

## Chapter 6

### State intervention and child protection measures in New Zealand

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#### 1 INTRODUCTION

South Africa and New Zealand have similar socio-economic circumstances. Like South African society, New Zealand society is characterised by cultural diversity. Like South African indigenous law, New Zealand customary law has an important influence on New Zealand positive law.<sup>1</sup> The family group conference, which serves as an important instrument for the protection of children in New Zealand, came into existence as a result of the recognition of Maori values in the legislative process.<sup>2</sup>

In 1840, the *Treaty of Waitangi* was concluded between Paheka (non-Maori New Zealanders) and Maori representatives. This treaty forms the basis of the integration of Maori customary law with the positive law of New Zealand. Maori customary law is known as *tikanga*, which means “right ways”. *Tikanga* embodies guidelines derived from the Maori community which are applied in the everyday lives of the people. Although the *tikanga* of the modern Maori originates from the *tikanga* of the ancestors, it reflects social, economic and political changes that influenced the Maori way of life. *Tikanga* is thus no static concept.<sup>3</sup>

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<sup>1</sup> Robinson 1996 *Stell LR* (1) 210; 1996 *Stell LR* (2) 313.

<sup>2</sup> Robinson 1996 *Stell LR* (2) 313-314.

<sup>3</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 54. Also see, in general, Robinson 1996 *Stell LR* (1) 210 *et seq.*

The integration of *tikanga* and New Zealand positive law is no easy process.<sup>4</sup> What follows is a brief discussion of Maori customary family law. Thereafter the Children, Young Persons and Their Families Act 24 of 1989 will be dealt with.

## 2 **TIKANGA MAORI AND FAMILY LAW**

Maori expectations of family law can be found in two reports which were published in 1986 and 1988 respectively. In 1986, the *Puao-Te-Ata-Tu*<sup>5</sup> was published. The aim of this report was to eradicate all forms of cultural racism that result in the lifestyle and values of the majority group (Paheka) being regarded as superior to that of other cultural groups (especially Maori). This should be done in future by incorporating the values, cultures and beliefs of the Maori group in all policy considerations in New Zealand.

The report has the following to say about the position of families and children:<sup>6</sup>

“The child was not the child of the birth parents, but of the family, and the family was not a nuclear unit in space, but an integral part of a tribal whole, bound by reciprocal obligations to all whose future was prescribed by the past fact of common descent ... the children had not so much rights, as duties to their elders and community. It was a community responsibility.”

In 1988 the *Report of the Royal Commission on Social Policy* was published. In this report policy-makers are called upon to recognise the family structure of Maori customary law, namely *whanau* (the basic family unit), *hapu* (several *whanau* that are linked together) and *iwi* (several related *hapu*). In this way the principles of *whanaungatanga* (bonds of

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<sup>4</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 54-55.

<sup>5</sup> *Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (1986), as cited by Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 55, who quote from the recommendations embodied in the report.

<sup>6</sup> quoted by Robinson 1996 *Stell LR* (1) 211.

kinship) and *mana* (authority and control) are given effect to.<sup>7</sup> The principle of *whanaungatanga* is very important to the Maori. No Maori is without a tribe, so there is always a sense of belonging. Although there is a hierarchical system which gives authority to the elders, the Maori way is usually to talk through problems rather than to impose solutions.<sup>8</sup> Where personal problems or family problems exist in the nuclear family, attempts will be made to solve these problems within the *whanau*. Where the *whanau* does not function properly, the responsibility is placed on the *hapu*, and thereafter on the *imi*, to intervene and solve the problem.<sup>9</sup>

The concept *whanau* involves the following:

“... a group of relatives defined by reference to a recent ancestor (tupuna), comprising several generations, several nuclear families and several households, and having a degree of on-going corporate life focussed in group symbols such as a name, a land base ... and taonga. The land base may include a marae and land holdings operated as an incorporation or trust; taonga include ornaments, weapons, cloaks, ancestral history and ... (genealogies).”<sup>10</sup>

The *whanau* is the basic family unit from which the parent-child relationship develops. It involves at least three generations and is likely to have 25 to 50 members. The responsibility for bringing up children does not rest solely on the birth parents, but is shared by adult relatives. The parenting will often be done primarily by uncles, aunts or grandparents. Members of the *whanau* sometimes work together to look after and promote the *taonga*, to provide mutual support and to let children socialise with other members of the *whanau*.<sup>11</sup>

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<sup>7</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 57-58.

<sup>8</sup> Atkin 1988-89 *JFL* 232.

<sup>9</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 65.

<sup>10</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 61.

<sup>11</sup> Atkin 1988-89 *JFL* 232.

There is uncertainty as to the membership of *whanau*. According to some viewpoints, membership of *whanau* is restricted to descendants of the *whanau* ancestor, while other viewpoints also include spouses and adopted children who are not descendants, but actively take part in *whanau* activities. As far as the fulfilment of their duties is concerned, different *whanau* make different arrangements. Some only act when the need arises, while others meet often and form *komiti* (clubs) or *kotahitanga* (unions) that have regular meetings. Older persons usually fill high profile roles, such as acting as public speech-makers, chairpersons and directors of ceremonial aspects at these meetings. Behind the scenes they work in close so-operation with the “active middle-aged” and the “promising young”.<sup>12</sup>

Membership of *whanau* is not exclusive. Maori that belong to the *whanau* of one parent, can also choose to belong to that of the other parent. A spouse can also choose to belong to the *whanau* of his or her spouse. Members of the *whanau* are bound to one another by ties of *aroha* (loyalty and affection), and they support one another financially and morally. In terms of traditional *tikanga* they also have to accept responsibility for each other's behaviour and they have to assist in mediation. Furthermore, individual members share in the public recognition that other members receive for achievements, but also in the blame when other members infringe community norms, and in helping that person make reparation.<sup>13</sup>

Maori nuclear families are not compelled to belong to *whanau*. When a nuclear family does belong to a *whanau*, it often happens that family members experience tension between their loyalty towards each other and their loyalty towards the *whanau*. This tension is worsened by the fact that pressure is placed on nuclear family members to make sacrifices for the good of the *whanau*, such as financial contributions, the rendering of services, and

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<sup>12</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 61.

<sup>13</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 61-62.

making their children available to be brought up by other members of the *whanau*.<sup>14</sup>

In terms of Maori customs, children are not the exclusive possessions of their parents. As a matter of fact, the ideas of possession and exclusion, separately or in association, outrage Maori sensibilities. Children belong not only to their parents but also to the *whanau*, *hapu* and *imi*. They are both a *tatou tamariki* (the children of us many) and a *taua tamariki* (the children of us two). Children are called *taonga* (precious treasures). They have the status of descendants in the group, but are also at all times under the custody of the individuals in the group. These individuals are regarded as controlling the children in trust for the future. Children are entitled to be treated with respect, love, care and responsibility by all the members of the group. When the *whanau* functions properly, it is expected of parents to share the care and control of their children with the other members of the *whanau*. Generally, other members of the *whanau* have to do whatever parents do for their children, “from feeding, tending and cuddling them to disciplining and giving them orders, in everyday and crisis situations, whether their parents are present or not”.<sup>15</sup>

In this way, children are usually entrusted to the grandparents or other senior members of the *whanau*, who sometimes even care for the children permanently. The relationship between grandparents and grandchildren is a very special one, characterised by warmth and intimacy, and in important ways complementary to that between parents and children.<sup>16</sup>

“Grandparents concentrate particular attention on three activities which parents often avoid: fostering children’s self esteem by praise and expressions of affection, developing verbal skills through storytelling and discussion, and talking about sex and emotional matters.”

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<sup>14</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 62.

<sup>15</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 64.

<sup>16</sup> *Ibid.*

The *hapu* consists of *whanau* that are linked to one another, and that are linked to a local community. The *hapu* will have between one hundred and one thousand members, all having common ancestors going back six generations. The focal point of the *hapu* is the *marae* or meeting house. People may belong to several *hapu*, though they are likely to have developed a closer association with one rather than another.<sup>17</sup>

The *imi* is a much larger kinship linkage where members share a common ancestor. *Imi* comprise related *hapu* and is connected to a certain large territory which traditionally will have been protected and defended.<sup>18</sup>

What has just been discussed is the traditional family pattern for the Maori people. Without first explaining this, the most recent thinking in New Zealand family law cannot be properly understood. For some Maori the traditional concepts are now less powerful than when New Zealand was colonised. This is a result of intermarriage, both across *imi* and between Maori and Europeans. Urbanisation has also taken place, resulting in the migration of Maori from their traditional lands to cities and suburbs. This has placed the Maori within a non-traditional cultural setting. In some places urban *marae* and *whanau* have been established, but they are new and do not necessarily depend upon blood ties.<sup>19</sup>

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<sup>17</sup>     Atkin 1988-89 *JFL* 232.

<sup>18</sup>     Atkin 1988-89 *JFL* 232.

<sup>19</sup>     Atkin 1988-89 *JFL* 232; Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 54.

### 3 THE CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 24 OF 1989

#### 3.1 Introduction

Swain<sup>20</sup> describes the Children, Young Persons and Their Families Act 24 of 1989 (hereinafter “the Act” or “the 1989 Act”) as follows:

“The [Act] is a massive, complex and contentious piece of social policy legislation. It comprises 469 sections organized in eleven parts. It deals both with child care and protection and with youth justice in a stressed, changing and increasingly bicultural society.”

The Act was promulgated following the *Puao-Te-Ata-Tu* and the *Report of the Royal Commission on Social Policy*.<sup>21</sup> The Act, which came into operation on 1 November 1989, provides a culturally sensitive approach to the protection of children, young persons and their families and family groups in legal proceedings. Its uniqueness lies in its recognition of the diversity of family forms to be found in New Zealand (particularly among the Maori), in including promotion of this diversity among its objectives, and in laying down procedures which give *whanau*, *hapu* and *wi* a place in decisions affecting Maori individuals and nuclear families.<sup>22</sup> However, the Act does not only apply to Maori children and families, but to all children referred to the Department of Social Welfare for whom there are care and protection concerns.<sup>23</sup>

The Act covers both children and young persons in need of care or protection, and children and young persons who have committed offences. Its point of departure is that the role of the state and the court should be of a limited nature. Emphasis is placed on assisting the

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<sup>20</sup> Swain 1995 *IJLF* 155.

<sup>21</sup> See ch 6 par 2 above.

<sup>22</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 74; Robinson 1996 *Stell LR* (2) 314.

<sup>23</sup> Connolly 1994 *BJSW* 89.

family to make decisions.<sup>24</sup>

One of the most notable ways in which this Act embodies Maori *tikanga* by involving the family (including the *whanau*, *hapu* and *im*) in decision-making regarding children, is the family group conference.<sup>25</sup> The family group conference is aimed at making decisions and recommendations regarding the promotion of the welfare of children and young persons.

The precursor of the 1989 Act is the Children and Young Persons Act 72 of 1974 (hereinafter “the 1974 Act”). This Act provided statutory workers with the legal authority to intervene in family situations where children were in need of care and protection. Following such intervention, the children’s court had the authority to place children in alternative care, such as foster care or institutional care. In 1986 a Bill was introduced to replace the 1974 Act. It proposed a multidisciplinary process, called the case conference process, which brought together three different groups: the relevant family members, front-line staff, and those with specific expertise in the field of child abuse and neglect who were members of the local Child Protection Team. As with the 1974 Act, the Bill provided that the paramount consideration in child protection decisions is the best interests of the child. The Bill was criticised as being “monocultural”. The paramountcy of the best interests of the child was also criticised because it failed to place the interests of the child within the context of the child’s family. A radically revised Bill was but before parliament, and the 1989 Act was enacted and came into force on 1 November 1989.<sup>26</sup>

### 3.2 The meaning of the Act

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<sup>24</sup> Robinson 1996 *Stell LR* (2) 314; Robinson 2000 *Obiter* 131; Tapp 1990 *NZRLR* 83.

<sup>25</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 29; Robinson 1996 *Stell LR* (1) 215-216; Swain 1995 *IJLF* 157.

<sup>26</sup> Atkin 1990-91 *JFL* 387-388; Connolly 1994 *BJSW* 88-89. In regard to the 1974 Act, see ch 6 par 3.2.2.1, 3.2.5, 3.4 & 3.5 below. With regard to the 1986 Bill, see ch 6 par 3.2.2.1 & 3.8.3 below.



The Children, Young Persons and Their Families Act 24 of 1989 contains such a large and diverse range of legislative principles and objects that it is difficult to ascertain clearly parliament's intentions or the import of the Act.<sup>27</sup>

### 3.2.1 *The objectives of the Act*

The objectives of the Act can be found in the long title of the Act, read with section 4. The title sets out some specific goals, the first of which is to advance the well-being of families. The well-being of children is mentioned next, but, significantly, their well-being is promoted "as members of families, whanau, hapu, iwi, and family groups".<sup>28</sup>

The term "well-being" is not defined in the Act. It is probably intended as a broad term encompassing all aspects of the child's and family group's functioning. It has to be distinguished from "welfare," a term used in other sections of the Act. It goes without saying that the promotion of the well-being of children and family groups will require value judgments based on current states of knowledge (expert or lay) of what is necessary for the proper functioning of families and children. It is clear that the Act is not aimed merely at protection or support. Another important aspect emerging from the objectives as stated, is that the well-being of children is linked to the well-being of their families and family groups.<sup>29</sup>

The section of the Act entitled "Objects" contains only one object, which is "to promote the well-being of children, young persons, and their families and family groups ...".<sup>30</sup> The objects section sets out seven specific ways in which the object of well-being may be

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<sup>27</sup> Austin 1995 *VUWLR* 269.

<sup>28</sup> S (a) of the long title of the Act.

<sup>29</sup> Atkin 1990 *VUWLR* 321; Robinson 1996 *Stell LR* (2) 316. Also see Connolly 1994 *BJSW* 90; Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 26; Robinson 1996 *Stell LR* (1) 210; Swain 1995 *IJLF* 162; Tapp 1990 *NZRLR* 82.

