# DIVERSION:

## RECENT PROPOSALS IN THE JUVENILE JUSTICE SYSTEM

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CONTENTS

## 1. INTRODUCTION

In New Zealand the children and young persons legislation relating to child care, protection and measures for dealing with young offenders used to be mainly contained in the Child Welfare Act 1925. This Act, with amendments, remained in force for a period of fifty years until it was replaced by the Children and Young Persons Act 1974. In August 1984 just ten years after the 1974 Act, Ann Hercus, Minister of Social Welfare, set up a small working party to undertake a major review of the Children and Young Persons Legislation. In December 1984, the working party produced a public discussion paper and distributed thousands of copies. Over 400 submissions were received as a result of this paper. Since then a draft Bill has been prepared, which is planned to come into force on the 1st day of October 1987. The Bill is presently before the Select Committee.

This paper concentrates on the theme of diversion. In doing so it considers three areas of central significance to the handling of young offenders. These are: arrest, prosecution and diversion services. The discussion focuses on the way in which the 1987 Bill, the CYP Act 1974 and the discussion paper proposals deal with these three areas in relation to the concept of diversion.

## 2. DIVERSION THEME

Many of the discussion paper proposals are based on the theme of diversion. The introduction to the discussion paper states:[2]

> Research indicates that, far from having the salutary effect that some suppose, the stigma generated by a Court appearance can increase the likelihood of a young person

committing further offences. For this reason it is proposed that new diversion procedures should be employed to obviate the necessity of a Court appearance for all but the most persistent and serious young offenders.

This section of the paper provides analysis of the concept of diversion. The theme of diversion forms a basis from which to consider the more specifically focused areas presented subsequently.

(i) What is Diversion?

Diversion is an exceedingly broad term and has been applied to many types of processes which have been conducted at various stages of the juvenile justice system. The concept can be used in at least two different ways. It can refer to processes employed to turn young persons away from the formal justice system and it can also be used to refer to reducing further penetration into the formal justice system at later stages (hence "diversion from prison"). This paper focuses on the former meaning, that is diversion away from the formal system.

The concept of diversion is by no means new. The Juvenile Court itself was originally planned to divert children from the more formal court procedures applied to adults. Diversion from the Juvenile Courts has occurred informally for years through Police warnings and for instance when a shopkeeper decides to give a young shoplifter another chance by not reporting the incident. The CYP Act 1974 implemented formal processes of diversion in the form of Childrens Boards and Youth Aid consultation procedure. Under the CYP Act 1974 children (i.e. juveniles between 10 and 14 years) can not be proceeded against in court, other than by the complaints procedure[3] except for murder and manslaughter. They

were instead to be diverted away from the formal court to the Children's Boards which were established under the 1974 Act.[4] A "young person" (aged 14 to 17 years) can be brought before the court, charged in his or her own name with an offence. In non-arrest cases young persons appear in court only after consultation has taken place between the informant (whether a member of Police or otherwise), a Social Worker and a Community Officer appointed under the Maori Affairs Act 1962 where the option is taken up. This consultation procedure, set up by Section 26 of the CYP Act 1974, is called "Youth Aid Consultation" and is designed to aid diversion away from formal court processing.

The central characteristic of any diversion process is that it offers an alternative to formal disposition. This alternative disposition is one based on treatment (such as social work, counselling, or employment assistance). The emphasis of diversion programmes is on measures designed to meet the "needs" of a young person (i.e. a welfare approach) whereas the emphasis of juvenile courts is on handling young persons according to their "deeds" by imposing punishment in accordance with the severity of the crime (i.e. the justice approach). Although the juvenile court is more concerned with punishment it does also offer the full range of youth services. If any treatment or service is prescribed, however, it is mandatory, and compulsory treatment delivered by the court is often viewed by the clients of the juvenile justice system as synonomous with punishment. On the other hand, the alternative disposition which diversion programmes offer is treatment provided on a voluntary basis. This voluntarism is an essential difference between the formal court process and the alternative informal diversion programmes[5]. Although the emphasis of diversion is on "treatment" it is important to recognise that in attempting to "treat" a

young person what is done may have all the essential attributes of punishment. It is easy to justify loss of a young persons liberty for lengthy periods on the grounds that the offender is being reformed rather than punished. There is a danger that diversion programmes become an instrument of coercion in the guise of reformatory treatment.

In an early study of juvenile diversion for the National Assessment of Juvenile Corrections (in Britain), Cressy and McDermott (1973)[6] defined true diversion as occurring when a juvenile is completely out of the realm of the juvenile justice system and is immune from incurring the delinquent label in any of its variations. The problem with true or total diversion, however, is that it also eliminates the opportunity to provide needed assistance and services to young offenders. To avoid this, formal diversion programmes have been set up to divert young people <u>away</u> from the courts and direct them <u>to</u> needed services.

(ii) <u>Why Divert?</u>

(a) <u>The Labelling Theory</u>

Arguments in favour of diversion programmes are based heavily on the labelling theory[7]. The labelling theory attempts to explain delinquency as a result of negative labelling experiences. The suggestion is that the court process changes the self image of the juvenile. Increasingly the juveniles see themselves as a delinquent, acts as if they were delinquents and others respond to them as if they always were delinquents. So the public labelling of a juvenile as a delinquent serves as a self fulfilling prophecy. The discussion paper repeatedly expresses the growing concern that entry

into the official system increases the likelihood of re-offending because of labelling.[8] Diversion from the courts is hoped to avoid the stigma and labelling associated with a court appearance and therefore decrease further acts of delinquency.

Questions have arisen as to the soundness of the labelling theory as an underlying assumption of diversion. Foster et al (1976)[10] for example, criticized the labelling argument, stating that

> the extent of perceived stigmatization and social liability that follows Police or court intervention seems to be over estimated in the labelling hypothesis.

