FGC itself: a formal mechanism which allows the family to participate in the decision making process. It is argued that the integral part that the FGC plays in the youth justice system results in a ‘quite radical’ transfer of state power to the family and wider community. Through the mechanism of the FGC, the family is consulted on decisions at various stages of the youth justice system including diversion from the formal criminal justice system, the making of orders in the Youth Court and decisions around custodial sanction and jurisdiction over offences.

D. Concluding Remarks

This section has considered the place of rights in the legislative framework. The guiding principles do not mention the rights of children and young people, apart from during the investigation of offences. Proposals to enact a principle stating the importance of the rights of the child or young person (perhaps along the lines of the Canadian youth justice legislation) have not come to fruition. The youth justice provisions of the CYPF Act are exempt from the requirement to consider the welfare of the child or young person as paramount. In addition, the interests and rights of others such as victims of offences and the family of the young person are given prominence in the legislation. This raises questions as to whose rights and interests are paramount if there is a conflict. The practical effects of these legislative requirements are considered in the substantive chapters of this thesis.


456 See Chapter 7(V).

457 See Chapter 5(II) and (III).

458 See especially Chapter 13(IV).
V. CONCLUSION

This chapter sets out the rights benchmarks which will be used in this research to evaluate the youth justice FGC.

International and national sources of rights were considered individually. In the international sphere, New Zealand has ratified the ICCPR and the CRC. The CRC is the most relevant to the youth justice system, as it is a human rights convention specifically dealing with the rights of children and young people. As noted though, the ICCPR may provide additional protections where its provisions have not been repeated in the CRC. Additional United Nations standards (principally the Beijing Rules) provide additional detail on existing rights and provide guidance for national authorities on minimum standards for youth justice.

In international law, by signing and ratifying the CRC, New Zealand has signified its willingness to be bound by its principles (subject of course to the three reservations which New Zealand has entered). However, the status accorded to the CRC by the judiciary remains ambiguous, although there is evidence of a willingness to pursue a rights-based approach towards children and young people, in family law cases at least. It was argued here, and will be argued throughout this research, that international standards like the CRC and the Beijing Rules represent an important benchmark for youth justice in New Zealand. The domestic human rights legislation, the NZBOR Act, was also considered. The importance of the NZBOR Act for this research is its codification of the common law procedural guarantees for the accused or convicted person. Many of these rights (such as legal assistance, the right to examine witnesses, and the prohibition on retrospectivity) are found in international instruments such as the ICCPR, and indeed one of the purposes of the NZBOR Act was to enshrine the ICCPR’s content into domestic legislation. The last part of this chapter considered the place of rights within the framework of the CYPF Act. An important consideration for this research is the emphasis the CYPF Act places on the rights and interests of the family, and of the victim of the offence.

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459 See Chapter 7(IV).

460 See Chapter 13(IV).
CHAPTER FIVE: THE FGC AND THE YOUTH JUSTICE SYSTEM: POWERS AND FUNCTIONS

I. INTRODUCTION

Although this thesis is focused on the rights of the young person in the youth justice FGC, it is necessary to discuss the operation of the youth justice system generally, so as to place the FGC in context. Firstly, this chapter will provide general information and statistics on the operation of the youth justice system in New Zealand. Secondly, the place of the youth justice FGC within the youth justice system will be discussed, including its powers and functions. The operation of the youth justice provisions of the CYPF Act have previously been detailed in two major reports. The third aim of this chapter is to provide some background information on youth justice conferencing schemes in other similar jurisdictions. New Zealand was innovative in introducing the FGC model in 1989, but since that time a number of other jurisdictions have legislated for youth justice conferencing. These other conferencing schemes are used as points of comparison during this research, so it is necessary to discuss their operation here. Then, Chapter 6 will discuss procedure and practice at the FGC itself.

II. OPERATION OF THE YOUTH JUSTICE LEGISLATION

A. Responses to Offending by Children

There is a legislative distinction between children (those aged ten years and over but less than fourteen years) and young people (those aged fourteen years and over but less than seventeen years). The age of criminal responsibility in New Zealand remains at ten years of age.

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462 s 2(1), CYPF Act.

463 s 21, Crimes Act 1961.
This has been criticised by international bodies as being too low, however the potentially harsh effects of this low age of criminal responsibility are mitigated somewhat by the fact that children cannot be prosecuted for criminal offences except manslaughter and murder, and only then when it can be proven that the child knew that what he or she did was wrong. This presumption of doli incapax for children under fourteen was well established in the common law since the seventeenth century. Instances of homicide committed by children are thankfully extremely rare in New Zealand.

For all other types of offence, children cannot be held legally responsible through prosecution, but may still be held accountable. The legislative provisions dealing with child offenders reflect the assumption that offending by this age group is usually symptomatic of ongoing problems in the home life of the child, and that such children should not be held solely responsible for their actions. Most offences committed by children are at the minor end of the scale, typically involving petty theft and minor assaults against other young children. Minor cases of offending by children may be dealt with by means of a police warning at the scene of the offence, or informally through the specialised Youth Aid section of the New Zealand Police. More serious offending may be dealt with through referral to a FGC.

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465 s 22(1), CYPF Act.


467 A recent infamous case was the killing of Michael Choy, a pizza delivery person, by five assailants, one of whom was a twelve year old child. See R v Kurariki (2002) 22 FRNZ 319.


470 s 209, CYPF Act.


472 See below at III.
There have been calls for increased powers to deal with serious and persistent child offenders, whom it is alleged are out of control and are not being held properly accountable. The contention that there are not sufficient powers to deal with child offending is unfounded. Granted, children can only be prosecuted in cases of homicide, but there are many options to deal with offending by children such as warnings, the Police Youth Diversion scheme and the child offender FGC (which is discussed in more detail below). This FGC has the power to recommend a referral to the Family Court for a declaration that the child is in need of care and protection due to offending.

Overall, the question arises as to why the power to refer children to the Family Court for section 67 declarations on grounds of offending is not being used regularly, if indeed there is a problem with serious and persistent child offenders. The Family Court has extensive powers to address both the underlying care and protection issues which are contributing to the child’s offending through the ordinary Family Court orders, and the effects of the offending on the community and the victim through additional criminal justice powers contained in section 84. The latest available statistics from the Family Court indicate that only sixty eight applications were made in 2005 for section 67 declarations on grounds of offending. In addition, only six applications were made for section 84 orders addressing the effect of a child’s offending through forfeiture, reparation or admonishment.

Despite the existence of these extensive powers to deal with child offending (which seem to be rarely exercised), there have been calls for legislative reform to allow the prosecution of children. A Private Member’s Bill proposed by the New Zealand First Party which would essentially have allowed children to have been prosecuted on the same basis as adults was

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473 These comments have primarily been from the MP Ron Mark who drafted a Private Members Bill which sought to lower the age of criminal responsibility in response to a ‘spate’ of serious crimes by children. See for example ‘Young Offenders Account for 43% of Apprehensions’ Press Release New Zealand First Party, 7 August 2007.

474 s 258(a), CYPF Act. The child may then be the subject of a wide range of orders even up to custody and guardianship orders.

475 As alleged by the Hon. Ron Mark in his speech on the first reading of the Young Offenders (Serious Crimes) Bill 2006. (26 March 2006) 630 NZPD 2321.

476 Such as counselling orders (s 74, CYPF Act), services orders (s 86, CYPF Act), support orders (s 91, CYPF Act) and custody orders (s 101, CYPF Act).


defeated in Parliament. The 2007 Discussion Document on an update of the CYPF Act, contained a proposal to include twelve and thirteen year old children who are alleged to have committed serious indictable offences within the jurisdiction of the Youth Court, but as yet this proposal has not been translated into legislation.

B. Responses to Offending By Young People

Responses to offending by young people (those aged fourteen and over but under seventeen) will now be considered. This is the age group which is the focus of this research.

1. The upper age limit of the CYPF Act.

Despite the age of majority in New Zealand being twenty years, the youth justice provisions (similarly with the care and protection provisions) of the CYPF Act do not extend to young people beyond the age of seventeen years. This means that young people over the age of seventeen are dealt with through the adult system and not the specialised Youth Court. The upper limit also means that those who have attained seventeen years of age cannot benefit from the state funded Youth Advocate scheme and must use the over-burdened Legal Aid scheme (if eligible). The United Nations Committee on the Rights of the Child is concerned that special protection is not offered to all persons under eighteen years during the

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479 Young Offenders (Serious Crimes) Bill 2006.
481 See further Report to the Ministry of Social Development: Safeguarding Our Children, Updating the Children, Young Persons, and Their Families Act 1989- Overall Summary of Submissions (Wellington: Allen and Clarke Policy and Regulatory Specialists Limited, 2007). At the time of writing (December 2008), the incoming National-led government has made this change one of its legislative priorities.
482 See Chapter 6.
483 s 4(i), Age of Majority Act 1970.
484 s 2(1), CYPF Act. The exclusion of seventeen year olds from the youth justice (and also the care and protection) provisions of the Act is part of a confusing array of policies around the definition of children and young people in New Zealand legislation. The 2003 non-governmental organisation report to the United Nations Committee on the Rights of the Child identified a range of ages at which the young person attains 'adult' status in New Zealand in different contexts, see Action for Children and Youth Aotearoa, Children and Youth in Aotearoa 2003 (Wellington: Action for Children and Youth Aotearoa, 2003). The official investigation into the death of Liam Ashley (the seventeen year old remand prisoner murdered by a violent adult prisoner with which he was being transported) also noted that 'there are differences in the interpretation and application of youth status across Government which results in different management practices and requirements by the various agencies.' The exclusion of seventeen year olds from the provisions of the Act meant that instead of being dealt with through the Youth Court and remanded to a youth justice residence or bailed, Liam Ashley was charged in the adult District Court and remanded to an adult prison. This was arguably one of the contributing factors to his murder: Louise McDonald, Investigation of the Circumstances Surrounding the Death at Auckland Public Hospital of Prisoner Liam John Ashley of Auckland Central Remand Prison on 25 August 2006, Report to: Chief Executive Department of Corrections (Wellington: Department of Corrections, 2006).
investigation, prosecution and disposition of criminal offences and has recommended that the ambit of the Act be extended to include eighteen year olds. The Human Rights Commission has also recommended that the upper age limit be raised to eighteen years. In response the New Zealand Government promised a review of the upper age limit. A proposed amendment to the Children, Young Persons, and Their Families Act would include seventeen year olds within the definition of young person in section 2(1) of the CYPF Act and thereby include this group within the youth justice system.

2. Young people and the police

(a) Police diversion

The scheme of the CYPF Act emphasises that formal criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter. In line with this principle the majority of offending by young people is dealt with without formal charges being laid. The CYPF Act has a strong emphasis on diversion from formal criminal proceedings and custodial penalties.

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487 Second Periodic Report of New Zealand to the Committee on the Rights of the Child, CRC/C/93/Add.4., paras 44, 45.

488 Children, Young Persons, and Their Families Amendment Bill (No. 6). This Bill was reported back from Select Committee stage on 11 August 2008, but no further progress has been made towards enactment. For discussion on the implications of this for the resourcing of the youth justice system see further Report to the Ministry of Social Development: Safeguarding Our Children, Updating the Children, Young Persons, and Their Families Act 1989- Overall Summary of Submissions (Wellington: Allen and Clarke Policy and Regulatory Specialists Limited, 2007).

489 For a discussion of the statutory regime for questioning of children and young people in police custody see Chapter 4(IV)(B).

490 s 208(a), CYPF Act.

491 Jin Chong, Youth Justice Statistics in New Zealand: 1992 to 2006 (Wellington: Ministry of Justice, 2007), 14. This is the first year in which specific statistics on youth justice have been produced. These are the latest available statistics on the youth justice system. The 2007 statistics are not available at time of writing (Personal communication from Bazia Arnold, Youth Justice Policy Manager at the Ministry of Justice).

The CYPF Act mandates the police to first consider warning the young person, if the offence warrants it. Minor incidences of offending by young people (for example, minor property damage, possession of cannabis, minor incidences of shoplifting and theft) are usually dealt with by means of an immediate police warning at the scene of the offence. In 2006, 26% of young people coming to notice were dealt with by means of a warning. Offending may also be dealt with through the Police Youth Diversion Scheme. Youth Aid officers may put a diversion plan (also known as ‘alternative action plan’) in place. Plans typically involve an apology to the victim of the offence, completion of community work hours, the writing of essays, or payment of reparation to the victim. In 2006, 39% of young people coming to notice were dealt with through the Police Youth Aid diversion scheme.

It is evident that New Zealand has been successful in establishing a comprehensive statutory diversion scheme where the majority of children and young people coming to notice of the police will be dealt with without recourse to prosecution. There is no doubt but that the rate of diversion compares favourably with rates of diversion in other similar jurisdictions. The police have generally embraced diversion, helped by the existence of a highly specialised Youth Aid section. The existence of specially trained officers to deal with youth justice matters is firmly in line with international best practice. Previous diversionary schemes

493 Pursuant to s 209, CYPF Act.
501 Rule 12.1, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). The Police are also heavily involved in crime prevention and education in schools through the Youth Education Service. Examples of such programmes are Crime Prevention and Social Responsibility, DARE, Keeping Ourselves Safe, Kia Kaha and School Road Safety Education. See further New Zealand Police Youth Policing Plan 2005-2006 (Wellington: New Zealand Police, 2005). This Youth Policing Plan is the latest available at the time of writing.
allowed the police to take control of the system and to sidestep the diversionary mechanisms completely.\textsuperscript{502} Cases that were being referred for diversion were therefore cases where the police had already made the decision that prosecution was not justified.\textsuperscript{503} The present diversion scheme is evidently more independent and mainstream. There is clear statutory guidance that formal criminal justice proceedings are to be a last resort.\textsuperscript{504} The police may only make an arrest if there are no alternative means of dealing with the case. If the police wish to lay a charge in a non-arrest case, the statutory requirement to consult with the youth justice co-ordinator means that there is less chance of the police circumventing diversionary mechanisms and proceeding straight to prosecution.

As noted earlier, more than one-third of young people coming to notice are dealt with through the Police Youth Diversion Scheme.\textsuperscript{505} This scheme is operated entirely by the police, thus lacking independent oversight. Nonetheless, it is evident that the scale of the present Police Youth Diversion scheme was not envisaged by the framers of the CYPF Act. As Maxwell et al have stated:

\begin{quote}
\textit{it could be argued that it was not the intention of the [CYPF] Act that Police should make decisions about outcomes except in relatively minor matters that did not require substantive actions and it was the intention that the rights of families and young people would be best protected in a family group conference or the Youth Court when determining actions intended to make young people accountable for offending.}\textsuperscript{506}
\end{quote}

In spite of this, an evaluation of the Police Youth Diversion scheme in 2002 concluded that the actions of the police in developing the scheme were broadly within the principles of the CYPF Act, namely the legislative presumption against formal criminal proceedings and keeping matters within the community where possible. The report also praised Youth Aid officers in their efforts to adopt the ethos of the CYPF Act.\textsuperscript{507} Some concerns were raised however about the significant variability between geographical areas in regard to outcomes.\textsuperscript{508}

\begin{footnotes}
\item[504] s 208(a) and s 209, CYPF Act.
\end{footnotes}
(b) **Arrest**

Police powers of arrest without warrant are limited in relation to children and young people. The police officer must be satisfied on reasonable grounds that the arrest is necessary to ensure appearance before court, prevent further offending, or prevent the loss or destruction of evidence or interference with witnesses. Arrest can only take place where these functions could not reasonably be carried out through the use of a summons. However, the police retain the power of arrest in cases where the young person is believed to have committed a purely indictable offence, or the police officer believes on reasonable grounds that the arrest is in the public interest.

The *Achieving Effective Outcomes* report found that although the use of arrest declined dramatically in the years immediately following the introduction of the CYPF Act, the rate of arrest had climbed again during 2000/2001 "in circumstances that do not appear to be consistent with the principles and objects of the [CYPF] Act." If the police wish to lay a charge against a young person who has not been arrested, there is a statutory requirement to consult with a youth justice co-ordinator and an Intention to Charge FGC must be held.

C. **Young People in the Criminal Courts**

Young people may be charged with any criminal offence. The vast majority of charges (with the exception of serious indictable offences and minor traffic offences which may be dealt with through the adult courts) are finalised in the Youth Court. The Youth Court is a

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509 s 214, CYPF Act.

510 s 214(1)(a)(i), CYPF Act.

511 s 214(1)(a)(ii), CYPF Act.

512 s 214(1)(a)(iii), CYPF Act.

513 s 214(1)(a)(i), CYPF Act. The fact that the alleged offence is purely indictable does not necessarily mean that the arrest is in the public interest: *YP v Youth Court at Upper Hutt & Attorney General*, 30/1/07, HC Wellington, Mallon J, CIV-2006-485-1905.

514 s 214(2)(a), CYPF Act.


516 See (III)(C) below.

specialised court which is separate from the adult criminal justice system, but operates administratively as a division of the District Court.\textsuperscript{518} It replaced the former Children and Young Persons Court which dealt with care and protection proceedings as well as offending by young people. The Youth Court has jurisdiction over young people who are charged with offences apart from manslaughter, murder and traffic offences not punishable by imprisonment.\textsuperscript{519} Serious indictable offences may be dealt with through the adult court system. Due to the legislative emphasis on diversion from prosecution,\textsuperscript{520} only about one third of police apprehensions of young people are dealt with through prosecution.\textsuperscript{521} The number of young people prosecuted (both through the Youth Court and the adult courts) in 2006 was 6202.\textsuperscript{522} This was a slight increase on 2005 (5602) and 2004 (5918).\textsuperscript{523}

The Youth Court is a division of the District Court, but in recognition of the youth of the clientele who appear before it, procedure is different to that of the normal criminal court. To preserve confidentiality there is no public access to the Youth Court.\textsuperscript{524} In order to reduce the amount of waiting time for young people and their families, and to avoid the negative effects of young people associating with each other while waiting, the Youth Court is required to operate an appointment system.\textsuperscript{525} This provision is designed to reduce lengthy waiting times and make appearances at court more predictable and less stressful for young people appearing on charges.\textsuperscript{526} Every young person appearing before the Youth Court charged with an offence is assigned a state funded Youth Advocate unless private legal representation has already been arranged.\textsuperscript{527} Youth Advocates are lawyers specially selected to act for young people.\textsuperscript{528}

\begin{small}
\textsuperscript{518} s 321, CYPF Act.
\textsuperscript{519} s 272(3), CYPF Act.
\textsuperscript{520} s 208(a), CYPF Act.

\textsuperscript{524} s 329, CYPF Act.
\textsuperscript{525} s 332, CYPF Act.

\textsuperscript{526} There were criticisms of the former Children and Young Persons Court in relation waiting times and unsuitability for young people and their families. See further Terrence Loomis, \textit{An Evaluation of the Children’s Advocate Scheme Pilot in the Auckland Children and Young Persons Court} (Auckland: The Social Research and Development Trust, 1985), Allison Morris and Warren Young, \textit{Juvenile Justice in New Zealand: Policy and Practice} (Wellington: Institute of Criminology, 1987).
\textsuperscript{527} s 323(1), CYPF Act. Private legal representation is almost unknown in the Youth Court due to the prevailing low socio-economic status of its clientele.
\end{small}
In the case of a child or young person charged with murder or manslaughter, the preliminary hearing will take place in the Youth Court. Serious indictable offences may be transferred to the District Court for trial or sentencing. Purely indictable offences are not within the jurisdiction of the Youth Court unless Youth Court jurisdiction is offered. Section 18 of the Sentencing Act 2002 does not permit a sentence of imprisonment to be imposed on a young person unless the offence is purely indictable. Section 283(o) of the CYPF Act allows a young person over the age of fifteen years to be convicted and transferred to the District Court for sentence. In the case of conviction and transfer to the District Court, the Court must consider 'all other alternatives' available to it and be satisfied that none are appropriate to the circumstances of the case. The Youth Court Judge is required to record his or her reasons in writing if taking such a step. In the years 2004 to 2006, the proportion of young people convicted in the District Court or High Court has remained constant at about 5%. This is a significant reduction from the early 1990s where the proportion of young people convicted was at about one-tenth of prosecutions involving young people.

D. Young People in Custody

1. Youth justice custody

The CYPF Act promotes non-custodial and community based sanctions where practicable, therefore there are few young people held in custodial institutions. The latest official figure available for the amount of young people in youth justice custody is the daily count of 30th

528 Youth Advocates may attend the FGC and make representations on behalf of the young person, similarly with any proceedings relating to residential institutions, s 324(3), CYPF Act. See further Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology for Victoria Link, 1997). See Chapters 8 and 9 on the right to legal assistance at the FGC.

529 s 272(1) and (3), CYPF Act.

530 s 274, CYPF Act.

531 s 275 and s 276, CYPF Act.

532 s 290(2), CYPF Act.

533 s 290(3), CYPF Act.

534 This occurs after the case is transferred for trial or sentencing.


June 2006, where there were 180 young people in custody.\textsuperscript{538} The lack of more up to date information about the number of young people in custody is frustrating.\textsuperscript{539}

At present there are three youth justice residences in New Zealand. These residences house young people completing supervision with residence orders and also those on remand.\textsuperscript{540} However, there is a significant shortfall in the number of youth justice residential beds available. There are plans to build an additional facility in the North Island to cope with increasing demand.\textsuperscript{541} As a result there are significant problems with accommodating young people on remand. A young person must not be held on remand unless he or she is likely to abscond or to commit further offences.\textsuperscript{542} However, there are not enough beds available because most available beds are taken up with young offenders completing supervision with residence orders. Because young people cannot be remanded to an adult penal institution,\textsuperscript{543} and there is a lack of suitable facilities, they are regularly remanded to police cells - facilities designed to hold adult prisoners for short periods of time.\textsuperscript{544} A Parliamentary Question revealed that in the first six months of 2006, 329 young people spent more than twenty four hours in police cells.\textsuperscript{545} In some cases remands in police cells have stretched to seventeen days.\textsuperscript{546} Young people may be left in situations which are inhumane and degrading. Access to


\textsuperscript{539} Repeated enquiries were made to Child, Youth and Family in 2008, but the answer was that a daily count is not kept. This seems highly unlikely as there must be information available to enable Youth Court Judges to decide whether a supervision with residence order can be made.

\textsuperscript{540} Two are located in the North Island: Korowai Manaaki Youth Justice Residence is situated in Wiri, South Auckland and has forty six beds, and the Lower North Youth Justice Residential Centre is situated in Palmerston North and has thirty beds. Another is located in the South Island: Te Puna Wai o Tuhinapo is in Rolleston and has thirty two beds. Source: www.cyf.govt.nz (last viewed 12 February 2008).

\textsuperscript{541} Work on a new forty bed residence (Youth Justice Central) is to begin on a site near Parekarangi in the Bay of Plenty in October 2008. See ‘Fact Sheet: Youth Justice Residence – Rotorua’ (August 2008), available at www.cyf.govt.nz (last viewed 16 October 2008).

\textsuperscript{542} s 239(1), CYPF Act.


\textsuperscript{544} s 239(2) of the CYPF Act states that young people should not be remanded to police custody unless the young person is violent and there are no other suitable facilities available.

\textsuperscript{545} Hon Ruth Dyson, documents tabled in response to Parliamentary Question no 8068, Questions for Written Answer, 28\textsuperscript{th} June 2006.

education is non-existent and young people may have contact with older adult offenders. The Principal Youth Court Judge has publicly criticised the situation as being in breach of New Zealand’s obligations under human rights legislation to prohibit inhuman or degrading treatment.\textsuperscript{547} The Human Rights Commission has also expressed concern about the situation.\textsuperscript{548} The chronic shortage of residential placements for young people on remand is not a new problem, having been criticised in 1997 in a report commissioned by the Children’s Commissioner.\textsuperscript{549} While the numbers of youth justice residential places have increased since then, so has the demand. Consideration is being given to alternatives to remand, for instance electronic tagging of young people.\textsuperscript{550}

2. Adult prisons
As noted, there is provision for some young people found guilty of serious offending to be transferred to the adult courts for sentence. These young people may then be sentenced to an adult correctional facility.\textsuperscript{551} International standards require that young people be separated from adult prisoners, but New Zealand has entered a reservation to this requirement and retains the right to mix age groups in custody if it is in the interest of the prisoners concerned.\textsuperscript{552} The Department of Corrections has established youth wings in four of the adult male prisons. Those young people under seventeen are to be housed in Specialist Youth Units. Seventeen year olds are not eligible for Specialist Youth Units in prisons unless they are

\begin{itemize}
\item Judge Andrew Becroft, ‘Children and Young People in Conflict with the Law: Asking the Hard Questions’ Paper presented at the XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, 2006, 11.
\item Robert Ludbrook, Young People in Police Cells: A Report by the Commissioner of Children to the Minister of Social Welfare and the Commissioner for Police (Wellington: Office of the Commissioner of Children, 1997).
\item A pilot programme of supervised bail for young people has taken place, with an evaluation due in early 2007. See New Zealand Government Press Release, ‘New Programme to Focus on Young People on Bail’ 8\textsuperscript{th} June 2004. Positive results from this pilot were presented at the Working Together: A Practical Conference on Offending by Young People in New Zealand conference in November 2007. See Gabrielle Martin, Dr Elaine Mossman and Sam Thompson, ‘The Supported Bail Programme’. Available at www.yoc.org.nz (last viewed 12 March 2008)
\item David Harpham, Census of Prison Inmates and Home Detainees 2003 (Wellington: Department of Corrections, 2004): 2003 figures indicate that less than twenty young people were serving sentences in adult prison. However, there were 327 prisoners in the seventeen to nineteen age bracket. Although there is no breakdown as to the specific ages of this group, it is likely that a significant number of these were aged seventeen. As noted the Government has been criticised for failing to include all under eighteen year olds in the provisions of the CYPF Act. These are the latest available statistics showing the breakdown of age groups in prison. The prison census series is no longer published.
\item Article 37(c), CRC.
\end{itemize}
specifically designated as vulnerable prisoners. There is a complete lack of facilities for young female offenders and so young women are always detained in adult women's prisons. This situation has been criticised by the United Nations Committee on the Rights of the Child and also in the 2004 Report of the United Nations Committee against Torture but, as yet, there has been no substantive progress in removing the reservation.

Under the previous New Zealand regulations governing correctional facilities, prisoners under the age of twenty were not to mix with prisoners over twenty years of age 'so far as practicable'. Under the present regulations, it is only prisoners under eighteen years of age that must be separated from those over eighteen years. When outside the prison (for example, when being transported to and from court) prisoners under eighteen are separated from those over eighteen only 'where practicable'. This policy was one of the contributing factors in the recent murder of a seventeen year old remand prisoner who was being transported with an adult prisoner. The move to lower the distinguishing age from twenty to eighteen was apparently to 'align [the Corrections Regulations] with the United Nations Convention on the Rights of the Child'. As the Government is not usually so prompt in aligning legislation with the CRC it seem likely that the Convention is being used to justify what is doubtless a resource driven policy change.

556 Penal Institutions Regulations 2000, reg 132.
557 Corrections Regulations 2005, reg 179.
559 Department of Corrections' Corrections Act Implementation Committee statement quoted in Louise McDonald, Investigation of the Circumstances Surrounding the Death at Auckland Public Hospital of Prisoner Liam John Ashley of Auckland Central Remand Prison on 25 August 2006, Report to: Chief Executive Department of Corrections (Wellington: Department of Corrections, 2006), para 284.
560 For example, the upper age limit of the CYPF Act remains at seventeen years despite repeated criticism from the UN Committee on the Rights of the Child.
E. Concluding Remarks

This section has briefly outlined the main features of the youth justice system under the CYPF Act. The majority of offending is dealt with through action by the police, either through a warning administered by front-line staff at the scene of the offence, or through the police diversion scheme administered by the specialist Youth Aid division. Only about one-third of young people coming to notice are dealt with through prosecution, with a minority of these receiving a custodial sentence or being transferred to the adult criminal justice system. The role and powers of the youth justice process which is the subject of this research will now be considered.

III. THE YOUTH JUSTICE FGC

A. Statutory Functions of the FGC

The term ‘youth justice family group conference’ refers to a statutory decision making forum in which the child or young person, their family, 561 state officials and possibly the victim of the offence meet under the auspices of Child, Youth and Family to decide on a plan to deal with offending by that child or young person. The FGC is a ‘vital and integral part of the procedures for the delivery of youth justice’. 562 The following table shows the amount of youth justice FGCs convened in the last three years. 563

<table>
<thead>
<tr>
<th>Fiscal Years</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>New</td>
<td>6,543</td>
<td>6,524</td>
<td>7,870</td>
<td>7,803</td>
<td>7,964</td>
</tr>
<tr>
<td>Reviewed</td>
<td>75</td>
<td>89</td>
<td>94</td>
<td>114</td>
<td>119</td>
</tr>
<tr>
<td>Reconvened</td>
<td>824</td>
<td>1,014</td>
<td>1,243</td>
<td>1,242</td>
<td>1,113</td>
</tr>
<tr>
<td>TOTAL HELD</td>
<td>7,442</td>
<td>7,627</td>
<td>9,207</td>
<td>9,159</td>
<td>9,196</td>
</tr>
</tbody>
</table>

From this table, it is possible to see the large amount of children, young people and their families who are involved in the youth justice FGC process. There are six instances in which a FGC must be convened, however it is only the intention to charge and court-referred FGCs

561 s 251 uses the terms ‘family, whanau or family group’ but for convenience the term ‘family’ is used throughout the text.

562 Police v T [2006] NZFLR 1057, para 1, per Rodney Hansen J.

563 Information request made to Child, Youth and Family, 11 November 2008.
which are the subject of this research as these types of FGC are involved in exercising criminal justice type powers. The functions of all types of FGC are outlined briefly below.

B. Child Offender FGC

If a child comes to the notice of the police due to serious or repeated offending (the level of which causes concern for the child's wellbeing), the police may form the opinion that the child is in need of care and protection. Offending of this nature by a child is a ground for care and protection under section 14(e) of the CYPF Act. A FGC may then take place after consultation with the youth justice co-ordinator. This is a youth justice conference, but with a difference. As well as formulating a plan to deal with the child's offending by making recommendations relating to accountability and addressing needs, the FGC may recommend that an application be made to the Family Court for a section 67 declaration that the child is in need of care and protection. If the Family Court Judge does find that the child is in need of care or protection, he or she has the power to make wide-ranging orders, from parenting orders to support orders addressing the needs of the child and their family. Unusually, the child's need for care and protection on the ground of offending must be demonstrated to the criminal standard of proof (that is beyond reasonable doubt) rather than the civil standard of the balance of probabilities usually applicable to care proceedings.

C. Intention to Charge FGC

As discussed above, the majority of offending by young people is dealt with by the police through warnings or the Police Youth Aid Diversion scheme. For more serious offending, if the police wish to lay a charge against a young person who has not been arrested, a youth

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564 See further Chapter 7. The child offender FGC is also involved in a response to offending but is part of the care and protection system.
565 s 18(3), CYPF Act.
566 s 260, CYPF Act with regard to the principles set out in s 208, CYPF Act.
567 s 260(3)(c), CYPF Act. These applications are rare: Ong Su-Wuen, Family Court Statistics 2005 (Wellington: Ministry of Justice, 2007).
568 s 83, CYPF Act.
569 s 84, CYPF Act.
570 s 198, CYPF Act.
justice co-ordinator must be consulted and a FGC held. Providing the young person admits
the offence, this type of FGC is tasked with deciding on a plan to keep the charges out of
the Youth Court. If the agreed actions in the plan are completed within the specified
timeframe, the police will agree not to charge the young person and it will be the end of the
matter. The intention to charge FGC is one of the types of FGC which are the subjects of
this research.

D. Court-referred FGC
The two types of FGC discussed above operate outside the formal court based system, but
even when a young person's case has entered the Youth Court system through a prosecution,
the FGC has a central role in the decision making process. The court-referred FGC is one of
the two categories of FGC which are the focus of this research and may be convened in two
situations.

1. Court-referred FGC: charges 'not denied'
When the young person appears before the Youth Court, he or she is asked to plead 'denied'
or 'not denied' to the charge(s). The Principal Youth Court Judge has described the 'not
denied' mechanism as 'a useful but somewhat odd mechanism'. It allows the young person
to state the charge is not contested, leaving the FGC to ascertain whether the charge is
actually admitted. If the charge is 'not denied', the Youth Court Judge is required to adjourn
the case to allow a FGC to be held. Provided the young person admits the offence, the FGC
has the task of agreeing on what action and/or sanctions should result and recommending to
the court accordingly.

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571 s 245, CYPF Act.
572 s 259, CYPF Act.
573 Hereinafter ITC FGC in the text.
574 Principal Youth Court Judge Andrew Becroft, 'Youth Justice Family Group Conferences: A Quick 'Nip and
Tuck' or Transplant Surgery: What would the Doctor Order in 2006?' Paper presented at the International
See Chapter 9.
575 The exact meaning of the terms 'not denied' and 'admitted' and the implications for the young person's right
to be presumed innocent unless proven guilty and the right to a fair trial is the subject of Chapter Ten of this
thesis.
576 s 258(d) and s 259(1), CYPF Act.
577 s 258(d), CYPF Act. The limits on sanctions are discussed in Chapter 12, while Chapter 13 considers the
objectives underlying FGC outcomes.
2. Court referred FGC: charges 'denied'

If the young person denies the charge a hearing date will be set. Matters proceed to a defended hearing in accordance with the Summary Proceedings Act 1957. Every young person appearing before the Youth Court charged with an offence is assigned a state funded Youth Advocate unless private legal representation has already been arranged. Hearings are closed to the public. If the offence is proved at the defended hearing, the Youth Court Judge must adjourn the case and refer the matter to a FGC. This FGC has the task of deciding 'how the young person should be dealt with for that offence, and to recommend to the Court accordingly'.

3. The role of the Youth Court Judge

When the case has been adjourned for an FGC, the FGC then has the responsibility of formulating a plan or recommendation in relation to the young person’s case. This plan or recommendation is presented to the Youth Court Judge at a later hearing. The Youth Court Judge is not bound to accept the plan or recommendation decided by the FGC but must have regard to such plans or recommendations when making decisions. There are no statistics available on the percentage of FGC plans which are accepted. However, the Principal Youth Court Judge has stated that 95% of plans are accepted, and Maxwell et al noted that although the outcomes of court-referred FGCs are technically recommendations, non-acceptance by the Youth Court is extremely rare. If the requirements of the FGC plan are

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578 s 321, CYPF Act, subject to Schedule 1.
579 s 323(1), CYPF Act.
580 s 329, CYPF Act.
581 s 247(e), CYPF Act.
582 s 258(d), CYPF Act.
583 s 258(d), CYPF Act.
584 s 279, CYPF Act.
585 Enquiry to the Youth Justice Policy section of the Ministry of Justice, August 2007.
586 Principal Youth Court Judge Andrew Becroft, 'Youth Justice: The New Zealand Experience: Past Lessons and Future Challenges' Paper Presented at Juvenile Justice: From the Lessons of the Past to a Roadmap for the Future, Sydney, Australia, 2003. This was also the experience of the two youth justice co-ordinators whose practice was observed during this research.
completed within the agreed timeframe, there will usually be a discharge pursuant to section 282 or 283(a) of the CYPF Act. The Judge may make further orders under section 283 particularly where the FGC plan has not been successfully completed. 588

E. FGC: Custodial Placement
On occasion, it is necessary for the protection of the public for a young person to be placed in Child, Youth and Family or police custody pending the resolution of a 'denied' charge in the Youth Court. A FGC must then be convened to make recommendations to the Youth Court Judge on whether the custodial placement should continue and where the young person should be placed. 589

F. FGC at the Discretion of the Youth Court
Under the CYPF Act, the Youth Court Judge has a residual discretion to order a FGC at any stage of proceedings where it appears necessary or desirable to do so. 590 The Youth Court Bench Book gives as an example a situation where the Youth Court has to make a decision whether Youth Court jurisdiction is to be offered to a young person accused of a purely indictable offence. 591

G. Concluding Remarks
This section has considered the six situations where there is a statutory requirement to convene a FGC. The FGC has a central role in decision making at all stages of the youth justice system including resolving offending by children, diversion from prosecution, and after prosecution, in the Youth Court. It will be the intention to charge and court-referred FGCs that are the focus of this research. This is because criminal justice type powers are being exercised in these types of FGC. 592 The theoretical foundations of the youth justice FGC and the type of legal process which the FGC represents, is considered later in this chapter. 593

588 Orders that the Youth Court may make are listed in s 283, CYPF Act and include discharge, admonishment, come up if called, fines, reparation, restitution, forfeiture, disqualification from driving, supervision orders, community work orders, supervision with activity, supervision with residence with and conviction and transfer to the District Court for sentence.

589 s 247(c), CYPF Act.

590 s 281B, CYPF Act.

591 Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008)

592 See Chapter 7.

593 See Chapter 7.
IV. CONFERENCING SCHEMES IN OTHER JURISDICTIONS

A. Introduction

New Zealand was innovative in introducing the first statutory based conferencing scheme under the CYPF Act in 1989, but similar schemes now exist in most comparable jurisdictions. Youth justice is an area in which there has been a remarkable ‘policy transfer’ between jurisdictions, and the youth justice FGC is arguably one of New Zealand’s best known policy exports. The FGC model has been adapted and adopted by a number of other jurisdictions. This research is not a purely comparative study, as it is focused on the New Zealand youth justice FGC. However, reference will be made to the legislation of other jurisdictions which have adopted the New Zealand model of conferencing. A theme running through this research is the argument that other jurisdictions utilising conferencing have in some cases developed better safeguards for the rights of young people compared to New Zealand. This section will give some background information on conferencing schemes in other jurisdictions.

B. Conferencing Schemes in Australia

1. Introduction

The most comparable schemes are to be found in Australia. All Australian states or territories have some form of conferencing. While the ‘favoured model’ of conferencing in Australia stems from the New Zealand FGC model, some of the first forms of conferencing were different from the New Zealand model. One example was the conferencing model associated with Wagga Wagga, New South Wales, where the police facilitated conferencing based on a scripted approach. This approach was heavily influenced by Braithwaite’s theory of re-

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596 Kenneth Polk, Christine Alder, Damon Muller and Katherine Rechtman, Early Intervention: Diversion and Youth Conferencing – A national profile and review of current approaches to diverting juveniles from the criminal justice system (Canberra: Australian Government Attorney General’s Department, 2003), 27-45.

integrative shaming.\textsuperscript{598} Conferences were convened by a police officer and held at the local police station. A similar police-led approach is now used in the Australian Capital Territory, Tasmania and the Northern Territory.\textsuperscript{599} These schemes have been criticised on the basis of the power imbalance between police and young people.\textsuperscript{600}

In terms of comparability with New Zealand, it is the conferencing schemes used by New South Wales and South Australia which are the most similar. These jurisdictions have used a model in which (like New Zealand) the conference is convened and facilitated by an agency independent of the police. Similar policy imperatives such as victims’ rights and addressing the needs of young people, underpin the New South Wales and South Australian schemes. Tromboli notes that the growth of conferencing in Australia:

\begin{quote}
reflects the interplay of a number of forces, including dissatisfaction with the existing juvenile justice systems, a shift in emphasis from simply punishing the offender towards holding the offender accountable for his/her actions while at the same time involving families in making decisions about their children and meeting the needs and rights of the victims of the offence(s).\textsuperscript{601}
\end{quote}

In New Zealand, however, Maori concerns at the mono-cultural nature of the previous legislation resulted in an arguably more culturally appropriate youth justice system.\textsuperscript{602} In the Australian situation, there was not the same commitment to cultural appropriateness for indigenous Australians.\textsuperscript{603} The two most comparable schemes to New Zealand (New South Wales and South Australia) will now be discussed, as these jurisdictions will be used as points of comparison in this research.

\textsuperscript{598} John Braithwaite and Stephen Mugford, ‘Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders’ (1994) 34 \textit{British Journal of Criminology} 139.

\textsuperscript{599} Kenneth Polk, Christine Alder, Damon Muller and Katherine Rechtman, \textit{Early Intervention: Diversion and Youth Conferencing – A national profile and review of current approaches to diverting juveniles from the criminal justice system} (Canberra: Australian Government Attorney General’s Department, 2003), 47.


\textsuperscript{601} Lily Tromboli, \textit{An Evaluation of the NSW Youth Justice Conferencing Scheme} (Sydney: NSW Bureau of Crime Statistics and Research, 2000), 2.

\textsuperscript{602} Mike Doolan, ‘The Youth Justice- Legislation and Practice’ in BJ Brown and FWM McElrea, \textit{The Youth Court in New Zealand: A New Model of Justice} (Auckland: Legal Research Foundation, 1993)

2. Conferencing in New South Wales

Youth justice conferencing was introduced in New South Wales by the Young Offenders Act 1997. This conferencing scheme was generally influenced by the New Zealand FGC model. The principles governing the operation of the youth justice system are set out in section 7 of the Young Offenders Act 1997. These draw heavily on the principles set out in section 208 of the CYPF Act, such as a preference for community based sanctions, a ban on criminal proceedings being used solely for welfare interventions and a presumption against the use of formal criminal proceedings. There are additional principles which govern the conferencing scheme itself.

Like New Zealand, the youth justice conference is a high tariff intervention and may be used in response to a wide range of offences. Similarly, the New South Wales youth justice conference is tasked with making decisions and formulating a plan for a young person who has offended. The young person can be referred for a conference by a specialised youth officer, by a court, or by the Director of Public Prosecutions. Typical procedure at a conference is similar to that at a New Zealand FGC.

During the drafting of the New South Wales legislation, there was debate on which agency should administer conferencing. It was ‘acknowledged that the [administering] agency must not only be neutral and independent of specific interest groups, but it must also have an established infrastructure across NSW’. There was a rejection of the police-referred

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605 s 3, Young Offenders Act 1997.

606 s 34(1), Young Offenders Act 1997.


608 s 8, Young Offenders Act 1997.


schemes present in other Australian jurisdictions,\textsuperscript{611} and the New South Wales conference is facilitated by an independent convenor.

Thus the New South Wales youth justice conference can usefully be employed as a point of comparison when considering the rights of young people in the New Zealand FGC.

3. Conferencing in South Australia

While the New South Wales scheme is the most comparable to New Zealand in terms of conferencing, the South Australian legislation will also be referred to in this research. South Australia is regarded as being progressive in youth justice policy, being one of the first jurisdictions in the world to introduce a separate youth court, and to introduce a statutory youth justice conferencing scheme.\textsuperscript{612} A youth justice conferencing scheme was introduced under the Young Offenders Act 1993,\textsuperscript{613} which was based on the New Zealand scheme.\textsuperscript{614}

Like the New South Wales legislation, the South Australian legislation is based on similar principles to the CYPF Act. Section 3 of the South Australian legislation emphasises the importance of holding young people accountable for their offending and ensuring community safety. Secondary to these principles are the concepts of strengthening families and rehabilitation of young offenders.\textsuperscript{615} Daly notes that the South Australian legislation is less prescriptive in relation to principles than the later New South Wales legislation.\textsuperscript{616}


\textsuperscript{613} See further Kathleen Daly, Michele Venables, Mary McKenna, Liz Mumford, and Jane Christie-Johnston, \textit{South Australia Juvenile Justice (SAJJ) Research on Conferencing, Technical Report No. 1: Project Overview and Research Instruments} (Brisbane: School of Criminology and Criminal Justice, Griffith University, 1998), Kathleen Daly, \textit{South Australia Juvenile Justice (SAJJ) Research on Conferencing, Technical Report No. 2: Research Instruments in Year 2 (1999) and Background Notes} (Brisbane: School of Criminology and Criminal Justice, Griffith University, 2001).


C. Other Jurisdictions Utilising Conferencing

1. Introduction

As was set out in the preceding section, certain Australian jurisdictions are the most comparable to New Zealand in terms of the design of the conferencing scheme and the principles underpinning youth justice. Limited reference will be made in this research to conferencing schemes in other jurisdictions. These provide a less valuable comparison as they are less well established and not used in the mainstream youth justice process.

2. Conferencing in Canada

Canada is a jurisdiction which is generally comparable to New Zealand. The Canadian Charter of Rights and Freedoms was used as a model for the NZBOR Act, and Canadian decisions are frequently cited in the New Zealand courts when considering rights issues. In addition, there are similar concerns about providing culturally appropriate justice for Canada’s indigenous peoples. In relation to youth justice, the Canadian constitutional arrangements mean that responsibility for youth justice is shared between the federal and provincial authorities. Under the Canadian Youth Criminal Justice Act 2002, extra-judicial sanctions may be used for young people who offend. Conferences may be used to advise on extra-judicial sanctions. Like New Zealand, Canada has introduced conferencing to aid the development of culturally appropriate justice for Canada’s indigenous peoples.

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621 s 10(1), Youth Criminal Justice Act 2002.

622 s 19(2), Youth Criminal Justice Act 2002.

3. Conferencing in England and Wales

Youth justice legislation and policy in England and Wales is complex. In the last ten years, there have been numerous pieces of legislation, and enormous amounts of policy documents relating to youth crime and justice. Youth justice conferencing in England and Wales has developed in a piecemeal manner and is not based on statute. There are a number of small-scale conferencing schemes in operation, in both the child welfare and youth justice fields. The police-led scripted restorative caution model (the Wagga model) has been arguably more popular.

Unlike other jurisdictions, the principal objective of the Crime and Disorder Act 1998 is the prevention of offending. However, the Crime and Disorder Act 1998 arguably facilitates a restorative justice type approach to offending by young people. These approaches include referral orders (where the young person is referred to a volunteer led youth offender panel) and the system of reprimands and warnings. Family group conferencing has become more prevalent but is not based on statute.

D. Concluding Remarks

This section has introduced youth justice conferencing schemes in other similar jurisdictions. The conferencing schemes of New South Wales and South Australia are the most comparable to New Zealand. These schemes are statute based, have been in operation for a number of

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627 The Thames Valley Police Cautioning Scheme. See further C Hoyle, R Young and R Hill, Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning (York: RTF, 2002)

628 s 37, Crime and Disorder Act.


years and evaluations are available. Most importantly, these schemes are directly based on the New Zealand model. Thus, these schemes provide a valuable comparison for this research as to how the rights of young people have been safeguarded in the conference process.

V. CONCLUSION

This chapter has set out the necessary background information on the operation of the youth justice system, and the place of the youth justice FGC within this system. The key points to be taken from this discussion are summarised here. Firstly, the youth justice FGC has an essential part in the youth justice system. The FGC makes decisions at all stages of the youth justice system, both inside and outside the Youth Court. Secondly, approximately 9,000 FGCs take place every year, thus affecting the lives of many young people and their families. The powers and functions of the six types of FGC were set out here. The focus of this research is on the ITC and court-referred FGCs, as these are the most common type of FGC, and those which are involved in the administration of criminal justice type powers. This will be discussed further in Chapter 7. Finally, youth justice conferencing schemes in other similar jurisdictions were discussed. These conferencing schemes are used as points of comparison throughout this research.
CHAPTER SIX: PRACTICE AND PROCEDURE AT THE YOUTH JUSTICE FGC

I. INTRODUCTION

The preceding chapter considered the operation of the youth justice legislation and the place of the FGC within the youth justice system. Information presented in this chapter is principally derived from an observational study of FGCs in two regions of New Zealand. This observational study allowed an insight into practice and procedure at the FGC, and how possible legislative and policy changes might improve protections for young people.

The purpose of this chapter is to discuss practice and procedure at the FGCs which were observed. This provides the context for the use of practice examples from these FGCs in the substantive chapters.

II. OBSERVATION OF THE FGC

Though this research is grounded in legal concepts and carried out in a Faculty of Law, it was considered important that some observation of the FGC be carried out to gain practical experience of how the FGC operates, and particularly to consider how proposed improvements to legislation and policy might work in practice. To this end, twelve FGCs were observed over a three and half year period in two centres, one in the lower North Island and one in the lower South Island.631

A. Centre 1 - South Island

There was little difficulty in gaining permission to observe FGCs in Centre 1, which was in a South Island city. An introduction was made to Child, Youth and Family staff through a member of the local judiciary in September 2006. A meeting was held with the two local youth justice co-ordinators. A protocol was agreed whereby subject to the permission of the young person and their family, I would be allowed to sit in and observe the FGC. Originally, two youth justice co-ordinators were involved, but by this stage one of the youth justice co-ordinators involved had left the employment of Child, Youth and Family, and so it was the

631 The exact location cannot be specified to preserve confidentiality. This was a condition of being allowed to observe these private and confidential meetings.
work of one youth justice co-ordinator which was observed. This youth justice co-ordinator agreed to ask young people and their families who had been referred for a FGC by the Youth Court or by the police whether I could observe the FGC. If the young person and their family agreed, I was permitted to sit in on the FGC, except during private family discussion time. No information was collected on how many families or young people refused to have an observer present. In the majority of cases, I would get a phone call on the morning or the day before to say that there was permission to attend. Over a six month period, it was possible to observe seven different FGCs. In Centre 1, all but one of the FGCs were court-referred (all through the ‘not denied procedure’), the other was an ITC FGC. All the young people involved were male. All were classed as ‘young people’ i.e. between the ages of fourteen and seventeen. There were no ‘child offender’ FGCs in the sample.

B. Centre 2- North Island

It was considered important to also observe FGCs in another centre in New Zealand, in order to compare practice. It proved much more difficult to gain access to observe FGCs in another centre. Repeated efforts were made to gain permission to observe FGCs in the North Island, through requests to youth justice co-ordinators, Child, Youth and Family staff, the judiciary, and other personal contacts by my supervisors. Although enquiries commenced in 2006, it was not possible to obtain permission to observe until the latter stages of this project, i.e. late 2008. Finally, a successful introduction was made to a youth justice co-ordinator, again through a member of the judiciary. This youth justice co-ordinator is based in the lower North Island. The youth justice co-ordinator agreed to ask his referrals if they would permit me to observe the FGC. Again, this would generally eventuate at short notice. It was possible to observe five FGCs over a three month period in late 2008. Three of these were court-referred (again under the ‘not denied’ procedure), while the other two were ITC FGCs. All but one of the young people were male. Again, all were classed as young people.

C. Ethical Approval

Before observation of FGCs commenced in the South Island centre, ethical approval was sought from the University of Otago’s Human Ethics Committee as the research involved human subjects. Ethical approval for the observations was granted through the Human Ethics Committee.

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632 See Chapter 10(III) for discussion of the ‘not denied’ procedure.

633 Unfortunately, due to the fact that it was not always possible to obtain a copy of the FGC record, it was not possible to record ages accurately.

634 See Chapter 5(III) for detail on the different categories of FGC.
Committee in March 2007. The method and procedure as approved by the Committee was as follows:

With the consent of the family and young person, the researcher will sit in and observe the family group conference. The researcher will sit as part of the circle but will not contribute to the discussion in any way. The researcher will leave the room with the co-ordinator and the police officer during the allotted time for family discussion. The researcher will observe whether the requirements of the Children, Young Persons and their Families Act are being met in terms of conference procedure, explanation of the young person’s rights, and effective participation by the young person and will record the charge and the terms of the plan agreed upon.

The information sheets for the young people and their families are attached an an appendix.

D. Types of Offences dealt with at FGC

The following table sets out the type of offences dealt with at these FGCs. The classification used is that used by the Ministry of Justice in the official sentencing statistics. The most common offences were assault and property offences, though there were two instances of ‘victimless’ offences i.e. drug possession and dangerous driving.