<sup>30</sup> S 4.

achieved:

- It sets as priority the establishment and promotion of services and facilities within the community that will advance the well-being of children, young persons and their family groups.<sup>31</sup>
- The well-being of children, young persons and their families and family groups will further be promoted by the rendering of social services and facilities which are to be appropriate with reference “to the needs, values, and beliefs of particular cultural and ethnic groups”.<sup>32</sup> These services are to be “accessible to and understood by” children, young persons and their families and family groups,<sup>33</sup> and must be provided by “persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community”.<sup>34</sup> Section 7 imposes the obligation on the Director-General of Social Welfare to take positive and prompt action to ensure that such services and facilities are put into operation.<sup>35</sup>
- In section 4(b), emphasis is placed on prevention in the carrying out of the object of advancing the well-being of children, young persons and their families and family groups.
- In order to prevent their children from suffering harm, ill-treatment, abuse, neglect, and deprivation, parents, families, *whanau*, *hapu*, *imi* and family groups have to be assisted. In terms of s 7 it is also the duty of the Director-General to take prompt

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<sup>31</sup> S 4(a). This section has to be read with section (b) of the long title of the Act, which provides that an object of the Act is to make provision for families, *whanau*, *hapu*, *imi* and family groups to receive assistance in caring for their children and young persons.

<sup>32</sup> S 4(a)(i).

<sup>33</sup> S 4(b)(ii).

<sup>34</sup> S 4(a)(iii).

<sup>35</sup> S 7(a)(1).

and positive action in this regard. Assistance must also be given where the relationship between a child or young person and his or her parents, family, *whanau*, *hapu*, *imi* and family group is disrupted.<sup>36</sup>

- Sections 4(d) and (e) must be read together. Children and young persons have to be assisted to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation.
- However, if such prevention is not possible, protection must be provided for such children and young persons.
- When children and young persons commit offences, they should be held accountable and encouraged to accept responsibility for their actions. However, they will be 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.<sup>37</sup>

It should be noted that the “objects” section mentions the provision of assistance and services, and very general statements about protection of children are then mentioned as ways of achieving the object. The “objects” section does not spell out in any detail how the provision of assistance and services is to take place. According to Atkin, the emphasis in the objects section is on administrative provisions rather than on the values and policies underlying the Act,<sup>38</sup> but it seems to be that quite the opposite is true: the section seems to consist of broad, general policy based objectives.

### 3.2.2 *Important definitions*

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<sup>36</sup> S 4(c).

<sup>37</sup> S 4(f).

<sup>38</sup> Atkin 1990 *VUWLR* 321.

### 3.2.2.1 Background

The 1974 Act and the 1986 Bill placed initial responsibility for children on parents and guardians and followed the so-called “child welfare perspective”. The “child welfare perspective”, which emphasises the state’s responsibility to ensure the child’s welfare by removing the child from the care of the parents if necessary, gave rise to the following concerns on the part of the Department of Social Welfare:<sup>39</sup>

- The child welfare perspective often erodes the rights of families, *whanau*, *hapu*, *imi* and family groups and destroys the skills and resources they could once provide for their children.
- This perspective subjected children to prolonged substitute care, which disrupted their sense of identity and belonging, and gave rise to the stigma of being state wards.
- The child welfare perspective meant that families were often stripped of their responsibilities for their children rather than supported in their efforts to provide appropriate care.

These problems are said to be rectified by the wider definition of the concept of family in the 1989 Act.<sup>40</sup>

### 3.2.2.2 Explicit definition of “family” lacking

Henaghan and Tapp point out that, rather than define “family” explicitly, current New Zealand family law legislation implicitly embodies certain central themes. The first is an

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<sup>39</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 28.

<sup>40</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 27. Also see ch 6 par 3.2.2.3 below.

assumption about the types of family the legislation wants to give preference to. At the centre of this assumption is the idea that the married family is the preferred living arrangement, that marriage is essential to becoming part of a family. Terms such as “husband” and “wife”<sup>41</sup> are used consistently as a means of conveying the connection of family. In that sense, according to Henaghan and Tapp, the definitions are predominantly status based as opposed to functionally based.<sup>42</sup> In my view, one should be mindful of the possibility that the basic assumptions inherent in the use of words with fixed legal meanings may make the Act status based.

Henaghan and Tapp<sup>43</sup> indicate that “[a] group may be functioning as what they perceive as a family, but will not be defined as such unless the members have the appropriate legal status”. However, this statement does not appear to be borne out by the wide definition of family group.<sup>44</sup>

Henaghan and Tapp add that the advantage of a status based definition is that it is easy to establish and prove, whereas the disadvantage is that it may not reflect the actual living arrangements of the people involved. Although a functionally based definition may be more difficult to prove, it would reflect the reality of the living arrangements.<sup>45</sup>

The second theme that runs through New Zealand family law legislation is that it predominantly involves economic and monetary assistance and that basic concepts are adapted to optimise economic considerations.<sup>46</sup> Thirdly, definitions are mainly Eurocentric,

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<sup>41</sup> Note that the authors refer to New Zealand family law legislation in general - the 1989 Act does not use the terms “husband” and “wife”, nor are the terms defined in the Act.

<sup>42</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 4.

<sup>43</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 4.

<sup>44</sup> See ch 6 par 3.2.2.3 below.

<sup>45</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 4.

<sup>46</sup> In the Immigrants Land Act 1973, eg, “family” is seen as wider than the so-called nuclear family. By giving land grants the government of the day wanted to protect the interests of

with some variations depending on the context.<sup>47</sup>

### 3.2.2.3 Specific definitions

In terms of the Act, “child” means a boy or girl under the age of 14 years, whereas “young person” means a boy or girl over the age of 14 years but under the age of 17 years, excluding a person who is or has been married.<sup>48</sup> According to the Act, “parent” includes a step-parent.<sup>49</sup>

A recent attempt at defining the concept of family can also be found in the 1989 Act (see below). Henaghan and Tapp point out that the definition of family in this Act originated from a concern that too much power for the state in decisions relating to children could undermine the ability of families to care for children.<sup>50</sup>

“Family group” is defined as follows:<sup>51</sup>

“‘family group’, in relation to a child or a young person, means a family group, including an extended family, -

(a) In which there is at least 1 adult member -

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the married family as well as the interests of other relatives. By contrast, family is defined more narrowly in the Family Homes Protection Act 1895. The purpose of that Act was to allow for homes to be protected from being mortgaged or sold for debt (Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 4-5).

<sup>47</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 4.

<sup>48</sup> s 2(1).

<sup>49</sup> S 2(1).

<sup>50</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 27, where they quote from the second reading speech of the Minister of Social Welfare.

<sup>51</sup> S 2(1).

- (i) With whom the child or young person has a biological or legal relationship; or
- (ii) To whom the child or young person has a significant psychological attachment; or
- (b) That is the child's or young person's whanau or other culturally recognised family group."

It is significant that the Act contains no definition of family (or extended family), only of family group. According to Henaghan and Tapp this distinction between family and family group assumes that they are different. The family is assumed to be a much smaller group, more like the traditional nuclear family consisting of the married couple and their children.<sup>52</sup>

#### 3.2.2.4 Meaning and consequences of definitions

The emphasis is clearly on the connection with the child, namely biological, legal or psychological, or by *whanau*<sup>53</sup> or other culturally recognised family group, and the means of connection are wide and varied. Atkin points out that many problems arise from the use of the concepts "family" (a phrase that is used in the Act, but not defined) and "family group" in the Act, concepts which are fundamental to the aims and objectives of the Act, and yet they are vague and ill-defined, or not defined at all (ie "family").<sup>54</sup>

One can think of various possible connections to children that can constitute family groups in terms of this definition. Biological relationships would include the so-called "nuclear family", namely a married couple and their children. Atkin<sup>55</sup> asks the question whether the reference to one adult member means that a solo parent situation may constitute a family group. No one would deny that a solo parent situation constitutes a family, but is it also by

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<sup>52</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 6-7.

<sup>53</sup> See ch 6 par 2 above.

<sup>54</sup> or, to use Atkin's words: "distinctly obscure" (Atkin 1990 *VUWLR* 321). Also see Swain 1995 *IJLF* 163.

<sup>55</sup> Atkin 1990 *VUWLR* 321-322.

itself a family group? The fact that the act also refers to *whanau* and “extended family”<sup>56</sup> implies that a family group is wider than a family in its ordinary meaning (ie a married couple and their children) and should involve grandparents, aunts, cousins, *et cetera*. If regard is had to the way in which the family group conference is designed to operate, a wider group than one solo parent is clearly envisaged. But does this mean that the family group does not have to live together, but can be a collection of individuals whose relationship apart from blood or adoption may be superficial and spasmodic? As Atkin points out: “If this is so, then the idealism of the Act starts to look less attractive”.<sup>57</sup>

The one adult person who must belong to the family group may be anybody related to the child by blood (ie a “biological relationship”), or by adoption (ie a “legal relationship”) or psychologically (ie a “significant psychological attachment”). A step-parent, who falls within the Act’s definition of a “parent”, may possibly be included in the family group due to his or her marriage to the child’s natural parent (according to Atkin,<sup>58</sup> possibly a “legal relationship”), or else due to a “significant psychological attachment” as used in the definition of “family group”. The phrase “significant psychological attachment” is probably designed to take account of step or foster parent situations, but is a very clear indication that the act is not solely concerned with blood relationships. There will be cases where a child is part of a family with which it has no biological or adoptive links. What if the child’s estranged natural family claims an interest in the child’s welfare - can they be regarded as part of the child’s family group? Or does the child have two family groups? Suppose that the child’s blood relatives are Maori and the child belongs to an identifiable *whanau* or *hapu*, will the *whanau* take precedence over the child’s foster family? Further, Atkin poses the question as to how far the phrase “significant psychological attachment” can be stretched. Some children may claim that they have such an attachment with a favourite

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<sup>56</sup> “Extended family” forms part of the definition of “family group” contained in the Act (see ch 6 par 3.2.2.3 above). However, the concept “extended family” as such is not defined in the Act.

<sup>57</sup> Atkin 1990 *VUWLR* 322.

<sup>58</sup> *Ibid.*



teacher. Clearly, it could not have been the intention of the Act to place the teacher in the position of constituting a family group. However, if one looks at the strict wording of the Act, this interpretation is by no means far-fetched.<sup>59</sup>

A person with a biological, legal or *whanau* connection may have had no direct contact with the child at all, but for purposes of the Act, such person is part of the child's family group and is entitled to take part in decisions about the child when the child is in need of care or protection. Biological, legal or *whanau* connections are based on status, whereas psychological attachment is functionally based. The latter attachment can only be achieved by forming a significant psychological attachment with the child.<sup>60</sup> In view of what was said above about the advantages of using a functionally based definition, this definition should be welcomed, keeping in mind, however, the concerns discussed above about its possible wide interpretation.

The extended view of the family relationship is important for the protection of children: children are now regarded as members of families, *whanau*, *hapu*, *imi* and family groups, and these institutions have to take responsibility for the care, protection and control of their children and young persons.<sup>61</sup> Henaghan and Tapp indicate that the wider definition of the concept of family in the Act creates wider family responsibility with the primary concern of saving the public purse the immediate cost of alternative child care and hopefully the longer term cost of inappropriately socialised children.<sup>62</sup> They add that the extended definition of the concept of family is also consistent with the principles of the *Treaty of Waitangi*,<sup>63</sup> the

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<sup>59</sup> *Ibid.*

<sup>60</sup> Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 6. Also see Robinson 1996 *Stell LR* (2) 315.

<sup>61</sup> Ss 4, 5, 13, 21, 22, 28.

<sup>62</sup> 26,31. Also see Connolly 1994 *BJSW* 90; Swain 1995 *IJLF* 157; Tapp *et al* in Henaghan & Atkin (eds) *Policy* 175-178.

<sup>63</sup> See ch 6 par 1 above.

*Puao-te-ata-tu*,<sup>64</sup> and the United Nations Convention on the Rights of the Child 1989.<sup>65</sup>

Durie-Hall and Metge<sup>66</sup> consider the omission of a definition of “family” or “whanau” from the Act wise. They refer to the fact that previous attempts to define key Maori concepts in legislation have been criticised and deeply resented by Maori people. As far as the *whanau* is concerned, it is almost impossible to develop a definition that combines accuracy with brevity, and also reflects the changes that the concept has undergone over the last two centuries.

### 3.2.3 *The principles of the Act*

#### 3.2.3.1 General

Sections 5 and 6 of the Act contain principles which govern the operation of the whole Act, including both the care and protection and juvenile justice parts. In addition, section 13 contains a separate set of principles which apply only to the care and protection part. However, these principles are subject to the overriding principles of section 5.<sup>67</sup> Thus, there are at least 18 principles for care and protection, plenty of material upon which to draw when searching for the intention of Parliament, although this fact is seen by Atkin as an “embarrassment of riches as the principles often tug in different directions”.<sup>68</sup> The principles bind the court and persons exercising powers under the Act. They are at least an essential aid to interpretation and they can be invoked to challenge actions and decisions made under the Act. Atkin submits that they bind not only the courts and Director-

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<sup>64</sup> See ch 6 fn 5 above.

<sup>65</sup> Aa 3(2), 5 & 9 of the United Nations Convention on the Rights of the Child 1989. See ch 9 par 2 below.

<sup>66</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 74.

<sup>67</sup> Robinson 1996 *Stell LR* (2) 318.

<sup>68</sup> Atkin 1990 *VUWLR* 322-323.