It is unknown how major an influence public labelling has on whether a juvenile re-offends. An individual may re-offend for reasons which have nothing to do with public labelling. Perhaps many young persons are by their very nature and character likely to re-offend. That is why they have been selected for prosecution. The fact that they are likely to re-offend may be seen as evidence that the decision to prosecute the young person was the right one. This young person needs to be dealt with formally because he may have re-offended regardless of any public labelling. There are however also young offenders whose re-offending may be due to the negative effects of labelling. Rutter and Giller (1983)[11] come to the conclusion that delinquency in juveniles is in <u>most</u> cases a passing phase that will come to an end without the need for rigorous intervention. For these young persons formal court processing may make things worse because of the consequential stigma and labelling. If Rutter and Giller are

correct and most juvenile delinquency is only a passing phase then a policy of minimal intervention and diversion away from the court is more appropriate for first and minor offenders. Formal court processing is perhaps too heavy handed for such offenders.

The labelling theory as a justification for diversion away from the courts has also been criticized because the young person is likely to already be publicly labelled as a delinquent before he/she appears in court. Mahoney (1974)[12] points out that the stigma from the court may be vastly overrated since juvenile offenders often bear other labels such as bad school performance, being in difficulty with the Police, and so forth. There is also concern that the institutions which a person is diverted to and even the process by which the decision to divert is made may have an equally stigmatizing effect as the juvenile court. Osgood et al (1982)[13] however observed that with few exceptions, programmes offered by external diversion agencies were more benign and humane and were viewed by staff as less stigmatizing than formal programmes of the juvenile justice system. The staff perceptions, of course, may not reflect the feelings the young people have toward the agencies. It is probably true however that even if a young person has already to some extent been publicly labelled, a court appearance is likely to increase and re-enforce such labelling and the alternative diversion programmes are capable of being less stigmatizing than the court.

Diversion is one response to concerns about labelling. Another response is to attempt to shield young persons from adverse labels or stigma

by changing the court process itself rather than diverting young persons away from the court process. In New Zealand the existence of a special court for juveniles (The Children and Young Persons Court), the creation of a special vocabulary, non-public hearings and according confidentiality are measures which attempt to protect a young person from negative social reactions.

(b) Contamination

Criminal behaviour is likely to increase when individuals have more contact with people with delinquent than those with non-delinquent attitudes. Diversion it is argued can avoid "contamination", it can prevent "naive" offenders from associating with more experienced offenders. As with the labelling theory this requires identification of just who the "naive" offenders are.

(c) Cost

Diversion is also viewed as a way of alleviating the already over-burdened juvenile courts, and as a cost effective method of processing cases. Because juvenile courts have limited staff and money they are often overloaded and as a result ineffectiveness increases.

(d) Effectiveness

Diversion programmes are often considered a more effective and humanitarian method of processing young persons. They involve measures designed to rehabilitate and treat rather than punish. This is seen as especially appropriate for young offenders

because their youth and immaturity renders them more likely to be malleable and responsive to such an approach than older offenders who have become set in their ways.

(iii) Problems with Diversion

The notion of diversion is not without its problems. What appear to be good intentions may produce unexpected and negative effects. The results of the diversion movement may be quite different from what is intended. This section of the paper considers the possible problems diversion can have.

(a) Widening the Net of Social Control

Contrary to the expected reduction in penetration into the juvenile justice social control system Blomberg (1979)[14] argues that diversion has increased rather than limited the number of young persons receiving some kind of justice related service. Stanley Cohen (1985) notes that:[15]

> the population of new agencies are not simply the cast-offs from the old system, but new groups who might otherwise never have found themselves in contact with the official system at all.

In other words offenders who would otherwise merely have been warned and released are now referred to the treatment services diversion programmes provide. It should also be noted that diversion may get more people into the formal system by drawing people into the diversion programmes and then referring them to the formal system if they fail to respond to these programmes. Austin and

Krisberg (1981)[15] conclude that "diversion programmes have been transformed into a means for extending the net, making it stronger and creating new nets." A more recent study in America however concluded that diversion programmes if properly implemented, do not widen the net of social control and can be considered successful.[16]

(b) Difficulties of Discretion

The decision to divert involves large measures of discretion. As Giller and Covington (1983)[17] point out exhortations that minor offenders should be dealt with informally and those who pose a "real or serious threat to society" should be referred to the court merely begs the question which has to be addressed. What precise circumstances should guide the exercise of discretion to divert? There is a danger that unfettered discretion may lead to discriminatory practices. However, structuring discretion is a difficult task and there are no grounds for believing that the particular words of decision making guidelines will be interpreted restrictively. The other problem with the discretion involved in diversion is that it is largely concealed and hence uncontrollable even if you have guidelines. The later section discussing prosecution criteria deals more specifically with the problems of structuring discretion.

(c) Due Process

Diversion by its very nature dispenses with the due process rights normally afforded by the criminal trial. The young person will have admitted to guilt but there is never any formal finding of guilt. The loss of a day in court also makes it

very difficult to challenge pre-trial practices - validity of arrest, search, interrogation etc.

In many cases a young person admits guilt, not because they actually are guilty but because they are under pressure to do so in order to avoid a court appearance. Diversion allows "treatment" of a young person without any formal guilt. Lack of due process is of major concern if such "treatment" in reality resembles punishment. There is a danger that diversion can involve the unjustified infringement of human rights even though the objects of diversion are benevolent. Because of this danger the discretionary practices of those working in the diversion process should where possible be made visible and reviewable.