<table>
<thead>
<tr>
<th>Offence category</th>
<th>Number (n = 12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent offences (assault)</td>
<td>3</td>
</tr>
<tr>
<td>Property offences (burglary, theft, car conversion, wilful damage)</td>
<td>7</td>
</tr>
<tr>
<td>Drug offences</td>
<td>1</td>
</tr>
<tr>
<td>Traffic offences</td>
<td>1</td>
</tr>
</tbody>
</table>

III. PURPOSE OF OBSERVING THE FGC

A. Limitations

The overall aim of this thesis is to examine a particular legal process (the youth justice FGC) from the perspective of the young person’s rights. This includes examining the theoretical foundation of the rights of young people in the New Zealand youth justice system, the sources of such rights, how these rights apply to the particular theoretical model of the FGC, and to examine how specific key areas of rights are safeguarded in the youth justice FGC. It is a law thesis, using legal reasoning as the principal method. Therefore, it is important to set the limitations of the information obtained during observation of the FGC.

635 The Ministry of Justice classification of offences is used here. See e.g. Nataliya Soboleva, Nina Kazakova, and Jin Chong, Conviction and Sentencing of Offenders in New Zealand 1996-2005 (Wellington: Ministry of Justice, 2006).
Patently, the observations were qualitative in nature, and the small sample size means that the discussion of outcomes etc is not statistically significant. There has been previous empirical research carried out FGC as part of large-scale evaluations of the youth justice system. These research projects have provided quantitative information such as the number of participants at the FGC, what percentage of FGCs were attended by a Youth Advocate, and the levels of community work hours decided on by the FGC. These projects were supported and resourced by the Ministry of Social Development and the Ministry of Justice. Reference is made to this larger scale statistical context throughout this research. In relation to larger scale statistical information, there are few reported cases dealing with the FGC procedure, and the FGC records are not public. During the course of this research, a Youth Justice Statistics report was published by the Ministry of Justice, which is a most useful source of information about youth justice outcomes and sentencing in the Youth Court. However, there are many statistical holes in the system, e.g. the complete lack of recorded information about the ‘not denied’ procedure, and any statistical information about the FGC plan. The 2004 evaluation (though supported and resourced by the Ministry of Social Development, the Ministry of Justice and the police) also faced difficulties with information about young people being held on many different databases. Efforts were underway in 2004 to establish a minimum youth justice dataset, though there have not been any more updates on this process.

The key limitation relating to the information derived from these observations, however, is that access to the FGC was by invitation, and not of right. It proved difficult to gain access to the FGC as it is considered to be essentially a private family matter. Apart from officials such as the youth justice co-ordinator and the police, and the victim of the offence, other participants such as family supporters and social workers are present subject to the wishes of the family. Access was gained through contacts in the judiciary, and only the work of two youth justice co-ordinators were involved. Ideally, if practice were to be empirically tested, then the youth justice co-ordinators would not know that I was arriving and would not know


637 See Chapter 10(IV) for discussion of the case law dealing with the ‘not denied’ procedure.


what I was interested in, and youth justice co-ordinators would be assigned at random. This was not an objective of this project, and neither would it have been possible (both in terms of gaining permission, and resources). It would also have been useful to interview the young people afterwards to get their views on the process, but this was not possible because permission could not be obtained.

It is appropriate here to make a brief comment about the difficulty of gaining access to information relating to the youth justice FGC. The youth justice co-ordinator is essentially the gate keeper of the process. It was also typical for the police officer or the Youth Advocate to question my authority for being there, although this seemed to be out of concern for the confidentiality of the young person's case. Had I and my supervisors not had personal contacts to whom requests could be made, it would have been impossible to gain access to observe the FGC. While it is important that confidentiality be maintained - the Youth Court too is not open to the general public, it is also vital that legitimate researchers are able to gain access to evaluate criminal justice processes.

B. Purposes of Observation
Firstly, at the very initial stages of this research, observation of the FGC was necessary to learn how the convoluted and complicated legislation worked in practice. The legislation gives minimal guidance on procedure and practice at the FGC. Previous studies had discussed procedure at the FGC, but there was no information available on adherence to provisions such as the requirement that the young person admit the offence.

Secondly, observation of the FGC helped at the initial stages in identifying which areas of rights were worthy of further study. The areas of legal assistance and sanctions have previously been identified as being areas where rights are in danger of being infringed in extra-judicial criminal justice processes like the FGC. However, the unusual and unique

640 I did attempt to minimise bias by being as reticent as possible with explanations about the exact nature of the project, however the youth justice co-ordinators did know that I was a legal researcher interested in the rights of the young person, and it is possible that they would change their behaviour because I was there. However, others such the police officer and the youth advocate only knew that I was an observer.

641 See Chapter 7 for discussion on the FGC as a criminal justice process.


643 See e.g. Kate Warner, 'Family Group Conferences and the Rights of the Offender' in Christine Alder and Joy Wundersitz (eds.), Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism? (Canberra: Australian Institute of Criminology, 1994).
way in which offences are proved through the FGC process became an issue of importance for this research, only after some observation of the FGC took place. Invaluable also were informal conversations, during the break for family discussion, with youth justice coordinators, Youth Advocates and Youth Aid officers and other professionals who offered their own views about problems with the legislation. These discussions led me to investigate issues which I was not previously aware of, including (e.g. the lack of provision for attendance by the Youth Advocate at the ITC FGC).\footnote{Chapter 8.}

The key focus in this research is on the due process type rights such as the right to a lawyer, and the presumption of innocence. The right to participation has previously been identified as an area of concern for young people in the youth justice system. Participation is not an issue directly addressed by this research.\footnote{However, see the discussion later in this chapter about how decisions are made at the FGC, and see also Chapter 11(II) and (III).}

Empirical research on participation at the FGC (including interviews with young people, and matching of their response with observational data) has previously been carried out.\footnote{Gabrielle Maxwell et al, \textit{Achieving Effective Outcomes in Youth Justice – Final Report} (Wellington: Ministry of Social Development, 2004), ch 4.}

Thirdly, it was necessary to observe how the legislative requirements relating to rights e.g. the requirement that the young person admits the offence and the behaviour of the Youth Advocate when he or she attends the FGC. I was particularly influenced by Dr Ursula Kilkelly’s research project on the operation of the Irish Children Court.\footnote{Kilkelly, Ursula, \textit{The Children Court: A Children’s Rights Audit} (Cork: 2005).}

This research involved observational research of youth court proceedings, using international children’s rights standards as an auditing tool.

Observations were carried out on a non-participative basis.\footnote{Catriona Campbell et al, \textit{Evaluation of the Northern Ireland Youth Conference Service – NIO Research and Statistical Series: Report No. 12} (Belfast: Northern Ireland Office, 2005).} It was not permitted to take notes during the FGC itself as the youth justice co-ordinator believed that this would disturb the informal atmosphere. My observations were written directly afterwards. In some cases, if the family agreed, and the youth justice co-ordinator was willing, it was possible to obtain a copy of the official FGC record. This document is the official record of the FGC and is transmitted...
back to the referring agency (i.e. the police or the Youth Court Judge). This was possible in eight out of the twelve cases. In cases where it was not possible to obtain the FGC record, I relied on my notes of what the FGC had decided. The FGC record notes the participants who attended the FGC and their relationship to the young person, the charge which the young person admitted, and the decisions or recommendations made by the FGC.

Practice examples derived from the observations made at the FGC, and the FGC record informs the discussion of practice and procedure at a typical FGC (which is discussed later in this chapter). These will be used to illustrate the discussion in the substantive chapters. For example, what form of words is used to fulfil the legislative requirement that the young person admits the offence,649 the role of the Youth Advocate when he or she attends the FGC,650 and examples of FGC outcomes.651

Finally, the most important purpose of observing the FGC was to aid understanding of how improvements could be made to legislation and practice. The issue of rights in informal processes like the youth justice FGC has been the subject of previous critiques, though not in a New Zealand context.652 What has been missing from these critiques however, is a way forward – if there are concerns about rights, how can processes be improved and how suggested legislative and policy improvements work in practice. Given that the FGC is likely to remain a part of the New Zealand youth justice system for the foreseeable future, it is necessary to take a pragmatic approach, and suggest workable improvements. The experience of observing the FGC particularly informs the last chapter entitled ‘The Way Forward’. This chapter draws together the recommendations for improving rights protections at the FGC, including draft legislative changes and policy recommendations.

649 Chapter 11.
650 Chapter 9.
651 Chapters 12 and 13.
IV. PARTICIPANTS AND VENUE

A. FGC Participants and Their Statutory Roles

Before proceeding to discuss procedure at a typical FGC, it is necessary to set out who the participants are, and what their statutory roles are. The FGC is responsible for a number of important statutory functions in the youth justice system. Consequently, there are extensive legislative provisions setting out who may attend the FGC. 653

1. The youth justice co-ordinator

The youth justice co-ordinator is employed by Child, Youth and Family654 to perform the statutory role of convenor and facilitator of the FGC. The YJC has a number of legal duties concerning the FGC. 655 These include:

- To convene the FGC according to the time limits prescribed by the CYPF Act, 656
- To consult with the family group and the young person to agree on a suitable date, venue and time to hold the FGC, 657
- To ensure that the victim of the offence is notified, 658 and if the victim is unwilling or unable to attend, to ascertain his/her views, 659
- To notify all those entitled to attend. 660

The role of the YJC in the FGC is an important and vital one for a successful FGC. It requires skilful facilitation and mediation between the various participants, especially between estranged family members coming together for the FGC. Both youth justice co-ordinators observed for this research had worked for Child, Youth and Family for at least ten years, and were thus experienced facilitators.

653 s 251, CYPF Act.
654 Child, Youth and Family is part of the Ministry of Social Development.
655 In practice, youth justice coordinators may delegate some responsibility for conference preparation to a clerk or a youth justice social worker if one is employed in that region.
656 s 249, CYPF Act. Time limits vary from 7 -21 days depending on the type of FGC.
657 s 250(1), CYPF Act.
658 s 250(2), CYPF Act.
659 s 254(1), CYPF Act.
660 s 253, CYPF Act.
2. The police

The informant is entitled to attend the FGC.\textsuperscript{661} In all of the twelve FGCs this police informant was a member of the specialised Youth Aid section. Unlike some Australian states, where the police officer acts as the facilitator of the conferencing process, the police officer's primary role is to inform the FGC of the charge against the young person, through a reading of the summary of facts,\textsuperscript{662} but the police officer is also a member of the FGC, and thus must agree to the FGC outcome before an agreement is reached. In practice, the police often acted as a guardian of the public interest, especially when the victim was not present.\textsuperscript{663} The proper role of the police in the FGC decision making is considered in a later chapter.\textsuperscript{664}

3. The young person and the family

Attendance at the FGC is a right and not an obligation; however it would be highly unusual for a FGC to take place without the child or young person present.\textsuperscript{665} All the FGCs attended during this research took place with the young person present. The family of the young person may attend and invite such supporters as they see fit.\textsuperscript{666} All FGCs had at least one family member present (in all cases a parent). In the other eleven FGCs, there was at least one other family member present. Family members included siblings, aunts, uncles, grandparents, and cousins. The largest FGC attended had twelve family members present. In two cases, family members joined the proceedings via speakerphone. This was to facilitate family members who were in another location and would not otherwise have been able to participate.

4. Other professionals

There is provision for a lawyer for the young person to be present.\textsuperscript{667} This may be the young person's own lawyer or a court-appointed youth advocate where the case has been referred

\textsuperscript{661} s 251(1)(d), CYPF Act. The legislation uses the term 'informant' as the role could potentially be carried out by a Ministry of Transport official where a motoring offence was concerned. For convenience, the term Police officer is assumed throughout the text.

\textsuperscript{662} See Chapter 11 for more detailed discussion on how admissions are made in the FGC.

\textsuperscript{663} See Chapter 12(IV) on the role of the police in deciding on the FGC outcome, and Chapter 13(IV) on the relationship between the rights of victims and the rights of young people.

\textsuperscript{664} See Chapter 12(IV).


\textsuperscript{666} s 251 (1)(b)(ii), CYPF Act.

\textsuperscript{667} s 251(g), CYPF Act.
from the Youth Court. All the court-referred FGCs attended during this research had a Youth Advocate present for at least some part of the FGC. Youth Advocates were not present at the three ITC FGCs observed. The issue of legal assistance at the FGC is discussed in greater detail in Chapters 8 and 9.

In eleven out of the twelve FGCs, at least one other professional was present. These included school guidance counsellors (at four FGCs), youth justice social workers (at four FGCs), social workers (at six FGCs), drug and alcohol counsellors (at seven FGCs), psychologists (at one FGC), and Maori or other cultural support workers (at three FGCs). The largest number of professionals present at a FGC was five.

The number and nature of professionals attending the FGCs is surprising when one looks at the legislative provisions governing the FGC. The legislation is prescriptive in regard to attendance by professionals. Social workers can only attend in limited prescribed circumstances, similarly other agency representatives may only attend where the young person is subject to a support order pursuant to the care and protection provisions of the CYPF Act. The only authority for having others (such as drug and alcohol counsellors and school guidance counsellors) present at the FGC is section 251(o) which permits ‘any other person whose attendance at that conference is in accordance with the wishes of the family, whanau, or family group of the child or young person’. These restrictions on the attendance of professionals except where already involved in the young person’s case are presumably intended to restrict the power of professionals and empower the young person and their family to make decisions.

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668 s 324(3)(a), CYPF Act.
669 s 251(1)(h), CYPF Act.
670 s 251(h) states that a social worker may only attend where:
   (i) The chief executive is a guardian of the child or young person; or
   (ii) the chief executive has the role of providing day-to-day care for the child or young person under the Care of Children Act 2004, or is entitled to custody of the child or young person under an order or agreement made under Part 2 of this Act; or
   (iii) The chief executive is required, pursuant to an order made under section 91 of this Act, to provide support to the child or young person; or
   (iv) The young person is under the supervision of the chief executive pursuant to an order made under section 283(k) or section 307 or section 311 of this Act:
671 s 91, CYPF Act.
672 This is the section under which my attendance at the FGC is permitted.
Despite these legislative restrictions, there was an overwhelming impression that these professionals regarded themselves as attending as of right, rather than by invitation of the family. For example, when social workers did attend, there was no evidence during the FGC to suggest that they were there as a result of a Family Court support order. In the cases where the school guidance counsellor attended, the YJC stated ‘I asked X to come along’. Similarly, the drug and alcohol counsellor in Centre 2 arrived with the police at their invitation. Granted, there was no question of the family disputing professionals being there, in all cases the family and the young person seemed content to have others there, but this is certainly an area in which care needs to be taken that the family and the young person give consent for these other professionals to be present. The legislation has placed restrictions on their attendance for a good reason: to minimise cross over between care and protection and youth justice except where strictly necessary.\(^\text{673}\)

5. The victim of the offence

As discussed, an innovative feature of the CYPF Act was the provisions designed to directly involve victims of offences in responses to offending by young people. The victim of the offence has the right to attend or send a representative,\(^\text{674}\) and the youth justice co-ordinator has a statutory duty to ascertain and present to the FGC the views of the victim if the victim cannot or will not attend the FGC. Responses to offending under the previous legislation (the Children and Young Persons Act 1974) had an element of community representation,\(^\text{675}\) the CYPF Act was innovative in giving the victim of the offence the right to attend the FGC and to play a direct part in formulating the FGC outcome. The original legislation did not permit the victim’s supporters to attend but the CYPF Act was amended to allow this,\(^\text{676}\) following a review of the CYPF legislation in 1992 which had reported victims’ concerns about lack of support compared to the young person and their family.\(^\text{677}\) Persons attending under this section

\(^{673}\) See Chapter 13(V) for analysis on the relationship between the two systems, and the implications for the rights of the young person.

\(^{674}\) s 251(1)(f), CYPF Act.


\(^{676}\) s 37, Children, Young Persons and their Families Amendment Act 1994.

are not members of the FGC for the purposes of the legislation.\textsuperscript{678} A larger scale evaluation of the youth justice system has demonstrated that victims are present at approximately half of FGCs.\textsuperscript{679} Only three out of twelve of the FGCs attended during this research had a victim present (in one of these cases, the victim was a close family member), although in six of the remaining FGCs, the youth justice co-ordinator reported the views of the victim to the FGC.

B. Venue

The CYPF Act permits the FGC participants to agree amongst themselves on a suitable venue to hold the FGC,\textsuperscript{680} and thus would seem to envisage FGCs taking place in alternative venues such as the home of the young person or on the marae.\textsuperscript{681} All the FGCs observed in the course of this research took place at Child, Youth and Family premises, and there was the impression that this was usual practice. Again, these FGCs were attended by invitation rather than by right, and it is very likely that the youth justice co-ordinators invited me to attend FGCs which were held in easily accessible and neutral venues, rather than private homes. Choice of venue for the FGC was not an issue directly addressed by this research, but a 2004 evaluation found that the requirements of the CYPF Act to consult families and victims in relation to preferences for the time and place of the FGC were not always followed.\textsuperscript{682} In these twelve FGCs, there was no evidence that families or young people were unhappy with the choice of venue.

In both centres, the room where the FGCs took place was a standard meeting room facility. There was adequate room for up to twenty people to sit in a circle of chairs. There was a whiteboard provided for the family to write up the FGC plan which could be printed out. Tea and coffee was available for the participants. Unlike a courtroom, there was no designated seating arrangement and participants sat wherever they wished in the circle of chairs.

\textsuperscript{678} s 251(2) and (3), CYPF Act which permit the victims supporters to attend the FGC but state that such supporters are not members of the conference were added by s 37 of the Children, Young Persons and Their Families Amendment Act 1994.


\textsuperscript{680} s 250(1) and (2), CYPF Act.


\textsuperscript{682} Gabrielle Maxwell et al, \textit{Achieving Effective Outcomes in Youth Justice – Final Report} (Wellington: Ministry of Social Development, 2004), 12.
V. FORMAT OF THE FGC

The CYPF Act provides that participants regulate FGC procedure as they see fit, but the FGCs generally proceed in a comparable manner. Specific procedural issues relating to the rights under discussion will be dealt with in the substantive chapters, but typical practice will be discussed here. The key stages will now be considered. There were no discernable differences in procedure or format between the court-referred FGC and the ITC FGC.

A. Introduction Phase

In all cases, the youth justice co-ordinator was present in the room first and welcomed the participants as they arrived. The young person was usually the last to arrive, but in one case, the Youth Advocate was already there speaking to the young person in private. The youth justice co-ordinator introduced everyone and stated their relationship to the young person. These introductions were repeated if there was a latecomer. In two cases, there was a prayer by a member of the young person’s family. It was usual for the youth justice co-ordinator to make some comment about the purpose of the FGC. Sometimes this was as brief as ‘We are here to talk about offending by X’ or ‘We are here for you, X’. In other cases, there would be a fuller explanation about the FGC, explaining the purpose e.g. in the case of a court-referred FGC, that the Judge had referred the matter to the FGC to make decisions, or that the FGC was here ‘to make sure you were accountable to your victim’, or ‘to put things right between you and your victim’. The level of explanation given appeared to depend on how much ‘groundwork’ the youth justice co-ordinator had been able to put in before hand. The youth justice co-ordinators explained to me that they preferred to meet the participants separately before the FGC and explain matters to them. Sometimes this was not possible (it was sometimes difficult to track young people down as they were often transient), or it might only be possible to speak on the phone. The introductions phase lasted five to ten minutes depending on the number of participants present.

B. Admission of the Offence

As noted, the CYPF Act does not take a prescriptive approach to procedure at the FGC. One of the few prescribed procedural requirements is that the young person admits the offence at

683 See Chapters 8 and 9 (legal assistance), 10 and 11 (how the offence is proved in the FGC), 12 and 13 (outcomes of the FGC), and 14 (a summary of recommendations).

684 See Chapter 9, which discusses the role of the Youth Advocate at the FGC.

685 See Chapter 14(V) for recommendations on explanations that should be provided to the young person.
the FGC. 686 This requirement was fulfilled in all the FGCs. In all cases, this was accomplished by the police officer reading the summary of facts and the young person being asked whether they agreed. 687

Chapters 10 and 11 deal with this requirement in much more detail, but it is worth noting here the variance in explanations given to the young person. In Centre 2, the youth justice co-ordinator gave a detailed plain language explanation about what would happen if the young person chose not to admit the offence, including that the offence would then go back to the police or the Youth Court (as appropriate). This did not happen in Centre 1, although I cannot discount the possibility that the youth justice co-ordinator explained this to the young person in advance of the FGC. This was the quickest phase of the FGC, typically lasting only a few minutes.

C. Discussion Phase

After the admission was formally noted by the police and the youth justice co-ordinator, the FGC proceeded to the discussion phase. Patently, the content and length of time devoted to discussion varied depending on the circumstances of the young person, whether the victim was present, and especially how many family members were present, but three broad themes were discussed in all the FGCs: the effect of the offending/ circumstances of the offending, the general circumstances of the young person and/or their family, and possible/appropriate outcomes for the FGC.

The first of these is the offence. The victim (if present) had an opportunity to speak about the effects of the offending (on the invitation of the youth justice co-ordinator), noting that victims were only present in a quarter of these FGCs. 688 When the victim was present, this was evidently more satisfactory than when the victim’s views were conveyed by the youth justice co-ordinator, or there was no presentation of the victim’s views. It was possible to hear the effect of the offence on the victim (analogous to a victim impact statement in court), and an apology could be made directly to the victim. When the victim was present, it was possible to get ‘the other side of the story’ relating to the circumstances of the offending. The relationship between the victim and the rights of the young person is discussed in more detail in a later

686 s 259(1), CYPF Act.

687 The legal issues relating to this are discussed in detail in Chapters 10 and 11.

688 One of the FGCs was a drug offence, and another was a traffic offence, so there were no victims per se.
chapter.\textsuperscript{689} If the victim was not present, it was typical for the police or the youth justice co-ordinator to start the discussion by asking the young person 'why it happened'. This would lead into a discussion about the causes of the offending, e.g. why the young person had been out that late, whether he or she had been drinking, and what friends he or she had been with. As drugs and/or alcohol were featured in all twelve FGCs, this would always lead into discussion about whether the young person had alcohol or drug abuse issues, and whether these needed to be addressed in the FGC plan.

In all the FGCs, there was discussion about the general circumstances of the young person. For example, this could include discussion about how the young person was getting on at school, and whether he or she was attending school - especially in the cases where a school guidance counsellor was present, the young person's living arrangements, who the young person was associating with, and the young person's relationship with his or her family. As will be discussed in Chapter 13, this type of discussion is arguably indicative of a care and protection process rather than a criminal justice process. This was especially noticeable where there was no victim presence. The presence of the victim also reminded participants that the FGC was a process convened to deal with offending. Otherwise, the FGC tended to resemble a social work meeting between the family and various professionals, with only the police officer there to argue the public interest.

Before the FGC paused to allow the family time to discuss in private, there would be some discussion about possible outcomes. It was typical practice for the police officer or the youth justice co-ordinator to make some suggestions to the young person and his or her family about what would be 'acceptable' to the Youth Court Judge, or to the police.\textsuperscript{690} This would include advice like 'the Judge is going to be looking for some accountability', or 'the Judge is going to want a curfew'. In Centre 1, it was the practice of one particular police officer to make reference to sentences in the adult court, e.g. 'if you were two years older you would be looking at up to ten years' (a burglary charge). However, the youth justice co-ordinator would typically tell the family to come up with a plan that they thought would work for them.

There are arguments for and against these suggestions made to the young person and their family. Obviously, the family are new to the process and need some guidance on what is

\textsuperscript{689} See Chapter 13(IV).

\textsuperscript{690} The issue of limits on sanctions is dealt with in Chapter 12
expected in the plan e.g. that there would need to be an appropriate sanction, what form the
sanction could take, what community service was available or how money could be paid back
through the police officer or through the Youth Advocate’s trust account. The police officer
would usually have a value for reparation in the case of damage or vandalism. In some cases
this would be provided by the insurance company. However, these suggestions could also
descend into a discussion between the professionals as to what placements (e.g. drug and
alcohol), referrals (e.g. to psychologists) and community work placements were available.
Unfortunately, this was usually characterised by frequent use of acronyms, presumably
incomprehensible to those not familiar with the system. The discussion phase was typically
the longest phase of the FGC, taking between thirty minutes and an hour and a half.

D. Private Family Discussion
In all but one of the FGCs, the professionals left the room to allow time for family discussion
in private.691 In the one FGC where this did not happen, the family and the young person did
not feel it was necessary to have private discussion time. The length of time which the family
took was generally related to the amount of family members present, and ranged from five
minutes to one hour. In four cases, the family requested further information from the
professionals (usually the youth justice co-ordinator) before making a decision. In one case,
the family asked the Youth Advocate to stay and explain matters to them.

E. Formulation of the Plan
1. Reporting back after family decision making
In both centres, the young person and their family were encouraged to write their proposed
plan on the whiteboard before the formal part of the FGC re-started. In Centre 1, the practice
of the youth justice co-ordinator was to ask the young person to inform the FGC participants
as to what had been decided during family discussion time. This appeared to be a successful
method of involving the young person at this stage of the FGC.

There were two issues of concern with this part of the FGC. In all cases, there was evidence
that the young person would benefit from a break at this stage in proceedings. Young people
appeared tired and lacking in concentration, after being the centre of attention for up to two
hours at this stage. The second issue is that both families and young people typically appeared
confused about what the process involved, what they were actually being asked to decide and

691 This included myself.
especially what the next steps would be. Recommended explanations for the young person are set out in the final chapter. 692

2. How decisions were made
Theoretically, the FGC process is characterised by group consensus decision-making. 693 This is a decision making model characterised by negotiation and participation. In the FGC, the young person, their family and the victim of the offence are given the opportunity to directly participate in the negotiation of a response to the offending. Maxwell et al contrast group consensus decision making with the linear decision making process, that is when a professional or expert person (e.g. a judge) makes a decision on behalf of others. 694 Decisions at the FGC are to be made by negotiation between the parties concerned and the agreement of all parties must be reached before the recommendations of the FGC are reported back to the referring agency (the police or the Youth Court). 695

In the observations, I recorded which participant, in my opinion, took the largest part in decision making. In only one out of the twelve FGCs, this was the young person. This young person was a confident and articulate young person, and was well able to put across his views and speak up when he thought proposed outcomes were unfair. This level of participation was as a result of the young person’s own confident personality, rather than any special intervention by the facilitator. In four cases, the police officer was recorded as being the dominant party. 696 In two cases, it was the youth justice co-ordinator, and in one case it was a relative of the young person. In the remaining FGCs, no party stood out as dominating the decision making process.

It is apparent, however, that there is a fine line between assisting the young person and their family with information, and making the decision on their behalf. Typically, there was a need for the professionals to inform the family if they were crossing the boundaries of the CYPF Act’s powers. Common instances of this were the family wanting to write conditions into the

692 See Chapter 14(V).
695 See Chapter 7 for a more detailed discussion of the theoretical model of the FGC.
696 See Chapter 12(IV) for discussion on the role of the police in deciding on the FGC sanction.
plan which were outside the remit (such as requesting that a police officer accompany the young person to school in the morning to make sure he went there) or provisions which strayed into family law proceedings (attempting to write conditions in which overrode previous custody and guardianship orders). However, some plans still had conditions which arguably fell outside the remit of the CYPF Act, especially those overlapping with the care and protection system. These issues are discussed in further detail in Chapters 12 and 13.

3. Agreement and recording
There must be an agreement between the participants before the FGC plan can be reported back to the referring agency. All of the FGCs observed came to an agreement.697 To avoid repetition, the content of the plans are not detailed here, but are referred to in Chapters 12 (dealing with limits on sanctions) and 13 (dealing with the objectives underlying FGC outcomes).

The meeting was closed by the youth justice co-ordinator who thanked all participants, and then printed off the plan from the whiteboard for the record. An official typed copy of the FGC plan is then sent to all participants and to the relevant referring agency (that is the police or the Youth Court).

V. CONCLUDING REMARKS
This chapter has provided the context for the substantive chapters by discussing practice and procedure at the FGC. The roles of the participants, the venue, and format of the typical FGC were considered. Although the legislation is generally silent on FGC procedure, in both centres, the FGC followed a similar course. The information derived from the observation of these FGCs provides practice examples which are used throughout the substantive chapters.

697 s 264 of the CYPF Act requires that where there is no agreement, the youth justice co-ordinator must report back to the referring agency.
CHAPTER SEVEN: THE APPLICATION OF RIGHTS TO THE FGC MODEL

I. INTRODUCTION

Chapter 4 analysed the rights framework for the young person involved in the youth justice system. It is self evident that international human rights standards (such as the CRC and the ICCPR) and the NZBOR Act were formulated with the formal adversarial (or inquisitorial) criminal process in mind. Chapters 5 and 6 set out the powers of, and procedure at, the youth justice FGC. It was apparent that although the FGC is an integral process in the resolution of offending by young people, it differs markedly in format from the normal adversarial criminal process. Therefore, before considering some of the specific rights issues in the FGC, it is necessary to clarify the nature of FGC outcomes in support of an argument that rights do apply to young people in these situations. As arguments for rights protections in more informal processes like the youth justice FGC are frequently countered with contentions that rights do not apply, or are not required, it is important to establish what type of legal process the FGC represents.

In the following sections, three contentions advanced against the need for, or application of, rights to the FGC model will be refuted. First, that the FGC is concerned with restoration or reconciliation rather than punishment in respect of a criminal offence. Secondly, that the FGC is a voluntary process in which the young person consents to the outcome rather than a coercive state process. Thirdly, that the FGC is a cultural justice process, not a state process. Essentially, it will be argued here that although the FGC may contain elements of restorative justice practice and Maori justice principles, and emphasises the importance of family empowerment, it remains a state process designed to resolve breaches of the criminal law and thus the due process rights of the young person should be safeguarded.

II. RESTORATION, NOT PUNISHMENT?

A. Introduction

Certain features of the youth justice FGC, such as the potential for victim involvement mean that the youth justice FGC is commonly identified as an example of restorative justice in practice.699 This section will define restorative justice and consider the potentially restorative features of the youth justice FGC.700 More importantly for the purposes of this research, is the relationship between rights and restorative justice. Proponents of restorative justice often deny the need for rights in such processes, arguing that the process does not involve punishment, but a ‘higher purpose’ of reconciliation and re-integration. These arguments have been advanced in relation to the FGC.701 It will be argued here that although the FGC has the potential for restorative processes and outcomes, it still involves punishment in respect of a criminal offence.

B. The FGC as a Restorative Justice Process

1. Defining restorative justice

Under the restorative justice model, the criminal act is seen not as an act against the state but as an act against the community in general and the victim in particular.702 The focus is on creating positive obligations for the offender rather than imposing negative consequences. Restorative justice sees offending behaviour as damaging human relationships; therefore these breaches should be remedied by active participation by families, victims and the community.703 Restorative justice aims for re-integration and repair of harm rather than punishment and retribution.704 Restorative justice is often distinguished by comparison with the traditional retributive or punishment model, in which the formal legal process is involved in a determination of guilt for which punishment proportional to the gravity of the crime is


700 The compatibility of restorative justice with the rights of the young person is considered in greater detail in Chapter 13(IV).


imposed. The system is adversarial and the focus is more on process then on actual outcome.705

2. Potentially restorative features of the FGC

Though it has been described as the ‘first legislated example of a move towards a restorative justice approach to offending’,706 there is no explicit mention of restorative justice in the CYPF Act. ‘Restorative justice’ was not truly developed as a concept in criminology until the work of Howard Zehr and John Braithwaite in the early 1990s.707 The youth justice provisions of the CYPF Act had been developed before these ideas had been widely disseminated. The CYPF Act is, therefore, restorative in practice rather than in theoretical basis. As Stewart has commented ‘the concept of restorative, as opposed to adversarial, justice was probably not a foremost concern of the original legislators but this has emerged from practice as a key factor in dealing with juvenile offenders’.708

It can be said that the goals of restorative justice and the New Zealand youth justice principles intersect on some levels. McElrea categorizes three particular elements of the CYPF Act as being restorative in nature; the transfer of state power from the courts to the family and community, group consensus decision-making in the FGC and the involvement of victims leading to a healing process.709 In practice, levels of ‘restorativeness’ vary between FGCs. Approximately half of FGCs do not have a victim or victim’s representative present.710 When the victim is not present, one of the key components of a restorative justice event (i.e. the repair of harm caused by the offending) is diminished.711 It is difficult therefore to class as restorative justice a FGC where there is no victim presence. The central idea of restorative

justice is that the offender will perform actions to repair the harm caused by the offending. This could take the form of an apology to the victim, reparation to the victim or the carrying out of some work (either for the victim directly, for some organisation nominated by the victim, or some work related to the offence). In addition, there are the more subtle measures of restorativeness. Spontaneity and genuineness of the apology is an issue, especially if the victim is not actually present at the FGC. Voluntary attendance and participation by the offenders is a characteristic of restorative justice events. However, it is essentially mandatory for a young person to attend a lawfully convened FGC. McElrea notes that it is 'extremely rare for a young person to refuse to attend a conference, perhaps reflecting a strong preference for the community based alternative.' Non-attendance is not an offence per se but if the young person refuses to attend, the case will go to the Youth Court (with the attendant risk of a more coercive sanction).

C. Implications for the Rights of the Young Person

In Chapter 2, the relationship between the welfare approach to youth justice and the rights of the young person was discussed. In the welfare model of youth justice, which had as its broad aim an individualised and paternalistic approach to offending by young people, it was argued that rights were not needed or did not apply because the purpose of the youth justice system was benevolent and any actions were taken in the best interests of young people. In other words, there was a higher purpose, and the results were not criminal sanctions, even though impositions such as custodial sanctions were involved which, if imposed on an adult, would certainly be regarded as punishment for a criminal offence. In the current youth justice system operating under the CYPF Act, it is argued that the sanctions resulting from the FGC are distinguished from punitive criminal justice sanctions because the intention or purpose is not punishment for its own sake, but the repair of harm, the reconciliation of the young

712 Maxwell et al described as restorative those elements aiming to repair the harm caused by the offending (apologies, reparation or donation, work for the victim): Gabrielle Maxwell et al, Achieving Effective Outcomes in Youth Justice – Final Report (Wellington: Ministry of Social Development, 2004), 240.


715 See Chapter 2(III).

offender with the victim of the offence and the re-integration of the young person to their 'community of care'. Maxwell et al describe as restorative those elements aiming to repair the harm caused by the offending (apologies, reparation or donation or work for the victim).

Proponents of restorative justice do not deny that the process is involved in the administration of criminal sanctions but argue that procedural protections for the offender are not required because restorative justice has a 'higher purpose' i.e. reconciliation and reintegration between the offender and the victim. This assertion may be partially explained by the fact that advocates of restorative justice often come to the process from a religious standpoint. Similarly those who see restorative justice as coming from indigenous traditions often seem to gloss over the more coercive elements of such processes. Such ideological standpoints may cloud judgment with regards to the potential for coerciveness and unfairness in restorative justice. Braithwaite states his view that rights in restorative justice processes would ruin the restorative nature of the process and describes the debate on standards for restorative justice as a 'dangerous debate'. As Ashworth has commented, 'too often...enthusiasm for such processes leads proponents either to overlook the need for safeguards or to imply that they are not relevant'. In the restorative justice literature a sharp contrast is made between restorative sanctions, purportedly designed to repair the harm caused to the victim, and retributive sanctions, designed to punish the offender. Does the different intention mean that the sanction is not punishment? The argument that procedural protections for the alleged offender are not required because the FGC process has a 'higher purpose' is a dangerous one, reminiscent of the punishment versus treatment debate.


A theoretical forerunner of the restorative justice movement was the development of the idea that the state had stolen conflicts from individuals.\textsuperscript{723} Restorative justice views conflicts more as the property of individuals rather than the state. Due process, the argument runs, was formulated to place controls on state arbitrariness and so is not needed when individuals resolve the matter. Critics of restorative justice question whether the returning of control over conflicts to individuals is a positive development, especially in relation to the role restorative justice gives to the victim.\textsuperscript{724}

D. Is the FGC Outcome Punishment in Respect of a Criminal Offence?

1. Theoretical arguments

Many restorative justice theorists argue that an outcome is only punishment if the intention is to punish. As Miller and Blackler note, ‘restorative justice is often contrasted with retributive justice, on the grounds that the latter is held to be committed to punishment for its own sake, the former to abandoning punishment in favour of shame, reconciliation and forgiveness’.\textsuperscript{725} Punitive elements are distinguished as being the infliction of punishment for its own sake.\textsuperscript{726} Walgrave also distinguishes punishment as occurring when the pain is willingly inflicted.\textsuperscript{727} RA Duff argues that:

\begin{quote}
Punishments are ‘merely punitive’ if they are intended or administered as mere retribution, with the sole aim of ‘making them suffer’ – regardless of the meaning of that suffering. They are ‘merely punitive’ if they are intended or administered merely as deterrents whose sole aim is to secure the obedience of a supposedly dangerous class of potential offenders by threatening them with sanctions. They are ‘merely punitive’ if their primary effect is to further exclude those who have already been excluded – to stigmatise offenders as enemies against whom ‘we’ must be protected, to deprive of more of the rights and benefits of citizenship those we were already excluded from a just share in those rights and benefits.\textsuperscript{728}
\end{quote}

Luna argues that ‘punishment entails the intentional infliction of pain or some type of deprivation that individuals would generally prefer to avoid, making it insufficient to simply

\textsuperscript{723} Nils Christie, ‘Conflicts as Property’ (1977) 17 British Journal of Criminology 15.


\textsuperscript{725} Seumas Miller and John Blackler, ‘Restorative Justice: Retribution, Confession and Shame’ in Heather Strang and John Braithwaite, Restorative Justice: Philosophy to Practice (eds.) (Dartmouth: Ashgate, 2000), 88.


declare that state-imposed sanctions are a necessary adjunct of a criminal justice system'.

Walgrave states that ‘punishment only occurs when the pain is willingly inflicted, and is inflicted on a person because of the wrongfullness of the behaviour he/she has done’. Similarly, Wright and Masters argue that ‘the outcome [of restorative justice processes] is not ‘punishment’, which means the infliction of pain for its own sake and hence making things worse, but reparation, which means attempting to make things right’. Arguments such as those just outlined inevitably lead to the assumption that rights are not required when the intention is not punishment. As Skelton argues:

The protection of rights is surely important, but in restorative justice we are striving for more than formalistic protection – we are aiming higher, hoping for behaviour change, hoping to prevent re-offending, hoping to balance the needs of the offender with the needs of the victim.

Restorative sanctions should be seen as an alternative form of punishment rather than an alternative to punishment.

As Zernova has argued ‘punishment is probably best defined not by reference to the intention of the punisher, but to the element of hard treatment’, and criticisms of the intention based approach of distinguishing restorative justice sanctions from punishment have correctly likened the approach to the arguments around the difference between punishment and treatment. The distinction appears to turn upon the intention of the punisher. Daly rightly argues that it ‘overlooks decades of critique of the rehabilitative ideal, with its associated

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735 Margaret Zernova 'Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences' (2007) 47 British Journal of Criminology 491, 493.
treatment-orientated intervention', and 'exemplifies how elites may delude themselves into thinking that what they intend to do (that is, not to punish) is in fact experienced by those at the receiving end'. Daly seeks to explain why restorative justice advocates are against the idea of calling the outcomes of such processes punishment:

It is part of a broader development in the history of punishment, in which justice elites have increasingly come to imagine and announce that what they intend to do in responding to crime is not to punish, but rather to guide, correct, educate, or instruct offenders... Such intentions are fine, but they need to be mindful of the empirical world. Do those who are not justice elites or who are on the receiving end of this new penal imaginations see it in the same way? Does their experience matter to the justice elites?

2. Application to the FGC

The non-punitive intentions of restorative justice theorists are all very well, but what of the characteristics of the FGC plan? An FGC outcome involving, for example, fifty hours of community service or a monetary penalty of $500 will undoubtedly be seen as a punishment by the young person. Punishment is something that is unpleasant and involves an imposition. Little appears to distinguish a sentence of reparation or community service administered in the adult courts (which few would deny constitutes punishment) and the FGC plan. Both deprive the offender of interests such as money or time. FGC plans may involve numerous hours of community service and thousands of dollars in reparation. The purported difference between punitive and restorative measures appears to turn upon the intention. There may be exactly the same outcome. Zernova has carried out interviews with FGC participants in England. Only a minority of young offenders perceived FGC outcomes as punishment although it was 'clear' from interviews with offenders that outcomes were frequently painful. One possible explanation for the fact that the young offenders seemed

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736 Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite (eds.), Restorative Justice: Philosophy to Practice (Aldershot: Ashgate, 2000), 39 [italics in original].

737 Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite (eds.), Restorative Justice: Philosophy to Practice (Aldershot: Ashgate, 2000), 39 [italics in original].


739 Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite (eds.), Restorative Justice: Philosophy to Practice (Dartmouth: Ashgate, 2000). See Chapter 12. II for examples from FGC plans.


741 Margaret Zernova 'Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences' (2007) 47 British Journal of Criminology 491, 494.
not to regard conference outcomes as punishment was ‘the way restorative interventions were prepared and conducted could have concealed the essence of restorative justice sanctions’. The ‘hospitable, informal and friendly atmosphere’ might have meant that the offender did not perceive the FGC as punishment.

Moreover, the terminology of the CYPF Act refers to ‘sanctions’ and ‘penalties’. The principles guiding youth justice use the terminology ‘impose sanctions in respect of criminal offending’ and the ‘nature of any such sanctions’. Section 260 (3)(d) states that the FGC may recommend ‘appropriate penalties’, while section 260 (3)(e) states that FGC may recommend that the young person ‘make reparation to any victim of the offence’. Again there is no mention of repair of harm or reconciliation as the objective. Criminal justice terms such as ‘reparation’ and ‘penalty’ are used. McElrea (a strong advocate of a restorative justice approach to offending), states that he has ‘never seen restorative justice as an alternative to punishment’ and notes that most FGC plans have a ‘punitive’ element such as ‘unpaid community work’.

The argument that sanctions resulting from a FGC are not punishment because they are designed to repair harm and effect reconciliation cannot be sustained when the statistics on the rate of victim participation are considered. Both major evaluations of the youth justice system under the CYPF Act have reported victim attendance rates at less than one half of youth justice FGCs. In the FGCs observed for this research, only three out of twelve had a victim present. How could the sanctions imposed on the young person whose victim chose not to participate in the process be designed to reconcile the victim to the offender or to repair

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742 Margaret Zernova ‘Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences’ (2007) 47 British Journal of Criminology 491, 494.

743 Margaret Zernova ‘Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences’ (2007) 47 British Journal of Criminology 491, 495.

744 s 208(e)(i) and (ii), CYPF Act.


748 See Chapter 6(IV).
the harm caused? What about a driving offence (e.g. driving without a licence or speeding\textsuperscript{749}) where there is no specific harm to a specific victim? To argue that the community work hours completed by such young people are intended to be restorative rather than punishment is to argue that a sentence of community work in the District Court is restorative.

3. Censure in the FGC

As well as a sanction, the FGC plan involves the censure of the young person. Disposition involves depriving the offender of important interests. It may be a negotiated procedure but it is still an imposition. The youth justice FGC process involves admitting liability for and being censured for a criminal offence. The FGC process is a process which begins with an allegation that the young person committed a criminal offence, involves acceptance of liability for that offence, and usually ends in a penalty being imposed on the young person in respect of that offence. Luna distinguishes the type of censure supposedly associated with restorative justice processes when compared to retributive court based sentencing:

Constructive censuring must be distinguished from destructive censuring. The latter condemns the offender, rather than just the crime, as bad or evil. This type of denouncement stigmatizes the offender as unworthy of respect and designates him an outcast of society. Self-categorisation theory predicts that destructive censuring will only further entrench the offender’s identity as a deviant with ad hominem condemnation often becoming a self-fulfilling prophecy.\textsuperscript{750}

Daly makes the valid argument that holding a young person ‘accountable’ is in itself retributive as it involves censure for an action in the past.\textsuperscript{751} To apply Daly’s theory of ‘multiple justice aims’ to a typical FGC outcome, there will potentially be elements of retributive justice (for example community work), elements of rehabilitative justice (drug and alcohol counselling), and elements of restorative justice (payment of reparation to the victim).\textsuperscript{752} Censure is a process which ‘impose[s] obligations as the consequence of committing an offence’.\textsuperscript{753}

\textsuperscript{749} See Chapter 6(II) on the offence types dealt with at these FGCs.


\textsuperscript{751} Kathleen Daly, ‘Restorative Justice: The Real Story’ (2002) 4 \textit{Punishment and Society} 55.

\textsuperscript{752} Kathleen Daly, ‘Restorative Justice: The Real Story’ (2002) 4 \textit{Punishment and Society} 55, 61. See Chapters 12 and 13 for examples from FGC plans.

\textsuperscript{753} Andrew Ashworth, ‘Responsibilities, Rights and Restorative Justice’ (2002) 42 \textit{British Journal of Criminology} 578, 578.

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E. Concluding Remarks

From the point of view of those in charge of the system it is not punishment, but in the view of the young person it will certainly be a punishment.\textsuperscript{754} Even if outcomes of such FGCs are benevolent in intention, they still involve a form of punishment.\textsuperscript{755} Calling the outcome of a FGC community or family based punishment does not change the fact that it is punishment.\textsuperscript{756} As Warner argues, FGC outcomes must be seen as 'alternative punishments' not 'alternatives to punishments', 'nor can calling it community punishment rather than state punishment justify it any more than calling punishment treatment'.\textsuperscript{757}

III. VOLUNTARY, RATHER THAN COERCIVE?

A. Introduction

In a similar vein to the argument that rights are not required in the FGC because the outcome is not punishment, is the contention that FGC outcomes are voluntary so rights are not required, or concerns about coerciveness are countered with the argument that the young person and their family have agreed to the outcome.\textsuperscript{758} This argument is commonly advanced against the need for rights in restorative justice type processes. For instance, Reimund argues that 'voluntariness can remedy coercive elements of restorative practices that have a tendency to impede due processes'.\textsuperscript{759} Walgrave notes that some commentators perceive 'free participation in the process and voluntary compliance with the agreements as satisfying

\textsuperscript{754} Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite, \textit{Restorative Justice: Philosophy to Practice} (Dartmouth: Ashgate, 2000), 41.


\textsuperscript{756} Kate Warner, 'Family Group Conferences and the Rights of the Offender' in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994), 147.

\textsuperscript{757} Kate Warner, 'Family Group Conferences and the Rights of the Offender' in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994), 147.

\textsuperscript{758} Kate Warner, 'Family Group Conferences and the Rights of the Offender' in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994).

replacements for legal safeguards. If not, it is feared, legal formalism and rule setting would hinder the healing and encountering character of the sessions. 760

This may be true for voluntary pre or post sentencing programmes for adult offenders, for instance the New Zealand court-referred restorative justice programme. 761 However, this scheme is completely voluntary and involves adult offenders who are mature enough to make an informed decision to participate in a process with less due process protections than a court hearing. Marshall has argued that free participation is a substitute for procedural rights, 762 but even voluntary processes must have rights as a safeguard against coerciveness. Even voluntary sessions ‘need to be checked as to their respect for legal rights’. 763 It will be argued here that the criminal justice sanctions in the FGC context are being re-framed as something that is voluntary and is agreed to by the young offender.

B. Mandatory Nature of the FGC

Luna argues voluntariness means:

that a party is involved in the sanctioning process of his own freewill. An individual is granted respect by providing him the power of choice, giving him the autonomy to participate in a decisionmaking process and the freedom to accept or reject a particular decision. 764

In terms of attendance at the FGC itself, it is essentially mandatory for a young person to attend a lawfully convened FGC.

An ITC FGC is held where the police wish to lay a charge in a non-arrest case. If agreement can be formulated on a plan to deal with the offence, and the plan completed, no charge will be laid. Is this a voluntary plan? Who has a choice? Yes, the young person can refuse, but then the matter will be dealt with through a charge in the Youth Court. While the process is


761 Crime and Justice Research Centre and Sue Triggs, New Zealand Court- Referred Restorative Justice Pilot: Evaluation (Wellington: Ministry of Justice, 2005).


nominally voluntary, the young person cannot choose to have nothing happen to him or her. If he or she refuses to attend the FGC, he or she cannot avoid the laying of information by failing to attend the FGC. In *H v Police*, Smellie J stated that:

> It cannot possibly have been the intention of Parliament that a young person and his family could avoid the laying of an information in respect of alleged offending simply by staying away from a [family group] conference and then arguing that because of their absence no [family group] conference had taken place.765

The plan formulated by an ITC FGC is binding on the participants when agreed to and there may be adverse consequences for non-compliance with the sanctions imposed by an ITC FGC. Non-completion of an ITC FGC plan means potential re-entry to the formal court based criminal justice system where the Youth Court could dispose of the matter through formal court orders under section 283 of the CYPF Act.

The situation of the court-referred FGC is a little different. While the ITC FGC takes place completely outside the court system, the plan agreed to by the court-referred FGC is technically a sentencing recommendation to the Youth Court Judge. The Youth Court is not bound to accept the plan but will do so in the vast majority of cases.766 The Youth Court may also modify or extend the plan. A FGC plan is technically a recommendation which is accepted by the Judge. Therefore it is a type of order, though not one under section 283. The Youth Court Judge also retains the right to make orders if the FGC plan is not completed. The Judge must deliberate the FGC plan before it becomes binding on the young person. But almost all FGC plans are accepted and will only be modified by the Judge when clearly falling outside the principles of the CYPF Act.767 Statutory principles stress the empowerment of the family and the responsibility of the family. Therefore there is a rebuttable presumption that FGC plans will be accepted.

C. Consent to the FGC Plan

The fact that the plan agreed to by a youth justice FGC is a criminal sanction cannot be refuted by arguing that the young person and his or her family gave consent to the outcome.

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765 *H v Police* [1999] NZFLR 966, 975.


767 See Chapter 12(III).
The young person cannot choose to have nothing happen to him or her. The statement that the young person (and his or her family) has agreed to the FGC plan is technically true. To report back to the referring entity (the police in the case of the ITC FGC and the Youth Court in the case of the court-referred FGC), the youth justice co-ordinator must have agreement among the FGC participants. The young person and their family have a veto – but what can they do if they veto the plan? The case goes back to the police or to the Youth Court. The referring agency is in a much stronger position. Any consent by the young person and their family is ‘consent in a coercive situation’.

While the FGC has a useful function in promoting family decision making in a culturally appropriate environment, it is important to note that entry to and exit from the FGC process is tightly controlled by the referring entity (either the police or the Youth Court). The statutory principles stress the importance of family decision making and the literature is replete with the rhetoric of empowering families. In fact, freedom of choice for families is within tightly controlled boundaries. The family cannot choose to have nothing happen to a young person who has been referred for a FGC. Any decisions, recommendations or plans agreed to by a FGC must be acceptable to the referring agency (the police or the Youth Court Judge). Essentially, there is freedom to participate in decision making within the bounds of what is acceptable to the state. As Zemova observes (in the context of English family group conferences) ‘the criminal justice system stayed in charge, while creating an impression that FGC participants were the key decision makers. Participants were ‘empowered’ so as not to frustrate – or even positively to promote- the agenda of the system’. It has been argued that the FGC model:

...reflects post-modern notions of empowerment in promoting active participation with family members being both consulted and supplying some means of interpretative framework...As a decision-making

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mechanism, it could be argued that FGCs are in reality based on modernist notions of empowerment where power is a possession and professionals are central to the process.\textsuperscript{772}

And whatever the theoretical basis of the FGC model, in practice, professionals (especially the youth justice co-ordinator and the police officer) have been consistently found to be primary decision makers in the FGC.\textsuperscript{773}

Wonnacott has analysed the principles underpinning the youth offender contract in the United Kingdom.\textsuperscript{774} This disposal for young offenders involves the negotiation of a contract with a lay panel.\textsuperscript{775} Wonnacott argues that despite the ‘imagery’ surrounding the process being ‘overwhelmingly consensual’,\textsuperscript{776} the young offender is in a precarious position. There is little for the young offender to ‘bargain’ with. If there is no agreement, there is no detriment to the panel, however the young offender’s case will be remitted to the formal court system, with the high possibility of a coercive order being imposed. As Wonnacott notes:

\begin{quote}
the offender is supposed to be an active (if not necessarily willing) participant in agreeing and then carrying out a course of action that will remedy what he has done, instead of being the traditional passive and resentful recipient of a sentence determined by the court.\textsuperscript{777}
\end{quote}

Young people under the age of eighteen have restrictions on their ability to enter into binding contracts because of their immaturity and vulnerability.\textsuperscript{778} It does not then seem right to argue that an outcome cannot be coercive because the young person and their family have agreed to it, especially since the young people who populate the youth justice system are generally disadvantaged.\textsuperscript{779} Zernova argues that it is:

\begin{quote}
...deceptive on the part of [FGC] proponents to equate coercion to judicial coercion and limit to official legal sanctions... there might be other sources which were informal and more covert in nature. Also it is
\end{quote}


\textsuperscript{775} Youth Justice and Criminal Evidence Act 1999, Part 1.