General of Social Welfare (along with all other official agencies), but also the family and the family group, especially in the context of the family group conference.<sup>69</sup>

### 3.2.3.2 The principles contained in section 5

- The first principle is that of family participation in decisions. Wherever possible, a child's or young person's family, *whanau*, *hapu*, *imi* and family group should participate in the making of decisions affecting the child or young person. Accordingly, wherever possible, regard should be had to the views of the family, *whanau*, *hapu*, *imi* and family group.<sup>70</sup> The family group conference is the key mechanism for obtaining the participation of all these mentioned in the first principle. From the wording of the article, it appears that no preference is given to participation of "immediate" family over the wider *whanau* or *imi*. All are accorded equal rights of participation and regard should be had to the views of all of them. The phrase "regard must be had" indicates that the view of the family, *whanau*, *hapu*, *imi* and family group are not determinative.<sup>71</sup>
- The second principle is that wherever possible, the relationship between a child or young person and his or her family, *whanau*, *hapu*, *imi* or family group should be maintained and strengthened.<sup>72</sup> The most obvious ways of achieving this, are by keeping the child in the family, or if the child has to be removed, by maintaining regular access. This principle embodies the plea of the Minister of Social Welfare in the second reading speech that greater emphasis should be placed on the interests and authority of families, and that "for the most part, the needs of children

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<sup>69</sup> *Ibid.*

<sup>70</sup> S 5(a).

<sup>71</sup> Robinson 1996 *Stell LR* (2) 319.

<sup>72</sup> S 5(b).

are best served within the context of the family”.<sup>73</sup> The Minister explained that the well-being of children and young persons is bound in with the well-being of their families, adding that most cases of child protection did not concern serious physical or sexual abuse, but rather neglect, emotional harm or deprivation. In such cases there is a need for a form of intervention aimed at assisting with the upbringing of the child involved.<sup>74</sup>

Implicit in the second principle is the assumption that where the immediate or nuclear family cannot provide adequately for the needs of the child, the wider extended family is best equipped to provide such assistance, support and care. There is, of course, always the danger that “the children will become trapped in a family system with unhealthy attitudes and defensive to any outside monitoring”.<sup>75</sup> Indeed, some authors have cautioned against the assumption that kinship care is best, suggesting that this must be examined empirically.<sup>76</sup>

- The third principle requires that consideration must always be given to how the decision affecting a child or young person will affect his or her welfare and the stability of his or her family, *whanau*, *hapu*, *iwi* and family group.<sup>77</sup> It is not stability *per se* which is being addressed in this article, but rather how decisions affecting a child will influence stability. In some situations a decision to remove a child from a family group may affect stability because of disruption, whereas in others the stability of the family group may be best achieved by removing the child.<sup>78</sup> It is clear that the welfare of the child is linked to the stability of the family, which means that

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<sup>73</sup> As quoted by Robinson 1996 *Stell LR* (2) 319.

<sup>74</sup> Robinson 1996 *Stell LR* (2) 319. Also see Tapp 1990 *NZRLR* 85 fn 25.

<sup>75</sup> *Re Custody Application* (1990) 6 FRNZ 337 at 341.

<sup>76</sup> Robertson in Hudson *et al* (eds) *Conferences* 55; Swain 1995 *IJLF* 178.

<sup>77</sup> S 5(c).

<sup>78</sup> Robinson 1996 *Stell LR* (2) 319.

they should be read together. In other words, the welfare of the child is not to be seen in isolation from family stability but only as part of it.<sup>79</sup>

- The fourth principle relates to the child's or young person's wishes. Consideration should be given to the child's or young person's wishes as far as those wishes can reasonably be ascertained. It is expressly provided that those wishes should only be given such weight as appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.<sup>80</sup> Atkin points out that one can readily understand the need for the child to be old and mature enough before his or her views will carry much weight,<sup>81</sup> but finds the mention of "culture" obscure: "[d]oes this mean that the wishes of a mature child can be ignored if this is consistent with the child's ethnic background?"<sup>82</sup>
- The fifth principle states that endeavours should be made to obtain the support of the parents or guardians or other persons having care of the child, and also the support of the child or young person for any proposed courses of action in terms of the Act.<sup>83</sup> From the wording of the article, it appears that this principle does not apply to the wider *whanau*, *hapu*, or *imi*.<sup>84</sup>
- The sixth principle deals with the sense of time of a child or young person. The Act provides that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time frame appropriate to the

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<sup>79</sup> Atkin 1990 *VUWLR* 323.

<sup>80</sup> S 5(d).

<sup>81</sup> although he asks the question whether this problem cannot be partially overcome if there is someone to speak on behalf of the child.

<sup>82</sup> Atkin 1990 *VUWLR* 323.

<sup>83</sup> S 5(e).

<sup>84</sup> Robinson 1996 *Stell LR* (2) 320.

child's or young person's sense of time.<sup>85</sup> In this principle, the emphasis is on the fact that a child's sense of time is different from that of an adult. It goes without saying that there should be a sense of urgency about reaching decisions.<sup>86</sup>

### 3.2.3.3 The welfare and interests of the child

When the 1989 Act was first promulgated, section 6 provided that where, in the administration or application of the Act with regard to the care and protection of the child or young person, any conflict of principles or interests<sup>87</sup> arose, the welfare and interests of the child or young person had to be the deciding factor. This was known as the "conflict principle". The conflict principle was a qualification of the paramountcy (of the child's interests) principle. The exclusion of the unqualified paramountcy principle from the Act initially was a result of the argument that if the welfare of the child was to be unqualifiedly paramount (as opposed to only in the case of "conflict"), it would undermine the emphasis on the family, which is the main focus of the Act.<sup>88</sup> The paramountcy principle was perceived as being monocultural. It was argued that the paramountcy principle subsumed the importance attached to the responsibility of the tribal group, which took precedence over the view of the birth parents. According to Maori views, children's interests could only be determined after considering the views and concerns of the child's *whanau* and *hapu*. The role of the state should be to support the *whanau* by providing information that is timely and necessary, and by providing access to resources.<sup>89</sup>

It was not appreciated how difficult it would be to establish the necessary conflict.

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<sup>85</sup> S 5(f).

<sup>86</sup> Robinson 1996 *Stell LR* (2) 320.

<sup>87</sup> Atkin 1990 *VUWLR* 324 submits that "principles" means the principles laid down in the Act, and that "interests" may be those of the child, the parents or the family.

<sup>88</sup> Robinson 1996 *Stell LR* (2) 320-321.

<sup>89</sup> Atkin 1988-89 *JFL* 234; 1990-91 *JFL* 388.

According to one view, one needed to prove the conflict by means of detailed and precise argument in each particular case, whereas according to another view, if the child had been abused, then there was almost automatically a clash of interests between the child and the abuser.<sup>90</sup>

In *Director-General of Social Welfare v L*,<sup>91</sup> Richardson J held *obiter* that the original section 6 was merely “a contemporary re-statement” of the legislation policy, long entrenched, that the welfare of the child is the first and paramount consideration. However, it is to be doubted whether this view is correct. In terms of the Act, the child’s welfare is the deciding factor only if there is a conflict of principles or interests, and is thus a secondary rather than a primary consideration.<sup>92</sup> This was clearly in contravention of the United Nations Convention on the Rights of the Child 1989, which provides in article 3(1) that “the best interests of the child shall be a primary consideration”.<sup>93</sup>

This viewpoint has since been echoed by the *Report of the Ministerial Review Team to the Minister of Social Welfare*, where the following is said about the paramountcy of the child’s welfare principle: “[w]e are in no doubt that the well-being of the child is paramount”. The report continues to recommend that the Act be amended so as to ensure that the welfare of the child is treated as the first and paramount consideration.<sup>94</sup> This recommendation has now been carried out. The Children, Young Persons and Their Families Amendment Act 121 of 1994 (hereinafter “the Amendment Act”) unequivocally reinstated the paramountcy principle. The Amendment Act repealed section 6 of the 1989 Act and introduced a new provision that in respect of care and protection matters (but not youth justice) under the Act the welfare and interests of the child or young person shall be

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<sup>90</sup> Atkin 1990-91 *JFL* 389-390.

<sup>91</sup> (1989) 2 NZLR 314 at 319.

<sup>92</sup> Atkin 1990 *VUWLR* 323-324; 1990-91 *JFL* 390.

<sup>93</sup> Atkin 1990 *VUWLR* 324.

<sup>94</sup> as cited by Robinson 1996 *Stell LR* (2) 321.

the first and paramount consideration, having regard to the principles set out in sections 5 and 13 of the 1989 Act.<sup>95</sup> With the enactment of this amendment both the paramountcy principle emphasising the welfare and interests of the child and the original Act's principle emphasising the decision-making authority of the child's family group are affirmed. Swain points out that it remains to be seen how these two principles will be combined.<sup>96</sup>

It is unclear what is meant by the phrase "welfare and interests" of the child or young person. In *Director-General of Social Welfare v L*<sup>97</sup> a minority decision was delivered by Bisson J. The court held that the separate reference to "interests" indicated that a distinction had to be drawn between the two concepts. "Welfare" had to be viewed as the immediate day to day care and upbringing of the child, whereas "interests" had to be understood as the concern with long term matters, such as maintaining a link with the child's natural family.<sup>98</sup> However, the view of the majority of the court (as per Richardson J) was that the phrase "and interests" were merely meant to emphasise the welfare of the child, since the term "welfare" is a broad one "concerned with all aspects of the well-being of the child".<sup>99</sup>

The question arises how the concepts "well-being" (as used in the "objects" section<sup>100</sup>) and "welfare and interests" (as used in section 6) are related. Swain<sup>101</sup> points out that the term "well-being" is clearly meant to be a different term than welfare. Well-being is probably intended as a broad term which encompasses all aspects of a child's and family group's functioning. Swain puts it as follows: "It will require value judgments based on the current

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<sup>95</sup> Amendment Act s 3.

<sup>96</sup> Swain 1995 *IJLF* 161.

<sup>97</sup> (1989) 2 NZLR 314.

<sup>98</sup> At 324-325.

<sup>99</sup> At 319.

<sup>100</sup> See ch 6 par 3.2.1 above.

<sup>101</sup> Swain 1995 *IJLF* 162.



states of knowledge (whether expert or law) of what is necessary for the proper functioning of families and children.” It is clear that the Act is directed at well-being and not just protection or support.

#### 3.2.3.4 The section 13 principles

Section 13 contains the principles that relate only to the care and protection provisions of the 1989 Act:

- Section 13(a) states “[t]he principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted”.
- However, this principle is qualified by later principles. In terms of section 13(b)(ii), intervention into family life should be kept to the minimum necessary to ensure the child’s or young person’s safety and protection. This minimum intervention principle is a strong statement to discourage state action in the interests of the child.<sup>102</sup>
- Further, section 13(e) states that the child or young person should be removed from the family, *whanau*, *hapu*, *imi* and family group only if there is a serious risk of harm to the child or young person. Atkin points out that on one interpretation of the phrase “serious risk of harm”, the harm does not have to be serious, only the risk. Thus a small risk of serious harm will not justify removal, but the strong probability of slight harm will be consistent with removal. Swain also points out that it is the risk that must be serious, not necessarily the harm.<sup>103</sup> On the other hand, “serious risk of harm” might be construed as a unity, so that there must be a strong probability of serious harm. The difficulty of measuring “seriousness” is self-evident. It is also unclear what is meant by “harm”. Atkin submits that it should embrace not only

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<sup>102</sup> Atkin 1990 *VUWLR* 324; Tapp 1989 *NZRLR* 145.

<sup>103</sup> Swain 1995 *IJLF* 202 fn 36.

physical harm but also emotional and psychological harm, and in the context of the 1989 Act, cultural and spiritual harm as well.<sup>104</sup>

It is at any rate clear that there is a powerful statutory injunction against removing a child from its family. In view of this, Tapp correctly makes the following statement: “[t]he Act classifies family violence by adults against children far towards the private end of the continuum ...” (ie not to be interfered with by the state).<sup>105</sup>

Most of the remaining principles in section 13 are family oriented. They deal primarily with the desirability of the child’s continuing relationship with its family, even where he or she has been removed from the family.

- Section 13(b) contains the novel principle that the family, *whanau*, *hapu*, *imi* and family group have the “primary role in caring for and protecting” a child or young person. This is in stark contrast to the traditional European view and that which is stated in the United Nations Convention on the Rights of the Child 1989 that the primary responsibility rests with the child’s parents.<sup>106</sup>
- Section 13(b)(i) further provides that the family, *whanau*, *hapu*, *imi*, and family group itself should be supported, assisted and protected as much as possible.

It is surprising that these principles are not general ones covering the whole Act but ones which only relate to care and protection, meaning that they are relevant only to situations where the family is dysfunctional, where the weakest members of the family are at risk and where there is a distortion of the commonly accepted patterns of child rearing.<sup>107</sup>

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<sup>104</sup> Atkin 1990 *VUWLR* 324.

<sup>105</sup> Tapp 1989 *NZRLR* 144. Also see Atkin 1990-91 *JFL* 392-393. Also see ch 8 par 4 below.

<sup>106</sup> A 18 of the United Nations Convention on the Rights of the Child 1989. See ch 9 par 2.3 below.

<sup>107</sup> Atkin 1990 *VUWLR* 324-325.

### 3.2.4 *Where does this leave the interests of the child?*

The above discussion reveals an alarming fact: when seen in the overall context of the principles in the Act, the interests of the child tend to be “backseated by the minimalist intervention philosophy and family favouritism”.<sup>108</sup> Above it was indicated that the Act recognises the child’s or young persons’ interests as an individual only in very limited circumstances.<sup>109</sup> Of the principles of the Act only four refer to the child or young person as an individual rather than as an adjunct of the family, namely<sup>110</sup>

- the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time frame appropriate to the child’s or young persons’ sense of time<sup>111</sup>
- the principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted<sup>112</sup>
- the principle that the child’s interests should be given paramountcy<sup>113</sup>
- the principle that consideration should be given to the child’s or young person’s wishes as far as those wishes can reasonably be ascertained.<sup>114</sup>

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<sup>108</sup>     Atkin 1990 *VUWLR* 325. Atkin 1990-91 *JFL* 388 says that “... the significant feature of the new legislation is that the welfare of the child sits in the shadow of the welfare of the family”.

<sup>109</sup>     See ch 6 par 3.2.4 above.

<sup>110</sup>     See Atkin 1988-89 *JFL* 235; Austin 1995 *VUWLR* 257; Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 26.

<sup>111</sup>     S 5(f).

<sup>112</sup>     S 13(a).

<sup>113</sup>     S 6.