(iv) Central Issues if Diversion is Implemented

Although there are potential problems with diversion these problems are not inherent features of diversion. Formal court process is often an over reaction to the normal problems of adolescence. The strong reaction and potentially stigmatizing effect of formal court processing can exacerbate the long term problems for society. Diversion away from the courts and policies of minimal intervention and informal processing are worthy of implementation. It seems that if diversion programmes can be designed in a way which minimizes the possible problems then they have a chance of effectively dealing with young people, reducing recividism and alleviating the already over-burdened juvenile courts.

Acceptance of the principles of diversion requires the establishment of sifting mechanisms to ensure that young persons only enter the juvenile court where public interest and justice demand it. These sifting mechanisms

are the pivotal points of the juvenile justice system. It is here that the crucial decision is made i.e. whether a child should be dealt with formally by the court or be diverted away from the court and dealt with informally.

The implementation of diversion and the accompanying sifting mechanisms raises many questions: at what stage in the system should the mechanism(s) exist? Who should perform the "sift"? I.e. decide who to divert, should the discretion involved in this decision be controlled by statutory guidelines and if so what criteria should have most weight and finally what option should be available to divert a young person to?

Three areas of the CYP Act 1974, the discussion paper and the 1987 Bill are now evaluated in relation to these questions which arise in any discussion of diversion. The three areas are arrest, prosecution and diversion services.

## 3. A REVIEW OF THREE SPECIFIC AREAS

### (i) Arrest

Arrest is one of the main gateways into the juvenile justice system. Under the current legislation arrest cases generally proceed directly to court.[18] There is no requirement for any prior consultation process as there is in non-arrest cases. Therefore the decision to arrest is the major sifting mechanism under the present system. It is at this point that a crucial decision is made. There are three possibilities. Firstly the young person might be arrested so that he/she may proceed directly to Court. Secondly the young person may be completely diverted away from the formal process by the mere issuing of a warning. The third possibility is to not arrest but still charge the young person with an

offence. In which case the young person must be referred to Youth Aid. In non arrest cases a young person may proceed to court only after the Youth Aid consultation process has taken place.

This consultation process is another sifting mechanism in the current juvenile justice system, where the decision about whether to recommend prosecution is made. By arresting the young person the consultation process can be by-passed. There is evidence from the research by the Institute of Criminology[19] that Police constables in the Uniform Branch do not have complete confidence in the Youth Aid Section and may have arrested juveniles to avoid the need for referral to Youth Aid. At the arrest stage the arresting person has a large amount of power in determining whether the young person will be dealt with formally or informally. The action of arrest sets the formal process into action.

Recognition of the important role, as a sifting mechanism, that the arrest stage plays in the present system prompts the question of how this power should be controlled. Under the present legislation the power to arrest is very wide. It can be exercised by any person, but the large majority of cases it is the Police who make arrests. The power to arrest must either be pursuant to a warrant, or if there is no warrant then it must be pursuant to statutory powers of arrest. The main statutory power to arrest is in Section 315(2) of the Crimes Act 1961:

> (2) Any constable, and all persons whom he calls to his assistance, may arrest and take into custody without a warrant -
>
> (a) Any person whom he finds disturbing the public peace or committing any offence punishable by death or imprisonment:

(b) Any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by death or imprisonment:

Section 32 of the Crimes Act 1961 states that where any constable has the power to arrest without a warrant he is justified in arresting any person whom he believes on reasonable and probable grounds to have committed an offence, whether or not that offence has in fact been committed or whether or not the arrested person committed it. The interpretation section defines justified as meaning not guilty of an offence and not liable to any criminal proceedings. So the power of arrest is very wide. It can only be reviewed by the courts in terms of "belief on reasonable and probable grounds" and in practice the court will usually accept that at the time of arrest, the constable had such a belief, and the arrest was justified. The CYP Act 1974 contains additional powers for the arresting and detaining of juveniles, and these are very wide powers.[21] For instance under section 12 if young persons are found unaccompanied by their parents or guardian or other person who have car of them and they are in an environment detrimental to their physical or moral well being then a Police Officer can use such force as may reasonably be necessary to take them and forthwith deliver them to a person who has care of them.

The Police general instructions[20] do require members of the Police to exercise the utmost restraint and discretion in using the power to arrest children and young persons without warrant. They also require supervisors to ensure that all arrests are made for good and sufficient reasons and in accord with established policy. The instructions are not however very detailed. For instance there is no reference made to what actually are "good and sufficient reasons", also the instructions are not law.

The first point to make is that at present a very wide arrest power is given and after an arrest is made there is no other process in the juvenile justice system which enables some authority to investigate and consider the case, to see whether prosecution is or is not appropriate. The decision of whether to prosecute and deal formally with a young person or whether to divert the young person away from the formal court process is a very important decision. It should be made by some formal process outside of arrest. Even though this outside scrutiny will take extra time the importance of the decision warrants such time. A Police Officer's decision as to whether or not to arrest is frequently an instantaneous decision and made with a minimum amount of information. Both the Bill and the discussion paper proposals involve certain formal processes to be carried out before prosecution can ensue regardless of whether the case is an arrest one or a non-arrest one. These processes are different in the Bill and the discussion paper and are discussed later in the paper. They go some way to limiting the power which at present resides in an arresting officer. They reduce the role of arrest as the major sifting mechanism involved in diversion.

These other sifting mechanisms do not however justify the arrest power being left as wide as it is at present. Firstly, once a young person has been arrested, even if the prosecution decision process which follows diverts him/her away from formal court process, that young person may still have suffered negative labelling effects due to the actual arrest itself and also possibly the prosecution decision process itself (depending what this is). This "labelling" could lead to re-offending. Secondly the arrest power at present is open to abuse. In the course of research by the Institute of Criminology[22] the way in which the arrest power was exercised was frequently commented on by parents and

children who were interviewed. Concern was expressed for example about the Police arriving late at night or early in the morning of parents being notified of the arrest long after it had happened and of Police being obstructive about requests from young persons to consult lawyers. The research also showed that the arrest power was not always used as a last resort. Sometimes in minor cases arrest was used merely because it had practical advantages[23] (e.g. obtaining of photographs and fingerprints). It is important then that some restrictions are placed on the present power of arrest in order to reduce the possible labelling effects of arrest and the possible abuse of arrest power by helping to ensure that arrest is used only as a last resort. However given the pressures on Police at present to arrest, the form of the restrictions and the practical effect of such provisions may be problematic.

