

# The Judge's role in Creative Conferencing in Youth Justice

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The Youth Court has an important role as guardian of the principles of Youth Justice. It is not the only guardian, but it is a key one. It must protect and enhance the credibility of the fgc process, speaking out where necessary against the abuse and neglect of its machinery.

Around New Zealand and no doubt Australia there are considerable variations in the degree of imagination used in conference plans. In some parts of New Zealand they have tended to become boringly predictable - "apology, reparation, community work and curfew" would be pretty standard. Some time ago I contemplated offering (anonymously) an annual cash prize for three years for the most imaginative fgc plan in each year. The Chief Judge persuaded me that I would be blurring the judicial role if I did that, so I am delighted to have this alternative and less expensive means of encouraging the same end.

The problem is in fact a deeper one than the creativity of fgc plans. There are tremendous variations generally in the quality of work done by the Children Young Persons and their Families Service. This city, Wellington, has one of the best Youth Justice sections of CYPS in the country and it shows in the reduced rate of offending by young persons. The role of the Judge will depend partly on how well the system works out of court. In those areas where it works well creative conferences should be the natural product of the system and the Judge's role will be reduced.

Most creative outcomes result from the collective imagination of victims and families working together. Wonderful examples I recall are the lad who had to take a bunch of flowers to the victim, along with his apology letter, and the youth whose eight victims wanted him to write out a list of his goals in life and how he would achieve them.

Diversionary conferences are not the Judges' responsibility, at least directly, but court-directed fgc's are. Judges can refuse to accept their recommendations and may direct a further conference if appropriate. This has been happening in New Zealand with the encouragement of the PYCJ in three specific types of cases that have concerned us for some time:

i.) **Absence of victims from conferences.** It is one of the most widely acknowledged facts that the best conferences are those where victims attend. Without a victim present it is almost impossible to get that essential element of encounter and confrontation that challenges a young person's perception of their actions and shows them the human face of crime. Too often we see conferences with no victims present at all, or only one out of a dozen affected. Sometimes an explanation is provided and sometimes not.

ii.) **Inadequate family attendance at conferences.** Conferences with only one family member in support of the young person are not within the spirit of the legislation and are unlikely to be very successful, for obvious reasons. The wider family are not going to become involved as an agent for change if they are not at the fgc. Problems at home are unlikely to be addressed if those involved are absent. The one parent attending may be a major cause of the problem. Maori and Pacific Island people were largely responsible for the legislative emphasis on the whanau or wider family but experience has shown that all cultures benefit where the effort is made to ensure wider family involvement.

iii.) **Attention to educational needs.** Given that well over half of our young persons in Youth Court have not been to school for months or years, what if anything has the conference proposed by way of remedial measures?

Plainly, a conference without victim or wider family is a conference in name only. The absence of one or other (or both) components means the conference will not have the human resources to come up with a creative plan. The necessary community support is unlikely to be present or be activated. A Judge's refusal to accept such a conference sends an important signal to those responsible - that they too are accountable and that a higher standard is required.

The risk is that Judges will not want to impose on the conscientious players who do attend conferences regularly by ordering a repeat conference, but I suggest those people will readily know why it has happened and will appreciate the improvement in the quality of fgc's that should follow from some "policing" by the Bench.

A fourth but less common reason for considering directing another conference is an **apparent lack of substance to the fgc plan**. Certainly Judges should query any plan that appears to be inadequate to the occasion, just as they should question the plan that appears unduly onerous. It is one of the functions of the Youth Court to act as a filter for inappropriate plans. In most cases where I have questioned the adequacy of a plan there has been an explanation that has satisfied me - eg there is a diversionary fgc with a more comprehensive plan that is operating concurrently, or the young person is a first offender and the conference felt that a responsible attitude had already been shown - ie nothing more intrusive was needed.

**Others should also be queried** when appropriate - eg the prosecutor can be asked why it was necessary to arrest the young person given the very limited grounds for arrest in s 214. DSW can be asked why a persistent absconder and reoffender was not held in secure care, or why diversionary conferences are so slow in being convened in Auckland.

**Time frames** are another factor the court can assist with and monitor. Conferences held months after the event are less likely to produce good results. Our legislation empowers the Court to dismiss charges that are laid after a protracted delay [s 322], and encourages matters to be handled in a time frame meaningful to young persons[s 5(f)]. Personally I believe this means Youth Courts should sit at least fortnightly. Of course the problem still arises when the Social Welfare Dept files a form "SW854" which certifies that the conference has not been held in the time allowed by the court and excuses the young persons from attending on the intended day for reporting back to the court. Sometimes two such certificates are filed. I insist that the certificate should give the reason for the delay, but questions from the Bench are still needed to test the position. Often the real problem is poor social work practice or overloading of staff. I have dismissed an Information where three SW854 forms were filed, and left it to the police to complain to Social Welfare. It is of course an extreme step, because the victim and the young person are both left without their needs being addressed, but a conference held months after the event is not likely to address their needs very well anyway.

One novel way to encourage shorter time frames for conference plans is the Dunedin idea that the youngster's curfew will end as soon as the rest of the plan is completed. This provides an incentive to get on and finish the community work, pay the reparation, and so on. Instead of the plan having a stated timeframe (commonly 3, 4 or 6 months) the Court can

adjourn to a particular date for a completion report, knowing that the plan may well have finished somewhat earlier.

The Youth Court has to avoid **lengthy adjournments or remands**. Personally I think that every adjournment should have the reason for it recorded by the Judge, as an accountability issue on our part. Where young persons are in custody special care is needed to minimise delays. One technique is to have the young person appear in a different court, preferably before the same Judge, at an earlier date than is available in the “home” court. Another technique is to set defended matters down for no more than 4 or 5 weeks out, and double up the fixtures on the basis that 10-20% settle at the last minute so the chances of two proceeding are 1-4%.