<sup>114</sup>     S 5(d).

There are, however, other provisions in the Act which counterbalance these tendencies:

- The principle of child participation is present in the Act.<sup>115</sup> In terms of sections 8, 10 and 11, children are to receive information and explanations about decisions and proceedings affecting them and are to be positively encouraged and assisted to participate in court proceedings, depending on their age and maturity. However, there are qualifications to these duties. For example, a child may be denied information because it is unable to understand, or because “[i]t is plainly not in the child’s ... interests to be so informed”.<sup>116</sup> The latter is presumably judged by the person who is taking the action or making the decision in question. However, the duty to encourage participation is restricted to proceedings before the court. The stage during which the case is before a family group conference, is not covered by the duty. There is no duty on the family group conference to encourage the child to participate.<sup>117</sup> There is thus only diluted protection of the child’s right to participate.
- A further important protection for the child is the appointment of legal representation for the child.<sup>118</sup> Appointment is mandatory when the child is the subject of proceedings,<sup>119</sup> but will often not have been made when a family group conference meets in an attempt to resolve the case. There is also a discretionary power to appoint a “lay advocate”,<sup>120</sup> who is supposed to appear in support of the child.<sup>121</sup>

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<sup>115</sup> The inclusion of this principle, which is consistent with the approach of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, was recommended by the committee which reviewed the Children and Young Persons Bill 1986 (Atkin 1990 *VUWLR* 325).

<sup>116</sup> S 8(2).

<sup>117</sup> Atkin 1990 *VUWLR* 325.

<sup>118</sup> Ss 159-162.

<sup>119</sup> S 159(1).

<sup>120</sup> Ss 163-165.

<sup>121</sup> S 163(1).

However, the duties and responsibilities of the lay advocate are clouded by a subsequent provision which states that the lay advocate is “[t]o represent the interests of the child’s or young person’s whanau, hapu, and iwi (or their equivalents (if any) in the culture of the child or young person) ....”<sup>122</sup> Atkin offers a possible explanation for this conflict.<sup>123</sup>

“This strange conflict can perhaps only be explained if the position of lay advocate is peculiarly designed for Maori and Pacific Island people and that within those cultures the conflict is less apparent.”

However, since there is no limitation on the appointment of a lay advocate, the confusion may still cause problems. Atkin refers to a further problem, which is the uncertain boundary line between legal representation for the child and the lay advocate. Their functions are, in some respects at least, identical.<sup>124</sup> This emphasises the diluted protection of the child’s right of participation.

- The office of Commissioner for Children<sup>125</sup> created by the Act is also a significant step in advancing the interests of children. The Commissioner is given wide functions, some of them being what Atkin calls “ombudsmanlike” in handling individual complaints. Other functions are more like those of the Human Rights Commission who fulfills a general advocacy role with the government and society on behalf of children. It is significant that the Commissioner’s statutory functions are child and not family oriented. Several of these functions specifically mention the welfare of the child.<sup>126</sup>

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<sup>122</sup> S 164(b).

<sup>123</sup> Atkin 1990 *VUWLR* 326.

<sup>124</sup> *Ibid.*

<sup>125</sup> Ss 410-422.

<sup>126</sup> Atkin 1990 *VUWLR* 326.

The functions of the Commissioner are the following:<sup>127</sup>

- to investigate any decision or recommendation made, or any act done or omitted, under the 1989 Act in respect of any child or young person in that child's or young person's personal capacity;
- to monitor and assess the policies and practices of the Department of Social Welfare, and of any other person, body, or organisation exercising or performing functions in terms of the 1989 Act;
- to encourage the development, within the Department of Social Welfare, of policies and services designed to promote the welfare of children and young persons;
- to undertake and promote research into any matter relating to the welfare of children and young persons;
- to inquire generally into, and report on, any matter (including any enactment or law or any practice or procedure) relating to the welfare of children and young persons;
- to receive and invite representations from members of the public on any matter relating to the welfare of children and young persons;
- to increase public awareness of matters relating to the welfare of children and young persons;
- on the Commissioner's own initiative or at the request of the Minister of Social Welfare, to advise the Minister on any matter relating to the administration of the Act;
- to keep under review, and make recommendations on, the working of the Act.

The Commissioner has all such powers as are reasonable necessary or expedient to enable the Commissioner to carry out his or her functions.<sup>128</sup>

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<sup>127</sup> S 411(1).

<sup>128</sup> S 412.

- Lastly, the Act contains procedures which enable officials to act very quickly to remove a child from danger.<sup>129</sup> Place of safety warrants can be obtained from judicial officers who, on application in writing made on oath, are satisfied that there are reasonable grounds for suspecting that a child or young person is suffering, or is likely to suffer, ill-treatment, neglect, deprivation, abuse, or harm. The place of safety warrant authorises any member of the police or a social worker, to search for the child or young person. If the authorised person believes, on reasonable grounds, that the child or young person has suffered, or is likely to suffer, ill-treatment, serious neglect, abuse, serious deprivation, or serious harm, the authorised officer may remove or detain the child or young person, and place him or her in the custody of the Director-General of Social Welfare.<sup>130</sup>

The Act also provides for the so-called “warrants to remove”. Where an application for a declaration that the child is in need of care or protection has been made in respect of a child or young person, certain judicial officers may, on application in writing made on oath, issue a warrant authorising any police officer or a social worker, to search for and remove or detain the child or young person and place him or her in the custody of the Director-General. Before issuing the warrant, the judicial officer must have reasonable grounds for believing that the child or young person is suffering, or is likely so suffer, ill-treatment, serious neglect, abuse, serious deprivation, or serious harm, or is so seriously disturbed as to be likely to act in a manner harmful to the child or young person or any other person, or to cause serious damage to property.<sup>131</sup>

Where it is critically necessary to protect the child or young person from injury or

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<sup>129</sup> Ss 39-42.

<sup>130</sup> S 39.

<sup>131</sup> S 40.

death, the police can remove without a warrant.<sup>132</sup> These emergency powers are temporary measures only and do not protect the child's long-term safety.<sup>133</sup>

### 3.2.5 *A multi-faceted legislative intention?*

Atkin submits that there is no single underlying parliamentary intention with respect to the Children, Young Persons, and Their Families Act. On the contrary, the intention of parliament has several facets to it. Although downplayed compared with the 1974 Act,<sup>134</sup> the welfare of the child is still an important principle. However, this principle is given more substance by, for example, the creation of the office of the Commissioner for Children.

At the same time the Act places considerable emphasis on the position of the family. Many provisions are aimed at assisting and protecting the family rather than parents. Atkin points out that, despite the difficulties in defining the parameters of the "family", the composite phrase "family, *whanau*, *hapu*, *imi* and family group" indicates that the Act "is not particularly interested in the so-called "nuclear family" and wishes to tap the resources and wisdom of the extended family".<sup>135</sup>

## 3.3 The family group conference

### 3.3.1 *Convening a family group conference*

The overall emphasis throughout the Act on family participation and decision-making, culminates in the family group conference. A family group conference is defined in the

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<sup>132</sup> S 42.

<sup>133</sup> Atkin 1990 *VUWLR* 326.

<sup>134</sup> See, in general, ch 6 par 3.2.2.1 above, and ch 6 par 3.4 below.

<sup>135</sup> Atkin 1990 *VUWLR* 327. Also see Swain 1995 *IJLF* 163.



interpretation clause,<sup>136</sup> in relation to care and protection proceedings, as a meeting convened by a care and protection coordinator<sup>137</sup> in accordance with section 20 of the Act.<sup>138</sup>

The calling of a family group conference is mandatory in the following situation: Where any social worker or member of the police believes, after inquiry, that a child or young person is in need of care or protection,<sup>139</sup> that social worker or member of the police must report the matter to a care and protection coordinator, who must call a family group conference.<sup>140</sup> The mandatory character of the family group conference is in respect of the coordinator's duty to call it, not in respect of attendance by family members *et cetera*.<sup>141</sup>

In a number of other situations the coordinator has a discretion<sup>142</sup> to convene a family group conference.<sup>143</sup> The Act provides that if a court "believes" that the child or young person is in need of care or protection, and refers the matter to a coordinator, the coordinator has a discretion to call a conference and may call for a social worker to investigate the matter.<sup>144</sup> Under this provision the court can only make a referral to the coordinator, but the judicial indication will clearly carry substantial weight in the exercise

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<sup>136</sup> S 2(1).

<sup>137</sup> See ch 6 par 3.3.5 below.

<sup>138</sup> S 20 provides that where a coordinator is authorised or required to convene or reconvene a family group conference, he or she must fix the date on which and time and place at which the family group conference is to be held.

<sup>139</sup> See ch 6 par 3.4 below.

<sup>140</sup> S 18(1).

<sup>141</sup> Swain 1995 *IJLF* 202 fn 43.

<sup>142</sup> The discretionary character of the family group conference is in respect of the coordinators choice as to whether to call it (Swain 1995 *IJLF* 203 fn 44).

<sup>143</sup> S 19(1) & (3).

<sup>144</sup> S 19(b) read with s 19(3).

of the coordinator's discretion to convene a family group conference.<sup>145</sup>

### 3.3.2 *Importance of the findings of the family group conference*

As indicated above, a family group conference will have to be involved in decision-making regarding a child in need of care or protection. Little decision-making can be done without the conference first having been convened and having had the opportunity to find a solution.<sup>146</sup> For example, an application to the court cannot normally be made unless there has been a family group conference.<sup>147</sup> If an application to the court has been made, the court may not grant a declaration that the child is in need of care or protection unless there has been a conference.<sup>148</sup> The following three exceptions to this principle is provided for in the Act:<sup>149</sup>

- where emergency action to remove the child into the Director-General's custody has been taken in terms of a warrant, or without a warrant
- where a restraining or custody order is needed as a matter of urgency
- where the child has been abandoned by his or her parents.

### 3.3.3 *The purpose of the family group conference*

The three main functions of the family group conference are as follows:

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<sup>145</sup> Robinson 1996 *Stell LR* (2) 322.

<sup>146</sup> Atkin 1990 *VUWLR* 327; Robinson 1996 *Stell LR* (2) 322.

<sup>147</sup> S 70.

<sup>148</sup> S 72.

<sup>149</sup> S 70(2)(c).

- To consider any matter relating to the care and protection of the child or young person as it thinks fit.<sup>150</sup>
- If it decides that such child or young person is in need of care, to make such decisions or recommendations or formulate such plans as are necessary or desirable, having regard to the principles of the Act.<sup>151</sup>
- To review decisions, recommendations or plans made by the conference, and their implementation.<sup>152</sup>

The functions of the family group conference need to be understood against the background of the Act to empower families to deal with the problem of care and protection. The Act is built around the simple premise that, since families are the setting within which the problem of abuse and neglect occurs, the onus should be placed on families to come up with solutions.<sup>153</sup> Families are considered to be best equipped for such care and protection, and the family group conference is the key mechanism for achieving these aims, and also to divert children and families from the courts.<sup>154</sup>

Much of the conference's work hinges on the initial question of whether the child is "in need of care or protection".<sup>155</sup> Atkin points out that it is unclear from the legislation how the conference is required to go about addressing this basic question.<sup>156</sup> While it is clear that the care and protection coordinator has a duty to ensure that the conference receives all

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<sup>150</sup> S 28(a).

<sup>151</sup> S 28(b).

<sup>152</sup> S 28(c).

<sup>153</sup> Tapp *et al* in Henaghan & Tapp (eds) *Policy* 168.

<sup>154</sup> Robinson 1996 *Stell LR* (2) 326.

<sup>155</sup> See ch 6 par 3.4 below.

<sup>156</sup> Atkin 1990 *VUWLR* 328.

necessary information and advice<sup>157</sup> (which may include information and advice from specialists), the decision that the child is in need of care or protection appears to be one which the conference has to make as best it can on the available evidence. Care and protection resource panels are appointed throughout New Zealand to assist with the process of supplying the conference with all necessary information and advice.<sup>158</sup> Their role, which is very loosely defined in the Act, is entirely advisory and not executive, and it may have an important influence in practice. How the conference should go about to resolve a conflict of evidence or a refusal to contribute by the alleged perpetrator of the abuse, or how it will test the accuracy of claims made to it, is not covered by the Act. All that the Act contains on this is the provision that the conference can regulate its own procedure.<sup>159</sup>

Confidentiality is obviously critical to ensure the success of the family group conference. The Act consequently provides that no evidence of any information, statement or admission disclosed or made in the course of a family group conference is admissible in any court or before any person acting judicially.<sup>160</sup> The publication of any report of the proceedings of a family group conference is prohibited.<sup>161</sup>

### 3.3.4 *Membership of the family group conference*

The Act sets out a long list of people who are “entitled” to attend a conference.<sup>162</sup> “Entitled” presumably means that they have a right to attend without having to seek anyone else’s

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<sup>157</sup> S 23.

<sup>158</sup> Ss 428-432.

<sup>159</sup> S 26(1). Also see Atkin 1990 *VUWLR* 328.

<sup>160</sup> S 37.

<sup>161</sup> S 38(1)-(4).

<sup>162</sup> S 22(1).

permission.<sup>163</sup>

The first category of persons entitled to be present, is the child or young person in respect of whom the family group conference is held.<sup>164</sup> Secondly, the child's or young person's parent, guardian, or caregiver, and members of the family, *whanau*, or family group of the child or young person.<sup>165</sup> Although called a "family group conference", members of the family and *whanau* who do not belong to the child's immediate family group are entitled to attend (eg birth families of adopted or foster children). The list of entitled persons contained in these two groups is however significantly qualified by the discretion of the coordinator to exclude attendance.

The child may be excluded from the conference, not by the family, but by the coordinator convening the family group conference if he or she is of the opinion that such attendance would not be in the interests of the child or young person, or if for any other reason the coordinator thinks it would be undesirable, or if the child is too young or immature to understand the proceedings.<sup>143</sup> Robertson points out that research indicates that children are excluded for various reasons, including the child's age or lack of maturity, the fact that the family group conference was dealing with sexual or physical abuse, and the fact that the child might be too scared or anxious to attend the meeting.<sup>144</sup> Atkin suggests that this extraordinarily wide power is a statutory discretion which is subject to the rules of administrative law.<sup>145</sup>

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<sup>163</sup> Atkin 1990 *VUWLR* 328. Tapp 1990 *NZRLR* 85 fn 27 points out that generally, family, *whanau* and family groups are entitled to attend, but the Act does not state that they are required to do so.