The discussion paper proposals specify circumstances under which an arrest is authorised. These circumstances are the same as those required by the CYP Bill. Clause 114(a) of the Bill requires that the arresting officer must be satisfied on reasonable grounds that it is necessary to arrest the child or young person for the purpose of either ensuring appearance before a court, preventing further offending, or preventing loss or destruction of evidence relating to the offence. Clause 114(b) provides that the arresting officer must also be satisfied that the proceedings by way of summons would not achieve any of the purposes in Clause 114(a)[24]

The restrictions in the Bill on arrest power are a substantial improvement on existing legislation. The next problem is how these restrictions can best be enforced.

One way the restrictions on arrest can be enforced under the Bill is by the very fact that the restrictions are

law so are subject to judicial review. The arresting officer actually has to be satisfied on reasonable grounds of 114(a) and (b) and if the court finds this is not so then the arrest is unlawful. But to have this as the only way of enforcing the restrictions is however of limited practical effect. There are likely to be times when an arresting officer is not satisfied on reasonable grounds of (a) or (b) but the young person and parents are unaware of the right to sue and have no money to do so. Also the problem with civil action is that for most people it is wholly unrealistic especially where the young person is guilty. Anyway in most cases the test is in fact fairly easy to satisfy. Ex post facto the Police Officer will not find it difficult to show that there were reasonable grounds for believing the young person was offending and from this it always follows that there were also reasonable grounds for believing further offending is likely and a summons is ineffective. The real problem is that even if the test has been satisfied it does not always justify the possible negative effects of arrest on the child. As well as being infrequent, judicial review comes too late, the unlawful arrest has already occurred, the harm has already been done. In any case, the arresting officer who is found guilty of not following the requirements is unlikely to be severely dealt with by the court and the young person is unlikely to be provided with very meaningful remedies.

As well as judicial review the Bill contains a reporting provision as a way of enforcing the restrictions the Bill places on arrest. Clause 114(2) requires the arresting officer to furnish a written report to a senior member of the Police and a Senior Youth Aid Officer within three days of the arrest. The Bill however fails to require the report to indicate either the grounds for arrest or the reasons why a summons could not be used instead. It could be argued on the present wording that the report

need only state that an arrest has been made. This might be seen as a problem of drafting but could perhaps be rather more than this. It may be a problem of attitude and approach. The report need not be detailed because nobody else will see it and it isn't seriously intended to interfere with acts which the Police Officers see as justified in the practical situations they face. The lack of a detailed requirement suggests that the report is a formality not to be taken too seriously.

The discussion paper also proposes the furnishing of a written report[25], but the requirement is more detailed. It must be a detailed written report on th exercise of the power and the circumstances under which it came to be exercised. This provision goes a lot further than the Bill does but would be even better if it included a requirement for the report to indicate the reasons why a summons could not be used instead. Although there is still the possibility that this detailed written requirement would not be taken seriously it has more likely to be an effective enforcement measure than the reporting provision of the Bill.

In addition to the furnishing of a written report the discussion paper proposals include a "permission" provision[26] as a way of enforcing the restrictions on arrest power. This provision requires the arresting officer to obtain the permission of a Senior Youth Aid Officer, or where this is not reasonably practicable, to obtain permission from a senior supervising non-commissioned officer. This is not however required if because of the location of the Police District or the nature of the situation it is not possible to obtain such permission. The provision is designed to inhibit arrest by making it more inconvenient however it is unlikely to work in practice, and a detailed reporting provision alone could achieve this just as well. Many arrests of

young people occur late at night when a Youth Aid Officer is unlikely to be on duty. For this reason alone it would be "not reasonably practicable" to obtain the permission of a senior Youth Aid Officer. There are many other situations, especially in rural areas when it is not possible for the arresting officer to seek permission to arrest from either a senior Youth Aid Officer or a senior supervising non-commissioned officer. In any case if permission was sought, the facts would probably be briefly outlined to the Youth Aid Officer by the arresting officer, usually over the radio telephone. This would be a poor basis for the Youth Aid Officer's decision of whether or not to give permission. The provisions are unlikely to effectively enforce the restrictions on the power of arrest. The better way of enforcing the restriction is the requirement of a detailed written report.

In so far as the submissions on the discussion paper related to the restriction of arrest power the response was mixed. Some were concerned that by restricting the arrest power in the way the discussion paper proposes, the Police role would be weakened leading to the escalation of unacceptable behaviour amongst young persons. One submission put it this way:[27]

> The restriction on arrest power would be a serious impediment to the Police in the carrying out of their duties which will result in anarchy and increased vandalism.

If however the permission provision was deleted then perhaps views like this would not be so strong. The Police in Wellington were concerned that the restrictions on arrest power in the discussion paper implied that young people need protection from Police and that this was damaging to Police morale. This however, is a fairly

trivial response. There were just as many submissions however which supported the proposals to restrict the power or arrest and were concerned with the large amount of power presently held by Police in relation to arrest.