\textsuperscript{778} Minors’ Contract Act 1969.

\textsuperscript{779} Kaye L McLaren, Tough is Not Enough: Getting Smart About Youth Crime (Wellington: Ministry of Youth Affairs, 2002).
misleading to think of coercion in 'either/or' terms: either coercive or voluntary. Such a way of thinking is too naïve and fails to reflect the intricacies and complexities of what really happens.\textsuperscript{780}

There are major inequalities in bargaining power between the young person and their family and state representatives such as the youth justice co-ordinator and the police representative.\textsuperscript{781}

There will also be implicit pressures to come to an agreement (mostly from the youth justice co-ordinator).\textsuperscript{782} In theory, the FGC process should operate on a group consensus decision making model with a negotiated outcome resulting from full participation by all the parties. In practice, professionals (such as the youth justice co-ordinator and the police) frequently play a large part in the decision making process.\textsuperscript{783} This raises questions about whether the outcomes are truly voluntary. Shapland argues that ‘the extent to which offenders (or victims) can be said to have freely ‘consented’ to any justice outcome is dubious. Consenting implies the ability to walk out of the situation without prejudice. Justice processes rarely provide that opportunity’.\textsuperscript{784}

D. Concluding Remarks

Although the FGC process is couched in the language of voluntariness and consent, the extent to which this is true in practice is debatable. The balance of power is held by the referring agency (the police or the Youth Court) who must agree to the plan before it becomes binding. The Youth Court Judge retains the power to alter the FGC plan or to impose additional obligations after the plan is finished. Most importantly, the family cannot choose to have nothing happen to the young person.

\textsuperscript{780} Margaret Zernova, ‘Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences’ (2007) 47 British Journal of Criminology 491, 506 [italics in original].


\textsuperscript{782} In the youth justice FGCs observed by the author, there was a sense of the youth justice co-ordinator having put considerable efforts into organising the coming together of different groups. There seemed to be implicit pressure to come to an agreement after putting so much work into facilitation. See Chapter 11, III.


IV. A CULTURAL PROCESS, NOT A STATE MATTER?

The communitarian decision-making process embodied in the FGC has been linked by some to family decision-making models used in traditional Maori society. Pratt notes that the justice system in use by Maori in pre-European times - in common with other indigenous justice systems- was ‘founded on the belief that socially harmful behaviours (hara), whether of a civil or criminal nature in Western terms, had been caused by an imbalance to the social equilibrium of some kind or other’.785 Responsibility for offences was collective rather than individual.786 Traditional Maori dispute resolution processes thus used a restorative type approach of restoring the balance by remedying the harm done by the transgression. Participation by victims and the provision of reparation to the victim and their family were integral parts of the process.787 If the correct elements are in place customary Maori dispute resolution procedure and FGC procedure may share some common features. These include group consensus decision making, the goal of restoring balance and harmony in the community and meaningful participation by those concerned.788 It is apparent that the process is influenced by some elements of Maori custom – collective responsibility, family decision making and an aim of healing the effects of crime rather than engaging in retributive behaviours.789 However, Crawford cautions about the ‘romanticization of ‘unregulated community self regulation’...such visions often stem from a selective reading of history, anthropological studies or contemporary commentaries’.790 In addition, Daly has cautioned against linking processes such as the FGC directly with indigenous justice processes.791

The FGC process has few procedural rules therefore there is potential for different cultural groups to adapt the process to fit their own cultural ethos. This is in accordance with section

4(a) of the CYPF Act which states that services must be appropriate to the ‘needs, values, and beliefs of particular cultural and ethnic groups’. However, the FGC is not the ‘wholesale adoption of an indigenous method of dispute-resolution and a rejection of the Western legal system’. Rather the CYPF Act seeks to make the established youth justice system more culturally appropriate and flexible. Although the system seeks to recognise the important role played by extended family in Maori and Polynesian culture, and the family and community are empowered to participate in decision making, state officials still retain overall control of the system. The roles played by participants of a FGC may be very different roles to the traditional ones. For example, the young person is required to participate in and agree to any decision made at a FGC. This requirement may be in conflict with cultural traditions where family members usually make decisions on behalf of children and young people.

What is most relevant to this research is that even though the process has the potential to be culturally appropriate in terms of process and procedure, the criminal law and procedure of the state remains in place. As Maxwell et al stress ‘it needs to be recognised that this is a statutory process arranged by the state to resolve matters according to law.’ The family cannot choose to have nothing happen to the young person or pursue an alternative method based on culture if not in the public interest. This was confirmed in the case of Police v S and M concerning the exercise of section 275 discretion as to Youth Court jurisdiction. Two young people of Samoan descent were accused of serious sexual offending against a girl from the same community. The families of the alleged offenders and the victim of the offence were from the same community and knew each other. The families wished to resolve the matter according to cultural norms and argued that the case be decided within the Youth Court system. Harvey DCJ ruled that the circumstances and nature of the offence meant that the

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matter was too serious to be dealt with through the cultural process and remitted the matter to the High Court.

V. CONCLUSION: THE FGC AS A CRIMINAL JUSTICE PROCESS

This chapter has argued that although there is evidence that the FGC has potential to be restorative and culturally appropriate, and to involve families in decision making, it remains a state process involved in resolving a breach of the criminal law and thus the young person should have the protection of rights. The rest of this thesis will examine key areas of rights which may be infringed in the youth justice FGC process.
CHAPTER EIGHT: THE RIGHT TO LEGAL ASSISTANCE

I. INTRODUCTION

Having established the theoretical framework for the rights of the young person in the youth justice system, and considered the application of this framework to the particular model of the youth justice FGC, this thesis will now move to consider the three key areas of rights in the context of the FGC.

This chapter will discuss the young person's right to legal assistance in the FGC process. Firstly, the importance of legal assistance to the young person involved in the youth justice system generally, and in the FGC specifically, will be considered. It will be argued here that the informal and private nature of the FGC and the vulnerability of the young people involved in the process, make legal assistance particularly important. Secondly, law and practice relating to the availability of legal assistance in the FGC process will be examined. In particular, the disparity of access between young people participating in the ITC FGC and those participating in the court-referred FGC will be highlighted. The ITC FGC takes place completely outside the court system, and thus there are no formal procedures in place to ensure that the young person has access to legal assistance. The quality of the right to legal assistance, i.e. what happens when lawyers do attend the FGC, is considered in the next chapter.

The CYPF Act provides for specially selected lawyers for young people (referred to as Youth Advocates). Youth Advocates are state-funded. To set the context of this research, the role of the Youth Advocate under the CYPF Act generally was considered in a 1997 report. The 1997 Report surveyed and interviewed Youth Advocates and other youth justice professionals such as Youth Court Judges, Youth Aid officers and youth justice co-ordinators. This report sought to ‘clarify the views and expectations of youth advocates and other participants in the

798 s 323 and 324, CYPF Act.
799 s 325, CYPF Act.
800 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997). Hereinafter the 1997 Report in the text.
youth justice system about the role of youth advocates. With respect to the contribution that this research makes to understanding the role played by Youth Advocates, and the profile and training needs of Youth Advocates, there was no mention of the rights and needs of the young person in relation to legal assistance at the FGC. Neither was there discussion of the professional standards applying to legal practitioners in New Zealand. This research differs from the 1997 Report as it deals specifically with the legal assistance at the FGC, and takes the perspective of the young person’s rights.

II. THE RIGHT TO LEGAL ASSISTANCE IN THE YOUTH JUSTICE SYSTEM: CONTEXT AND IMPORTANCE

A. Introduction

The right to legal assistance during the criminal process is a fundamental tenet of a modern criminal justice system. As the United States Supreme Court stated when when considering the rights of young people in the youth justice system: ‘the right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice’. The right to legal assistance for the accused person is provided for in the NZBOR Act, and the ICCPR. The right to legal assistance for young people is mandated by the CRC.

B. Historical Context

At various stages in the history of youth justice, there has been debate about whether legal assistance is required in youth justice proceedings at all. Wilson notes that for most of the twentieth century in Canada, ‘there was considerable doubt as to whether or not lawyers could appear as of right in the juvenile court’. In a specific New Zealand context, a 1987 study found that ‘in some areas judges and social workers have discouraged the use of duty solicitors, believing that they add unnecessarily to the formality of the Court and are of little

801 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), vii.


803 s 23(1)(b) and s 24(c), NZBOR Act.

804 Article 14.3(d), ICCPR.

805 Article 40.2 (ii) and (iii), CRC.

value’. Perceptions of the lawyer’s place in the youth justice system have evolved with the changing ideologies of youth justice. In the welfare-based youth justice system, which had as its objective the re-classification of the young offender to a young person in need of state assistance, reform and re-education of the young person were broadly the aims of the system, rather than the administration of a proportionate response to the offence. Where the best interests of the young person were paramount, it was argued, there was either no place for legal assistance or else the lawyer was seen as a friend of the court. The lawyer was a ‘repeat player’ who assisted with the expediency and smooth running of the court rather than advocating for the client’s interests. As one commentator states, lawyers in the welfare based youth justice system were ‘badly cast as “friendly interveners” or “wise judicious parents”’. The ‘best interests’ of the young person was to be the basis of the court’s decision and so the lawyer would not be expected to argue against decisions taken in furtherance of this objective. In a New Zealand context, it was apparent that judges regarded lawyers to be of value in assisting in the efficient running of the Children and Young Persons Court. Morris and Young’s study in 1987 reported that lawyers in the Children and Young Persons Court ‘primarily worked for the benefit of the court system, enabling it to operate smoothly and fostering the appearance rather than the reality of adversarial justice’.

In addition, international standards for youth justice now emphasise the importance of legal assistance for the young person. Most western jurisdictions now provide for (generally

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808 See Chapter 2(II).


815 Article 40.1(b), CRC. cf Article 14.3(b) and (d), ICCPR.
state-funded) legal representation for young people during court proceedings.\textsuperscript{816} It is important to note however, that the mere presence of a lawyer in youth justice proceedings does not guarantee the rights of the young person. For instance, evidence derived from empirical studies of youth court practice have even raised doubts about whether legal representation actually benefits the young defendant.\textsuperscript{817} One American study reported that ‘out of home’ placements occurred more frequently where the young person was represented by counsel, with the authors postulating that when routine matters were disrupted by counsel, more formal interventions were likely to result, with potentially negative effects for the young person.\textsuperscript{818}

It was noted above that in the welfare based youth system, it was frequently assumed that legal assistance for the young person was not required because the process was informal and compassionate in intention. With the phenomenal growth in the use of informal extra-judicial measures (such as the FGC, youth offender panels and restorative cautioning) across jurisdictions in response to offending by youth,\textsuperscript{819} similar ideological arguments against the involvement of lawyers are invoked. It is argued that lawyers are not needed, that lawyers complicate proceedings and that legal assistance is not required as the process is benevolent, informal and in the interests of the young person.\textsuperscript{820} As one New Zealand commentator argues, ‘unless the facts are in major dispute, purely legal defences are probably not as important in serving the interests of either justice or the young person as a quick and diversionary solution’.\textsuperscript{821} As was discussed in a preceding chapter, the FGC is a process which should be based on a group consensus decision making model with an emphasis on meaningful participation by all parties.\textsuperscript{822} There is also the potential for restorative process and

\textsuperscript{816} See for example s 323(1) CYPF Act and s 25, Youth Criminal Justice Act 2002 (Canada).


\textsuperscript{818} George W Burruss and Kimberley Kempf-Leonard, ‘The Questionable Advantage of Defense Counsel in Juvenile Court’ (2002) 19 Justice Quarterly 37, 60. See also Chapter Nine on the proper role for the lawyer in the FGC process.


\textsuperscript{822} See Chapter 6 for discussion on typical practice and procedure at the FGC.
outcomes. Some commentators argue that when the lawyer does attend a restorative justice type process, this will alter the restorative potential of the process. Concerns have also been expressed that the lawyer would speak for the young person or discourage the young person from telling the truth, and that the presence of the lawyer would compromise the potential for increased participation by the young person in the FGC process. In a paper frequently cited by restorative justice advocates, Christie contends that ‘lawyers are particularly good at stealing conflicts’, and as was discussed in a foregoing chapter, one of the avowed purposes of the CYPF Act generally, and the FGC particularly, is to empower the family to deal with offending by their young person.

C. The Importance of Legal Assistance Generally

Legal assistance is a fundamental safeguard for accused persons at all stages of the criminal justice process. The importance of legal assistance for the accused person is well rehearsed. In particular, the vulnerability of the accused person in comparison to the power of the state and the complicated nature of the legal system are strong reasons for the right to legal assistance. Young people are especially vulnerable in the criminal justice system. The CYPF Act explicitly recognises this vulnerability and recognises that young people should have special protections in the system. Research has demonstrated the susceptibility of young people to explicit and implicit pressures, and their lack of foresight as to consequences. Grisso states that although studies on decision making capacities have generally concluded that mid-adolescents’ decision making capacities are not much different

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825 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997).

826 Nils Christie, ‘Conflicts as Property’ (1977) 17 British Journal of Criminology 1, 4.

827 s 208(c)(ii), CYPF Act.


829 s 208(h), CYPF Act. See also R v Z [2008] NZCA 246.

830 See generally Thomas Grisso and RG Schwartz, Youth on Trial: A Developmental Perspective on Juvenile Justice (Chicago: University of Chicago Press, 2000).
from adults, few studies have examined the decision making capacities of socially and educationally disadvantaged young people—young offenders generally fall into these groups—and warns that ‘progress towards completion of cognitive and moral developmental stages can be detoured or delayed by cultural, intellectual and social disadvantages’. Empirical studies have demonstrated the susceptibility of young people to coercion and lack of understanding in relation to the right to legal assistance.

Young people generally are a vulnerable group but this is especially true for the typical clientele of the youth justice system. As one commentator notes:

> the contrast...between juvenile justice and family proceedings is particularly marked. The Family Court presumes that young people will be traumatised by direct participation in proceedings which are deciding their residence and parental contact rights. Certain juvenile justice conferencing schemes proceed on widely different assumptions – that young people will benefit by being ‘shamed’, should directly confront often angry and emotional victims (and their families) and acknowledge their wrongdoing by devising and making appropriate reparation. The contrasting approaches are even more stark when due account is taken of the types of children involved in family and juvenile justice proceedings. Many of the young people involved in family matters are confident, articulate, well-nurtured youngsters who are keen to inform a judge of their views. The juvenile justice cohort has within it some of the most disadvantaged, disaffected and least articulate young people in our community. Many young accused have little incentive to participate in, and few skills to comprehend legal processes.

There is evidence that young people frequently find the legal system ‘incomprehensible’. The CYPF Act is a particularly complicated piece of legislation. As Judge Inglis QC remarked in *Police v L*, the legislative provisions governing the FGC ‘might almost have been deliberately drafted so as to promote obscurity and to daunt even the most experienced lawyer’. In relation to effective and meaningful participation in the youth justice system, as Grisso states, ‘expecting children [and young people] to participate in legal proceedings in

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836 *Police v L* (1991) 8 FRNZ 123, 125.

837 As mandated by Article 12, CRC.
an adult-like manner without taking special measures to ensure that they possess the knowledge, understanding, and ability to make appropriate legal decisions renders them vulnerable to potentially negative outcomes. Legal assistance is an important tool in ensuring that young people in the youth justice system have the necessary understanding to participate in proceedings.

D. The Particular Importance of Legal Assistance in the FGC Process

There is little dispute that young people participating in the formal court based criminal justice system should have access to legal assistance. There is less support for the entitlement of young people participating in extra-judicial and diversionary measures to legal assistance. As was set out in a preceding chapter, although the FGC differs in format from formal court proceedings, the FGC has significant powers of a criminal justice nature. Morris and Young state that there was a belief that ‘legal representation is desirable [in the court system] because it will enable young persons to understand the court proceedings, to exercise their rights and to make an informed decision as to the options open to them’. It is apparent that these reasons for the importance of legal assistance are relevant to the FGC as well.

It is important that the young person gives an informed consent to participation in the FGC, because through accepting responsibility for the offence at the start of the FGC, that young person is effectively waiving his or her right to have the matter dealt with by a court. The argument which is frequently advanced in the New Zealand context is that the formal court system is present as a ‘backstop’. That is, that the young person has the option to have a trial in court if they wish. However, this option is not a real safeguard unless the young

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840 See Chapter 7.

841 Allison Morris and Warren Young, Juvenile Justice In New Zealand: Policy and Practice (Wellington: Institute of Criminology, 1987), 112.

842 This issue is dealt with in more detail in Chapter 10, which discusses the unusual and unique method by which the offence is established through the FGC process.


844 If the young person chooses not to admit the offence at the FGC, the matter is remitted to the referring agency, presumably for prosecution (in the case of the ITC FGC), or for formal court orders to be imposed (in the case of the court-referred FGC).
person is cognisant of it. Arguing that it is always possible to have recourse to the formal criminal justice system is not realistic unless the young person is aware of this choice. This is why access to legal assistance is especially necessary to provide such information to the young person in the FGC process. This is particularly important in New Zealand as the CYPF Act does not place a statutory duty on the youth justice coordinator or the referring entity (the police or the Youth Court Judge) to advise the young person on his or her rights. For example, in the New South Wales legislation there is a statutory requirement for the referring police officer and the conference convenor to explain to the young person that he or she is entitled to elect that the matter be dealt with by a court.845

It is essential in all types of youth justice proceedings that the young people have access to legal advice and representation to ensure that their rights are protected and that they are treated fairly. However, in an informal process such as the FGC, there is a particular danger that the young person’s rights could be infringed. In the ITC FGC, there is no judicial oversight. Entry to and exit from the process is controlled by the police.846 The court-referred FGC is overseen by a Youth Court Judge but the evidence is that almost all FGC plans are accepted.847 Further, one of the functions of the formal judicial system is to scrutinise the investigative methods carried out by the police.848 The essentially confidential nature of the FGC process means that there is not the same level of scrutiny and openness as a criminal trial. In the criminal trial, defence counsel should make the Judge aware if the police have not followed the correct investigative procedures. Warner rightly questions whether the ‘progressive dimensions of the current emphasis on procedural justice and rights at the investigation stage will be undermined by a system whose emphasis is on essentially private solutions to alleged offending?’849 Young people are particularly vulnerable to police pressure during questioning and investigation.850 Because the majority of offending dealt with by the

845 s 39(1)(c), s 45(3)(h), Young Offenders Act 1997 (NSW). See further Chapter 14(V) on recommendations for the wording of information to be given to the young person.

846 s 245(1), CYPF Act.

847 See Chapter 12(III).


FGC process is a result of admissions of guilt made outside the court system, it is unusual for confessions to be scrutinised by the courts.\textsuperscript{851}

In relation to the New Zealand FGC, it has been argued that there are sufficient procedures in place to ensure that the rights of the young person are protected during the FGC. Morris states that ‘if facilitators [youth justice co-ordinators] at a family group conference have any concerns about young offenders’ legal rights, they may request the appointment of a lawyer (paid for by the state)’.\textsuperscript{852} It could be argued that the youth justice co-ordinator has the duty of informing the young person and their family of their rights.\textsuperscript{853} However the youth justice co-ordinator operates however; he or she is an officer of Child, Youth and Family.\textsuperscript{854} Many of the young people and their families will have had contact with Child, Youth and Family through the care and protection system.\textsuperscript{855} It is also likely that some young people and their families will have had negative experiences with Child, Youth and Family.\textsuperscript{856} This raises questions about the independence or perceived independence of the youth justice co-ordinator. It was also apparent from observation of FGCs that there was a close working relationship between the professionals (youth justice co-ordinators, Youth Aid officers, CYFS social workers etc).\textsuperscript{857} Although interagency co-operation is desirable and recommended as best practice,\textsuperscript{858} this may raise questions about impartiality.

\textsuperscript{851} See Chapter 11.

\textsuperscript{852} Allison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’ (2002) 42\textit{British Journal of Criminology} 596, 601. Note use of the term ‘young offenders’. Surely the young person cannot be classed as ‘an offender’ until guilt has been admitted during the conference?


\textsuperscript{854} Child, Youth and Family is the social agency which deals with children, young people and their families in matters of care and protection, adoption, and offending.

\textsuperscript{855} Gabrielle Maxwell et al \textit{Achieving Effective Outcomes in Youth Justice –Final Report} (Wellington: Ministry of Social Development, 2004).

\textsuperscript{856} Marlene Levine, Aaron Eagle, Simi Tuiavi'i and Christine Roseveare,\textit{Creative Youth Justice Practice} (Wellington: Social Policy Agency/ Children, Young Persons and Their Families Service, 1998), 5. Gabrielle Maxwell et al \textit{Achieving Effective Outcomes in Youth Justice –Final Report} (Wellington: Ministry of Social Development, 2004), 56. In total, approximately 7 out of 10 young people in the retrospective sample had had previous contact with Child, Youth and Family for either youth justice or care and protection referrals.

\textsuperscript{857} See Chapter 6(V) for detail on the format of a typical FGC.

III. THE RIGHT TO LEGAL ASSISTANCE AT THE COURT REFERRED FGC

A. Introduction

Law and practice relating to the right to legal assistance in the two types of FGC under discussion will now be considered. The two categories of FGC which are the subject of this research (i.e. the court-referred FGC and the ITC FGC) will be examined separately. The situation of the court-referred FGC will now be considered. Firstly, the legislative provisions relating to legal assistance at the FGC will be analysed. Secondly, the sufficiency of practice and policy in relation to legal assistance will be evaluated.

B. Legal Assistance at the Court-Referred FGC

1. Legislation

In the court-referred FGC, the first instance where a young person would expect to have the right to legal assistance is when that young person is making a decision whether to have the matter decided by a defended court hearing. In the Youth Court, referral to the first type of court-referred FGC is triggered by a plea of ‘not denied’. If the young person chooses to deny the charge, the matter is dealt with through a defended hearing according to the procedure set down in the Summary Proceedings Act 1957. If the charge is proved, there will then be a referral to a FGC to make recommendations as to orders. All young people appearing before the Youth Court are automatically assigned a state funded Youth Advocate unless private representation has already been or is about to be arranged. The Youth Justice Sub-committee of the New Zealand Law Society have stated that it is ‘extremely rare for young people to privately retain their own counsel, and Youth Advocates are used almost exclusively’. The rarity of privately retained counsel is almost certainly due to the prevailing low socio-economic circumstances of the Youth Court’s clientele.

Those young people appearing before the Youth Court should therefore have the opportunity to consult with their Youth Advocate before deciding to ‘deny’ or ‘not deny’ the charge (the process which triggers the referral to the FGC). Indeed, under section 246 of the CYPF Act a young person appearing on a charge in the Youth Court must consult with a lawyer before

859 s 246(b)(i), CYPF Act. Chapters 10 and 11 deal with how the offence is established in the FGC process.
860 s 246(a), s 273, CYPF Act.
861 s 323(1), CYPF Act.
deciding to deny the charge.\textsuperscript{863} It appears as if it is mandatory for a consultation with a lawyer to take place before the Youth Court accepts a plea of ‘not denied’. Can the young person enter a plea of ‘not denied’ without consulting with a lawyer? This is not specifically mentioned in the legislation but is probably a moot point as each young person appearing on a charge in the Youth Court is automatically assigned a Youth Advocate.\textsuperscript{864} Therefore, there is a formal mechanism for ensuring that a young person has the opportunity to avail themselves of legal advice before deciding whether to plead ‘not denied’ to the charge and have the matter resolved through a court-referred FGC, or to plead ‘denied’ and have the matter proceed to a defended hearing in the Youth Court. In regards to legal assistance at the FGC itself, there is provision in the CYPF Act for a lawyer representing\textsuperscript{865} the young person to be present at the FGC.\textsuperscript{866}

2. Policy

Although in law it is still a matter of discretion for Youth Advocates as to whether they attend the FGC or not, it is generally accepted that those young people participating in a court-referred FGC should have legal assistance at the FGC. It is instructive to examine the various Practice Notes issued in relation to attendance of Youth Advocates at FGCs in which the evolution of policy in relation to attendance by Youth Advocates may be observed. In the early years of the CYPF Act’s operation, Principal Youth Court Judge Brown stated that ‘the legislation contained the \textit{laudable aspiration} requiring that every child or young person charged with an offence be legally represented’.\textsuperscript{867} In a 1993 Youth Court Practice Note, Judge Brown then indicated that he was concerned with the ‘exponential growth’ in expenditure on Youth Advocates and the fact that it had become the ‘norm’ for Youth Advocates to attend FGCs.\textsuperscript{868} It appears from the Practice Note that the reluctance to permit Youth Advocates to attend FGCs was guided more by financial than ideological reasons. Ideological reasons were to come later. Principal Youth Court Judge Carruthers changed tack. A 1995 Practice Note was concerned about the ‘growing practice of denying funding for youth advocates to attend a

\begin{footnotes}
\footnotetext[863]{s 246(a), CYPF Act.}
\footnotetext[864]{s 323(1), CYPF Act (unless private representation has been arranged).}
\footnotetext[865]{See Chapter 9 which discusses the quality of legal assistance at the FGC.}
\footnotetext[866]{s 324 (a), CYPF Act.}
\footnotetext[867]{Youth Court Practice Note: \textit{Youth Advocate Scheme} (MJA Brown. Principal Youth Court Judge, 17 December 1993) [author’s italics].}
\footnotetext[868]{Youth Court Practice Note: \textit{Youth Advocate Scheme} (MJA Brown. Principal Youth Court Judge, 17 December 1993).}
\end{footnotes}
Family Group Conference unless there are special circumstances which make that necessary. 869

The current Best Practice Guidelines for Youth Advocates state that the Youth Advocate should attend the FGC. 870 It is likely that it is the court-referred FGC that is referred to. These Guidelines stress that attendance by the Youth Advocate is especially important if the young person wishes that the Youth Advocate attends, if the matter is a serious one, if the young person is a repeat offender, or there are legal issues involved. 871 But it could be argued that there are legal issues involved in every FGC, since a FGC by its nature involves a determination of legal issues, such as the admission of the offence, and decisions on outcomes. It must be for the young person to make an informed decision as to whether legal advice is required. 872

3. Attendance of Youth Advocates in practice

In the nine court referred FGCs observed for this research, 873 all the young people had been appointed a Youth Advocate when appearing in the Youth Court. This is to be expected as it is mandatory for each young person to be appointed a Youth Advocate when appearing in the Youth Court. It was not possible to observe discussions that took place when Youth Advocates advise young people before the Youth Court hearing. Previous research into practice at the Youth Court found that many young people only met their Youth Advocate briefly before the court hearing. The 1997 Report found that Youth Advocates were often not notified of their appointment to represent a young person until the day of the court appearance. 874 This would raise questions about the quality of the right, such as whether young people have sufficient time in an adequate environment to consult with the Youth Advocate. It is important to note that the rules of professional conduct for legal practitioners state that:

869 Youth Court Practice Note: Attendance of Counsel at Family Group Conference (Principal Youth Court Judge DJ Carruthers 5 November 1996).

870 New Zealand Law Society Youth Justice Sub-committee, Best Practice Guidelines for Youth Advocates, 2 November 1998.

871 New Zealand Law Society Youth Justice Sub-committee, Best Practice Guidelines for Youth Advocates, 2 November 1998.

872 See Chapter 14(V) for suggested wording of explanations to the young person.

873 See Chapter 6(II).

874 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), 8.
When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.\(^{875}\)

However, the 1997 Report on the practice of Youth Advocates observed that:

Some youth advocates took the view that if the young person wanted to deny the charge, then youth advocates should pursue these instructions; avoiding a finding of guilt was viewed as 'the best interests' of the young person. Others felt that it was not always in the young person's 'best interest' to run 'technical' defences and that a sanction might be more beneficial in the long run. They viewed the provision in the 1989 Act with respect to accountability as allowing them, on occasions, to dissuade the young person from defending him or herself.\(^{876}\)

The question arises as to whether defence counsel would take this sort of view when defending an adult client in a criminal case. The answer is it is very unlikely. The issue of the quality of legal assistance at the FGC will be taken up in more detail in the next chapter.

As regards attendance at the FGC itself, all the court-referred FGCs observed for this research had a Youth Advocate in attendance at some stage in the FGC.\(^{877}\) There are some larger scale statistics available from the two major empirical evaluations of the youth justice system. The first comprehensive evaluation of the operation of the CYPF Act found that Youth Advocates were present in only 59% of court-referred FGCs\(^{878}\) however the most recent evaluation found that lawyers were present in 364 of the 471 court-referred FGCs in the sample (77%).\(^{879}\) In summary, although all young people appearing at the Youth Court are automatically assigned a Youth Advocate, not all FGCs are attended by Youth Advocates.

4. Views of Youth Advocates

The four Youth Advocates who represented those young people involved in these FGCs were surveyed by postal questionnaire to ascertain their views on attending the youth justice FGC.\(^{880}\) The 1997 study on the practice of Youth Advocates found that two thirds of Youth

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\(^{876}\) Allison Morris, Gabrielle Maxwell and Paula Shepherd, *Being a Youth Advocate: An Analysis of Their Role and Responsibilities* (Wellington: Institute of Criminology, 1997, 32.

\(^{877}\) In three of the nine FGCs, the Youth Advocate either arrived late, or left early.


\(^{880}\) The questionnaire is attached as an appendix to this thesis.
Advocates surveyed agreed that attendance at the FGC was an integral part of their role. Three out of the four Youth Advocates surveyed here agreed that they ‘always’ attended the FGC when they had been appointed by the Youth Court to represent the young person. One Youth Advocate stated:

[I] would never not attend.

Other Youth Advocates stressed the importance of attending the FGC. One Youth Advocate stated that if they could not attend they would arrange for another Youth Advocate to attend instead. Another Youth Advocate surveyed stated:

[I] always make myself available by telephone if I cannot be there in person.

C. Concluding Remarks

The preceding section discussed legal assistance during the court-referred FGC process. There is a formal mechanism in place to ensure that the young person has access to legal advice when making the decision whether to plead ‘not denied’ or ‘denied’ to the charge (the process which triggers referral to the FGC). Those young people who deny the charge are dealt with through a defended hearing in the Youth Court. Although the CYPF Act provides that a Youth Advocate appointed to represent a young person may attend the FGC if the young person requests, it is a matter of discretion for the Youth Advocate as to whether they attend. Policy would appear to support the attendance of Youth Advocates at the FGC. In addition, all court-referred FGCs observed were attended by the Youth Advocate. Overall in New Zealand, the majority of court-referred FGCs are attended by a Youth Advocate.

IV. The Right To Legal Assistance at the ITC FGC

A. Introduction

The situation of the young person referred to an Intention to Charge (ITC) FGC is much less satisfactory as regards legal assistance. The legislative and policy difficulties will now be considered.

B. Legislative Provisions Dealing with Legal Assistance at the ITC FGC

An ITC FGC is held where the police form the intention to lay a charge against a young person who has not been arrested. In these cases, there is a statutory requirement to consult

881 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997).
with a youth justice co-ordinator before a charge is laid in the Youth Court, and an ITC FGC will almost always be held at this stage. The ITC FGC is tasked with ‘considering whether the young person should be prosecuted for that offence or whether the matter can be dealt with in some other way’. In practice, this means that the FGC will agree on a binding plan, and if this plan is completed within the specified timeframe that will be the end of the matter.

As discussed earlier in this chapter, all young people appearing on a charge before the Youth Court are automatically appointed a Youth Advocate unless private representation has been arranged, however there does not appear to be any provision dealing with the appointment of Youth Advocates for those young people referred for an ITC FGC. At section 251 of the CYPF Act (which presumably refers to all types of FGC, court-referred or ITC), it is stated that ‘any barrister or solicitor or Youth Advocate or lay advocate representing the child or young person’ is ‘entitled’ to attend. It has been argued that the wording of section 324(3) ‘a Youth Advocate appointed to represent a child or young person in any proceedings’ may attend the FGC and ‘make representations on behalf of the child or young person at any such conference’ applies only to the court-referred FGC. If this interpretation of section 324(3) was correct, then it would mean that young people participating in an ITC FGC would not be precluded from having a lawyer present at the FGC but the lawyer would not be state-funded through the Youth Advocate scheme. As privately retained counsel are practically unknown in the youth justice system due to the socio-economic circumstances of the clientele, this effectively rules out the right to legal assistance for those young people participating in an ITC FGC. Alternatively, it could be argued that the wording of section 324(3) appointed to

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882 s 245(1), CYPF Act.
883 s 258(b), CYPF Act.
884 Of course, the young person must admit responsibility for the offence at the FGC before a plan may be formulated. s 259(1), CYPF Act.
885 s 323(1), CYPF Act.
886 s 251(1), CYPF Act.
887 s 324(3), CYPF Act.
888 ‘Intention to charge Family Group Conferences continue to provoke debate amongst youth justice professionals’ Court in the Act Newsletter (Principal Youth Court Judge’s Office, March 2007).
represent a child or young person in any proceedings\textsuperscript{890} could encompass an appointment to represent the young person in an ITC FGC and not just in court proceedings. There is evidence that some Court Registrars have appointed Youth Advocates to represent young people at ITC FGCs (presumably under this section).\textsuperscript{891}

While it is uncertain whether the statutory appointment process envisages the appointment of Youth Advocates for young people participating in ITC FGCs, what is certain is that it is exceptional for a young person participating in an ITC FGC to have legal assistance either in advance of the FGC or during the FGC itself.\textsuperscript{892} None of the three ITC FGCs observed for this research had a Youth Advocate present. The most recent larger scale evaluation found that Youth Advocates were only present at 10 out of 366 of ITC FGCs (approximately 2%).\textsuperscript{893} There is therefore, a disparity between young people participating in court-referred FGCs and those participating in ITC FGCs. The arguments for extending the state funded Youth Advocate scheme to the young person participating in an ITC FGC will now be set out.

C. The Case for Legal Assistance at the ITC FGC

1. Required to admit offence without the benefit of legal advice

It is generally accepted as important that young people should have access to legal advice before making the decision to admit an offence.\textsuperscript{894} The Youth Justice Sub-Committee of the New Zealand Law Society has stated that not having a Youth Advocate at an ITC FGC 'potentially places a young person in a worse position than an adult defendant would be, as they [young people] are essentially being required to plead before receiving independent legal advice'.

\textsuperscript{890} s 324(3), CYPF Act [author's italics].

\textsuperscript{891} ‘Intention to charge Family Group Conferences continue to provoke debate amongst youth justice professionals’ Court in the Act Newsletter (Principal Youth Court Judge’s Office, March 2007).


\textsuperscript{893} Gabrielle Maxwell et al, Achieving Effective Outcomes in Youth Justice – Final Report (Wellington: Ministry of Social Development, 2004), 83. Neither of the youth justice co-ordinators had convened an ITC FGC where a Youth Advocate was present.

advice. A joint submission to the review process of the CYPF Act by Youth Law, and ACYA stresses that:

It should be remembered that a pre-charge FGC is still a formal part of the criminal process for young people. As the accused, a young person is in the most vulnerable position at a pre-charge FGC and in that respect should be able to access legal advice and advocacy. We would therefore support s323 of the Act to be amended to allow a Youth Advocate to be appointed once the police have consulted with an FGC co-ordinator under s245(1)(b)(ii).

All the Youth Advocates for this research were in favour of the Youth Advocate scheme being extended to cover ITC FGCs. Some Youth Advocates felt strongly about the rights of the young person in the ITC FGC. One Youth Advocate stated:

Youth Advocates should be available at FGCs for all serious offending. FGCs for sex offending, burglaries and serious assaults should not be held in the first instance as non-court FGCs without Youth Advocates being present. This denies the young person very important representation at an early stage.

The current government Youth Offending Strategy has recognised that current practice in regards to the role of the Youth Advocate requires clarification especially with regard to attendance at the ITC FGC. The New Zealand Law Society recommends that ‘attendance by a [youth] advocate should be mandatory for purely indictable offences’.

2. Extra-judicial sanctions

The ITC FGC may formulate plans with elements ranging from community work to payment of reparation to apologies. In addition, ITC FGC plans are not overseen by a Judge (unlike court-referred FGCs). The CYPF Act does not prescribe any limits for FGC plans. As Bala argues (in a Canadian context):

the plan developed in extrajudicial sanctions may be more onerous or intrusive than the sentence which a youth court judge would impose, but the youth without legal assistance may not be aware of the

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896 Youth Law is a community law service which specialises in children and young people’s legal services.
897 Action for Children and Youth Aotearoa is a non-governmental body which advocates for the rights of children and youth. It is involved in the preparation of the alternative report to the Committee on the Rights of the Child. Action for Children and Youth Aotearoa, Children and Youth in Aotearoa 2003 (Wellington: Action for Children and Youth Aotearoa, 2003). The author is a member of the advisory panel.
901 The issue of sanctions is dealt with in Chapters 12 and 13.
discrepancy and may erroneously believe that any alternative measures plan is less than the sanction a
court would impose.\textsuperscript{902}

The issue of limits on sanctions is dealt with in more detail in Chapter 12.

As well as intervening if the ITC plan is too severe or coercive, Youth Advocates may assist
in ensuring that the plan is realistic. While observing FGCs, it was apparent in some instances
that the family were ‘overambitious’ as to the elements of the plan, and suggested plans that
could not realistically be completed within the specified time frame.\textsuperscript{903} The Youth Advocate
then intervened to make sure that the plan was one which could reasonably be completed
within the timeframe. As one Youth Advocate stated when surveyed for this research,
intervention at this stage could help to prevent the young person ending up in the Youth Court
for failing to complete elements of the plan:

I believe that the process could be assisted with the attendance of a Youth Advocate at an Intention to
Charge Conference. Sometimes the young person ends up in Court anyway for non-compliance and the
presence of a Youth Advocate at an Intention to Charge FGC might help avoid non-compliance with a
plan

This was also emphasised in the New Zealand Law Society’s submission on the Children,
Young Persons and Their Families Act Amendment Bill (no 4).\textsuperscript{904} The submission argued that:
...interventions within the Youth Justice system generally become less effective the more times a child
or young person goes through them. Specifically this was recognised in the Report of the Ministerial
Task Force on Youth Offending, April 2002. Following that report, a Youth Offending Strategy was
also produced in April 2002. Anecdotal evidence suggests that where pre-charge [ITC] FGCs are held
without a Youth Advocate being present, agreements reached are often unrealistic. This is particularly
true in respect of reparation plans. This unfortunately has an effect of setting a young person up to fail
when he or she is not able to comply with those agreements. Further intervention may then be required.
Not only does this involve fairness issues for the young person involved but also for the victims of the
offending. In such situations it is not unusual for victims to feel let down by the system.\textsuperscript{905}

Ensuring that the plan is realistic is especially important as there is no judicial oversight of the
FGC plan. Unlike the court-referred FGC, the plan agreed to by the ITC FGC is not reviewed
by a Youth Court Judge.\textsuperscript{906} Entry to and exit from the process is at the discretion of the police.

\textsuperscript{902} Nicholas Bala, ‘Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders’ (2003) 40
Alberta Law Review 991, 1024.

\textsuperscript{903} See Chapter 6(V).

\textsuperscript{904} New Zealand Law Society, \textit{Submissions on the Children, Young Persons and Their Families Amendment Act
(no. 4)} (6 September 2004). Available online at www.lawyers.org.nz (last viewed 1 October 2008).

\textsuperscript{905} New Zealand Law Society, \textit{Submissions on the Children, Young Persons and Their Families Amendment Act
(no. 4)} (6 September 2004). Available online at www.lawyers.org.nz (last viewed 1 October 2008),
Recommendation: Clause 14 – Persons entitled to attend FGC.

\textsuperscript{906} See Chapter 12.
It is important that a person with legal knowledge (that is the Youth Advocate) is present to ensure that the young person is treated fairly.

D. Concluding Remarks
An examination of the legislation and policy relating to legal assistance at the FGC and data available on the attendance by lawyers at the FGC has demonstrated that although the CYPF Act provides for the attendance of a lawyer representing the young person at all types of FGC, in practice only those young people participating in a court-referred FGC have the opportunity to seek legal advice before referral to the FGC or have the opportunity to have a state funded Youth Advocate present at the FGC. There is no statutory obligation to inform the young person that they have the right to seek legal advice before participating in a FGC and there is no obligation to advise the young person that they have the right to have a lawyer present at the FGC.

Those young people referred for a court-referred FGC will have already been assigned a Youth Advocate at the court hearing. This Youth Advocate will advise them before they decide whether to deny or not deny the charge. Although the legislation allows for this Youth Advocate to attend the FGC if the young person requests, it is still a discretionary matter for the Youth Advocate as to whether they will attend. In the ITC FGC, there is no legislative mechanism for ensuring that the young person has access to legal advice. Although the legislation does not preclude attendance at an ITC FGC, there is no formal mechanism to enable young people to have a lawyer present at the FGC. There is a strong argument that young people participating in an ITC FGC should have legal assistance as they are essentially being required to plead without the benefit of legal advice. There is also no judicial oversight for the sanctions imposed by an ITC FGC.

V. THE COMPLIANCE OF LAW AND PRACTICE WITH RIGHTS STANDARDS
A. Introduction
Following from the criticisms above, it is now proposed to examine whether the current situation in relation to legal assistance for young people in the FGC process is in compliance with the NZBOR Act and New Zealand's obligations under the CRC. In each case, the applicability of the rights benchmark is discussed and then whether the current situation is in compliance.
B. Compliance with the NZBOR Act

1. Does the NZBOR Act apply to the FGC?

Section 24 of the NZBOR Act provides for certain rights applying to 'all those charged with an offence'. This includes the right to 'consult and instruct a lawyer'; and the right to free legal assistance 'if the interests of justice so require and the person does not have sufficient means to provide for that assistance'. As the young person involved in a court-referred FGC has already been the subject of an information laid before the Youth Court, such young persons would come within the remit of this provision. The position of a young person referred to an ITC FGC vis-à-vis the NZBOR Act is less clear cut. As previously noted, the young person involved in a court-referred FGC will already have been the subject of formal charges before the Youth Court. It is therefore necessary to examine more closely the situation of a young person referred to an ITC FGC to determine whether such a young person comes within the remit of section 24 of the NZBOR Act.

2. The meaning of 'charged'

Section 245(1) of the CYPF Act states that the young person (who is to be the subject of the ITC FGC) is alleged to have committed an offence but no information has been laid yet. Section 247 of the CYPF Act (which specifies the instances in which a youth justice co-ordinator is to convene a FGC) states in relation to the ITC FGC that the 'intended informant desires that the young person be charged with the offence'. Section 258 (which deals with the functions of the FGC) states in relation to the ITC FGC that it has been 'convened in relation to an alleged offence in respect of which proceedings have not yet been commenced under this part'. These provisions read together mean that the young person participating in an ITC FGC has not yet been formally charged in court.

The application of section 24 of the NZBOR Act to the ITC FGC would thus seem to hinge on the meaning of 'charged'. Section 6 of the NZBOR Act requires that 'whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in
this Bill of Rights, that meaning shall be preferred to any other meaning’. In *R v Pora*,912 and *R v Poumako*,913 it was stated that Parliament must demonstrate clear intention if fundamental rights are to be eroded.

The meaning of the phrase ‘charged’ has been considered on a number of occasions in New Zealand and overseas case law. In the New Zealand case of *R v Gibbons*, Goddard J stated that ‘in common parlance the word “charge” does not have a fixed meaning and is loosely applied to a number of steps in the prosecutorial process’.914 His Honour gave some possible examples of the meaning of the phrase ‘charged’: the moment of arrest when the arrested person is informed of the reason for the arrest; following arrest where the arrested person is informed that the police intend to prosecute; when the police initiate formal court proceedings; when the charge is read to the accused person in court and a plea is requested. Later in the *Gibbons* decision Goddard J expressed a preference for the Canadian position as to the meaning of ‘charged’. In the Canadian decision of *R v Kalanj*,915 the majority decided that a person was ‘charged’ for the purposes of the Canadian Charter of Rights and Freedoms when a formal court process was initiated.916 Lamer J in a minority judgment argued that a person is ‘charged’ when they are made aware that a process is to be initiated against them.917 This is interesting because in the case of the ITC FGC, the police must have the intention to prosecute before referring to the youth justice co-ordinator before a FGC of this type is held.

In the *Gibbons* case, it was eventually held that the right to a lawyer in section 24 of the NZBOR Act is ‘triggered’ by the concept of charged.918 Goddard J concluded that ‘charged’ must refer to an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face’.919 Following this decision it would seem that the right to a lawyer would

914 [1997] 2 NZLR 585, 593.
916 s 11, Canadian Charter of Rights and Freedoms.
917 (1989) 70 CR (3d) 260, para 27.
not apply to the young person participating in an ITC FGC as this young person would not have been arrested. Nonetheless, in a later unreported High Court decision concerning a young person (where charges were laid in the High Court), Fisher J stated his belief that:

broadly speaking...to "charge" a person in a criminal context is to take the formal step of confronting an accused with an alleged offence in a way that identifies for the accused the offence for which the accused stands in jeopardy of conviction in a proposed or current prosecution.

Applying this reasoning to the young person participating in an ITC FGC, the police must have clearly formed the intention to prosecute the young person before referral to an ITC FGC takes place. The ITC FGC may be considered a step along the road to prosecution (if the young person does not complete the plan agreed to at the FGC). By Fisher J’s reasoning the situation of the young person participating in the ITC FGC could fit within the meaning of ‘charged’ for the purposes of the NZBOR Act.

The decision of the House of Lords in the English case of R v Durham Constabulary may also be of relevance in interpreting the meaning of ‘charged’ in the present context. This appeal concerned a young person who had been given a formal warning by the police under the Crime and Disorder Act 1998, in respect of an offence of indecent assault. The system of reprimands and warnings under this legislation differs from the New Zealand system of diversion in that reprimands and warnings can be introduced as evidence in court hearings should the young person commit another offence at a later date. In addition, the young person may be required to give fingerprints, and all reprimands and warnings are recorded on the police national computer system. Since the offence in Durham Constabulary was sexual in nature, the young person’s details were also placed on the Sex Offenders Register. The young person challenged the provisions of the Crime and Disorder Act on a number of ‘fair trial’ issues.

In the course of the judgment, there was discussion about the meaning of ‘charged’ in the youth justice system, as it was necessary for the young person to have been ‘charged’ in order

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920 s 245(1), CYPF Act.
921 The Queen v PK, AP, RR & DH, 18/06/02, Fisher J, HC Auckland T 014047.
923 Of course this would mean that the other rights contained within s 23 NZBOR would also apply. Other rights are considered in later chapters.
925 s 65 and s 66, Crime and Disorder Act 1998.
to engage his fair trial rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms. The judgment of Baroness Hale of Richmond discussed the meaning of ‘in the determination of a criminal charge’. Counsel for R argued that:

the process to which R was subjected involved the determination of a criminal charge within the autonomous meaning given by the Strasbourg jurisprudence to that expression in article 6 of the Convention, since it was triggered by suspicion that R had committed criminal acts and culminated in a finding that he had committed such acts.926

Baroness Hale found that the criminal charge in this instance ceased to exist when the police had made the firm decision that the young person would not be prosecuted.927 As Gillespie argues ‘it [the reprimand and final warning scheme] must be considered punitive and could be considered as a determination of a criminal charge even if it falls short of a public pronouncement of guilt’.928 Applying this reasoning to the New Zealand ITC FGC, the police retain the option to charge until the conference plan has been completed successfully.

C. International Law

It is also necessary to consider compliance with New Zealand’s obligations under international law relating to youth justice (principally the CRC). The relevance of non-binding United Nations standards (principally the Beijing Rules) will also be discussed.

1. The CRC

The CRC provides that ‘every child alleged as, accused of, or recognised as having infringed the criminal law’ is guaranteed ‘legal or other appropriate assistance in the preparation of his or her defence’.929 This is an affirmation of the right to legal assistance as provided for in the general human rights conventions.930 The CRC also guarantees the young person the right ‘to have the matter determined by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance’.931 It is not clear whether the court-referred FGC would be considered part of formal court proceedings under the CRC. International law on the rights of children and

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927 [2005] 1 WLR 1184, para 12, per Baroness Hale of Richmond.
929 Article 40.1, CRC.
930 Article 11, UDHR. Article 14.2, ICCPR.
931 Article 40.2(b)(iii), CRC.
young people must be wide enough to cover differing national systems of youth justice, but
the CRC is generally designed with formal judicial proceedings (adversarial or inquisitorial)
in mind. However, the Committee on the Rights of the Child has mentioned alternatives to a
conviction even when the case has reached the level of the formal court proceedings (pre-trial
alternatives).\textsuperscript{932} However, any diversion from formal judicial proceedings should respect
human rights and legal safeguards.\textsuperscript{933} What are the human rights and legal safeguards? The
Committee on the Rights of the Child has stated that ‘the child must be given the opportunity
to seek legal or other appropriate assistance on the appropriateness and desirability of the
diversion offered by the competent authorities, and on the possibility of review of that
decision’.\textsuperscript{934}

2. Other United Nations standards

The Beijing Rules state that ‘basic procedural safeguards such as ...the right to counsel...shall
be guaranteed at all stages of proceedings’.\textsuperscript{935} As the Beijing Rules were formulated in 1985
before the development of extra-judicial processes like the FGC, the Beijing Rules
contemplate formal judicial proceedings. The court-referred FGC is part of the Youth Court
proceedings, as a formal charge has been laid before the Youth Court. At Rule 15.1 of the
Beijing Rules, which deals with adjudication and disposition, it is stated that ‘throughout the
proceedings the juvenile shall have the right to be represented by a legal adviser or to apply
for free legal aid where there is provision for such aid in the country’.

Turning to the ITC FGC, ‘diversion’ is defined in the Beijing Rules as action that is taken
without ‘resorting to formal trial’.\textsuperscript{936} The Beijing Rules also state that ‘any diversion involving
referral to appropriate community or other services shall require the consent of the juvenile, or
her or his parents or guardian, provided that such decision to refer a case shall be subject to
review by a competent authority, upon application’. The Commentary to Rule 11 states that:

\textquote{Consent [to participation in a diversionary process] should not be left unchallengeable since it might
sometimes be given out of sheer desperation on the part of the juvenile. This rule underlines that care
should be taken to minimise the potential for coercion and intimidation at all levels in the diversion

\textsuperscript{932} Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s rights in juvenile justice,
CRC/C/GC/10, 25 April 2007, para 68.

\textsuperscript{933} Article 40.3, CRC.

\textsuperscript{934} Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s rights in juvenile justice,

\textsuperscript{935} Rule 7.1, Beijing Rules.

\textsuperscript{936} Rule 11.1, Beijing Rules.

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process. Juveniles should not feel pressured (for example in order to avoid a court appearance) or be pressured into consenting to diversion programmes.