<sup>164</sup> S 22(1)(a).

<sup>165</sup> 22(1)(b).

<sup>143</sup> S 22(1)(a).

<sup>144</sup> Robertson in Hudson *et al* (eds) *Conferences* 54.

<sup>145</sup> Atkin 1990 *VUWLR* 329.

The coordinator has a corresponding power of exclusion with regard to parents and members of the family, the grounds being the interests of the child or undesirability of attendance “for any other reason”.<sup>146</sup> Robertson points out that research indicates that family members were usually excluded because they were the alleged or actual abuser, or the child, family or *whanau* requested it.<sup>147</sup> Atkin points out that one can readily understand why it might be undesirable for the child to face its alleged abuser in front of a gathering of the family. However it is strange that such a broad and vaguely defined discretion is given to an officer of the department, when the family itself is supposed to be regulating its procedures.<sup>148</sup>

From the above it is clear that the coordinator can be in a very powerful position.<sup>149</sup> Since the Act does not give a definition of “family” or “*whanau*”,<sup>150</sup> in effect the responsibility for definition is placed upon the care and protection coordinator. The Act requires the care and protection coordinator to consult the child’s family, *whanau* or family group in relation to the persons who should attend a family group conference.<sup>151</sup> The coordinator is also required to consult a care and protection resource panel before convening a family group conference.<sup>152</sup> Thus, unless the coordinator gets advice from the panel as to the composition of the child’s family, *whanau* or family group, it is for the coordinator to define membership and to decide whether to exclude any member of the group from the conference.<sup>153</sup>

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<sup>146</sup> S 22(1)(b).

<sup>147</sup> Robertson in Hudson *et al* (eds) *Conferences* 54.

<sup>148</sup> Atkin 1990 *VUWLR* 329.

<sup>149</sup> Swain 1995 *IJLF* 178 considers the role of the coordinator to be pivotal.

<sup>150</sup> See ch 3 par 3.2.2.3 above.

<sup>151</sup> S 21(b).

<sup>152</sup> S 21(a).

<sup>153</sup> S 22(1)(b). Also see Henaghan & Tapp in Henaghan & Atkin (eds) *Policy* 29-30.

The third category of people entitled to attend the conference, consists of the following: the care and protection coordinator who is convening the family group conference, or any other coordinator.<sup>154</sup> Police members or social workers are also entitled to attend the family group conference where they believe that the child is in need of care and thereafter report the matter to the coordinator.<sup>155</sup> Any barrister, solicitor or lay advocate representing the child may also be present and so too the agent of the High Court where the child is under guardianship of that court.<sup>156</sup>

The fourth category of people entitled to attend consists of anyone else whose attendance is in accordance with the wishes of the family.<sup>157</sup> Such persons could include, for example, a lawyer, doctor, teacher, member of the *hapu* or *imi* or other support person.<sup>158</sup> In addition to this list, it appears that professional advisors have a right to attend for information and advice purposes only.<sup>159</sup>

Most of the non-family people “entitled” to attend the conference as members of the third and fourth categories are not “entitled” to attend when the conference is engaged in “any discussions or deliberations”. The only person apart from the child or family who retains the right to attend is the agent of the High Court, all others being present solely at the request of the family.<sup>160</sup> Atkin points out that the significance of the exclusion of people from the conference depends somewhat on the scope of the phrase “any discussions or deliberations”. Given a narrow meaning it may refer only to the final weighing up of evidence and options. However, the phrase is clearly not as limited as this. Atkin thus

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<sup>154</sup> S 22(1)(c).

<sup>155</sup> S 22(1)(d).

<sup>156</sup> S 22(1)(g) & (h).

<sup>157</sup> S 22(1)(i).

<sup>158</sup> Robinson 1996 *Stell LR* (2) 324.

<sup>159</sup> S 23(2).

<sup>160</sup> S 22(2).

submits that it embraces virtually the whole of the conference proceedings with the exception of administrative matters which may be in the hands of the coordinator and information and advice sessions in terms of section 23(2). Although one might think that a spokesperson for the child or a representative of the alleged perpetrator might need to be present at the crucial stages in the process when the future of the child is at stake, this appears not to be the case.<sup>161</sup>

### 3.3.5 *The care and protection coordinator*

As indicated above, the Act provides for the care and protection coordinator who is convening the family group conference, or any other coordinator, to attend the conference.<sup>162</sup> The Act does not specify the particular background or profession such a coordinator should come from. Coordinators are appointed by the Director-General of Social Welfare and must be suitably qualified by reason of “personality, training or experience”.<sup>163</sup> They are civil servants in the permanent employ of the Department of Social Welfare. When the Act was passed, it was contemplated that the coordinator should be perceived by all involved in the process as a servant of the family group conference, rather than a servant of the Department of Social Welfare. This proves to be untenable in practice, since on the one hand they are obliged to demonstrate loyalty towards the department, and on the other hand they are obliged to appear and act independently and impartially in the interests of the family group conference participants.<sup>164</sup>

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<sup>161</sup> Atkin 1990 *VUWLR* 329.

<sup>162</sup> S 22(c). Also see ch 6 par 3.3.4 above.

<sup>163</sup> S 423(2).

<sup>164</sup> Robinson 1996 *Stell LR* (2) 324; Robertson in Hudson *et al* (eds) *Conferences* 56.



The care and protection coordinator has the duty to receive reports and referrals of a child or a young person in need of care or protection.<sup>165</sup> There is also a duty to convene a family group conference<sup>166</sup> and to record the details of any decision, recommendation or plan made or formulated at a family group conference.<sup>167</sup> Further, the coordinator must ensure that such decisions, recommendations or plans are regularly reviewed.<sup>168</sup> The coordinator must also notify the child or young person, his or her parent or guardian, any legal representative of the child or young person, and also any other person who will be directly affected by the outcome, of the results of the family group conference.<sup>169</sup> It is also his or her duty to consult on cultural matters any persons or groups having “knowledge or experience” on such matters.<sup>170</sup>

### 3.3.6 *The family group conference and the role of the court*

The family group conference has the following advantages, according to Atkin:<sup>171</sup>

- It reduces the cultural bias towards families which exist in key sectors of the community.
- It reduces court time.
- It avoids an officialdom approach to child care problems (although the care and protection coordinator can be in a very powerful and controlling

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<sup>165</sup> S 424(a).

<sup>166</sup> S 424(b).

<sup>167</sup> S 424(e).

<sup>168</sup> S 424(f).

<sup>169</sup> S 424(g) read with s 32.

<sup>170</sup> Robinson 1996 *Stell LR* (2) 324.

<sup>171</sup> Atkin 1990 *VUWLR* 330.

position).

- The intimate involvement of family members may enable the conference to come up with innovative solutions.

However, Atkin points out that family group conferences may also give rise to many problems. He refers to the following examples of potential problem situations: persons who claim they have been wrongly left out of the conference, family groups that have been defined too narrowly or too broadly, allegations of abuse that are denied without giving a proper “hearing” to the “accused”, decisions of a child being in need of care or protection that are wrongly made, families that refuse to hold a conference or only the alleged abuser turning up, and conferences that make inappropriate decisions that leave the child in danger.<sup>172</sup>

There are several solutions to these questions which do not involve court action. First, the help of the Commissioner for Children could be sought.<sup>173</sup> Furthermore, the conference can reconvene and reconsider its decisions.<sup>174</sup> It is important to note that the decisions of the conference will only be implemented if the original social worker, police officer or referring body or organisation agrees with the solution.<sup>175</sup> Lastly, the Director-General and the police need not give effect to the decisions if they are “clearly impracticable or clearly inconsistent with the principles set out in sections 5, 6 and 13” of the Act.<sup>176</sup> Atkin argues that although the task of weighing up the large number of potentially conflicting principles will not be easy for the Director-General or the police, this last solution represents a

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<sup>172</sup> Atkin 1990 *VUWLR* 330. Atkin refers to an example of the latter problem: in a sexual abuse case, the denials of the “accused” are backed up by the powerful members of the family, and the social worker colludes in the outcome (eg *Nelson v M* (1988) 5 NZFLR 97).

<sup>173</sup> See ch 6 par 3.2.4 above.

<sup>174</sup> S 36.

<sup>175</sup> S 30 read with ss 18(1) & 19(2).

<sup>176</sup> Ss 34 & 35.

significant “claw-back” of power from the family to the state, a major safeguard against the family group conference going wrong.<sup>177</sup>

In spite of the above, it may still happen that a family member, or an interested person such as a godparent, teacher, doctor or priest, is dissatisfied with the outcome of the whole process. Atkin points out that once a family group conference has been held, then an application to the family court can be made for a declaration that the child is in need of care or protection.<sup>178</sup> As was decided in *Re Children CYPF*,<sup>179</sup> the family court has the responsibility to make the final declaration. As the conference has been held, the court will have jurisdiction to hear the case. Atkin also submits that the High Court may be used in exceptional cases either through its wardship jurisdiction or by judicial review. In terms of the High Court’s wardship jurisdiction, it has jurisdiction to step in before, during or after a family group conference if there is evidence that a conference is being manipulated fraudulently or where there is collusion or bad faith between the family and the authorities to the detriment of the child. The court will then intervene in the process and take over the responsibility of declaring the child to be in need of care or protection.<sup>180</sup>

The decisions or recommendations of a family group conference will in many cases be highly influential on the court’s final determination. However, the weight attached to such decisions or recommendations may depend on whether they appear appropriate in the light of the non-privileged evidence available to the court. The reason for this is the potential dangers inherent in family group conference decisions. These include decisions based on an incorrect gasp of the facts or on expediency, as well as decisions that are disproportionately influenced by a sense of family loyalty. The court can thus be seen as a safeguard against the dangers of incorrect decisions by the family group conference. It

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<sup>177</sup> Atkin 1990 *VUWLR* 330.

<sup>178</sup> *Ibid.*

<sup>179</sup> (1990) 6 *FRNZ* 55 at 57.

<sup>180</sup> Atkin 1990 *VUWLR* 330-335, 340-342; Swain 1995 *IJLF* 172.

would therefore be an abdication of the court's responsibility simply to rubberstamp the decision of the family group conference.<sup>181</sup>

### 3.3.7 *Some perspectives on the workability of the family group conference*

Atkin argues that reference to the *whanau* or *hapu* may work for those Maori who still identify with the traditions. It goes without saying that the law must be flexible enough to allow this to happen. However, even before the commencement of the 1989 Act, Atkin was of the opinion that the workability of the family group conference is questionable. He asks the following questions:<sup>182</sup>

"[H]ow are administrators to know which *hapu* should be consulted when many people belong to more than one *hapu*? What if the child or young person, or even the birth parents strongly object to bringing the *whanau* or *hapu* into the decision-making process? If there has been sexual abuse by members of the *whanau*, are those responsible for the abuse to be given a powerful say in the outcome of the problem? What is to happen to those people who live in the cities and now have little or no connection with their *whanau* or *hapu* many miles away? Will the law now require reference to those virtually unknown people, who happen to be blood related? There is also the position of the large majority of New Zealanders who are not Maori for whom concepts such as *whanau* are meaningless."

These problems, and other problems highlighted elsewhere in this discussion<sup>183</sup> were raised early on in the legislative process, even before the family group conference process came into operation. Below a perspective will be given on the first decade of the 1989 Act, followed by a discussion of some comments on and criticism against the Act. Whereas the

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<sup>181</sup> *Ibid.*

<sup>182</sup> Atkin 1988-89 *JFL* 236-237.

<sup>183</sup> See ch 6 par 3.2.2 & 3.3.6 above.

problems highlighted in this discussion are of a practical nature, the discussion below will focus more on theoretical and conceptual issues.<sup>184</sup>

### 3.4 “In need of care or protection”

The basis for action under the Children, Young Persons, and Their Families Act is that a child is in need of care or protection. The Act sets out the meaning of this phrase in section 14.<sup>185</sup> Unless a case can be brought within this section, it cannot be dealt with in a care

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<sup>184</sup> See ch 6 par 3.8 below.

<sup>185</sup> S 14(1) provides that a child or young person is in need of care or protection within the meaning of the Act if:

- (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 well-being 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 well-being 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 is, or is likely to be, harmful to the physical or mental or emotional well-being of the child or young person or to others, and the child's or young persons' parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control; or
- (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 well-being of the child; or
- (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
- (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
- (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 to such an extent that the physical or mental or emotional well-being of the child or young person is being seriously impaired; or
- (i) the ability of the child or young person to form a significant psychological attachment to the person of persons having the care of the child or young person

and protection situation. The Act is intended to focus primarily on abuse and neglect, but there are other grounds for deciding that a child is in need of care or protection, ranging from parental incompetence and conflict to uncontrollable behaviour and child (as opposed to young person) offending. A new ground is where the child's bonding is prejudiced because the child has been left too often with others (including friends or relatives). Atkin suggests that on the face of it this ground contravenes the policy of the Act favouring wide family responsibility for the care of children.<sup>186</sup>

The two principal grounds which relate to abuse and neglect are:

- “(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;<sup>187</sup> or
- (b) the child's or young person's development or physical or mental or emotional well-being is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable.”<sup>188</sup>

These provisions are complex and allow for many different combinations. It should be noted that neglect and the similar concepts of deprivation and impairment must be “serious”, which means that the threshold before satisfying the legal standard is quite a bit higher than under the 1974 Act. It is clear that the 1989 Act demands a more rigorous assessment of the facts. In contrast, where there has been abuse (ie ill-treatment or harm), it is not necessary to show that the abuse was serious. It is enough to show that the abuse

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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 for the purposes of maintaining the child or young person apart from the child's or young person's parents or guardians.”

<sup>186</sup> Atkin 1990 *VUWLR* 336 fn 63.