The other provision in the Bill in relation to arrest is Clause 115. It requires that the person having care of young persons should be notified to their arrest as soon as possible. This provision follows the discussion paper proposals[28] however where the Bill uses the words "as soon as possible" the discussion paper says "forthwith". "As soon as possible" is a more realistic requirement since forthwith is not always possible. Clause 115 is an improvement on the existing legislation which has no such similar provision. The discussion paper also says that where a young person identifies as a Maori or Pacific Islander a Maatua Whangai worker or a person nominated by a Pacific Island Community group should also be notified. This is not included in the Bill for good reasons. The young person may not wish such a person to be notified and could resent it. It also discriminates against other ethnic groups by singling out Maoris and Pacific Islanders.

Overall the Bill and the discussion paper have different approaches toward arrest. The discussion paper proposals make a serious attempt to ensure that arrest is used as a last resort. The permission proposal (although this may not work in practice) and the detailed written reporting provisions are designed to inhibit arrest to stop it occurring unthinkingly as it often does at present. The Bill's attempts to inhibit arrest however do not go as far as the discussion paper. The permission provision is not included and the reporting provision is very vague. The result is that reliance will remain on the common sense and individual judgment of Police Officers on the street.

(ii) Prosecution

Under the present legislation arrest cases undergo no further sifting stage before prosecution. In non arrest cases, however, the Youth Aid consultation procedure operates as a sifting mechanism attempting to ensure that prosecutions are not made unnecessarily. The CYP Act 1974 section 26 sets up this procedure. The process involves consultation between an informant (this will usually be a member of the Police), a Social Worker and a Community Officer appointed under Section 4 of the Maori Welfare Act 1962 where the option is taken up. The young person and the parents are not involved. Those participating in the consultation may recommend no action, a Police warning, referral to counselling or other informal action or they may recommend prosecution. This is only a recommendation, the final decision on prosecution is with the Police. The review of the CYP legislation raises the questions of who should be making the prosecution decision and how it should be made.

(a) Who Should Make the Prosecution Decision?

Clause 120 of the Bill abolishes this consultation procedure and leaves the decision to prosecute a young person in the hands of the Police. It abolishes the consultation process and gives the Police guidelines to make their decision (these are dealt with in part (b) of this Section. The main problem with the present system is that the consultation process is largely dominated by the Police. So if the Police are to be directly involved in the prosecution decision it is less cumbersome and less time consuming to adopt the approach of the Bill than to attempt to have some kind of consultation process. In the Youth Aid consultations it is usually only the Police who

have knowledge of the situation so the Social Worker can contribute little to the decisions. Therefore the consultation process is often little more than a "rubber stamp" for Police wishes. Of course Police attitudes towards the consultation process are likely to differ between areas. In some areas Police are anxious to make the process work by encouraging Social Workers to participate but the differing Police attitudes appear to have little effect on the nature and outcome of consultations. In all areas the structure inevitably leads to Police domination and control.[29] Another objection to the present consultation procedure is that there is no community involvement and no opportunity for the alleged offender or parents to be present. It would be common that none of the parties involved would have first hand knowledge of either the young person or the incident. Also the procedure can be totally by-passed by following the arrest procedure.

The discussion paper proposes that a Youth Assessment Panel be established to make the prosecution decision.[30] This is a development of the Youth Aid Scheme. It would apply to all young persons aged 12 to 17 years alleged to have committed an offence not just to non-arrest cases. The panel would consist of a senior Police Officer, a senior Social Worker a Maatua Whangai worker and where the young person is a Pacific Islander, a person nominated by an appropriate Pacific island community group. Many of the submissions on the discussion paper which agreed with the Youth Assessment Panel in principle, felt that the involvement of the young person's parents and a school representative was also necessary. However in practice this may not always be possible.

Teachers and parents may not always be willing or available for such consultations and even if they did participate, the Police would still have the final say. The establishment of Youth Assessment panels does not remove the problem of Police domination. The consultation process would be much the same as present and since the Police generally have exclusive knowledge and control of the information being considered, the Police will inevitably dominate the process. The other members of the panel are unlikely to contribute much to the decision and in any case the final decision is still only a recommendation and is not binding on the Police. The addition of a Maatua Whangai and a person nominated by an appropriate Pacific Island community group may cause problems if the youth does not want assistance from either his/her ethnic community. This provision also discriminates against other ethnic minorities who do not receive similar treatment. It would be better to allow culturally appropriate people to attend if desired by the young person. There is a danger that as the consultation meetings become larger they become more formal and the massive inquiry is more likely to have a labelling effect on young persons before they even reach court.

If the Police are to be directly involved in the prosecution decision the approach of the Bill is less time consuming and cumbersome than attempting to have some kind of consultation process. The question then arises of whether in actual fact the Police are the appropriate agency for making the decision to divert young people away from the courts.[31] It is not a task for which the Police have been given any special training and it is a task which is at odds with demands made on the

Police to "do something about" juvenile delinquency. The Police are likely to believe in the prosecution ethic. The central duties of the Police are prevention, control and detection of crime and the normal end product is to take the individual to court. If the Police make the prosecution decisions it leads to a conflict in the various roles performed by an individual Officer. If diversion is to occur effectively it would seem preferable to have an independent sifting authority as Scotland does. This possibility was referred to in the discussion paper.[32] In Scotland independent reporters decide on the basis of reports, whether the child referred to them is in need of "compulsory measures of care"[33] in other words whether or not the child can be diverted from the formal children's hearings (the Scottish equivalent of the juvenile courts). The reporters stand as an independent and visible sifting mechanism between the Police and the children's hearings. This sifting mechanism for diversion has reduced the number of children appearing before the children's hearings by 45 per cent between 1970 and 1976.[34] In some cases this involved total diversion, that is no further action at all. To the extent that reporters are prepared to give a large number of no action disposals, reporters are resisting pressures to act primarily as law enforcement agents. Reporters are also free to utilise community programmes where these exist and seem desirable. The limits of action lie in the imagination of the reporter and the consent of the child. This could be transferred to the New Zealand context and meet the objective of the discussion paper[35] and Bill[36] to involve community agencies.