D. Concluding Remarks
From an examination of the relevant provisions, it is clear that international law stresses the importance of the young person having the right to legal assistance at all stages of youth justice proceedings. As international standards for youth justice are necessarily general, it is not clear whether CRC’s guarantee of legal assistance would encompass the ITC FGC. Nevertheless, international standards emphasise the importance of protecting human rights and legal safeguards when young people are diverted from the formal criminal justice system. The importance of informed consent to diversionary processes is also emphasised. Legal assistance is an important safeguard to ensure that young people give an informed consent to the process. To ensure compliance with international law, it is essential that the young person has access to, and is facilitated to access, legal assistance before and during the FGC process.

VI. THE RIGHT TO LEGAL ASSISTANCE IN OTHER JURISDICTIONS UTILISING CONFERENCING

A. Introduction
The preceding section has argued that the current law and practice in relation to the young person’s right to legal assistance in the FGC process is not in compliance with rights standards. To argue non-compliance is relatively straightforward, but to set out legislative solutions to safeguard the right to legal assistance is more difficult. As previously discussed the New Zealand model of family group conferencing has been adopted and adapted by a number of other jurisdictions. It is instructive to examine what statutory provisions relating to the young person’s right to legal assistance are present in the youth justice legislation in other jurisdictions. In this respect, it would appear that other jurisdictions have increased provisions relating to legal assistance when compared with New Zealand.

B. Legal Assistance before Referral to a Conference
In other jurisdictions, importance is placed on the young person being informed of their right to obtain legal advice before agreeing to participate in a conference process. The New South Wales youth justice legislation prescribes strict conditions for admission of the offence which

must occur before a conference can be held.\textsuperscript{938} Admission of the offence for the purposes of
the legislation must occur in the presence of an independent adult (that is a parent, caregiver,
appropriate adult or lawyer).\textsuperscript{939} The principles of the New South Wales legislation state that
'children who are alleged to have committed an offence are entitled to be informed about their
right to obtain legal advice and to have an opportunity to obtain that advice'.\textsuperscript{940} The legislation
prescribes that the child must be informed of the entitlement to legal assistance at two
different stages in advance of the conference. The first stage is when the specialist youth
officer is proceeding to refer the child for a conference. Section 39(1)(b) of the New South
Wales legislation specifies that this specialist youth officer must explain to the young person
'that the child is entitled to obtain legal advice and where that advice may be obtained'. In
addition, before the conference is convened, the conference convenor must ensure that the
young person has been provided with a written notice outlining inter alia the young person’s
right to obtain legal advice and where such legal advice may be obtained.\textsuperscript{941} Best practice
guidelines for conference convenors state that the convenor has the duty to ensure that the
young person is aware of specialist children’s lawyers in the area, how to contact a lawyer
that has represented the child previously and that the lawyer is aware of the time and date of
the conference.\textsuperscript{942} The manual for conference convenors also stresses the importance of the
young person’s right to legal assistance being realised in practice:

\begin{quote}
Whilst the development of the [Young Offenders] Act has been aware of the risk [of lack of legal
advice] and has addressed it in statutory terms, it remains vitally important that the principles of access
are realised in practice. It is clear that the earlier that a young person can obtain access to legal advice
the better.\textsuperscript{943}
\end{quote}

In South Australia, before a police officer refers a young person for a family conference under
the Young Offenders Act 1993, the officer should explain to the young person that the young
person is 'entitled to obtain legal advice.'\textsuperscript{944}

\begin{flushright}
\textsuperscript{938} s 36(b), Young Offenders Act 1997.
\textsuperscript{939} s 10, Young Offenders Act 1997.
\textsuperscript{940} s 7 (b), Young Offenders Act 1997.
\textsuperscript{941} s 45(3)(g), Young Offenders Act 1997.
\textsuperscript{942} New South Wales Department of Juvenile Justice, Youth Justice Conferencing Policy and Procedures
para 3.1.2.
\textsuperscript{943} New South Wales Department of Juvenile Justice, Youth Justice Conferencing Policy and Procedures
para 3.1.3
\textsuperscript{944} s 7(2)(a)(ii), Young Offenders Act 1993.
\end{flushright}
Under the Irish Children Act 2001, there is provision for a Garda to convene a restorative conference to discuss offending by a child. The child must have the opportunity to consult with a solicitor before admitting the offence and agreeing to participate in the conference. In Canada also, the legislation states that the young person must have been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel before consenting to take part. However, Bala reports that in Canadian programmes similar to the New Zealand FGC, most young people are advised of their right to consult with counsel but few have the opportunity to actually do so usually because of lack of funding.

C. Legal Assistance at the Conference

In Northern Ireland, for example, legal representation is permitted at all types of FGC. A young person may apply for legal aid under certain conditions. In Canada, there is no legal provision providing for access to legal counsel during the conference itself. This is compared with a provision which provides for the right to counsel during the formal court based process. Under section 47(f) of the Young Offenders Act 1997 lawyers are permitted to attend conferences in New South Wales. In South Australia, the young person is entitled ‘to be advised by a legal practitioner’ at a family conference.

D. Policy Lessons for New Zealand?

The Ministry of Social Development commenced a review of the CYPF Act in 2007. The discussion document Safeguarding our Children: Updating the Children Young Persons and their Families Act 1989 stresses the importance of learning from other jurisdictions which have implemented conferencing. Youth justice is an area in which there has been a

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945 Police officer.

946 In the Children Act 2001, the term ‘child’ encompasses all those under eighteen years.

947 s 10(2)(d), Youth Criminal Justice Act 2002.


949 s 35A and s 28A, Legal Aid, Advice, and Assistance Order (Northern Ireland) 1981.

950 s 25(4) of the Youth Criminal Justice Act 2002.

951 See Chapter 9 for discussion of the role of the lawyer at the conference.

952 s 11(4), Young Offenders Act 1993.

remarkable correspondence' in terms of policy across western jurisdictions.\footnote{John Muncie, 'The Globalisation of Crime Control – The Case of Youth and Juvenile Justice' (2005) 9 Theoretical Criminology 35, 36.} Although New Zealand was innovative in being the first jurisdiction to legislate for a conferencing model, it is clear from the above discussion that other jurisdictions have been innovative in protecting the rights of young people in conferencing. It is important that New Zealand considers these developments.

In terms of 'policy lessons', the most comparable conferencing schemes are probably Australian.\footnote{Kathleen Daly and Hennessey Hayes, Restorative Justice and Conferencing in Australia (Canberra, Australian Institute of Criminology, 2001).} The New South Wales legislation has a strong emphasis on the rights of young people. It contains prescriptive legislative provisions setting out exactly what the requirements are for ensuring that young people have appropriate legal assistance before and during the conference. It is important too that such requirements are set at the legislative level. This means that young people in all areas have the same entitlements. In New Zealand currently, it is clear that different geographical areas are interpreting the requirements of the CYPF Act in relation to legal assistance differently.\footnote{Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997).}

Having a requirement to ensure that the young person is informed of and facilitated to access legal assistance could easily be made part of the FGC referral process. Best practice for youth justice co-ordinators is that home visits (or at least phone conversations) should take place with the young person and their family in advance of the FGC process.\footnote{Gabrielle Maxwell et al, Achieving Effective Outcomes in Youth Justice –Final Report (Wellington: Ministry of Social Development, 2004), Marlene Levine, Aaron Eagle, Simi Tuiavii and Christine Roseveare, Creative Youth Justice Practice (Wellington: Social Policy Agency/ Children, Young Persons and Their Families Service, 1998).} Explaining and facilitating the right to legal assistance could be part of this. The final chapter of this thesis makes specific recommendations in the form of legislative and policy changes.\footnote{See Chapter 14(II).}

\textbf{VII. CONCLUSION: RIGHT TO LEGAL ASSISTANCE IN THE FGC PROCESS}

This chapter has considered law and practice relating to legal assistance at the FGC. It is apparent that while the legislation does not preclude legal assistance during the FGC process, the provisions are not sufficient to ensure that young people have access to legal assistance. A
young person participating in a court-referred FGC comes within the ambit of section 24 of NZBOR and the provisions of the CRC and the general human rights conventions. There is a strong argument that a young person participating in an ITC FGC should come within the ambit of the NZBOR Act. In addition, international law states that young people dealt with extra-judicially should have their human rights and legal safeguards (such as legal assistance) safeguarded.

At present in New Zealand only young people referred to a court-referred FGC have legal assistance before the FGC. Those referred to an ITC FGC do not, which means that those young people are required to plead and to accept extra-judicial sanctions without the benefit of legal assistance. Essentially only young people in court-referred FGCs have legal assistance at the FGC. An examination of best practice in other jurisdictions demonstrates the comprehensive statutory provisions relating to legal assistance in the legislation of other jurisdictions which utilise conferencing. A more prescriptive standard in relation to legal assistance would ensure that each young person participating in the FGC would have access to legal assistance.

The next chapter will consider the quality of the right to legal assistance, i.e. what happens when the Youth Advocate does attend the FGC.
CHAPTER NINE: QUALITY OF THE RIGHT TO LEGAL ASSISTANCE

Under the old legislation, I sometimes observed that a lawyer's only objective was to 'get the client off'. Achieving this by focussing on technicalities and loopholes means that young clients sometimes did not have to take responsibility for their actions and walked away from wrongdoing. The lessons learned from these situations were beneficial to no-one in the longer term – neither to the young offender, nor to the victim, and certainly not to society. 959

I. INTRODUCTION

As the preceding chapter concluded, the right to legal assistance is a fundamental right under international and national human rights law. The preceding chapter considered the young person's right to legal assistance in the course of the FGC process. Aspects of legislation and practice were criticised, especially the disparity of access to legal assistance in the two types of FGC under discussion.

In this chapter, the discussion will move to the quality of the legal assistance when the lawyer960 does attend the FGC. There are two key issues to consider. Firstly, while the legislation provides that the Youth Advocate has the same rights and duties as if privately instructed by a client,961 there is evidence from the observation of FGCs that some Youth Advocates take a best interests approach in advising the young person. It will be argued that the CYPF Act and the relevant professional standards (Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008962) preclude a best interests model of representation, and that a best interests approach is at odds with the view of the young person as a competent and autonomous individual.

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960 As considered in the previous chapter, in almost all cases legal representation in the youth justice system is provided by State funded lawyers called Youth Advocates. Privately retained counsel are practically unknown in the Youth Court. Thus the terms Youth Advocate and lawyer are used interchangeably in this chapter.

961 s 234 of the CYPF Act states that 'a Youth Advocate appointed to represent a child or young person in any proceedings shall have, in relation to the representation of that child or young person in those proceedings and on any other occasion on which that Youth Advocate represents that child or young person, the same rights, powers, duties, privileges, and immunities that the Youth Advocate would have had if he or she had not been appointed pursuant to section 323 of this Act but had been retained by that child or young person to provide legal representation.‘

962 Hereinafter Conduct and Client Care Rules in the text.
The second issue to be considered is the correct role of the lawyer in the light of the different model of criminal justice represented by the FGC. There is an argument that the attendance of, and participation by lawyers who are used to adversarial criminal proceedings and the traditional model of representing an accused in the criminal trial might stunt the potential for an informal and supportive environment which is conducive to increased participation by the young person. It will be argued here that a balance can be achieved between protecting the rights of the young person through effective legal assistance, and preserving the positive aspects of the FGC process.

II. THE ROLE OF THE LAWYER IN THE YOUTH JUSTICE SYSTEM

A. Competing Views

Like the issue of whether lawyers should be involved in youth justice proceedings at all, there is an ongoing theoretical debate regarding the role of the lawyer in proceedings concerning children and young people. A large body of literature exists in relation to representation of young clients in family law proceedings. There is a less visited debate (though along similar lines) in relation to the proper role of counsel in youth justice proceedings. The debate centres on best interests versus direct representation.

A best interests model of legal representation is fundamentally concerned with what adults decide is best for the young person. The ‘best interests’ style of representation necessarily views the young person as lacking in capacity and unworthy of consultation and participation. This view is inconsistent with the idea of the competent young person. Lawyers taking a best interests approach tend to act more as facilitators of the smooth running of the system rather than as an advocate for the young person. In this model, “the best interests of the child” is the accepted mantra and any “bargaining” that might hinder the child’s rehabilitation

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963 See Chapter 8.


967 See Chapter 3.
would theoretically conflict with that notion'. The best interests of the young person no longer guide the youth justice system in New Zealand, but there is evidence that the paternalistic attitude may still prevail amongst some lawyers. Conversely, the direct representation model means that the lawyer fulfils the ‘traditional role’ of the legal practitioner in the criminal justice system; protecting rights, providing legal advice and above all being guided by the instructions and interests of the client. This model regards the young person as an autonomous and competent individual, however, under this model of legal assistance the lawyer will speak on behalf of the client, thus diminishing the opportunity for meaningful participation by the young person.

B. The Youth Advocate Role

1. Who are the Youth Advocates?

The detailed provisions relating to the type of person suitable to be appointed to the Youth Advocate list provide some information as to the type of legal representation envisaged by the CYPF Act. The CYPF Act states that the barrister or solicitor appointed as a Youth Advocate should be suitable ‘by reason of personality, cultural background, training, and experience’ to represent the young person. The Youth Court Practice Note relating to the appointment of Youth Advocates gives further detail on the qualities desirable in a Youth Advocate. These include:

- Knowledge of the objects, principles and provisions of the Children, Young Persons, and Their Families Act 1989, including a knowledge of the procedures under s 14(1)(e) of the Act, relating to child offenders;
- Knowledge of, and experience in, criminal law;
- Knowledge of specialist Police practice as it applies to young offenders;
- Knowledge of the roles of the various participants in the Youth justice system;
- Ability to relate to and communicate with young persons and their families;
- Awareness of community groups and resources available;
- Knowledge of education and training facilities available in local areas;
- Evidence of knowledge and experience of local cultural organisations;
- Knowledge of restorative justice principles and practice;


969 s 6, CYPF Act.

970 Allison Monis, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997).

971 Conduct and Client Care Rules.

972 s 323(2), CYPF Act.
- Relevant qualifications, and training and whether there is a commitment after appointment by the applicant to attend all relevant training and education programmes that may be offered by the New Zealand Law Society at a local, regional or national level;
- Any other evidence, including references; and
- Where there is a secure Youth Justice Residential facility close to the Court to which the person has applied to be listed as a Youth Advocate a demonstrated knowledge of the secure care provisions of the Children, Young Persons, and Their Families Act 1989. 973

A 1987 report on the New Zealand youth justice system found that the standard of legal representation in the Children and Young Person’s Court was frequently lacking in quality. 974 Similar observations were reported in a 1985 account of the Children’s Advocate scheme in the Auckland Children and Young Person’s Court. 975 Morris and Young found that representing children and young people was perceived as ‘one of the lowest rungs on the professional ladder’ and that some junior practitioners were using the Children and Young Person’s Court as a forum for work experience. 976 Thankfully, research in the post- CYPF Act era has found that Youth Advocates are generally ‘an experienced group of lawyers’. 977 The 1997 Report found that most of the Youth Advocates surveyed were senior practitioners and over half had experience in acting as counsel for the child in family law proceedings. 978 Of the Youth Advocates who attended the FGCs observed for this research, none was newly qualified, and all were senior criminal or family practitioners.

2. What is the Youth Advocate role?

The role of the Youth Advocate is codified in the CYPF Act as the normal lawyer and client relationship. The legislation requires that when appointed, the Youth Advocate shall have ‘the same rights, powers, duties, privileges, and immunities that the Youth Advocate would have had if he or she had not been appointed pursuant to section 323 but had been retained by that

973 Youth Court Practice Note: Appointment and Review of Youth Advocates (AJ Becroft, Principal Youth Court Judge, 1 December 2006), para 3.55.


975 Terrence Loomis, An Evaluation of the Children’s Advocate Scheme Pilot in the Auckland Children and Young Persons Court (Auckland: The Social Research and Development Trust, 1985). This scheme was the genesis for the current Youth Advocate scheme.


977 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), 7.

978 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), 7.
child or young person to provide legal representation’. As noted, there is also provision for ‘any barrister or solicitor representing the young person’ to be present at the FGC. A privately appointed lawyer attending a FGC under this provision would be presumed to be fulfilling the normal role of a lawyer.

The normal ‘rights, powers, duties, privileges, and immunities’ of New Zealand legal practitioners are set out in the Conduct and Client Care Rules. Section 107 of the Lawyers and Conveyancers Act 2006 states that these rules are:

binding on all lawyers and former lawyers, whether or not they are members of the New Zealand Law Society, and on all incorporated law firms and former incorporated law firms, but are not binding on other persons.

Thus Youth Advocates, or indeed any lawyers acting for a young person in the youth justice system, are not exempt from the professional standards. The duties of practitioners are especially relevant in this instance. The lawyer has an ethical duty to represent the client to the best of his or her ability. The Conduct and Client Care Rules state that ‘A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.’

Further, a lawyer representing a child or young person in the Youth Court has the statutory duty to explain in age appropriate language ‘the nature of the proceedings, including, in the case of proceedings in a Youth Court, the nature and legal implications of the allegations’ and also the nature of any court orders which may be made. There is a similar duty on the lawyer to ‘encourage and assist’ participation by the young person, where appropriate. Overall, it is clear that the CYPF Act prescribes a direct representation model of representing the young person rather than a best interests model. As noted, the youth justice provisions of

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979 s 324(1), CYPF Act.
980 s 251(g), CYPF Act.
981 s 107(1), Lawyers and Conveyancers Act 2006. Further s 107(3) states that ‘no partnership deed, employment agreement, or other legal arrangement governing the manner in which a practitioner is in practice, business, or employment may require a practitioner to act in breach of the practice rules and any part of a deed, condition of employment, agreement, or other legal arrangement that purports to require such conduct is void’.
982 Rule 5, Conduct and Client Care Rules.
983 s 10(2)(a), CYPF Act
984 s 10(2)(c) CYPF Act.
985 s 11, CYPF Act.
the CYPF Act are not subject to the paramountcy of the child or young person’s welfare and interests. In summary, the CYPF Act envisages a traditional lawyer-client relationship, viewing the young person as an autonomous individual.

III. QUALITY OF LEGAL ASSISTANCE AT THE FGC

A. Introduction
This section considers the role of the Youth Advocate at the FGC, principally based on observation of the FGC. The typical functions performed by the Youth Advocate are discussed, as well as some areas of concern.

B. The Lawyer's Role at the FGC
1. Legislative provisions
In relation to the role of the lawyer during the FGC itself, the CYPF Act provides that when the Youth Advocate attends the FGC (at the request of the young person) the Youth Advocate may make representations on behalf of the young person. As mentioned above, there is provision for any barrister or solicitor (or lay advocate) to attend the FGC. There must be a presumption that the lawyer is to act in the normal role of a New Zealand legal practitioner, that is in the interest of the client.

2. Practice examples
Firstly, to outline the typical role which the Youth Advocate played at the FGCs which were observed. I was not privy to what was said at the initial meeting with the young person at the Youth Court, when the young person is referred to the FGC. Turning to practice at the actual FGC, I always arrived early at the FGC venue. There was only one instance where the Youth Advocate arrived before me and was speaking to the young person in a separate room. At the remaining FGCs there was no evidence of the young person meeting with the Youth Advocate before the FGC began. In four of the FGCs the Youth Advocate arrived late or left early during the FGC, coming from, or going to attend court or on other urgent business. The foremost impression of the role of the Youth Advocate in proceedings was that Youth

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986 s 6, CYPF Act.
987 s 324(a), CYPF Act.
988 s 251(g), CYPF Act.
989 Rule 5, Conduct and Client Care Rules.
Advocates tended to act as a partner to the youth justice co-ordinator and the police. There was a strong sense that all the professionals knew each other well (which of course would be the position at the criminal court as well).

Typically, the stage at which the Youth Advocate participated most was when discussion moved to possible outcomes. The Youth Advocate was often up to date with what community work and assessments were available, and whether local psychologists and drug and alcohol counsellors had capacity to see the young person. Youth Advocates were also willing to facilitate FGC plans, e.g. by offering to hold money to be earned by the young person in a trust account to be eventually paid to the victim of the offence. It was common for the Youth Advocate to join in the general discussion of what the young person should do in the future — suggesting possible educational courses, and giving general 'life advice' to the young person.

In summary, the Youth Advocate's role at these FGCs was to provide information to the FGC and to assist in facilitating the FGC plan, rather than the usual role of a lawyer in a criminal proceedings which would be to protect rights, advocate on behalf of the client and aim to mitigate the client's liability or penalty.

C. Issues of Concern

1. Acting against the young person's interests

What is most relevant for this discussion about rights, is that even in the small amount of FGCs observed there were examples of the Youth Advocate acting in a manner at odds with the duties of a defence lawyer in a criminal proceedings (remembering that the CYPF Act states clearly that the Youth Advocate has the 'same rights, powers, duties, privileges, and immunities',990 as if he or she was retained by the young person privately). What was particularly concerning was when the Youth Advocate appeared to act completely contrary to the young person's interests. There were three particular examples of this attitude on the part of the Youth Advocate.

In one court-referred FGC, the young person had been involved in a burglary. The police summary of facts stated that the proceeds of the burglary had been divided between a number of young people. Other FGCs were in progress for the co-offenders. This young person had stated that the offence was 'not denied' at the start of the FGC when the police summary of facts was read. However, during the FGC, it became apparent that the matter was not so clear.

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990 s 323(1), CYPF Act.
The young person claimed that he had not taken such a central part in the offending and had received a much lesser part when the proceeds were divided. Despite the young person giving a plausible explanation and not knowing the details of the burglary proceeds, the Youth Advocate backed up the police version of events, and began to pick holes in the young person’s story. The Youth Advocate did not ask the young person whether he wanted to reconsider his earlier admission, and simply stated ‘well, you have admitted this already’. In this instance, the Youth Advocate was clearly acting against the young person’s interests. If a defence counsel had advanced this sort of argument during a criminal trial (i.e. doubting publicly the client’s version of events), it would be a serious breach of professional responsibility. It is certain that in the adult criminal justice system, a defence counsel would never argue for the victim’s interests in such a manner.

In three other FGCs, the Youth Advocate appeared to be more of a ‘Victim Advocate’, and began speculating how upset the victim must have been after the offence. In one of these the Youth Advocate asked the young person in an angry tone:

Did you think of your victim [while committing the offence] and how they felt?

That is not to doubt the importance of the victim’s perspective and the importance of the young person accepting responsibility for his or her actions. But it is certainly not the role of the Youth Advocate to advocate for the perspective of the victim. The CYPF Act makes ample provision for the victim’s views to be heard. Victims are permitted to attend the FGC and make representations, are permitted to bring a reasonable number of supporters to the FGC.991 In addition, the youth justice co-ordinator may report the views of the victim to the FGC if the victim is unable or unwilling to attend. The police also take the responsibility for the public interest.

2. Defences

In other FGCs, it appeared that there was a prima facie case that the elements of the offence were not made out from the summary of facts, or that there were available defences for the young person which were not raised. The subject of how the offence is established in the FGC process is dealt with in detail in other chapters,992 but it is important to note here that the young person is required to admit the offence at the FGC, except in the rare cases where the

991 s 251(2), CYPF Act.
992 See Chapters 10 and 11.
young person has opted for a defended hearing. The summary of facts is read by the police officer, and the young person is asked whether he or she admits the offence. It is at this stage, that one would expect the Youth Advocate to act to ensure that the elements of the offence are made out, and that there are no defences to the charge.

While, unsurprisingly, drugs and alcohol were a feature of the summary of facts in all offences dealt with at the FGCs observed, there were two FGCs in particular where the young people claimed to have been extremely intoxicated at the time of the offence. In both of these, the summary of facts provided by the police officer mentioned this level of intoxication. In both cases, the Youth Advocates involved seemed to regard this not as a mitigating factor, or a reason why the offence might not be made out, but an aggravating factor. In another offence, the young person involved was adamant that he had not been party to the actual theft, but had joined the offending group after the incident had taken place. Again, the Youth Advocate did not mount the obvious argument that the young person had not been party to the actual offence. In these sort of cases, the Youth Advocate should discuss the availability of these defences with the young person, either in advance of the FGC, or ask for a ‘time out’ during the FGC, if the question of defences arise.

Examples like these give the impression that in some cases, Youth Advocates appear to regard running ‘technical defences’ as contrary to the best interests of the young person. The 1997 Report found that:

[Others] felt that it was not always in the young person’s ‘best interest’ to run ‘technical’ defences and that a sanction might be more beneficial in the long run. They viewed the provision in the 1989 Act with respect to accountability as allowing them, on occasions, to dissuade the young person from defending him or herself.993

It appears that some Youth Advocates hold the view that defending a young person is ‘teaching the child that crime is okay if you have good lawyers’.994 This is clearly symptomatic of a best interests approach to young people. Wilson notes ‘it was suggested [in Canada] that it was not in the best interests of the child to have a delinquency charge dismissed as a result of quality representation by an astute attorney, as the child might be

993 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997, 32.

given a wrong impression and further delinquency might result. This could just as easily be argued in relation to adult clients. Marrus argues the contrary:

with respect to the argument that getting guilty children off can result in future crime because it engenders an attitude of being able to get away with anything as long as you have a good lawyer, it is well to remember that such a belief is grounded in reality. By insisting on proof beyond a reasonable doubt, the child is learning another, perhaps more important lesson; he or she is valued by the system, and that the system, although imperfect, assures that individuals count and that it is better to free a guilty person that to convict an innocent one. It has also been shown that when people understand how the system works and the rules to be followed, they are more likely to become law-abiding citizens.

Some commentators have also argued that ‘technical’ defences ignore the rights and needs of victims as provided for in the principles of the CYPF Act. While the rights and needs of victims are undoubtedly important, the FGC remains a state process designed to resolve a breach of the criminal law. Again, it would be extremely unusual, if not a prima facie case of professional misconduct, for a defence lawyer in a criminal proceedings to fail to run a valid defence because of concern for the victim. Further, it is commonsensical that there is little benefit to the victim if the young person is subject to an FGC plan for an offence he or she was not involved in or was not responsible for. This would also conflict with the notions of fairness, justice and participation which processes like the FGC are meant to represent.

3. The principles of the CYPF Act

Another argument which has been advanced in relation to the role of the Youth Advocate at the FGC is that the unique principles of the youth justice provisions of the legislation, and the requirements of the Youth Advocate role somehow ‘override’ the normal duties of legal professionals to the client. A Child, Youth and Family representative states his belief that:

all who have a role determined by statute in the youth justice process are bound by both the general principles of the Act and by the principle specifically set out in Part IV. It is therefore incumbent on all participants in the FGC process to bring the principles of s 4(f)(1) and (2) to life. In my view it is not helpful if key functionaries revert to and are restricted to traditional roles as played out in the traditional justice processes. Therefore one should see police and youth advocates to be equally concerned with accountability and addressing the underlying causes of offending in every conference.


998 Note s 107(3) of the Lawyers and Conveyancers Act 2006 which states that ‘no partnership deed, employment agreement, or other legal arrangement governing the manner in which a practitioner is in practice, business, or employment may require a practitioner to act in breach of the practice rules and any part of a deed, condition of employment, agreement, or other legal arrangement that purports to require such conduct is void’.

Section 5 of the CYPF Act states that the guiding principles are to guide ‘any Court which, or person who, exercises any power conferred by or under this Act’, similarly with section 208. Are lawyers acting for a young person exercising a power ‘conferred by or under this Act’? There is an argument that Youth Advocates appointed by the Youth Court under section 323(1) are exercising a power under the CYPF Act. However, a privately appointed lawyer (admittedly rare in the youth justice system) is not court-appointed. It would seem unlikely that lawyers under this section would come under section 5. Even if lawyers and Youth Advocates were to be guided by section 5, it seems absurd that a lawyer representing a young person should be guided by the victim’s interests or community’s interests. The duty of the lawyer is to the client. The name given to the lawyer in this role is ‘Youth Advocate’, not ‘Victim Advocate’ or ‘Public Interest Advocate’. As Wilson argues, ‘the lawyer’s function as advocate is openly and necessarily partisan’.

D. The Appropriate Role for the Youth Advocate

1. Views of Youth Advocates

When the views of Youth Advocates were surveyed, contradictions emerge in how the Youth Advocates viewed their role at the FGC. ‘Traditional’ core roles of lawyers in the criminal justice system were considered important. ‘Protecting rights’ was regarded as ‘very important’ by all respondents, while ‘provision of information to the young person’ and ‘representing the young person’ were considered ‘very important’ by three-quarters of respondents. However, three quarters thought it was ‘very important’ to ‘advocate for a solution that was in the young persons’ best interests’. Similarly, in the 1997 Report, there was a high level of consensus amongst Youth Advocates about the importance of ‘traditional’ roles such as protecting rights and providing legal information. However, in relation to outcomes, Youth Advocates consistently rated representing the best interests of the young person as of high importance.

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1001 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), 31.

1002 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997, 31.)
Despite these seemingly contradictory views expressed by Youth Advocates, the legislation is unambiguous that the duties of the Youth Advocate are the same as if the lawyer had been retained privately and not court-appointed. 'Paternalistic lawyering' is not envisaged by the CYPF Act. The 1997 Report into the practice of Youth Advocates expressed concern that acting in the best interests of the young person and ensuring the outcome was in the best interests of the young person were identified by participants as forming part of the core tasks of the Youth Advocate. As the authors caution:

Reference to a client’s “best interests” is neither part of an advocate’s role vis-à-vis adult clients nor part of the philosophy underlying the 1989 Act. It was also clear that ‘best interests’ was defined in a range of very different ways by participants to the research and was sometimes used to justify doing whatever particular youth advocates felt was appropriate.

According to an Australian report into the rights of children and young people:

A general rule of legal advocacy is that the client sets the goals of representation. Lawyers are instructed by the client and, subject to their professional judgment and their duty to the court, advance the case in accordance with the wishes and directions of the client. A lawyer acts as adviser and advocate — ensuring that the client is informed of relevant considerations and is assisted, through discussion of those considerations, to provide informed instructions. However, the decisions concerning the case are ultimately those of the client and the representative may be required to advocate a position with which he or she disagrees. Lawyers are encouraged to exercise their forensic judgment concerning their advocacy but are not required to critically assess the soundness of the judgment of the client.

2. The appropriate role for the Youth Advocate

To summarise, what should the proper role of the Youth Advocate be? It is clear that the Youth Advocate is appointed to represent the young person in criminal proceedings, and the CYPF Act states that the Youth Advocate has the same powers, duties and immunities as if he or she had been retained by the young person. The professional standards for lawyers require that the lawyer must ‘within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties’. The first duty of the Youth Advocate should be to the young person, and Youth Advocates should never argue the side of the public interest or the victim’s interests. The Youth Advocate should not take a ‘best interests’ approach, in particular refraining from suggesting or advocating particular courses of action or outcomes, unless the young person requests it. There are many other


1004 Allison Morris, Gabrielle Maxwell and Paula Shepherd, Being a Youth Advocate: An Analysis of Their Role and Responsibilities (Wellington: Institute of Criminology, 1997), ix.


1006 Rule 6, Conduct and Client Care Rules.
professionals such as social workers and youth workers, and also the family and the family's supporters, who may concern themselves with the interests of the young person. The main duty of the Youth Advocate should be the protection of rights and the provision of information about legal issues that might arise in relation to the FGC. In particular, the Youth Advocate should intervene if the offence is not made out, or if there is not enough evidence to support the admission which the young person proposes to make.

IV. TO REPRESENT OR TO ADVISE?

A. Introduction

Some have argued that the traditional role of the lawyer is inconsistent with the FGC model. As previously discussed, the FGC model is theoretically premised on informality and group consensus decision making.\textsuperscript{1007} It will be argued here that the CYPF Act does not and cannot disestablish the duties of the lawyer in relation to their clients, but the role of a lawyer in the FGC need not be combative or adversarial.\textsuperscript{1008}

To say that the lawyer in the FGC should confine himself or herself to the core duties of lawyers such as the protection of rights and the provision of legal information is not to mandate that Youth Advocates must take a strictly representative role which is not cognisant of the differing needs of young people as opposed to adult clients. There is certainly scope for a more holistic approach to legal representation taking into account the particular circumstances of the FGC.

B. Representation in Practice

Theoretically, the FGC is based on a consensus decision making model, with all parties who have a stake in the offence invited to negotiate an outcome.\textsuperscript{1009} One of the recognised potential benefits of such an approach is an increased opportunity for the young person to participate in the discussion and negotiation of the outcome.\textsuperscript{1010} Effective and meaningful participation by

\textsuperscript{1007} See Chapters 6(V), and 7.


young people in legal processes which affect them is an important requirement of the CRC. Evaluations of youth court practice both in New Zealand, and internationally, have criticised the lack of participation by the young person. The nature of the FGC (informal, less hurried and taking place in ‘neutral territory’ with family support present) should mean increased levels of participation by young people. In reality, this has not been the case. Observational research of the FGC has demonstrated that many young people do not feel involved in the decision making process or do not understand what went on. This lack of participation is likely to be a symptom of the large caseload of youth justice co-ordinators. ‘Repeat players’ such as the police and the youth justice co-ordinator are too often reported as being the primary decision makers. This is unfortunate, as the youth justice FGC represents a real opportunity to involve and empower children in decisions regarding them.

However, the CYPF Act states that a lawyer may be present at the FGC to ‘represent’ the young person. In the particular provisions dealing with Youth Advocates, the legislation states that the Youth Advocate may make ‘representations on behalf of the child or young person’ at the FGC. The dictionary definition of ‘represent’ is to stand in for as proxy. This is indicative of the language of formal criminal proceedings where the lawyer speaks on behalf of the accused person.

What is relevant for the purpose of this discussion, is whether the Youth Advocate helps or hinders increased participation by the young person at the FGC. Maxwell has stated that:

1011 Article 12, CRC. The right to participation was not an issue directly addressed by this research, although it is undoubtedly important. To gather valid evidence of the rate of participation in the FGC would require social science and interviewing skills outside the scope and expertise of this project.


1017 s 251(g), CYPF Act.

1018 s 324(3)(a), CYPF Act.

it is clear from both a consideration of the legislation and of the nature of the process that it is critical
that the youth advocate recognises that the sole justification for their presence, both in court and at the
family group conference, is to assist the young person to express their views, to advocate on behalf of
the young person, to respect the young person's views as they would those of an adult client and to
ensure that the process provides a voice for the young person.\textsuperscript{1020}

Morris et al argue that a lawyer speaking for the young person is not consistent with the
philosophy of the CYPF Act.\textsuperscript{1021} They argue that if the lawyer represents the young person at
the FGC, there would be conflict with the principle of taking responsibility.\textsuperscript{1022}

Professionals are expected to play a low key role in the family group conference. The youth advocate's
main role is to advise on legal issues and to protect the young person's rights; they may also express an
opinion about the proposed penalties if these seem excessive. The social worker, if present, will
normally only provide background information on the young person and participate in supporting the
plans of the family and the young person for the future. Practice can, however, vary considerably.
Conferences are intended to be flexible and responsive to young people, families and victims. All these
values can be breached at times, especially when professionals do not understand or accept their
roles.\textsuperscript{1023}

The 1997 Report found that other youth justice professionals sometimes regarded the Youth
Advocate as a hindrance 'because he/she would highlight legal issues and rights and this was
seen as conflicting with obtaining a 'good' outcome.\textsuperscript{1024} Further, Braithwaite has argued (in the
more general context of restorative justice) that:

\begin{quotation}
Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to
speak in their own voice rather than through legal mouthpieces who might have an interest in polarizing
a conflict...A standard that gives legal counsel a right to speak at the conference or circle seems an
unwarranted threat from the dominant legal discourse to the integrity of an empowering restorative
justice process.\textsuperscript{1025}
\end{quotation}

\begin{footnotes}
\begin{enumerate}
\item\textsuperscript{1020} Gabrielle Maxwell, 'The Youth Advocate's Role: The Implications of Research Findings' in New Zealand
\item\textsuperscript{1021} Allison Morris, Gabrielle Maxwell and Paula Shepherd, \textit{Being a Youth Advocate: An Analysis of Their Role
\item\textsuperscript{1022} s 4(f)(i), CYPF Act.
\item\textsuperscript{1023} Allison Morris and Gabrielle Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a
Case Study' (1998) 1 \textit{Western Criminology Review} available at \url{http://wcr.sonom.edu/v1n1/morris.html} (last
viewed 2 August 2008).
\item\textsuperscript{1024} Allison Morris, Gabrielle Maxwell and Paula Shepherd, \textit{Being a Youth Advocate: An Analysis of Their Role
and Responsibilities} (Wellington: Institute of Criminology, 1997), 17.
\item\textsuperscript{1025} John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 \textit{British Journal of Criminology} 563, 566.
\end{enumerate}
\end{footnotes}
C. A More Prescriptive Provision?

1. Legislative provisions in other jurisdictions

How might a balance between participation and protection of rights be achieved? Compare, for instance, the New South Wales youth justice legislation which states:

1) Except as provided by subsection (2), a child who is the subject of a conference is entitled to be advised (but not represented) by an Australian legal practitioner at the conference.

2) The conference convenor may permit a child who is the subject of a conference to be represented by an Australian legal practitioner at the conference, either generally or subject to such conditions or limitations as may be imposed by the convenor.

3) A conference may be adjourned at any time for the purpose of allowing a child to obtain legal advice or representation by an Australian legal practitioner. 1026

This legislation specifies that (with exceptions) the child must not be represented but can be advised. This would seem to suggest that the lawyer must not speak for the child but that the child can seek advice. The manual for conference convenors in New South Wales states that ‘a lawyer may be present to answer the young person’s questions but may not speak on the young person’s behalf’. 1027 The manual for conference convenors states that ‘the restrictions on legal representation are designed to ensure that the conference process is protected from becoming legalistic and adversarial and from simply resembling court proceedings’. 1028 In the South Australian legislation, the young person is entitled to be ‘advised’ by a legal representative during the FGC. 1029

2. Specifying the lawyer’s role

The current legislation’s wording of the lawyer’s role in the FGC is not in line with current standards for participation by the young person. The Youth Justice Sub-Committee of the New Zealand Law Society also argues that ‘the youth advocate should play a role in the family group conference that enables the young person to have his or her views put forward and be a key decision maker’. 1030 Facilitating the meaningful participation of the young person in the FGC is undoubtedly a positive aim and is in line with the participation provisions of the CRC. 1031 Protection of rights by the lawyer does not have to mean that the lawyer engages in adversarial behaviour. Walgrave sees the role of the lawyer in such processes as being a

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1026 s 50, Young Offenders Act 1997.
1029 s 11(4), Young Offenders Act 1993.

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protector of rights and a giver of information rather than an advocate in the formal sense of
the word.\textsuperscript{1032} It is true that increased opportunity for meaningful participation by the young
person is an acknowledged benefit of the conference process and some change in the
conventional behaviour of lawyers is necessary to facilitate dialogue during the conference,
for example by encouraging the young person to participate rather than speaking for the
young person.\textsuperscript{1033} Lawyers do not have to be 'berobed, wigged, distant, combative
presences'\textsuperscript{1034} and can take an approach sensitive to the age and culture of the young person.

V. CONCLUSION: QUALITY OF THE RIGHT TO LEGAL ASSISTANCE

The preceding chapter argued the importance of the young person having access to legal
assistance at all stages of the FGC process. However, the quality of the right is equally
important. This chapter examined issues surrounding the duties and role of the lawyer when
attending the FGC with the young person. Although the CYPF Act is unambiguous as to the
duties of the lawyer, it appears as if the best interests style of representation persists among
practitioners. It was argued here that lawyers should confine themselves to their duty of
protecting the young person's rights and ensuring that their client is fairly treated in
accordance with the law. Matters relating to the best interests and welfare of the young person
are properly within the province of other professionals such as social workers. The standards
of the legal profession do not make exceptions for the youth of the client, and lawyers should
not advocate for the interests of the victim or the public.

While it is certain that the lawyer should act to protect the young person's rights, this can be
achieved while still encouraging the young person to participate in the process. There is also
confusion over the role that lawyers should take. The CYPF Act states that the lawyer is there
to 'represent' the young person but this is not in line with the participation rights of the young

\textsuperscript{1030} New Zealand Law Society Youth Justice Sub-committee, \textit{Best Practice Guidelines for Youth Advocates}, 2
November 1998.

\textsuperscript{1031} Article 12, CRC.

\textsuperscript{1032} Lode Walgrave, 'Restorative Justice and the Republican Theory of Criminal Justice: An Exercise in

\textsuperscript{1033} Allison Morris, Gabrielle Maxwell and Paula Shepherd, \textit{Being a Youth Advocate: An Analysis of Their Role
and Responsibilities} (Wellington: Institute of Criminology, 1997).

\textsuperscript{1034} Joanna Shapland, 'Restorative Justice and Criminal Justice: Just Responses to Crime?' in Andrew von
person or the format of the FGC. The lawyer should act in an advisory role, intervening only if the young person's rights are being infringed. It would be better if the legislation prescribed an advisory role for the Youth Advocate.\textsuperscript{1035}

\textsuperscript{1035} See further Chapter 14(II), for the wording of recommended legislative and policy changes.
CHAPTER TEN: ESTABLISHING THE OFFENCE – THE LEGISLATIVE MECHANISMS

[The question is not whether] this boy or girl committed a specific wrong, but what is he, how has he become what he is and what best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence from a criminal court is not the sort of evidence to be heard in such a proceeding.\[^{1036}\]

I. INTRODUCTION

The preceding two chapters have argued the importance of the young person having access to quality legal assistance at the FGC. One of the arguments advanced in relation to the importance of legal assistance was the lawyer’s role in making sure that there was evidence to substantiate the offence, and that the young person was legally guilty. The next two chapters will examine how the offence is proved in the FGC process.

The first section discusses the key right (the presumption of innocence) and its particular importance to the young person in the youth justice system. Then, the unusual and unique way in which the offence is proved under the CYPF Act is considered.

Aspects of the scheme of the CYPF Act for proving the offence have caused confusion, even at a judicial level. The divergent approaches coming from the case law will be considered. In essence, it will be argued that the way in which the offence is proved in the FGC process is legally sound, if certain conditions are met (e.g. legal assistance). Then, Chapter 11 will examine these procedural requirements and how these operate in practice at the FGC.

II. THE PRESUMPTION OF INNOCENCE

A. Content of the Right

In the adversarial criminal process, the accused’s guilt is established after a plea of guilty (after consultation with a lawyer) or by a finding of guilt after a defended hearing.\[^{1037}\]

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Evidence provided by the prosecution must come up to the criminal standard of proof i.e. beyond reasonable doubt.\textsuperscript{1038} The requirement of putting the prosecution to the proof is central to the adversarial process. As McElrea states:

\begin{quote}
\textit{at the heart of the usual Western concept of criminal justice is the idea of a contest between the State and the accused, conducted according to well defined rules of fair play and leading to a verdict, guilty or not guilty. One of the most important of these rules is the presumption of innocence – the accused is to be found “not guilty” unless the State can prove otherwise. Those found guilty are punished by the State, and of course the more punitive the sentencing regime the greater is the incentive for a guilty person to rely on the presumption of innocence and put the State to the proof; i.e., not to plead guilty.}\textsuperscript{1039}
\end{quote}

The presumption of innocence, that is the right to be considered innocent until proven guilty according to law, is a fundamental principle of the adversarial system.\textsuperscript{1040} In Woolmington \textit{v Director of Public Prosecutions}, Viscount Sankey famously described the concept of the accused being innocent until proven guilty as the ‘golden thread’ running through the common law criminal trial.\textsuperscript{1041}

The presumption of innocence ‘finds a place in every known human rights document’,\textsuperscript{1042} and is thus a fundamental principle of international human rights law. The ICCPR states that: ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’.\textsuperscript{1043} ‘This longstanding principle is also codified in section 25 of the NZBOR Act which provides that ‘everyone who is charged with an offence has, in relation to the determination of the charge...the right to be presumed innocent until proved guilty according to law’.\textsuperscript{1044}\n
\begin{flushleft}
\textsuperscript{1041} [1935] AC 462, 481.
\textsuperscript{1044} s 25(c), NZBOR Act. Cf’s 11(d), Canadian Charter of Rights and Freedoms, art 6.2, European Convention on Human Rights, and see further Andrew Butler and Petra Butler, \textit{The New Zealand Bill of Rights Act: A Commentary} (Wellington: Lexis-Nexis, 2005), paras 23.4.2-23.4.15. In relation to the meaning of the word charged, see Chapter 8(V)(B)(2).
\end{flushleft}
In relation to the application of the right to those in the youth justice system, the requirements of the ICCPR are mirrored by the Convention on the Rights of the Child which provides that 'every child alleged as or accused of having infringed the penal law has at least the following guarantees...to be presumed innocent until proven guilty according to law'. The Committee on the Rights of the Child considers the presumption of innocence to be 'fundamental to the protection of the human rights of children in conflict with the law'. The Beijing Rules also emphasise that 'basic procedural safeguards' such as the presumption of innocence shall be 'guaranteed at all stages of proceedings'. The Committee on the Rights of the Child has issued further guidance, stating that the presumption of innocence in the CRC means that:

the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial.

B. Importance of the Right

In his paper 'Four Threats to the Presumption of Innocence', Ashworth examines the rationale for the presumption of innocence. He summarises the importance of the presumption of innocence as being that the presumption is:

inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.

While the general importance of the presumption of innocence applies to young people as well as adults, the presumption may have extra relevance to young people. There is a high rate of guilty pleas in youth courts generally. Research into the Children and Young Persons Court in 1987 found that the process was akin to an assembly line. Contested cases were extremely rare and raising legal issues in these cases was even rarer. It must be noted that guilty pleas

\[1045\] Article 40.2(b)(i), CRC.


\[1047\] Rule 7.1, Beijing Rules.


are the norm in youth courts across jurisdictions.\textsuperscript{1051} There is, of course, a prevalence of guilty pleas in the lower courts generally.\textsuperscript{1052}

Further, there may be a presumption of guilt when young people are involved. While the media are careful to refer to the actions of adult defendants in cases before the courts as ‘alleged’, there is evidence of the use of the term ‘offender’ instead of alleged offender when discussing young people.\textsuperscript{1053} Prejudgment by demeanour is also an issue. The Committee on the Rights of the Child caution that:

\begin{quote}
States Parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to lack of understanding of the process, immaturity, fear or for other reasons, the child may behave in a suspicious manner, but authorities must not assume that the child is guilty without evidence proven beyond a reasonable doubt.\textsuperscript{1054}
\end{quote}

In addition, the history of youth justice demonstrates less of a focus on the offence and more of a focus on the young person’s general situation.\textsuperscript{1055} Under the welfare orientated mode of youth justice, proving the offence was regarded as secondary. The system focused on the young person’s problems as a whole, rather than a reaction to a proved offence. One of the distinguishing characteristic of a welfare type approach to youth justice was the provision for a non-specific complaint system meaning that a child or young person could be brought into the court’s jurisdiction even if there was no specific offence involved.\textsuperscript{1056} Rights such as the presumption of innocence provide a control on the discretion of youth justice professionals. The presumption of innocence and the requirement that the offence be proved lessens the risk that criminal proceedings are used solely to intervene in the young person’s life, as there must be an offence that is proved or capable of being proved.

\textsuperscript{1051} Joseph B Sanborn Jnr, ‘Pleading guilty in juvenile court: Minimal ado about something very important to young defendants’ (1992) \textit{9 Justice Quarterly} 127.


\textsuperscript{1053} ‘Bail Decision Beggars Belief’ Press Release: New Zealand First Party, Thursday 13\textsuperscript{th} December 2007.


\textsuperscript{1055} See Chapter 2(III) and (IV).

\textsuperscript{1056} s 31, Child Welfare Act 1925.
III. HOW ARE OFFENCES PROVED IN THE FGC PROCESS?

A. Introduction

Aspects of how the offence is proved under the CYPF Act are unusual and unique, and so must be considered here in detail. There are considerable differences from the traditional adversarial criminal process.

B. The Court-Referred FGC

The concept of proof beyond reasonable doubt is arguably the high water mark of the adversarial criminal process. However, only less than a third of youth justice apprehensions are actually dealt with through prosecution in court. The latest available figures from the Ministry of Justice indicate that in 2006, out of the 30,451 apprehensions:

- 29% were prosecuted
- 39% were dealt with through the Police Youth Diversion Scheme
- 23% received a formal police warning
- 6% were dealt with through an Intention to Charge FGC.

As this chapter will discuss, even for these one-third of young people who are prosecuted, proof through the adversarial process is rare.

The system in the Youth Court differs markedly from that of the regular criminal court. Formal pleas of guilty or not guilty are not taken. For those young people participating in a court-referred FGC, formal charges will already have been laid in the Youth Court. There are two routes by which a young person may arrive at a court referred FGC. When the young person appears in the Youth Court the young person is asked (after first consulting with a Youth Advocate), whether the charge(s) are 'denied' or 'not denied'.

1. Charges ‘denied’

If the young person wishes to deny the charge, the matter will then be subject to a defended hearing as for an adult accused. The procedure is the adversarial one set out in the Summary Proceedings Act 1957. If the charge is not proven, that is clearly the end of the matter. If

1058 s 323(1), CYPF Act.
1059 s 246(a) and (b), CYPF Act.
1060 *Youth Court Bench Book* (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 2.3.1.
the charge against the young person is proved in the Youth Court, a FGC must be convened to make recommendations as to sentencing options.\textsuperscript{1061} None of the FGCs in this sample involved denied charges. There are no legal issues in how the offence is proved in this type of FGC, as the offence has been proven through the normal adversarial process before the FGC considers the matter.

2. Charges 'not denied'

The more common situation however, is where the 'not denied' procedure is used. All of the nine court-referred FGCs in the sample were convened under this procedure.

This is a model unique to the New Zealand Youth Court. The CYPF Act states that where the young person has not opted to deny the charge, the Court 'shall not enter a plea to the charge' but must adjourn proceedings to allow a FGC to be convened.\textsuperscript{1062} This is known as the 'not denied' procedure. The Principal Youth Court Judge has succinctly described the concept of 'not denied' as 'a somewhat odd, but very useful mechanism'.\textsuperscript{1063} This is not a formal admission or plea of guilty but allows the young person to acknowledge there is a 'case to answer' and to let the FGC handle the matter.

At the subsequent FGC, there must be an 'admission of the offence' by the young person.\textsuperscript{1064} At FGCs attended during this research, this legislative requirement was fulfilled by a reading of the summary of facts, and the young person being required to indicate his or her agreement.\textsuperscript{1065} If the young person does not admit the offence or if the FGC is unable to ascertain whether the young person admits the offence, the FGC cannot proceed to make a recommendation or formulate a plan in respect of the offence.\textsuperscript{1066} At all the nine court-referred FGCs observed for this research, the young person admitted the offence.

\begin{flushright}
\footnotesize 1061 s 258(c), CYPF Act.
\footnotesize 1062 s 246(b), CYPF Act.
\footnotesize 1064 s 259(1), CYPF Act
\footnotesize 1065 See Chapter 11(II) and (III).
\footnotesize 1066 s 259(2), CYPF Act.
\end{flushright}
When the recommendations, plans or decisions formulated at the FGC are reported back to the Youth Court Judge, the notation ‘Proved By Admission at Family Group Conference’ should be made on the file. Essentially the ‘not denied’ concept fulfills two purposes. Firstly, the young person is agreeing to let the matter be resolved at the FGC, and secondly, the young person is waiving their right to have a defended hearing. Should the young person answer ‘not denied’ to the charge at the Youth Court but change his or her mind and decide not to admit the offence at the FGC, the matter is referred back to the Youth Court, for a defended hearing to take place.

In summary, there are no legal issues with the ‘denied’ procedure, as the offence is proved through a defended hearing in the usual manner. The issue is really with the ‘not denied’ procedure. There are two undefined concepts here: what does ‘admit the offence’ mean, and what does the notation ‘Proved by Admission at Family Group Conference’ made by the Youth Court Judge mean? Before considering the meaning of these two concepts, it is worth discussing the scale of the issue.