<sup>187</sup> S 14(1)(a).

<sup>188</sup> S 14(1)(b).

exists or is likely.<sup>189</sup>

Under the 1974 Act several rules were developed for determining whether a child was in need of care or protection. It was held<sup>190</sup> that in considering whether a child has been neglected the court should try to reflect the community's minimum standards of parenthood. It is wrong to look at the range of orders which the court could make, decide that one of them might be useful for the child and then determine that the case of neglect has been made out. The stage of deciding whether there had been neglect (the adjudicative stage) was distinct from the subsequent stage of deciding what might happen to the child (the dispositional stage). These two stages needed to be kept separate.

The separation of stages became an accepted ruling under the 1974 Act. Under the 1974 Act, the minimum community standards test, in terms of which the court should try to reflect the community's minimum standards of parenthood in considering whether a child has been neglected, was accepted. However, it was limited as set out below. In *Department of Social Welfare v J*<sup>191</sup> there was evidence that a 5-year old girl was being hit, thrown to the floor and locked up. The trial judge dismissed the complaint laid against the mother by applying a minimum standards test. The judge had balanced the instances of "abuse" with the love and care given by the mother at other times. On appeal, the court refused to accept the minimum standards test as applying to cases of ill-treatment. It was held that abuse could not be ignored or minimised by reference to community standards. Further, the law did not allow for the balancing of good and bad aspects of parenting. If there was ill-treatment, it was wrong to dismiss the complaint just because there were other good features. These good features only became relevant at the second stage of deciding what should happen to the child. Doubtless less drastic steps would be taken where such features were present.

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<sup>189</sup>       Atkin 1990 *VUWLR* 336.

<sup>190</sup>       in an unreported case cited by Atkin 1990 *VUWLR* 336 (*H v Social Welfare Department*).

<sup>191</sup>       (1988) 4 *FRNZ* 534 at 535.

These rules did not survive intact following the 1989 Act. Neglect cases must now be serious, and it may follow that a mere breach of minimum standards may not be enough to satisfy the new ground. A strict level of discipline maintained by parents could, for example, fall below the minimum standards the community can accept, but it is quite a different question whether the discipline and its effect are sufficiently serious to satisfy the new Act.<sup>192</sup>

The separation of the adjudicative and dispositional stages must also be looked at afresh under the new Act. When considering simply whether a child is in need of care or protection, as a family group conference is required to do, the traditional separation of stages applies. However, the position of the court is radically different under the 1989 Act. A court is prevented from declaring that a child is in need of care or protection unless it has first explored all other practicable and appropriate means of providing for the child.<sup>193</sup> Thus, even if a court is satisfied that a child is seriously neglected, it cannot declare that to be so before it has assessed the range of options available for disposing of the problem. On the other hand, the division of stages still applies in the sense that, if one of the orders laid down in the Act would be useful for the child, that does not in itself justify a finding of serious neglect, ill-treatment, *et cetera*.<sup>194</sup>

Two further pre-1989 Act rules appear from the decision of the House of Lords in *In re D (A Minor)*.<sup>195</sup> In this case it was held that a baby that was born with drug addiction to parents who were drug addicts could be taken straight into care from birth. The argument against this was that the case depended upon events that took place before the child's birth, and not upon the present situation. The court held that it was necessary to find a continuing state of affairs, the first rule laid down in the case. However, when considering

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<sup>192</sup> Atkin 1990 *VUWLR* 337.

<sup>193</sup> S 73(1).

<sup>194</sup> Atkin 1990 *VUWLR* 337.

<sup>195</sup> [1987] AC 317.



the present state of affairs it was legitimate to look back into the past to assess what was likely to happen. The court held that the mere fact of some past avoidable neglect would not in itself be enough, but the evidence of drug abuse in this case meant that the parents were unlikely to be able to care properly for the child. The time at which a court had to consider whether there was a continuing state of affairs was at the time the proceedings began, the second rule laid down in the case. To follow any other rule would frustrate the outcome of the case. The reason for this is that the child might well have been in good alternative care during the interval between application and hearing and thus no longer be in need of care (as defined by statute).

The above decision was followed in *Director-General of Social Welfare v B*.<sup>196</sup> After a complaint was laid, two children with a drug dependent mother were placed into foster care, where they remained for two years. Their mother agreed to enter a drug rehabilitation programme, which appeared to have been successful. The trial judge dismissed the original complaint of two years ago because he was of the opinion that the mother could now care for the children. This decision was overturned on appeal. Tipping J held that the question was to be determined at the date of the complaint and not the date of the hearing. Events between those two dates could be relevant to the question of disposition but not adjudication. Thus, if a complaint was not valid at the date it was laid, subsequent events could not make it valid. If need be, a new complaint would have to be laid. On the other hand, a complaint does not cease to be valid as a result of subsequent events.

Atkin submits that the latter rule laid down in *Director-General of Social Welfare v B supra* is no longer valid under the 1989 Act. He gives the following reasons for this submission:<sup>197</sup>

Firstly, as mentioned above, the court cannot make a declaration unless it has considered

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<sup>196</sup> (1988) 5 NZFLR 584.

<sup>197</sup> Atkin 1990 *VUWLR* 338.

other means of dealing with the problem. If the parent has in the meantime obtained or regained the necessary parenting skills that were lacking in the first place, then placing the child in the care of that parent is the logical solution. If this is so, then under section 73(1) the subsequent rehabilitation of the parent prevents the declaration from being made - disposition decides adjudication.

Secondly, under the 1974 Act a complaint was laid by a social worker or police officer “who reasonably believes” that the child was in need of care, protection or control.<sup>198</sup> The proof of the complaint thus obviously depended upon the basis for the belief at the time of laying the complaint. This language does not appear in the 1989 Act.

The third reason flows from the second one. Under the 1974 Act the court could find in terms of section 31 that the grounds of the complaint were proved. This means that the focus was on the grounds that were specified in the original complaint. In contrast, the 1989 Act empowers the court in section 67 to make a declaration “that the child or young person *is* in need of care or protection” (Atkin’s emphasis). As a result of this, according to Atkin, the emphasis is on the present and not on proof at an earlier point.

Finally, when deciding whether or not to declare that the child is in need of care or protection, the court may take into account evidence (a) that the harm will not continue or be repeated,<sup>199</sup> (b) that the parent, guardian or caregiver can ensure that harm will not continue or be repeated.<sup>200</sup> Clearly such evidence may include changes in the lifestyle and circumstances of the family which have occurred since the proceedings began.

A final point which should be made regarding the phrase “in need of care or protection”

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<sup>198</sup> S 27(1).

<sup>199</sup> Atkin 1990 *VUWLR* 339 points out that the subsection does not link these two limbs with “or” or “and”, but submits that since it refers to “any” evidence, there is no reason why both limbs have to be satisfied.

<sup>200</sup> S 73(2).

relates to culpability. The fact that it is not proven that a parent, guardian or other caregiver was responsible for neglect or ill-treatment does not prevent a court from declaring that a child is in need of care or protection assuming that other evidence establishes the grounds listed in section 14.<sup>201</sup>

### 3.5 Making a declaration

There are some restrictions on the ability of the court to make a declaration. A judicial declaration is a step of last resort which is available only if the court is satisfied that there are no other practicable and appropriate means of dealing with the child. The court is thus obliged to consider options other than declaring that the child is in need of care or protection, even if the need of the child for care and protection is obvious.<sup>202</sup>

The jurisdiction of the court is also restricted by the need to hold a family group conference. In terms of the Act<sup>203</sup> an application to court in the absence of a family group conference can be made only in three situations:

- where emergency action to remove the child into the Director-General's custody has been taken in terms of a warrant, or without a warrant
- where a restraining or custody order is needed as a matter of urgency
- where the child has been abandoned by his or her parents.

Even if an application has been made, a declaration can be made without the holding of

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<sup>201</sup> S 71.

<sup>202</sup> Atkin 1990 *VUWLR* 340.

<sup>203</sup> S 70. See ch 6 par 3.3.2 above.

a family group conference only in the case of abandonment.<sup>204</sup> The problems resulting from these rules are illustrated by the decision in *Application of Atkinson*.<sup>205</sup> In this case, a family group conference was convened, but the family refused to participate. It is obvious that some kind of court action was necessary, but in this case it could not be argued that the matter could be treated as a matter of urgency (the child was in good alternative care), nor was there any evidence of abandonment (although they refused to co-operate in the conference, the parents were still involved in the care of the child). The risk to the child in a situation like this is self-evident. Atkin submits that on the face of it, the court has no other option but to return the child to the parents in a situation like the one under discussion.<sup>206</sup>

Once a family group conference has been held, on the other hand, the court has jurisdiction to grant a declaration that the child is in need of care or protection. Curiously, nothing in the legislation prevents a declaration even where the family group conference has come up with a plan which has been agreed to by the authorities. If the court does not consider the plan to be practicable or appropriate under section 73(1), then it can override the conference. This should ideally be done on request of someone outside the family group, such as a doctor or social worker.<sup>207</sup> A court may also make a consent order following a family group conference.<sup>208</sup>

Finally, reference should be made to the standard of proof which is required before the grounds for a declaration are made out. Under the 1974 Act the widely accepted rule was that the test was the civil standard of a balance of probabilities, but that it was important to have regard to the serious nature of the allegation, thus tipping the scales slightly closer to the criminal standard. The 1989 Act states expressly that the standard of proof is that

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<sup>204</sup> S 72.

<sup>205</sup> (1989) 6 NZFLR 97.

<sup>206</sup> Atkin 1990 *VUWLR* 341.

<sup>207</sup> Atkin 1990 *VUWLR* 341. In terms of section 68(c) the court can grant leave to anyone to apply for a declaration.

<sup>208</sup> S 202.

“applying in civil proceedings”.<sup>209</sup> Atkin opines that it remains to be decided whether the gloss about the seriousness of the allegation remains.<sup>210</sup>

### 3.6 The powers of the family court after making a declaration

The family court has the authority to grant a wide range of orders as set out below. These orders can be made only if the court first makes a declaration that the child is in need of care or protection.<sup>211</sup> As pointed out earlier,<sup>212</sup> a judicial declaration is a step of last resort, available only if the court is satisfied that there are no other practicable and appropriate means of dealing with the child. The court is thus obliged to consider options other than declaring that the child is in need of care or protection, even if the need of the child for care and protection is obvious.<sup>213</sup>

After making a declaration that the child is in need of care or protection, the family court can do one or more of the following things:<sup>214</sup>

- “(a) [d]ischarge the child or young person, or any parent or guardian or other person having the care of the child or young person (or both) from the proceedings without further order;
- (b) [o]rder that the child or young person, or any parent or guardian or other person having the care of the child or young person, or both, come before the court, if called upon within 2 years of the making of the order, so that the court may take further action under this section;
- (c) [o]rder one or more of the following persons to receive counselling from such person or persons, and subject to such conditions specified by the Court:

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<sup>209</sup> S 197.

<sup>210</sup> Atkin 1990 *VUWLR* 342.

<sup>211</sup> S 83.

<sup>212</sup> See ch 6 par 3.5 above.

<sup>213</sup> Atkin 1990 *VUWLR* 340.

<sup>214</sup> S 83(1).

- (i) [t]he child or young person;
- (ii) [a]ny parent or guardian or other person having the care of the child or young person;
- (iii) [a]ny person in respect of whose conduct a restraining order or an interim restraining order was sought or made in the proceedings;
- (d) [m]ake a services order under section 86 of this Act;<sup>215</sup>
- (e) [m]ake a restraining order under section 87 of this Act;<sup>216</sup>
- (f) [m]ake a support order under section 91 of this Act;<sup>217</sup>
- (g) [m]ake a custody order under section 101 of this Act;<sup>218</sup>
- (h) [m]ake an order under section 110 of this Act appointing a guardian of the child or young person.<sup>219</sup>

### 3.7 The Children, Young Persons and Their Families Act 24 of 1989: some perspectives on the functioning of the Act during the first decade

As will be indicated below,<sup>220</sup> the introduction of the Children, Young Persons and Their Families Act led to vigorous debate, especially about the merits of family group conferences in care and protection cases. Unfortunately, since much of this debate has been hindered by the lack of research, many of the arguments presented are “couched at

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<sup>215</sup> ie an order directing any person or organisation to provide certain services and assistance to a parent, guardian or other person having the care of the child or young person, or to the child or young person.

<sup>216</sup> ie an order restraining any person named in the order from residing with the child or young person, or from molesting the child or young person (or any person with whom the child or young person is residing) by following or contacting the child or young person, or by watching or besetting the child's or young person's place of residence, work or education.

<sup>217</sup> ie an order directing any person or organisation to provide support (ie maintenance) to that child or young person for a period specified in the order, but not exceeding 12 months.

<sup>218</sup> ie an order placing the child or young person in the custody of the director-general, an *iwi* authority, a cultural authority, the director of a child and family support service, or any other person.

<sup>219</sup> ie an order appointing any of the persons or organisations listed in fn 218 above as the child's guardian.

<sup>220</sup> See ch 6 par 3.8 below.

the level of theory and anecdote”.<sup>221</sup>

The Department of Social Welfare reviewed the 1989 Act a year after its implementation. This report<sup>222</sup> contains a brief review of the operation of the Act and its impact on staff and clients. However, the report is based on the limited statistics then available and interviews with departmental staff and other agencies. In this report it was stated that in the relatively short time since the Act was passed, family group conferences have come to be accepted as an important addition to the family court system by both Maori and non-Maori. In general, family group conferences have been effective in finding solutions to the problems of children at risk by mobilising the resources of the wider family.<sup>223</sup> Durie-Hall & Metge are similarly optimistic when they say the following:<sup>224</sup>

“Initially sceptical of the willingness of the Justice system to accept and act on their contribution, many Maori families and whanau have been excited and revitalized by the outcomes achieved. Inevitably there have been difficulties with the implementation of the Family Group Conference provisions, but these are in the process of being identified and worked through.”