(b) Statutory Guidelines for the Prosecution Decision

The CYP Act 1974 does not enact any statutory guidelines for the prosecution decision. Whoever makes the decision to divert, whether it is the Police or some other independent authority, it would be helpful if they had some statutory guidelines to aid them in the exercise of their discretion. It is true however that statutory guidelines can not hope to totally solve the problem of whether or not to divert a young person. They would however allow the Government to have more control over an important decision. This is a good thing as it results in an increased consistency of decisions and a higher level of public accountability. It also enables justifications for Police Officers' decisions to become more focused on relevant factors. If Police Officers' decisions are questioned they can point to the set of guidelines and say Parliament told them to take X or Y into consideration when exercising their discretion. At present they might justify their decision merely on the grounds that it was totally in their discretion. Most importantly statutory guidelines would go some way ensuring that prosecutions are not brought unnecessarily.

The Bill and the discussion paper proposals specify certain criteria which should be taken into consideration when deciding whether to recommend that young person be prosecuted. The Bill contains a list of thirteen factors (the discussion paper contains a similar list[37]) to be considered by the Youth Officer who prepares a report for the authorising Officer who having regard to this report has the final decision on whether or not to

prosecute. There is however no indication of the weight to be attached to each of them so they have limited use as a set of guidelines. The introductory words of clause 120(4) of the Bill says such matters as the Youth Aid Officer considers important shall be taken into account. So this still leaves open the question of what exactly is important. Also some of the criteria are not very specific in that they do not state the effect the particular criteria will have. For example Clause 120(4)(i) of the Bill specifies age as a relevant criterion. Presumably this means the younger a child is the less likely he is to be prosecuted. If it means this it should say this.

Clause 120(4)(d) of the Bill lists the young person's attitude to the offence as a criterion. Presumably this means if a young person is remorseful they are more likely not to be prosecuted. And in 120(4)(m) plans put forward by the young person to compensate the victim are also listed as a criterion. Both of these criteria suggest that young persons who admit guilt, but are sorry and willing to make amends are less likely to be prosecuted than young persons who swear they did not commit the offence at all. So if young persons have in actual fact not committed the offence it would be wiser for them to pretend they are guilty in order to avoid prosecution. This pressure to admit guilt is a danger in diversion programmes. However it seems that the benefits of diversion outweigh this possible problem. Anyway if the Police are convinced a young person did commit an offence and that young person is adamant he did not, then the court is the best place to fight the battle because here the young person has the full rights of due process.

Clearly one of the main criteria should be that the prosecution agency is satisfied there is a reasonable prospect of conviction. It is unfair to subject a young person to the formal court process when there is little chance of conviction. This would serve no useful purpose. In the Bill and the discussion paper however the sufficiency of evidence is given no more weight than any other criteria. It would be better if the guidelines were to state that the prosecution agency need to be satisfied that there is a reasonable prospect of conviction before prosecution is brought.

The discussion paper proposals give the criteria of public interest equal weight to the other criteria listed. The Bill however takes a different approach. The Youth Aid Officer has to take 13 factors into consideration and prepare a written report. Public interest is not singled out as one of these factors. The report is then taken into consideration by an authorising officer who has the final decision as to whether or not to prosecute. Clause 130(3) requires that the authorising officer shall not prosecute unless having regard to the Youth Aid Officer's report he/she is satisfied that, because of the seriousness of persistence of the offending or the nature and number of previous offences committed by the child or young person, the institution of criminal proceeding is required in the interests of the child or young person or in the public interest. The persistence of the offending and the nature and number of previous offences committed are probably the most relevant factors in determining whether a young person will re-offend. It is unnecessary to subject first time offenders to the formal court process if they are unlikely to re-offend. Their offending is probably

a passing phase and court process is only likely to increase the chances of re-offending because of its possible negative labelling effect. Seriousness of the offence may or may not be relevant to the likelihood of re-offending but it is relevant in that society wishes to show it will not tolerate such offending.

The Bill has the public interest as an overriding factor which is of central importance and then the factors in the Youth Aid Officers report can be used to determine whether the public interest requires prosecution. The Bill however adds that the interests of the child or young person can be used as an alternative to the public interest as a justification. It seems wrong to justify the institution of formal criminal proceedings merely on the basis of the supposed welfare of the child. It can never be certain what effect court process will have on any given individual child and young offenders may be more effectively dealt with informally. Their behaviour is often, as Rutter and Giller (1983)[38] conclude, merely a passing phase of growing up. There is a danger that court process will result in negative labelling effects which may lead to re-offending. It would be better if the justification was based on public interest alone. If court process is required in the interests of the child or young person then surely it will also be required in the public interest for this very reason.

There is a concern that by including social factors as well as offence related factors in the guidelines can lead to discriminatory practices in that two people who have committed the same offence may be treated differently. However if considering

the action in its wider social context helps to lower re-offending rates and ensure unnecessary prosecutions are not brought unnecessarily then it is worthwhile.

The process involving the Youth Aid Officer and an authorising officer is a worthwhile one. It means that the final decision is based not only on a recommendation but on a detailed report as well. This means both the Youth Aid Officer and the authorising officer have to consider all the relevant information before they make a choice as to which course of action is appropriate.

It is difficult to set out useful guidelines for a decision which inevitably involves significant amounts of discretion. However any attempts to raise a presumption against prosecution in relation to juvenile offenders and to specify criteria by which the presumption can be rebutted are an improvement on present legislation. It is important that prosecutions are not brought unnecessarily and are used sparingly and selectively. Statutory guidelines should go some way toward achieving this.

