



**His Honour
Judge Peter Boshier**

Can We Protect Children?

Can We Protect Children and Protect Their Rights?

Letting Children and Youth Speak Out for Themselves.

Introduction

At the same time that the United Nations Convention on the Rights of the Child was adopted in 1989, New Zealand enacted the Children Young Persons and Their Families Act 1989.

The Act is a very large one, and covers care and protection of both children and young people, as well as prescribing how young people who commit offences are to be dealt with.

A feature of the Act, is the importance it places on the protection of children and young people, by securing their right to be heard and to be properly represented.

In this paper, I explore whether children and young people who are in need of care or protection because of abuse, neglect, or otherwise, are being properly heard and whether their protection as afforded by the Act is a useful model. I also consider briefly, the representation of young offenders.

The United Nations Convention

New Zealand ratified the United Nations Convention on the Rights of the Child in 1993.

The convention is now so well known, and accepted as being so important, that one hardly needs highlight its important articles. However I need to focus on articles 12 and 16, for these articles are directly relevant to the issue here. Article 12 requires parties to the convention to ensure that children who are capable of expressing views, be given the opportunity to do so, and that due weight must be afforded to those views. To give better effect to this, article 12(2) requires that in any judicial proceedings, children be given the opportunity to be heard through appropriate representation.

Also relevant to a child's protection, is article 16, which prevents arbitrary interference with a child's family life.

Many other articles in the convention represent a wonderful encapsulation of all of the sorts of things we should be doing for our children, but it is the particular protection aspects to which I have just referred, that I wish to confine myself to.

Getting the Balance Right

I imagine that in every country in the world, spirited debate occurs on when it is appropriate to take action in relation to children who are at risk. Paternalism favours intervention by the state; individualism favours emphasis, for what ever reason, on the right to be left alone.

Each philosophy has its own obvious dangers. Paternalism can see countries move unconscionably in interfering in family life and detaining children in circumstances which fail to acknowledge children's rights.

Conversely, individualism may see children neglected and abused with lack of avenue to have that redressed. It is the obtaining of the optimum position for children at any given time that provides us with such challenge.

The Children Young Persons and Their Families Act

The long title to the Act includes a statement that the legislation is enacted "to make a 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 where ever possible, by their own family, whanau, hapu, iwi or family group".

One of the hallmarks of this Act was its recognition of the indigenous peoples of New Zealand, the Maori, by importing many aspects of important Maori culture into the Act. The words whanau, hapu and iwi are expressions which reflect a child's family and/or tribal links. Those are critical in terms of this Act.

In its objects and principles, the Act reproduces article 14, but in addition to stating that a child's wishes should be heard, we are exhorted in section 5(e) to obtain the support of a child or young person "to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act".

I should indicate that "child" is defined in the Act as someone under the age of 14 and young person is defined as someone over the age of 14 but under the age of 17.

Inevitably, one of the objects of the Act is to "provide for the protection of children and young persons from harm, ill treatment, abuse, neglect and deprivation". (section 4(e)).

How is Intervention Undertaken?

In order to accommodate the competing consequences of paternalism / individualism, the Act decided to create a family group conference procedure so that those most connected with a child could meet and discuss issues before drastic action ensued.

Generally speaking, if a child is thought to be in need of care or protection, that fact would have been signalled by a social worker, police officer, school teacher or someone similar, who has noticed a problem.

In that event, a care and protection co-ordinator convenes a conference under section 20 of the Act and this is a lynch pin of the way in which the Act operates. It is impossible for a Court to make wide ranging orders affecting a child unless there has been a family group conference first called to discuss the issues of concern (see sections 70 and 72).

Issues discussed at a family group conference, and agreements reached, can be vital in affecting a child's destiny, and certainly, whether a Court further involves itself with a child may very much depend on what has been agreed at a family group conference.

Section 22 of the Act entitles those people who are important to a child, to attend the conference, such as the child's parents, wider relatives, social workers and so on. But importantly, the Act sets out that the child is entitled to attend their own conference, and to

participate in decision making, unless it is not in their interests, would be undesirable, or the child is just too young or disturbed to participate.

Of equal importance to this right of the child or young person to be present, to discuss their destiny, and be part of the decision making process, is the right of a barrister or solicitor representing them, or a lay-advocate, to also attend. In this respect, the Act requires that where any child or young person is the subject of proceedings, and is not represented, the Court **must** appoint a lawyer to represent them. The lawyer is paid for by the state.

Furthermore, the Court may also appoint a lay-advocate for the child who is **not** a lawyer, so that the advocate may “appear in support of the child or the young person in the proceedings and if the Courts thinks it desirable to do so, to do other things for the child as well.” A person appointed in this capacity must have “sufficient standing in the culture of the child or young person in respect of whom the appointment is made to enable that person to carry out functions correctly”. (see section 163). Again, fees for a lay-advocate are paid for by the state (section 165).

It can be seen that if these provisions are used to their full, a child in respect of whom it is said there is the need for intervention on care or protection grounds can speak strongly to that proposition and do so with the support of a lawyer and a lay advocate.

The function of a family group conference is to decide whether the young person is in need of care or protection. If the conference cannot agree, the matter is referred to the Family Court for decision. However if the conference reaches agreement on what is needed for a child or young person, the New Zealand Department of Child Youth and Family must carry out the wishes of the conference to the best of its ability by providing resources required. (section 34).

That this part of the procedure is important is reflected in section 73 of the Act which says that a Family Court cannot make a declaration that a child or young person is in need of care or protection unless it is satisfied “that it is not practicable or appropriate to provide care or protection by any other means, including implementation of decisions reached at family group conferences”.