A more comprehensive report was published in 1991 by the evaluation unit of the Department of Social Welfare.<sup>225</sup> This report presents a national statistical profile of care and protection family group conferences and describes how they were organised and operated, the nature of their plans and reviews, and the process used to resource their convening and plans.

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<sup>221</sup> Robertson in Hudson *et al* (eds) *Conferences* 49.

<sup>222</sup> Renouf, Robb & Wells *Children, Young Persons and their Families Act: Report on its first year of operation* (1990), as cited by Robertson in Hudson *et al* (eds) *Conferences* 49.

<sup>223</sup> See Durie-Hall & Metge In Henaghan & Atkin (eds) *Policy 75*, Robertson in Hudson *et al* (eds) *Conferences* 49-50.

<sup>224</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) 75.

<sup>225</sup> Paterson & Harvey *An evaluation of the organisation and operation of care and protection family group conferences* (1991), as cited by Robertson in Hudson *et al* (eds) *Conferences* 50. Also see Paterson 1993 *SWR* 14 *et seq*.

Angus (National Director of the Department of Social Welfare's Children and Young Persons Service)<sup>226</sup> indicates that in over 85% of cases family group conferences that have been convened for care and protection reasons have been able to reach agreement. He adds that of the more than 5000 family group conferences held in the first 8 months of the Act's operation (almost 2000 of which were for care and protection issues), the Department of Social Welfare had to exercise its statutory power not to agree to the plan proposed by the family group conference because of concerns about the safety of the child in only one or two cases. Angus adds that the family group conference process is not only a revolutionary process in child protection work, but also a highly successful one that reflects the multicultural composition of New Zealand. According to Angus, the new process probably protects the safety of children better than the previous system. The family group conference process is helping to reduce the incidence of removal of children and young persons from families and increase the incidence of placement of children within extended families where removal from family of origin is necessary. Angus says that, in the previous year, families have shown through their positive response that they are willing to play an active role in matters concerning the welfare of their children.

Hassell and Maxwell provided national data for care and protection outcomes in 1990.<sup>227</sup> There were 12 079 notifications. Of these, 6% were discussed with care and protection resource panels. Only 31% of the original notifications were referred to care and protection coordinators. Family Group Conferences were held in respect of 28% of the original notifications. Agreement was reached in 92% of these. One of the most common decisions (reached in 69% of the cases) was that a parent, child and/or young person would attend counselling and/or receive continuing support from a social worker or other professional, the other most common outcome being the provision of financial assistance covering for

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<sup>226</sup> Angus 1991 SWR 5.

<sup>227</sup> Hassall & Maxwell "The family group conference: A new statutory way of resolving care, protection and justice matters affecting children" in *The Office of the Commissioner for Children, an appraisal of the first year of the Children, Young Persons and Their Families Act 1989: A collection of three papers* (1991) 1-13, as cited by Swain 1995 *IJLF* 175 *et seq.*



example travel, clothing, *et cetera* (76% of the cases). Changes of care were made in respect of 12% of the original notifications (44% of the family group conferences). It is not possible to determine from the data what the original placements were but the pattern of placements after the family group conference was: original caregiver: 42%, extended family: 23%, Department of Social Welfare: 21%, other: 12%. Court declarations (that the child was in need of care or protection) were made in respect of 2% of the original notifications.

### **3.8 The Children, Young Persons and Their Families Act 24 of 1989: criticism and comments**

The following discussion will focus on some of the criticism against the 1989 Act. This discussion will comprise three main themes, namely concerns about the cultural appropriateness of the Act, concerns about the ability of the family to deal with abuse (especially in the case of a dysfunctional family), and concerns about the lack of professional input in the family group conference process.

#### *3.8.1 Difficulties related to cultural aspects of the Act - a Maori perspective*

Inevitably there have been difficulties with the implementation of the family group conference provisions. Durie-Hall and Metge indicate that some of these difficulties arise when judges, lawyers, coordinators and members fail to appreciate the importance of the corporate aspect of the *whanau* for the Maori population. Many confuse the concepts *whanau* and *whanaunga* (relative), assuming that the latter is a derivative of the former. In fact, *whanaunga* is derived from the verb *whanau* (to incline); its first vowel is short whereas that of *whanau* is long. While the members of a *whanau* are *whanaunga* to each other, collecting up a child's *whanaunga* does not necessarily produce a *whanau*. Children could belong to two or three different *whanau*, or to none at all. To identify a child's *whanau*, one should locate *whanaunga* who are bound together already by ties of descent, familiarity, loyalty and shared experience, and who are used to working together as a

group. *Whanaunga* of this sort will work together effectively to formulate and implement a management plan.<sup>228</sup>

Those working with family group conferences will have difficulties understanding the dynamics of the conference if they do not grasp the key role of descent in Maori nuclear families and *whanau*. Durie-Hall and Metge point out that unexpected alliances, oppositions and breakdowns in the discussions are to be expected. Tension between loyalty between co-descendants of the *whanau* ancestor and loyalty to one's spouse creates internal stress in nuclear families and *whanau*, for which allowance should be made.<sup>229</sup>

From a Maori point of view, the Act has an omission that will have to be remedied: it does not provide for the *whanau* to be involved in monitoring the implementation of the plan it has helped to develop. In Maori thinking the family group who developed the plan has a responsibility to ensure that it is being implemented effectively, whether the implementation rests with the family, or with the state, or is shared. This can be achieved if the family group conference reconvenes at key stages in the implementation of the plan, first to protect the child from practices that depart from the plan, secondly, to ensure that the child does not evade the plan, and thirdly, to restore and maintain the *mana* (authority and control) of the child on the one hand and of the *whanau* or family group on the other.<sup>230</sup>

### 3.8.2 *Difficulties with abilities of the family to solve problems*

Tapp, Geddis and Taylor indicate that the child protection sections of the Children, Young Persons and Their Families Act are built around the simple premise that, since families are the setting within which the problem of abuse occurs, the onus should be placed on

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<sup>228</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 75.

<sup>229</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 76.

<sup>230</sup> Durie-Hall & Metge in Henaghan & Atkin (eds) *Policy* 77.

families to come up with solutions. State involvement should thus be minimised. Tapp, Geddis and Taylor call this premise not only simplistic, but also fatally flawed.<sup>231</sup>

The underlying philosophy that shaped the 1989 Act is the belief that, given the resources, the information, and the power, a family group will generally make safe and appropriate decisions for children. Tapp, Geddis and Taylor illustrate why they call this statement startlingly simplistic. They show that the sorts of cases that require application of the legislative provisions will come from dysfunctional families. The intergenerational nature of abuse means that the dysfunctional family is usually part of an extended family with similar problems. The extended family is nearly always aware of the episodes of abuse, yet despite this knowledge the abuse has been allowed to continue. It is unrealistic to expect a family that has demonstrated its inability to protect its children to formulate a plan that will ensure the child's future safety.<sup>232</sup>

Tapp, Geddis and Taylor could find no logical explanation for the acceptance of this approach, which represented a significant departure from the prevalent model (in terms of which state involvement in cases of abuse and neglect is maximised) which had evolved from a decade of practice. The most "frightening fact", according to these authors, is the fact that the approach was basically untried and untested.<sup>233</sup>

As was indicated above,<sup>234</sup> previously, section 6 of the 1989 Act provided that where in the administration or application of the Act with regard to the care and protection of the child or young persons, any conflict of principles or interests arises, the welfare and

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<sup>231</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 168.

<sup>232</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 178, 202 fn 39. Also see Robertson in Hudson *et al* (eds) *Conferences* 55; Swain 1995 *IJLF* 235-236; Tapp 1990 *NZ Recent Law Review* 85 fn 25.

<sup>233</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 178, 180. On 202 fn 40 the authors show that the family centred approach had been piloted with a total of only six families in Panmure, Auckland.

<sup>234</sup> See ch 6 par 3.2.3.3 above.

interests of the child or young person shall be the deciding factor (the so-called “conflict principle”). This provision was the result of the notion that “the centrality accorded the child [previously] is not in keeping with Maori tradition”.<sup>235</sup> Tapp, Geddis and Taylor point out that as is evidenced by the United Nations Convention on the Rights of the Child,<sup>236</sup> it is accepted by all cultures and creeds in all nations that a child has a basic right to be raised in an environment free of abuse. Since in all normal situations a child’s family also share this same aspiration, the right of the child and that of his or her family do not conflict. Consequently, the Maori perspective in this regard is no different from that of the European. In view of the above, the amended section 6, which provides that in respect of care and protection matters (but not youth justice) under the Act the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles of the Act, should be welcomed.

### 3.8.3 *Difficulties with professional input*

All management approaches to child abuse fall within a framework of the opposing principles of family autonomy and coercive intervention, or, as Tapp, Geddis and Taylor call it, the competing values of compassion versus control.<sup>237</sup> The emphasis of the 1989 Act on family decision-making via the family group conference, put New Zealand “into the previously uncharted quadrant bounded by compassion and family autonomy and took it to an extreme ...”. According to the authors, the most balanced model was that contained in the 1986 Bill which sought to legislate the already established and effective procedure for managing cases of alleged child abuse, namely the case conference process.<sup>238</sup>

Based on the belief that a multidisciplinary approach was necessary, the case conference

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<sup>235</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 179, who quote from the *Puao-te-Ata-Tu*.

<sup>236</sup> A 19 of the United Nations Convention on the Rights of the Child 1989. See ch 9 par 2.4.3.2 below.

<sup>237</sup> Also see ch 8 par 4 below.

<sup>238</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 181. Also see Atkin 1990-91 *JFL* 392-393.

process brought together three different groups: the relevant family members, front-line staff, and those with specific expertise in the child abuse field who were members of the local Child Protection Team. When a case of child abuse was reported, the Team Coordinator was responsible for co-ordinating the investigation and convening a case conference. The evolution of this case conference process took place over a decade. Initially, the case conference was made up of professional staff, but later the value of including relevant family members was recognised. This mixture of family and professional staff, with its own internal set of checks and balances, provided a sound mechanism for addressing two key issues: First of all, has child abuse occurred? Secondly, if so, what steps need to be taken to protect the child and assist the family?<sup>239</sup>

Strong points of the case conference system included the following: the deficiencies of one group were overcome by the particular contributions made by the others. This was a dynamic process. Its success depended on some continuity of membership from one conference to another, and on the interaction between the different groups over the whole of the decision-making process. This approach was replaced in the 1989 Act by a confused and haphazard process, namely the family group conference process, which abolished the Child Protection Team concept and created an imbalance in the competing interests of child protection and family autonomy. Further, the responsibility for determining the two key issues referred to above (ie whether abuse has occurred and, if so, what needs to be done) was no longer vested in the same group of people. In terms of section 17 the first issue is initially addressed by the investigating officer of either the police or the Department of Social Welfare, in consultation with the care and protection resource panel. This excludes the family, other front-line staff, and anyone with expertise who is not a member of the panel. The second issue is to be addressed under the sections that relate to a family group conference. A fundamental flaw is that the composition of the family group conference varies depending on the specific section of the Act. This hinders the implementation of a co-ordinated approach.<sup>240</sup>

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<sup>239</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 182.

<sup>240</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 182.

The underlying reason for omitting professionals from the process appears to have been that in the presence of these professionals, individual family members are likely to feel inhibited and disempowered, resulting in the inherent strengths and abilities of the family group being overlooked. To redress this alleged imbalance, specific sections such as section 22(2)<sup>241</sup> have been included, tipping the scales dangerously in favour of family autonomy. Tapp, Geddis and Taylor argue that it is possible to read section 29 as putting the final responsibility for making decisions regarding the child's future protection and well-being into the hands of the family group who abused the child. The safeguards built into section 30 are unlikely to be as effective in practice as they appear in theory, since, to challenge the family's decision would be to question the basic premise upon which the whole process was founded, namely that the concept of empowering families would lead to them making the correct decisions for their children.<sup>242</sup> The authors conclude by pointing out that an effective approach to the management of child abuse requires a high level of commitment from all those involved. Individuals from different backgrounds and with different training and approaches have to come together to try and address the needs of the child. Power struggles can arise between family members, individual professional groups, and the family and professionals. It is obvious that a tremendous amount of goodwill and co-operation is required to achieve a satisfactory outcome. Tapp, Geddis and Taylor argue that since the fragmented approach outlined in the 1989 Act means that many of those whose input are essential are not included in the process, it will be very difficult to achieve the level of commitment needed. The result of this is that the likelihood of wrong decisions being reached is increased.<sup>243</sup>

Tapp, Geddis and Taylor are of the view that an Act specifically designed to protect children is, ironically, potentially dangerous to their welfare. Atkin mirrors these concerns

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<sup>241</sup> providing that none of the following persons are entitled to be present at the family group conference during "discussions and deliberations": the care and protection coordinator, social worker, member of the police, and the barrister, solicitor or lay advocate representing the child or young person. See ch 6 par 3.3.4 above.

<sup>242</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 182-183.

<sup>243</sup> Tapp *et al* in Henaghan & Atkin (eds) *Policy* 182-183.

in the following statement:<sup>244</sup>

“It is important not to overgeneralise about the extent to which wider kin networks will be a source of children’s rights protections. Children who need protection *from* their families may be placed in serious jeopardy if ideological positions as to the appropriate role for the State in child protection are allowed to cloud common sense.”

The question arises whether these assertions are supported by research. Robertson addresses this issue, and indicates that the requirement that the referrer, usually a social worker, and the coordinator agree to the family’s decision provides a check on the quality of the decision. The relatively high rate of agreement at family group conferences appears to suggest that these practitioners are usually satisfied that the child’s best interests are being protected by the plans. However, this level of agreement may also reflect the pressure exerted on practitioners not to disagree with the decision-making of the family, in line with the spirit of the Act. It is unknown how much negotiation and compromise is necessary between the family and the coordinator before agreement is reached.<sup>245</sup>

## 4 SUMMATIVE CONCLUSIONS

### 4.1 Summary of New Zealand child protection measures

The family group conference is the key mechanism for achieving one of the objectives of the 1989 Act, namely family participation in decisions. The following categories of persons are entitled to be present at a family group conference in New Zealand:<sup>246</sup>

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<sup>244</sup> Atkin 1995 *VUWLR* 256 fn 40.