3. How many cases go through the ‘not denied’ procedure?

As noted, all of the court-referred FGCs in the sample were as a result of the ‘not denied’ procedure, though patently this sample is not statistically significant. Efforts were made to ascertain the percentage of Youth Court cases that involve the ‘not denied’ procedure. Information requests to the Ministry of Justice, Child, Youth and Family, and the Principal Youth Court Judge’s office yielded only the fact that there are no statistics collected on the rate of ‘not denied’ cases, though all three parties indicated that this was a statistical gap in the system. Anecdotally though, all parties indicated that ‘denied’ cases were rare. The Principal Youth Court Judge has also stated that almost all Youth Court cases involve a plea of ‘not denied’. The Achieving Effective Outcomes report found that in a sample of 1,000 FGC cases, only two cases involved the young person denying all charges. The youth

1067 *Youth Court Bench Book* (Wellington: Institute of Judicial Studies, 2005, updated to 2008). There is an official stamp for this purpose. See Chapter 11(IV).

1068 As in the ITC FGC, there is no specific provision on what the procedure is if the young person does not admit the offence. The FGC cannot then make recommendations and so the non-agreement procedure in s 264 CYPF Act is presumably employed.


justice co-ordinators and Youth Advocates (those who were involved in the FGCs which were observed) agreed that almost all cases were dealt with through the ‘not denied’ procedure. Child, Youth and Family were also contacted, with a view to obtaining the breakdown of the types of FGC convened each year. Unfortunately, the breakdown of the FGC types is not collated. The section number under which the individual FGC is convened is only noted on the individual client’s file.

Some limited information is available on the amount of defended hearings. An information request to the Ministry of Justice in October 2008 yielded the following information on the rate of cases which were finally disposed of at a defended hearing in the Youth Court.

<table>
<thead>
<tr>
<th>Year [June–June]</th>
<th>Total Disposals</th>
<th>Number of Defended Hearings</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>7696</td>
<td>553</td>
<td>7.1</td>
</tr>
<tr>
<td>2007</td>
<td>7662</td>
<td>583</td>
<td>7.6</td>
</tr>
<tr>
<td>2006</td>
<td>7474</td>
<td>545</td>
<td>7.3</td>
</tr>
</tbody>
</table>

In summary, though there are no specific figures on the rate of cases dealt with through the ‘not denied’ procedure, what can be ascertained is that such cases are in the clear majority, when compared with those proved through defended hearings.

C. The ITC FGC

Three of the FGCs observed were ITC FGCs. The ITC FGC is held with the purpose of resolving the young person’s case without formal charges. When the young person has not been arrested, but is alleged to have committed an offence, there is a statutory process which must be followed before the police may lay a charge in the Youth Court. There is a requirement to consult with a youth justice co-ordinator, and if after consultation the police still wish to charge the young person, an ITC FGC must be held before a charge is laid in the Youth Court. At an ITC FGC, the FGC participants are tasked with deciding whether a

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1071 See Chapter 5(III)(A) on the categories of FGC.
1072 Information request made to Child, Youth and Family in December 2007.
1073 s 245(1), CYPF Act.
1074 s 245(1), CYPF Act.
charge should be laid in the Youth Court or whether there is another means of dealing with the matter,\textsuperscript{1075} usually through the formulation of a plan which the young person must complete within a specified timeframe.

There is no requirement that the young person be found guilty by a court, but admission of the offence by the young person is a pre-requisite for the FGC to proceed to a decision.\textsuperscript{1076} Again, the legislation does not specify what procedure should be used to ascertain whether the young person admits the offence. At the three FGCs, this requirement was satisfied by the police officer reading the summary of facts and the young person being required to state whether he or she agrees with the summary of facts.\textsuperscript{1077} As was discussed in an earlier chapter, lawyers are rarely present at this type of FGC.\textsuperscript{1078}

Moreover, by admitting the offence at the ITC FGC, the young person is essentially waiving the right to have a defended hearing in the Youth Court to resolve the matter.\textsuperscript{1079} The police essentially agree not to charge the young person if the offence is admitted and a plan put in place to address the offending. The legislation does not contain any specific provisions on what should happen if the young person chooses not to admit the offence at the ITC FGC. No reported instances of this type could be found. Presumably the matter is referred back to the police.\textsuperscript{1080} The police would then have two options: to lay a charge in the Youth Court, or to opt not to take the matter further. If the young person then wishes to have the matter dealt with through a defended hearing, he or she would have to deny the charge at the initial court hearing, and the matter would be set down for a defended hearing.

D. A Complex Array of Terms
It is clear from an examination of the CYPF Act that there are a number of different terms used in place of the standard 'guilty/not guilty' criminal pleas.

\textsuperscript{1075} s 258(b), CYPF Act.
\textsuperscript{1076} s 259(1), CYPF Act.
\textsuperscript{1077} See Chapter 6(V)(B), and Chapter 1(II).
\textsuperscript{1078} See Chapter 8(IV).
\textsuperscript{1079} Of course in some cases after admitting the offence at the ITC FGC, the FGC may fail to reach agreement. In these cases, the matter is referred back to the police.
\textsuperscript{1080} Presumably s 264, CYPF Act which is headed 'Procedure where no agreement possible' would apply. In these cases the matter is referred back to the referring agency, in this case the police: s 264(1)(e), CYPF Act.
• not denied is used to facilitate the referral to the court-referred FGC
• admit the offence is used to acknowledge responsibility for the offence in the FGC
• denied is used when the young person wishes to have the matter determined by a defended hearing in the Youth Court
• proved is used when the offence has been established through a defended hearing in the Youth Court.

The key issue, therefore, is whether the 'not denied' procedure (under which the majority of charges in the Youth Court are proved through admission at the FGC) means that a lesser standard of proof applies to young people in these situations, and consequently whether the procedure contravenes the presumption of innocence.

IV. THE RIGHT IN PRACTICE: CASE LAW

A. Introduction
Unlike the subjects of the other chapters e.g. legal assistance, the 'not denied' procedure, and especially the meaning of the term 'admit the offence' has come in for judicial scrutiny, and thus there is case law available. However, there has been a divergent approach taken by judges as to whether the admission at the FGC equates to the criminal standard of proof. One school of judicial thought is that the admission made at the FGC does not equate to a conventional plea of guilty, and thus cannot support Youth Court orders. The other school of thought takes a more pragmatic approach, and considers that the sum total of 'not denied' plus the admission made at the FGC plus the ‘PAFGC’ notation made by the Youth Court Judge on the information equates to the criminal standard of proof.

B. The Legislative Provision
Section 259(1) of the CYPF Act states that:

Every family group conference convened ...shall seek to ascertain whether the child or young person in respect of whom the conference is held admits any offence alleged to have been committed by that child or young person.

1081 s 246(b), CYPF Act.
1082 s 259, CYPF Act.
1083 s 246(a), CYPF Act.
1084 s 258(e) and s 283, CYPF Act.
1085 [Author's italics]
Before considering the meaning of the term 'admits' the offence, it is worth briefly considering what the term 'offence' in section 259(1) means.

A criminal offence is an action prohibited by law which may be prosecuted in a criminal proceeding and followed by a criminal sanction. Subject to certain exemptions, truly criminal offences require both actus reus and mens rea. In the adversarial process, a plea of guilty means an acceptance of legal fault. It is a fundamental principle of criminal law that for criminal liability to attach there must be criminal intent. As Simester and Brookbanks state, 'if a person is not to blame when something goes wrong, the censure of the criminal law is not appropriate'. This concept is expressed in the criminal law by means of the maxim actus non facit reum nisi mens sit rea (the act is not culpable unless the mind is guilty). Of course, there are limited exceptions to this, notably certain regulatory offences.

To take two examples of offences which make up a large part of offending by young people, and were common in the FGCs observed, the crime of assault in New Zealand requires both the act (the application of force) and the mental component ('intentionally'):

Assault means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and to assault has a corresponding meaning.

Similarly, the offence of theft involves not just the physical act of taking, but also the necessary dishonest intent and the intent to deprive the owner permanently:

Theft or stealing is the act of...dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property...dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently...

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1092 s 2(1), Crimes Act 1961.
of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.\textsuperscript{1093}

Hence, the standard criminal plea of guilty means acknowledging both elements of the offence – the factual scenario and the necessary intent. The nub of the issue here is whether the CYPF Act adopts a completely different scheme than the usual concept of legal guilt?

C. The Case Law: Divergent Approaches

1. Introduction

The case law on the meaning of ‘admits’ in section 259 of the CYPF Act and on the legal status of the ‘not denied’ mechanism has divergent strands. The principal judgments have concerned the making of orders under section 283 of the CYPF Act and the making of orders for compulsory blood samples under the Criminal Investigations (Bodily Samples) Act 1995.\textsuperscript{1094} Both section 283 of the CYPF Act and section 2 of the CIBS Act require that the offence is ‘proved’ before the relevant order can be imposed. Under section 283 of the CYPF Act, the Youth Court has the power to make the standard disposal orders including discharge,\textsuperscript{1096} admonishment,\textsuperscript{1096} come up if called upon,\textsuperscript{1097} fines,\textsuperscript{1098} reparation,\textsuperscript{1099} restitution,\textsuperscript{1100} forfeiture,\textsuperscript{1101} and disqualification from driving.\textsuperscript{1102} The more coercive and longer-term orders (which may involve custodial sanctions and transfer to the adult criminal justice system) are set out in s 283 (k)-(o). These are supervision orders,\textsuperscript{1103} community work orders,\textsuperscript{1104} supervision with activity,\textsuperscript{1105} supervision with residence,\textsuperscript{1106} and conviction and transfer to the

\begin{thebibliography}{99}
\item \textsuperscript{1093} s 219, Crimes Act 1961.
\item \textsuperscript{1094} Hereinafter the CIBS Act.
\item \textsuperscript{1095} s 283(a), CYPF Act
\item \textsuperscript{1096} s 283(b), CYPF Act.
\item \textsuperscript{1097} s 283(c), CYPF Act.
\item \textsuperscript{1098} s 283(d) and (e), CYPF Act.
\item \textsuperscript{1099} s 283(f), CYPF Act.
\item \textsuperscript{1100} s 283(g), CYPF Act.
\item \textsuperscript{1101} s 283(h) and (j), CYPF Act.
\item \textsuperscript{1102} s 293A, CYPF Act.
\item \textsuperscript{1103} s 283(k), CYPF Act.
\item \textsuperscript{1104} s 283(l), subject to s 298, CYPF Act.
\item \textsuperscript{1105} s 283(m), CYPF Act.
\end{thebibliography}
District Court for sentencing. Factors to be taken into account on sentencing are listed in s 284 of the CYPF Act. These are comparable to those set out in the Sentencing Act 2002 and make reference to the effect on victims, the young person's history and social circumstances, and the attitude of the young person and their family.

The key issue in these cases therefore, is whether the admission made by the young person at the FGC plus the notation made by the Youth Court Judge at the time the FGC plan is reported back, equates to the criminal standard of proof.

2. A rights based argument

(i) C v Police

A High Court decision (C v Police) by Hammond J in 2000 was critical of the way in which offences are proved through the FGC process. In this case, the judgment emphasised the young person's rights as an offender, i.e. that the young person should have the same rights under the NZBOR Act as an adult in the same situation.

In this case, the young person had been convicted and transferred to the District Court under section 283(o) of the CYPF Act. This section allows for such an action by a Youth Court Judge when 'a charge has been proved before a Youth Court'. The Crown's case was that if a 'not denied' court-referred FGC was held, and there subsequently was an application to transfer the case to the District Court, the admission made at the FGC was sufficient and within the requirements of the NZBOR Act to prove guilt according to law. C had appealed on the grounds that the charges had not been proved and that the conviction could not be properly entered. There was some confusion over the exact details, but essentially

106 s 283(n), CYPF Act.
107 s 283(o), CYPF Act. The young person must be over the age of fifteen.
109 s 284(f), CYPF Act.
110 s 284(b), CYPF Act.
111 s 284(d) and (e), CYPF Act.
113 s 283, CYPF Act.
Hammond J was asked to consider whether the youth justice concepts of ‘not denied’ and ‘admitted’ could support a conviction, i.e. whether it equated to the criminal standard of proof.

Hammond J stressed the importance of section 25(c) of the NZBOR Act which ‘encapsulates one of the most fundamental propositions of the rule of law’\(^{1116}\) that is the right to be presumed innocent unless proven guilty according to law. His Honour emphasised that ‘a plea of “guilty” admits not only the essential facts relied upon by the prosecution, but that all necessary elements of the charge, according to law, have been met’.\(^{1117}\) Hammond J went on to hold that the concepts of ‘not denied’ did not mean that a conviction had been entered.\(^{1118}\) His Honour made the valid argument that:

> to rely on a different kind of taxonomy from the tried and tested “guilty, or not guilty” when a youth may very well go to prison, is quite unwise. Legal language generally has well settled meanings. That is supposed to be one of the essential virtues of law’.\(^{1119}\)

In relation to the exact meaning of the term ‘admits’, Hammond J rightly considered that one can admit to the facts of the offence but not the legal responsibility:

> the term “admits” is much more problematical. As I said to counsel during the course of argument, one could take the example of a youth who runs away with a soccer ball belonging to a second youth. That youth may well “admit” to having “taken” the ball. But whether he admits to having intended permanently to deprive that other youth of it, still remains an open question, unless and until, the youth pleads guilty to the charge of theft as such. He then pleads to the asportation, with the necessary intent, and the legal consequences which flow from those things.\(^{1120}\)

Hammond J correctly considered that ‘a plea of “guilty” admits not only to the essential facts relied upon by the prosecution, but that all necessary elements of the charge, according to law, have been met’.\(^{1121}\) His Honour therefore found that the fact that the charges were ‘not denied’ or ‘admitted’ could not support a conviction and remitted the case to the District Court for correct pleas to be taken.

\(^{1115}\) Some of the charges were marked as ‘not denied’ whereas other charges were marked ‘admitted’.

\(^{1116}\) [2000] NZFLR 769, para 21.


\(^{1120}\) [2000] NZFLR 769, para 25.

Hammond J's analysis is based on the young person's rights as an alleged offender, and the importance of the presumption of innocence. His Honour is correct in asserting that the presumption of innocence requires that the legal requirements of the particular offence must be satisfied. In the true criminal offences such as theft and assault, this means that both the actus reus and the mental element must be proved. If the offence is proved through a plea of guilty or similar procedure, the accused must acknowledge both factual and legal guilt. Factual guilt will not suffice.

This judgment patently had wide-ranging consequences. If an 'admitted' notation could not support a conviction then it could not support the rest of the orders in section 283 of the CYPF Act.

(ii) Police v S

_C v Police_ was concerned with a situation where a young person was being transferred to the adult criminal justice system. The factual scenario in _Police v S_1122 is directly relevant to the type of FGCs observed for this research, where the matter is resolved purely by means of a FGC plan. No s 283 orders were involved.

The reasoning in _Police v S_ was also based on the principle that the normal standard of criminal proof should be met. In this case, the matter had been resolved by means of a FGC plan, and later a section 282 discharge. Then, the police issued a databank compulsion order under section 39 of the CIBS Act. The young person had answered 'not denied' to the charge and had subsequently admitted the charge at a FGC. Ryan DCJ declined to make the order requested. The Judge accepted counsel for the young person's argument that there had been no finding that the charge was proved for the purposes of the CIBS Act. The Judge was:

...not prepared to accept the submission that an admission by a young person at a family group conference later confirmed in front of a Youth Court Judge amounts to a finding by that Judge that a charge has been proved. That is an inference which simply cannot be drawn given the clear statutory intention to provide a means whereby charges against young persons are disposed of without the necessity for the charge to be proved.1123

Counsel for S had stated that 'unless the Court is contemplating the making of an order pursuant to s 283 of the Children, Young Persons, and Their Families Act, a Youth Court

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1122 [2000] NZFLR 188.

does not have to make a finding that a charge has been proved'. In this case, a section 283 order was not being made. Matters had been disposed of through a FGC plan, ultimately resulting in a section 282 discharge. Judge Ryan found that there was no ‘requirement on the Youth Court to make a finding that the charge had been proved where it is contemplated that the information will be discharged pursuant to s 282’. His Honour went on to hold that there must be a specific finding that the charge was proved.

(iii) Analysis
Thus, in both these cases, the judges involved doubted that the admission at the FGC could support an order or a conviction, i.e. that the procedure did not equate to the criminal standard of proof had been met. Both judges were certain that the normal standard of criminal proof applied in the Youth Court.

3. Youth Court practice
The alternative view (and that which appears to reflect current Youth Court orthodoxy) was that set out in Police v B, and Police v M. In these cases, it was held that admissions made at the FGC equated to a plea of guilty, and thus the requirement to prove the offence was met.

(i) Police v B
Police v B was subsequent to and had similar facts to C v Police. Here also, a young person had committed serious offences and was to be convicted and transferred to the District Court under s 283(o) of the CYPF Act. Once more, the issue was whether the admission at the FGC equated to plea of guilty, and was sufficient to support a conviction. However, McElrea DCJ declined to follow C v Police. His Honour considered that Hammond J’s remarks in C v Police were obiter dicta as the Youth Court Judge in that case ‘had not marked the file in any way as having been proved in any form’. In Police v B, McElrea DCJ stated his belief that

1126 Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008). This document is not available to the public.
1129 [2001] NZFLR 585, 588. However see paras 11 and 12 of C v Police [2000] NZFLR 769 where it was stated that ‘the charge was noted as having been “admitted”’. 203
Hammond J in *C v Police* was misinformed about the difference between 'not denied' and 'admitted'. His Honour stated that:

Counsel for the New Zealand Police had referred to matters being 'not denied' at family group conferences, which is nonsense. If they [the charges] are not denied in Court they go to a family group conference – the conference must ascertain whether the charge is “admitted” or not.\(^{1130}\)

McElrea DCJ relied on the decision of *Police v M* \(^{1131}\) where a clear distinction was drawn between the initial 'not denied' mechanism and the act of admitting the offence at the FGC.

(ii) *Police v M*

In *Police v M* the young person concerned had appeared in the Youth Court charged with sexual violation (an indictable charge). He was remanded and indicated a desire to plead guilty. A FGC was held to consider jurisdiction, M admitted the charge at the FGC and was offered Youth Court jurisdiction. The notation ‘Proved by Admission at Family Group Conference’ was made on the information. The police later made an application under section 39 of the CIBS Act for a blood sample from the young person. Judge CJ Harding discussed Hammond J’s analogy of the young person taking the soccer ball.\(^{1132}\) Harding DCJ concluded that:

> The admission of having taken the ball is the initial “not denied”, and the admission of the charge of theft as such; with the necessary intent and legal consequences, the “PAFGC” notation after the admission at the Family Group Conference.\(^{1133}\)

Like McElrea DCJ in *Police v B*, His Honour drew a distinction between ‘not denied’ (being that the young person did not deny that the factual scenario took place) and ‘admitted’ (being that the young person admitted all necessary elements of the charge). In *Police v M*, Harding DCJ stated:

> Under s 283 of the CYPF Act, before any “sentencing” option is taken, there must be a finding that the charge is proved. Such a finding is made in one of two ways – either by proof to the appropriate standard in a defended hearing, or by the Youth Court accepting the admission made in the family group conference and confirmed in Court. It is the equivalent in the summary jurisdiction of proof at defended hearing or proof by plea of guilty.\(^{1134}\)

The Judge was satisfied that the admission at the FGC equated to a plea of guilty.

\(^{1130}\) [2001] NZFLR 585, 588.

\(^{1131}\) [2001] DCR 385.

\(^{1132}\) [2000] NZFLR 769, para 25.

\(^{1133}\) [2001] DCR 385, 344.

\(^{1134}\) [2001] DCR 385.
(iii) Police v JL

The reasoning in Police v B and Police v M was followed in Police v JL,\(^{1135}\) where the young person had admitted a charge of robbery at a court referred FGC. This case had an identical factual scenario to Police v S, but a different conclusion was reached.

JL completed the FGC plan successfully and was given a section 282 discharge.\(^{1136}\) Later, the police issued a databank compulsion order under section 39 of the CIBS Act. One of the issues considered in the judgment was whether JL’s admission at the FGC constituted a conviction for the purposes of the CIBS Act. The admission had been made by JL at the FGC and was noted by the Youth Court Judge on the information as ‘Proven by Admission at FGC’. Section 2 of CIBS Act includes in the definition of conviction, ‘a finding, by a Youth Court, that a charge against a young person is proved’. In the present case, Mill DCJ found that on the ‘record and circumstances’ of the case, the entry by the Judge of the notation ‘proved by admission at FGC’ amounted to a finding of proof in the Youth Court and therefore a conviction for the purposes of the CIBS Act.\(^{1137}\)

This is the opposite approach to that taken in Police v S, where the Judge declined a CIBSA order under the same circumstances.

V. ANALYSIS

A. Introduction

The examination of the case law in the preceding sections demonstrates a divergence in judicial opinion on the legal significance of the admission made at the FGC. While Hammond J’s judgment in Police v C is clearly rights based, the judgments in Police v B, Police v M and Police v JL, take a more pragmatic view. These three decisions rely on there being a definite distinction between ‘not denied’ and ‘admitted’ charges. The ‘not denied’ concept is a conduit to the court-referred FGC. It means essentially that the young person is waiving his or her right to a court hearing and electing to have the matter dealt with by the FGC. The admission at the FGC is akin to a guilty plea (acknowledging both elements of the offence). When this

\(^{1135}\) [2006] DCR 404.

\(^{1136}\) A s 282 discharge means that the ‘information discharged...shall be deemed never to have been laid’. s 282(2), CYPF Act.

\(^{1137}\) [2006] DCR 404, para 35. Note that due to the operation of the s 282 discharge, the databank compulsion order was held to be of no effect.
admission is confirmed in front of a Youth Court Judge, it is argued that this represents proof by guilty plea.

Before considering which is the preferable view, it is necessary to discuss the principles underpinning the ‘not denied’ concept. An obvious question is why it is necessary to have this convoluted procedure at all. Why not just require a conventional guilty plea at this first court appearance and then remit the matter to the FGC?

B. Philosophy of the Youth Court
1. Avoiding stigmatising terms
The immediately apparent difference between the scheme of the CYPF Act and the practice of the adult criminal courts is nomenclature. The Youth Court seeks to avoid the terminology of the adult criminal justice system, preferring to avoid terms like ‘conviction’ and ‘guilt’. Criminal convictions are rare. In Timo v Police, Williamson J found that a finding of proof in the Youth Court does not mean that a conviction has been entered against that young person under section 318(6) of the Crimes Act 1961. The practice of avoiding these terms is consistent with the ‘philosophy and enabling jurisdiction’ of the Youth Court.

A high rate of diversion has been accomplished in New Zealand. Most offending is dealt with through warnings by the police or through the Police Youth Diversion Scheme. As discussed earlier in this chapter, around 6% are dealt with through the ITC FGC, thus diverting these young people from the courts altogether, and less than a third are formally prosecuted, and of which most are resolved through admission at the FGC followed by a FGC plan, rather than through the adversarial process.

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1138 A formal plea of guilty is required in very limited circumstances when a purely indictable offence, other than manslaughter is involved. Youth Court jurisdiction may be offered if the young person ‘indicates to the Court that the young person desires to plead guilty to the offence’, s 276(1), CYPF Act.


1140 [1996] 1 NZLR 103, 104.

1141 *C v Police* [2000] NZFLR 769.

1142 See Chapter 5(II).


The principles of avoiding convictions and minimising stigmatising terms and procedures are undoubtedly positive aspects for young people. In the ITC FGC, the intention is to resolve the matter without the case entering the formal court system at all, while the use of the court-referred FGC allows the matter to be resolved without a formal hearing if the young person does not deny the charge, thus avoiding the adversarial process. The CYPF Act discourages the use of formal criminal proceedings unless the public interest demands otherwise. In a recent House of Lords judgment dealing with the diversion procedures under England and Wales' Crime and Disorder Act 1998, it was stated that 'it has long been recognised as undesirable in many cases for young offenders to be drawn into the process of the criminal courts (including juvenile and youth courts) unless this is really necessary'. The avoidance of such terminology is designed to minimise the criminalisation of young people. Studies have shown court hearings, sentences, and convictions aid the confirmation of the young person into a criminal career. The sociological theory of 'labelling' suggests that:

identifying a person as 'deviant' can set in motion a process of alienation. The offender finds himself cut off from the normative values of society, and forms a social identity or sub-cultural 'out-group' of offenders. This group develops their own values which conflict with those of the rest of society. This results in an 'amplification of deviance' whereby the deviant group's norms become intolerant to the rest of society, law enforcement is increased to express that intolerance, and hostility of the deviant group towards law enforcers results in further deviant behaviour.

Luna argues that 'social psychology's “self-categorization” theory suggests that labelling an offender as “sick”, “demented”, “delinquent”, and so on, may actually cement his negative identity and connection to a criminal lifestyle'. The CRC encourages diversion from formal judicial proceedings where relevant, providing human rights and legal safeguards are guaranteed. This applies both to diversion from the court system altogether (like the ITC

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1146 s 208(a), CYPF Act.

1147 R v Durham Constabulary ex parte R [2005] 2 All ER 369, per Lord Bingham.


1151 Article 40.3(b), CRC.
FGC) and alternative processes within the court system (like the court-referred FGC).\textsuperscript{1152} Similarly, the Beijing Rules encourage diversion from the court system.\textsuperscript{1153}

It seems unlikely that Parliament meant to alter completely the notion of legal fault. The likely explanation for the change in terminology away from pleas of guilty or not guilty, to ‘denied’ and ‘not denied’ is the avoidance of potentially stigmatising terms. Mike Doolan (one of the officials who was heavily involved in the drafting of the CYPF legislation) has written ‘the family group conference is authorised to find alternatives to prosecution in dealing with an offender who admits guilt’.\textsuperscript{1154} Further, as McElrea DCJ stated in \textit{Police v B}:

\begin{quote}
If the young person admits the matter at the conference, but is later to be offered a chance to formally plead, it leaves open the possibility that a plea of Not Guilty will be entered and notwithstanding the admissions made at the conference to a victim and apologies tendered and plans solemnly agreed upon and drawn up, the Court would have to go through the extraordinary situation of having a defended hearing with possibly a different outcome.\textsuperscript{1155}
\end{quote}

\textbf{C. Is the Scheme of the CYPF Act Legally Sound?}

The preceding section has identified the reasoning underpinning the unusual way in which the offence is proved under the CYPF Act. Does the system of ‘not denied’ plus ‘admits the offence’ plus ‘PAFGC’ satisfy the requirement that the offence is proved?

Hammond J in \textit{C v Police} is correct in expressing concern about departing from the well established concepts of guilty and not guilty when the process can result in significant consequences for the young person. As was stated above, as well as the requirements of the FGC plan itself,\textsuperscript{1156} an admission made at an FGC can result in loss of liberty through a Youth Court supervision with residence order or even a prison sentence imposed in the District Court. Such an admission could also lead to an application for a databank compulsion order under the CIBS Act, a serious intrusion on the bodily integrity of the person.

The importance of the presumption of innocence was discussed earlier and an examination of the rationale showed that it was especially important where loss of liberty or punishment

\begin{itemize}
\item \textsuperscript{1153} Rule 11, Beijing Rules.
\item \textsuperscript{1154} Mike Doolan, ‘The Youth Justice- Legislation and Practice’ in BJ Brown and FWM McElrea, \textit{The Youth Court in New Zealand: A New Model of Justice} (Auckland: Legal Research Foundation, 1993), 22.
\item \textsuperscript{1155} [2001] NZFLR 585, 588.
\item \textsuperscript{1156} See Chapters 12 and 13.
\end{itemize}
occurs. Hammond J argued in *C v Police* ‘to rely on a different kind of taxonomy from the tried and tested “guilty, or not guilty” when a youth may very well go to prison, is quite unwise’. Hypothetically, under the CYPF Act, a young person could answer ‘not denied’ to a charge in the Youth Court, be referred to a FGC, fail to complete the FGC plan and then be the subject of a Youth Court order under section 283 involving an order of supervision with residence. So the young person could potentially receive a custodial sentence possibly without acknowledging criminal liability.

However, making a clear distinction between ‘not denied’ (essentially a conduit to the FGC) and ‘admitted’ (essentially a plea of guilty), cures the procedure in terms of the presumption of innocence. If ‘admission’ is taken to equate to acknowledgement of the facts and the necessary mental element, then the young person is technically pleading guilty, despite the different terminology. This interpretation of the legislative provisions, that there is a clear difference between a charge which is ‘not denied’ (which is a conduit to the FGC) and a charge which is ‘admitted’ (which means that the young person has accepted legal liability) would mean that the provisions are in compliance with the presumption of innocence. The young person would be accepting legal liability in the FGC.

Importantly though, *Police v M* also placed the qualifier that the Youth Court Judge must accept the admission made at the FGC before the offence is considered to be proved. The ‘ideal world’ procedure as expressed by Harding DCJ in *Police v M*, where the young person opts to answer ‘not denied’ after consultation with the Youth Advocate, the matter proceeds to a FGC also with the Youth Advocate present and the young person admits the charge, acknowledging both the factual scenario and the legal liability. The FGC plan is then considered by a Youth Court Judge who turns his or her mind to whether proof is available and makes the notation of PAFGC on the information.

Whether the ‘ideal world’ procedure set out in *Police v M* is followed in practice, is considered in more detail in the next chapter.

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1158 *C v Police* [2000] NZFLR 769, para 29.

1159 See Chapter 11(IV) for more detailed discussion on this aspect.
VI. CONCLUSION: ESTABLISHING THE OFFENCE

This section has considered how the offence is proved under the CYPF Act. A reading of the data available from the Ministry of Justice's Case Management System indicates that defended hearings are very rare. Proof through the adversarial process is therefore very rare. Offences are almost always proved through admission at the court-referred FGC, while offences dealt with through the ITC FGC are always proved by admission. The exact legal meaning of 'not denied' and 'admitted' has caused some controversy. Hammond J in C v Police raised valid concerns about a concept other than the standard concept of legal guilt being used to support a court order or conviction and transfer to the adult court. However, the interpretation set out in Police v M and approved in Police v B reflects current Youth Court practice and appears to be legally sound. This is that the admission at the FGC, confirmed by the Youth Court Judge, equates to proof by plea of guilty.

The next chapter considers practice and procedure at the FGC in relation to the admission.
CHAPTER ELEVEN: ESTABLISHING THE OFFENCE – FGC PROCEDURE

It is good for children to learn to take responsibility for their actions; that is part of growing up to be responsible members of society. It is therefore good for children to ‘own up’ when they have done wrong. But it is absolutely vital that children’s admissions, like adults, should be voluntary and reliable. Corners should not be cut just because the offender is a child.\textsuperscript{1160}

I. INTRODUCTION

The preceding chapter concentrated on the overall scheme of the CYPF Act for proving the offence. The conclusion was that the convoluted process of ‘not denied’ plus admission at the FGC, plus the Youth Court Judge’s notation on the information when the FGC plan is reported back at court, could satisfy the requirement that the offence be proved. However, as discussed, this conclusion depends on the young person being aware that this admission at the FGC equates to an acknowledgement of factual and legal guilt, presence by the Youth Advocate at the FGC to ensure that a valid charge exists, and the Youth Court Judge having the ultimate responsibility to ensure that the admission is valid. Similar considerations apply to the ITC FGC, but of course there is no oversight by the Youth Court Judge in these cases. This chapter will examine whether in fact these conditions for the admission of the offence are fulfilled at the FGC.

Two key issues will be discussed: ensuring admissions are reliable, and ensuring admissions are voluntary. Reference will be made to practice examples derived from observation of the FGC. Then the current safeguards will be discussed and improvements suggested, especially with reference to the safeguards for admissions in police custody, and the situation in other jurisdictions utilising similar schemes. Specific wording of proposed legislative and policy changes is set out in the final chapter.\textsuperscript{1161}

II. RELIABLE ADMISSIONS

A. Accepting Legal Liability

1. Practice and procedure at the FGC

Section 259 of the CYPF Act requires that the offence is admitted by the young person before the FGC can proceed to the decision making stage. In all of the twelve FGCs, this requirement

\textsuperscript{1160} R v Durham Constabulary ex parte R [2005] 1 WLR 1184, para 46, per Baroness Hale of Richmond.

\textsuperscript{1161} See Chapter 14(III).
was fulfilled. This was accomplished by the police officer reading the summary of facts from the official police file. This happened in both the court-referred and ITC FGCs.

The young person was then asked (either by the youth justice co-ordinator or by the police officer) to speak. The terminology used (in both centres) was usually 'Is that how it happened?' or 'do you agree with that account?' The young person would then answer yes, or even a nod was taken to suffice. The police officer and the youth justice co-ordinator would then take a note of this, and the FGC would proceed. A slightly different wording was used for the three ITC FGCs in the sample. In the court-referred FGCs, the police officer always specified the Crimes Act section under which the young person was charged when reading the summary of facts e.g. 'this is a Crimes Act assault under section 196'. Presumably, this was because in a court-referred FGC, a formal charge had already been laid in the Youth Court and would thus be on the official documentation which the police possess. In the ITC FGC, no formal charge has been laid in court and so there was no mention of a specific charge, only the summary of facts.

What is most relevant for the purpose of this discussion however, is that the procedure (in both the court-referred and ITC FGCs) was to seek the young person's agreement with the summary of facts, rather than an admission of legal liability to a specific charge. Patently, there is a clear difference between agreeing with the facts of the incident and admitting legal guilt. To take Hammond J’s example of the taking of a ball, discussed in the preceding chapter, agreeing with the summary of facts would be to agree that the young person took the ball, but an admission to theft would require the necessary malicious intent. The problem with only requiring agreement with the summary of fact was demonstrated clearly in one of these FGCs (an ITC FGC).

The young person concerned was accused of a burglary on a property of a person (who was a relative). The summary of facts read out by the police officer stated that the young person had entered the property (there was no damage carried out to gain entry to the property) and taken some property which belonged to the victim. The young person agreed with the summary of facts and acknowledged (through a nod) that there had been an entry to the property and that some property had been taken. This agreement with the summary of facts was noted by the youth justice co-ordinator and the police, and the FGC proceeded. In the latter stages of the FGC, there was discussion about what sanction should be imposed on the young person. The

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1162 See Chapter 10(IV)(B)(2)(i).
police officer commented that the offence of burglary would attract a term of imprisonment of up to ten years, in the adult criminal justice system. The young person then became upset, and claimed that he did not realise that burglary was what he was being accused of. He claimed that the relative knew that he was going to call over to the property that day and had given him permission. Further, he claimed he believed that he was allowed to borrow the property. Although the offence of burglary plainly requires the offender to have entered the property with malicious intent,\textsuperscript{1163} and theft would also require an intent to deprive the owner permanently,\textsuperscript{1164} this was glossed over by the other conference participants, and they reminded him that he had ‘admitted the offence’ earlier in the FGC. Obviously, the credibility of the young person would be a factor, but clearly there should have been some further investigation or clarification if the requirements of the offence did not appear to have been met. A Youth Advocate was not present. Had the Youth Advocate been present, he or she would be able to clarify the legal situation for the young person. There is a strong argument that the charge should have been explained in plain language to the young person at the start (e.g. you are accused of entering your relative’s property intending to commit a crime). Then the young person could have agreed knowing what he was agreeing to, or disagreed and the matter could have gone to court to be resolved.

This is one particular example where the young person was confident and articulate enough to speak up in the FGC and point out that he did not agree with what was being said. But given that in all FGCs observed the practice was to seek agreement with the summary of facts rather than an admission of legal liability per se, it is likely that other young people may not be aware exactly what they are agreeing to.

2. Reporting back to the Youth Court

While in the ITC FGC, there is no independent oversight of proceedings, the ‘line of defence’ for the admission made at a court-referred FGC is the fact that the Youth Court Judge is required to make a notation (there is apparently an official stamp for this purpose) of ‘Proved by Admission at the Family Group Conference’ (PAFGC) on the information before the offence can be considered to be proved. While it seems technically possible that the Youth

\textsuperscript{1163} s 231 of the Crimes Act 1961 defines the offence of burglary as

(1) Every one commits burglary and is liable to imprisonment for a term not exceeding 10 years who—
(a) enters any building or ship, or part of a building or ship, without authority and with intent to commit a crime in the building or ship; or
(b) having entered any building or ship, remains in it without authority and with intent to commit a crime in the building or ship.

\textsuperscript{1164} s 219, Crimes Act 1961.
Court Judge could refuse to accept the admission, no recorded instances of this could be found. Again, there are no statistics collected on whether the admission is accepted, though obviously it must be noted on the information. A search of the case law revealed no reported instances of admissions being refused. None of the youth justice co-ordinators had heard of any instance where an admission made had not been accepted. The Principal Youth Court Judge’s office were also unaware of any such cases. This would suggest that the PAFGC notation is considered a formality rather than a mechanism by which the admission can be further scrutinised before the FGC plan is accepted by the Youth Court.

There is nothing in the CYPF legislation requiring the Judge to make an examination of the circumstances surrounding the admission. Youth Court practice, appears to have divergent approaches. Some Youth Court Judges automatically accept admissions made at the FGC, while others question the young person whether he or she is content to admit the offence, or others rely on the Youth Advocate to bring any issues to the attention of the Court. This practice has two potential problems. Firstly, if the safeguard is to check with the young person that he or she is content to admit the offence, the same problems exist as in the example given above. If the young person is not aware exactly what he or she has agreed to, and has only agreed with the summary of facts, this is unlikely to come out in Court. Further, if reliance is placed on the Youth Advocate to bring the Judge’s attention to any issues with the admission, what of the young people who do not have a Youth Advocate present at the FGC? The issue of how safeguards could be improved is dealt with later in this chapter, but one of the recommendations is that Youth Court Judges should have the overall responsibility to ensure that admissions are reliable, as would be the case with admissions made in police custody.

B. Particular Issues in the ITC FGC

While the concerns discussed at section 1 above apply to both types of FGC, there are particular issues with the ITC FGC, as it is a pre-trial diversionary process taking place completely outside the court system. The New Zealand youth justice system is progressive in


1166 Personal communication, November 2008.

1167 This was ascertained from observations at Youth Court in 2006, and a personal communication from the Principal Youth Court Judge, November 2008

1168 See Chapters 8 and 9 on the right to legal assistance.

1169 See Chapter 14(III).
diverting the majority of young offenders away from formal court based youth justice towards more informal processes.\footnote{Jin Chong, \textit{Youth Justice Statistics in New Zealand: 1992 to 2006} (Wellington: Ministry of Justice, 2007).} The Youth Aid Section of the New Zealand Police has embraced diversion. A comprehensive Police Youth Diversion Scheme has been developed.\footnote{Gabrielle Maxwell, Jeremy Robertson, and Tracy Anderson, \textit{Police Youth Diversion- Final Report} (Wellington: Crime and Justice Research Centre, Victoria University of Wellington, 2002).} However, there is always a danger that as:

> enthusiasm for the opportunities for constructive work with young offenders at this pre-trial stage increases, so too does the temptation to apply it to a greater pool of recipients, including those committing very minor infractions of the law or, even worse, those at risk of offending.\footnote{Julia Fionda, \textit{Devils and Angels: Youth Policy and Crime} (Oxford: Hart Publishing, 2005).}

The evidentiary requirement, that is, that there is enough evidence to charge the young person, is an important safeguard against net widening. In relation to the court-referred FGC, at the least a charge must be laid before court, and the Youth Court Judge must accept the plan. The situation of the ITC FGC is more complicated, and it suffers from a common defect relating to diversion schemes, i.e. a lack of control over whether the offence is provable.

Diversionary processes like the ITC FGC should only occur in response to behaviour which is legally prosecutable. Admission to these types of processes should be through a type of ‘but for’ test. That is, but for the availability of the diversionary process, the young person would have been prosecuted or sentenced in court. The importance of the evidentiary requirement is to prevent net widening, i.e. to prevent young people coming into the system who would not have been there in the first place. The House of Lords decision in \textit{R v Durham Constabulary and another ex parte R} emphasised that the offence must be capable of being proved in court.\footnote{R v Durham Constabulary ex parte R [2005] 1 WLR 1184, para 36, per Baroness Hale. See discussion of the facts of this case in Chapter 8(V).} Under the previous legislation – the Children and Young Persons Act 1974 - there was a type of statutory consultation process in order to divert young people from the courts. When the police wished to lay a charge against a young person who had not been arrested there was a requirement to consult with social workers before doing so. However, the police were found to be arbitrarily bypassing these consultation requirements and only diverting those young people whom they did not intend to prosecute anyway.\footnote{Allison Morris and Warren Young, \textit{Youth Justice in New Zealand: Practice and Policy} (Wellington: Institute of Criminology, 1987).} Consequently the present system was developed, where if the police wish to lay a charge against a young person...
who has not been arrested (or a young person who has been arrested and then released\(^{1175}\)), there is a statutory requirement to consult with a youth justice co-ordinator. An ITC FGC is then held.

Diversion from the formal judicial process is encouraged by the CRC.\(^{1176}\) However, there is a caveat that any such diversionary process (such as the ITC FGC) must respect 'human rights and legal safeguards'.\(^{1177}\) The Committee on the Rights of the Child has stressed that diversionary processes should only be used where:

> there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding.\(^{1178}\)

The Committee on the Rights of the Child has recently stated 'the child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered...and on the possibility of review of the measure'\(^{1179}\) The issue of legal assistance in the ITC FGC was highlighted in the previous chapter. As discussed those young people participating in the ITC FGC rarely have legal assistance.\(^{1180}\)

The New Zealand situation (perhaps more than the systems of other jurisdictions) involves a diversion towards something (often a significant sanction) rather than a diversion away from something. The principal argument in New Zealand is that young people should be dealt with at the lowest level possible. While there are valid arguments for diverting young people from the formal criminal justice system, young people should not be drawn into the criminal justice system through formal or informal means unless the offence is provable. As Kilkelly emphasises:

> While it might be argued that children would be better off in a diversionary scheme regardless of what rights they must waive, any process which denigrates or sidelines children's due process rights represents not just an alternative to the formal juvenile justice system but an inferior alternative. While some degree of informality may be permitted in the context of diverting young people away from the

\(^{1175}\) *Youth Court Bench Book* (Wellington: Institute of Judicial Studies, 2005, updated to 2008).

\(^{1176}\) Article 40.3(b), CRC.

\(^{1177}\) Article 40.3(b), CRC.


\(^{1180}\) See Chapter 8(IV).
formal system, the importance of due process rights should not be undermined. These rights are important not just to safeguard the interests of children involved in the diversionary scheme but to enhance their faith in the fairness of its procedures.\footnote{Ursula Kilkelly, \textit{Youth Justice in Ireland: Tough Lives, Rough Justice} (Dublin: Irish Academic Press, 2006), 76.}

C. Concluding Remarks

The procedure used for admissions at these FGCs is concerning, as the young people were asked whether they agree with the summary of facts rather than accepting legal liability. This means that some admissions may not be reliable. In the court-referred FGC, mechanisms already exist to ensure that admissions are reliable. Youth Advocates should be present, and should ensure that the young person understands what the admission entails, and that evidence exists to support the admission. The Youth Court Judge should also be responsible for checking this, and it should not be left to the FGC participants or to the Youth Advocate. In the ITC FGC, Youth Advocates are rarely present, and there is no independent oversight of the admission. Possible solutions to this lack of oversight are canvassed at Part IV of this chapter.

III. VOLUNTARY ADMISSIONS

When faced with a choice between a formal criminal process (such as court hearings and court orders) and a more informal intervention (such as the FGC), there is bound to be pressure to accept the more informal option.\footnote{Andrew Ashworth, \textit{The Criminal Process: An Evaluative Study} (Oxford: Clarendon Press, 1994), 141.} There is always concern that there may be pressures or inducements to admit the offence, in the belief that it is easier than challenging proceedings, or in the belief that a harsher sanction may be meted out if the case goes to court.\footnote{MJA Brown, ‘Empowering the Victim in the New Zealand Youth Justice Process – A Strategy for Healing’ Address to the 8th \textit{International Symposium on Victimology}, Adelaide, Australia, 1994.} Both the young people and their families are likely to be intimidated by the threat of going to court.\footnote{M Levine, ‘The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation’ (2000) 18 \textit{Behavioural Sciences and the Law} 517.} As Polk has argued:

Confronted with a forced choice between, on the one hand, admitting guilt and being given the chance of an “informal” (less coercive) option, especially without the advice of counsel, and, on the other hand, deeper penetration within the justice process, the young person may feel little choice but to admit guilt when she or he is, in fact, innocent.\footnote{Kenneth Polk, ‘Family Conferencing: Theoretical and Evaluative Concerns’ in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994).}
The FGC procedure is used for admitted offences only. Proponents of the FGC approach claim that process is never used when guilt is in dispute and point out that there is an opportunity to pursue the matter through the full criminal justice process if there is any dispute. The argument runs that if there are any questions of liability then the formal criminal justice system is present as a ‘backstop’. McElrea argues that:

A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a Youth Advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (- beyond reasonable doubt) and the admissibility of evidence.

He further notes that ‘the western model of justice is retained for what it does best, i.e. deciding issues of liability’. There is a valid argument that the formal adversarial system is present to decide any questions of liability.

In practice however, ‘denied’ cases appear to be very rare. The requirement that the offence be admitted was fulfilled at all the FGCs observed for this research. Maxwell et al found that out of over 1,000 FGCs, seventy two young people admitted some, but not all, of the charges, but only two of these young people denied all charges. In the FGCs observed for this research, there was no evidence of explicit pressure on the young person to admit the offence i.e. young people were not told that they must admit the offence. However, there is objectively implicit pressure to admit the offence. This requirement was fulfilled at the start of the FGC, and never took longer than a minute or two. There was a strong sense that the admission was a formality to be gotten over with without delay. Further, a considerable amount of effort goes into organising a FGC. In a typical FGC, there are a number of busy people (such as the Youth Advocate, the Youth Aid officer, youth workers and social workers) that must find time in their schedules to attend. It was apparent that arranging for the young person and their family to attend at a time suitable for all was not an easy task. In at least six of the FGCs observed, the young person’s parents were living separately and most

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1186 s 259(1), CYPF Act.
1189 See Chapter 10(III).
1191 See Chapter 6(V) for a discussion on the format of the typical FGC.
had younger brothers and sisters. Therefore, two different households had to arrange time off work or other commitments to attend, as all these FGCs were held during the day. There was a strong impression that there was a presumption that the FGC was going to go ahead on the day.

While it is legally possible for the young person to refuse to admit the offence, young people will be aware that if the FGC does not go ahead the case will go to court with the attendant risk of a more coercive sanction.1192 Voluntariness ‘will always be qualified by enticements, inducements, perceived threats and availability of alternative courses of action’1193 A study of FGCs in England found that when young people were asked whether their participation was voluntary approximately half believed that they had to participate.1194 According to the author of this study, there is a real possibility that consent to participate in the FGC may be ‘motivated by the fear that unless they agree to take part in a restorative justice encounter ‘voluntarily’, they will be subjected to judicial sanctions’.1195 The Committee on the Rights of the Child has recently made comments directed mainly at confessions in police custody but relevant also to admissions in this context:

There are other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term “compelled” should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true.1196

IV. SAFEGUARDS

A. Introduction

The preceding sections have identified two key issues relating to the admission of the offence by the young person: ensuring that the admission is an acceptance of legal guilt, and ensuring that the admission is voluntary. Bearing in mind that the clientele of the youth justice system


are invariably disadvantaged and less educated than non-offending young people, there is a responsibility to ensure that young people understand the process and consequences of making admissions. The sufficiency of the current safeguards will now be discussed, and improvements suggested.

B. Legal and Other Assistance

In Police v M, Harding DCJ placed great emphasis on the fact that the finding of a charge proved in the Youth Court after an admission at a FGC is only made after specialist legal advice provided by a Youth Advocate. His Honour considered essential elements of a FGC as he saw it: ‘almost inevitably’ a Youth Advocate present, discussion of the charge and whether the young person ‘in that context admits the charge or not’. It is certainly true that the presence of a Youth Advocate is a valuable safeguard for the young person. The role of the Youth Advocate was discussed in Chapter 9. As discussed, the Youth Advocate should protect the rights of the young person, and ensure that admissions made are voluntary, informed, and supported by sufficient evidence. However, not all court-referred FGCs have a Youth Advocate present, and there is no formal mechanism by which a Youth Advocate can attend the ITC FGC, and the presence of a Youth Advocate does not always ensure that rights are protected. Nonetheless, quality legal assistance is an important safeguard to ensure that admissions are voluntary and reliable.

In theory, one of the strengths of the New Zealand model is that there is an objective facilitator (the youth justice co-ordinator). Criticisms have been directed at conferencing processes in other jurisdictions that are facilitated by police officers because of concerns about objectivity and police domination of the process. In his or her role as facilitator, it could be argued that the youth justice co-ordinator has the duty of ensuring that young persons and their family understand the nature and consequences of the proceedings as she or he has the statutory responsibility to ensure that the principles of the CYPF Act are being

1197 Kaye L McLaren, Tough is Not Enough: Getting Smart About Youth Crime (Wellington, Ministry of Youth Affairs, 2002).


1199 See Chapter 9(II).

1200 See Chapter 8(III) and (IV).

1201 See Chapter 9(III).

met. In Centre 2, the youth justice co-ordinator always made a statement at the start of the FGC that ‘if X does not want to admit the offence, then we wont go any further, and the matter will go back to the court’. Any effort to explain matters to young people and their families is a positive development, and some explanations are better than none. But the key element lacking was an explanation of what admission of the offence actually means, while in Centre 1 no such explanation was given. Further, youth justice co-ordinators will have put considerable effort into organising the conference and so may have a vested interest in the conference going ahead on the day, especially in light of the fact that youth justice coordinators are often overworked and under-resourced. In addition, the youth justice coordinator should not compromise impartiality by advising the young person on what choices they should make.

C. Contrast with Admissions made in Police Custody

Section 208 of the CYPF Act emphasises the importance of protecting the rights of the young person during the investigation of the offence and there are extensive provisions dealing with the rights of young people when being questioned by the police. These were discussed in detail in an earlier chapter, but to summarise: the young person must be informed of his or her rights, especially the right not to accompany the police officer to the station unless a formal arrest has been made. The police must allow the young person to nominate a

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1204 See II above.


1207 s 208(h), CYPF Act.


1209 Chapter 2(IV).

1210 These rights are set out in s 215. The police officer must warn the young person that if he or she refuses to give his or her name and address they may be arrested; that they are not obliged to accompany the officer to a place for questioning, and, if he or she gives his or her consent to do so, that consent may be withdrawn at any time; that there is no obligation on the young person to make a statement, and, if he or she consents to making a statement, that consent may be withdrawn at any time; that any statement made or given may be used in evidence in any proceedings; and that the young person is entitled to consult with and make or give any statement in the presence of a lawyer (a barrister or solicitor) and any person nominated by the young person.
supportive adult. The duties of this adult are set out in a 1994 amendment to the CYPF Act. The persons who may be nominated are specified in section 222 of the CYPF Act. These are the parent or guardian of the young person, an adult member of the family, whanau or family group of the young person or any other adult selected by the young person. If the young person fails to nominate any of the above, any adult nominated for that purpose by the police may fulfil the role. Consequently, there are considerably more protections for the young person who makes an admission in police custody when compared to making admissions in the FGC, and especially the ITC FGC. This is discussed more thoroughly in the final chapter which sets out recommendations to address this disparity.