(iii) <u>Diversion Services</u>

The concept of diversion necessarily involves the establishment of informal community based services. These services should be provided on a voluntary basis and are an alternative to formal court process. The following is an assessment of the two diversion services the discussion paper proposes; Community Resolution Meetings and Maori Committees.

The CYP Act 1974 and the Bill do not incorporate the establishment of any diversion services into their

provisions at all. This is a major failing of the Bill. Reliance will now have to be placed on the hope that such services and others will be set up in New Zealand despite the lack of a statute to provide for their establishment. In the present and foreseeable climate this is highly unlikely and yet it is vital that adequate services are available to which a young diverted person can be referred.

(a) Community Resolution Meetings

The discussion paper proposals include referral to a Community Resolution Panel[39] as one of the options a Youth Assessment Panel has when deciding how to deal with a young person referred to them The function of the meetings would achieve a reconciliation between the offender, the victim of the offence and the community. Some measure of "pay back" could be arranged by the young offender, this could be an apology or community service. The referral should only be made where the young person and his/her family and any victim of the offence consent. The Youth Assessment Panel would have to believe a prosecution would be justified. This would limit possible net-widening effects. The mediation would be done by two people from the young person's local community who would be chosen by the Youth Assessment panel from a panel of voluntary trained mediators and where possible mediators of the same culture would be chosen. The Community Resolution Meeting would be attended by the young person, his/her family, any other person the young person wishes to be present, the young persons Social Worker and any victims of the offence. However the victim would not be required to attend. Where there is no direct victim some representative of the community chosen by the

mediators would attend the meeting. If the meeting could not achieve a resolution the matter should be referred back to the Youth Assessment Panel. If the young person failed to fulfil the terms of the agreement there would be no redress.

Achieving reconciliation between the offender and victim seems a worthy concept which should be attempted in New Zealand. In the present juvenile justice system there is little consideration given to the victim at all. However the proposed system does have faults. The proposal offers no redress if the terms of the agreement are no fulfilled. This lack of redress is based on the belief that diversion programmes should be voluntary and informal. The idea is for the victim and offender to come to an agreement largely by themselves. The resolution process becomes a sham if the agency exercises too much control and begins to act like a court. Although the proposal suggests no direct redress there is little doubt that if the young person later re-offends this failure to meet the terms of a previous resolution agreement would be taken into consideration when the sifting authority decide whether or not the young person should this time be diverted from the court. However, for the system to make more sense to its consumers and be accepted by the community (which are principles of the discussion paper[40]) then when an offender fails to fulfil the terms of the agreement there should be some redress or enforcement mechanism. Clearly entering the mediation process should be voluntary as with all diversion services. However if young offenders choose to use the diversion service they should then face their responsibilities for agreements reached by the mediation. If the young person fails to honour the

agreement the matter should be referred back to the Youth Assessment panel or other independent sifting authority.

Another possible objection to the scheme is that it unfairly favours the young person who fortuitously offends against a fair minded victim who is willing to come to a reasonable agreement. If the victim either refuses to consent to mediation at all or unreasonably fails to reach an agreement at the meeting then the young offender will be referred back to the Youth Assessment panel with the consequent possibility of prosecution. The victim is put in a position of power where he/she is able to some extent determine the severity of treatment the offender receives. The problem with this is that it results in a large disparity of treatment between young offenders who, apart from their victim, have committed the same offence in similar circumstances. However assisting the young person and victim to understand, if possible, one another's feelings in relation to the offence and achieve reconciliation achieves gains which outweigh the possible disparity of treatment of young offenders. Anyway it is not wrong to expect offenders to take their victims as they find them. If the victim is amenable to a reasonable reconciliation this is good fortune on the offender's part, if not, the juvenile justice system will be forced to deal with the offender by prosecution or some other way.

The attempt of the proposed system to include the cases where there is no victim within the resolution process could pose problems. It is proposed that the mediation will be between the young offender and some representative of the local

community. Since "community" is a very wide concept which is made of many different social groups with varying values and interests it would be impossible to choose a true representative of the community as a whole. The young offender is likely to find it difficult to understand the point of reaching a reconciliation agreement with someone who has nothing to do with the offence except that he/she is part of the community within which the offence was committed. Effective reconciliation would be minimal. The reconciliation concept is most appropriate for offenders and their victims.

Another criticism is that the proposal for two mediators seems unnecessary and if there are too many people at the meeting the young offender can feel overwhelmed, making mediation difficult. Lastly it is also important that the meetings should be arranged as quickly as possible since undue delay is a complaint often made about the present Children's Board meetings.

(b) Maori Committees

The discussion paper proposes referral to a Maori Committee[41] as another option available to the Youth Assessment panel when deciding how to deal with a young offender who identifies as a Maori. Again young persons, their family and any victims have to give consent to the referral and the panel must believe prosecution would be justified. The discussion paper recognises the existence of Maori Committees under the Maori Community Development Act 1962 and considers it possible to extend their role to deal with certain young offenders.

The Bill makes no reference to the Maori Committees. Diverting young offenders to Maori

Committees seems to be a worthy proposal. It is a service which would recognise the cultural diversity of New Zealand. The Committee however should only be used if the offender genuinely identifies with the Maori Community. If the service is foisted on parents and children without their full consent it could cause resentment. It would also be a good idea for local communities to develop, if possible, committees for other cultural minorities.

## 4. CONCLUSION

The juvenile court is only one way society can react to those young persons who commit wrongful acts. A judicial response however is not always necessary or desirable. The current trend toward diverting people away from the court founded on the belief that positive and effective responses to delinquency are available outside the already overloaded court system. There are of course problems with diversion which have already been canvassed. These problems however are not inherent features of diversion and can be minimised.

Both the discussion paper and the Bill are an improvement on existing legislation. The approaches however are different. They do both restrict the powers of arrest, establish guidelines for the prosecution decision and abolish the Youth Aid consultation process as it is at present.