<sup>245</sup> Robertson in Hudson *et al* (eds) *Conferences* 56.

<sup>246</sup> See, in general, ch 6 par 3.3.4 above.

- The first category of persons entitled to be present, is the child or young person in respect of whom the family group conference is held.<sup>247</sup>
- Secondly, the child's or young person's parent, guardian, or caregiver, and members of the family, *whanau*, or family group of the child or young person are entitled to attend.<sup>248</sup> The coordinator has the power to exclude the child and his or her parents and family members from the conference in certain circumstances, for example if the person's attendance would not be in the best interests of the child, or if it would be undesirable.<sup>249</sup>
- Certain other groups of persons (eg the care and protection coordinator who convened the family group conference, any representative of the child, the agent of the High Court if the child is under guardianship of that court, and any person whose attendance is in accordance with the wishes of the family) are entitled to be present at the family group conference.<sup>250</sup> However, these persons (with the exception of the agent of the High Court) are not entitled to attend if the conference is engaged in "discussions or deliberations".<sup>251</sup>

The calling of a family group conference is mandatory in the following situation: Where any social worker or member of the police believes, after inquiry, that a child or young person is in need of care or protection,<sup>252</sup> that social worker or member of the police must report the matter to a care and protection coordinator, who must call a family group

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<sup>247</sup> 1989 Act s 22(1)(a).

<sup>248</sup> 1989 Act s 22(b).

<sup>249</sup> 1989 Act s 22(1)(a) & (b).

<sup>250</sup> 1989 Act s 22(1)(c)-(i).

<sup>251</sup> Atkin 1990 *VUWLR* 329. See further ch 6 par 3.3.4 above.

<sup>252</sup> See, in general, ch 6 par 3.4 above.



conference.<sup>253</sup> Further, if a court “believes” that the child or young person is in need of care or protection, and refers the matter to a coordinator, the coordinator has a discretion to call a conference and may call for a social worker to investigate the matter.<sup>254</sup>

The function of the family group conference is to consider any matter relating to the care and protection of the child or young person as it thinks fit. If it decides that such child or young person is in need of care, it has the further function to make such decisions or recommendations or formulate such plans as are necessary or desirable, having regard to the principles of the Act.<sup>255</sup>

A family group conference will have to be involved in decision-making regarding a child in need of care or protection. Little decision-making can be done without the conference first being convened and having the opportunity to find a solution.<sup>256</sup> For example, an application to the court cannot normally be made unless there has been a family group conference.<sup>257</sup> If an application to the court has been made, the court may under normal circumstances not grant a declaration that the child is in need of care or protection unless there has been a conference.<sup>258</sup> Further, the decisions or recommendations of a family group conference will in many cases be highly influential on the court’s final determination.<sup>259</sup>

The basis for action under the 1989 Act is that a child is in need of care or protection. The Act sets out the meaning of this phrase in section 14. The Act is intended to focus primarily

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<sup>253</sup> 1989 Act s 18(1). Also see ch 6 par 3.3.1 above.

<sup>254</sup> 1989 Act s 19(b) read with s 19(3).

<sup>255</sup> 1989 Act s 28(a)-(b). See further ch 6 par 3.3.3 above.

<sup>256</sup> *Atkin* 1990 *VUWLR* 327; *Robinson* 1996 *Stell LR* (2) 322. See further ch 6 par 3.3.2 above.

<sup>257</sup> 1989 Act s 70.

<sup>258</sup> 1989 Act s 72.

<sup>259</sup> *Atkin* 1990 *VUWLR* 330-335, 340-342; *Swain* *IJLF* 172. See further ch 6 par 3.3.6 above.

on abuse and neglect, but there are other grounds for deciding that a child is in need of care or protection, ranging from parental incompetence and conflict to uncontrollable behaviour. Neglect must be “serious”. In contrast, where there has been abuse, it is not necessary to show that the abuse was serious. It is enough to show that the abuse exists or is likely.<sup>260</sup>

The family court, however, can only declare a child to be in need of care or protection if it is satisfied that there are no other practicable and appropriate means of dealing with the child.<sup>261</sup> After making a declaration that the child is in need of care or protection, the family court can do a number of things.<sup>262</sup> It can, for example, discharge the child or parent from the proceedings without making an order, order that the child and/or parent receive counselling, or make a restraining order under section 87 of the Act. The powers of the family court are wide and varied, and removing the child from the parental home is only one of a number of options.

The 1989 Act provides that consideration should be given to the child’s or young person’s wishes as far as those wishes can reasonably be ascertained, and that those wishes should only be given such weight as appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.<sup>263</sup> However, the duty to encourage participation is restricted to proceedings before the family court. There is no duty on the family group conference to encourage the child to participate.<sup>264</sup> A further important protection for the child in New Zealand is the appointment of legal representation for the

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<sup>260</sup> Atkin 1990 *VUWLR* 336. See further ch 6 par 3.4 above.

<sup>261</sup> Atkin 1990 *VUWLR* 340. See further ch 6 par 3.5 above.

<sup>262</sup> 1989 Act s 83. See further ch 6 par 3.6 above.

<sup>263</sup> 1989 Act s 5(d). Also see ch 6 par 3.2.3.2 above.

<sup>264</sup> Atkin 1990 *VUWLR* 325. See further ch 6 par 3.2.4 above.

child.<sup>265</sup> Appointment is mandatory when the child is the subject of proceedings,<sup>266</sup> but will often not have been made when a family group conference meets in an attempt to resolve the case.<sup>267</sup>

## 4.2 The strengths and weaknesses of New Zealand child protection measures

The following strengths and weaknesses of the child protection system in New Zealand are in my view of importance: The first strength is certainly the revolutionary way in which Maori customary law was integrated into New Zealand positive law by means of the family group conference system. The family group conference is the key mechanism for achieving one of the objectives of the 1989 Act, namely family participation in decisions. Wherever possible, a child's or young person's family, *whanau*, *hapu*, *imi* and family group should participate in the making of decisions affecting the child or young person.<sup>268</sup>

Another strength of the 1989 Act, is the emphasis it places on prevention in the child care setting. In section 4 (the objects section), emphasis is placed on prevention in the carrying out of the object of advancing the well-being of children, young persons and their families and family groups. In order to prevent their children from suffering harm, ill-treatment, abuse, neglect, and deprivation, parents, families, *whanau*, *hapu*, *imi* and family groups have to be assisted. The reinstatement of the paramountcy of the interests of the child principle by the Children, Young Persons and Their Families Amendment Act 121 of 1994 is another strength of the Act.

The following strength can also be seen as a weakness, depending on the view one takes on the state's role in family life. The child protection system in New Zealand places

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<sup>265</sup> 1989 Act ss 159-162. See further ch 6 par 3.2.4 above.

<sup>266</sup> 1989 Act s 159(1).

<sup>267</sup> See ch 6 par 3.2.4 above.

<sup>268</sup> S 5(a). Also see ch 6 par 3.2.3.2 above.

considerable emphasis on the importance of the family. In the 1989 Act, emphasis is placed on assisting the family to make decisions.<sup>269</sup> A policy of minimum state intervention “far towards the private end of the continuum”<sup>270</sup> is followed.<sup>271</sup> This is evidenced *inter alia* by the following points I wish to highlight:

- The well-being of children is one of the objectives of the Act, mentioned in the long title of the Act. However, significantly, their well-being is promoted “as members of families, whanau, hapu, iwi, and family groups”.<sup>272</sup> This ties in with the plea of the Minister of Social Welfare in the second reading speech that greater emphasis should be placed on the interests and authority of families, and that “for the most part, the needs of children are best served within the context of the family”.<sup>273</sup>
- One of the principles contained in section 5 (which governs the operation of the whole Act) is that, wherever possible, the relationship between a child or young person and his or her family, *whanau*, *hapu*, *iwi* or family group should be maintained and strengthened.<sup>274</sup> The most obvious way of achieving this, is by keeping the child in the family, and keeping interference with family life to a minimum.<sup>275</sup>
- In terms of section 13(b)(ii), one of the principles applicable to the care and protection provisions, intervention into family life should be kept to the minimum

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<sup>269</sup> Robinson 1996 *Stell LR* (2) 314; Robinson 2000 *Obiter* 131; Tapp 1990 *NZRLR* 83. Also see ch 6 par 3.1 above.

<sup>270</sup> Tapp 1989 *NZRLR* 144. Also see Atkin 1990-91 *JFL* 392-393.

<sup>271</sup> For a discussion of the dangers inherent in a policy of minimum state intervention, see ch 8 par 4 below.

<sup>272</sup> S (a) of the long title of the Act. Also see ch 6 par 3.2.1 above.

<sup>273</sup> As quoted by Robinson 1996 *Stell LR* (2) 319. Also see ch 6 par 3.2.3.2 above.

<sup>274</sup> S 5(b).

<sup>275</sup> See ch 6 par 3.2.3.2 above.

necessary to ensure the child's or young person's safety and protection.

- Further, section 13(e) (another principle applicable to the care and protection provisions) states that the child or young person should be removed from the family, *whanau*, *hapu*, *imi* and family group only if there is a *serious risk of harm* to the child or young person.
- On close inspection of section 14, which deals with the meaning of the phrase "child in need of care or protection", it appears that neglect and the similar concepts of deprivation and impairment must be "serious", which means that the threshold before satisfying the legal standard is quite a bit higher than under the 1974 Act. In contrast, where there has been abuse (ie ill-treatment or harm), it is not necessary to show that the abuse was serious. It is enough to show that the abuse exists or is likely.<sup>276</sup>

The above discussion reveals that, when seen in the overall context of the principles in the Act, the interests of the child tend to be "backseated by the minimalist intervention philosophy and family favouritism".<sup>277</sup> There are, however, provisions that counterbalance these tendencies. The first provision of this kind can be found in section 5 (which contains principles governing the whole Act). It provides that consideration should be given to the child's or young person's wishes as far as those wishes can reasonably be ascertained. It is expressly provided that those wishes should only be given such weight as appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.<sup>278</sup> However, the duty to encourage participation is restricted to proceedings before the court. The stage during which the case is before a family group conference, is not

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<sup>276</sup>     Atkin 1990 *VUWLR* 336. Also see ch 6 par 3.4 above.

<sup>277</sup>     Atkin 1990 *VUWLR* 325. Atkin 1990-91 *JFL* 388 says that "... the significant feature of the new legislation is that the welfare of the child sits in the shadow of the welfare of the family". Also see ch 6 par 3.2.4 above.

<sup>278</sup>     S 5(d). Also see ch 6 par 3.2.3.2 above.

covered by the duty. There is no duty on the family group to encourage the child to participate.<sup>279</sup> There is thus only diluted protection of the child's right to participate.

A further important protection for the child is the appointment of legal representation for the child.<sup>280</sup> Appointment is mandatory when the child is the subject of proceedings,<sup>281</sup> but will often not have been made when a family group conference meets in an attempt to resolve the case. This is an unfortunate omission.<sup>282</sup>

A weakness that I wish to emphasise is the following: I have serious concerns about the lack of recognition of the Western concept of family, namely the nuclear family consisting of a mother, father and their children in New Zealand. This concern relates to both Maori and non-Maori nuclear families. Although the Act attempts to include all possible forms of families, Atkin correctly points out that the composite phrase "family, *whanau*, *hapu*, *wi* and family group" indicates that the Act "is not particularly interested in the so-called "nuclear family" and wishes to tap the resources and wisdom of the extended family".<sup>283</sup> The Act does thus not provide adequately for that part of the population who, by culture, descent or choice prefer Western values and lifestyles.

I also have serious concerns about the appropriateness of the family group conference as the tribunal for making decisions in the context of child protection. Granted, the family court has to make the final determination. The court can thus be seen as a safeguard against the dangers of incorrect decisions by the family group conference. However, the decisions or recommendations of a family group conference will in many cases be highly influential

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<sup>279</sup> Atkin 1990 *VUWLR* 325.

<sup>280</sup> Ss 159-162.

<sup>281</sup> S 159(1).

<sup>282</sup> See ch 6 par 3.2.4 above.

<sup>283</sup> Atkin 1990 *VUWLR* 327. Also see Swain 1995 *IJLF* 163.

on the court's final determination.<sup>284</sup> As indicated above,<sup>285</sup> the Act is built around the simple premise that, since families are the setting within which the problem of abuse and neglect occurs, the onus should be placed on families to come up with solutions.<sup>286</sup> I can only agree with Tapp, Geddis and Taylor, who call this premise not only simplistic, but also fatally flawed.<sup>287</sup> They show that the kinds of cases that require application of the legislative provisions will come from dysfunctional families. The intergenerational nature of abuse means that the dysfunctional family is usually part of an extended family with similar problems. It is unrealistic to expect a family that has demonstrated its inability to protect its children to formulate a plan that will ensure the child's future safety.<sup>288</sup>

Added to the above concern, there is the danger of the family group conference reaching decisions based on an incorrect grasp of the facts or on expediency, as well as decisions that are disproportionately influenced by a sense of family loyalty. I have serious doubts whether one can expect a group of lay persons, many of whom will undoubtedly have very subjective opinions on the issue, to formulate an appropriate plan to safeguard the interests of a child in need of care or protection.

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<sup>284</sup>     Atkin 1990 *VUWLR* 330-335, 340-342; Swain 1995 *IJLF* 172. Also see ch 6 par 3.3.6 above.

<sup>285</sup>     See ch 6 par 3.3.3 above.

<sup>286</sup>     Tapp *et al* in Henaghan & Tapp (eds) *Policy* 168.

<sup>287</sup>     Tapp *et al* in Henaghan & Atkin (eds) *Policy* 168.

<sup>288</sup>     Tapp *et al* in Henaghan & Atkin (eds) *Policy* 178, 202 fn 39. Also see Robertson in Hudson *et al* (eds) *Conferences* 55; Swain 1995 *IJLF* 235-236; Tapp 1990 *NZRLR* 85 fn 25. Also see ch 6 par 3.8.2 above.