D. Comparison with other Jurisdictions

1. Reliable admissions

The conclusion on the reliability of admissions was that sufficient safeguards already exist in the court-referred FGC (i.e. the Youth Advocate, and scrutiny by the Youth Court judge), and it is simply necessary for these safeguards to be vindicated. The concern is with the ITC FGC as this takes place completely outside the court system, and there is no independent oversight of the ITC FGC. The police investigate and apprehend the young person, refer the young person to the FGC, inform the FGC of the charge, and then have the final veto over the FGC decision. This is a common issue with police led diversion schemes.

England and Wales’ Crime and Disorder Act 1998 provides for a comprehensive system of pre-trial diversion, in different format to the ITC FGC, but with the same purpose. The United Kingdom is certainly not a leader in the area of young people’s rights in the youth justice system, but there are some elements of the police diversion scheme which could have relevance for the ITC FGC. The Crime and Disorder Act 1998 replaced the former

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1211 s 221, CYPF Act. These include taking reasonable steps to ensure that the young person understands his/her rights and to support the young person during questioning and the making of statements. This provision recognises the principle that young people in the police station are vulnerable to police pressure (s 208(h), CYPF Act.).


1213 See Chapter 14(II) and (III). See also Alisdair Gillespie, ‘Reprimanding Juveniles and the Right to Due Process’ (2005) 68 Modern Law Review 1006, 1012.

1214 See Chapter 5(IV) on the operation of conferencing schemes in other jurisdictions.

system of cautions in England and Wales with a system of reprimands and warnings. The police administer reprimands and warnings, but there may be a restorative element. Referrals are also made to local Youth Offending Teams. In contrast to the lack of guidelines apparent in the New Zealand system, there is emphasis on having demonstrable evidence sufficient for a court prosecution. The scheme requires that ‘the offender admits to the constable that he committed the offence’. Like the New Zealand legislation, the Crime and Disorder Act 1998 does not define what an ‘admission’ is. However, in Durham Constabulary, the House of Lords confirmed that it is not enough that some or all of the facts are admitted and that the young person must recognise his or her guilt. The Home Office guidance for the scheme provides that ‘a reprimand or warning can be given only if the young person makes a clear and reliable admission to all elements of the offence. This should include an admission of dishonesty and intent, where applicable’. There is a clear requirement to have both elements of the offence – mens rea and actus reus. The Home Office guidelines on the final warning specify that:

for action to be taken under the scheme, the evidence must meet the required standard: that it could be used and would be reliable, such that a jury or bench of magistrates properly directed in accordance with the law would be more likely than not to convict the young person.

There must be a realistic prospect of conviction before a reprimand or final warning may be administered.

Granted, these requirements have not ensured reliable admissions in all cases. Puech and Evans found that in some cases there was ‘limited attention to police evidence during the interview process and the administering of the final warning,’ and caution that

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1217 Section 65(1)(c), Crime and Disorder Act 1998.


1219 R v Durham Constabulary ex parte R [2005] 1 WLR 1184, para 33, per Baroness Hale of Richmond.


It is not clear what arrangements exist for reviewing the evidence in cases that receive a warning or what quality assurance processes are in place. It remains a matter for concern that there does not appear to be a robust internal review system or an external independent review of the evidence, such as that by the CPS [Crown Prosecution Service] for cases that go to court.\footnote{Lynn Keightley-Smith and Peter Francis, 'Final Warning, Youth Justice And Early Intervention: Reflections On The Findings Of A Research Study Carried Out In Northern England' [2007] 2 Web Journal of Legal Issues available online at http://webjcli.ncl.ac.uk/2007/issue2/keightleysmith2.html (last viewed 2 November 2008).} Specific legislative and policy recommendations are dealt with in the final chapter.\footnote{See Chapter 14(III).}

2. **Ensuring voluntary admissions**

As discussed above, there is no requirement in the New Zealand FGC process to explain the meaning and consequences of the proposed admission to the young person. Some Australian jurisdictions have statutory requirements relating to the explanations that must be given to young people who are referred for a FGC. Under the New South Wales legislation, before a specialist youth police officer refers the young person for a conference, there is a statutory duty to inform the young person of ‘the nature of the offence and the circumstances out of which it is alleged to have arisen’, ‘that the child is entitled to obtain legal advice and where that advice may be obtained’, ‘that the child is entitled to elect that the matter be dealt with by a court’, ‘what a conference is and the effect of the conference’.\footnote{Kyela Puech and Roger Evans, 'Reprimands and Warnings: Populist Punitiveness or Restorative Justice?' (2001) Criminal Law Review 794, 800.} Where practicable, this explanation must take place in the presence of the young person’s caregiver, an appropriate adult, or a lawyer.\footnote{s 39, Young Offenders Act 1997.} Under Section 45(3) of the legislation, the conference convenor must supply written notice to the child outlining the offence which is to be the subject of the conference.\footnote{s 45(3)(a), Young Offenders Act 1997.} Similarly, in the South Australian scheme, before notifying the youth justice co-ordinator of the conference referral, the police officer must explain to the young person the nature and circumstances of the alleged offence,\footnote{s 7(2)(a)(i), Young Offenders Act 1993.} the entitlement to have legal advice,\footnote{s 7(2)(a)(ii), Young Offenders Act 1993.} and the entitlement to have the matter dealt with by a court.\footnote{s 7(2)(a)(iii), Young Offenders Act 1993.} If the matter is not going to court then the police officer must secure the admission in writing, preferably signed by the young
person. Admission of the offence should if practicable occur in the presence of the young person’s guardian or a nominated responsible adult. This research recommends that consideration be given to creating a statutory duty to explain to the young person the meaning and consequences of the admission. It is also recommended that young people be provided with a plain language explanation of their rights and responsibilities in the FGC process. Suggested wording is set out the final chapter.

V. CONCLUSION

The New Zealand system places a lot of emphasis on the admission of the offence as a procedural safeguard. The FGC only deals with admitted offences. As has been discussed, there is considerable implicit pressure on the young person to admit the offence. The scheme of the CYPF Act encourages offences to be dealt with through admission rather than through the adversarial process. Consequently, denied charges are extremely rare. Of course, implicit pressures to admit the offence are always present in informal diversion schemes. It is important to note that the New Zealand system is a diversion towards something (an informal community based sanction) rather than a diversion away from the justice system altogether. Therefore it is important that the young person’s admission is reliable. Under the CYPF Act, there are no statutory requirements to inform the young person of his or her right to have the matter dealt with by a court. It is apparent that conferencing schemes in other jurisdictions are more prescriptive in regard to informing young people about the conference procedure and their rights in respect of the procedure and admission of the offence.

1232 s 7(3)(b), Young Offenders Act 1993.
1233 s 7(3)(a) and (b), Young Offenders Act 1993.
1234 See Chapter 14(V).
1235 s 259(2), CYPF Act.
CHAPTER TWELVE: LIMITS ON SANCTIONS

It should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals, and that there are proportionality limits which should not only constrain the measures agreed at restorative justice conferences etc. but also ensure some similarity in the treatment of equally situated offenders. If the state does delegate certain spheres of criminal justice to some form of community-based conference, the importance of insisting on the protection of basic rights for defendants is not diminished.\textsuperscript{1236}

I. INTRODUCTION

These two final substantive chapters will consider the rights of the young person in relation to FGC outcomes. An earlier chapter identified the differences in how the offence is established in the FGC process compared to the adversarial criminal process.\textsuperscript{1237} Similarly, the process by which the appropriate sanction for the young person is decided on differs from the traditional sentencing process, where the ultimate decision is made by a judge.

This chapter will consider the aims and powers of the FGC, the content of FGC plans, and what restrictions (if any) there are on the sanctions resulting from the FGC. The two key issues are the lack of limits on sanctions, and the role of the police in deciding on the sanction. Solutions to the lack of limits on sanctions are also discussed, and specific recommendations on legislative and policy changes will be set out in the final chapter.\textsuperscript{1238}

As well as traditional criminal justice type elements such as community work and reparation (which are the subject of this chapter), the FGC plans typically also include measures to address the needs of the young person, and/or to address the causes of the offending. This issue will be discussed in the next chapter.


\textsuperscript{1237} Chapter 10(III).

\textsuperscript{1238} Chapter 14(IV).
II. THE FGC PLAN

A. Introduction

This section will discuss the aims and powers of the FGC in relation to sanctions. This will be illustrated by practice examples derived from the observation of the FGC, though reference is also made to existing statistics where available. A note on terminology: the term ‘sanction’ is used here for the punishment or accountability element of the FGC plan. This encompasses elements like apologies, community work hours, reparation, curfews and non-association orders. Sanction is the specific term used in the youth justice provisions of the CYPF Act.\(^{1239}\) Sanction means ‘the specific penalty enacted in order to enforce obedience to a law’.\(^{1240}\) Sentence is the usual criminal justice term i.e. ‘the judicial determination of the punishment to be inflicted on a convicted criminal’.\(^{1241}\) There has been debate as to what the exact meaning of sanction is in this context, specifically whether it means punishment in respect of a criminal offence. This was discussed in an earlier chapter.\(^{1242}\)

B. The Court-Referred FGC

1. Purpose of the FGC

Nine out of the twelve FGCs observed for this research were court-referred FGCs.\(^{1243}\) All of these were as a result of the ‘not denied’ procedure,\(^{1244}\) where the matter is adjourned for a FGC to take place.\(^{1245}\) As was discussed in a preceding chapter, less than 8% of Youth Court cases involve a defended hearing,\(^{1246}\) therefore the ‘not denied’ FGC is the most prevalent type of court-referred FGC. This FGC is tasked to ‘consider whether the offence alleged to have been committed by that young person should be dealt with by the Court or whether the matter can be dealt with some other way, and to recommend to the Court accordingly’.\(^{1247}\) If the

\(^{1239}\) s 208(e) and (f), CYPF Act.


\(^{1242}\) Chapter 7(II).

\(^{1243}\) See Chapter 6 for discussion on the observation of the FGC.

\(^{1244}\) s 246(b)(i) and s 247(d), CYPF Act.

\(^{1245}\) s 246(b)(ii), CYPF Act.

\(^{1246}\) See Chapter 10(III).

\(^{1247}\) s 258(d), CYPF Act. The young person must ‘admit’ the offence: s 259(1), CYPF Act.
offence is admitted at the FGC, the FGC will proceed to formulate a plan. In all of the nine court referred FGCs, the young person admitted the offence, and agreement was reached on a plan.

This plan is then reported back to the Youth Court Judge, who must accept the plan before it becomes legally binding. If the Youth Court Judge accepts the plan, there will be an adjournment for the plan to be completed. If the agreed actions are completed, the charges will be withdrawn or the young person will be given a section 282 discharge (as if the charges were never laid). If the plan is not completed successfully, further orders may be made by the Youth Court Judge under section 283 of the CYPF Act. The FGC may also recommend that a section 283 order be made. All FGC plans in the sample were accepted by the Youth Court Judge involved without modification. Unfortunately, statistical information is not collected on instances where the Youth Court Judge does not accept the plan, however, the Youth Court Bench Book states that in ‘about 95%’ of cases, the plan recommended by the FGC is accepted by the Youth Court Judge.

The second type of court-referred FGC takes place when the charge is admitted in the Youth Court or proved through a defended hearing. None of the court-referred FGCs observed for this research were in this category. The Youth Court may not make any orders under sections 282 or 283 of the CYPF Act unless a FGC has had an opportunity to consider the matter. The aim of this FGC is ‘to consider how the young person should be dealt with for that offence, and to recommend [to the Youth Court Judge] accordingly’. Again, there is no statistical information on the amount of plans which are accepted by the Youth Court Judge, but presumably the acceptance rate discussed above applies to this type of FGC also.

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1248 Chapter 11(II).
1249 See Chapter 6(V).
1250 Statistics on sentencing of young people, including s 283 orders can be found at Jin Chong, Youth Justice Statistics in New Zealand: 1992 to 2006 (Wellington: Ministry of Justice, 2007), Table 5.2).
1251 This information was obtained by checking with the youth justice co-ordinator involved.
1252 Information request to the Ministry of Justice, October 2007.
1253 Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 2.3.2. Both youth justice co-ordinators stated that in their experience, ‘almost all’ FGC plans were accepted.
1254 s 281(1), CYPF Act.
1255 s 258(e), CYPF Act.
2. **Legislative guidance**

The legislation is not prescriptive on the content of the FGC plan. Provided the young person has admitted the offence,\(^{1256}\) the FGC can proceed to ‘make such decisions and recommendations and formulate such plans as it considers necessary and desirable’ for the young person.\(^{1257}\) Prima facie, section 260 of the CYPF Act affords the FGC a large measure of discretion in determining the content of the plan. However, section 260 - headed *Family group conference may make decisions and recommendations and formulate plans* does provide some general guidance. Section 260 (3) of the CYPF Act proceeds to set out some possible outcomes for the youth justice FGC. These include guidance that:

- Any proceedings already commenced against the young person should proceed or be discontinued,\(^{1258}\)
- A formal police caution should be given to the young person,\(^{1259}\)
- Appropriate penalties should be imposed on the young person,\(^{1260}\)
- The young person should make reparation to the victim.\(^{1261}\)

It is notable that all these elements are traditional criminal justice type penalties,\(^{1262}\) however this section does not limit the generality of section 260(1). Further, the FGC participants ‘shall have regard’ to the general principles set out in section 208 (which is itself subject to section 5). These principles were discussed in an earlier chapter.\(^{1263}\)

3. **Practice examples**

The plans are set out here. Only the sanctions are outlined, but these plans also contained measures to address needs and to address the causes of offending.\(^{1264}\)

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\(^{1256}\) s 259(2), CYPF Act.
\(^{1257}\) s 260(1), CYPF Act.
\(^{1258}\) s 260(3)(a), CYPF Act.
\(^{1259}\) s 260(3)(b), CYPF Act.
\(^{1260}\) s 260(3)(d), CYPF Act.
\(^{1261}\) s 260(3)(e), CYPF Act.
\(^{1262}\) See discussion about the inclusion of welfare type elements in the FGC plan in Chapter 13(V).
\(^{1263}\) Chapter 2(VII)(B).
\(^{1264}\) See Chapter 13, especially (V).
<table>
<thead>
<tr>
<th>Offence</th>
<th>Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft and criminal damage</td>
<td>40 hours community work</td>
</tr>
<tr>
<td></td>
<td>$187 reparation</td>
</tr>
<tr>
<td></td>
<td>Apology letter to [victim]</td>
</tr>
<tr>
<td></td>
<td>Curfew from 7pm – 7am except in [parents’] company</td>
</tr>
<tr>
<td>Assault</td>
<td>$100 reparation</td>
</tr>
<tr>
<td></td>
<td>50 hours community work</td>
</tr>
<tr>
<td></td>
<td>Curfew from 7pm – 7am</td>
</tr>
<tr>
<td></td>
<td>Non-association order with [certain individuals]</td>
</tr>
<tr>
<td></td>
<td>Complete a project about effects of offending and present it to [family and victims]</td>
</tr>
<tr>
<td>Criminal damage</td>
<td>20 hours community work</td>
</tr>
<tr>
<td></td>
<td>Curfew from 7am – 9pm (except in company of [named family members])</td>
</tr>
<tr>
<td></td>
<td>Not allowed to enter [named geographical location]</td>
</tr>
<tr>
<td></td>
<td>Apology to [victim]</td>
</tr>
<tr>
<td>Burglary</td>
<td>$500 reparation</td>
</tr>
<tr>
<td></td>
<td>50 hours community work</td>
</tr>
<tr>
<td></td>
<td>Apology to [victim]</td>
</tr>
<tr>
<td>Assault</td>
<td>25 hours community work</td>
</tr>
<tr>
<td></td>
<td>$120 charity donation</td>
</tr>
<tr>
<td></td>
<td>Apology to [victim]</td>
</tr>
<tr>
<td>Assault</td>
<td>40 hours community work</td>
</tr>
<tr>
<td></td>
<td>Gift to victim</td>
</tr>
<tr>
<td>Car conversion</td>
<td>25 hours community work</td>
</tr>
<tr>
<td></td>
<td>$350 reparation</td>
</tr>
<tr>
<td></td>
<td>Apology letter to [victim]</td>
</tr>
<tr>
<td></td>
<td>Curfew from 9pm – 7am</td>
</tr>
<tr>
<td>Criminal damage</td>
<td>45 hours community work</td>
</tr>
<tr>
<td></td>
<td>$225 reparation</td>
</tr>
<tr>
<td></td>
<td>Apology letter to [victim]</td>
</tr>
<tr>
<td>Burglary</td>
<td>30 hours community work</td>
</tr>
<tr>
<td></td>
<td>$119.50 reparation</td>
</tr>
<tr>
<td></td>
<td>Not allowed to enter [named geographical area] except to and from [workplace]</td>
</tr>
</tbody>
</table>
C. The ITC FGC

1. Purpose of the ITC FGC

Three of the FGCs observed for this research were ITC FGCs. The CYPF Act states that the purpose of the ITC FGC is "to consider whether the young person should be prosecuted for that offence or whether the matter can be dealt with some other way, and to recommend to the relevant enforcement agency accordingly". Essentially, the ITC FGC aims to divert the young person's case from the Youth Court by finding another means of resolving the offence. This is achieved by the formulation of a plan. If the plan is completed, that will be the end of the matter and charges will not be laid. This is due to the principles of the CYPF Act which state that formal criminal proceedings should be avoided where possible. The police must comply with any reasonable decisions and recommendations formulated by a FGC, and the police must give effect to the outcome of the FGC unless 'clearly impracticable or clearly inconsistent with the principles set out in sections 5 and 208'.

2. Plans

The same legislative principles (discussed at B 2. above) apply to the ITC FGC. The three FGC plans are detailed here, again these plans also contained measures to address needs.

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1265 s 258(b), CYPF Act.
1266 s 208(a), CYPF Act.
1267 s 267, CYPF Act.
1268 s 267, CYPF Act.
1269 s 264, CYPF Act.
1270 Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 2.2.
### Table 5: Plans formulated by ITC FGCs

<table>
<thead>
<tr>
<th>Offence</th>
<th>Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>$200 reparation&lt;br&gt;25 hours community service&lt;br&gt;24 hour curfew (reviewed after one month)</td>
</tr>
<tr>
<td>Traffic offence</td>
<td>25 hours community work&lt;br&gt;7am to 7pm curfew (except in [parents’] company)</td>
</tr>
<tr>
<td>Drug offence</td>
<td>Complete residential drug and alcohol programme</td>
</tr>
</tbody>
</table>

### III. CONTROLS ON SANCTIONS

#### A. Introduction

The FGC plans detailed above demonstrate that FGC plans contain significant levels of criminal justice sanctions: monetary, community work, and restrictions on liberty. Before considering the key issues relating to limits on these sanctions, it is necessary to examine the current legislative controls on the content of the FGC plan.

#### B. The Court-Referred FGC

The intention of the legislature is clear in the court-referred FGC, as the legislative provision states that the plan reported back from the FGC is a recommendation to the Youth Court. Section 281(1) states:

> where a charge against a young person is proved before a Youth Court, the Court shall not make any order under section 282 or section 283 unless a family group conference has had an opportunity to consider ways in which the Court might deal with the young person in relation to the charge.

In section 284, one of the factors which the Court ‘shall have regard to’ is ‘any decision, recommendation, or plan made or formulated by a family group conference’.

Since the legislation makes it clear that the plan is technically a recommendation, then the legislation must have intended that the Youth Court Judge has the ultimate responsibility for the content of the FGC plan. Therefore one would expect that FGC plans would be regularly refused or modified by the Youth Court Judge. However, this does not appear to be the case. All court-referred FGC plans in this sample were accepted without modification by the Youth Court Judge. Larger scale analysis of this issue is hampered by a lack of statistics, as no accessible records are available. Drawing conclusions about court-referred FGC plans is difficult because the outcomes are not published despite arguably being a type of Youth Court plan.

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1271 s 284(h), CYPF Act.
sentence. The official statistics do give some broad figures on section 283 orders, but FGC outcomes will not be recorded here unless the FGC has recommended a section 283 order be imposed, or the Judge uses his or her residual discretion to impose such an order. In the interests of openness and transparency, statistics on the penalties imposed by court-referred FGCs should be published similar to the Youth Justice Statistics reports. However, as noted earlier, almost all plans are accepted by Youth Court Judges.

The fact that almost all court-referred FGC plans are accepted suggests one or both of two situations: first, the FGC participants are already regulating the plan within the limits of what is considered acceptable, or second; Youth Court Judges almost automatically accept the plan presented to them without examining it for consistency or fairness. On the first point, this would suggest that contrary to the assertion that plans are ‘limited only by the imagination’ of their participants, that there is already control by professionals such as youth justice coordinators and police officers who are aware of what the Youth Court Judge will and will not accept in the particular case.

On the second point, granted, one of the key policy imperatives underpinning the FGC is to give effect to principles of the legislation, such as strengthening families and allowing families to participate in decision making. The legislation requires that the Youth Court consider every FGC plan presented to it. The Youth Court Bench Book states that ‘the starting point should be the presumption that the [FGC] plan is the best outcome, while recognising that the Court is there to filter out inappropriate outcomes’. Some appear to have the view that the CYPF Act transfers power over decision making from the state to the community. This is not the case, but the CYPF Act certainly empowers families to participate in decisions. McElrea argues that the Youth Court nearly always accepts the plans agreed to by the FGC because of recognition that ‘the scheme of the [CYPF] Act places the primary power of disposition with the FGC’. It is true that the CYPF Act emphasises the importance

1274 See Chapter 6(V).
1275 s 279, CYPF Act.

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of the involvement of the family in the decision making process, but it is clear that the plan formulated by the court-referred FGC is intended to be a recommendation. Judges clearly retain the power to refuse or modify the plan. As discussed in Chapter 7, the FGC remains a state process, and the family cannot choose to have nothing happen to the young person.\textsuperscript{1278} The Youth Court Bench Book states that ‘...the Youth Court’s role with regard to FGCs is one of supervision and monitoring, with final decision making control’.\textsuperscript{1279}

C. The ITC FGC
The situation of the ITC FGC differs greatly. In this type of FGC there is no judicial oversight. It is left entirely to the participants to decide an appropriate sanction between them, to which the police officer must agree. The police apprehend the young person, form the intention to prosecute the young person, refer the young person for the ITC FGC, and then the FGC plan must be acceptable to the police. There is no independent oversight. Again, there is no publication of outcomes, and no statistics are available on the levels of sanctions in the ITC FGC.

D. Concluding Remarks
In summary, an examination of the court-referred FGC demonstrates that the legislative intent was that the plan formulated by the FGC was to be a recommendation to the Youth Court Judge, with the Judge given the power to modify the plan, or send the matter back to the FGC. However, in practice, almost all FGC plans are accepted by the Youth Court Judges. In the ITC FGC, there is no independent oversight. In both types of FGC, there is a lack of transparency, as statistics on FGC outcomes are not collated, and FGC plans are not publicly accessible.

IV. PARAMETERS OF SANCTIONS
A. Introduction
This section will consider two issues in relation to levels on these sanctions: the upper limit of sanctions, and disparity between offenders. Reference is made to practice examples from the observation of the FGC. It is submitted that the examples discussed are indicative of a lack of restrictions on sanctions.

\textsuperscript{1278} See Chapter 7(IV).

\textsuperscript{1279} Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 5.14.
B. Upper Limit on Sanctions

In these FGCs the highest number of community work hours required of a young person was fifty hours, and the highest reparation amount was $500 (a court-referred FGC plan). What was concerning though, was the lack of a context for these abstract amounts. While these amounts in themselves are not high, for instance the average work-related community sentence in the adult court system was 116 hours in 2006,\textsuperscript{1280} investigation of the level of FGC sanctions yielded some concerning issues. Firstly, at no stage during the FGC, was an upper limit on sanctions discussed. Secondly, there are no available statistics on the levels of sanctions resulting from FGCs with which comparison could be made. Thirdly, there are no court only sentences to compare FGC outcomes to, as all cases entering the Youth Court system will involve a FGC at some stage.

First, there does not appear to be an upper limit on the penalties which a FGC could decide on. The FGC participants are to be guided by the section 208 principles which state that any sanctions ‘should...take the least restrictive form that is appropriate in the circumstances’.\textsuperscript{1281} The Crimes Act 1961 sets out maximum penalties for criminal offences generally.\textsuperscript{1282} However, in line with the principle that young people who offend are treated differently from adult offenders, the CYPF Act places some specific limits on the orders which the Youth Court can impose. For instance, section 298 of the CYPF Act deals with community work orders. The Youth Court Judge may make a community work order, within the limits of ‘not less than 20 nor more than 200’ hours. However, section 283(d) permits the Youth Court Judge to ‘impose such a fine as could have been imposed by a District Court if the young person had been convicted of the offence [in the District Court]’. Similarly reparation may be ordered by the Youth Court to ‘such sum as it thinks fit’.\textsuperscript{1283}

As noted, none of the FGC plans studied in the course of this research exceeded 50 hours of community service. However, in the 2004 \textit{Achieving Effective Outcomes} report, it was reported that out of a sample of 561 youth justice FGCs, two young people were required to

\textsuperscript{1280} Ministry of Justice, \textit{Statistical Bulletin} (Number 1, December 2007).

\textsuperscript{1281} s 208(f)(ii), CYPF Act.

\textsuperscript{1282} E.g. s 196, Crimes Act 1961: ‘Every one is liable to imprisonment for a term not exceeding one year who assaults any other person.’

\textsuperscript{1283} s 283(f), CYPF Act.
complete 'more than 200' hours of work in the community. This is concerning if young people were required to complete more hours than the limits specified in section 298 CYPF Act. The Achieving Effective Outcomes report does not specify what type of FGCs (court-referred or ITC FGCs) that were involved. This would suggest one of two situations, either the Youth Court was imposing a sanction outside its own powers or this was an ITC FGC. Up to twenty five hours of community work was required of seventy nine young people (14%). Analysis of whether this is a more widespread issue is hampered by the lack of freely available statistics about FGC plans. Even if these are isolated incidences, it is very concerning if the FGC was to impose a penalty which was outside the maximum which the Youth Court could impose in that situation.

On a theoretical level, there is no doubt but that sanctions resulting from the FGC should never be in excess of that which could be imposed under the law. Most do not doubt that sanctions agreed to by informal processes should never go beyond the maximum that could be imposed by a court. Braithwaite cautions that:

The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence. It is therefore critical that restorative justice never be allowed to undermine this constraint. Restorative justice processes must be prohibited from ever imposing punishments that exceed the maximum punishment the courts would impose for that offence.

However, McElrea argues that it is:

inherently unfair to criticize family group conference procedures on the grounds that sometimes they impose outcomes more onerous than the court would have imposed – just as I think a similar criticism of the police diversion process for adults is unfair. In both cases what is overlooked is that sentencing is not an exact science and there can be considerable disparity between the sentences imposed by different judges in similar cases; we do not therefore say that judges should not be involved in sentencing. In point of fact outcomes under the new regime [the CYPF Act] are generally more creative, more community-based, less dependant on custodial solutions, than those the courts imposed.


It is a valid assertion that outcomes may be more creative in the FGC than in the traditional sentencing model. However, community based and non-custodial does not always equate to benevolent or non-coercive.\textsuperscript{1288}

Further, New Zealand is unusual in the fact that virtually all cases of offending will involve a FGC at some stage. Even if the young person was to plead ‘denied’ and the matter be proved through a defended hearing, the Youth Court must then refer the matter to a FGC to make recommendations as to what penalty the Youth Court Judge should impose. Therefore there is no ‘court only’ sentencing process to compare the results of the FGC.

C. Potential for Disparity Between Offenders

According to Warner, ‘when [FGC] outcomes depend on the whims and idiosyncrasies of victims and families, disparities in outcomes are inevitable.’\textsuperscript{1289} Previous studies have found that FGC outcomes for offences of similar severity varied considerably between regions.\textsuperscript{1290} The potential for inconsistency in FGC plans is evident especially where group offending dealt with at separate FGCs is at issue. Lack of consistency in sanctions is something which young people feel aggrieved about.\textsuperscript{1291}

The other was the issue of separate FGCs for group offending. Group offending is a common feature of youth offending. In one of the FGCs which was observed for this research, separate FGCs were held for two young people involved in the same property offence. The victim was only able to attend one of the FGCs, and this FGC resulted in twice as much community work hours as well as reparation, while the other young person was only required to carry out community work. The victim of the offence pushed for a more considerable penalty. This seemed unfair as the young people involved were friends, and would obviously discuss what penalty they had received. The young person spoke up about this during the FGC. The make up of the particular FGC influenced the severity of the outcome. Group offending is a

\textsuperscript{1288} See Chapter 7(II).

\textsuperscript{1289} Kate Warner, ‘Family Group Conferences and the Rights of the Offender’ in Christine Alder and Joy Wundersitz (eds.), \textit{Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?} (Canberra: Australian Institute of Criminology, 1994), 148.


common feature of offending by young people. If markedly disparate outcomes like this occur, this is likely to cause resentment, which is contrary to an avowed aim of the FGC process, that is reintegration and reconciliation.

Ashworth has criticised processes like the youth justice FGC on the basis of consistency, arguing that ‘if different communities can adopt separate standards, the result is likely to be a form of ‘justice by geography’ or ‘postcode lottery’’. He strongly argues that ‘in principle, justice should be administered in a consistent manner so that individuals do not find themselves subject to variable standards in different locations’ Consistency is one of the elements which society expects from a criminal justice system. Surely it is important that young people who commit similar offences in similar circumstances should receive a similar sanction?

Can inconsistency be defended on the basis that the young person and their family has agreed to the outcome? Morris and Young argue that ‘[FGC] outcomes are measured chiefly by the satisfaction of the stakeholders in each case, and not by comparison with the outcomes of like cases and that ‘what is more important are the reasons for the inconsistencies...inconsistencies between outcomes which are the result of genuine and uncoerced agreement between the key parties, including victims may be [right]’. Doubts about whether the FGC process is truly voluntary were expressed in an earlier chapter.

Of course, there is an argument that court based sentences also result in disparity between offenders. McElrea argues that:

Many of the elements of a successful restorative justice conference are already recognised as valid elements in mitigation of penalties -- remorse meaningfully expressed, apologies made, restitution

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1297 See Chapter 7(II).
offered or paid, and the victim's attitude to these elements. These elements therefore can lead to
different outcomes in otherwise similar cases even under the standard western sentencing model.\footnote{1298}{Judge FWM McElrea, 'Restorative Justice – A New Zealand Perspective' Paper presented at Modernising Criminal Justice – New World Challenges, London, 16-20 June 2002, para 14 (c).}

However as Ashworth states in relation to the comparison with court-based system, 'there is
an important distinction between tribunals responding in a principled manner to relevant
factual differences between cases, and responding on the basis of their own views and
preferences'.\footnote{1299}{Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 British Journal of Criminology 578, 581.} Further, neutral criminal justice professionals (e.g. lawyers and judges) are
much more likely than FGC participants to see the situation in clear cut terms.

V. ROLE OF THE POLICE

A. Introduction

Unlike conferencing schemes in other jurisdictions,\footnote{1300}{See further Kathleen Daly and Hennessey Hayes, Restorative Justice and Conferencing in Australia (Canberra: Australian Institute of Criminology, 2001). See also Chapter 5(IV).} the police do not facilitate youth justice FGCS under the CYPF Act. However, the police do still have a significant role in the FGC process. The role of the police in informing the FGC participants of the charge was discussed
in Chapter 11. This section will discuss the role of the police in deciding on the sanction
which the young person receives through the FGC process.

B. Role of the Police in the FGC

1. Is it right for a police officer to be involved in deciding on a sanction?

There are two relevant issues with the role of the police in deciding on a sanction in the FGC. The first of these is the role that the police representative has in deciding on the sanction the young person should receive. As a full participant of the FGC, the police have a veto over the FGC plan. On a theoretical level, as Wonnacott notes, 'it is simply undesirable for a serving police officer to be involved in any form of sentencing'.\footnote{1301}{Camilla Wonnacott, 'The Counterfeit Contract – Reform, Pretence and Muddled Principles in the New Referral Order' (1999) 11 Child and Family Law Quarterly 271, 281.} It is a fundamental principle of the common law that the roles of the prosecutor and of the judiciary are entirely separate. In addition, one of the aims of the 1989 reforms was in part to constrain the amount of discretion exercised by professionals such as the police.\footnote{1302}{Allison Morris and Warren Young, Juvenile Justice in New Zealand: Policy and Practice (Wellington: Institute of Criminology, 1987).} It does not seem right that the police should
have a controlling vote over what penalty the young person receives. While the court-referred FGC has some element of judicial oversight, in the ITC FGC, the police investigate the offence, apprehend the young person, and then have the final veto on what penalty the young person should have.

This significant power that the police have is concerning when there is evidence that the police are reported as being one of the primary decision makers in the FGC.\textsuperscript{1303} In the FGCs observed in the course of this research, the police officer often took a dominant role. Granted, the young person and his or her family do have the option of refusing to agree and sending the case back to the referring agency. This did not happen in any of the FGCs observed for this research. However, the *Achieving Effective Outcomes* report reported that in cases where the FGC ended in non-agreement, it was ‘overwhelmingly’ the police who had vetoed the plan.\textsuperscript{1304}

2. Using police knowledge

The second issue is whether the police (with their possible extra knowledge of the young person) will seek to extend the process to other alleged offences or anti social behaviours that are not the subject of the FGC. Wonnacott rightly argues that a police officer:

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\text{is likely to be privy to prejudicial information and facts about the offender that (for good reason) are not available to a court; for instance, that the offender was suspected of another offence, but was not prosecuted for lack of admissible evidence. The temptation for the police officer will naturally be to impose contractual terms that take into account not only the offences for which the offender was convicted, but also those of which he was suspected.}\textsuperscript{1305}
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This was a feature of some of the FGCs which were observed during this research. In three of the FGCs, it was noted that the police made reference to other unproven offences or troublesome behaviours that the young person had allegedly been engaged in. In one particular FGC, the police officer (after reading the summary of facts) spoke for a number of minutes about the young person’s alleged offending in another part of the country, and how the local police had been warned to expect trouble when the young person moved into the locality. The police officer also informed the FGC about the (alleged) criminal activities of the young person’s family. There was also discussion about a previous alleged offence in which there had not been enough evidence to charge the young person. This appeared to alter

\textsuperscript{1303} See Chapter 6(V)(E)(2).
the FGC participants’ view of the young person and there appeared to be an assumption that this was a repeat offence, despite there being no official record of the previous alleged offending.

Far from there being a prohibition on discussing other alleged offending as there would be in a criminal trial, the encouraged restorative practice of the FGC promotes frank discussion and does not look at the offence in isolation. Discussing the FGC, Luna notes that:

Consistent with holism, the FGC recognizes that crime is not an atomised event existing within a vacuum but instead an interconnected whole that occurs against a specific background and with consequences that extend into the future. The process thus emphasizes the concrete over the abstract, allowing the stakeholders to discuss a field of causation preceding the offense and its rippling impact on particular persons and collectives.1306

This is perilously reminiscent of the welfarist response to youth offending. A previous chapter identified characteristics of a welfarist approach to youth justice like focussing on the whole situation of the young person rather than on the offence.1307 To avoid individualised penalties, it is vital that the young person receives a penalty in respect of the admitted offence only. This is another argument for a set of guidelines related to particular types of offences so that the opportunity for other unproven offences to be taken into account would be lessened.

VI. RECOMMENDATIONS

The preceding sections have identified a number of concerning issues relating to restrictions on the level of penalties that can be imposed by the FGC. It will now be proposed that the introduction of basic guidelines on the range of penalties could usefully be formulated. Specific legislative changes are set out in the final chapter.1308

The issue of the upper limit on sanctions in the court-referred FGC is more of a practice issue, the FGC should never be permitted to impose a penalty that is outside that which is allowable under the CYPF Act, and this should be made explicit in the legislation. As noted, for court - referred FGCs, the Youth Court Judge should refuse to accept a plan which contains elements that are outside the Youth Court’s maximum penalties. The situation of the ITC FGC is less

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1307 See Chapter 2(II) and (III).

1308 See Chapter 14(IV).
clear cut as there is no judicial oversight. This is yet another instance which demonstrates the need for the young person to have legal assistance during the FGC process.

Because of their position as investigators and prosecutors, there is a strong case for permitting the police to have an informative role only in the FGC. The police could continue their role of informing the FGC about the charge and the circumstances of the offending, and police officers often played an important part in informing the FGC of available community work etc. However, it is submitted that the police should not be allowed to have a vote in the decision about what sanction should result. This would work well in the case of the court-referred FGC, as the decision is remitted to the Youth Court Judge for final approval. The situation is more complex in the case of the ITC FGC, because the whole purpose of the FGC is to have an agreement with the police not to charge the young person if certain conditions are met. Therefore the agreement of the police must be sought. It would be possible to have an agreement made at an ITC FGC where there was a victim present, as the public interest element would be protected. But because victims are only in attendance at about half of the FGCs, the police officer is essentially representing the public interest. It would obviously be undesirable for the penalty to be decided solely by the young person and their family.

To continue on a recurring theme of this research, there is no reason why guidelines to ensure that young people are treated fairly and equitably could not co-exist with the legislative goal of family empowerment. To suggest guidelines on the levels of sanctions in the ITC FGC would not be to impose ready made solutions on the family of the young person. Speaking about restorative justice generally, Robinson has proposed a "punishments units" system that allows the restorative process greater unfettered discretion in determining the method of punishment than in determining its amount.1309 There would still be room for encouraging creativity in terms of the content of the plan for instance, community hours for a community agency which the young person has a relationship with, or a donation to a charity which the victim of the offence had nominated.1310

Further, to promote transparency, statistics should be collated on FGC outcomes, which could be made available in the same manner as the youth justice statistics.


1310 See further Chapter 14(IV).
CHAPTER THIRTEEN: THE OBJECTIVES UNDERLYING FGC OUTCOMES

I. INTRODUCTION

This final substantive chapter will consider the objectives underlying outcomes of the youth justice FGC, and whether these objectives are in line with a rights based approach to youth justice.

This chapter will begin by discussing the rights of young people in relation to youth justice outcomes. Then, the objectives underlying FGC outcomes will be considered. The context of the legislative principles will be considered in order to ascertain the legislative intent. It will become clear from an examination of the legislative principles guiding FGC outcomes, that the underlying objective of the FGC process has altered over the years. At the time of drafting, the rights of the young person, especially in relation to a fair and determinate sanction, were a concern. Since the inception of the CYPF Act, the principles underlying the legislation have taken a different course, especially towards restorative justice, and arguably towards the blurring of lines between welfare interventions, and responses to offending.

The first major issue is theoretical: the compatibility of the increasingly restorative justice orientation of the youth justice system with the rights of the young person. This is especially important given the likelihood of a legislative amendment to the CYPF Act strengthening the position of the victim's interests. While the interests of victims are undoubtedly important, it will be argued that the youth justice system must retain the young person as its focus, and that the full restorative justice model is not appropriate for youth justice. This discussion is principally concerned with the shifting theoretical model of the FGC, but is informed by practice examples derived from observation of the FGC.

The second issue to be considered is whether the separation of welfare issues and responses to offending envisaged by the framers of the CYPF Act has been maintained. While the welfare of the young person and their family is certainly important, it will be argued that the lessons of past incarnations of youth justice demonstrate that a separation between care and protection and responses to criminal offending is vital. This will be illustrated with practice examples from the FGC plans.
II. A RIGHTS BASED APPROACH TO YOUTH JUSTICE OUTCOMES

A. Introduction

The principles relating to youth justice outcomes coming from domestic and international law will now be considered. The most relevant standards are those coming from the CRC, and its related standards.

B. Aims of Youth Justice Outcomes

By their nature, international law and standards relating to youth justice are drafted generally so as to apply to differing national legal systems. However, a number of distinct principles underpinning youth justice sanctions may be identified. As is the case with the principles underpinning the youth justice provisions of the CYPF Act, the aims reflect the tension between the traditional goals of criminal justice (e.g. deterrence, crime control and rehabilitation) and the particular characteristics of young people (e.g. vulnerability and immaturity). Above all, international law emphasises the importance of treating young people who offend differently to adult offenders. The Committee on the Rights of the Child has recently re-stated the reasoning behind the need for a separate youth justice system:

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.

The CRC states that young people should be treated in a manner ‘consistent with the promotion of the child’s sense of dignity and worth’, and states that ‘a variety of dispositions…. shall be available to ensure that children are dealt with in a manner appropriate to their well-being…’ The Beijing Rules also state that the juvenile justice system shall emphasize the well-being of the juvenile.

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1311 The term ‘outcomes’ is used in this chapter to describe the overall elements of the FGC plan – this encompasses the sanctions discussed in the preceding chapter and other elements designed to address needs.

1312 Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para 10. Note of course that in international law terms the word ‘children’ describes all those under the age of 18 years.

1313 Article 40.1, CRC.

1314 Article 40.4, CRC.

1315 Rule 5.1, Beijing Rules.
While it is accepted that a strictly punitive approach to young offenders is not in compliance with international law, what the principal aim of the youth justice system should be is not explicitly stated. Article 14 (4) of the ICCPR states that in the case of young people involved in the criminal justice system ‘the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation’, suggesting that rehabilitation should be the principal aim of the youth justice system. However, the CRC speaks of the ‘desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’.

Is there a difference between rehabilitation and re-integration? Van Bueren explains that the term ‘rehabilitation’ was withdrawn from the draft convention during the second reading of the CRC. The attention of States was drawn to ‘the revision of thought which had occurred since the adoption of the CCPR’ and ‘highlighted the risk of States abusing rehabilitation as an undesirable form of social control’. It is also because the concept of rehabilitation implies that responsibility rests solely with an individual who can be removed from society for treatment and once restored, released. Contemporary international standards emphasise re-integration rather than rehabilitation. According to Van Bueren, ‘the notion of re-integration has a different starting point. It rejects the assumption that the difficulties which children face are necessarily individual and considers the social environment of the child’. Van Bueren argues that the concept of rehabilitation in the ICCPR should be interpreted as ‘the means by which a child can assume a constructive role in society’.

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1317 Article 40.1, CRC.


C. Types of Outcome

As noted at the start of this section, international standards emphasise general principles rather than specifying particular outcomes. The Committee on the Rights of the Child has stated (in relation to diversion) ‘it is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation’.1323

The Committee on the Rights of the Child argues that ‘it goes without saying’ that forced labour, corporal punishment or other inhuman and degrading punishments are in violation of international standards.1324 Article 40.1 of the CRC states that:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40.4 of the CRC states that:

A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Deprivation of liberty is to be a last resort, and used in the least restrictive form possible in the circumstances.1325 Custodial interventions should not be imposed 'unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.1326

The recent General Comment issued by the Committee on the Rights of the Child provides specific guidance on the aims and objectives of a CRC compliant youth justice system.1327 The General Comment reiterates the importance of key principles of the CRC such as non-discrimination and the best interests of the young person. Further guidance was also provided

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1324 Committee on the Rights of the Child, General Comment No. 10 (2007): Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras 71 and 73. See also Article 37, CRC.

1325 Rule 17(b), Beijing Rules.

1326 Rule 17(c), Beijing Rules, see also Rule 18: ‘avoid institutionalisation to the greatest extent possible’.

by the Committee on the Rights of the Child in relation to contemporary youth justice processes, taking into account the increase in the prevalence of non-court dispositions, and the development of interventions such as restorative justice and family group conferencing. Above all, the Committee on the Rights of the Child emphasised that when the young person is diverted from formal judicial proceedings, human rights and legal safeguards must always be respected.\textsuperscript{1328}

D. Concluding Remarks

This section has discussed the benchmarks for outcomes of youth justice processes coming from relevant rights standards. There is a clear rationale for a separate system of youth justice. Outcomes should be non-punitive and designed to promote the re-integration of the young person. Although diversion from formal criminal justice processes is encouraged by the international standards, the young person's legal rights must be assured.\textsuperscript{1329}

III. OBJECTIVES UNDERLYING FGC OUTCOMES

A. Introduction

The CYPF Act contains extensive principles, some relating to the operation of the legislation generally,\textsuperscript{1330} and some to the youth justice system specifically.\textsuperscript{1331} It was unusual or perhaps unique at the time to have a statement of principles in legislation. It is now a lot more common. For example, the Sentencing Act 2002 provides for the '\textit{Purposes of sentencing...}',\textsuperscript{1332} and also sets out the principles to be applied when sentencing offenders.\textsuperscript{1333} Statements of principles now appear in the youth justice legislation of other jurisdictions.\textsuperscript{1334}

The interpretation of the principles underpinning sanctioning of young people under the CYPF Act appears to have transformed over the years. Before considering the principles of the CYPF Act, it is necessary to consider the problems with the previous system in order to

\textsuperscript{1328} Article 40.3(b), CRC.

\textsuperscript{1329} See Chapter 4.

\textsuperscript{1330} It is important to note that the CYPF Act deals both with children and young people in need of care and protection and those who are offending.

\textsuperscript{1331} s 208, CYPF Act.

\textsuperscript{1332} s 7, Sentencing Act 2002.

\textsuperscript{1333} s 8, Sentencing Act 2002.

\textsuperscript{1334} See s 3, Youth Criminal Justice Act 2002(Canada), s 7, Young Offenders Act 1997 (New South Wales).
place the principles in context and especially where the rights of the young person fit into the legislation. The general theoretical context of the CYPF Act was considered earlier in this thesis. This section will focus specifically on the objectives underlying FGC outcomes.

B. Identifying the Legislative Intent
1. Objectives identified during the reform process

The 1974 Children and Young Persons Act dealt both with children and young people in need of care and protection and those who were offending. Some of the problems with this approach in terms of the rights of the young person were set out in a public discussion paper prepared in 1984. The 1984 Working Party began by noting that 1979 was the International Year of the Child and this had ‘focused public attention on the rights of children’. The 1974 Act was generally welfarist in intent, that is premised on the principle that both those young people in need of care and protection and those who were offending were in that situation as a result of family difficulties that could be remedied through intervention by social services. Lack of concern for the rights of young people stemming from an official attitude of paternalism and benevolent intention was one of the hallmarks of welfare based youth justice system. According to the 1984 Working Party:

There has also been a growing realisation that benevolently intended official measures employed to rehabilitate children in difficulty can violate the children’s civil rights by introducing a level of interference within their lives that is out of proportion to the seriousness of the behaviour that initially prompted the intervention. Providing justice for children as well as supplying necessary assistance requires that those who come to official notice for offending should have the full legal protection of due process.

1335 See Chapter 2(VII).
1336 Hereinafter the 1974 Act.
1337 Department of Social Welfare, Review of Children and Young Persons Legislation: Public Discussion Paper (Wellington: Department of Social Welfare, 1984). This review was carried out by a Working Party within the Department of Social Welfare. It comprised DSW employees and Pauline Tapp, a Faculty of Law member from the University of Auckland. It was criticised at the time for lacking Maori representation. Note that this document deals with care and protection legislation as well as youth offending. Hereinafter the ‘1984 Working Party’ in the text. See also Chapter 2(III) and (IV).
The 1984 Working Party argued that the welfare approach to youth offending was misguided because the fact that a young person was offending did not necessarily mean that that young person and their family were in need of intervention by social services. In essence, the 1984 Working Party argued that ‘an offence by a young person should not be used...to justify the taking of extended powers over the young person’s life for the purposes of rehabilitation’.

The 1984 Working Party argued for a more justice and rights focused approach, including the establishment of a Youth Division of the District Court in which young people would be provided with the same basic rights as those given to adults but with special safeguards and guarantees recognising the special characteristics of young people. The 1984 Working Party also recommended that deprivation of liberty should be a last resort and court orders should be determinate. This reflected concerns, especially amongst Maori, that indeterminate orders such as guardianship were being used for young people who had committed minor offences. The emphasis which the 1984 Working Party placed on ‘recompensing the victim of the offence and achieving reconciliation between the young person and the victim, and the young person and the community’ is possibly the first mention of what is later described as a restorative approach to youth offending.

In December 1986 a Children and Young Person’s Bill was brought before Parliament. It was based largely upon the recommendations of the 1984 Working Party but met with major opposition, especially from Maori and Pacific people who were critical of the mono-cultural and ‘professionally dominated’ provisions. Opposition was centred mainly on the care and protection provision of the Bill. Following the re-election of the Labour government in

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1346 See Chapter 7(II) and Part (IV) of this chapter.

1347 Mike Doolan, ‘Youth Justice Reform in New Zealand’ in Julia Vernon and Sandra McKillop (eds.) Preventing Juvenile Crime (Canberra: Australian Institute of Criminology, 1991), 123.

1348 On the youth justice provisions, see the final chapter of Allison Morris and Warren Young, Juvenile Justice in New Zealand: Policy and Practice (Wellington: Institute of Criminology, 1987).
1987, the new Minister of Social Welfare, Dr Cullen, set about reviewing the 1986 Bill and commissioned a new Working Party. The main objective was to react to the concerns of Maori about the mono-cultural nature of the Bill. In relation to youth justice, contrary to the recommendations of the 1984 Working Party, the 1987 Working Party recommended that the Youth Court should be a division of the Family Court so as to better address the needs of young offenders. This reflected a more welfarist approach than the 1984 Working Party who were concerned about the due process rights of young people. The 1987 Working Party also sought to remedy some of the perceived problems with previous diversionary schemes by recommending the establishment of ‘Family Advisory Panels’ made up of community members and co-ordinated by social workers. These were designed to reduce police powers in relation to diversion. The report of the 1987 Working Party was presented in December 1987 and a Select Committee worked on re-drafting the Bill for almost two years. Major consultations were carried out with Maori and Pacific communities.

2. Concern for the rights of the young person

As the Children and Young Person’s Bill was concerned with the care and protection of young people as well as youth justice, and the care and protection provisions were extremely contentious, both the Select Committee submissions and the parliamentary debates were predominantly concerned with child protection issues such as mandatory reporting of child abuse. Nonetheless, a number of themes relating to the rights of young people in youth justice can be identified. Firstly, there was concern that young people would be held accountable. As one Member of Parliament argued ‘the main point is that young offenders have to face up to the fact that there are consequences for their wrongdoings’. This reflected concerns that the


1351 It was reported that the police were bypassing previous diversionary schemes and only referring those young people who they did not intend to prosecute anyway. Allison Morris and Warren Young, Juvenile Justice in New Zealand: Policy and Practice (Wellington: Institute of Criminology, 1987).


1353 Chair of the Social Services Select Committee, Judy Keall, 47 NZPD 20 April 1989, 10105.
welfarist approach was insulating young people from the effects of their offending. Further, according to the Minister of Social Welfare, the view prevailed that:

offending behaviour should be dealt with as just that, not as something else. It may be that a young person offends against the law for reasons related to family and social circumstances. If so, it may be that issues involving the care and control of the young person should be dealt with, but at the same time the young person should be held accountable for what he or she has done, and appropriate action should be taken. This is necessary for both the young person’s own sake and because the community has a right to have offences dealt with in an appropriate way.

During the reporting back to Parliament of the Select Committee on Social Services’ report on the Bill, it was stated that the youth justice provisions ‘are based on the justice model, which ensures that children and young people are held accountable for their actions but are dealt with in ways that are appropriate for their age and culture’.

Secondly, there was concern that young people should have the protections of due process of law. The Minister of Social Welfare stated that the Bill ‘provides stronger protection for the rights of children and young people who fall foul of the law, or who are suspected of doing so’ and that the Bill ‘reflects a belief that more attention should be paid to the rights of children and young persons…the right to a fair hearing and appropriate sanctions when they have offended against the law’.

Annette King argued that ‘people are looking for a positive alternative to institutional facilities for our children, and they believe that young offenders should face due process of law’. Richard Northey identified the ‘priorities’ of the youth justice provisions of the Bill as being firstly to hold the young offender accountable, and secondly to protect the rights of the young offender.

It was considered important, following from the recommendations of the first Working Party in 1984, that a young person appearing in the Youth Court should have ‘the same rights as an adult in a court of law, including the right to legal advocacy and the right to due process’.