It seems, however, that the discussion paper makes more of an attempt to maximise the benefits of diversion and minimise the problems. For instance the provision enforcing the restrictions on the power of arrest are more stringent than those of the Bill which are perhaps merely symbolic[42].

The discussion paper seems more committed to inhibiting arrest so it is used only as a last resort thus encouraging the

diversion away from the formal system at the arrest stage. The Youth Assessment Panel proposal of the discussion paper endeavours to have more than just Police involved in the prosecution decision and also suggests an independent sifting authority, as they have in Scotland, as a favourable alternative. Because of the police's belief in the prosecution ethic this emphasis on removing the Police from the prosecution decision seems desirable if diversion is to occur effectively.

The Bill on the other hand leaves the decision to prosecute soley in the hands of the Police. Finally the discussion paper includes proposals which establish two worthwhile diversion programmes. The Bill however fails to provide any such services which are vital for the success of diversion.

One thing is clear, the existing legislation is in need of reform. The Bill involves some worthwhile changes and omits to include other possible improvements. It remains to be seen how the changes in legislation will actually effect the juvenile justice system in practice. Meaningful changes in any system however require not only changes in the law but changes in the attitudes of the people who are part of that system.

FOOTNOTES

1. Hereinafter referred to as the CYP Act 1974.

2. Public discussion paper "Review of Children and Young Persons Legislation", Department of Social Welfare (1984), 1.

3. Section 27 of the CYP Act 1974 sets up the complaints procedure whereby any member of the Police or any Social Worker who reasonable believes that any child or young person is in need of care, protection, or control may make a complaint addressed to his or her parents requiring the child or young person to be brought to court.

4. See the CYP Act 1974 Section 13-19.

5. See R. Sarr "Paradigms and Pitfalls in Juvenile Justice Diversion" in Providing Criminal Justice for Children. A. Morris and H. Giller (eds) (1983), 54.

6. D. Cressy and R. McDermott, Diversion from the Juvenile Justice System. Ann Arbor: University of Michigan, N.A.J.C. (1973).

7. For discussion of the labelling theory see J.O. Finckenauer, Juvenile Delinquency and Corrections: The Gap Between Theory and Practice (1984), 61.

8. Above n 2, 27.

9. See for example D. Farrington "The Effects of Public Labelling" British Journal of Criminology", (1977) 17,2 112-25.

10. J.D. Foster, S Dintz and W.C. Reckless "Perceptions of Stigma Following Public Intervention for Delinquent Behaviour" in R.M. Carter and M.W. Klein (eds) Back on the Street: The Diversion of Juvenile Offenders (1976), 159-166.

11. M. Rutter and H. Giller Juvenile Delinquency Trends and Perspectives, Penguin Books (1983), 350.

12. A.R. Mahoney "The Effects of Labelling Upon Youth in the Juvenile Justice System" Law and Society 8, 1-52.

13. D.W. Osgood, F. Dunford and Weichselbaum: Stigma and Service Delivery in Juvenile Decisions. Ann Arbor: University of Michigan Institute for Social Research, unpublished paper (1982) quoted in S.H. Decker (ed) Juvenile Justice Policy; Analysing Trends and Outcomes (1984).

14. T.G. Blomberg "Diversion and the Juvenile Court" in Courts and Diversion P. Brantigham and T. Blomberg (eds) 1979).

15. S. Cohen Visions of Social Control (1985), 138.

16. J. Austin and B. Krisberg "Wider, Stronger and Different Acts: The Dialectis of Criminal Justice Reform" Journal of Research in Crime and Delinquency 18 (January) (1981), 165-196.

17. Giller and Covington "Structuring Discretion: Answer or Question?" in Providing Criminal Justice for Children A. Morris and H. Giller (eds) (1983) 143-150.

18. Section 316, Crimes Act 1961 requires a person who has been arrested to be brought before a Court "as soon as possible".

19. A. Morris and W. Young, Research from the Institute of Criminology, unpublished manuscript.

20. See the CYP Act Section 7, 12, 28 and 104.

21. Police General Instructions A 106.

22. Above n 19.

23. For a discussion on the advantages perceived by the Police in the use of arrest procedure as against the summons procedure, see T. Arnold "Why Arrest?" in Essays on Criminal Law in New Zealand R.S Clark (ed) (1971).

24. Note that the words "any of" should be deleted, otherwise a Police Officer would be required to use a summons if there was no likelihood of re-offending, even though arrest was necessary to ensure appearance in court. That would be absurd.

25. Above n 2, 38, paragraph 1(ii).

26. Above n 2, 38, paragraph 1(i).

27. Submission on the discussion paper by J. Hay, Auckland Primary Principals Association.

28. Above n 2, 38, paragraph 1(iv).

29. Above n 19.

30. Above n 2, 40.

31. For discussion on the suitability of Police as prosecutors (in general not just for young persons) see M. Stace The Prosecution Process in New Zealand (1985). He concludes that the criminal justice system operates on

the understanding that in most cases due process rights will and should not be asserted and that whether the decision to initiate a prosecution is undertaken by the Police or an independent authority would not change this.

32. Above n 2, 41.

33. Section 39(3) Social Work (Scotland) Act 1968.

34. Morris, Giller, Szwed and Geach Justice for Children (1980), 59.

35. Above n 2, 4 paragraph 2(d).

36. Children and Young Persons Bill, Clause 3(e).

37. Above n 2, 40 paragraph 3.

38. Above n 11.

39. Above n 2, 41-42.

40. Above n 2, 5.

41. Above n 2, 42.

42. Although the permission proposal of the discussion paper may not work well in practice it does show a difference in attitude between the discussion paper and the Bill.