**Regular reporting of problems** is another step the Court can take. When I was Youth Court Liaison Judge in the Northern Region I used to keep a note of problems (and notable successes) occurring during a Youth Court week, and put them in a letter to the PYCJ. Now I bother Judge Lovell-Smith with such letters and she passes them on to the PYCJ. It is, I admit, a “hands on” approach to problems that requires other players to be accountable, and the Court is in turn accountable to them.

Balanced against this must be a **“hands off” philosophy, a surrendering of substantial power to others**, that sees the Youth Court’s overriding role as facilitating and empowering the fgc process. It is indeed “a new model of justice”. This means something is wrong if the Court is not accepting the great bulk of fgc recommendations. In my own case it would be something under 5% of cases - at a guess 2 or 3% - that do *not* involve accepting the fgc plan, and that is usually in cases of very serious offending where I have sent off to the District Court someone the conference wanted dealt with in the Youth Court. These are always the hard cases to decide. Otherwise I believe Judges should be acting as facilitator and supporter of the fgc process, and respectful of its pre-eminent role.

We need to remember that even after the conference **“it’s still their show”**, not ours. This respect for the fgc can be shown in court by Judges in a number of ways.

a.) We should generally **refrain from making court orders** unless they are recommended by the conference. There are regional differences within New Zealand on this score and I believe we could do better. An adjournment to carry out the fgc plan is usually quite adequate, provided the court calls for a completion report.

b.) In the courtroom we should go out of our way to **involve the young person and their family, and other conference participants (including the victim) if present**. Our legislation specifically requires us to actively involve the young person in the proceeding. They cannot be involved if they are not speaking. Therefore I start by having the Youth Advocate introduce me to the young person and then I ask the young person to introduce their family or supporters. I do not let the Advocate make those introductions. If there has been a conference I usually ask the young person to tell me what they agreed to do as part of the plan. If the victim was present at the conference I often ask the young person to tell me about their dealings with the victim. One of the family can be asked if they were happy with the way the conference went, and/or its outcome. Victims attending court - which is pretty rare - should always be invited to speak if they wish to. Sometimes the Youth Aid officer who attended the conference will be in court and can be the best person to help explain a puzzling feature of the conference report.

c.) Families will not feel they are empowered **if lawyers take over** and make all the running in court. The techniques above for involving the young person will quickly help

lawyers to realise this. Youth Advocates do not really have to say anything unless there is a disputed point to be decided. The good ones realise this.

d.) We have to try and **minimise the young person's contact with the court**, unless it is for a good purpose. Hence the fewer adjournments the better, normally. For purely indictable charges "**jurisdictional**" fgc's should not be directed for matters that are denied - no meaningful conference can take place without an acceptance of responsibility. Where such a matter is not denied the one conference can be directed to consider *both* jurisdiction and outcome. This technique reduces both court contact and time delays.

e.) A technique I picked up in Dunedin recently is helpful where **the only outstanding issue is reparation**, and a s 282 discharge (or "discharge without conviction" in adult terminology) is intended. Under s 282(3) the court can grant such a discharge *and* make a reparation order. The effect of the discharge is still that the information is "deemed never to have been laid."

f.) Not all reasons for adjournment will justify the young person having to return to court. We have to be selective about them. One of the perennial quandaries I find myself in is **whether to excuse the young person's attendance** for the final call of the matter (assuming no formal orders are envisaged). Do they have to come back just to be discharged or to have the information withdrawn? The argument against this is that it disempowers the fgc by increasing the court's control over the young person and their family. On the other hand the chance to congratulate a young person on a plan successfully completed can be invaluable, especially for a youngster or a family who have not had any praise or affirmation from officialdom for a long time. (And it is one of the real pleasures of our job.) I usually resolve this dilemma by asking those in court, especially the family, which procedure would be best. Also, if the young person is not there on the final day and the result has been a good one I normally ask their advocate to pass on my congratulations.

g.) An important aspect of the court's respect for the fgc process is the personalising of the court appearance by insisting on the use of **appointment times**. This is enjoined by our statute [s 331] in order to avoid the congregation of large numbers of young persons and their families.

h.) The Youth Court should embody a **collegial approach**, one that is inclusive, compared to the professionally oriented atmosphere of other courts (even the Family Court, I am told). This can be assisted by the sort of inter-agency meetings that are held in Wellington, and the likes of the Youth Courts Association that used to operate in Auckland.

So in the end, as at the beginning, "**it's not our show, it's theirs**", but the courts can help make it happen if we are true to the spirit of the legislation.

#### **POST SCRIPT - other points arising at this conference:-**

- Need for watch-dog role in respect of the length of conferences - conference reports should show start and finish times?
- could be good value following the Victorian practice (in their non-statutory fgc's) of appointing a **key person** whose job it is to keep an eye on the young person and the progress of the plan. This can be a professional or non-professional person and they are effectively chosen by the young person as the person whom they most trust and can work

with. If this person is a non-professional they need professional support, according to Senior Magistrate Jennifer Coate of Melbourne who described the key person role to us.

- Judge should always have the Summary of Facts on file as it is relevant re bail conditions etc.
- Should put families at the centre of a semi-circle in the courtroom, not at the back of the room.
- In Napier Youth Court there is always a volunteer in court, a friendly face, someone who can talk their language [like Friends at Court in Auckland?] - a good role for the churches to take on, just as the Salvation Army has in some places.