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1355 Hon Dr. M Cullen (20 April 1989) 47 NZPD 10115.

1356 Hon Judy Keall (20 April 1989) 47 NZPD 10105.

1357 Hon Dr. M Cullen (20 April 1989) 47 NZPD 10115.

1358 Hon Dr. M Cullen (20 April 1989) 47 NZPD 10115.

1359 Hon Annette King, (20 April 1989) 47 NZPD 10109.

1360 Hon Richard Northey (20 April 1986) 47 NZPD 10114.

1361 Hon Dr. M Cullen (20 April 1989) 47 NZPD 10115.
Thirdly, there was the intention that there should be a strict separation of care and protection from youth justice. It was noted that actions had been taken under the criminal law to justify unnecessary intervention in the lives of young people and their families.\textsuperscript{1362}

3. \textit{Concluding remarks}  
In conclusion, an examination of the context in which the legislation was enacted demonstrates that there was concern that the rights of young people who offend were safeguarded. In particular, the dangers of the broadly welfarist Children and Young Persons Act 1974 were emphasised: lack of due process, indeterminate sanctions, and using the criminal law solely to intervene into the life of young people and their families.\textsuperscript{1363} The final principles enacted in the legislation will now be discussed.

C. \textit{Objectives of FGC Sanctions}  
1. \textit{The guiding principles}  
As a starting point, it is important to note that the CYPF Act deals both with young people in need of care and protection and those who are offending. Consequently, there are a number of sets of principles relevant to sanctions scattered throughout the legislation, some applying to the whole CYPF Act,\textsuperscript{1364} and some applying to the youth justice provisions specifically.\textsuperscript{1365} Which of these apply to the young person in the youth justice FGC?

The Long Title of the CYPF Act and sections 4 and 5 of the CYPF Act are relevant to the whole piece of legislation. Section 4 sets out the objects of the legislation, while section 5 sets out the principles to be applied in exercise of powers conferred by the CYPF Act. There are specific principles guiding youth justice which are set out in section 208 of the CYPF Act. Section 260 which sets out the scope of decisions which may be made by the youth justice FGC, states that regard must be had to the section 208 principles.\textsuperscript{1366} Section 208 is then subject to section 5 of the CYPF Act which deals with general principles for the whole legislation. For those young people involved in a court-referred FGC, in the High Court case

\textsuperscript{1362} Hon Dr. M Cullen (20 April 1989) \textit{47 NZPD} 10115.  
\textsuperscript{1363} See Part (V) of this chapter.  
\textsuperscript{1364} The Long Title, s 4-12, CYPF Act.  
\textsuperscript{1365} s 208, CYPF Act.  
\textsuperscript{1366} s 260(2), CYPF Act.
of *X v Police*, it was held that in making sentencing decisions the Youth Court is guided by the youth justice principles set out in section 208 of the CYPF Act, the objects of the CYPF Act set out in section 4, the principles applying generally to the CYPF Act set out in section 5 and the Long Title of the CYPF Act.\(^{1367}\) In addition to this, there is section 284 of the CYPF Act which is headed ‘Factors to be taken into account on sentencing’. This section sets out a number of factors which the Youth Court Judge ‘shall have regard to’\(^{1368}\) when making an order under section 283 of the CYPF Act.

The fact that a single piece of legislation covers two distinct groups of young people makes for a large range of principles. The key issue here is how the concerns relating to the rights of young people discussed earlier translated into the final legislation. The principles will now be discussed under two main headings – traditional objectives and new objectives.

2. ‘Traditional’ objectives

Many of the principles relating to youth justice sanctions in the CYPF Act are an amalgamation of the justice and welfare approaches to youth justice. In relation to the objectives of the CYPF Act for young people who offend, section 4(f) states that where children and young people commit offences, it must be ensured that they are ‘held accountable’ and encouraged to ‘accept responsibility’ for their behaviour. These provisions reflect the concerns expressed with the welfare approach during the legislative process. There was a perception amongst both youth justice professionals and the wider public that the system was failing to hold young offenders properly accountable for their offending.\(^ {1369}\) The treatment approach had the effect of insulating young people from the consequences of their actions. Also indicative of a justice approach is the location of the Youth Court within the District Court structure. Under the previous legislation, one court (the Children and Young Persons Court) dealt both with those children and young people in need of care and protection and those who were offending. The 1984 Working Party believed that young people involved in formal court proceedings ‘should receive the same due process protections as adults, should be dealt with predictably and should receive a disposition similar to that imposed on other

\(^{1367}\) *X v Police* 7/2/05, Courtney and Heath JJ, HC Auckland, CRI 2004-404-374, para 42.

\(^{1368}\) s 284(1), CYPF Act.

juveniles committing the same offence'. The Youth Court is based on justice principles with the young person having the same basic rights as an adult in the same situation, e.g., proof must be established to the criminal standard of beyond reasonable doubt through a defended hearing for contested charges, and young people are legally represented by specialised defence counsel. Another element of a rights based approach is the principle that ‘the vulnerability of young people entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person’. The translation of concerns about young people’s rights into the legislation may be seen in the fact that Youth Court orders are determinate, reflecting concerns about the use of indeterminate orders under the Children and Young Persons Act 1974. For similar reasons, the least restrictive sanction appropriate to the circumstances is to be imposed. Age is a mitigating factor when deciding whether to impose sanctions and what form those sanctions should take place.

While the CYPF Act has elements of a justice approach, the CYPF Act does not however take a strictly punitive or strictly crime control approach to youth offending. As Doolan stated in a paper written soon after the CYPF Act was enacted, there was a ‘shift towards the principles underlying the justice model, but without embracing that model’s more doctrinaire aspects’. That is offending by young people would not be ascribed completely to the choice of the young person; the wider circumstance of the young person’s offending must be looked at. Deprivation of liberty is a last resort in cases where public safety is at risk. Young people are only transferred to the adult criminal justice system in cases involving serious indictable

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1371 See Chapters 10 and 11 for criticisms of how most offences are proved through the FGC process.
1372 s 323, CYPF Act. See Chapters 8 and 9 for discussion on the right to legal assistance in the FGC.
1373 s 208(h), CYPF Act.
1374 s 283, CYPF Act.
1375 s 208(f)(ii), CYPF Act.
1376 s 208(e), CYPF Act.
1377 Police v D [2002] DCR 897, per Thorburn DCJ.
1378 Mike Doolan, ‘Youth Justice Reform in New Zealand’ in Julia Vernon and Sandra McKillop (eds.) Preventing Juvenile Crime (Canberra: Australian Institute of Criminology, 1991), 121.
1379 s 208(d), CYPF Act.
This approach is in sharp contrast with the crime control agenda underpinning England and Wales' Crime and Disorder Act 1998 which states that 'it shall be the principal aim of the youth justice system to prevent offending by children and young persons'. The Canadian Youth Criminal Justice Act also emphasises public safety and the prevention of offending. However as Thomas J noted in *W v The Registrar of the Youth Court (Tokoroa)*:

> It is accepted that the emphasis in the Act is on restorative justice and the rehabilitation of young offenders, but there is also recognition in the legislation and case law that serious offending may call for stronger penalties than the Act provides. Section 276, relating to indictable offences, and s 283(o) in relation to sentencing options, both recognise that some offences are better dealt with by the District Court or the High Court. In addition, s 208(d) in its terms acknowledges that there are limits on the desirability of community-based sentences where public safety is involved.

There is no explicit mention of welfare or rehabilitation in the youth justice principles of the CYPF Act, apart from a prohibition on using criminal proceedings solely to advance the welfare of the young person and their family. As noted above section 4(f) sets out holding young people accountable and promoting a sense of responsibility in young people as objectives of the CYPF Act. However, the second part of section 4(f) requires that young people who offend are 'dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways'. Section 4 states that the object of the Act is to 'promote the wellbeing of children, young persons and their families by…' Section 5 states that 'consideration must always be given' to how decisions affecting young people will affect the 'welfare' of the young person. These provisions have been interpreted as requiring a twin focus in FGC plans on holding young people accountable and addressing the needs of the young person. As was discussed previously, diversion from the formal criminal justice system had been a feature of the New

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1380 s 290, CYPF Act.
1382 s 3(1), Youth Criminal Justice Act 2002.
1384 s 208(b), CYPF Act.
1385 s 4(f)(i), CYPF Act.
1386 s 4(f)(ii), CYPF Act.
1387 s 5(i), CYPF Act.
1388 Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 2.3.2.
Zealand youth justice system for a considerable period of time. The CYPF Act gave statutory recognition to this principle, stating explicitly that formal criminal proceedings should not be commenced against young people if there was an alternative means of dealing with the matter. Similarly, community based sanctions are preferred ‘so far as that is practicable and consonant with the need to ensure the safety of the public’.

3. New objectives

(a) Family decision making

The preceding section identified how many of the principles of the CYPF Act embody ‘traditional’ criminal justice objectives. However, others of the objectives and principles of the CYPF Act were certainly unique in New Zealand law, and arguably unique amongst other jurisdictions. A defining feature of the CYPF Act is the emphasis it places on the importance of family involvement in decision making and the goal of strengthening and maintaining family structures. This objective is set out in no uncertain terms in the Long Title of the CYPF Act which describes the legislation as:

An Act to reform the law relating to children and young persons who are in need of care or protection or who offend against the law, and in particular to make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, whanau, hapu, iwi, or family group.

Section 5 emphasises the importance of participation of family members in decision making, the strengthening of family relationships and the stability of the family. The object of the CYPF Act is to ‘promote the wellbeing of children, young persons, and their families and family groups, by...’ The specific principles governing the youth justice provisions of the CYPF Act also emphasis the importance of youth justice outcomes which strengthen families and empower families to develop their own means of dealing with offending by their young people, and also that sanctions should seek to ‘maintain and promote the development of the young person within his/her family’.

1387 See Chapter 2(II) and (III).
1389 s 208(a), CYPF Act.
1390 s 208(d), CYPF Act.
1392 s 5(a), (b), (c), (d), CYPF Act.
1393 s 4, CYPF Act.
1395 s 208(c)(i) and (ii), CYPF Act.
What does this mean for the rights of the young person? It seems that this is more about family empowerment and family involvement in the decision making process rather than handing over the process to the family of the young person. Mike Doolan has argued that the intention of the CYPF legislation was less about victims and more about empowering families to take responsibility for their children and young people. Of course the cynical view is that the family has a limited power to decide on options which are tightly controlled by the state, but the family may then be blamed if things go wrong. Is there also a danger that young people coming from disadvantaged and dysfunctional families will be doubly penalised? They will receive a sanction in respect of the criminal offence and also be disadvantaged by lacking a supportive environment in which to fulfil the terms of the FGC plan. FGC plans which frequently contain requirements to attend training courses and programmes -inevitably requiring the input of family members with regard to transport etc. As Khylee Quince argues in relation to Maori in the criminal justice system in New Zealand: ‘initiatives such as the FGC and marae justice programmes are predicated upon the offender coming from a functional whanau group, with whom the offender identifies, and who will take responsibility for them’

As was discussed in a previous chapter, the youth justice process is still firmly a state process and the wishes of the family are arguably subject to other goals of the criminal justice system like public safety. For instance, the family of the young person choose that nothing would happen to a young person charged. Any plan that the family comes up with in the FGC process is subject to veto by the Youth Court Judge (in the case of the court-referred FGC) or by the police (in the case of an ITC FGC).

1396 s 208(f)(i), CYPF Act.
1400 See Chapter 7 on the theoretical model represented by the FGC.
1401 See e.g. Police v S and M (1994) 11 FRNZ 322. This case involved sexual offending by two Samoan boys against a girl who was also from the Samoan community. The families of both the defendants and the complainants wished to resolve the matter through the youth justice system and traditional Samoan dispute resolution processes. Judge Harvey committed the matter to the High Court for trial, citing inter alia the public interest.
(b) Victims of offences

The second novel element of the CYPF Act's principles was the provision relating to victims of offences. Section 208 states that 'any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending'.\textsuperscript{1402} The inclusion of victims' interests was commensurate with the development of a victims' rights movement both in New Zealand and overseas.\textsuperscript{1403} Whose interests are paramount though? Section 6 of the CYPF Act provides that 'the welfare and interests of the child or young person shall be the first and paramount consideration...' However, the youth justice provisions of the CYPF Act are explicitly exempted from this clause.\textsuperscript{1404} As was argued during the second reading of the Bill in Parliament:

In dealing with any offender, the offender's needs are not put first. The code quite clearly sets out that the needs of the victim and of the public have to be considered, and if young offenders are to be confronted with taking responsibility for offences it is not possible to put their needs first throughout the Bill.\textsuperscript{1405}

D. The 'Evolution' of the Objectives Underlying FGC Outcomes

1. Introduction

Thus far, it has been argued that the principles underpinning the youth justice provision of the CYPF Act are based generally on justice principles, but also with a requirement to acknowledge needs. There is also an emphasis on a diversionary approach. These principles were generally an amalgamation of previous approaches from New Zealand and overseas jurisdictions. Two novel elements of the youth justice provisions of the CYPF Act were the emphasis on the consultation and involvement of family and the requirement to have due regard to the interests of victims. However, the New Zealand youth justice system is now overwhelmingly described as either being based on restorative justice principles or being an example of restorative principles in practice. How this 'evolution' in the principles of the youth justice system occurred will now be considered.

\textsuperscript{1402} s 208(g), CYPF Act.


\textsuperscript{1404} s 6, CYPF Act.

\textsuperscript{1405} Hon Richard Northey (20 April 1989) 47 NZPD 10104.
2. Restorative justice

The concept of restorative justice was discussed in Chapter 7. Restorative justice as a concept is difficult to define. What is and what is not restorative justice is the subject of much debate. To reiterate, characteristics of restorative justice include the resolution of the offence through the involvement of the victim of offence and offender, an intention to repair the harm caused by the offence rather than to punish the offender and an aim of reconciliation between victim and offender and to re-integrate the offender to the community, rather than to punish the offender. Restorative justice was not truly developed as a concept in criminology at the time of the drafting of the CYPF Act. One of the officials closely involved in the drafting of the CYPF Act, Mike Doolan, makes a frank admission that ‘those of us who were involved in policy development process leading up to the new law had never heard of restorative justice (indicating some deficits in our research approach as there was a body of literature available on the subject even then).’

The first major evaluation of the youth justice system (published in 1993) does not appear to mention the term ‘restorative justice’. Nonetheless, by the time the second major report on the CYPF Act’s operation was published almost ten years later, it was stated that ‘the youth justice system has been seen as the first and most fully developed example of a national

1406 Chapter 7(II).


1409 The roots of restorative justice theory can be found in publications such as Nils Christie, ‘Conflicts as Property’ (1977) 17 British Journal of Criminology 1, but the concept was not truly developed in criminology until the late 1980s with books like John Braithwaite, Crime, Shame and Reintegration (Cambridge: Cambridge University Press, 1989).

1410 His report of an overseas study tour was highly influential on the final legislation. See Mike Doolan, From Welfare to Justice (Towards New Social Work Practice with Youth Offenders) (Wellington: Department of Social Welfare, 1987).

1411 Mike Doolan, ‘Restorative Practices and Family Empowerment: both/and or either/or?’ Family Rights Newsletter (London: Family Rights Group, 2003), 1.


system of justice that incorporates restorative justice principles into practice', 1414 and that the CYPF Act represented ‘the first legislated example of a restorative justice approach to offending’. 1415 Further, it was stated that ‘the objects and principles of the legislation also emphasise...the importance of restorative responses’, 1416 and ‘the extent to which restorative processes were achieved’ was regarded as a major benchmark in identifying ‘effective outcomes’ in the youth justice system. 1417 It was argued that the CYPF Act ‘focuses on repairing harm, reintegrating offenders, and restoring the balance within the community affected by the offence’. 1418 In addition, the CYPF Act, and especially the youth justice FGC, has almost become synonymous with restorative justice in the international literature. 1419

The assumption that the youth justice system is based on restorative justice principles is also prevalent in the case law. In Police v N, Malosi DCJ stated that ‘If one likens the Children, Young Persons, and Their Families Act to a crown, the family group conference is the jewel in it. At the seat of this crown is the concept of restorative justice’. 1420 In the High Court case of RE v Police, Williams J stated that:

Young persons receive special treatment under our law. Since 1 November 1989, the manner in which Courts deal with them has changed. It is a basic change since it requires concentration upon a restorative justice system rather than a retributive or deterrent system. The object of the new provisions was to enable victims and the community, as well as young persons, to participate in a process which would help them and heal the damage caused by their offences. An essential part of this process is a negotiated community response at a family group conference. It is a system which operates in a vastly different way to that which Courts are required to use in dealing with adult offenders. 1421


1421 RE v Police [1995] NZFLR 433, 434, per Williams J [author’s italics].

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In a similar vein to the ‘discovery’ that the youth justice system was based on restorative principles, there was also a ‘discovery’ that the system was based on Maori justice principles — although admittedly this is generally the result of misinterpretation by commentators.1422 It is clear that a system based on restorative justice principles was not the intention of the framers of the CYPF Act. As Stewart has commented ‘the concept of restorative, as opposed to adversarial, justice was probably not a foremost concern of the original legislators but this has emerged from practice as a key factor in dealing with juvenile offenders’.1423

Judge FWM McElrea, a proponent of the restorative justice approach,1424 postulates that the goals of restorative justice and the New Zealand youth justice principles intersect on some levels. McElrea categorizes three particular elements of the CYPF Act as being restorative in nature; the transfer of state power from the courts to the family and community, group consensus decision-making in the FGC and the involvement of victims leading to a healing process.1425 Maxwell and Morris consider that:

Both family group conferences and restorative justice give a say in how the offence should be resolved to those most affected by it — victims, offenders, and their “communities of care” — and both give primacy to their interests; both also emphasize the need to address the offending and its consequences (for victims, offender, and communities) in meaningful ways; reconcile victims, offenders, and their communities through reaching agreements about how best to deal with the offending; and attempt to reintegrate or reconnect both victims and offenders at the local community level through healing the harm or hurt caused by the offending and through taking steps to prevent its recurrence.1426

This interpretation of the principles of the CYPF Act is a rather subjective view, since neither re-integration, repair of harm or hurt or reconciliation is mentioned in the legislation. In addition, the principles of the CYPF Act being used by proponents of restorative justice to back up the argument that it is restorative could arguably be used to claim that the CYPF Act represents a retributive response to crime. Indeed, similar language is to be found in the


1424 One of the commentators who first identified the CYPF Act as having restorative characteristics. See further BJ Brown and FWM McElrea (eds.), The Youth Court in New Zealand: A New Model of Justice (Auckland: Legal Research Foundation, 1993).


principles of the Sentencing Act 2002, which lacks the support given to the CYPF Act by restorative justice advocates. The principles of the Sentencing Act also mention accountability. The section 4(f) principles i.e. accountability, promotion of a sense of responsibility and also the interests of victims can also be argued as a retributive response.\footnote{Julian V Roberts, "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" 36 Australian and New Zealand Journal of Criminology 249.} Section 7(1)(a) of the Sentencing Act 2002 states one of the purposes of sentencing as being ‘to hold the offender accountable for harm done to the victim and the community by offending’, while section 7(1)(b) seeks ‘to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm’. The Sentencing Act also mandates that account be taken of harm to victims of offences, which is considerably stronger language than that used in the CYPF Act.

As for the contention that restorative justice processes are the way in which young people can be facilitated to ‘develop in responsible, beneficial, and socially acceptable ways’\footnote{s 4(f)(ii), CYPF Act.}, this is a subjective view also. One could also advance the view that tougher sentencing and more use of custody are a more efficacious way of ensuring that young people ‘develop in responsible, beneficial, and socially acceptable ways’\footnote{See e.g. ‘Youth Justice- Is This as Good as it Gets?’ Press Release, New Zealand First Party, 18 April 2007}.\footnote{\textsuperscript{1429}}

E. Concluding Remarks

In summary, an examination of the context of the legislation and the legislative drafting process demonstrates that there was concern for the rights of young people to a fair and determinate sanction. The system was intended largely to be based on justice principles, but with a requirement that the needs of young people would be acknowledged. The CYPF Act does not take a strictly punitive or crime control approach to youth justice and there is a preference for diversionary approaches and non-custodial approaches.

It is clear from an examination of the principles that the underlying philosophy of the youth justice provisions of the CYPF Act has evolved considerably since the inception of the legislation in 1989. The CYPF Act principles certainly contained some novel elements, but it appears as if the inclusion of the family in decision making was considered the key element
by policy-makers at the time. The 1993 Family, Victims and Culture report classed ‘due process’ as one of the goals of the CYPF Act. However, this goal has arguably been superseded by values such as restorativeness and repair of harm. The question of whether the move towards restorative practice and values is compatible with the rights of the young person will now be considered.

IV. RESTORATIVE JUSTICE AND THE RIGHTS OF YOUNG PEOPLE

A. Introduction

The purported benefits of a restorative justice approach to youth offending and for victims of crime have been canvassed extensively elsewhere and it is not proposed to revisit them extensively here. Rather, the focus here will be on the implications for the rights of the young person of a youth justice system incorporating restorative justice aims and processes. This examination is pertinent at the present time due to the fact that the legal position of victims of offences in the youth justice system is likely to be strengthened in the near future through an amendment to the CYPF Act. In addition, while restorative justice processes generally have received criticism from commentators concerned about strict adherence to the rule of law, restorative justice processes have not received much attention from those concerned with a rights based model of youth justice.

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1434 Children, Young Persons and Their Families Amendment Bill (No. 6).


1436 Some concerns are raised in Kate Akester, Restoring Youth Justice – New Directions in Domestic and International Law and Practice (London: Justice, 2000).
B. Potentially Positive Aspects for Young People

1. Decarceration/diversion


2. Participation

Another potentially positive aspect of restorative sanctions is participatory practice.\footnote{Principal Youth Court Judge Andrew Becroft, ‘Trial and Treatment of Youth Offenders: Human Rights at the Coalface of Youth Justice’. Paper presented at the Commonwealth Law Conference, London, September 2005.} Article 12 of the CRC mandates that a young person who is ‘capable of forming his or her own views’ has ‘the right to express those views freely in all matters’ affecting the young person with these views being given due weight in accordance with the age and maturity of the
young person. Hypothetically, the FGC should provide a more appropriate forum for the young person’s right to effective and meaningful participation in the youth justice process than the youth court. Evaluations of youth court practice both in New Zealand, and internationally, have criticised the lack of participation by the young person. The adversarial process itself is generally not considered to be conducive to participation by the young person. A pre-CYPF Act evaluation found lack of understanding and lack of participation by young people and their families. Cognisant of these difficulties, the CYPF Act has a number of provisions designed to promote participation. Section 10 of the CYPF Act states that both counsel and the court have a duty to explain the nature of the proceedings and any orders that are to be made, in appropriate language. However, a post-CYPF Act evaluation of Youth Court practice demonstrated lack of understanding and participation on the part of young people and their families. A more recent evaluation showed that practice had improved overall, but young people still rated the process low when asked questions such as ‘I understood what was going on’ and ‘I understood what was decided’.

The nature of the FGC (informal, less hurried and taking place in ‘neutral territory’ with family support present) should mean increased levels of participation by young people. The

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1444 Article 12(1), CRC.
1445 Article 12(2), CRC.
concepts of taking responsibility and direct accountability rather than the more impersonal criminal trial may have advantages from the young person’s perspective. Acceptance of responsibility takes place in a more supportive environment surrounded by family members and other important people from the young person’s life rather than through the ‘ritual of plea taking’ in the court. Instead of pleading guilty in an abstract notion to the charge, there can be negotiation and discussion with the victim about the exact circumstances. However, evaluations of young people’s views of the FGC process and the Youth Court average out as similar. The Achieving Effective Outcomes report found that:

on the whole, young people’s views of their experiences in the family group conference and the Youth Court are relatively similar...In particular, similar proportions agreed with the extent to which they were prepared for what would happen, were supported, understood what happened, were treated with fairness and respect, agreed with the decisions and were stigmatised and excluded.1454

While participation was not an area directly addressed by this research, typically, the young person did not play a large part in the FGC discussion and decision making. Except for one notable FGC, where the young person was confident and articulate, the young people generally communicated in monosyllables and nods. It was also typical for the professionals and family members to talk over the young person e.g. ‘he tends to do this’, or ‘I know she wouldn’t be able to do that’. This lack of participation is likely to be a symptom of the large caseload of youth justice co-ordinators. With almost 9,000 youth justice FGCs being convened per year, this does not leave much time for the preparation of the young person and his or her family. It must also be said that it is a daunting prospect for the young person to speak about personal issues in front of strangers such as victims of offences and the police officer. This is unfortunate, as the youth justice FGC represents a real opportunity to involve and empower young people in decisions regarding themselves.

C. Appropriateness of a Victim-Centred Approach for Youth Justice

The potentially positive aspects of restorative sanctions have only been briefly outlined. These have received extensive treatment elsewhere. An important question which has not received


1455 To study participation of young people properly would require interviews of young people, and it was not possible to gain permission to do this.

as much attention has been the appropriateness of the victim-centred nature of restorative justice processes for young people in the youth justice system.

1. The legislative intent

Section 208(g) of the CYPF Act requires that due regard be given to the interests of the victim of the offence when deciding on measures in response to offending by young people. Through their right to attend the FGC, victims are given a direct role in deciding on the sanction that should result. The statutory recognition of victims' rights was unusual at the time, especially with regard to giving victims an actual say in the formulation of a response to offending. Mike Doolan (one of the officials responsible for the drafting of the legislation) explains that the decision to provide for victim involvement was not as a result of a desire to introduce a restorative justice based system, but more to allow some public insight into the essentially private FGC process. Doolan explains why victims were included in the process:

Simply, to enable the process to attain public credibility. This was a radical departure from previous child welfare decision-making practices. Politicians, police and members of the general public were understandably nervous about it. As policy makers, we had the benefit of talking with Maori, Pacific Peoples, and other cultural groups about these proposals, which had emerged through public debate within these communities about how they might regain the power that was rightfully theirs, and we had little doubt that this process would work. It seemed important, though, that the public had some way of assessing this for itself, and thus the notion of involving victims arose. It was felt that if victims received justice for themselves in this process, if victims saw that the process was rigorous and not a soft option, and that if victims were satisfied with the outcomes, then these attitudes would begin to permeate New Zealand society.\footnote{1457 Mike Doolan, ‘Restorative Practices and Family Empowerment: both/and or either/or?’ \textit{Family Rights Newsletter} (London: Family Rights Group, 2003), 3.}

This correlates with a view expressed during the parliamentary debates of concern that families would have a ‘direct say in the solution’ choosing themselves who could attend the FGC.\footnote{1458 Hon Mr Gerard (20 April 1989) \textit{NZPD} 10107.} This was an insinuation that dysfunctional families would not hold their young people sufficiently accountable. Was the inclusion of the victim in the legislation an attempt to counter this sort of view? Arguably, this view is evident in the fact that victims do not have a right to attend proceedings in the Youth Court, although Youth Court Judges are encouraged to use their discretion to permit victims to attend youth court hearings where the victim wishes to attend.\footnote{1459 \textit{Youth Court Bench Book} (Wellington: Institute of Judicial Studies, 2005, updated to 2008).} That is, accountability was not needed as the Youth Court Judge is there to ensure the public interest is accounted for.
That was the original intention at the time of the drafting of the CYPF Act. The needs and rights of victims of offences are now to the forefront of criminal justice policy. With the enactment of the Victims' Rights Act in 2002, the broad principles set out in the Victims of Offences Act 1987 – that the sentencing judge should be aware of the harm caused to the victim of the offence – have evolved into rights. These include the right to be kept informed of the progress of the particular case or prosecution, \footnote{1460} and a right to have a victim impact statement heard during sentencing. \footnote{1461} The Sentencing Act 2002 mandates that the needs and rights of victims must be taken into account. \footnote{1462}

2. Proposed amendments to the CYPF Act

A proposed amendment to the CYPF Act would replace the current wording of section 208(g), which states that responses to offending must have ‘due regard’ to the interests of victims with a new provision strengthening the position of the victim. The proposed new provision would read:

In the determination of measures for dealing with offending by children or young persons, consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending) ... and ... any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them. \footnote{1463}

This amendment reflects the opinions of ‘stakeholders’ in the youth justice area whose views were canvassed for a Discussion Document released by the Ministry of Social Development. In this document it was stated that:

Some youth justice practitioners felt that as the youth justice system incorporates restorative justice principles and practices it should go further in victim empowerment than provisions that apply to adult offending. Within the youth justice sector there was also a view current practice had moved ahead of the CYPF Act’s victim provisions. For instance, it was suggested youth justice co-ordinators are going beyond the current requirements in the CYPF Act to ensure the active participation of victims in youth justice provisions. \footnote{1464}

The legislation is becoming more focused on the victim rather than the young offender. How compatible is this with the rights of the young person?

\footnotesize{\begin{itemize}
  \item \textsuperscript{1460} s 12, Victims' Rights Act 2002.
  \item \textsuperscript{1461} s 21, Victims' Rights Act 2002.
  \item \textsuperscript{1462} s 8(f), CYPF Act.
  \item \textsuperscript{1463} Clause 27, Children, Young Persons, and Their Families Amendment Bill (No 6).
\end{itemize}}
3. Where should the focus lie?

The place of the victim in restorative justice processes, that is participating in the decision around the sanctions to be imposed on the offender, has been criticised elsewhere and would apply to young people as well as adult offenders. Some commentators are vehemently opposed to the victim having a say in the punishment of the offender. Ashworth argues that ‘the victim’s legitimate interest is in compensation and/or reparation from the offender, and not in the form or quantum of the offender’s punishment’ 1465. Ashworth argues that victims should not have a say in the punishment of offenders or the decision to prosecute or not to prosecute. 1466 Cavadino and Dignan agree with Ashworth that victims should not be able to influence the severity of the sentence ‘we wish victims to have a real say in what reparation they should receive, not in what retributive (or denunciatory, deterrent or incapacitatory penalty the offender should suffer’ 1467

In terms of international law, neither the CRC nor the Beijing Rules or Riyadh Guidelines explicitly mention restorative justice, but the recent General Comment issued by the Committee on the Rights of the Child appeared to endorse restorative justice as one method of diverting young people from formal judicial proceedings. 1468 Some of the proclaimed objectives of restorative justice i.e. re-integration and reconciliation would appear to be in accordance with international standards. However, it is less clear whether the victim-centred focus of restorative justice would be in compliance, as Article 3 of the CRC mandates that the best interests of the young person is a primary consideration. As discussed above, international standards encourage an approach centred on the re-integration of the young person and the promotion of the young person’s wellbeing. 1469 Where do the traditional goals of criminal justice like accountability and public safety fit into this approach? There is less emphasis on this issue. Young people who offend should be dealt with in a manner which ‘reinforces the child’s respect for the human rights and fundamental freedoms of others’. 1470


1469 See Chapter 4.

1470 Article 40.1, CRC.
Presumably accountability to victims and the public can be read into this. The Committee on the Rights of the Child has stated that a non strictly punitive approach can be introduced ‘in concert with public safety’ but is then silent on how public safety can be ensured. Further, the Committee on the Rights of the Child has stated recently that ‘the protections of the best interests of the child, means, for instance, that the traditional objectives of criminal justice (repression/retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders.

There exists conflicting objectives relating to sanctions in the youth justice system. There are perennial tensions in youth justice between differing objectives such as rehabilitation of young people and the public interest. While ‘intuitively it seems right, not only that wrongdoers should be penalised, but also that the victims who have suffered at their hands should be helped and compensated for the wrong done to them’, the rationale for a separate youth justice system is the distinctive characteristics of young people compared to adults in the same situation. A victim centred approach is not in line with recognition of special characteristics of young people. The youth justice system should be offender focused, however that is not to say that victims could not be involved or could not receive reparation or repair of harm. The rights of the victim of the offence are more in being involved and empowered through the process. If the victim can receive reparation or compensation for the offence through the youth justice process that is a positive aspect, but the repair of harm to the victim should not be the primary focus of the youth justice system.

Whose interests would be paramount? While the CRC recognises that young people must be held accountable to the community for offending, the youth justice system must be young person centred, and the best interests of the young person must be a primary

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consideration. It is doubtful whether a move towards a victim-centred, increasingly restorative justice approach would be in compliance with the requirement to have a young person-centred youth justice system.

D. Remorse and Re-integration

The rationale for a separate youth justice system is that young people’s capacities for self control etc. are less than those of adults. The formulaic nature of FGCs may lessen their restorative power. As Braithwaite argues:

> Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologizes or grants mercy. Apart from it being morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy to invite participants in a restorative justice process to consider proffering it during the process. People take time to discover the emotional resources to give up such emotional gifts. It cannot, must not, be expected. Similarly, remorse that is forced out of offenders has no restorative power.

Mike Doolan rightly argues that ‘some caution needs to be applied in considering the full restorative model as a response to offending by young people, particularly where the young persons lack capacities of personal insight, guilt and remorse that makes the restorative approach such a powerful influence on offenders generally.’

In a study of youth justice conferences in England, Zernova reported that facilitators often seemed to cajole apologies from young people. This was also the case in five of the FGCs observed, in one case going as far as the youth justice co-ordinator announcing that it was now time to apologise. The Principal Youth Court Judge Becroft has spoken of how many of the persistent youth offenders lack remorse or victim empathy. This raises questions about how appropriate it is to mainstream restorative justice for young people who offend. As Weijers argues:

1476 Article 3.1, CRC.
1477 See Chapter 6(V).
1478 John Braithwaite, ‘Setting Standards for Restorative Justice’ 42 British Journal of Criminology 563, 571.
1480 Margaret Zernova ‘Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences’ (2007) 47 British Journal of Criminology 491.
using young persons who have committed a serious crime simply as a tool for restoration of their victims will be counter-productive in the end. Far from offering restoration, this kind of instrumentalism, which does not look seriously at the precarious position and role of the young offender, can offer at best some sort of material reparation of the harm done. Since it denies the complex and precarious moral and emotional expectations involving the role of the (young) offender in any restorative process, it seems unlikely that the things that are really crucial for restoration - that is recognition of personal responsibility for the wrongdoing, some sort of repentance for that wrongdoing and some convincing sort of apology – can be reached. All of these things pre-suppose an active and positive, moral and emotional involvement of the young offender which in turn presupposes that he is taken seriously, as a responsible, almost fully responsible, moral agent. 1482

Re-integration of the young person to the community is another aim of restorative justice. Promotion of re-integration is of itself a worthy aim. However, the very term re-integration assumes that the young person is integrated to the community in the first place. Because of New Zealand’s ‘graduated’ youth justice system, most offending is dealt with through warnings and the Police Youth Diversion Scheme. Those young people who reach the stage of the youth justice FGC have therefore either offended at a more serious level or are recidivists. Many of these young people are characterised by poor educational opportunities, poverty and unsupportive families. 1483 Restorative justice is predicated on the offender taking responsibility for his or her actions. Especially in the case of young people, society bears responsibility for ensuring that young people are integrated to the community in the first place. 1484 The authors of the Achieving Effective Outcomes report concluded that ‘it appears that well-socialised young people from strong family backgrounds are most likely to respond positively to the family group conference’. 1485

V. ‘ADDRESSING NEEDS’ OR A WELFARIST RESPONSE TO OFFENDING?

A. Introduction

The earlier discussion about the context of the legislative reforms and the legislative process itself, 1486 revealed that the framers of the CYPF Act were clearly concerned with the excesses


1486 See Part (III), above.
of the welfarist approach to youth justice. Under the previous legislation (the Children and Young Persons Act 1974), there was blurring between young people in need of care and protection and those who were offending. Young people in need of assistance were seen to be ‘tainted’ by association with the criminal courts. Equally, there were concerns that young people who were offending were not being held sufficiently accountable. The new legislation had a clear policy imperative that the care and protection system would be separate from the youth justice system, and that the fact that the young person had committed a criminal offence would not be a pretext for intervention into the life of the young person or their family with welfarist intent.

This section will argue that despite this legislative separation, youth justice FGC plans are being used to address welfare issues. In relation to a child or young person who comes to the notice of the authorities for a purely care and protection reason (such as neglect or abuse) there are strict conditions for compulsory state intervention. However, in the case of young people who offend, despite there being an interface between the care and protection and criminal systems for cases where this is necessary, there is a lower standard for intervention and welfare type responses are being included in FGC plans.

B. Examples of Welfare Interventions in the FGC Plan

All twelve of the FGCs observed had elements which were designed to intervene in the young person’s welfare.

<table>
<thead>
<tr>
<th>Element</th>
<th>No of FGC plans (n=12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational</td>
<td>7</td>
</tr>
<tr>
<td>Counselling/Psychologist</td>
<td>5</td>
</tr>
<tr>
<td>Drug and alcohol counselling/programmes</td>
<td>12</td>
</tr>
<tr>
<td>Living arrangements</td>
<td>5</td>
</tr>
<tr>
<td>Mentoring/Assign social worker</td>
<td>10</td>
</tr>
<tr>
<td>Employment/Work and Income</td>
<td>4</td>
</tr>
</tbody>
</table>

Some examples of particularly onerous welfare interventions included:


1488 s 208(b), CYPF Act.
• Requirement to attend school every day
• Requirement to reside with a particular parent/family member
• Requirement to undergo a medical check-up
• Requirement to undergo psychological evaluation
• Requirement to ‘talk more’ with family members

C. The Deed and the Need?
The examples provided above demonstrate that FGC plans generally contain measures which go beyond a penalty for offending. The Youth Court Bench Book states that:

The [FGC] plan should address both the “deed” and the “need”; the consequences and causes of offending. That is, the young person should be held accountable for the offending but a comprehensive, rehabilitative plan should be formulated to prevent further offending and to allow the young person to develop in a socially beneficial way without further offending.\(^{1489}\)

Where does the authority for this requirement arise? The assertion that the legislation has a twin focus on the deed and the need has become an accepted mantra. On analysis of the legislative provisions, this may not be the case. Neither the specific section dealing with the content of youth justice FGC plans, nor the specific principles governing the youth justice section of the CYPF Act provide for FGC outcomes which aim to further the welfare of the young person or rehabilitate the young person. In section 260, which sets out some possible outcomes for the youth justice FGC, provisions to address the needs of the young person are not mentioned. Admittedly, the section does not aim to limit the generality of FGC outcomes\(^{1490}\) but the list of possible outcomes is arguably indicative of a legislative intention to focus on responses to offending rather than welfare needs.\(^{1491}\) The possible outcomes listed focus on the traditional criminal justice type penalties such as reparation and police cautions.\(^{1492}\) Section 260(2) requires that the FGC participants should have regard to the general principles guiding youth justice which are set out in section 208. These specific principles governing youth justice do not mention rehabilitation or welfare as a principle of the youth justice system (apart from the prohibition on using criminal justice proceedings solely to advance the welfare of the young person or his or her family). In the section 208

\(^{1489}\) Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008), para 2.3.2.

\(^{1490}\) s 260(3), CYPF Act.

\(^{1491}\) The possible outcomes listed in s 260(3) are: that proceedings be continued or discontinued, that a formal police caution be administered, that an application for a s 67 declaration be made (in the case of a child), that appropriate penalties be imposed or that reparation be made to the victim of the offence.

\(^{1492}\) s 260(3), CYPF Act.
principles which are to guide youth justice, it is clearly stated that ‘criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau or family group’.\textsuperscript{1493} There are a number of provisions encouraging youth justice outcomes which ‘strengthen the family’\textsuperscript{1494} of the young person and ‘take the form most likely to maintain and promote the development’,\textsuperscript{1495} of the young person within his/her family. In summary, the context of the legislation (considered earlier in this chapter) and the final legislation demonstrate a concern that responses to offending, and care and protection interventions be kept separate.

Best practice standards for youth justice, like the Youth Court Bench Book\textsuperscript{1496} and the Achieving Effective Outcomes Report\textsuperscript{1497} derive this twin emphasis from section 4(f) of the CYPF Act. Section 4 of the CYPF Act sets out the General objects of the CYPF Act. Section 4(f) provides that where children and young people commit offences, they are to be held accountable and encouraged to accept responsibility for their actions and dealt with ‘in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways’.\textsuperscript{1498} A requirement to deal with a young person in a way that acknowledges the needs of the young person is significantly different from a requirement to address those needs. Acknowledge means to recognise, allow or accept, \textsuperscript{1499} while address means to tackle, or to deal with.\textsuperscript{1500}

There could potentially be an argument that welfare type measures are implemented as ‘voluntary’ add-ons to youth justice FGC plans. However, see the earlier discussion as to how voluntary the FGC process really is.\textsuperscript{1501} In the FGCs observed for this research, the legislative

\textsuperscript{1493} s 208(b), CYPF Act.
\textsuperscript{1494} s 208(c)(i), CYPF Act.
\textsuperscript{1495} s 208(f)(i), CYPF Act.
\textsuperscript{1496} Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008).
\textsuperscript{1498} s 4(f)(ii), CYPF Act [author’s italics].
\textsuperscript{1499} Oxford English Dictionary (2\textsuperscript{nd} Edition 1989).
\textsuperscript{1500} Oxford English Dictionary (2\textsuperscript{nd} Edition 1989)
\textsuperscript{1501} See Chapter 7(III).
requirements were explained to the FGC participants as ‘accountability’ and ‘addressing needs’ with equal emphasis given to both elements. ‘Addressing needs’ was explained by the youth justice co-ordinator as addressing problems which the young person had with alcohol, drugs or education. Certainly in the youth justice FGCs observed by the author, there was no distinction made between elements of the plan that must be fulfilled and those that were voluntary.

D. The Envisaged Interface between Youth Justice and Care and Protection

So far it has been argued that there is shaky legislative basis for including measures designed to address the welfare of the young person in the youth justice FGC plan. It will now be argued that there already exists a clear process if the young person meets the legislative standard for a care and protection intervention. There is an objective standard for a young person in need of care and protection so why should the standard for welfare interventions be less for a young person who has offended?

1. Care and protection interventions in the youth justice system

While there is a separation between the systems responding to young people who offend and those who are in need of care and protection, there is a recognition that young people who populate the youth justice system may be also be in need of care and protection. In furtherance of this objective there are legislative provisions setting out what should happen if a young person in the youth justice system appears to be in need of care and protection.1502 Should care and protection provisions arise during a youth justice FGC, care and protection outcomes may be formulated with prior consent of a Care and Protection Co-ordinator.1503 As the Principal Youth Court Judge has stated:

The New Zealand system avoids an unhelpful rigorous split between the youth justice and care and protection provisions by allowing a cross-over between the two parts. This flexibility, which allows room for discretion as to whether an incidence of offending is really care and protection based. This enables the justice system to concentrate on justice issues and avoid getting involved in care and protection work, which it is poorly equipped to carry out.1504

The grounds for care and protection are set out in section 14 of the CYPF Act. These include situations where the child or young person is being, or likely to be harmed, ill-treated, abused

1502 s 280, CYPF Act.
1503 s 208(1), CYPF Act.
or deprived,\textsuperscript{1505} the child or young person's development or wellbeing is being or likely to be seriously and avoidably harmed or impaired,\textsuperscript{1506} or the parents or caregivers are unwilling or unable to care for the child or young person.\textsuperscript{1507} Offending of itself is not a ground for care and protection for young people. The situation for child offenders (those aged between ten and fourteen years) differs in this respect.\textsuperscript{1508}

Section 280 of the CYPF Act provides the interface between the care and protection system and the youth court system. The Youth Court Judge has three options when it appears to the Court that the young person is in need of care and protection. The Judge may make a referral to a care and protection co-ordinator under section 19(1),\textsuperscript{1509} adjourn proceedings until the outcome of the section 19 reference is known, or if there has been a section 67 Family Court declaration as a result of the section 19 reference, dismiss proceedings.

2. \textit{Justification for separating care and protection from youth justice}

The provisions of the CYPF Act were formulated at a time where there was concern about the level of state intervention in the lives of young people and their families. Years of welfarist based policies had led to injustices where young people were taken away from their families on grounds of offending.\textsuperscript{1510} Therefore, standards were set in legislation as to the level at which the State may intervene to protect the welfare of the young person, in order to give protection from paternalistic intervention into the lives of young people and their families.

Consequently, the CYPF Act contains detailed guidance as to the circumstances when the state may intervene for care and protection reasons. The level that is set is high, with onerous obligations before the state may intervene. So why should young people who offend be any different? Certainly if the young person fits the criteria for a care and protection process to be initiated, that is the correct path. But why should there be a lesser standard for intervention in the case of a young person in the criminal justice system? Certainly there is room for

\textsuperscript{1505} s 14(1)(a), CYPF Act.
\textsuperscript{1506} s 14(1)(b), CYPF Act.
\textsuperscript{1507} s 14(1)(f), CYPF Act.
\textsuperscript{1508} s 14(e), CYPF Act. The procedure in relation to child offenders is set out in Chapter 5(II).
\textsuperscript{1510} See Chapter 2(III) and (IV).
improvement with the way in which referrals between the youth justice system and the care and protection system are handled. The Youth Court Bench Book states that the section 280 procedure has been fraught with delays.\textsuperscript{1511}

Further, the Youth Court does not have power to make welfare orders. The orders which the Youth Court may make are set out in section 283 of the CYPF Act and are of a criminal justice nature. However, the Youth Court regularly accepts the plans formulated by court-referred FGCs to implement measures which ‘address needs’. When accepted by the Youth Court these recommendations are legally binding. This feature of Youth Court practice again ties into the contention that the FGC plan is voluntary or is imposed by the Court.\textsuperscript{1512}

E. Strengthening Families and Community Based Sanctions

So far it has been argued that measures to address the welfare needs of the young person should not be imposed as part of a youth justice process unless it fits the criteria for a care and protection process to be initiated. That is not to say that sanctions cannot be designed to strengthen families or maintain and promote the development of the young person within their family. There is a difference between welfare interventions and community based, non-punitive sanctions such as those encouraged by the CYPF Act.

Furthermore, section 260 of the CYPF Act which deals with the outcomes of the FGC, provides that ‘the conference shall have regard to the principles set out in section 208’.\textsuperscript{1513} The guiding principles set out in section 208 (while subject to section 5\textsuperscript{1514}), do not mention addressing the needs of the young person. Section 5(d) states that ‘consideration must always be given’ to how a decision affects the welfare of the child or young person. The section 208 principles emphasise the importance of strengthening families so that they may find solutions to offending by their children and young people,\textsuperscript{1515} and also the importance of non-restrictive community based and family based sanctions where practicable.\textsuperscript{1516} These principles are based

\textsuperscript{1511} Youth Court Bench Book (Wellington: Institute of Judicial Studies, 2005, updated to 2008).

\textsuperscript{1512} See Chapter 7 (III).

\textsuperscript{1513} s 260(3), CYPF Act.

\textsuperscript{1514} Section 5 sets out the general principles to be applied in the exercise of powers under the CYPF Act, e.g. that consideration should be given to the wishes of the child or young person and that decisions should be made and implemented within a time frame appropriate to the child or young person.

\textsuperscript{1515} s 208(c), CYPF Act.

\textsuperscript{1516} s 208(d) and (f), CYPF Act.
on the rationale that young people are less culpable and more amenable to growing out of crime. Imprisonment of young people has been shown to increase the incidences of offending, and is contrary to international standards for youth justice. Young people are best served by community sanctions unless public safety is at risk.

F. Concluding Remarks

This move towards a twin focus on the ‘need’ and the ‘deed’ means that the FGC process can be compared to the former welfarist movement where actions purported to promote the rehabilitation and best interests of the young person could turn out to be intrusive and coercive in nature. The purportedly restorative justice orientated nature of FGC practice is polarized from the failed rehabilitation model by its proponents. McElrea strongly argues that:

> It needs to be stressed that restorative justice is not simply the old argument for “rehabilitation rather than punishment”, dressed up in new language. That type of paternalistic approach has had its day and failed... Amongst other faults it ignores the desire of others to see justice done and it can interfere with important rights of offenders, eg to an outcome that is not disproportionate to the offence and which terminates within a limited period.

However, Daly argues that this ‘oppositional contrast’ between the rehabilitative ideal and the restorative ideal embodied in the FGC is wrong. She proposes that ideas of:

reintegrating offenders by members of relevant communities of care tap into a stronger vision of rehabilitation, in which broader networks of people associated with a lawbreaker, not just state actors, get involved and have a role. Thus, restorative justice should not be viewed in opposition to retributive or rehabilitative justice. Instead, this recent justice practice borrows and blends many elements from traditional practices of retributive and rehabilitative justice in the past century, and it introduces some new terms.

Especially with regard to the fact that victims are not present at all FGCs, there is a danger that FGCs facilitated by a welfare agency (Child, Youth and Family) and held on the premises of a welfare agency can descend into a social welfare case meeting. Whatever the arguments


1521 Kathleen Daly, ‘Revisiting the Relationship between Retributive and Restorative Justice’ in Heather Strang and John Braithwaite (eds.), *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000), 35 [internal references omitted].

1522 See Chapter 6(IV).
that the young people who populate the youth justice system are characterised by welfare needs, the purpose of the criminal jurisdiction is not to treat. It is notable that the major reforms of the youth justice system carried out through the CYPF Act were intended in part to address the deficiencies of the welfare-focused youth justice system. Reform and rehabilitation of the young person’s general situation was the focus rather than the actual offence committed.

Parallels may be drawn between the welfarist approach and the present approach. The language of ‘wrap around services’, ‘integrated service delivery’, ‘working together’ suggests there is increasingly less focus on the actual offence and more on the general situation of the young person. There is evidence of a move towards a closer relationship between the care and protection and youth justice systems. The Government’s Youth Offending Strategy makes three recommendations about addressing the needs of the young person in the youth justice FGC which would bring the two systems closer together. Firstly, ‘the development of a new process for joint educational/vocational and health assessments prior to some youths’ first FGC, followed by appropriate intervention from both sectors to address identified needs’, secondly that ‘YJCs [youth justice co-ordinators] ensuring that care and protection concerns are addressed within the FGC convened to address the offending. At the least, a decision should be taken at the time a youth justice FGC is being convened as to whether a care and protection FGC is also required’, thirdly ‘upskilling YJCs so that they are able to convene both youth justice and care and protection FGCs’. The Principal Youth Court Judge has also commented that the Youth Court should have some of the powers of the Family Court (e.g. the power to make orders for counselling and guardianship).

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1528 Principal Youth Court Judge Andrew Becroft, *Presentation to Criminal Justice Class on the Work of the Youth Court*, University of Otago, April 2007.
Thomas Bernard has demonstrated the cyclical nature of youth justice policy through the twentieth century. In the welfarist approach, there were concerns that young people were not be held accountable and were 'treated' for crime rather than receiving a fair penalty. However, in the youth justice FGC it seems as if young people are being held accountable through penalties like community work and reparation and receiving welfare interventions. Thereby the net of social control over young people and their families is increased rather than decreased as was the intention of the CYPF Act.

VI. CONCLUSION: OBJECTIVES UNDERLYING FGC OUTCOMES

This chapter has considered the objectives underlying FGC outcomes, and criticised the increasing orientation of the system towards restorative justice and the blurring of lines between care and protection and responses to offending.

An examination of the context and the intent of the legislation demonstrates that there was concern firstly, that young people would be held accountable rather than 'treated' for criminal behaviour, secondly, for the rights of young people to a fair and determinate sanction for offending and thirdly, that the criminal justice system was not to be used to intervene in the lives of young people and their families for welfare purposes. The CYPF Act as enacted reflects many of these concerns. There is a clear separation between young people in need of care and protection and those who are offending. The CYPF Act as enacted is indicative of justice principles, but one which would acknowledge the needs of young people.

