

New Zealand Law Society

Submission on Inquiry into the Identification, Rehabilitation, and Care and Protection of Child Offenders

Introduction

1. This submission is in respect of terms of reference number 4;
consider whether the care and protection model is effective in meeting the needs of key stakeholders and whether improvements could be made.

Terms of reference number 4

2. Unless accused of murder or manslaughter, child offenders are dealt with as part of the care and protection system under Part 2 of the Children, Young Persons and Their Families Act 1989.
3. A declaration may be sought that the child is in need of care and protection on s14(1)(e) CYPF Act grounds if “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 well-being of the child”.
4. Consequently, the focus is on the well-being of the child and welfare need, and this takes precedence over accountability.
5. However, there is a criminal justice “flavour” to the process as a declaration may be made only if the alleged offending is proved beyond reasonable doubt (198(1)(a)). A declaration may not be sought unless a Police officer believes that this is in the public interest (s18(3)).
6. Further, the child must be shown to have known that their actions were wrong or contrary to law. This is known as the *doli incapax* presumption (s198(1)(b) CYPF Act).
7. Even if there are serious concerns for the well-being of the child and a declaration is considered to be in the public interest, a declaration may nevertheless founder under s73 CYPF Act, which states that the Court is to prefer alternatives to a declaration.

8. In relation to this procedure the following points are raised:

- (a) The requirement that a child should know their act was wrong or contrary to law (the *doli incapax* presumption) is not always addressed in the Family Court even though, technically, the Family Court should be satisfied of this knowledge before making a declaration on s14(1)(e) grounds. It may be that *doli incapax* is given little attention because it is thought the child must have known their act was wrong given that it is self-evident to the adults involved. This view has been taken in the United Kingdom where the presumption was abolished and it was described in the House of Lords as an outdated and irrational protection for modern, street-wise children.¹ It should be stressed, however, that the presumption provides a safeguard in that it tests a child's criminal capacity before a declaration, and therefore orders such as reparations, are made.
- (b) It is accepted that there are problems with assessing a child's knowledge. A child may not fully understand the wrongfulness of their act depending on the nature and circumstances of their offending. For example, assault is generally understood by children to be wrong, but new or more obscure offences such as possession of BZP are unlikely to be widely publicised to, and understood by, children.² Further, children who have conditions such as Attention Deficit Disorder may be able to understand their act is wrong, but not be able to act on this knowledge due to their condition. For this reason South Africa has considered dealing with *doli incapax* by including the words "... had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation."³ Thus, it may be useful to consider whether this test should continue in its current form in this Act, or whether a better test could be formulated. Further, how should the Family Court (a civil Court dealing with a quasi-criminal procedure)s assess this test. If accountability is to continue to be a goal of the child offending process, as it should, there must be a robust test of criminal culpability in place to ensure that children who do not understand the nature and quality of their crime are not held culpable. Arguably, a robust test should consider more than knowledge - it should consider whether the child acted as a fully rational agent, meaning that the child was able to understand the wider circumstances of the

¹ *C (a minor) v DPP* [1995] 2 All ER 43, 62 (HL).

² Misuse of Drugs (Classification of BZP) Amendment Act 2008.

³ Child Justice Bill 2002 (South Africa) B49D-2002 clause 10(1).

offence, to foresee the consequences of their actions and have the ability to act in accordance with their knowledge of right and wrong.

- (c) The child offending provisions are found throughout Part 2 of the CYPF Act but some provisions, for example, those relating to family group conferences, are found in Part 4 of the Act. It can be difficult to locate the necessary provisions, particularly for those who are not youth justice specialists. The complexity of the system was noted in the “Choy Report”⁴ which inquired into the failings of the child offending system following the murder of pizza delivery worker, Michael Choy. Police officers receive limited training in dealing with child offenders and may only infrequently need to grapple with this part of the CYPF Act. This makes an expert grasp of the CYPF Act's child offending provisions unlikely. It may be the case that this is encouraging Police to avoid taking action until the child reaches 14 years of age and the more widely understood Youth Court jurisdiction. This is a danger because early intervention is now widely agreed as being highly effective in steering young people away from crime. It may, therefore, be useful to consider streamlining the child offending provisions - perhaps by grouping the child offending provisions together in one separate part of the CYPF Act.

9. The Society wishes to be heard.

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19.3.10

⁴ Ministry of Justice Report *Youth Justice and Social Sector Service Delivery to the Children and Young People Convicted in Relation to the Death of Michael Choy* (28 November 2002) para 86
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