By allowing and promoting the ability of children and young persons to participate in issues affecting them at this family group conference stage, the state may not be able to further intervene beyond the wish of the family group conference to do so. Certainly a Family Court is duty bound to only interfere in a child or that child's family's life if a Court is satisfied on the balance of probabilities that further intervention is required in the interests of that child.

The Family Group Conference procedure may however be a most empowering mechanism for children and young people who find themselves in a dysfunctional home and who need intervention in some fashion. It is easy to say, in a climate where State resources are stretched, that a threshold for intervention should be pitched at a high level. To adopt such an approach may lead to a failure to adequately care or protect the child concerned.

For this reason, the Family Group Conference is an important means for mature children and young people to have an avenue through which to seek help, and to articulate the reasons for it.

Shortcomings in Representation

A shortcoming in the Act however is that all important legal representation for children at conferences is only available once proceedings have been filed in Court. Accordingly, conferences called to consider care or protection issues **before** Court action is initiated, will not have State funded lawyers attending and representing children.

I believe this is regrettable and, in view of the importance of the Family Group Conference procedure and our acceptance through the United Nations Covenant that children should be properly represented, all pre-Court conferences should include lawyers appointed for those children.

Care Agreements

From time to time, parents may experience short term difficulties in caring for their children for a variety of reasons. Instead of pursuing formal enquiry by a social worker and the family group conference procedure, it is possible for the parents of a child and the social worker to

enter into an agreement so that care of the child is passed to someone else and overseen by the state, for a period of time (section 139).

Yet again, however the Act requires that in respect of children who are over the age of 12 years, and/also young people, no agreement can be entered into without the written consent of the child or young person. Furthermore, before any such agreement is entered into, the wishes of children affected by such agreements must be obtained (section 144(3)).

It may well be appropriate for counsel for children or lay-advocates to be appointed where agreements are proposed in order to ensure that children's rights and wishes are correctly addressed. However as it stands at present, the Act does not appear to permit this safeguard unless proceedings are actually issued in a Family Court. In this respect, the Act may be unwise in restricting representation.

Participating in the Court Process

A justifiable criticism levelled at Courts from time to time, is that procedure is undertaken in relation to Court users which does not always accommodate the wishes and needs of them to participate. Cases concerning children illustrate the point. Many of our hearings concerning children and young people take place in the absence of them.

The Act requires the Registrar of the Family Court to ensure that any declaration brought for a child over 12 years of age, or any young person, is served on that person. (section 153). The Court has the ability to make sure that the child or young person is present (section 157) and certainly any child or young person is entitled to be present at the hearing which is about them (section 166(1)(c)).

On the understanding that where the presence of a child or young person with their parents may give rise to conflict, a Judge has the ability to ask others to withdraw from the Courtroom while a child or young person either gives evidence or confers with the Judge. This is a vitally important safeguard and may be insufficiently used at present (see section 167)

The Importance of Consultation

I think it clear from the statutory terms of appointment of counsel to represent children both at Family Group Conferences and in Court hearings, that lawyers appointed for these purposes must represent children in the same fashion as they would if the client were an adult. I say this because although young and immature children will clearly be limited in the extent to which they can express views, lawyers are nevertheless bound to elicit those views and express them on behalf of their client children.

The fact that the section dealing with appointments, section 159, requires lawyers appointed for children to be suitable by way of personality and training, reflects the fact that lawyers simply must be in a position to talk over the issues with children and find out what a child's views are.

The importance of this consultation throughout all aspects of pre-Court and Court procedure cannot be understated. It is rather too easy to assume that as adults, we know best, and as lawyers, to adopt a paternalistic approach when making representations to the Court.

Child and Young Offenders

Just as the Family Group Conference procedure and participation in the Court process is important in care and protection cases, so also is it fundamental for cases where young people have committed offences.

Children who are aged between ten and fourteen cannot be charged with criminal offences other than murder or manslaughter, but they can be held accountable for their offending through care and protection procedure. Those fourteen and over can be charged and may appear in the Youth Court. Once young people reach seventeen years of age, they are treated as adults, and appear in the District Court.

Before young people can be charged however, a Family Group Conference is usually convened and once again, the young person has a voice in expressing regret or remorse and an influencing those at a conference in what the outcome of the case may be.

If a young offenders' case results in a charge being laid in Court, young people must appear and must be represented. Although the Youth Court procedure is designed to hold young people accountable for their offending, equally, it is designed to empower them to participate in their case and to a large extent, control their own destiny.

Unfortunately, it is not until cases actually reach Court for both child offenders and young offenders, that lawyers will be appointed to represent them. Family Group Conferences which occur before the Court process begins may be crucial in deciding what action should occur, and for children and young people to not have representation at this important stage is, in view of the United Nations covenant, unacceptable.

Empowering Children and Young People Through Positive Court Involvement

I conclude my paper by highlighting the most important thing of all. Courts can be intimidating and dis-empowering. To some extent, they are designed to do just that.

For children and young people, I am clear that the Court process must hold offenders accountable and must be bold in protecting vulnerable children. But in achieving these objectives, the best results of all may be achieved by raising a child's self esteem and sense of destiny. It is this empowerment which may well have been lacking in the child's home, and which the Court must seek to redress.

Allowing children and young people to speak through a variety of means such as oral and written communication, artwork and song, are all ways of allowing children to speak out, and to learn the importance of constructive participation in a social sense.

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