The principles underpinning youth justice sanctions appear to have changed focus in the years since the inception of the CYPF Act. The 'discovery' that the youth justice system is based on restorative justice principles has shifted emphasis from a broadly justice focus, to an emphasis on restorativeness, re-integration, reconciliation and repair of harm. The compatibility of a restorative justice orientated youth justice system with the rights of the young person was considered. As noted, it was not the original intention of the legislature to establish a system based on restorative principles, although elements of restorative practice have developed as a matter of practice and the restorative orientation of the system is likely to be strengthened

1531 See e.g. the Long Title of the CYPF Act ‘to make provision for matters relating to children and young persons who are in need of care and protection or who have offended against the law to be resolved, wherever possible, by their own family, whanau, hapu, iwi, or family group’
with a legislative amendment giving more recognition of victim’s interests. It was argued that although the restorative justice model could have some advantages for young people (for example non-punitiveness and participatory practice) the emphasis of the youth justice system must be the young person rather than the victim of the offence. It was further argued that the full restorative justice model, with its emphasis on remorse and responsibility, may not be suitable for young people, who lack the maturity and independence of older offenders.

The second issue to be considered was the separation of care and protection proceedings from criminal offending. The backlash against a youth justice system solely focused on the rehabilitation of offenders has produced the lesson that ‘progressive sentiments are no guarantee that reforms will not be corrupted and serve punitive ends’. It is clear that the framers of the legislation envisaged a strict separation of care and protection proceedings from youth justice proceedings. A discrete procedure is in place if care and protection concerns arise during youth justice matters. However, it appears to be accepted best practice that there be a twin focus on accountability and addressing needs. Closer examination of the legislative provisions reveals a shaky legal foundation for this policy.

The next chapter entitled ‘The Way Forward’ will draw together the recommendations made throughout the substantive chapters and comment on the future direction of the youth justice system.

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CHAPTER FOURTEEN: THE WAY FORWARD

I. INTRODUCTION

This thesis has analysed the youth justice FGC from the perspective of the young person’s rights. This concluding chapter will draw together the recommendations that have been made throughout this research.

There is a strong argument that the youth justice FGC has the potential to hold young people accountable in a culturally flexible process that can also help to address the needs of such young people. The informality of the FGC process may also be conducive to increased participation by young people. However, the principal message of this research is that increased informality and flexibility should not be to the detriment of human rights and basic criminal procedure. The FGC process may have benevolent intentions, but like any criminal justice process, it also has the potential for coerciveness and unfairness. The challenge is to ensure that the young person has basic protections like the right to a lawyer and an expectation of fair and reasonable outcomes.

This thesis has made some significant criticisms of the theory and practice of the FGC. However, it is apparent that the FGC will remain an integral part of the New Zealand youth justice system for the foreseeable future. Thus, this chapter takes a pragmatic approach to recommending legislative and policy changes to better safeguard the rights of the young person in the youth justice FGC. Further, as this thesis commenced with a review of the problems relating to previous incarnations of youth justice in New Zealand, it is appropriate to question the objectives which now appear to underlie FGC practice, that is restorative practice and welfare objectives. Specific legislative and/or policy changes are then advocated.

Overall, the principal recommendation is that young people receive a statement of their rights when agreeing to participate in the FGC process. An analogy will be drawn here with the scheme for ensuring that young people are aware of, and understand their rights, when being

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questioned by the police. Finally, as review and reform of the CYPF legislation (and a change of government) is ongoing at the time of writing, it is appropriate to conclude with a brief consideration of the broader legislative context, and the place of the rights of the young person in this future.

II. LEGAL ASSISTANCE AT THE FGC

A. Access to Legal Assistance

Chapter 8 of this thesis argued for the right to legal assistance in the youth justice FGC. As discussed, the right to legal assistance is a cornerstone of the protections for the accused in the adversarial system. Although the FGC takes place outside the formal court-based system, it was emphasised that legal assistance is important for young people in these situations as the FGC involves admitting liability for, and receiving a sanction in respect of, a criminal offence.

Although both types of FGC under discussion (the ITC FGC and the court referred FGC) involve the admission of liability and the possibility of sanctions, essentially only those young people referred to a FGC by the Youth Court can benefit from state funded legal assistance under the Youth Advocate scheme. This is despite the fact that the ITC FGC lacks any judicial or independent oversight, thus making the case for legal assistance even stronger. This thesis recommends that all young people participating in a youth justice FGC should have access to legal assistance, by extending the current Youth Advocate scheme (which provides for attendance by the Youth Advocate at the court-referred FGC), to the ITC FGC, especially in cases where large amounts of reparation are being sought, or it is very likely that the case will eventually end up in court.

The discussion in Chapter 8 demonstrated that section 323 of the CYPF Act already envisages Youth Advocates attending youth justice FGCs. The current section 323 reads:

> a Youth Advocate appointed to represent a child or young person in any proceedings, may, if requested to do so by the child or young person...attend any family group conference held under Part 4 in respect of the child or young person, and may make representations on behalf of the child or young person at any such conference.

Under the current statutory provision, the Youth Advocate’s attendance at the FGC has two legislative hurdles to overcome. First, the Youth Advocate must be ‘appointed to represent a child or young person in any proceedings’. In the case of the court-referred FGC, the situation is straightforward: all young people appearing in the Youth Court are automatically appointed a Youth Advocate to represent them. However, in the case of a young person referred to an
ITC FGC, the case will not have been before the Youth Court and consequently a Youth Advocate will not be appointed. There does not appear to be any formal mechanism by which a Youth Advocate can be appointed for an ITC FGC, although the legislation does not preclude their attendance. Possible solutions to this problem are canvassed later in this section.

Even when a Youth Advocate has been appointed in the Youth Court, that person does not always attend the FGC. This leads into the second ‘legislative hurdle’ which section 323 imposes: the Youth Advocate must be ‘requested to do so [attend the FGC] by the child or young person’. Of course, in order for a young person to request the Youth Advocate’s attendance, he or she must appreciate that such a request can be made, and appreciate how the Youth Advocate can assist in these matters. At the least, the young person referred by the Youth Court will have met his or her Youth Advocate in court. However, the young person referred to an ITC FGC needs information about where he or she can access legal advice. At present, there is no formal mechanism by which a young person can receive advice about where to access legal assistance. Child, Youth and Family have a number of pamphlets which are distributed to young people and their families in advance of the FGC, but there is no mention of how to access legal assistance. This research recommends that it should be made an explicit requirement that the youth justice co-ordinator must explain to the young person and their family that legal advice is available. Suggested wording is discussed at the end of this section.

An interesting comparison may be drawn with the statutory requirements relating to the right to legal advice and assistance when the young person is questioned by the police. In a recent (August 2008) pre-trial ruling given by the Court of Appeal, the Court was required to consider, inter alia, the extent and quality of the young person’s right to legal assistance during police questioning.

R v Z concerned a young person jointly accused in connection with a homicide. Z made admissions in the course of a police interview and reconstruction, after waiving his right to a lawyer, although he had been repeatedly informed of his right. Section 215 of the CYPF Act

1534 There is no legislative provision, and the youth justice co-ordinators involved in this research were not aware of any protocol, though they were aware of some anecdotal evidence that Registrars had appointed Youth Advocates for ITC FGCs.

prescribes a comprehensive scheme of rights when the young person is being questioned by the police, e.g. the right to have a lawyer present and the right to the presence of a nominated adult. Glazebrook J (for the Court) interpreted section 215 with regards to section 208(h) of the CYPF Act. The police officer must ensure that the young person understands the right to legal advice. Her Honour differentiated the scheme of the CYPF Act from section 23(a) of the NZBOR Act, stating that while the NZBOR Act assumes that adult suspects will have some knowledge of what a lawyer is and what lawyers do, the CYPF Act proceeds on the assumption that young people will have limited experience and understanding of the role and functions of a lawyer and how to access legal advice. Thus, the mere provision of additional information is not sufficient, there must be an explanation of the right. The police officer must explain in a manner appropriate to the age and understanding of the particular young person, that he or she has the right to instruct a lawyer, the type of assistance the lawyer could provide and the mechanics of instructing a lawyer. The young person must understand the right, thus being in a position to decide whether to exercise that right.

Further, while giving Z his rights, the police officer had attempted to explain the role of the lawyer using phrases like they 'help you in court', and 'a lawyer is someone you speak with in court and they help you'. Woodhouse J in the High Court was not satisfied that Z understood that he had a right to have a lawyer present during the questioning and reconstruction, and how a lawyer could assist at this stage. Again, Glazebrook J emphasised the importance of section 208(h), CYPF Act, and the requirement that the young person's rights be explained to him or her. Glazebrook J stressed that there is an obligation on the police to explain how a lawyer could help in the interview process. From the words which the police officer used, Z may have got the impression that lawyers could only help out in court and not that a lawyer could also advise during the questioning process. Glazebrook J considered that it was '...obvious that [Z] was labouring under the misapprehension that lawyers helped and advised only in court'. As Ellen France J (writing separately) stated '...Z should have been told that a lawyer could talk to him about matters such as whether or not he should speak to the police, how he answered questions, and generally that the lawyer

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1536 See Chapter 3(VII).
1537 This section states that the vulnerability of young people during the investigation of offences requires special protection.
1538 NZCA 246, para 37.
1539 NZCA 246, para 77.
could tell him about his options. This judgment illustrates on a practical level what type of language the police should employ when explaining the right to the young person, in order to comply with the requirements of the CYPF Act. Both Glazebrook J and Ellen France J were approving of the Canadian scheme, whereby the police are required to explain in plain language how lawyers can assist during police questioning.

This approach by the Court of Appeal is based on the young person having a dual status as offender (i.e. having the same minimum rights as an adult in the same situation, but also having certain extra rights /protections based on his/her status as young person). Not only were the police obliged to inform the young person of their right to a lawyer as the police would be required to when questioning an adult, the police were also required to take extra steps to ensure understanding. It is clear that this approach (requiring that the young person receives information about his or her rights in clear language, and taking reasonable steps to ensure that the young person understands the rights) is equally applicable to the youth justice FGC. As noted, the FGC is a process which involves admitting liability for, and receiving a sanction in respect of, a criminal offence. Like the young person being questioned by the police, the young person at the FGC is also vulnerable to implicit pressure to admit the offence. This is especially relevant for the ITC FGC, given that this process is tightly controlled by the police – the police apprehend the young person, decide to take action against the young person, refer them for an ITC FGC, and the final decision must be acceptable to the police before it becomes binding. Legal assistance is a safeguard against uninformed admissions and decisions by the young person. Furthermore, the judgment in R v Z placed considerable emphasis on the fact that young people are not generally familiar with the functions of lawyers, especially how lawyers can be of use outside the courtroom. This is equally applicable to the youth justice FGC. As the FGC differs in format from the criminal trial, it is unlikely that the young person will be aware of the fact that he or she can have a lawyer present at the FGC and how a lawyer could help at this time, unless the young person receives information about this. Overall, it is recommended that the young person receives plain language information about the availability and benefits of having a lawyer present. A draft statement of rights is provided later in this chapter.

1540 NZCA 246, para 148.

1541 [2008] NZCA 246, para 78.

1542 See discussion of the theoretical frame of reference for this thesis: Chapter 3 (III).
It is relatively simple to propose that each young person referred to a FGC should have the benefit of specialised legal assistance in the form of the Youth Advocate. Moving to the practicalities, it should not be necessary in all cases for the Youth Advocate to actually attend the FGC in every case. In some cases, matters may be simple, for example when the young person decides in advance to deny the matter at the FGC, and therefore the FGC will not be able to proceed. In some cases, the young person may decide that he or she is clear on the issues and has enough family support to go to the FGC without the Youth Advocate present. A corollary of the right to legal assistance must always be the ability to waive that right (providing of course, clear information has been provided about this right). In other instances, it may be sufficient for the young person and their family to receive some advice in advance of the FGC. Consideration should be given to providing a telephone advice service for young people about their rights and obligations at the FGC. This is provided to a limited extent by the Youth Law Service in Auckland, but this is a small resource. The latest available statistics from the Ministry of Justice indicate that in 2006, out of the 30,451 police apprehensions of young people, 6% were referred for an ITC FGC. This indicates that there were about 1,800 ITC FGCs held that year.

In the case of the court-referred FGC, the solution is relatively straightforward. The young person has already been appointed a Youth Advocate. The issue lies with improving practice so that young people understand their right to have a lawyer present, and the benefits of having a lawyer present at the FGC. The situation of the ITC FGC is more complicated, as there is presently no formal process by which a lawyer may be appointed for the young person, although the legislation does not preclude this. There is anecdotal evidence that the Youth Court Registrar may be asked by the youth justice co-ordinator to appoint a Youth Advocate in ITC FGC cases where the matter is serious or where large amounts of reparation are being sought. This is not a formal scheme and is not an adequate best practice model. This research recommends that the Youth Advocate Scheme should be extended to the ITC FGC. Like the Police Detention Legal Assistance scheme model, young people should be given a list of Youth Advocates and facilitated to contact a lawyer on the list. The referring agency or the youth justice co-ordinator should be given the legal duty to ensure that this requirement is adhered to. This is the model that is used in other jurisdictions.

1543 Personal communication from youth justice co-ordinator, September 2008.

1544 See e.g. s 7(2), Young Offenders Act 1993 and s 45(g), Young Offenders Act 1997.
B. Quality of Legal Assistance

The second major issue relating to the right to legal assistance is the quality of the legal assistance. The CYPFA Act clearly states that when representing and advising the young person, the Youth Advocate has the same duties, powers and responsibilities as if he or she was engaged privately to represent or advise the young person.\(^\text{1545}\) However, during this research, some of the Youth Advocates were seen to take a best interests approach to representing the young person. Examples of this approach included advocating that the young person would benefit from community service, and not arguing available defences to the charge. In two cases, the Youth Advocate actively disadvantaged the young person by pointing out the effect the offending had on the victim, or ‘picking holes’ in the young person’s story about the circumstances of the offence. The recommendation in response to the best interests approach is that Youth Advocates should adhere to the statutory requirements, and the standards for the profession set out in the *Lawyers: Conduct and Client Care Rules 2008*.\(^\text{1546}\) If a practitioner is engaged to represent a young person, that young person should be represented to the same standard as an adult client. The legislation clearly envisages the young person as being capable of exercising the right to a lawyer.\(^\text{1547}\) The main duty of the Youth Advocate should be the protection of rights and the provision of information about legal issues that might arise in relation to the FGC. In particular, the Youth Advocate should intervene if the offence is not made out, or if there is not enough evidence to support the admission which the young person proposes to make. Granted, the format and circumstances of the FGC require a more informal and less adversarial approach than a District Court jury trial, but the young person should not be any worse off than an adult client. Determining the best interests of the young person are is not the function of the Youth Advocate. This is the province of social and youth workers and the family of the young person.

\(^{1545}\) s 324(1), CYPF Act.

\(^{1546}\) See *Preface to the Rules of conduct and client care for lawyers* ‘Whatever legal services your lawyer is providing, he or she must...protect and promote your interests and act for you free from compromising influences or loyalties’, also Rule 5 ‘a lawyer must be independent and free from compromising influences or loyalties when providing services to his or her client’, Rule 5.2 ‘The professional judgment of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client’, Rule 5.3 ‘A lawyer must at all times exercise independent professional judgment on a client’s behalf. A lawyer must give objective advice to the client based on the lawyer’s understanding of the law’.

\(^{1547}\) See Chapter 3 (III).
C. Recommendations: The Right to Legal Assistance

1. That there be a legislative requirement that the young person is informed of, and reasonable steps taken to ensure that the young person understands, the right to legal assistance in the FGC process,

Suggested change to the legislation: 1548

'(i) the youth justice co-ordinator must inform the young person that he or she is entitled to have a Youth Advocate or other barrister or solicitor present at the family group conference

(ii) The youth justice co-ordinator must take reasonable steps to ensure that the young person understands this entitlement.'

2. That the state-funded Youth Advocate scheme is extended to cover the ITC FGC. This would be a policy decision, and would probably require that the youth justice co-ordinator applies to the Registrar to appoint a Youth Advocate in the ITC FGC,

3. That a statement is included in the advice letter relating to the youth justice FGC e.g. ‘The FGC is a process that involves admitting and receiving a sanction for a criminal offence. Therefore it is important that you understand your rights and responsibilities. If you have attended Court a Youth Advocate will have been appointed for you. You can have this Youth Advocate attend the FGC if you wish. This is free of charge. Please contact the youth justice co-ordinator if you wish the Youth Advocate to attend', 1549

4. Youth Advocates should give the same standard of legal advice and representation as they would to an adult client. This is a matter of adhering to the professional standards and should be part of the training for Youth Advocates.

III. ESTABLISHING THE OFFENCE

Chapters 10 and 11 of this thesis critiqued how the offence is established in the FGC process. As the process is different in the two types of FGC under discussion, these will be considered separately.

1548 The most appropriation section for the insertion of this new provision would probably be s 250 – Consultation on convening of family group conference.

1549 See Part (V) of this chapter.
A. The Court-Referred FGC

As discussed, an unusual and unique means of establishing the offence arises under the CYPF Act. Instead of the conventional plea of guilty or not guilty, the terms 'denied' or 'not denied' are used. Chapter 10 linked the origin of these concepts to the criminological theory of labelling; a desire to avoid stigmatising terms.\(^{1550}\)

Unfortunately, specific figures on the rate of 'not denied' in the Youth Court are not collected,\(^\text{1551}\) but it is possible to extrapolate from the existing figures, that almost all young people do not deny offences. In these cases, the offence is then established by the young person admitting the offence at the FGC. This thesis has criticised the concepts of 'not denied' and 'admitted' as being vague and imprecise. Even at judicial level, there is confusion as to whether these concepts equate to an acknowledgment of legal and factual guilt.\(^\text{1552}\) While it is important that the young person is legally guilty when the matter is disposed of through an FGC plan, it is even more important when the admission is used to support conviction and transfer to the adult criminal justice system or the taking of a blood sample. At present, the process is convoluted: the young person answers 'not denied', then referred to the FGC, where he or she must 'admit' the offence. Two options to address the problems of the present system will be canvassed here. One would involve abolishing the 'not denied' concept altogether, the other involves clarifying the present scheme. No objections are raised to the converse situation, that is when the young person indicates that the charge is denied, and the matter is put down for a defended hearing.

Firstly, at present, to equate to an acknowledgment of legal guilt, the young person answers 'not denied' at the initial Youth Court hearing (apparently regarded as an acknowledgment of being responsible or factual guilt), must 'admit' the offence at the FGC (apparently analogous with acknowledgement of legal guilt including the necessary mental state) and then the admission made at the FGC is nominally approved by the Youth Court Judge at the reporting back stage, by means of the notation 'Proved by Admission at the Family Group Conference' on the information. It seems under the current system that the Youth Court Judge must accept the admission made at the FGC before accepting the plan. This seems unnecessarily complicated, and has caused judicial confusion.

\(^{1550}\) See also Chapter 2(III)(B) on the previous statutory regime.

\(^{1551}\) Personal communication from the Ministry of Justice, October 2008.

\(^{1552}\) See Chapter 10.
The present system, with its language of 'admit the offence' rather than 'guilty' would seem to be influenced by the criminological theory of labelling. This theory was in vogue during the time the CYPF legislation was being developed. At that time, young people were being dealt with through slightly modified versions of the District Court. There were valid concerns that young people would be tainted by association with the terms and format of the adult criminal justice system. However, the Youth Court has carved out a distinct path separate from the adult criminal justice system, staffed by specially selected and trained judges, aided by specially selected and trained lawyers, and generally considered to be a model of best practice for youth courts. It is submitted that the practice of the Youth Court is not stigmatising in nature, and if the sum total of 'not denied' plus 'admit the offence' plus 'proved by admission at family group conference' equals a plea of 'guilty', then it is 'six of one, and half dozen of the other'. Further, at the time the CYPF Act was drafted, practice under the welfare based Children and Young Person's Act was categorised by high rates of guilty pleas in the Children and Young Persons Court. It is arguable that the framers of the CYPF Act wished to remedy this high guilty plea rate by moving the acceptance of responsibility to a different and more supportive forum — the FGC, where discussion of the circumstances of the offence could take place before the young person committed to accepting responsibility for the offence. However, in the FGCs observed during this research, the 'admit the offence' phase was always carried out first (indeed the legislation seems to require this), and thus became a formality, like the much maligned court based guilty plea of former times.

It would be considerably simpler if the 'not denied' plus 'admit at FGC' could be combined into a normal guilty plea at this first Youth Court hearing, thus avoiding the convoluted process of 'not denied' and 'admit the offence'. There is a strong argument that a formal guilty plea should be taken when there is the possibility of a court ordered sentence such as a supervision with residence order. It is arguable that all court referred FGCs result in a court order, especially in relation to the risk of conviction and transfer to the District Court. It seems that under the present system, this is possible without a proper acknowledgement of legal and factual guilt. It would be better to have a clear understanding of a guilty plea rather than this undefined admitted/not denied concept. There are some considerable advantages to this approach. If the young person pleads guilty before the FGC, the Youth Court Judge then has the responsibility of ensuring that there is sufficient evidence to support the plea. It is unclear under the present scheme whether the Youth Court Judge has responsibility for ensuring that the evidence supports the admission — although this would be the orthodox view of the judge's responsibility in the criminal trial process. It was noted earlier that the framers
of the CYPF Act probably intended that the FGC process would provide a more supportive environment for the young person to raise objections to the charge rather than the Youth Court. If the legislation was changed to require a guilty plea before the FGC is convened, there could still be a ‘safety valve’ of allowing the young person to change their plea if further information emerged at the FGC. Discussion about the circumstances of the offending would still be best practice at the FGC. The model of entering a formal plea of guilty before referral to a FGC is that which is used in other jurisdictions which utilise conferencing.1553

Secondly, if the ‘not denied’ model is retained, clearer information should be given to young people and their families about the process, especially that admitting the offence is taking legal responsibility for the offence. As discussed in Chapter 9, observation of the FGC process indicates that practice is to seek the young person’s agreement with the summary of facts, rather than an admission of the offence in the legal sense of the word (i.e. accepting responsibility for the actus reus with the necessary mens rea). At the present time, as set out above, the system is overly complicated even for lawyers and judges, not to mind young people and their families. Again, legal assistance is important at this stage. The Youth Advocate should ensure that the elements of the offence are made out, no defences arise from the facts, and assist the young person in understanding that accepting both legal and factual guilt is involved. Further, when the FGC record is returned to the Youth Court, the Judge should ensure that there is sufficient evidence to support the admission.

B. The ITC FGC

The ITC FGC raises further questions. In the court-referred FGC, the admission is at least nominally subject to scrutiny by the Youth Court Judge when the FGC plan is referred back to the Youth Court. However, the ITC FGC takes place completely outside the court system. There is thus no independent oversight of the admission made by the young person. As the ITC FGC involves a police referral, the police are essentially in control at all stages of the process. The police apprehend and question the young person, refer the young person to the FGC, are present at the FGC when the young person is required to decide whether to admit the offence, and then are required to agree to the FGC plan or decision before it becomes binding. The young person is thus subject to implicit pressure by the police to admit the offence, as in the case of police questioning in custody. However, there is a marked contrast between the regime of protection for the rights of young people in police custody versus the ITC FGC. While being questioned in police custody, the young person has a right to legal

1553 E.g. under the Young Offenders Act 1993 (South Australia).
assistance, the right to a presence of a nominated adult, and these rights must be explained to the young person and his or her nominated adult.\textsuperscript{1554} In the ITC FGC, there are no such requirements or rights, despite the fact that in the ITC FGC, not only are admissions involved, but also the possibility of a sanction.

Granted, such concerns are always present in diversion schemes, where there will be implicit pressure on the young person to admit the offence and receive a diversion rather than have the matter proceed to court. Some of the arguments for diversion were set out in Chapter 2 including that diversion avoids delay, avoids the formal criminal justice system and promotes positive outcomes for young people. Unfortunately, favouring diversion appears to have polarised practice and policy in New Zealand to the point that it is ‘diversion good – court bad’, and it is considered in the interest of the young person to admit the offence. While well operated diversion schemes undoubtedly have benefits for young people, it is not in the interests of young people, or victims or society at large, for the young person to admit to something for which he or she is not responsible. Further, although the Youth Aid section of the New Zealand Police is rightly recognised as progressive, well trained and responsive to young people, in schemes like the ITC FGC, there are always dangers in having police control of the process without proper safeguards to ensure that admissions are reliable. Deficiencies in investigatory practice, and supporting evidence may go unchecked.

What safeguards, then, could be introduced to ensure reliable admissions? Again, as discussed above, the provision of legal assistance in the ITC FGC would be a valuable safeguard to ensure reliable admissions. The presence of a lawyer at the FGC could be a check on ensuring that the proposed admission is supported by sufficient evidence. Further, it should be made clear to the young person that he or she is accepting liability for a criminal offence, and that there will not be any detriment if the young person chooses to deny the offence and proceed to the court system.\textsuperscript{1555} Consideration could also be given to having an independent review mechanism for the evidence supporting admissions made during the ITC FGC.

\textsuperscript{1554} See the discussion at Part (II) above in relation to the right to legal assistance

\textsuperscript{1555} Cf the duty on the conference convenor under the New South Wales legislation to explain the young person’s right to elect to have the matter dealt with by a court if the young person does not wish to proceed: s 45(3)(g), Young Offenders Act 1997.
C. Recommendations:

1. That there be a change in legislation requiring a guilty plea in the Youth Court before the matter is referred to the FGC. The present section 246 reads:

   (a) If, after consulting with the barrister or solicitor representing the young person or with a Youth Advocate, the young person denies the charge, then the charge shall be dealt with in accordance with sections 273 to 276 of this Act:

   (b) In any other case the Court shall not enter a plea to the charge but shall—

   (i) Direct a Youth Justice Co-ordinator to convene a family group conference in relation to the matter; and

   (ii) Adjourn the proceedings until that family group conference had been held.

The terminology could be changed from ‘denies’ to ‘not guilty’ in (a), and (b) could be changed to read ‘if the young person pleads guilty to the charge’. If this was done it would vitiate the need for s 259 which requires the FGC to ascertain whether the young person admits the offence, although it would still apply to the ITC FGC.

2. Whether or not the legislation is revised to abolish the ‘not denied’ concept, the exact meaning of ‘not denied’ and ‘admit the offence’ should be clarified, perhaps through a Youth Court Practice Note,

3. The safeguards for the young person in the ITC FGC should be reviewed, with reference to the section 215 safeguards for young people being questioned in police custody.

IV. OUTCOMES OF THE FGC

This thesis considered three major issues in relation to the outcomes of the youth justice FGC, including the nature of FGC outcomes, the limits on sanctions, and the underlying objectives of FGC outcomes. Recommendations on these three issues will be considered in turn.

A. The Nature of the FGC Process

Chapter 7 of the thesis examined the theoretical foundations of the FGC model. On a theoretical level, contentions of coerciveness or unfairness are often countered with the assertion that the FGC process is voluntary or a private family matter. It is important to note that the FGC is a process which is involved in deciding on sanctions in respect of a criminal

1556 If this was done it would vitiate the need for s 259 which requires the FGC to ascertain whether the young person admits the offence, although it would still apply to the ITC FGC.
offence. Although the participation of the young person and their family is seen as necessary and desirable, entry to and exit from the process is tightly controlled by the State. Importantly, non-adherence to the decisions made by the FGC may have serious consequences for the young person, including the imposition of s 283 orders.

However, the informal nature of the FGC process means that young people and their families can misunderstand the nature of the process. This is a side-effect of the fact that the FGC process is operated by Child, Youth and Family rather than through the courts system. Young people and their families are likely to know Child, Youth and Family as a social agency concerned with care and protection rather than criminal proceedings. In a wider context, there is a strong argument for the separation of offending from care and protection proceedings, through separate legislation, though this would necessitate the establishment of a new agency to facilitate youth justice FGCs. A full consideration of this topic would be outside the scope of this research. For the purposes of this research, it is recommended that it is made clear to young people and their families that the result of a youth justice FGC, although designed to promote re-integration, is a criminal sanction, designed to resolve a breach of the criminal law, breach of which can result in more serious action including court orders or in some cases conviction and transfer to the District Court. A draft information statement is included later in this chapter.

B. Limits on Sanctions
Chapter 12 of this thesis considered the issue of limits on the sanctions resulting from the youth justice FGC. In essence, it is apparent that the FGC has significant powers but few limits. Court-referred FGC plans are nominally approved by the Youth Court Judge, but there is no independent oversight of the ITC FGC.

The first criticism that was made was the lack of an upper limit for FGC sanctions. Consideration be given to making an explicit upper limit on FGC sanctions in the CYPF Act. This should at least be the limit on sanctions the Youth Court is permitted to order. The FGC should not be permitted to recommend or decide on amounts of community hours or fines which are in excess of those which can be ordered by the Youth Court.\textsuperscript{1557} For instance, in the South Australian legislation, there is a limit (albeit a significant amount of hours – 300) on the amount of community service hours the family conference can require the young person to

\textsuperscript{1557} s 298(1), CYPF Act.
complete.\textsuperscript{1558} The family conference ‘must have regard to’ sentences imposed by the Court in comparable cases.\textsuperscript{1559} Similarly, the New South Wales legislation requires that sanctions contained in conference plans are ‘not more severe than those that might have been imposed in court proceedings for the offence concerned’.\textsuperscript{1560} A change to the legislation could be simply done. The most relevant statutory provision is section 260(3)(d), which currently states that the FGC can ‘recommend appropriate penalties that might be imposed on the young person’. The phrase ‘penalties may not exceed those that can be imposed by the Youth Court’ could easily be added here. At the least, the FGC should not be able to decide on a sanction in excess of that which could be imposed by the Youth Court (currently 20-200 hours community work),\textsuperscript{1561} although the Youth Court can impose the same level of fines as the District Court.\textsuperscript{1562} Consideration should be given to imposing a definite limit on the sanctions which an ITC FGC can decide on, as there is no judicial or independent oversight of this type of FGC.

The second issue is the potential for disparity between similarly situated offenders. At present, there are no formal mechanisms for ensuring a basic level of equality and consistency between similarly situated offenders. This research recommends that consideration be given to the introduction of broad guidelines as to range of sanctions, to encourage a basic level of consistency and equality. When sanctions are decided upon by individual groupings of people, subject only to the (fairly vague) principles of the CYPF Act, there are bound to be differences between similar offences and offenders.

Further, the current practice is that the police officer is the person who ensures the ‘public interest’ is taken into account at the FGC, especially when the victim is not present. In practice, this means this depends heavily on what the particular police officer believes the public interest is in the particular circumstance. Police officers will obviously vary in personality and outlook. Criticisms were also made in this research about the role of the police officer in the process.\textsuperscript{1563} It was recommended that consideration should be given as to

\begin{footnotesize}
\textsuperscript{1558} s 12(1)(c), Young Offenders Act 1993.
\textsuperscript{1559} s 12(2), Young Offenders Act 1993.
\textsuperscript{1560} s 52(6)(a), Young Offenders Act 1997.
\textsuperscript{1561} s 298, CYPF Act.
\textsuperscript{1562} s 283(d), CYPF Act.
\textsuperscript{1563} See Chapter 12.
\end{footnotesize}
whether it is appropriate for a police officer to be involved in deciding what sanction the young person should receive. On principle, the police officer’s role should be limited to informative only. The idea of a set of guidelines as to what level of sanction is appropriate for the particular type of offence would minimise the potential for large discrepancies based on the make up of the particular FGC or views of the particular victim or police officer.

How would such guidelines work? A possible model would be minimum and maximum amounts for typologies of offences. Offences committed by young people are generally quite predictable: assaults, burglaries, shoplifting and vandalism feature heavily. These minimum and maximum amounts could be based on ‘punishment units’1564 rather than number of community work hours or monetary figures. The FGC could then decide what type of outcome (e.g. where or what form the community service could take, or to what charity a donation could be made). There would still be room within this maximum/minimum for variation based on the circumstances, but at least a basic level of equality and consistency could be introduced so as to avoid ‘justice by geography’. These guidelines should apply only to sanctions such as community work, reparation or payment to/work for the victim. It is difficult, if not impossible to quantify outcomes such as personal apologies and letters of apology. Introduction of these guidelines would probably be better served by a Practice Note from the courts or a policy decision rather than legislative change.

C. The Policy Imperatives Underlying the FGC

The objectives underlying FGC outcomes were also considered. From an examination of the context of the legislation, it is apparent that the principles underlying sanctions under the CYPF Act have evolved since the enactment of the legislation. It is arguable that the framers of the CYPF Act were concerned with the excesses of the welfarist approach to youth justice, and intended to ensure that young people’s due process rights were protected, and that the criminal justice system was not permitted to intervene on welfare grounds. Since the inception of the CYPF Act, there has been a ‘discovery’ that the legislation is based on restorative justice principles, to the point that the FGC is almost synonymous with restorative justice. While it is arguable that the restorative justice model has some advantages for the rights of the young person, for example, an emphasis on community based sanctions and the opportunity for meaningful participation, it is doubtful that the victim-centred nature of the full restorative model is appropriate for the youth justice system, which should be centred on the young

person. Further, it is also debatable whether the full restorative model, with its emphasis on remorse is appropriate for young people who often lack emotional maturity. More generally, there are considerable doubts about the value of the FGC process if the victim of the offence is not present (as is the case in about half of FGCs). What is the value of the FGC if the victim is not present? Is it worth putting resources into such a process to have what essentially becomes a private decision making process between the young person, their family and the police or Youth Court? Family empowerment is a valid aim, but consideration should be given to whether this could be achieved in other ways (e.g. through encouraging greater family participation in the Youth Court), if the victim does not wish to participate. This is certainly a subject worthy of further investigation.

Finally, there should be caution in relation to the practice of the FGC containing measures to address the welfare needs of the young person. While it is arguable that the FGC plan could contain measures which would address the cause of the offending (like an alcohol education programme, for instance) FGC plans should not address purely welfare issues like place of residence and educational issues. If the young person’s situation is serious enough to warrant a care and protection intervention, there is a clear process in the CYPF Act to facilitate this. No change to legislative provisions are needed as the CYPF Act already states that criminal proceedings should not be used to intervene for care and protection reasons.

D. Outcomes of the FGC: Recommendations

1. That there be more information given to young people and their families about the nature of the FGC process and outcomes,

2. That there be an upper limit on the sanctions which result from the FGC i.e. that no more than the Youth Court can impose in the case of community work, and a definite figure in the case of the ITC FGC,

Suggested wording:

s 260 Family group conference may make decisions and recommendations and formulate plans

(1) Subject to section 259(2) of this Act, a family group conference convened under this Part of this Act may make such decisions and recommendations and

1565 See Chapter 13(IV).
formulate such plans as it considers necessary or desirable in relation to the child or young person in respect of whom the conference was convened.

(2) Except as provided in section 258(a)(ii) of this Act, in making such decisions and recommendations and formulating such plans, the conference shall have regard to the principles set out in section 208 of this Act.

(3) Delete: [Without limiting the generality of subsection (1) of this section, a family group conference may—]

(a) Recommend that any proceedings commenced against the child or young person for any offence should proceed or be discontinued:

(b) Recommend that a formal Police caution should be given to the child or young person:

(c) Recommend that an application for a declaration under section 67 of this Act should be made in respect of the child:

(d) Recommend appropriate penalties that might be imposed on the young person, subject to (4)

(e) Recommend that the child or young person make reparation to any victim of the offence, subject to (4)

(4) A family group conference held under s 258(b) cannot recommend penalties in excess of 20 hours community work or $500 reparation

3. That guidelines be developed for FGC outcomes to promote consistency and equality,

4. That consideration be given to the role of the police officer in the FGC process,

5. A review of the value of ‘victimless’ FGCs.

V. THE FGC CHECKLIST

In summary, it would be a good idea if each young person referred for a youth justice FGC received a clear written statement about their rights. Best practice is for youth justice co-
ordinators to spend considerable time preparing participants in advance of the FGC.\textsuperscript{1566} Considerable time and resources are expended encouraging family members to attend and participate at the FGC (and rightly so). At least some of this effort should go into ensuring that young people understand their rights in the process.

Again, parallels may be drawn with the scheme for ensuring that young people are aware of, and understand, their rights during police questioning and investigation. There is a strong argument that similar principles should apply to the young person in the FGC. The young person is in a situation where he or she is on the ‘back foot’, in a room with powerful adults (such as the police, social workers etc). Yes, the family of the young person is present, but the machinations of the CYPF Act are complicated, the family is not in a position of power, and many families will have had negative experiences with Child, Youth and Family in the past. The principal issue is that the family of the young person cannot choose to have nothing happen to the young person and so is automatically in a position to be reluctant to stand up to authority figures. Young people are in a similar state of vulnerability as in police questioning, being asked to admit liability for a criminal offence and being censured for this offence; should not the same arguments for a clear statement of rights, and ensuring explanations apply?

The Child, Youth and Family brochure entitled \textit{Youth Justice: Family Group Conferences},\textsuperscript{1567} contains valuable information about the FGC process, including typical FGC procedure and outcomes. However, the brochure does not give any advice about legal rights.

\textbf{The FGC Checklist- Essential Points}

1. The FGC is a process which involves admitting liability for a criminal offence, and receiving a sanction in respect of a criminal offence. It is important that you understand your rights and responsibilities,

2. The FGC is not compulsory,

3. You must admit the offence before the FGC proceeds. This means that you accept that you committed the physical act (e.g. taking goods from a shop) and the legal responsibility (that you meant to take them permanently),


4. At this stage, if you do not want to admit the offence, the matter will go back to the Youth Court. There will not be any adverse consequences if you don’t want to admit the offence.

5. Legal advice: You are allowed to have a Youth Advocate to advise you during the FGC. A Youth Advocate is a special lawyer for young people. If you have already been to Court you will have been allocated a Youth Advocate. If you want, you can have your Youth Advocate present at the FGC. This is free of charge.

6. Outcomes of the FGC: A plan will be drawn up which is presented to the Youth Court (or the police). If you don’t agree with the plan, you can opt out and the case will go back to the Youth Court or to the police. Nothing worse will happen if you don’t want to agree. However, the plan is legally binding and if you don’t complete what you agreed to, you could end up going back to the Youth Court, and the Youth Court might impose a formal order on you.

The above proposal would be in the form of information explaining legal rights which would be provided to the young person. In the alternative, consideration could be given to conferring a legal duty on the referring agency (i.e. the police or the Youth Court Judge), or indeed the youth justice co-ordinator, to explain the relevant rights. For example, under the New South Wales youth justice legislation, the referring entity (in this case a specialist youth justice police officer) has a statutory duty to explain matters to the young person such as ‘that the child is entitled to obtain legal advice and where that advice may be obtained’ \(^ {1568} \) and ‘what a conference is and the effect of the conference’. \(^ {1569} \) These explanations must take place, if practicable, in the presence of a nominated adult or legal advisor. \(^ {1570} \) Again, comparison can be made with sections 10 and 11 of the CYPF Act which place a legislative duty on the Youth Court or Family Court, and the counsel representing the young person, to inform and ensure the young person’s understanding. There is a strong argument that these provisions should be extended to the FGC also.

Suggested wording of new legislative section:

*Duty of youth justice co-ordinator to explain proceedings*

\(^ {1568} \) s 39(1)(b), Young Offenders Act 1997.

\(^ {1569} \) s 39(1)(d), Young Offenders Act 1997.

\(^ {1570} \) s 39(2), Young Offenders Act 1997.
(1) Where, in any family group conference convened under Part IV of this Act child or young person, or any parent or guardian or other person having the care of a child or young person, is referred for a family group conference, the youth justice co-ordinator shall:

(a) Explain in a manner and in language that can be understood by the child or young person or other person the nature of the process

(b) Satisfy himself or herself that the child or young person or other person understands the proceedings; and

(c) Where the FGC makes any decision, recommendation or plan explain to the child or young person to whom the decision, recommendation or plan relates and to any parent or guardian or other person having the care of the child or young person, in a manner and in language that can be understood by that child or young person or other person,—

(i) The nature and requirements of the decision, recommendation or plan,

(ii) Any provisions for variation of the decision, recommendation or plan.

VI. THE WIDER LEGISLATIVE CONTEXT

The preceding sections have drawn together the strands of recommendations relating specifically to the youth justice FGC. It seems appropriate at this juncture to make some comment on the broader context of the youth justice legislation, especially as review and reform of the CYPF legislation is ongoing at time of writing, and a new government has just been elected. While there are no proposed reforms which would directly affect the youth justice FGC, it is necessary (and also for completeness of this research) to briefly consider the future directions of the youth justice legislation. This thesis will conclude by proposing an amendment to the legislative principles guiding youth justice.

A. The Future Direction of the CYPF Act

The CYPF Act, although innovative and unique at the time of drafting, is now almost twenty years old and ripe for reform. In April 2007, a discussion document on reform of the CYPF Act was published.\textsuperscript{1571} Stakeholder and public submissions were called for and a summary of

the submissions was published in December 2007. This process has already resulted in draft legislation, and there is likely to be additional reform in the coming years. There are some constructive aspects for young people's rights. For example, the proposed legislation would include seventeen year olds within the ambit of the youth justice system. This would be a very positive development. Not only would this mean that New Zealand would be in compliance with the CRC, it would also bring the youth justice system in line with other legal age limits like the voting age and the age at which alcohol may be purchased. There are other reform proposals not yet translated in legislation. One positive proposal would be the strengthening the right to participation. Some Australian jurisdictions have taken a more prescriptive approach to participation in their legislation.

As to the policy imperatives underpinning youth justice, New Zealand is unusual amongst similar western jurisdictions in resisting 'get tough' policies for youth justice. His may change as the political landscape alters. 2008 was an election year, and youth crime and justice has emerged as a principal election issue. As Pitts argues:

'Youth crime', the political issue, is characteristically mobilised by opposition parties during elections to highlight the social disintegration and moral decay fostered by the government's complacency and inaction, or its middle-headed policies which reward moral turpitude and discourage moral continence among the young. Incumbent governments usually turn to 'youth crime' when the economy is faltering and they need to deflect attention to an alternative arena in which they can mount dramatic, but inexpensive, demonstration of their political grit.

As noted earlier, a Bill which would have lowered the age of criminal responsibility and made it easier for young people to be prosecuted as adults was defeated in Parliament.

1573 CYPF Amendment Bill (No 6).
1579 Young Offenders (Serious Crimes) Bill.
There is pressure however to increase the powers of the Youth Court to deal with serious offending.\textsuperscript{1580} At present, the highest tariff order in the Youth Court is three months in duration.\textsuperscript{1581} Youth justice professionals have argued that the current orders are not long enough to help young people address issues with alcohol, drugs and behavioural disorders.\textsuperscript{1582} It is important that young people receive support, but a balance must be struck with avoiding the negative effects of custody. Better use could be made of non-custodial orders, such as supervision with activity. At the time of writing, the majority of party policy documents indicate a preference for increasing the ambit and severity of youth justice powers. For example, the National Party (newly elected to government at the time of writing) would ‘create a tough new range of sentencing options for dealing with the hardcore group of young criminals’ and introduce longer residential sentences for young offenders.\textsuperscript{1583} Only time will tell how this policy will translate into action.

B. Promoting Rights-Based Youth Justice
Specific changes to legislation and policy have been recommended earlier in this chapter. The discussion will move now to the wider context of the legislation, particularly the principles guiding youth justice.

Section 208 of the CYPF Act provides for certain principles which guide youth justice proceedings. These were discussed in detail earlier in this thesis, and include a requirement that measures have ‘due regard to the interests of victims’\textsuperscript{1584} and 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’.\textsuperscript{1585} Section 208(h) states the principle that ‘the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person’. However, there is no

\textsuperscript{1581} s 290, CYPF Act.
\textsuperscript{1584} s 208(g), CYPF Act.
\textsuperscript{1585} s 208(a), CYPF Act.
mention of the rights of the young person during the disposal, diversion, prosecution, or trial on criminal matters. It is submitted that a statement emphasising the importance of the rights of young people at all stages of the youth justice system should be added to section 208.

Before considering the wording of the proposed principle, it is necessary to consider the value of such a principle. It is certainly arguable that guiding principles of this nature are vague and idealistic. However, it is worth considering again the issue of the rules governing the investigation of offences involving young people and the questioning in police custody. As noted, section 208(h) sets out the principle that special protection is required for young people in these situations. This guiding principle has had a significant effect on judicial interpretation and application of the statutory requirements for the rights of young people during police questioning. It is a simple principle but provides a context for the other legislative principles, and is regularly used to interpret other sections.1586

As to the wording of a new guiding principle, New Zealand could look to the legislation of other jurisdictions. For example, under the Canadian legislation, a principle guiding the Act is that:

\[(d) \text{ special considerations apply in respect of proceedings against young persons and, in particular,}
\]

\[(i) \text{ young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms.} 1587\]

Or indeed to look back, a statement of principle which was proposed during the legislative process of the CYPF Bill in the 1980s is still relevant more than twenty years later:

A child or young person suspected of offending should be accorded the same legal protections as an adult suspect, save in so far as that child or young person may need extra protection by reason of his or her age, maturity or level of understanding.1588

This statement refers only to children and young people ‘suspected’ of offending, but there is no reason why this could not be extended to all children and young people at all stages of the youth justice system.

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1587 s 3(d), Youth Criminal Justice Act 2002.

1588 Warren Young and Neil Cameron, Submissions on the Children and Young Persons Bill: Submission to the Parliamentary Select Committee on Social Services (Submission number SS/89/108/89), para 3.1.
Suggested wording of a new guiding principle:

*a child or young person dealt with under Part IV of this Act should be accorded the same legal protections as an adult in the criminal justice system, save in so far as that child or young person may need extra protection by reason of his or her age, maturity or level of understanding.*

In conclusion, amendment of the guiding principles in section 208 of the CYPF Act such as that just proposed, would provide an interpretative tool for the legislative provisions, and a statement of principle to guide policy and practice
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THESIS

Information sheet for parents/caregivers – research into family group conferences

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate I thank you. If you decide not to take part there will be no disadvantage to you of any kind and I thank you for considering my request.

What is the Aim of the Project?

This project is part of research required for a doctorate in Law at the University of Otago. It is going to look at whether young people’s rights are properly protected in the family group conference and whether any improvements could be made in the law or in procedure to improve the process for young people.

What Type of Participants are being sought?

I am looking for families that will allow me to sit in and observe their family group conference. I would also like to talk to the young person on their own afterwards to get their views.

What will Participants be Asked to Do?

Should you agree to take part in this project, you will be asked to:

Give your permission for me to sit in on your family’s conference. I don’t need to be present during the family discussion time and I won’t be contributing to the discussion in any way.

Afterwards, if the young person agrees, I would like to talk to them on their own to get their views on what took place at the conference.

There are no known risks in participating in this project.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

Can Participants Change their Mind and Withdraw from the Project?

You can change your mind at any time without any disadvantage to your family.

What Data or Information will be Collected and What Use will be Made of it?
The project will involve collecting information on whether the young person’s legal rights are protected during the conference, the level of participation by the young person and the plan agreed to by the conference. The names or any other personal details of the participants or any other identifying details of the incident involved will not be recorded.

If the young person is willing, he/she will have the opportunity to give his/her views on the conference in an interview with the researcher. The precise nature of the questions asked is not set out in advance but will depend on the way the interview develops. Although the Human Ethics Committee is aware of the general areas to be explored in the interview, it cannot review in advance the precise questions to be asked. In the event that the line of questioning does develop in a way that the young person is not happy with, they have the right not to answer the question or to withdraw from the interview without disadvantage of any kind.

The results of the project may be published and will be available in the library but every attempt will be made to preserve anonymity.

You are most welcome to request a copy of the results of the project should you wish.

The data collected will be securely stored in such a way that only those mentioned above will be able to gain access to it. At the end of the project any personal information will be destroyed immediately except that, as required by the University's research policy, any raw data on which the results of the project depend will be retained in secure storage for five years, after which it will be destroyed.

What if Participants have any Questions?

If you have any questions about the project, either now or in the future, please feel free to contact either:-

Nessa Lynch
Faculty of Law
University Telephone Number: 03 479 8799

or

Mark Henaghan/Geoff Hall (supervisors)
Faculty of Law
University Telephone Number: 03 479 8857

This project has been reviewed and approved by the University of Otago Human Ethics Committee
Information Sheet for Young People- Research into Family Group Conferences

I am writing a report for my university studies. Some of the report is going to be about what young people's views are on how they were treated at the conference and whether they feel involved in the decision. This report may help to improve the way young people are treated in the future.

Your participation in this is totally voluntary, which means you don't have to take part if you don't want to. Nothing will happen if you decide you don't want to be involved.

I would like to sit in on your family group conference if that's alright with you and your family. I'd also like to talk to you on your own afterwards to get your views. I'll be writing up a report on this, it will be read by my University supervisors and it will be in the library afterwards but I won't use your name or any details that might identify you. I won't share anything you tell me with the youth justice co-ordinator, the police officer or your parents.

If you change your mind at any stage, I can stop the interview or leave the conference. Your parents might give me permission but if you don't want to talk to me that's fine. You can ask any questions you like and you can have a copy of the report when it is finished. You can contact me at any stage afterwards if you have any concerns.

Nessa Lynch
Faculty of Law, University of Otago
Office Phone: 03 479 8799
Questionnaire for Youth Advocates

1. Attendance at the FGC

*When you are appointed to represent a young person do you attend the FGC?*

<table>
<thead>
<tr>
<th>Option</th>
<th>Ticks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td></td>
</tr>
<tr>
<td>If the young person requests</td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td></td>
</tr>
</tbody>
</table>

*Reasons why you do attend the FGC – please tick those that apply*

<table>
<thead>
<tr>
<th>Reason</th>
<th>Ticks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part of the youth advocate role</td>
<td></td>
</tr>
<tr>
<td>Young person requests</td>
<td></td>
</tr>
<tr>
<td>Family requests</td>
<td></td>
</tr>
<tr>
<td>Offence is a serious one</td>
<td></td>
</tr>
<tr>
<td>Legal issues present</td>
<td></td>
</tr>
<tr>
<td>Other (please specify)</td>
<td></td>
</tr>
</tbody>
</table>

*Reasons why you do not attend FGCs – please tick those that apply*

<table>
<thead>
<tr>
<th>Reason</th>
<th>Ticks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remuneration too low</td>
<td></td>
</tr>
<tr>
<td>Services not needed</td>
<td></td>
</tr>
<tr>
<td>Young person did not ask you</td>
<td></td>
</tr>
<tr>
<td>Time was inconvenient</td>
<td></td>
</tr>
<tr>
<td>Pressure of other work</td>
<td></td>
</tr>
<tr>
<td>Matter was clear cut</td>
<td></td>
</tr>
<tr>
<td>Not part of the youth advocate role</td>
<td></td>
</tr>
<tr>
<td>Other (please specify)</td>
<td></td>
</tr>
</tbody>
</table>

2. Intention to Charge FGC

*Do you ever attend Intention to Charge FGCs?*

__________________________________________
The youth advocate scheme should be extended to cover the Intention to Charge FGC?

Agree ___  Disagree ___

3. Role of Youth Advocate in relation to the FGC

Listed are a number of possible roles for the youth advocate in the FGC itself. Please rate importance on a scale of 1 (very important) 2 (important) 3 (not important)

Protect the young person’s rights
Provide information to the young person
Represent the young person
Ensure the victim gets reparation
Ensure the summary of facts is correct
Advise the family during family discussion time
Ensure the outcome is as lenient as possible
Ensure the outcome is realistic
Ensure outcome will be acceptable to the Judge
Ensure the young person speaks
Provide support for the young person
Speak up for the young person
Ensure the principles of the CYPFA are adhered to
Advocate for a solution that is in the yp’s best interest
Ensure that the plan provides for the yp’s needs
Ensure that the outcome is restorative
Suggest possible outcomes
Defend the young person

4. Are there any other comments you would like to make on the role of the youth advocate in the youth justice family group conference?